DID *VIMEO* KILL THE RADIO STAR? DMCA SAFE HARBORS, PRE-1972 SOUND RECORDINGS & THE FUTURE OF DIGITAL MUSIC♦

INTRODUCTION

Ever since the days of Napster,[1] online digital music services have continually been characterized as the "bad guys," while content owners—the major record companies that hold themselves out to represent the interests of artists—have been characterized as the "good guys." That may have been true in 1999, but in light of the current landscape of the increasingly digitized music industry, such a characterization is facile at best. This Note challenges outdated notions about the effects of online digital music services on the future of the music industry landscape.

The debate on how courts should adjudicate copyright infringement cases involving pre-1972 sound recordings[2] has intensified dramatically over the past five years.[3] At stake is the viability of musicians to continue earning a living amidst a rapidly changing digital media landscape.[4] While consumers of music increasingly shift away from traditional physical records, toward digital music streaming, the legal landscape will likely create a chilling effect on the online service providers ("OSPs")[5] that provide not only the very platforms by which

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[1] Napster is a peer-to-peer music file sharing service that was founded in 1999 by Shawn Fanning, John Fanning, and Sean Parker. It is widely recognized as the first major online peer-to-peer service to focus entirely on digital music sharing. *See* Alex Suskind, *15 Years After Napster: How the Music Service Changed the Industry*, THE DAILY BEAST (June 6, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/06/06/15-years-after-napster-how-the-music-service-changed-the-industry.html. The U.S. Copyright Office's definition of a "peer-to-peer" service provides as follows:

> A type of network where computers communicate directly with each other rather than through a central server. Often referred to simply as peer-to-peer, or abbreviated P2P with this type of network each workstation has equivalent capabilities and responsibilities in contrast to client/server architectures in which some computers are dedicated to serving the other computers. A "network" is a group of two or more computer systems linked together by various methods. In recent usage, peer-to-peer has come to describe applications in which users can use the Internet to exchange files with each other directly or through a mediating server.

U.S. COPYRIGHT OFFICE, http://www.copyright.gov/help/faq/definitions.html (last visited Mar. 30, 2016).

[2] "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

17 U.S.C. § 101. Pre-1972 sound recordings are those sound recordings fixed before February 15, 1972. *See infra* Part I.

[3] *See infra* Parts II and III.

[4] *See infra* Part IV.

[5] *See* U.S. COPYRIGHT OFFICE, http://copyright.gov/onlinesp/ (last visited Mar. 30, 2016). The U.S. Copyright Office provides the following definition of "service provider":

> For purposes of section 512(c) [of the U.S. Copyright Act], a "service provider" is defined as a provider of online services or network access, or the operator of facilities therefor, including 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, without modification to the content of the material as sent or received.

the modern audience consumes music, but also the main platforms for promotion and distribution upon which many musicians rely.

This debate revolves around the question of whether or not courts should treat pre-1972 sound recordings as protected under federal copyright law. Although sound recordings were first accorded federal copyright protection in 1972,[6] protection only applied to those sound recordings fixed[7] on or after February 15, 1972, the effective date of the U.S. Copyright Act's Sound Recording Amendment of 1971.[8] Prior to that date, sound recordings were covered under a veritable hodgepodge of state and common laws.[9] Therefore, it may logically follow that pre-1972 sound recordings remain protected under state common law and excluded from federal protection. As it turns out, the courts did not so easily reach that conclusion.

While the Sound Recording Amendment was Congress's response to the music industry's shift from vinyl records to compact cassette tapes—a technology that facilitated the common consumer's ability to engage in music piracy—Congress has subsequently revised federal copyright law several times to adapt to further evolutions in music technology.[10] Key to the debate over pre-1972 sound recordings is the Online Copyright Infringement Limitation Act ("DMCA Safe Harbors"), Title II of the Digital Millennium Copyright Act ("DMCA"), which was enacted in 1998 in response to trends in music consumption shifting from compact discs to digital file formats, such as MP3s.[11] Congress enacted the DMCA Safe Harbors to address potential consequences of the rapid growth of OSPs in the digital music industry. Specifically, Congress was concerned about the viability of such businesses if held to prohibitively strict enforcement measures for its users' infringing activities.[12] Since codified as an amendment to the U.S. Copyright Act,[13] the DMCA Safe Harbors provide OSPs, such as Spotify and Grooveshark, with a limited level of protection against liability for copyright infringement, conditioned upon their adherence to

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6 *See infra* Part I.

7 "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101 (2012).

8 Sound Recording Amendment of 1971, Pub. L. No. 92-140, § 3 (1971), 85 Stat. 391, 392 (1971).

9 *See infra* Part I.A.

10 *See infra* Part I.A.

11 Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (since codified as 17 U.S.C. § 512). For further discussion on legislative history, *see infra* Part I.A.

12 *See infra* Part I.C.2.

13 *See* 17 U.S.C. § 512 (2012).

specific statutory requirements.[14] In short, so long as an OSP lacks actual knowledge of infringing material on its platforms and has an adequate takedown policy to expeditiously remove infringing material once it receives notice, the OSP in theory is not liable for its users' infringing activities.[15]

The question thus presented is whether OSPs are protected by the DMCA Safe Harbor Provision with respect to the unauthorized upload of pre-1972 sound recordings at the direction of their users. It is a question that has increasingly filled court dockets for the last several years.[16] Pre-1972 content owners and major record labels have taken aim at OSPs, such as MP3Tunes and Grooveshark, for hosting potentially infringing pre-1972 sound recordings. Perhaps the relative obscurity of these digital streaming services serves as some indication of the extent of their success in these lawsuits.

In *Capitol Records, Inc. v. MP3tunes, LLC* ("*MP3Tunes*"),[17] a lawsuit brought by fourteen record companies against the online music storage locker service MP3Tunes,[18] the U.S. District Court for the Southern District of New York held that the DMCA Safe Harbors do in fact apply to pre-1972 sound recordings.[19] The court held that the plaintiff's interpretation of the DMCA Safe Harbors as inapplicable to pre-1972 sound recordings "would eviscerate the purpose of the DMCA," and that "the DMCA was enacted to clarify copyright law for Internet service providers in order to foster fast and robust development of the Internet."[20] The decision was controversial and largely interpreted as a significant loss for content creators in their ongoing fight against the exploitation of their unlicensed content.[21] The court concluded its decision by stating that limiting the DMCA to *post*-1972 sound recordings while excluding the pre-1972 sound recordings would "spawn legal uncertainty."[22]

Of course, legal uncertainty was spawned nonetheless.[23] In 2013 Universal Music Group, the biggest record label in the world, controlling nearly 90% of the world music market,[24] brought a lawsuit against Escape Media Group, the parent company of Grooveshark, a

14 *See infra* Part I.C.1.
15 *See id.*
16 *See infra* Part II; Part III.
17 821 F.Supp.2d 627 (S.D.N.Y. 2011).
18 *See infra* Part II.
19 *See id.*
20 *MP3tunes, LLC*, 821 F.Supp.2d at 641–42.
21 *Id.*
22 *Id.* at 642.
23 *See id.*; *infra* Part III.
24 *See* Laura Sydell, *Universal's Purchase Of EMI Gets Thumbs Up In U.S. And Europe*, NPR (Sep. 21, 2012, 6:06 PM), http://www.npr.org/blogs/therecord/2012/09/21/161560048/universals-purchase-of-emi-gets-thumbs-up-in-u-s-and-europe.

relatively new OSP at that time.[25] The New York State Appellate Division, in *UMG Recordings, Inc. v. Escape Media Grp., Inc.* ("*Grooveshark*"),[26] held that the DMCA Safe Harbors did *not* apply to pre-1972 sound recordings hosted on its service.[27]

Five months after the decision in the *Grooveshark* case, the U.S. District Court for the Southern District of New York in *Capitol Records, LLC v. Vimeo, LLC* ("*Vimeo*")[28] issued a similar ruling, finding that the DMCA Safe Harbors did not apply to pre-1972 sound recordings hosted on Vimeo.

Together the *Grooveshark* and *Vimeo* decisions dramatically shifted the tides in both the debate over the applicability of the DMCA Safe Harbors to pre-1972 sound recordings and the tension between content creators and digital media companies in general. They are largely perceived as a significant victory for content creators against companies seeking to exploit their works without permission.

Assessing the effect of these decisions on content owners, pre-1972 and beyond, it is worth questioning whether extensive litigation may ultimately backfire on the interests of those whom these plaintiffs purportedly seek to benefit. Streaming services are increasing their market share for music consumers and becoming a crucial part of the U.S. cultural economy in terms of access to and preservation of musical works.[29] One potential side effect is that some OSPs may elect to remove pre-1972 content from their services altogether, perhaps at least until Congress clarifies the law, which would raise substantial access and preservation concerns. Accordingly, it is apparent that extensive litigation over DMCA Safe Harbors for pre-1972 recordings may have a deleterious effect on the growth of digital music whether a defendant OSP wins its day in court, as in the case of *MP3Tunes* case,[30] or loses, as in the case of *Grooveshark*.[31] MP3Tunes is bankrupt and arguably irrelevant, while Grooveshark, whose CEO has recently claimed to be financially drained due to various lawsuits, has seemingly lost the level of cultural cache it may have enjoyed five to six years ago and a

[25] Grooveshark launched in 2007 and operated for only three years before facing a slew of lawsuits, beginning in 2010, when Universal Music Group Recordings sued for alleged infringement of its copyrights in various pre-1972 sound recordings. *See* Complaint at 1, UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51 (2013) (No. 10100152), 2010 WL 195346, at *1; Helienne Lindvall, *Behind the Music: Why Grooveshark Takes a Bite Out of Artists' Earnings*, THE GUARDIAN (Sep. 9, 2011, 10:19 AM), http://www.theguardian.com/music/musicblog/2011/sep/09/behind-music-grooveshark.

[26] UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51 (N.Y. App. Div. 2013).

[27] *See id.*

[28] Capitol Records, LLC v. Vimeo, LLC, 972 F.Supp.2d 500 (S.D.N.Y. 2013).

[29] *See infra* Part IV.

[30] *See infra* Part II; Part V.

[31] *See infra* Part III.A; Part V.

significant share of the market as well.[32]

This Note will analyze the history of DMCA Safe Harbor protection for pre-1972 sound recordings and the judiciary's shift from favoring OSPs to content owners, in addition to the potentially unfavorable effects on the future of digital music. Part I provides an overview of relevant legal foundations, including the Sound Recording Amendment of 1971 and the DMCA Safe Harbors. Part II provides an analysis of the *MP3Tunes* case and its role in bringing pre-1972 sound recordings under the DMCA Safe Harbor Provisions. Part III provides an analysis of the more recent *Grooveshark* and *Vimeo* cases and their role in reversing the decision in *MP3Tunes*. Part IV discusses the evolving economic landscape of the music industry and the growth of digital music streaming. Part V contemplates the potentially negative impact of the *Grooveshark* and *Vimeo* decisions on the future of digital music and proposes that Congress enact legislation federalizing pre-1972 sound recordings in order to alleviate such concerns.

I. BACKGROUND LAW

A. *The Sound Recording Amendment of 1971*

Congress passed the Sound Recording Amendment on November 15, 1971, making sound recordings fixed on or after February 15, 1972 eligible for federal copyright protection for the first time.[33] Since codified in Section 102(a)(7) of the U.S. Copyright Act,[34] the Sound Recording Amendment was Congress's response to the potential effect of then-recent technological innovations on music piracy.[35] Specifically, the advent of home use of audiocassette tapes and recorders made it clear that the reproduction and distribution of unauthorized sound recordings could take place on a commercial scale for the first time.[36] Indeed, Congress estimated in the Sound Recording Amendment's House Report that at the time the annual volume of pirated music sales was "in excess of $100 million," as compared to $300 million annually from legitimate audiocassette tape sales.[37]

The enactment of the Sound Recording Amendment was further motivated by the lack of uniformity among state law remedies for authors of sound recordings.[38] In the 1960s, some states passed criminal laws for the commercial reproduction and distribution of sound

[32] *See infra* Part V.
[33] Sound Recording Amendment of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).
[34] 17 U.S.C. § 102(a)(7) (2012).
[35] H.R. REP. NO. 92-487, at 2 (1971).
[36] *Id.*
[37] *Id.*
[38] *See* H.R. REP. NO. 92-487.

recordings.[39] Now, nearly all states have such criminal piracy laws protecting the owners of sound recordings.[40] According to a survey conducted by the Association of Research Libraries and the U.S. Copyright Office, Vermont and Indiana are the only states without criminal piracy statutes addressing copyright infringement for sound recordings.[41] A number of states also have civil statutes that address pre-1972 sound recordings.[42] The states further provide protection through common law unfair competition claims; however, "the remedies available are limited."[43] For example, without protection over sound recordings, plaintiffs "could not enjoin activities beyond their [state's] borders."[44]

B. *The Applicability of Federal Copyright Law to Pre-1972 Sound Recordings*

In 1973, one year after sound recordings were incorporated into the U.S. Copyright Act, the Supreme Court addressed whether pre-1972 sound recordings were subject to state regulation.[45] In *Goldstein v. California*,[46] the Court held that federal copyright law did not preempt California's record piracy law's application to pre-1972 sound recordings pursuant to its decisions in *Sears, Roebuck & Co. v. Stiffel Co.*,[47] and *Compco Corp. v. Day-Brite Lighting*.[48] Invoking the

[39] In 1967, New York became the first state to make the commercial reproduction and distribution of sound recordings a criminal offense, followed by California in 1968. *See* U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 20 n.80 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf (citations omitted).

[40] *See* 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8C.03, n.9.1 (Matthew Bender, rev. ed. 2011) (citing U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 22 n.82 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf (noting that Indiana and Vermont are the only states without such statutes)).

[41] *See id.*

[42] *See, e.g.*, CAL. CIV. CODE § 980(a)(2) (2011) (state protection over sound recordings until 2047); COLO. REV. STAT. § 18-4-601(1.5) (2011) ("[N]o common law copyright shall exist for a period longer than fifty-six years after an original copyright accrues to an owner.").

[43] U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 11 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf (citations omitted); *see, e.g.*, A&M Records, Inc. v. M.V.C. Distributing Corp., 574 F.2d 312 (6th Cir. 1978); Victor Talking Mach. Co. v. Armstrong, 132 F. 711 (S.D.N.Y. 1904); Capitol Records v. Erickson, 2 Cal. App. 3d 526 (1969); Capitol Records v. Spies, 264 N.E.2d 874 (Ill. App. Ct. 1970); Columbia Broad. Sys., Inc. v. Melody Recordings, Inc., 341 A.2d 348 (N.J. Super. Ct. App. Div. 1975); Liberty/UA, Inc. v. Eastern Tape Corp., 180 S.E.2d 414 (N.C. Ct. App. 1971).

[44] U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 11 n.36 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf (citation omitted).

[45] Goldstein v. California, 412 U.S. 546 (1973).

[46] *Id.* at 570.

[47] 376 U.S. 225 (1964).

[48] 376 U.S. 234 (1964).

Supremacy Clause,[49] the Court established that "[n]o comparable conflict between state law and federal law arises in the case of recordings of musical performances," reflecting Congress's intent of "[leaving] the area unattended."[50] Therefore, "no reason exists why the State should not be free to act" in regulating pre-1972 sound recordings.[51] The *Goldstein* decision was the impetus behind a wave of states passing both criminal and civil anti-piracy laws addressing the rights of authors of pre-1972 sound recordings.[52]

In 1998, Congress codified the *Goldstein* decision in Sections 301(c) and (d) of the U.S. Copyright Act as follows:

> (c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.
>
> (d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.[53]

Indeed, in a common law infringement action filed by several record labels against a then-popular peer-to-peer music downloading service,[54] the Southern District of New York held that "[f]ederal copyright law does not cover sound recordings made prior to 1972. Rather, these recordings are protected by state common law on copyright infringement."[55]

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[49] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2; "The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the [federal] Government's general authority were subject to local controls." U.S. v. Allegheny Cnty., Pa., 322 U.S. 174, 183 (1944).

[50] *Goldstein*, 412 U.S. at 570.

[51] *Id.*

[52] *See supra* notes 39–42.

[53] 17 U.S.C. § 301 (2012).

[54] For a definition of "peer-to-peer," *see supra* note 1.

[55] Arista Records LLC v. Lime Grp. LLC, 784 F.Supp.2d 398, 436 (S.D.N.Y. 2011) (citing 17 U.S.C. § 301[c]). *See also* Capitol Records, Inc. v. Naxos of America, Inc., 830 N.E.2d 250, 263–64 (2005) (holding pre-1972 sound recordings are protected by common law).

C. *Section 512: An Overview of the DMCA Safe Harbors*

1. Key Provisions

In 1998, in yet another effort to ensure federal copyright laws kept up with advances in technological innovation, Congress enacted the DMCA in order to establish industry standards for businesses operating in the Internet and digital media space.[56] Under the DMCA Safe Harbors, contained in Section 512 of the U.S. Copyright Act, OSPs are not liable for infringement with respect to: 1) transitory digital network communications;[57] 2) system caching;[58] 3) information residing on systems at the direction of users;[59] and 4) information location tools.[60] The DMCA Safe Harbors were intended to account for the difficulty an OSP might otherwise face in identifying and enforcing against infringement, thus focusing its limitations on liability entirely on content that may appear on an OSP at the direction of a user and not the OSP itself.[61]

The relevant provision for the purpose of this Note is contained in Section 512(c), which limits an OSP's liability for "information residing on systems or networks at [the] direction of users."[62] Section 512(c) applies to OSPs, such as Grooveshark and Vimeo, whose online platforms enable the streaming of user-uploaded content. Key to Section 512(c) are subsections 512(c)(1)(C)[63] and 512(c)(1)(A)(ii),[64] otherwise known as the "red flag" test[65] and the notice and takedown procedure,[66] respectively.

Under the red flag test, liability is precluded under Section 512(c) when an OSP—

> (A)(i) does not have *actual knowledge* that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of *facts or circumstances from which infringing activity is apparent*; or

56 *See* 17 U.S.C. § 512 (2012); S. REP. NO. 105-190, at 2 (1998).
57 17 U.S.C. § 512 (2012).
58 *Id.*
59 *Id.*
60 *Id.*
61 *See* S. REP. NO. 105-190, at 2.
62 17 U.S.C. § 512(c) (2012).
63 *Id.* at § 512(c)(1)(C).
64 *Id.* at § 512(c)(1)(A)(ii).
65 *See* S. REP. NO. 105-190, at 44 (1998).
66 *See id.* at 45.

> (iii) upon obtaining such knowledge or awareness, *acts expeditiously to remove*, or disable access to, the material . . . .[67]

According to this provision's legislative history, under Subsection 512(c)(1)(A)(ii), "if the service provider becomes aware of a 'red flag' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action."[68] The "red flag" test involves a dual inquiry consisting of both an objective and subjective standard.[69] A subjective standard is used to determine the facts or circumstances surrounding whether an OSP was aware of a "red flag."[70] "However, in deciding whether those facts or circumstances constitute a 'red flag'—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used."[71] In sum, actual knowledge may be proven by evidence of an OSP's awareness of infringing acts, or may be imputed based on an objective standard as to whether lack of actual knowledge may have been precluded by willful blindness.[72]

Under Subsection 512(c)(1)(C), the notice and takedown procedure further establishes that an OSP will not be liable for user-uploaded infringing content if "*upon notification* of claimed infringement[,] . . . [the OSP] *responds expeditiously to remove*, or disable[s] access to, the material that is claimed to be infringing or to be the subject of infringing activity."[73] Further emphasizing Congress's intent to facilitate the proliferation of OSPs, the subsection's legislative history provides that "[t]his 'notice and takedown' procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright

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67 17 U.S.C. § 512(c) (2012) (emphasis added).

68 S. REP. No. 105-190, at 44.

69 *See id.*

70 *Id.*

71 *Id.*

72 *See id.*

73 17 U.S.C. § 512(c)(1)(C) (2012) (emphasis added). According to the accompanying Senate report,

> Subsection (c)(1)(C) establishes that in cases where a service provider is notified of infringing activity by a copyright owner or its authorized agent, in accordance with the notification procedures of subsection (c)(3), the limitation on the service provider's liability shall be maintained only if the service provider acts expeditiously either to remove the infringing material from its system or to prevent further access to the infringing material on the system or network.

S. REP. NO. 105-190, at 44 (1998). *See also* Derek Khanna, *Reflection on the House Republican Study Committee Copyright Report*, 32 CARDOZO ARTS & ENT. L.J. 11, 47–48 ("The DMCA then provides that the user who posted the material subject to the takedown notice may in turn submit a counter-notice contesting the claim which must contain a statement under penalty of perjury that the 'material was removed or disabled as a result of a mistake or misidentification.'" (quoting 17 U.S.C. § 512(g))).

infringement."[74]

Section 512(m) of the DMCA Safe Harbors further highlights Congress's intent to facilitate an OSP's capacity to efficiently operate its business without the constant threat of infringement litigation, and provides as follows:

> Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i)[.][75]

In short, absent actual knowledge of infringing material, under either Subsection 512(c)(1)(A)(i) or 512(c)(1)(A)(ii), an OSP lacks an affirmative duty to monitor its users' potentially infringing acts.[76] To be sure, subsection 512(i)(1)(A) sets forth an OSP's obligation to adopt a repeat offender policy "that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network."[77]

2. Public Policy, Legislative History, and Legislative Intent

The purpose of the Digital Millennium Copyright Act was to adapt U.S. federal copyright laws so as to facilitate the expansion of OSPs.[78] The DMCA Safe Harbors acknowledge that "[i]n the ordinary course of their operations [online] service providers must engage in all kinds of acts that expose them to potential copyright infringement liability."[79] OSPs are especially vulnerable to potential copyright infringement liability when they allow for user-uploaded content. For example, without an actual knowledge standard,[80] a notice and takedown procedure,[81] and a lack of affirmative duty to monitor its users' potentially infringing acts,[82] an OSP may otherwise be liable for

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74 S. REP. No. 105-190, at 45 (1998) (emphasis added).
75 17 U.S.C. § 512(m) (2012).
76 *See id.*; Viacom Int'l Inc. v. YouTube, Inc., 718 F.Supp.2d 514, 524 (S.D.N.Y. 2010) ("The DMCA is explicit: it shall not be construed to condition 'safe harbor' protection on 'a service provider monitoring its service or affirmatively seeking facts indicating infringing activity[.]'" [citing 17 U.S.C. § 512[m][1]; S. REP. 105-190, at 44 [1998]; H.R. REP. NO. 105-551, at 4 [1998]]), *aff'd in part, vacated in part, remanded*, 676 F.3d 19 (2d Cir. 2012).
77 17 U.S.C. § 512(i)(1)(A) (2012).
78 S. REP. NO. 105-190, at 2 (1998) ("Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's.").
79 *Id.* at 8.
80 17 U.S.C. § 512(c)(1)(A)(ii) (2012).
81 17 U.S.C. § 512(c)(1)(C) (2012).
82 17 U.S.C. § 512(m) (2012).

tremendous levels of litigation for infringing content of which it was not aware. Congress intended to avoid such a scenario, which would likely involve prohibitively high operational costs for OSPs.[83]

The DMCA's legislative history fully supports the notion that the statute was enacted in order to encourage investment in, as well as the development and proliferation of, OSPs.[84] In passing the DMCA, the legislature recognized that "the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials."[85] The Senate Report accompanying the statute provides that the DMCA "is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."[86] The DMCA and the Safe Harbors were intended to incentivize growth for new businesses in the digital media and Internet space as a means of improving the "variety and quality of services on the Internet," while allowing such OSPs to maintain economically efficient business operations.[87] Without explicitly delineating OSPs' liability for user-uploading content, "service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet."[88]

Of course, Congress certainly did not intend to solely protect OSPs to the detriment of content creators.[89] Congress's interpretation of the DMCA Safe Harbors also highlights the benefits of OSPs with respect to preservation and access for pre-1972 sound recordings. The legislature recognized that "[d]ue to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the internet without reasonable assurance that they will be protected against massive piracy."[90] The underlying public policy rationale behind the DMCA was that robust development of internet technologies would benefit both the music consuming public and content owners by "facilitat[ing] making available quickly and conveniently via the internet the movies, music, software, and literary works that are the fruit of American creative genius."[91]

83 *See* S. REP. NO. 105-190, at 1–2, 8 (1998).
84 *See id.*
85 *Id.* at 2.
86 *Id.* at 1–2.
87 *Id.* at 2.
88 *See* S. REP. NO. 105-190, at 8 (1998).
89 *See id.*
90 *Id.*
91 *Id.*

II. *MP3TUNES*: PRE-1972 SOUND RECORDINGS ENTER FEDERAL SAFE HARBORS

In 2007, Capitol Records and thirteen other record companies filed suit[92] against MP3Tunes, LLC[93]—an OSP operating a popular online music storage locker service[94]—and its founder and CEO, Michael Robertson,[95] asserting nine claims of relief for the alleged willful infringement of 350 song titles, including a number of pre-1972 sound recordings owned by plaintiffs.[96] In connection with the pre-1972 sound recordings, the record companies asserted common law infringement and unfair competition claims under New York law.[97] Following three years of litigation, both plaintiffs and defendants filed competing motions for summary judgment, with defendants asserting that the DMCA Safe Harbors applied to claims of infringement of pre-1972 sound recordings.[98]

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92 *See* Complaint at 1, Capitol Records, Inc. v. MP3tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011) (No. 07-9931), 2007 WL 4837988, at *1.

93 "[Michael] Robertson founded MP3tunes in February 2005 and launched the website MP3tunes.com to sell independent artists' songs in the mp3 file format. In the fall of 2005, MP3tunes added a storage service allowing users to store music files in personal online storage 'lockers.'" Capitol Records, Inc. v. MP3tunes, LLC, 821 F.Supp.2d 627, 633 (S.D.N.Y. 2011) (citations omitted).

94 At the time, MP3tunes, LLC operated http://www.MP3tunes.com and http://www.Sideload.com. The online locker service operated via the former website, which

> allow[ed] users to store music files in personal online storage 'lockers.' Songs uploaded to a user's locker could be played and downloaded through any internet-enabled device. MP3tunes offers free lockers with limited storage space and premium lockers with expanded storage for a subscription fee. Over 300,000 users have signed up for a locker." Sideload.com "allow[ed] users to search for free song files on the internet . . . If the user has a locker on MP3tunes.com, Sideload.com displays a link that if clicked, will 'sideload' (i.e., download) the song from the third-party website and save it to his locker. Sideload.com is free as is storage of sideloaded-songs in MP3tunes.com lockers. MP3tunes keeps track of the sources of songs in its users' lockers. Thus, MP3tunes can identify the third-party websites from which users copied songs to their lockers.

Id. at 633–34 (citations omitted).

95 The decision notes Robertson's history of being subject to copyright infringement litigation in the digital music context—

> Robertson is an online music entrepreneur familiar with high-stakes copyright litigation. Years ago, he founded MP3.com, an entity which was the subject of a copyright infringement action in this District. MP3.com offered users online access to music if they could demonstrate they already owned the same music on CD. Various record labels brought suit and a multi-million dollar judgment was entered against MP3.com for copying thousands of music files. In the wake of that judgment, MP3.com was sold and its locker service abandoned. MP3tunes—the subject of this litigation—is Robertson's current foray into online music services.

Id. at 633 (citations omitted).

96 *See* Second Amended Complaint at 15–27, Capitol Records, Inc. v. MP3tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011) (No. 07-9931), 2009 WL 4901824.

97 *See id.*

98 *See* Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 26–28, Capitol Records, Inc. v. MP3tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011) (No. 07-9931), 2010 WL 4632698.

In 2011, the Southern District of New York addressed defendants' argument as an issue of first impression.[99] If the DMCA Safe Harbors applied to pre-1972 sound recordings and MP3Tunes followed the Section 512 notice and takedown procedures, then MP3Tunes may be protected against liability for user-uploaded infringing content.[100] If not, under New York common law infringement and unfair competition claims[101] the mere presence of pre-1972 sound recordings on MP3Tunes' service might impose immediate liability on the OSP, without an opportunity to cure.[102]

In holding that the DMCA applies to pre-1972 sound recordings, the Southern District of New York employed a preemption analysis under the Supremacy Clause,[103] a plain meaning interpretation of the DMCA,[104] and invoked legislative intent in order to emphasize a public policy justification for its decision.[105]

The court rejected plaintiff EMI's argument that Section 301(c) of the Copyright Act trumped the applicability of the DMCA Safe Harbors to pre-1972 sound recordings.[106] Under its preemption analysis, the court held that Section 301(c) did not conflict with the DMCA Safe Harbors as to infringement of pre-1972 sound recordings.[107] According to the court, "[r]ead in context, section 301(c) is an anti-preemption provision ensuring that the grant of federal copyright protection did not interfere with common law or state rights established prior to 1972. But section 301(c) does not prohibit all subsequent regulation of pre-1972 recordings."[108]

The court's reasoning on the preemption issue was based on a plain meaning interpretation of the language of the DMCA.[109] It focused its analysis on Section 501(a) of the Copyright Act, which provides a definition for "infringement of copyright" under the DMCA.[110] Defendants argued that "infringement of copyright"[111] is limited to violations of "any of the exclusive rights of the copyright owner as provided by sections 106 through 122 [of the U.S. Copyright Act]."[112]

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99 *MP3tunes, LLC*, 821 F.Supp.2d at 640.
100 *See supra* Part I.C.1.
101 *See supra* note 96.
102 *See* 17 U.S.C. § 512(c)(1)(C) (2012); *see supra* Part I.C.1.
103 *See MP3tunes, LLC*, 821 F.Supp.2d at 633.
104 *See id.* at 641.
105 *See id.* at 641–42.
106 *Id.* at 640; *see* 17 U.S.C. § 301(c) (2012) ("Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067."); s*ee supra* Part I.B.
107 *MP3tunes, LLC*, 821 F.Supp.2d at 640.
108 *Id.* at 641.
109 *See id.*
110 17 U.S.C. § 501(a) (2012).
111 *Id.*
112 *Id.*; *see MP3tunes, LLC*, 821 F.Supp.2d at 641 (quoting 17 U.S.C. § 501).

They further argued that "because none of the provisions of the Copyright Act address state law . . . the DMCA provides immunity only for violations of federal copyright protections."[113] The court held: "[t]he text of the DMCA limits immunity for the 'infringement of copyrights' without drawing any distinction between federal and state law."[114] It reasoned that "section 501(a) does not provide a comprehensive definition of copyright infringement. It simply states that anyone violating the rights established by sections 106 through 122 is an infringer, *without suggesting it is all inclusive*."[115]

Finally, the Southern District provided a public policy justification for its decision.[116] The court held that "EMI's interpretation of 301(c) would eviscerate the purpose of the DMCA," which was "enacted to clarify copyright law for internet service providers in order to foster fast and robust development of the internet."[117] The court was concerned that holding otherwise would "lead to 'absurd or futile results . . . plainly at variance with the policy of the legislation as a whole,'" as well as "spawn legal uncertainty and subject otherwise innocent internet service providers to liability for the acts of third parties."[118]

Delivering a major blow to content owners, the Southern District of New York became the first court to bring pre-1972 sound recordings within the purview of the U.S. Copyright Act's DMCA Safe Harbors.[119] In weighing the interests of content owners against a public policy allowing OSPs to rely heavily on DMCA Safe Harbors, the court's decision may have been perceived as one that inappropriately allowed OSPs to be protected by the DMCA Safe Harbors for actions not covered under the U.S. Copyright Act.[120]

III. VICTORIES FOR CONTENT OWNERS? *GROOVESHARK* AND *VIMEO* SET A NEW TREND

A. *The* Grooveshark *Case*

The *MP3Tunes* case did little to settle the law with respect to the applicability of the DMCA Safe Harbors to pre-1972 sound recordings.[121] In 2010, Universal Music Group Recordings ("UMG")[122]

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113 *MP3tunes, LLC*, 821 F.Supp.2d at 641.
114 *Id.* (quoting 17 U.S.C. § 501).
115 *Id.* (emphasis added); *see* 17 U.S.C. § 501(a) (2012).
116 *See MP3tunes, LLC*, 821 F.Supp.2d at 641–42.
117 *Id.* at 641.
118 *Id.* at 641–42 (citations omitted); *see supra* Part II.C.2.
119 *See MP3tunes, LLC*, 821 F.Supp.2d at 642.
120 *See* Jeremy R. Lacks, *What's Old is New Again*, MANATT INTELL. PROP. L. NEWSL. (Oct. 18, 2012), http://www.lexology.com/library/detail.aspx?g=1afd0967-aacc-4213-a85a-fa11ca3405fb.
121 *See id.*
122 UMG owns close to forty percent of the world music market, boasting ownership over

filed a New York state court action against Escape Media Group, the owner and operator of Grooveshark,[123] a digital music OSP, alleging infringement of its common law copyright in its pre-1972 sound recordings, many of which were unlicensed.[124] UMG argued that those recordings should not fall under the application of the DMCA.[125]

In 2013, the New York Appellate Division held that the DMCA Safe Harbors did not apply to infringement of pre-1972 sound recording rights.[126] Invoking a similar preemption argument as the *MP3Tunes* plaintiffs,[127] UMG focused its claim on the plain language of section 301(c), which provides in relevant part, "With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State *shall not be annulled or limited* by this title until February 15, 2067."[128] UMG argued that "the DMCA could not apply to the pre-1972 recordings because that would conflict with Congress's directive in section 301(c) of the Copyright Act that nothing in the Act would 'annul' or 'limit' the common-law copyright protections attendant to any sound recordings fixed before February 15, 1972."[129] UMG further argued under the language of section 501(a) that "infringement of copyright"[130] referred solely to "'the exclusive rights of the copyright owner as provided by sections 106 through 122' [of the U.S. Copyright Act.]"[131]

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valuable pre-1972 content such as sound recordings performed by The Beatles, The Carpenters, Cat Stevens, Chuck Berry, The Jackson Five, The Mamas and the Papas, Marvin Gaye, The Supremes, The Temptations, and The Who. *See* Complaint at 1, UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51 (2013) (No. 10100152), 2010 WL 195346, at *1; Laura Sydell, *Universal's Purchase Of EMI Gets Thumbs Up In U.S. And Europe*, NPR (Sep. 21, 2012, 6:06 PM), http://www.npr.org/blogs/therecord/2012/09/21/161560048/universals-purchase-of-emi-gets-thumbs-up-in-u-s-and-europe.

123 *See* UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51, 52 (N.Y. App. Div. 2013). Describing the functionality of Grooveshark, the court explains—

> Users of Grooveshark can upload audio files (typically songs) to an archive maintained on defendant's computer servers, and other users can search those servers and stream recordings to their own computers or other electronic devices. Defendant has taken some measures to ensure that the Grooveshark service does not trample on the rights of those who own copyrights in the works stored on its servers. For example, it is a party to license agreements with several large-scale owners and licensees of sound recordings. In addition, it requires each user, before he or she uploads a work to Grooveshark's servers, to confirm ownership of the recording's copyright or license, or some other authorization to share it.

Id. at 52.

124 *See* Complaint at 1, UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51 (2013) (No. 10100152), 2010 WL 195346, at *1.

125 *See Escape Media Grp., Inc.*, 107 A.D.3d at 54.

126 *See id.* at 59.

127 *See supra* note 96.

128 17 U.S.C. § 301(c) (2012) (emphasis added); *see supra* note 106.

129 *Escape Media Grp., Inc.*, 107 A.D.3d at 54.

130 17 U.S.C. § 501(a) (2012).

131 *Escape Media Grp., Inc.*, 107 A.D.3d at 55–56 (quoting 17 U.S.C. § 501(a)); *see* Capitol Records, Inc. v. MP3tunes, LLC, 821 F.Supp.2d 627, 641 (S.D.N.Y. 2011).

Relying on the *MP3Tunes* decision, defendant Escape Media Group ("Grooveshark") invoked the Southern District of New York's interpretation of the plain language of the DMCA, asserting that, "nothing in the plain language of the DMCA limited its reach to works fixed after that date."[132] Further drawing on the public policy rationale behind the *MP3Tunes* decision, Grooveshark:

> maintained that a ruling in UMG's favor would eviscerate the DCMA, insofar as companies like it would still need to expend massive resources policing the works posted on its servers, rather than being able to wait until a copyright holder or licensee notified it that its rights were being infringed.[133]

The New York Appellate Division was not persuaded.[134] The court cited the familiar legal maxim *expressio unius est exclusio alterius*, "which dictates that the specific mention of one thing implies the exclusion of others," in determining that it was reasonable to interpret the references to "infringement of copyright"[135] in section 501(a) of the DMCA as limited in its application to works created under the Copyright Act (i.e., *post*-1972 sound recordings).[136]

On the issue of preemption, the Appellate Division reasoned that if the DMCA were to apply to pre-1972 sound recordings because the word "limit" in Section 301(c) is unqualified,[137] UMG's only remedy would be to serve Grooveshark with a takedown notice pursuant to subsection 512(c)(1)(C). This would constitute a "material limitation" and thus an "implicit modification" and violation of section 301(c).[138]

A major victory for content owners, and perhaps a potentially greater loss for OSPs, the *Grooveshark* case marked a dramatic shift from the New York federal court decision in the *MP3Tunes* case, specifically addressing and abrogating each basis for the Southern District's holding.[139]

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132 *See Escape Media Grp., Inc.*, 107 A.D.3d at 54; *see MP3tunes, LLC*, 821 F.Supp.2d at 640.

133 *Escape Media Grp., Inc.*, 107 A.D.3d at 54; *see MP3tunes, LLC*, 821 F.Supp.2d at 641; 17 U.S.C. § 501(a).

134 *See Escape Media Grp., Inc*., 107 A.D.3d at 58–59.

135 17 U.S.C. § 501(a).

136 *See Escape Media Grp., Inc*., 107 A.D.3d at 58–59.

137 *See* 17 U.S.C. § 301(c) ("With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State *shall not be annulled or limited* by this title until February 15, 2067." [emphasis added]).

138 *Escape Media Grp., Inc*., 107 A.D.3d at 57–58; *see* 17 U.S.C. § 512(c)(1)(C) (2012); 17 U.S.C. § 301(c) (2012).

139 *Compare Escape Media Grp., Inc.*, 107 A.D.3d, *with* Capitol Records, Inc. v. MP3tunes, LLC, 821 F.Supp.2d 627 (S.D.N.Y. 2011).

B. *The* Vimeo *Case*

The decision in *Capitol Records, LLC v. Vimeo, LLC*[140] lent credence to the notion that courts may recognize the *Grooveshark* case as a paradigm for favoring content owners on the issue of applying the DMCA Safe Harbors to pre-1972 sound recordings, absent congressional action.[141] Largely comprising the same plaintiffs from the *MP3Tunes* case, thirteen record companies sued Vimeo,[142] the popular user-uploaded video streaming service, for alleged infringement of plaintiffs' copyrights in various pre-1972 sound recordings.[143] This time, persuaded by and consistent with the New York Appellate Division's decision in the *Grooveshark* case, the Southern District of New York agreed with plaintiffs' argument that "because application of the DMCA affects copyright holders' rights and remedies, § 301(c) precludes such application to pre-February 15, 1972 recordings," holding that the OSP could not invoke DMCA Safe Harbor protection as it pertained to pre-1972 sound recordings.[144] The court placed significant weight on the *Grooveshark* decision, as well as the Copyright Office's Report on Federal Copyright Protection for Pre-1972 Sound Recordings.[145] Concluding that the DMCA Safe Harbors do not apply to pre-1972 sound recordings, the Report indicated that while there may be "no reason" why the DMCA Safe Harbors should ostensibly apply to pre-1972 sound recordings, "it is for Congress, not the courts, to extend the Copyright Act to pre–1972 sound

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140 972 F.Supp.2d 500 (S.D.N.Y. 2013).

141 *See* Capitol Records, LLC v. Vimeo, LLC, 972 F.Supp.2d 500, 536–37 (S.D.N.Y. 2013) *amended on reconsideration in part*, 972 F.Supp.2d 537 (S.D.N.Y. 2013) (certifying interlocutory appeal as to the question of whether the DMCA Safe Harbors are applicable to pre-1972 sound recordings).

142 Launched in 2005, Vimeo is—

> an online platform that [] enable[s] users to upload, share and view original videos . . . Vimeo differentiates itself from other video-sharing platforms by requiring that those who upload a video to the Website must have created, or at least participated in the creation of, the video. As Vimeo's President, Dae Mellencamp, explained, 'Vimeo has become an online destination for filmmakers who want to share their creative works and personal moments.' The diverse array of videos on the Website includes, *inter alia*, animation, documentaries and personal home videos uploaded by, *inter alia*, artists, politicians, educational institutions and entertainment companies . . . As of September 2012, Vimeo was one of the top 130 most-visited websites in the world and one of the top ten online distributors of web video. It has approximately 12.3 million registered users in forty-nine countries. Each day, approximately 43,000 new videos are uploaded to Vimeo's database, which now contains more than 31.7 million videos.

Vimeo, LLC, 972 F.Supp.2d at 504–05 (citations omitted).

143 *See id.*

144 *Id.* at 536.

145 In December 2011, the U.S. Copyright Office published a report concluding that the DMCA Safe Harbors do not apply to pre–1972 records. *See* U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf.

recordings."[146] The Southern District agreed with the Report and extended a similar call to Congress.[147]

IV. THE SHIFTING LANDSCAPE OF THE MUSIC INDUSTRY

A. *The Effect of Digital Streaming on the Market*

In 2012, according to a report published by the International Federation of the Phonographic Industry ("IFPI"), digital music streaming services led to a global rise in music sales for the first time since 1999, the year after the enactment of the DMCA.[148] Edgar Berger, CEO of the international division of Sony Music Entertainment, has been quoted as saying, "At the beginning of the digital revolution it was common to say that digital was killing music," but now, it can be said "that digital is saving music."[149] In 2013 overall music revenues increased by 0.8%, supported by high consumer demand for streaming services.[150] Revenues from such services increased by 51.3% globally, crossing the $1 billion threshold in the U.S. for the first time.[151] Digital revenues in the U.S., the world's largest digital market, increased by 3.4% in 2013, causing digital music to account for 60% of the current U.S. market.[152]

Recent statistics suggest that content owners and musical artists will increasingly rely on digital streaming services in order to reach consumers. Not only have sales from CDs and other physical formats dropped by 12.3% in the last year, but also digital music streaming revenue in the U.S. rose by 39% in 2013, accounting for $1.4 billion in revenue or approximately 20% of the U.S. recording industry.[153] The IFPI also found that in 2012, some streaming services increased their consumer base by 40%, accounting for a total of twenty million users.[154]

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146 Capitol Records, LLC v. Vimeo, LLC, 972 F.Supp.2d 500, 536 (S.D.N.Y. 2013) (quoting U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf) (citing UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51, 59 (N.Y. App. Div. 2013) ["[I]t would be far more appropriate for Congress, if necessary, to amend the DMCA to clarify its intent, than for this Court to do so by fiat."]).

147 *See id.*

148 Eric Pfanner, *Music Industry Sales Rise, and Digital Revenue Gets the Credit*, N.Y. TIMES (Feb. 26, 2013), http://www.nytimes.com/2013/02/27/technology/music-industry-records-first-revenue-increase-since-1999.html.

149 *Id.*

150 Int'l Fed'n of the Phonographic Indus., *Digital Music Report 2014*, IFPI 6 (Mar. 18, 2014), http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

151 *Id.*

152 *Id.*

153 Alex Pham, *Streaming Made Up One-Fifth of U.S. Recorded Music Revenue in 2013*, BILLBOARD (Mar. 18, 2014, 9:02 AM), http://www.billboard.com/biz/articles/news/digital-and-mobile/5937634/streaming-made-up-one-fifth-of-us-recorded-music.

154 *See supra* note 150.

B. *Artists' Revenue Streams*

While online digital music streaming services continue to expand their reach to wider consumer bases, musicians and performers ultimately pocket little of that increased revenue.[155] In a survey conducted by the Future of Music Coalition, of 4,447 respondents comprising various types of musical artists,

> 16% said their income from sound recordings had increased, 18% said it had stayed the same, and 22% reported that it had decreased over the past five years, which is 6% more than those respondents who said it had increased. This suggests that, in aggregate, survey respondents' income from sound recordings has been declining.[156]

One manager stated, "The thing that's decreased—this won't surprise you—is the income from recording. By that I mean the royalties, the advances, all of the income streams that go along with the recordings. It's all decreased significantly over the last 10 years."[157] According to the same survey, respondents claim to have earned, in aggregate, merely 6% of their annual income from sound recordings.[158] Further, 88% of respondents claim to have earned 0–10% of their annual income from sound recording royalties.[159]

V. THE PITFALLS OF LITIGATION AND THE NEED FOR FEDERALIZATION

A. *The Inadequacy of Litigation*

In order for musicians and content creators to sustain a viable living creating and performing music moving forward, Congress must enact legislation that will sweep pre-1972 sound recordings under the purview of the Copyright Act, subjecting infringement claims for such content to the DMCA Safe Harbor Provisions, among other available federal protections. To propose the federalization of pre-1972 sound recordings is not necessarily in and of itself a novel proposition. It is in fact the position of the Copyright Office, as well as a handful of legal commentators.[160]

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155 Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/3/.

156 *Id.*

157 Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/4/.

158 Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/2/.

159 *Id.*

160 *See, e.g.*, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND

However, any prior scholarship on the issue predates each of the *Grooveshark* and *Vimeo* cases, which are the two decisions that represent the recent, purported judicial shift toward favoring content owners. As a result, the analysis of the potentially vast, negative downstream effects of those decisions on current content owners and future content creators have yet to be implicated and therefore considered. Further, while existing legal scholarship frames the discussion over pre-1972 sound recordings in the context of certainty in investment in OSPs, none does so in the context of the downstream effects on content creators themselves, nor goes as far as to analyze statistical data surrounding artists' revenue streams, as this Note does below. *Grooveshark* and *Vimeo*, litigated and won by the major record company conglomerates, are purportedly wins for content creators. However, they may backfire not only on the interests of pre-1972 rights holders by limiting access and preservation, but also on those of future content creators by shutting down OSPs that serve as widely accessible promotion and distribution platforms.

The courts have made it clear that DMCA Safe Harbors shall only apply to pre-1972 sound recordings if Congress deems it so.[161] While this is the simplest solution, and seemingly the only solution that will curb litigation over the issue, it is also the only way to achieve the innovation-focused legislative purpose of the DMCA.[162] Otherwise, litigious rights holders of pre-1972 sound recordings may negatively impact the overall landscape of the music industry.[163]

To assume that the issue of the applicability of DMCA Safe Harbors to pre-1972 sound recordings is well settled as a result of *Grooveshark* and *Vimeo* would be a mischaracterization. From a legal standpoint, the fact that two courts have adopted similar holdings as to the applicability of DMCA Safe Harbors to pre-1972 sound recordings establishes clear boundaries for OSPs. A strict legal interpretation contemplating preemption and a parsing of the language of the relevant statutes necessitated those holdings. However, policy concerns relating to future content owners combined with various courts' own call to Congress strongly suggests that litigation is the improper avenue to deal with the issue of pre-1972 sound recordings and its effect on the music

RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 120–35 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf; Andrew M. Pinchin, *Casting Common Law and the Music Industry Adrift: Pre-1972 Recordings Enter Federal Safe Harbors*, 91 OR. L. REV. 635 (2012) (This article predates the *Grooveshark* and *Vimeo* cases); Michael Erlinger, Jr., *An Analog Solution in A Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L. REV. 45 (2009) (This article also predates the *Grooveshark* and *Vimeo* cases).

161 *See supra* note 145.

162 *See supra* Part I.C.2.

163 *See infra* Part V.B.

industry as a whole.

This Note argues that content owners, as a whole, may be in no better position than they were before *Grooveshark* and *Vimeo*. In fact, they may even be worse off because of the increased vulnerability of OSPs that allow for user-uploaded content. Without the limited liability conferred to OSPs by the DMCA Safe Harbor Provisions, enforcement is nearly impossible for an OSP that allows users to upload content. It may no longer be a prudent business decision for any company to engage in the user-uploaded music streaming business.

Litigating over pre-1972 sound recordings has become a shrewd business strategy for content owners who want to shut down OSPs that may be infringing their copyrights. It is the desired outcome for record companies, and it will continue to serve their interests until Congress eliminates the possibility of such a strategy. Administrative costs and judicial economy are certainly viable arguments for the federalization of pre-1972 sound recordings. They are indeed compelling arguments in a legal sense, but such a framework does not fully encapsulate the extent to which future content creators may suffer in the long run without the federalization of pre-1972 sound recordings.

Of course, future content creators may have no legal standing to claim a potential injury in the DMCA Safe Harbor cases, yet they are the ones who stand to lose the most. Future content creators need OSPs in order to adapt to the realities of the current landscape of the music industry. The litigation strategy employed by the major record companies has created a battle between those who seek to compel greater access to a breadth of music, and concentration of conglomerates that own the rights in recordings performed by creative artists. Ironically, the interests of the conglomerates are completely adverse to those of future content creators, which further suggests that the courts are the improper venue to settle this issue.

B. *The Downstream Effects of Litigation on Content Creators*

1. Content Creators Rely on OSPs to Serve Their Primary Revenue Stream

As digital music streaming increasingly becomes the dominant platform for music consumers, and artists continue to see a drop in their income from sound recordings, there are several reasons to believe that the utility of digital music streaming extends far beyond direct revenue for music artists. Artists overwhelmingly continue to receive most of their income from live performance and ticket sales.[164] According to a

[164] *See* Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/7/.

case study conducted by the Future of Music Coalition, the typical indie rock musician generates on average 72.3% of her income from live performance and is "completely dependent on touring" for income.[165]

Therefore, while artists may not pocket significant revenue from sound recordings directly, the benefit of litigation as a means to protect content owners' rights may not outweigh the benefit of the power of digital music streaming services to facilitate ancillary revenue streams for performers. Some musicians have recognized that the value of digital music streaming may be viewed through an alternative lens, embracing the idea of OSPs like Grooveshark as a discovery service to bolster ticket sales and broaden fan bases by increasing the public's access to their content.[166]

Daniel Glass, founder of Glassnote Records, whose stable of artists includes Erykah Badu and Mumford & Sons, seems to agree with the ancillary benefits of OSPs. Glass says, "When you have quality and you're in the sophomore stage of this band's career, I think the fear of holding it back is worse than letting it go. Opening up the faucet and letting people hear it, stream it and all that stuff is definitely very healthy."[167] Cellist Zoë Keating was similarly quoted as saying that online digital music streaming services are "awesome as a listening platform. In my opinion artists should view it as a discovery service rather than a source of income."[168] Respondents of the Future of Music Coalition survey have also noted the "promotional power" of digital music streaming services,[169] and many have noted that OSPs level the playing field for distribution.[170]

OSPs, as a result of the *Grooveshark* and *Vimeo* cases, may be

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165 Jean Cook, *Case Study: Indie Rock Composer-Performer*, FUTURE OF MUSIC COAL. (Mar. 15, 2012), http://money.futureofmusic.org/case-study-a/; *see also* Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/2 ("The largest pie slice was income from live performance, which accounted for 28% of survey respondents' music-related income."); Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/7/ ("*What puts the money in our pockets from record sales is concerts.* -Contemporary Chamber Music Player." "*Definitely our touring, flat out. The amount of money that we make on the road, that's what has allowed for us to remain full-time professional musicians.* -Chamber Music Ensemble.").

166 *See* David Byrne, *David Byrne: 'The Internet will Suck all Creative Content out of the World'*, THE GUARDIAN (Oct. 11, 2013, 10:53 AM), http://www.theguardian.com/music/2013/oct/11/david-byrne-internet-content-world.

167 *Id.*

168 *Id.*

169 Kristin Thomson, *Off the Charts: Examining Musicians' Income from Sound Recordings*, FUTURE OF MUSIC COAL. (June 12, 2012), http://money.futureofmusic.org/sound-recording-income/8/.

170 Kristin Thomson, *Are Musicians Benefiting From Music Tech?*, FUTURE OF MUSIC COAL. (Feb. 23, 2012), http://money.futureofmusic.org/are-musicians-benefiting-from-music-tech-sf-musictech-presentation/ ("*It's not a novel observation on my part, but technology has leveled the field of distribution to a great degree.* -jazz manager.").

prohibitively vulnerable to litigation and large damage awards. Owners of pre-1972 sound recordings have not only diminished the viability of currently operating OSPs as a promotion and distribution platform, but they may have also disincentivized investment in future OSPs to serve similar benefits to future content creators. In that sense, a win in the courtroom for pre-1972 content owners is only a win for themselves, meaning the record companies' litigation strategy fails to contemplate the negative, downstream effects. Such an aggressive litigation strategy not only serves little benefit to future content creators, but the chilling effect on OSPs may ultimately disadvantage them.

2. Limits on Preservation and Access for Pre-1972 Sound Recordings

Although the *MP3Tunes* case was a legal victory for MP3Tunes, four-and-a-half years of litigation against fourteen record companies resulted in MP3Tunes filing for bankruptcy in 2012 and disappearing into virtual obscurity in the digital media landscape.[171] In that respect, record companies and content owners effectively identified a strategy against OSPs and digital music streaming services such that their ultimate goal of eliminating those services is achieved whether or not they win in the technical, legal sense. To date, Grooveshark has been sued for copyright violations by all four of the major American recording companies: EMI, Sony Music, Warner Music Group, and UMG.[172] While OSPs such as Spotify and Pandora are valued in the billions of dollars, Grooveshark fights for obscurity, and its CEO and founder has admitted that copyright litigation has drained him financially.[173] Whether they won their day in court or not, the major record labels and content owners may have succeeded in producing a chilling effect on the development of digital music OSPs.[174]

In addition, a courtroom defeat for content owners, as in the *MP3Tunes* case, is compounded by a potential loss of the valuable benefits provided by the music service they have effectively shut down. If OSPs elect to avoid litigation by eliminating pre-1972 sound recordings from their catalog altogether, as opposed to obtaining a license, there is the genuine possibility of a severe limit being imposed on the preservation of and access to pre-1972 sound recordings.

Indeed, the U.S. Copyright Office has noted that federalization has the potential to increase preservation efforts for pre-1972 sound

171 *See* Greg Sandoval, *MP3tunes.com Locker Service Files for Bankruptcy*, CNET (May 10, 2012, 2:12 PM), http://www.cnet.com/news/mp3tunes-com-locker-service-files-for-bankruptcy-exclusive.
172 *See* Steven Musil, *Grooveshark Now Feels Lawsuit Wrath of All Major Music Labels*, CNET (Jan. 5, 2012, 8:51 PM), http://www.cnet.com/news/grooveshark-now-feels-lawsuit-wrath-of-all-major-music-labels.
173 Seth Fiegerman, *Grooveshark CEO: 'I'm Broke'*, MASHABLE (Apr. 22, 2013), http://mashable.com/2013/04/22/grooveshark-radio.
174 *See supra* Part III.

recordings.[175] Some stakeholders, such as libraries and archivists, argue that the availability of federal laws that provide specific limitations on liability for those engaging in legitimate preservation activities[176] would result in greater funding for preservation efforts, relative to state law, because of the certainty and consistency that would result from federalization.[177]

Furthermore, an increase in preservation efforts would be futile without increase of public access to pre-1972 sound recordings.[178] Together, increased efforts in preservation and access to pre-1972 sound recordings will result in expected benefits of greater availability of culturally valuable works, in addition to being eligible to benefit from any amendments to federal copyright law that may directly affect public access, such as Section 108.[179]

CONCLUSION

While clear boundaries may have been established for OSPs as a result of the *Grooveshark* and *Vimeo* cases, order is far from being restored in the recording industry. OSPs remain tremendously vulnerable to litigation over user-uploaded pre-1972 sound recordings, and the current legal landscape spells near-certain doom for an OSP's survival in the marketplace. Such a strategy does much as far as benefitting the record company conglomerates, but musicians themselves see very little by way of actual revenue.[180] Without federalizing pre-1972 sound recordings, future content creators may lose a valuable link in the chain, in the form of OSPs, which rewards the fruits of their labor with fair compensation.

The courts understand the rationale for federalizing pre-1972 sound recordings through a narrow lens. Defendants in these cases

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175 "At the very least, the relative certainty and consistency of federal copyright law provides a structural incentive for increased preservation of pre-1972 sound recordings." U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 91 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf.

176 *See* 17 U.S.C. § 107 (2012); 17 U.S.C. § 108 (2012).

177 *See* U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 92–93 (2011), http://www.copyright.gov/docs/sound/pre-72-report.pdf.

178 With respect to access, the U.S. Copyright Office states—

> Obviously, researchers and the public must have access to digitized pre-1972 sound recordings for the furtherance of public knowledge about our cultural patrimony, and for the light that these recordings can shine on the times in which they were recorded—basically, for the reasons we study film, literature, music, and any other product of the mind. Access also propels the "progress of science" in that current creators are able to build upon what has come before.

Id. at 95 (citations omitted).

179 *Id.* at 99.

180 *See supra* Part IV.B.

consistently invoke legislative intent in arguing that the purpose of the DMCA is to serve OSPs by protecting investment in their businesses and allowing them to operate efficiently.[181] That is a myopic interpretation. Content owners and courts alike may be ignoring the potential downstream, negative effects on the artists themselves, the cultural proprietors of the "fruit of American creative genius."[182] The future of the music industry is in tremendous flux. What is certain is that without the federalization of pre-1972 sound recordings, the shifting trend in the legal landscape over the applicability of the DMCA Safe Harbors may encourage content owners to initiate extensive litigation and continue to create a chilling effect on digital music streaming services, and that may ultimately spell trouble for the artists themselves.

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[181] *See supra* Part III.

[182] S. REP. 105-190, at 8 (1998).

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