

# Pinterest and Copyright’s Safe Harbors for Internet Providers

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## I. INTRODUCTION

Has the time come to substantially revise the Copyright Act to better adapt the law to the ever-evolving digital environment? A number of influential sources appear to think so.<sup>1</sup> If their initiatives gain momentum, it will be important to consider lessons learned from the first such effort fifteen years ago when Congress made far-reaching changes to copyright law by extending the term of copyright for twenty years<sup>2</sup> and by enacting a package of reform proposals known as the Digital Millennium Copyright Act (“DMCA”).<sup>3</sup> This Article intertwines the story of one important provision of the DMCA—safe harbors for Internet service providers (“ISPs”)<sup>4</sup>—with a case study of Pinterest as a successful bene-

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1. Press Release, H. Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), available at [http://judiciary.house.gov/news/2013/04242013\\_2.html](http://judiciary.house.gov/news/2013/04242013_2.html); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 320 (2013); *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet*, 113th Cong. 6–38 (2013) (statement of Maria A. Pallante, Register of Copyrights, U.S. Copyright Office); Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1176, 1176–77 (2010); *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet*, 113th Cong. (2013) (statement of Pamela Samuelson, Professor, Berkeley Law School).

2. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 302–304 (2006)).

3. Digital Millennium Copyright Act of 1998, H.R. 2281, 105th Cong. § 202 (1998) (codified at various sections of Title 17).

4. See 17 U.S.C. § 512 (2012).

ficiary of the DMCA's safe harbor policy. While some improvements are needed to protect users of protected services against indiscriminate automated takedown notices and to encourage greater licensing of on-demand content, this case study illustrates why any reform entailing substantial reallocation of enforcement responsibilities from copyright owners to service providers would be problematic and would undermine the support for innovation embedded in this policy.

The centerpiece of the DMCA was a compromise between two legislatively powerful groups: large corporate copyright owners and large telecommunications providers.<sup>5</sup> Both groups had achieved related policy successes in 1996.<sup>6</sup> The traditional media companies had successfully persuaded the Clinton Administration to spearhead the effort in the World Intellectual Property Organization to enact two multilateral copyright treaties,<sup>7</sup> one of which called on member states to provide copyright owners with a new cause of action against those who would circumvent technological protection measures applied to works of authorship.<sup>8</sup>

Separately, ISPs had persuaded Congress in 1996 to immunize them from liability for defamation and related communicative harms caused by users of interactive computer services such as chat rooms.<sup>9</sup> This statute, however, explicitly exempted harms caused by users' infringement of copyright and other forms of federal intellectual property from service providers' immunity,<sup>10</sup> leaving this issue to be resolved separately.

The DMCA gave each interest group a version of the policy it had sought. The DMCA imposed a new source of liability on those who circumvent an effective technological protection measure that controls access to a protected work and on those who traffic in technologies that circumvent both access and copy controls.<sup>11</sup> It also exempted from monetary liability qualifying service providers who, among other things, provide storage of infringing material at the direction of a user.<sup>12</sup> The scope of this latter policy, codified at 17 U.S.C. § 512(c), was the subject of vigorous litigation between YouTube and a coalition of copyright own-

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5. JESSICA LITMAN, DIGITAL COPYRIGHT 134–35 (2001).

6. *Id.* at 128–29.

7. *Id.* at 128–30.

8. World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997).

9. Communications Decency Act of 1996, tit. 5, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended at 47 U.S.C. § 230).

10. *See* 47 U.S.C. § 230(e)(2) (2006).

11. Digital Millennium Copyright Act of 1998, H.R. 2281, 105th Cong. § 202 (1998) (codified at 17 U.S.C. § 1201(b)).

12. *Id.* at 17 U.S.C. § 512(c).

ers led by Viacom.<sup>13</sup> YouTube has largely emerged victorious, and it is plausible to expect that the Viacom coalition will seek a legislative amendment to overrule the Second Circuit's decision.

The second story this Article tells is that of Pinterest,<sup>14</sup> a fast-growing social media company safely harbored in § 512(c)'s protective cove. Pinterest is a company that has learned by doing—shifting its business strategy to respond to users' preferences and behavior. What was once a mobile shopping application is now a robust Web-based platform, upon which a user population comprised mostly of women has built an extensive visual conversation using primarily photographs copied from the Web. Some uses of these photographs would qualify as fair use.<sup>15</sup> Uses of other photographs, such as those available under a Creative Commons license,<sup>16</sup> are licensed by the copyright owner.<sup>17</sup> However, some portion of these uses are likely infringing copyright, or are plausibly infringing to a sufficient degree to impose on Pinterest sizable potential litigation costs that would undermine its ability to raise investment capital to continue to innovate.<sup>18</sup>

For this reason, the policy decision embedded in § 512(c) is an important contributor to Pinterest's success. Those who would impose greater liability on service providers should consider this case study. Indeed, when one considers the sources of the social value that users create on, and derive from, Pinterest, creativity of the photographers whose copyrights arguably are being infringed represents a small portion. Section 512's protection provides Internet-based entrepreneurs with the opportunity to unlock this kind of value.

## II. SAFE HARBORS

Section 512 has proven to be an important, if not essential, piece of

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13. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

14. See PINTEREST, <http://www.pinterest.com> (last visited July 28, 2013).

15. See Andrew Mirsky, *Pinterest: Fair Use of Images, Building Communities, Fan Pages, Copyright*, DIGITAL MEDIA LAW PROJECT (Oct. 22, 2012), <http://www.dmlp.org/blog/2012/pinterest-fair-use-images-building-communities-fan-pages-copyright> (discussing the applicability of copyright fair use in using Pinterest).

16. See *generally About The Licenses*, CREATIVE COMMONS, <http://creativecommons.org/licenses/> (last visited Nov. 8, 2013).

17. See Trey Ratcliff, *Why Photographers Should Stop Complaining About Copyright and Embrace Pinterest*, STUCK IN CUSTOMS (Feb. 13, 2012), <http://www.stuckincustoms.com/2012/02/13/why-photographers-should-stop-complaining-about-copyright-and-embrace-pinterest/>.

18. See, e.g., *Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219 (C.D. Cal. 2010) (photographer unsuccessfully suing service provider even in light of evident DMCA protection); see also *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wash. 2004) (ruling on Amazon's § 512 defense without deciding whether its hosting of celebrity photographs was infringing), *overruled in part on other grounds*, *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010).

legal infrastructure to support the growth of social media. This section briefly describes the structure of § 512's safe harbors and how they apply to platforms such as Pinterest. It then revisits the public record of the negotiating and legislative history to recall the context in which the provision was enacted. The focus of this discussion is on the general policy choice concerning enforcement responsibilities between copyright owners and service providers.

In recent years, some copyright owners have invested in automated enforcement by relying on computer algorithms to identify the presence of a copyrighted work—usually recorded music or video—and to send an automated take-down notice to service providers without regard to whether the use of the work might be a fair use. Some service providers, such as YouTube, have invested in automated processes to respond to such notices. This phenomenon has three deleterious consequences that deserve more attention than can be given here. First, users making a fair use of another's copyrighted work are overburdened by the need to repeatedly send counter-notifications to service providers.<sup>19</sup> Second, the volume of automated takedown notices that a service provider must process imposes significant costs that can become a barrier to entry for some potential service providers.<sup>20</sup> Third, users often receive no notice when search engines remove links to their content. Taking these concerns as a given, the remainder of this section focuses on the policy choices Congress made concerning service provider liability for monetary relief in § 512.

#### A. Structure

Section 512's purpose is to shield service providers from monetary liability for copyright infringement caused by users of the providers' services.<sup>21</sup> Without such protection, successful service providers could face potentially crippling liability in light of the large number of users

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19. See Michael B. Farrell, *Online Lecture Prompts Legal Fight on Copyright*, BOSTON GLOBE (Aug. 27, 2013), <http://www.bostonglobe.com/business/2013/08/26/harvard-law-professor-sues-record-company-over-phoenix-lisztomania/jqYkgFaXSgGpd2hL2zsXsK/story.html> (reporting on declaratory judgment action filed by user against copyright owner to block future takedown notices to YouTube for use of copyrighted music in video of lecture); see also *Lenz v. Universal Music Group*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (holding that copyright owner must consider whether use is fair use before sending a takedown notice).

20. Google's data shows that it is processing takedown notices for 6.5 million URLs per month as of October 2013. See *Transparency Report: Copyright Owners*, GOOGLE, <http://www.google.com/transparencyreport/removals/copyright/owners/?r=last-month> (last updated Dec. 13, 2013).

21. See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) ("Congress recognized that '[i]n the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability.'") (quoting S. Rep. No. 105-190, at 8 (1998)).

and the large number of copyrighted works that can be shared through an Internet service.<sup>22</sup>

Originally proposed as stand-alone legislation that would immunize providers of Internet services from *infringement liability*,<sup>23</sup> § 512 in its enacted form limits the *remedies* available to a copyright owner in cases in which the service provider is liable for copyright infringement.<sup>24</sup> Specifically, § 512 provides that “[a] service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of [engaging in one of the four protected activities].”<sup>25</sup> The “monetary relief” that a qualifying service provider is spared is broad and is defined as “damages, costs, attorneys’ fees, and any other form of monetary payment.”<sup>26</sup> The conditions for injunctive relief in § 512(j) are also quite limited, making a service provider with a reasonable argument that it qualifies for safe harbor protection an unattractive target for litigation.

Congress identified four functions that service providers perform requiring safe harbor protection: Internet transmission (e.g., basic Internet service);<sup>27</sup> system caching (e.g., as done by search engines);<sup>28</sup> storing material at the direction of users (e.g., Web hosts or social media sites);<sup>29</sup> and linking to online locations (e.g., search engines).<sup>30</sup> Focused on defining the protected activities of service providers, Congress left somewhat ambiguous in § 512 its implicit theory of liability for copyright infringement from which the service provider receives safe harbor protection. The Copyright Act grants to authors and their assigns six exclusive rights,<sup>31</sup> and the verbs used to define these rights do not align directly with the verbs used to describe a service provider’s protected activities.<sup>32</sup> As a result, federal courts have had to explain, for example,

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22. *Id.* (“[Congress] was loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions.”).

23. *See* Online Copyright Liability Limitation Act of 1997, H.R. 2180, 105th Cong. § 2 (1997); Digital Copyright Clarification and Technology Education Act, S. 1146, 105th Cong. § 102.

24. *See infra* Part II.B and accompanying text.

25. *See* 17 U.S.C. § 512(a)–(d) (2012) (beginning each subsection with the quoted text).

26. *Id.* § 512(k)(2).

27. *See id.* § 512(a).

28. *See id.* § 512(b).

29. *See id.* § 512(c).

30. *See id.* § 512(d).

31. *See id.* § 106.

32. *Compare* 17 U.S.C. § 106 (granting copyright owners exclusive rights to “reproduce,” “distribute copies,” “perform . . . publicly,” and “display . . . publicly” the work of authorship or to “prepare derivative works” from it) *with* 17 U.S.C. § 512 (providing safe harbors for service providers that transmit, route, or provide connections to material; provide intermediate and temporary storage of material; store material at the direction of a user; and refer users to a location containing infringing material).

which of the copyright owner's exclusive rights are subject to the safe harbor when a provider gives "storage at the direction of a user" of infringing material.<sup>33</sup>

On the surface, the structure of a § 512 analysis is fairly straightforward. A defendant may successfully raise a § 512 defense to monetary relief if it shows that it: (1) is a "service provider"<sup>34</sup>; (2) has taken the necessary steps to be eligible for the safe harbor(s)<sup>35</sup>; (3) has responded appropriately to qualifying communications from the copyright owner or to other relevant facts and circumstances that could affect the service provider's continuing eligibility for the safe harbor(s)<sup>36</sup>; and, (4) does not receive a direct financial benefit from infringing activity that the service provider has the right and ability to control in the case of hosting and linking service providers.<sup>37</sup>

Under the surface, each element of the defense has additional subsidiary inquiries designed to tailor the scope of safe harbor protection, while also attempting to deter potentially abusive conduct by copyright owners. For example, the initial inquiry of whether the defendant is a "service provider" is actually more complex because the DMCA divides service providers into two classes and offers a different scope of protection to each.<sup>38</sup> Service providers of basic network transmission under § 512(a) receive broader protection than service providers protected under subsections (b)–(d).<sup>39</sup> In particular, a § 512(a) service provider remains protected even after receiving notice that infringing materials are passing through its network because, by definition, a qualifying service provider does not have control over the contents of the transmissions passing through its system.<sup>40</sup> Knowledge of infringement does impose obligations to respond on service providers under subsections

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33. See *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1015–20 (9th Cir. 2013) (devoting five reporter pages to the question and rejecting the argument that "storage" is limited to a service provider's ingest of infringing material).

34. See 17 U.S.C. § 512(k)(1) (defining "service provider").

35. See *id.* § 512(b)(2) (defining protected caching practice); (c)(2) (requiring designation of agent to receive notice of copyright infringement); (e)(1)(C) (requiring educational institution acting as service provider to provide to users information concerning compliance with copyright law); (i) (requiring of all service providers that they have a policy to terminate use of service by "subscribers" and "account holders" who are "repeat infringers" and that they do not interfere with "standard technical measures").

36. See *id.* § 512(b)(2)(B) (complies with Web site's reasonable caching policies); § 512 (b)(2)(E) (removes cached content upon receiving notice of infringement); § 512 (c)(1)(A) (removes infringing content expeditiously upon receipt of qualifying notice from copyright owner or when becoming aware of "facts and circumstances from which infringing activity is apparent"); § 512 (d)(1), (3) (same as § 512 (c)(1)(A)).

37. See *id.* § 512(c)(1)(B); § 512 (d)(2).

38. See § 512 (a)–(d).

39. See *id.*

40. See *id.*

(b)–(d) if they wish to retain safe harbor protection.<sup>41</sup>

To be clear, the inquiry is functional and not ontological. An entity may be a § 512(a) service provider insofar as it provides network services and also a § 512(c) service provider because it hosts users' content. The more robust protection offered to § 512(a) service providers invites defendants who might qualify more readily under a different subsection to attempt to arbitrage the difference.

The most notable example to date has been Napster. Its centralized server, which provided information about online locations from which infringing material could be retrieved, (i.e. other Napster users' computers), would appear to be the kind of service contemplated by § 512(d). Recognizing that it would have difficulty proving the other eligibility criteria under subsection (d), Napster instead initially sought unsuccessfully to characterize itself as a network provider under § 512(a).<sup>42</sup> When it fell back upon § 512(d), it failed again.<sup>43</sup>

The second element of the § 512 inquiry is whether the service provider took the necessary preliminary steps to be eligible for safe harbor protection.<sup>44</sup> All service providers must have adopted and implemented a § 512(i) compliant policy to terminate services for repeat infringers, and they must have set up their services not to interfere with standard technical measures.<sup>45</sup> Hosting service providers must also have designated an agent to receive email notifications<sup>46</sup> and must have registered the agent's information with the U.S. Copyright Office, which keeps an online directory of such agents.<sup>47</sup> The DMCA does not expressly require caching and linking service providers to designate such an agent, but they are required to respond to a notice of infringement sent to such an agent.<sup>48</sup> Caching service providers must have aligned their practice to

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41. *Id.*

42. *See* A&M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 WL 573136, at \*8 (N.D. Cal. May 12, 2000) (denying Napster's motion for summary judgment on its § 512(a) defense).

43. *See* A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 919 n.24 (N.D. Cal. 2000) (merging analysis of secondary liability with analysis under § 512(d)), *aff'd in part, rev'd in part*, 239 F.3d 1004, 1025 (9th Cir. 2001) (recognizing impropriety of merging the two standards but holding that balance of hardships favored preliminary injunction for plaintiffs and that Napster could develop its § 512(d) defense at trial).

44. *See supra* note 35.

45. *See id.*; *see also* Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004) (holding that the district court's grant of summary judgment for AOL, on the grounds it had reasonably implemented its § 512(i) policy, was inappropriate because AOL had changed its email address for receiving infringement notifications without adequately providing a means to receive and respond to notifications sent to the old address).

46. *See id.* § 512(c)(2).

47. *See Online Service Providers*, UNITED STATES COPYRIGHT OFFICE, <http://www.copyright.gov/onlinesp/> (last visited Aug. 2, 2013).

48. *See* § 512(c)(3) (defining elements for a qualifying notice); *see also* § 512(b)(2)(E)

comply with reasonable caching policies of publisher sites,<sup>49</sup> and non-profit higher educational institutions acting as service providers must have provided to users information about legal compliance with copyright law.<sup>50</sup>

The third element is whether the service provider has responded appropriately to a qualifying notice from a copyright owner or to other relevant facts and circumstances.<sup>51</sup> This element has generated the most significant litigation to date because it effectively allocates the costs of enforcement between copyright owners and service providers. Litigants have contested how specific a notice of infringement must be to trigger a service provider's obligation to respond.<sup>52</sup> They similarly have sparred over when a service provider acquires actual knowledge of infringing activity, or so-called "red flag" knowledge of facts and circumstances, from which infringing activity is apparent.<sup>53</sup> The Second and Ninth Circuit Court of Appeals have rejected attempts to revise § 512 through judicial interpretation to impose on service providers an obligation to act when they have generalized knowledge that users are uploading popular titles, but without knowledge of specific allegedly infringing files.<sup>54</sup>

Last, hosting and linking service providers must not receive a direct

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(incorporating (c)(3) notice requirements by reference for caching service providers); § 512(d)(3) (same for linking service providers).

49. *See id.* § 512(b)(2).

50. *See id.* § 512(e)(1)(C).

51. *See supra* note 36.

52. *See* *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (finding adequate notice that alleged two sites had been established to host infringing copies of plaintiff's photographs and therefore all of the content on each should be treated as infringing); *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 747 (S.D.N.Y. 2012) ("Notices that do not identify the specific location of the alleged infringement are not sufficient to confer 'actual knowledge' on the service provider."); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1089 (C.D. Cal. 2001) ("DMCA expressly provides that if the copyright holder's attempted notification fails to 'comply substantially' with the elements of notification described in subsection (c)(3), that notification 'shall not be considered' when evaluating whether the service provider had actual or constructive knowledge of the infringing activity . . .").

53. *See* *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013) ("In other words, the actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."); *see also* *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012) (fashioning an extra-textual standard for "willful blindness" that could lead to finding of actual knowledge); *Viacom Int'l, Inc. v. YouTube, Inc.*, No. 07Civ. 2103(LLS) 2013 WL 1689071, at \*4-5 (S.D.N.Y. Apr. 18, 2013) (applying willful blindness standard and holding that YouTube did not have actual knowledge of infringing activity). Further developments on this issue of law are forthcoming. *See* *Capitol Records, LLC v. Vimeo, LLC*, Nos. 09 Civ. 10101(RA), 09 Civ.10105(RA), 2013 WL 6869648 (Dec. 31, 2013) (certifying for interlocutory appeal the question "[w]hether, under *Viacom Int'l, Inc. v. YouTube, Inc.*, a service provider's viewing of a user-generated video containing all or virtually all of a recognizable, copyrighted song may establish 'facts or circumstances' giving rise to 'red flag' knowledge of infringement.").

54. *See supra* note 53.

financial benefit from infringing activity that they have the right and ability to control.<sup>55</sup> This terminology echoes the elements of the doctrine of vicarious liability as articulated by the lower courts.<sup>56</sup> Courts have rejected a “Catch 22” interpretation of § 512 that would make a service provider eligible for safe harbor protection because of vicarious liability only to have the service provider lose it by failure to meet this condition.<sup>57</sup> Instead, a service provider otherwise liable for vicarious infringement has a “right and ability to control infringing activity” for § 512 purposes—and thereby loses safe harbor protection—only when the service provider exerts “substantial influence” over its users.<sup>58</sup>

### B. History

Section 512 emerged out of a larger effort to define the rules of the road for the “information superhighway” in the early to mid-1990s. The Clinton Administration assembled a task force to provide what became a very contentious White Paper that would do so. Among its recommendations was a rejection of any protection for ISPs from copyright infringement liability.<sup>59</sup> Coalitions of large corporate copyright owners pushed for legislative adoption of the White Paper’s findings.<sup>60</sup> However, there was backlash from library groups, online service providers, Internet civil liberties groups, and others.<sup>61</sup> The Digital Future Coalition was formed by representatives from these groups, and it effectively stopped the hasty domestic adoption of the White Paper’s recommendations.<sup>62</sup> Policy attention shifted to the World Intellectual Property Organization, through which two multilateral copyright-related treaties were negotiated shortly after the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) had become effective.<sup>63</sup> Attempts by the United States delegation to incorporate

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55. See § 512(c)(1)(B).

56. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) (defining elements of vicarious liability). The Supreme Court’s articulation of vicarious liability, in passing, is more limited; see *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“[One] infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”).

57. See *UMG Recordings*, 718 F.3d at 1027 n.17 (collecting cases).

58. See *id.* at 1026–31.

59. BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 230 (1995) [hereinafter White Paper].

60. LITMAN, *supra* note 5, at 123.

61. *Id.* at 122.

62. PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 172 (Stanford Univ. Press rev. ed. 2003); LITMAN, *supra* note 5, at 128 (“Copyright owners remained unwilling to let service providers off the hook, and the providers and telephone companies were determined that the bill not move until their interests were addressed.”).

63. See LITMAN, *supra* note 5, at 128–29.

many of the more controversial proposals from the White Paper proved unsuccessful.<sup>64</sup> The compromises necessary to finalize the World Intellectual Property Organization (“WIPO”) Copyright Treaty left considerable flexibility for national implementation.<sup>65</sup> Treaty implementation became a platform to propose other revisions to the Copyright Act.<sup>66</sup> In this legislative setting, service providers found champions to introduce stand-alone legislation that would provide immunity from infringement caused by users.<sup>67</sup>

Both the House and Senate held hearings on the proposals.<sup>68</sup> Witnesses from large media companies argued that Internet services were little different from services provided by other content intermediaries, and therefore no Internet-specific protection was required.<sup>69</sup> Moreover, these witnesses wanted to keep the status quo, including the specter of secondary liability, to give service providers an incentive to police their users’ activities. Jack Valenti, of the Motion Picture Association of America, argued that the bills would produce the opposite result, encouraging service providers to turn a blind eye to their customers’ infringing actions.<sup>70</sup>

Witnesses from the telephone companies, other ISPs, and libraries argued that provision of Internet service was different in kind, and therefore required an Internet-specific solution. They argued that it would not be feasible—or even possible—to police their services to identify infringing material.<sup>71</sup> Service providers argued that the direct infringer

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64. *See id.* at 128–30.

65. See GOLDSTEIN, *supra* note 62, at 172–73 (detailing the negotiations and lack of agreement by the other member nations with all of the United States’ agenda).

66. *Id.*

67. *See id.* at 171–73.

68. *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. On Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter House Judiciary Hearing]; *The Copyright Infringement Liability of Online and Internet Serv. Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary*, 105th Cong. (1997) [hereinafter Senate Judiciary Hearing].

69. *See* House Judiciary Hearing, *supra* note 68, at 70, 79, 118, 130, 157, 168, 219 (statements of Robert Holleyman, Business Software Alliance; Jack Valenti, Motion Picture Association of America; Ken Wasch, Software Publishers Association of America; Lawrence Kenswill, Universal Music Group; Allee Willis, songwriter, Broadcast Music Inc.; John Bettis, American Society of Composers; Michael Kirk, American Intellectual Property Law Association); Senate Judiciary Hearing, *supra* note 68, at 10, 16, 20 (statements of Fritz Attaway, Motion Picture Association of America; Carey Sherman, Recording Industry Association of America; Daniel Burton, Novell).

70. *See* House Judiciary Hearing, *supra* note 68, at 79–80 (statement of Jack Valenti, Motion Picture Association of America).

71. *See* House Judiciary Hearing, *supra* note 68, at 65–66, 83, 114, 125, 151, 173, 250, 259 (statement of M.R.C. Greenwood, University of California, Santa Cruz; Roy Neel, United States Telephone Association; Tushar Patel, US WEB; Marc Jacobson, Prodigy Services; Robert Oakley, Georgetown University Law Center; Ronald Dunn, Information Industry Association; Christopher

should bear legal responsibility for his or her actions, not the service providers. Robert Oakley voiced concerns of libraries and educational institutions about the security, privacy, and due process accorded their users.<sup>72</sup> He argued that the libraries should be given reasonable security from liability in order to promote the basic purpose of their institutions.<sup>73</sup>

Once it became clear to the media proponents of anti-circumvention legislation that some action on service provider liability would be necessary for progress to be made,<sup>74</sup> the outlines of a deal began to take shape. The notice-and-takedown provisions were seen as a reasonable compromise because copyright owners could obtain swift action from service providers through sending of notice alone without adjudication or judicial supervision, but it would be the copyright owner's responsibility to monitor the provider's service for infringing content. Representatives from the Business Software Alliance ("BSA") and the Recording Industry Association of America ("RIAA") had shifted their position and testified in favor of safe harbors subject to the notice-and-takedown regime.<sup>75</sup> Although the general idea of safe harbor protection had been accepted, the legislative negotiations were not easy.<sup>76</sup> The House and Senate had adopted separate approaches and separate bills that required the formation of a conference committee shortly before the legislative recess.<sup>77</sup> The committee successfully produced a bill that both houses enacted, and President Clinton signed the DMCA into law on October 28, 1998.<sup>78</sup>

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Byrne, Silicon Graphics; Edward Black, Computer and Communications Industry Association); Senate Judiciary Hearing, *supra* note 68, at 26, 29, 34 (statement of George Vradenburg, ISP Copyright Coalition; Roy Neel, United States Telephone Association; Robert Oakley, American Association of Law Libraries).

72. See Senate Judiciary Hearing, *supra* note 68, at 34 (statement of Robert Oakley, American Association of Law Libraries).

73. *Id.*

74. See LITMAN, *supra* note 5, at 135.

75. *The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. On Telecomm., Trade, and Consumer Protection of the H. Comm. on Commerce*, 105th Cong. (1998) ("Business Software Alliance supports those provisions because they will promote cooperation and partnership between copyright owners and providers of online services, thus ensuring that the Internet does not become a haven for thieves.") (statement of Robert W. Holleyman, II, President, Business Software Alliance); *id.* at 45 ("This section represents an historic achievement in establishing new rules of the Internet road, balancing the legitimate needs and concerns of copyright owners with those of Internet service providers.") (statement of Hilary Rosen, President, RIAA).

76. See Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 633-36 (2005).

77. See Statement of Hilary Rosen, *supra* note 75, at 51-52 (describing the process and legislative negotiating positions).

78. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, SUMMARY

Following the enactment of the DMCA, a number of other countries also adopted some form of safe harbor protection for ISPs. The European Union's 1995 "Green Paper" for copyright reform also sought to chart a course for the digital future.<sup>79</sup> The initial proposal for the Directive also called for legislation on this topic and was released the same year as enactment of the DMCA.<sup>80</sup> It declared that online service providers and intermediaries should be able to avoid liability in some way since they often do not have knowledge of infringing material.<sup>81</sup> The proposal noted that legislation would help clarify this branch of law and dissuade forum shopping if the law was allowed to develop solely at the national level within the EU.<sup>82</sup> When the E-Commerce Directive was finally released, it included a provision much like the DMCA that exempted liability for online service providers in certain contexts.<sup>83</sup>

Other trading partners of the United States, most notably Canada and Chile, have adopted so-called "notice-and-notice" regimes under which service providers are obliged to send notices of infringement to their users but are not obliged to disable access to allegedly infringing material.

### C. Summary

Safe harbors from copyright infringement liability for ISPs grew out of Congressional recognition that Internet intermediaries require distinct protection because of the volume of copyrightable information that passes through, or is stored on their systems, and because of the significant costs associated with each work that has been infringed. Section 512 of the Copyright Act provides service providers with certain and broad enough protection from monetary liability to enable them to attract the significant investment capital to operate at Web scale. In exchange, § 512 provides copyright owners with a significant benefit by conditioning a service provider's continued eligibility for safe harbor

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(Dec. 1998).

79. *Green Paper on Copyright and Related Rights in the Information Society*, at 6–7, COM (1995) 382 final (July 19, 1995).

80. See Miquel Peguera, *The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems*, 32 COLUM. J.L. & ARTS 481, 481–82 (2009) ("The 1998 Proposal of Directive suggested safe harbors for the activities of 'mere conduit,' 'caching' and 'hosting,' which were obviously inspired by those set forth in the DMCA. With only a few minor changes, those safe harbors made their way to the final text of the Directive.").

81. *Proposal for a European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market*, at 12–13, COM (1998) 586 final (Nov. 18, 1998).

82. *Id.* at 12.

83. Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ("Directive on Electronic Commerce"), 2000 O.J. (L 178) 14.

protection on expeditious removal of allegedly infringing material based on an ex parte email exchange.<sup>84</sup> Congress balanced these interests in the larger context of the Digital Millennium Copyright Act, which also gave copyright owners three new causes of action against those who circumvent, or traffic in technologies that circumvent, technological measures that effectively control access or use of copyrighted works.

### III. PINTEREST

Many of the legislative proponents of § 512's safe harbors generally invoked its potential to spark innovation. In the words of Representative Robert Goodlatte (R-Va.), "[it] will allow the Internet to flourish."<sup>85</sup> They were right. The decision to limit service provider liability for monetary relief in § 512 is good policy in the United States' context, and it has provided the necessary security to attract investments in developing online platforms, through which users share creative works with each other.

The obvious case for this proposition is YouTube, which has grown significantly since it was acquired by Google, and does not appear to be slowing down anytime soon. But, like the cat videos upon which YouTube's success has been built, YouTube gets plenty of attention and admiration. Pinterest offers a more interesting case study to illustrate this Article's thesis because Pinterest's model is based on more than simply user-generated content. While YouTube's litigation with the Viacom coalition did show that some portion of the videos on YouTube consisted of user-copied content, a very substantial portion of the videos are uploaded by their authors and are thus user generated.

Pinterest is more explicitly aimed at user-copied content, but in the context of pictures and images that users have found in the vast array of content on the World Wide Web and have "pinned" to their electronic bulletin boards for future reference and sharing with others. The finding is often more work than the taking of the photographs. This is not always true, particularly in the context of professional fashion and commercial photography. These photographers are the copyright owners most aggrieved by Pinterest's success. But, this Article argues that the overall economic and social value created by Pinterest derives primarily from creators other than the photographers and from the conversational and inspirational nature of the communications enabled by Pinterest's platform.

This section first briefly outlines the story of Pinterest's develop-

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84. 17 U.S.C. § 512(j)(3).

85. 144 CONG. REC. 18,774 (statement of Rep. Goodlatte).

ment to date from the company's perspective. It then shows how § 512 has provided necessary shelter for this development to take place. Last, it argues for why the economic and social value that Pinterest generates should not be seen as piratical but rather generative.

#### A. *Pinterest's Evolution*

In August 2008, venture capitalist Paul Sciarra from Radius Capital and engineer Ben Silberman from Google left their jobs to cofound Cold Brew Labs.<sup>86</sup> Recognizing that computing was increasingly moving from laptops to mobile devices, they designed their first product as an iPhone application aimed at easily sorting items to facilitate online shopping.<sup>87</sup> They launched the application "Tote" in early 2009, but it failed to gain support.<sup>88</sup> Upon inspecting user behavior, the pair noticed that many Tote users relied on the software to store images of products from the Web.<sup>89</sup> Following their users' lead, Cold Brew reengineered the software to better enable users to clip, store, and share photos found on the Web. Although still believing in the future of mobile applications, they moved their platform to the Web and launched in the fall of 2009.<sup>90</sup>

As a start-up reliant on user growth, Pinterest's first few months showed only modest gains. However, some investors understood the site's potential and provided additional capital.<sup>91</sup> The site's popularity grew steadily throughout 2010, and by May 2011, it received a \$10 million investment at a \$40 million valuation.<sup>92</sup> Subsequent growth in 2011 was phenomenal. The number of Pinterest users grew by 4,377%, and the site quickly became one of the most popular social network sites on the Internet.<sup>93</sup> As speculation about a possible public offering increased in 2013, the company's value was estimated at \$2.5 billion.<sup>94</sup>

This market valuation is based on the fact that 83% of Pinterest

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86. Nicholas Carlson, *Inside Pinterest: An Overnight Success Four Years in the Making*, BUSINESS INSIDER (May 1, 2012, 12:45 PM), <http://www.businessinsider.com/inside-pinterest-an-overnight-success-four-years-in-the-making-2012-4?page=1>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* ("[Pinterest] got a very strong signal that [its] product was resonating. Unsolicited, former IAC M&A boss Shana Fisher called the company and said that she loved the product, and wanted to invest if they would let her.")

92. *Id.*

93. Salvador Rodriguez, *Pinterest Grew More than 4000% in One Year, Report Says*, LOS ANGELES TIMES (June 15, 2012), <http://articles.latimes.com/2012/jun/15/business/la-fi-tt-pinterest-4000-percent-20120615>.

94. J.J. Colao, *Why is Pinterest a \$2.5 Billion Company? An Early Investor Explains . . .*, FORBES (May 8, 2013, 1:22 PM), <http://www.forbes.com/sites/jjcolao/2013/05/08/why-is-pinterest-a-2-5-billion-company-an-early-investor-explains/>.

users are women between the ages of 25 and 44 who possess considerable discretionary income, often make purchasing decisions for their households, and use Pinterest as part of conversations closely connected to these consumption and purchasing decisions.<sup>95</sup> They use Pinterest as a way to collect and share their inspirations in the realms of fashion, cooking, and home décor with friends and the greater Pinterest community. The top five categories on Pinterest are: (1) home, (2) arts and crafts, (3) style and fashion, (4) food, and (5) inspiration and education.<sup>96</sup> Applications such as Postris (formerly RePinly) have tracked the popularity of boards on Pinterest and compiled popular pin boards for users to follow.<sup>97</sup> Some of the Postris top boards are related to fashion, food, crafts, and home décor.<sup>98</sup> Pinterest also invites advertisers to create their own boards. Among the most popular company boards are those created by Lowe's, Better Homes and Gardens, Nordstrom, RealSimple, and Sephora.<sup>99</sup>

Pinterest's rapid growth has challenged those who seek better insight into the Web site's appeal. A study done by the Pew Internet and American Life Project shows that the photos on users' boards serve as social currency and that Pinterest has been a means for women to "curate" or "create" content.<sup>100</sup> One small-scale study reveals why survey participants valued certain pins on Pinterest and what makes a certain pinner or pin more popular.<sup>101</sup> Within this small sample, many of the most popular pins were not necessarily from sites with high traffic outside of the Pinterest community.<sup>102</sup> The study also asked participants whether they used the site to show others content or for personal reasons, with most preferring the latter.<sup>103</sup>

Another study done by BlogHer, one of the top sites targeting women readers, shows that women are more likely to trust Pinterest.<sup>104</sup>

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95. See ENGAUGE, *PINTEREST: A REVIEW OF SOCIAL MEDIA'S NEWEST SWEETHEART* (2012).

96. Lauren Indvik, *What People are Pinning on Pinterest*, MASHABLE (Mar. 12, 2012), <http://mashable.com/2012/03/12/pinterest-most-popular-categories-boards/>.

97. See POSTRIS, <http://postris.com> (last visited Nov. 8, 2013).

98. See *Postris.com*, PINTEREST, <http://pinterest.com/postris/boards/> (last visited November 8, 2013).

99. Lauren Indvik, *The Most Popular Branded Boards on Pinterest*, MASHABLE (May 8, 2013), <http://mashable.com/2013/05/08/pinterest-most-popular-brand-boards/>.

100. Joanna Brenner et al., *Photos and Videos as Social Currency Online*, PEW RESEARCH CENTER (Sep. 13, 2012), [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_OnlineLifeinPictures.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_OnlineLifeinPictures.pdf).

101. See generally CHANGTAO ZHONG ET AL., *SHARING THE LOVES: UNDERSTANDING THE HOW AND WHY OF ONLINE CONTENT CURATION* (Ass'n for the Advancement of Artificial Intelligence 2013), available at <http://pub.geekonabicycle.co.uk/icwsm13.pdf>.

102. *Id.*

103. *Id.*

104. Ki Mae Heussner, *Women Trust Pinterest More than Facebook, Twitter*, ADWEEK (Mar.

Out of a representative sample of women, 81% said they trusted Pinterest or blogs, compared to 73% for Twitter and 67% for Facebook.<sup>105</sup> When asked whether they had been influenced to make a purchase based on a recommendation from these sites, 61% said they did from blogs, 47% from Pinterest, 33% from Facebook, and 31% from Twitter.<sup>106</sup> As the CEO of BlogHer, Lisa Stone, wrote about the survey, “[T]here’s no one a woman trusts more for advice, recommendations and guidance than another woman in her circle.”<sup>107</sup> Similarly, another study determined that women use Pinterest mostly for inspiration from other pinners, and not necessarily for the same concrete purchasing reasons as men.<sup>108</sup>

Pinterest and its investors understand the marketing potential of the conversation taking place on Pinterest. The company has created a market analytics program that tracks what is pinned and how often for any verified site.<sup>109</sup> Some analytics done by Bloomreach compare Pinterest to Facebook and show that Pinterest is based more on a consumer model.<sup>110</sup> Pinterest traffic converted to a sale 22% more than Facebook.<sup>111</sup> And although Facebook users were bounced to other sites 90% of the time compared to Pinterest’s 75%, Pinterest users spend 60% more money than Facebook users on those sites and viewed 81% more pages.<sup>112</sup> Users on Pinterest spend more, buy more, and have more transactions than any other social network.<sup>113</sup>

A leading Pinterest investor described Pinterest as more than “a social network built around products.”<sup>114</sup> Instead, “[i]t’s more a place where people collect or talk about or think about things that they want to do in real life”—which is great for marketing; further, he states, “It’s a special property.”<sup>115</sup>

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14, 2012, 9:00 AM), <http://www.adweek.com/news/technology/survey-women-trust-pinterest-more-facebook-twitter-138930>.

105. *Id.*

106. *Id.*

107. *Id.*

108. Jay Baer, *The 1 Big Difference Between How Men and Women Use Pinterest*, CONVINC & CONVERT, <http://www.convinceandconvert.com/the-social-habit/the-1-big-difference-between-how-men-and-women-use-pinterest/> (last visited November 8, 2013).

109. Tao Tao, *Introducing Pinterest Web Analytics*, PINTEREST BLOG (Mar. 12, 2013), <http://blog.pinterest.com/post/45179268152/introducing-pinterest-web-analytics>.

110. Justin Smith, *Facebook vs. Pinterest: You’re Investing, But What are Your Goals?*, BLOOMREACH BLOG (Apr. 25, 2013), <http://www.bloomreach.com/2013/04/facebook-vs-pinterest-youre-investing-but-what-are-your-goals/>.

111. *Id.*

112. *Id.*

113. Rodriguez, *supra* note 93.

114. Colao, *supra* note 94.

115. *Id.*

### B. *Pinterest and Copyright*

The majority of the content on Pinterest is comprised of photographs “pinned” by a person other than the photographer or copyright owner. This raises questions under copyright law. Photographs are copyrightable original works of authorship,<sup>116</sup> and the copyright owner has the exclusive rights to reproduce the work in copies, publicly distribute copies, publicly display copies, and adapt the work subject to certain limitations and exceptions.<sup>117</sup> As a prima facie matter, the pinner rather than Pinterest directly exercises at least the first three of these rights whenever she copies a photograph from another online location and pins it to her publicly accessible board.<sup>118</sup> Whether the exercise of these rights infringes copyright turns on whether the use is licensed or otherwise falls within the scope of the limitations and exceptions to copyright, in particular, the fair use exception.<sup>119</sup>

In a world without § 512(c)'s safe harbor, Pinterest would face potential secondary liability under one of two branches of contributory infringement or vicarious liability in the event that a pinner has directly infringed another's copyright. Pinterest would have reasonable defenses to some such claims, particularly inducement, but it would certainly face potential litigation under the Ninth Circuit's expansive interpretation of vicarious liability in *A&M Records, Inc. v. Napster, Inc.*<sup>120</sup> The remedies that copyright owners could seek from Pinterest would be significant, including actual damages, disgorgement of profits attributable to infringement,<sup>121</sup> statutory damages ranging from \$750–\$30,000 *per infringing photograph*,<sup>122</sup> and, perhaps most significant, attorneys' fees.<sup>123</sup> One would expect that Pinterest, faced with such potential liabil-

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116. See 17 U.S.C. § 102 (2013).

117. See *id.* § 106.

118. See *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004) (noting that a service provider lacks requisite volition to exercise reproduction or distribution rights when a user initiates automated processes to cause such reproductions and distributions); *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 742–43 (S.D.N.Y. 2012).

119. See 17 U.S.C. § 107.

120. See *A&M Records Inc. v. Napster Inc.*, 239 F.3d 1004, 1024 (9th Cir. 2001); see also Michael W. Carroll, *Disruptive Technology and Common Law Lawmaking: A Brief Analysis of A&M Records, Inc. v. Napster, Inc.*, 9 VILL. SPORTS & ENT. L.J. 5, 23–28 (2002) (analyzing the Ninth Circuit's expansive interpretation of vicarious liability).

121. See *id.* 17 U.S.C. § 504(b) (providing for disgorgement).

122. See *id.* § 504(c); see also generally Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 455 (2010) (explaining how the rule limiting statutory damages awards to one award per work infringed rather than per act of infringement still can lead to supracompensatory awards when multiple works are shared over the Internet).

123. See 17 U.S.C. § 505; see also generally Peter Jaszi, *505 and All That—The Defendant's Dilemma*, 55 LAW & CONTEMP. PROBS., no. 2, 1992, at 107–09 (arguing that the threat of paying

ity, would either abandon its model altogether or would proceed on a hobbled basis with a conservative pre-screening process by which only photographs whose use is clearly licensed or those protected by fair use would be made public.

For these reasons, § 512(c) has played a critical role in enabling Pinterest's founders to focus on encouraging and managing its explosive growth while trying to balance the provision of an attractive user experience with its—and its investors'—desires to profit from the site's popularity. Pinterest readily qualifies as a “service provider” for purposes of § 512(c) because it “provides online services” and is also an “operator of facilities therefor.”<sup>124</sup> Pinterest has adopted and reasonably implemented a policy to terminate repeat infringers,<sup>125</sup> designated an agent to receive notices of infringement,<sup>126</sup> and registered the agent's information with the U.S. Copyright Office.<sup>127</sup> Absent some showing that Pinterest has failed to respond appropriately to a qualifying notice, counter notice, or facts and circumstances from which infringing activity is apparent, Pinterest will not be liable for monetary relief in the event that some boards contain infringing images or other content.

While there are no reported cases concerning claims of copyright infringement against Pinterest or its users (as of August 2013), bloggers have actively discussed the legality and ethics of pinning others' copyrighted photos. In the absence of reliable survey data, this anecdotal evidence provides at least some flavor for the arguments about whether Pinterest harms or helps copyright owners and how.

At the outset, it is important to recognize that professional photographers are members of a creative community who have been significantly affected by changes in technology. As digital cameras and editing software become ever more sophisticated and automated, the distinction between professionals and talented amateurs has narrowed. Moreover, with cameras embedded in the vast majority of mobile phones, nearly everyone with such a device is a photographer with a camera at the ready. These images are saturating the Web, as sites compete to host and process these photographs.<sup>128</sup>

Even for those images that retain commercial value, the effort to

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attorneys' fees distorts defendants' incentive to resist overreaching claims by plaintiffs resulting in distorted development of copyright law through litigation).

124. 17 U.S.C. § 512(k)(1)(B).

125. See *Copyright*, PINTEREST, <http://about.pinterest.com/copyright/> (last visited Nov. 8, 2013).

126. See *id.*

127. See Amended Interim Designation of Agent to Receive Notice of Claimed Infringement, <http://www.copyright.gov/onlinesp/agents/p/p-interest.pdf> (last visited Nov. 8, 2013).

128. See, e.g., David Pogue, *New Flickr: Vast Space for Storage, At No Cost*, N.Y. TIMES, May 29, 2013, at B1 (reporting on Yahoo!'s decision to offer Flickr users one terabyte of free storage).

enforce copyright restrictions on copying and reposting has increased with the wide range of photo-sharing sites. Owners of copyrights in photographs have sued image search engines,<sup>129</sup> photo-sharing sites, and individuals who have posted photographs. Associations of professional photographers expressed anxious concerns about proposed “orphan works” legislation out of fear that many photos would become available for reuse as “orphans” because copyright owner information had not been embedded in, or stripped out of, commercially valuable images.<sup>130</sup> They also have petitioned policymakers for a “small claims”-like tribunal to handle infringement cases against individuals who repost copyrighted photographs because the prospects of receiving attorneys’ fees are insufficient for photographers to enforce their rights against such defendants through normal federal court litigation.<sup>131</sup> The U.S. Copyright Office issued its report recommending the creation of such a tribunal inside the Copyright Office to serve as a voluntary alternative to federal court for cases worth \$30,000 or less.<sup>132</sup>

Against this backdrop, some of the arguments made by photographers against Pinterest resonate with this more general anxiety caused by digital disruption. Getty Images expressed concern over the possibility that Pinterest earns revenue from advertisements arranged near copyrighted images.<sup>133</sup> In an open letter to fellow photographers, Sean Broihier argued that pinners who thought photographers should welcome pinning of their photos because they increased exposure to their work were mistaken.<sup>134</sup> The particular harm he identified is that Pinterest may divert search engine traffic from licensed sites from which photographers derive revenue.<sup>135</sup> Other photographers also characterize pinning as “theft.”<sup>136</sup>

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129. See generally *Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

130. See Victor Perlman, ASMP Legal Counsel, *Orphan Works*, AM. SOC’Y MEDIA PHOTOGRAPHERS, <http://asmp.org/articles/orphan-works.html#.UpDD1qVgzx4> (last visited Nov. 8, 2013).

131. See Joan Blazich, *NPPA Submits Comments Regarding a Copyright Small Claims Court System*, NPPA (Oct. 2, 2012), <http://blogs.nppa.org/advocacy/2012/10/22/nppa-submits-comments-regarding-a-copyright-small-claims-court-system/>.

132. See U.S. COPYRIGHT OFFICE, *COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS* (Sept. 2013), available at <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.

133. Colleen Taylor, *For Pinterest Revenue Will Turn Copyright Into Big Problems*, TECH CRUNCH (Mar. 22, 2012), <http://techcrunch.com/2012/03/22/for-pinterest-revenue-will-turn-copyright-questions-into-problems/>.

134. Sean Broihier, *Pinterest: Enabling Copyright Theft on a Global Scale*, FINE ART AMERICA (Mar. 2012), <http://fineartamerica.com/pinterest-enables-copyright-theft-on-a-global-scale.html>.

135. *Id.*

136. See generally Bob Vishneski, *Pinterest – Copyright Infringement Made Cool?*,

The other two common themes in this discourse, which are also sounded in the litigation against video-sharing sites, like YouTube and Veoh, are (1) the lack of respect for the copyright owner's right to control how and when the copyrighted work is shared with the public<sup>137</sup> and (2) the "making-money-off-of-my-stuff" concern. While some compare Pinterest to Napster,<sup>138</sup> other photographers recognize differences in market effects, recognizing that pinning does provide some benefits to copyright owners and that consumers are not usually licensees, so there is no direct substitution effect.<sup>139</sup>

Some risk-averse pinners have taken these concerns to heart. Kristen Kowalski created a stir when she blogged about the perceived copyright challenges she faced as a lawyer and photographer.<sup>140</sup> She went through Pinterest's terms of use and policy and determined that she should delete her "inspiration" board because it exposed her to too much liability.<sup>141</sup> Her decision received enough media attention to prompt Pinterest CEO Ben Silbermann to contact her and to assure her that Pinterest was working to resolve these issues and respond to her concerns.<sup>142</sup> Pinterest subsequently issued a press release arguing that although it was shielded from liability by the DMCA, it was still working to address copyright owners' concerns.<sup>143</sup> Pinterest argued that its goal is to help people share their interests in what they love and that

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PHOTOGRAPHY LIFE (Apr. 28, 2012), <http://photographylife.com/pinterest-copyright-infringement-made-cool>; Greekgeek, *Is Pinterest a Haven for Copyright Violation?*, HUBPAGES (last updated Sept. 27, 2013), <http://greekgeek.hubpages.com/hub/Is-Pinterest-a-Haven-for-Copyright-Violations>; Sean Locke, *Pinterest.com and Copyright*, SEAN LOCKE PHOTOGRAPHY (Jan. 26, 2012), <http://www.seanlockephoto.com/2012/01/26/pinterest-com-and-copyright/>; Amy Locurto, *Pinterest is Changing How I Blog*, LIVING LOCURTO (Feb. 13, 2012), <http://www.livinglocurto.com/2012/02/pinterest-changing-blog/>; Josh Davis, *Is Pinterest the New Napster?*, LLSOCIAL.COM (Feb. 15, 2012), <http://llsocial.com/2012/02/is-pinterest-the-new-napster/>; Photographer, *Photographers Unite Against Pinterest*, MODEL MAYHEM (Apr. 6, 2012, 7:09 PM), [http://www.modelmayhem.com/po.php?thread\\_id=830396&page=1](http://www.modelmayhem.com/po.php?thread_id=830396&page=1).

137. Vishneski, *supra* note 136, ("[B]ecause people willingly share their photos on the Internet, it doesn't mean they have relinquished their copyright protection or agreed to let everyone else repost their pictures to other sites without their permission.").

138. Davis, *supra* note 136.

139. *Id.*

140. Kirsten Kowalski, *Why I Tearfully Deleted My Pinterest Inspiration Boards*, PHOTO DAILY DOSE (Feb. 29, 2012), <http://joacarlosphoto.blogspot.com/2012/02/guest-blogger-kirsten-kowalski-why-i.html>.

141. *Id.*

142. Kirsten Kowalski, *My Date with Ben Silbermann – Following Up and Drying my Tears – Atlanta Senior Portrait Photographer Talks with Pinterest*, DDK PORTRAITS (Feb. 29, 2012), <http://ddkportraits.com/v2/2012/02/my-date-with-ben-silbermann-following-up-and-drying-my-tears/>.

143. Hayley Tsukayama, *Pinterest Addresses Copyright Concerns*, WASH. POST (March 15, 2012), [http://articles.washingtonpost.com/2012-03-15/business/35447213\\_1\\_ben-silbermann-pinterest-content](http://articles.washingtonpost.com/2012-03-15/business/35447213_1_ben-silbermann-pinterest-content).

“[d]riving traffic to original content sources is fundamental to that goal.”<sup>144</sup>

While this particular argument appears to be a non sequitur, Pinterest has taken some concrete steps to address photographers' concerns. Recognizing that attention is the scarce resource on the Internet, Pinterest explains “Pinning Etiquette” on its site, which asks users to “[e]ncourage artists to create great work by linking back to [the artists'] pages, and leaving polite comments when you see pins that aren't correctly credited.”<sup>145</sup> Pinterest also illustrated in a company blog post how to blog “pins” while also giving credit to the original author by embedding the link.<sup>146</sup>

More consequentially, Pinterest created and respects a “nopin” tag that sites can use to signal that photos from the site should not be pinned, in much the same way that Web site publishers can use the “robots.txt” exclusion header to signal to search engines that their site should not be indexed.<sup>147</sup> The relative ease of using this tag could lead to the argument that pinners are impliedly licensed to pin authorized photos on sites without a “nopin” tag.<sup>148</sup> Flickr has implemented the “nopin” tag on its site while allowing users to opt-out.<sup>149</sup> Some commentators have offered Pinterest advice about additional steps it might take to ameliorate copyright owners' concerns, including expressing a preference for linking out to originating sites rather than copying and pinning photographs.<sup>150</sup>

Taking these steps into account, other photographer bloggers have been more positive about Pinterest. Trey Ratcliff, a well-known photographer, argued that fellow photographers should “stop complaining” about Pinterest.<sup>151</sup> He argued that “[a] pure artist has two motivations:

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144. *See id.* (quoting Pinterest press release).

145. *Pinning Etiquette*, PINTEREST, <http://about.pinterest.com/basics> (last visited Oct. 17, 2013).

146. Stephanie Lim, *Bloggging Pins (with credit)*, PINTEREST BLOG (June 22, 2010), <http://blog.pinterest.com/post/31465412355/bloggging-pins-with-credit>.

147. Jeff Neuburger, *Will the Pinterest “Nopin” Tag Put Online Image Owners on the Defensive on Implied Copyright Licenses? Should We Look to Robots.txt as Precedent?*, E-COMMERCE L. REP., Mar. 2012, at 6.

148. *Cf. Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006) (holding that attorney-author's knowing choice to forgo use of the robots.txt exclusion header impliedly licensed Google to index and make a cache copy of his Web site).

149. T.C. Sottek, *Flickr Implements “Nopin” Code to Block Pinterest From Private Photos*, THE VERGE (Feb. 24, 2012, 9:10 PM), <http://www.theverge.com/2012/2/24/2822800/flickr-blocks-pinterest>.

150. Elizabeth Townsend Gard & Bri Whetstone, *Copyright and Social Media: A Preliminary Case Study of Pinterest*, 31 MISS. C. L. REV. 249, 259 (2012).

151. Trey Ratcliff, *Why Photographers Should Stop Complaining About Copyright and Embrace Pinterest*, STUCK IN CUSTOMS (Feb. 13, 2012), <http://www.stuckincustoms.com/2012/02/13/why-photographers-should-stop-complaining-about-copyright-and-embrace-pinterest/>.

creation for the sake of creation and sharing for the sake of connecting with the world” and that Pinterest helps with both.<sup>152</sup> He uses a Creative Commons Attribution Noncommercial license, which allows people to freely use his photographs non-commercially.<sup>153</sup> He argued that pins that “link back” do increase Web traffic to a photographer’s site and that Pinterest accounts for 15% of his blog traffic.<sup>154</sup> Others argue that Pinterest benefits photographers by providing publicity for them and their work, helping to solicit clients and to showcase the photographers’ portfolios.<sup>155</sup>

### C. *Lessons*

In light of photographers’ mixed reactions to Pinterest, it is somewhat difficult to assess whether § 512 is a but-for cause of its success. But in light of Pinterest’s scale, its potential litigation costs could have been substantial in the absence of safe harbor protection even if only a minority of copyright owners sued.

While the photographers’ colloquy in the blogosphere summarized above captures some of Pinterest’s effects, it is hardly a full accounting of how the site creates value. From this author’s perspective, the primary conversations taking place through pinning, following, liking, and other interactions on Pinterest are among decision-makers who must decide what to wear, what to cook, how to decorate interior and exterior living spaces, and how to enjoy other aesthetic hobbies and pursuits. If one were to draw up a list of all of the creativity around which the Pinterest conversations circle, one would have to credit the subjects of the photographs. These photographs capture a range of creative expressions including fashion design, preparation and presentation of food, interior design—and the list goes on. It is this creativity rather than the creativity of the photographer in selecting the lighting and camera angle that is more important to these conversations. Then, of course, there is the creativity of the board owners in selecting and arranging their images from the billions—if not trillions—of images posted to the Web.

Finally, Pinterest’s value derives from the sense of community that its users enjoy. By providing users with a platform for sharing their solutions to common decisions (e.g., what to cook tonight) and for inspiring and encouraging each other in their shared pursuits and interests by

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152. *Id.*

153. *Id.*

154. *Id.*

155. See Jim Goldstein, *Pinterest – Seeing Beyond Your Own Nose*, JMG GALLERIES (Feb. 22 2012), <http://www.jmg-galleries.com/blog/2012/02/22/pinterest-seeing-beyond-your-own-nose/>; Clay Zeigler, *Pinterest Comes with Pros and Cons for Photographers*, BLACK STAR RISING (Feb. 15, 2012), <http://rising.blackstar.com/pinterest-comes-with-pros-and-cons-for-photographers.html>.

using the 1,000 words that images convey, Pinterest provides critical technical infrastructure to the social Web. And, this technical infrastructure is supported by § 512's legal infrastructure that gives entrepreneurs the freedom to operate and innovate without the specter of crippling secondary liability for copyright infringement.

#### IV. CONCLUSION

The Internet service provider safe harbors embedded in § 512 of the Copyright Act bear many of the hallmarks of an eleventh-hour political compromise. The section is result oriented, identifying certain functions that service providers should be able to perform, subject to conditions, without exposure to liability. The language describing these functions differs from the language defining copyright owners' rights, and the courts have, for the most part, successfully aligned these through judicial interpretation. Notwithstanding these warts, the fundamental policy decision to shield service providers from monetary liability for the infringing acts of their users has been a policy success. Section 512 grants to ISPs sufficient security to innovate as they build platforms on which many Internet users rest the sites of their online lives, such as their Facebook and email accounts, blogs, and video and photo postings to social media sites. This Article focuses on the case of Pinterest as a successful company built upon § 512's foundation because its users' relation to the content they share through the site differs somewhat from other platforms. Users share the images as a means of sharing the underlying creativity in the subjects of the photos. In the absence of § 512, the threat of liability from potential litigation would likely have been crippling, even though the photographers' creativity is not the primary source of the social and economic value provided by Pinterest. Pinterest is also worth studying because the protection provided by § 512 gave Pinterest the space and time needed to shift its service to align with users' interests and preferences. For these reasons, Pinterest serves as a vindication of the agreement made in the waning days of the 105th Congress to give ISPs safe harbor protection from infringements of copyrights committed by their users.

