


Congress Does Not Hide Elephants in Mouse-Holes: How *Vimeo* Paid No Heed to that Caution

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CONGRESS DOES NOT HIDE ELEPHANTS IN
MOUSE-HOLES:

HOW *VIMEO* PAID NO HEED TO THAT
CAUTION

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MITCH BAILEY*

INTRODUCTION

With the passage of the 1976 Copyright Act, sound recordings fixed prior to February 15, 1972 remained under the protection of the state copyright laws where the works were registered.¹ Some incredible culturally significant songs were fixed before February 15, 1972, including songs from “The Beatles, The Supremes, Elvis Presley, Aretha Franklin, Barbara Streisand, and Marvin Gaye.”² To date, state law protects the owner’s rights without interference from federal law, including the Digital Millennium Copyright Act (“DMCA”).³

Given its location, the Second Circuit significantly influenced the development of intellectual property law in the United States, especially copyright law.⁴ Many businesses where intellectual property rights are “key assets, or at the heart of an endeavor,” are concentrated in the greater New York City metropolitan area.⁵ Implementing a reasonable application of the DMCA safe harbor provision is thus important for copyright law, but more specifically,

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1. 17 U.S.C. § 301(c) (2012) (provides that federal copyright law does not annul or limit state-law rights or remedies for sound recordings fixed before February 15, 1972).
2. Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78, 90 (2d Cir. 2016).
3. Digital Millennium Copyright Act, 17 U.S.C. § 512.
4. Kenneth A. Plevan, *The Second Circuit and the Development of Intellectual Property Law: The First 125 Years*, 85 FORDHAM L. REV. 143, 143 (2016).
5. *Id.* (“including television, advertising, publishing, and theater”).

the music industry in New York City and other metropolitans in the United States.

This comment focuses on the Second Circuit's interpretation of the Copyright Act of 1976. Section II offers background for the analysis that follows. Section III focuses on whether "red flag" knowledge must pertain to the particular work being sued over in the suit and whether a service provider gains "red flag" knowledge just by looking at an infringing work. Section IV examines the intra-state split between the New York State Appellate Court, First Department, and the Court of Appeals for the Second Circuit on the issue of whether the DMCA safe harbor is applicable to sound recordings fixed before February 15, 1972. Section V discusses the balance needed between the obligations of Internet service providers and copyright holders. In the conclusion section, I look at favorable positions in answering these issues regarding the DMCA safe harbor provisions. Ultimately, I conclude that this issue warrants attention from the Supreme Court.

I. SETTING THE STAGE: THE DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act was enacted to implement the World Intellectual Property Organization Copyright Treaty and to update domestic copyright for a constantly evolving digital age.⁶ Congress enacted the DMCA safe harbors to stimulate growth in this digital age. With a "greater certainty" concerning the legal exposure for infringements that may occur in the "course of common activities," websites and other online service providers would have more incentive to grow and expand their respective businesses.⁷ Congress recognized that without such certainty, service providers would hesitate to invest in, and develop, new and valuable Internet services.⁸ The DMCA was therefore designed to "clarif[y] the liability faced by service providers who transmit potentially infringing material over their networks," and, in the process, "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of the services on the internet continue to expand."⁹

The DMCA establishes a safe harbor in § 512(c), which gives qualifying Internet service providers protection from liability for copyright infringement when their users upload infringing material on the service provider's site and

6. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 26 (2012).

7. S. REP. NO. 105-190, at 8 (1998) (expressing the view that "without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet").

8. *Id.*

9. *Id.* at 2.

the service provider is unaware of the infringement.¹⁰ A safe harbor is an affirmative defense where defendants have the burden of establishing the statutory requirements.¹¹ In the context of the DMCA's safe harbor provision, a "service provider," is given a rather expansive definition, encompassing "entit[ies] [that offer] the transmission, routing, or providing of connections for [unmodified] digital online communications."¹²

To qualify for immunity from liability under § 512(c), a service provider must satisfy the following criteria: (1) a service provider cannot have actual or constructive ("red flag") knowledge of infringing content, or upon gaining such knowledge it must "expeditiously" act to remove such content; (2) a service provider cannot "receive a financial benefit directly attributable to the infringing activity" where the service provider "has the right and ability to control" the infringing activity; and (3) a service provider must, "upon notification of claimed infringement [respond] expeditiously to remove, or disable access to, the material that is claimed to be infringing."¹³

In *Viacom International v. YouTube, Inc.*,¹⁴ the Second Circuit held that "service providers must have knowledge or awareness of specific and identifiable instances of infringement on their websites" for there to be secondary liability for copyright infringement.¹⁵ The *Viacom* court explained the difference between two key DMCA provisions, "actual" knowledge and "red flag" knowledge.¹⁶ The difference, as the *Viacom* court explained, is not between "specific" and "generalized" knowledge, rather the difference is between a "subjective" and "objective" standard.¹⁷ Stated differently, "actual" knowledge turns on whether a provider "actually" or "subjectively" knew of specific infringement, whereas "red flag" knowledge turns on whether a provider was subjectively aware of facts that would have made the specific infringement 'objectively' obvious to the reasonable person."¹⁸

10. Digital Millennium Copyright Act, 17 U.S.C. § 512(c).

11. *Capitol Records*, 826 F.3d at 95.

12. 17 U.S.C. § 512(k)(1)(A). See e.g., *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1020 (9th Cir. 2013) (holding that a website allowing users to stream video, which features an "automated process" for making files accessible, is a service that falls within § 512(c)); *Viacom*, 676 F.3d at 38-39 (2d Cir. 2012) (holding that "playback of videos on 'watch' pages," transcoding user-uploaded video, and the function of linking "related videos" all fall within the ambit of "service provider" as defined by § 512(k)(1)(B)).

13. 17 U.S.C. § 512(c)(1)(A)-(C).

14. *Viacom*, 676 F.3d at 31.

15. Plevan, *supra* note 4, at 157 (also commenting that the court's decision is likely to have a lasting impact on the policies and practices of copyright owners and service providers alike).

16. *Viacom*, 676 F.3d at 30.

17. *Id.* at 31.

18. *Id.*

In *Capitol Records, LLC v. Vimeo, LLC*¹⁹ “the Second Circuit addressed an important question of first impression regarding the proper interpretation of the safe harbor provision of the DMCA.”²⁰ Founded in 2004, Vimeo operates an online video-sharing service that allows its users to upload and share original, creative videos that others can stream over the Internet, subject to Vimeo’s terms of service.²¹ “Vimeo hosted more than 31 million videos and had 12.3 million registered users in 49 countries, who collectively uploaded approximately 43,000 new videos per day.”²² With only a small group of employees dedicated to “community” support issues (16 employees as of 2012), Vimeo does not review every video that is uploaded per day.²³ The *Vimeo* court addressed, among other issues, whether the statutory safe harbor applies to non-preempted state copyright law.²⁴ The district court relied largely on the Copyright Office Report, ruling that the DMCA safe harbors do not extend to pre-1972 recordings, whereas the court of appeals reached a much different conclusion.²⁵

On appeal, the Second Circuit vacated the district court’s grant of summary judgment to the plaintiff, which denied safe harbor to pre-1972 recordings.²⁶ The court acknowledged the Copyright Office’s general expertise on the Copyright Act, but rejected its statutory interpretation as a “misreading” that was owed no special deference.²⁷ Instead, the court held that “[a] literal and natural reading of the text of § 512(c) leads to the conclusion that its use of the phrase ‘infringement of copyright’ *does* include infringement of state laws of copyright.”²⁸ The Second Circuit found its reading of the plain text of the statute confirmed by the statutory purpose—excluding works protected only by state copyright would defeat the statutory purpose of having a safe harbor.²⁹

19. *Capitol Records*, 826 F.3d at 78.

20. Plevan, *supra* note 4, at 159.

21. On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Brief for Respondents in Opposition, *Capitol Records, LLC v. Vimeo, LLC*, No. 16-771 at 6 (Feb. 16, 2017).

22. *Id.*

23. *Id.*

24. Plevan, *supra* note 4, at 159 (“In [*Vimeo*], the owner of the copyright in several pre-1972 sound recordings brought claims for direct, secondary, and vicarious copyright infringement against Vimeo, an Internet service provider that allows users to post videos to its website”).

25. *Capitol Records*, 826 F.3d at 81 (holding that those recordings are protected by state law, not federal).

26. *Id.* at 99.

27. *Id.* at 88-9.

28. *Id.* (emphasis added).

29. *Id.* at 90 (“Service providers would be compelled either to incur heavy costs of monitoring every posting to be sure it did not contain infringing pre-1972 records, or incurring potentially crushing liabilities under state copyright laws”).

Significantly, the court observed that Congress had omitted to qualify the phrase “infringement of copyright” in section 512(c) with the phrase “under this title” as it had in other provisions across the Copyright Act, and therefore concluded the scope of safe harbor was not limited to federal copyright claims.

II. “RED FLAG” KNOWLEDGE

In *Vimeo*, several record companies and music publishing companies brought a copyright infringement action against the online video-sharing platform Vimeo.³⁰ In this case, the parties filed an interlocutory appeal on certified question—whether “a service provider’s viewing of a user-generated video . . . [gave] rise to ‘red flag’ knowledge of [copyright] infringement.”³¹ Because the “evidence was not shown to relate to any of the videos at issue” in the copyright infringement action against Vimeo, the Second Circuit held that it was “insufficient to justify a finding of red flag knowledge . . . as to those specific videos.”³² The net effect of this reasoning created a new standard in addressing DMCA safe harbor provisions; “red flag” knowledge is applied on a work-by-work basis.

The Ninth Circuit’s decision in *Columbia Pictures Indus., Inc. v. Fung* conflicts with the Second Circuit’s decision in *Vimeo*.³³ The defendant in *Fung* argued that he lacked either type of knowledge because he never received the requisite notice of infringement³⁴ But the Ninth Circuit did not find this argument persuasive. The *Fung* court determined that it did not need to measure the adequacy of the plaintiff’s notification of the claimed copyright infringement.³⁵ Instead, the court adopted a simplified analysis—whether the defendant had red flag knowledge of any infringing activities, while also noting the role of defendant’s inducement.³⁶ Since the defendant had red flag knowledge of a broad range of infringing activities independent of any

30. *Id.* at 81.

31. *Id.* at 87 (stating that the interlocutory appeal also included certified questions of whether safe harbor of DMCA applied to recordings fixed before 1972 and whether evidence showed willful blindness justifying imposition of liability notwithstanding safe harbor provisions).

32. *Id.* at 99 (“[A] showing by plaintiffs of no more than that some employee of Vimeo had some contact with a user-posted video that played all, or nearly all, of a recognizable song is not sufficient to satisfy plaintiffs’ burden of proof that Vimeo forfeited the safe harbor [because the] red flag knowledge with respect to *that* video) (emphasis added).

33. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013).

34. *Id.* at 1043 (“Under § 512(c)(3)(B), notification of infringement that fails to comply with the requirements set forth in § 512(c)(3)(A) ‘shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.’ 17 U.S.C. § 512(c)(3)(B)(i).”).

35. *Id.* at 1043.

36. *See id.* at 1043-46

notification, the Ninth Circuit held the DMCA safe harbor provisions were not applicable.³⁷

The Ninth Circuit's reasoning in *Fung* expanded the safe harbor analysis—setting the bar much lower. In *Fung*, the court determined that the “record [was] replete with instances of [the defendant] actively encouraging infringement.”³⁸ For example, the *Fung* defendant actively urged users to both upload and download particular copyrighted works.³⁹ The defendant assisted users in watching copyrighted films.⁴⁰ And he assisted users in burning copyrighted materials onto DVDs.⁴¹ The Ninth Circuit employed a common-sense-approach; “it would have been objectively obvious to a reasonable person” the material was copyrighted and not licensed to random members of the public.⁴² Additionally, the Ninth Circuit recognized this material as “sufficiently well-known and current,” which lowered the red-flag-knowledge-bar lower and thus expanded the safe harbor analysis.⁴³

The *Fung* holding came out just one week after the same panel of judges reached a similar decision in *UMG Recordings, Inc. v. Shelter Capital Partners*.⁴⁴ The Ninth Circuit reiterated that red flag knowledge requires “specific knowledge of a particular infringing activity.”⁴⁵ Most significantly, however, the Ninth Circuit did not explicitly mention that “specific knowledge” had to be of a particular work-in-the-suit.⁴⁶ *UMG Recordings*' reasoning invited the *Fung* holding one week later—red flag knowledge, which strips a service provider of its entire safe harbor protection, does not have to pertain to a particular work-in-the-suit.⁴⁷

The Ninth Circuit in *Fung* conflicts with the Second Circuit in *Vimeo* over the “current and well-known” standard.⁴⁸ In *Vimeo*, the Second Circuit held “the mere fact that a video contains all or substantially all of a piece of recognizable, or even famous, copyrighted music and was [viewed in its entirety] by some employee of a service provider” was not enough “to sustain

37. *Id.* at 1043.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* (“[W]hile [the defendant’s] inducing actions d[id] not[render him per se ineligible for protection under § 512(c), they [were] relevant to the court’s determination that [the defendant] had ‘red flag’ knowledge of infringement”).

43. *Id.* at 1043.

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

45. *Id.* at 1021.

46. *See id.* at 1021-23.

47. *See Columbia Pictures*, 710 F.3d at 1043.

48. *Capitol Records*, 826 F.3d at 97.

the copyright owner’s burden of showing red flag knowledge.”⁴⁹ Whereas the Ninth Circuit outlined a different standard. In *Fung*, the Ninth Circuit reasoned that infringement “objectively obvious” to a “reasonable person” constitutes red flag knowledge and disqualifies a provider from safe harbor protection.⁵⁰ The Ninth Circuit’s “objectively obvious” standard effectively set the red-flag-knowledge-bar much lower.⁵¹

In conclusion, the Second Circuit’s decision in *Vimeo* limits red flag knowledge to situations where a service provider actually knows that a specific use of an entire copyrighted work is neither fair use nor licensed, yet does not surmise that it is infringing.⁵² The Ninth Circuit decision in *Fung*, however, suggests that Congress expects red flag knowledge to do far more work, incentivizing service providers to act in the face of a red flag, even without notice.⁵³

III. THE INTRA-STATE SPLIT

Under the 1976 Copyright Act, sound recordings fixed prior to February 15, 1972, remained under the protection of the state copyright laws where the works were registered.⁵⁴ Until the Second Circuit’s decision in *Vimeo*, pre-1972 sound recordings had never been covered by federal law.⁵⁵ The *Vimeo* holding directly conflicts with the decision of New York’s Appellate Division in *UMG Recordings, Inc. v. Escape Media Grp, Inc.*⁵⁶ and the view of the Copyright Office.⁵⁷ This means that in cases with proper venue in New York, whether or not a defendant can raise a federal defense to a state law claim turns on whether the claim is adjudicated in state or federal court, and thus relies on a jurisdictional hook unrelated to the federal defense. Despite the implications of this intra-circuit split, the whole question here is very simple—whether Congress imposed the DMCA’s safe harbor policy on state-protected pre-1972 recordings.

The Second Circuit’s decision is not entirely unreasonable. The plain language and structure of the DMCA safe harbor provision supports the Second

49. *Id.*

50. *See Columbia Pictures*, 710 F.3d at 1043.

51. *Id.*

52. *See Capitol Records*, 826 F.3d at 78.

53. *See Columbia Pictures*, 710 F.3d at 1043.

54. 17 U.S.C. § 301(c) (2012).

55. *See Capitol Records*, 826 F.3d at 81-82 (holding that federal safe harbor protections extend to pre-1972 sound recording that in the past were only governed by state copyright laws).

56. *UMG Recordings, Inc. v. Escape Media Grp, Inc.*, 107 A.D.3d 51, 59 (2013) (concluding that the federal DMCA only applied to post-1972 works).

57. *Id.* at 56.

Circuit's interpretation in *Vimeo*.⁵⁸ Congress expressly applied the DMCA to all action for "infringement of copyright," a phrase the Second Circuit read to include actions under both federal and state law, including actions based upon pre-1972 recordings protected only by state law.⁵⁹ The Second Circuit also indicated that nowhere in the Copyright Act is the term "infringement of copyright" defined, only "infringer of copyright" is provided a definition.⁶⁰ Finally, as the Second Circuit noted, Congress did not limit "infringement" in the safe harbor provisions to infringement claims "under this title," as it did elsewhere in the DMCA and Title 17, which supports the Second Circuit's interpretation.⁶¹

The construction of 17 U.S.C. § 512(c) invites the Second Circuit's interpretation.⁶² In *Vimeo*, the Second Circuit resolved this debate by looking at the DMCA's purpose; for Congress to relieve service providers of the onerous affirmative duty to monitor user uploads for songs by U2, Elvis Costello, Radiohead, Coldplay, Adele, Beyoncé, and Norah Jones, all recorded after 1972, only to impose the burden to monitor equally famous songs by "The Beatles, the Supremes, Elvis Presley, Aretha Franklin, Barbra Streisand, and Marvin Gaye" recorded prior to 1972 is illogical.⁶³ The Second Circuit thus looked at the purpose of safe harbor provisions.⁶⁴ Congress enacted the DMCA to protect copyright holders from online piracy while encouraging the robust expansion of online services.⁶⁵ And the safe harbor provisions serve the latter goal by relieving service providers of the crippling liability that would attach if they were strictly liable for every act of copyright infringement by their users.⁶⁶

Although the Second Circuit's holding in *Vimeo* aligns with the purpose of the DMCA, this reasoning relies heavily on several assumptions. To adopt the Second Circuit's reasoning, it must be assumed that Congress used an established phrase to convey a meaning never before ascribed to it and did so without spelling out that new meaning.⁶⁷ Moreover, the Second Circuit assumes that Congress intended that new meaning to override (1) its express command that "rights or remedies under the common law or statutes of any

58. See 17 U.S.C. § 512(c); See *Capitol Records*, 826 F.3d at 89.

59. *Capitol Records*, 826 F.3d at 89.

60. *Id.*

61. *Id.*; 17 U.S.C. §§ 106, 201(a).

62. See 17 U.S.C. § 512(c).

63. See *Capitol Records*, 826 F.3d at 90.

64. *Id.*

65. *Id.*; S. REP. NO. 105-190, at 8 (1998).

66. S. REP. NO. 105-190, at 8.

67. Brief for Petitioner at 5, *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2016) (No. 16-771).

State shall not be annulled or limited by [the Copyright Act]”⁶⁸ and (2) the settled presumptions against implied repeal and state-law preemption.⁶⁹

In sum, the plain language and structure of the DMCA safe harbor provisions leave room for debate, which resulted in the intra-circuit split between the Second Circuit and the New York Appellate Division. Although the Second Circuit’s interpretation is reasonable, its theory rests on several unqualified assumptions.

IV. THE BALANCE SHIFTS WHEN THE BAR IS SET TOO HIGH

In *Fung*, the Ninth Circuit held that an employee of a service provider, by seeing that numerous famous titles are being uploaded, possessed a red flag knowledge that copyright infringement was likely occurring.⁷⁰ The *Fung* holding extends red flag knowledge to *any* infringement not “expeditiously removed” by a service provider, not limited to a work-in-the-suit.⁷¹ The Second Circuit, however, held that *only* red flag knowledge of the work-in-the-suit may be considered in this regard.⁷²

Congress could not have intended to require service provider employees to possess industry or legal expertise to adequately suspect likely infringement.

Adopting the Second Circuit’s logic places too great a burden on the service provider and defeats the purpose of DMCA safe harbor provisions. Suspecting that copyright infringement is occurring does not require specialized knowledge; it requires mere common-sense. The Second Circuit’s opinion conflicts with this common-sense application—a professional employed at a place like Vimeo should be able to make an educated guess that a particular user did not license a song. Applying this common-sense approach aligns with the underlying purpose of the DMCA safe harbor provisions.⁷³ By enacting the DMCA safe harbor provisions, Congress intended to balance the rights of copyright holders with the takedown capabilities of service providers. This balance is disrupted when the bar is set too high.

The conflict between the Second Circuit and the New York Appellate Division creates an intra-state issue. As addressed earlier, this split means that in cases with proper venue in New York, a defendant’s ability to raise a federal defense to a state-law claim is contingent upon whether the claim is adjudicated

68. *Id.* at 2.

69. *Id.* at 27.

70. *See Fung*, 710 F.3d at 1043.

71. *Id.*

72. *See Capitol Records*, 826 F.3d at 97.

73. *See* S. REP. NO. 105-190, at 20 (1998).

in state or federal court. Because New York plays a central role in the music industry, many jurisdictional battles lie ahead unless the conflict is resolved.

When Congress made sound recordings eligible for federal copyright protection, it chose to apply federal law to subsequent creations only, leaving pre-1972 fixed recordings to exclusive state-law governance.⁷⁴ In 1971, Congress wrote, “nothing in [the Copyright Act] shall be applied retroactively or construed as affecting in any way rights with respect to sound recordings fixed before the effective date of this Act.”⁷⁵ Twice thereafter, Congress wrote that “[w]ith 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.”⁷⁶ On October 27, 1998, Congress enacted the DMCA, which imposed “limitations on liability” for “infringement of copyright,” but did not address pre-1972 recordings.⁷⁷ Most importantly, the DMCA enactment did not address the subject of state-law preemption.⁷⁸ In 2009, Congress directed the Copyright Office to “conduct a study on the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction.”⁷⁹

The answer is simple: nothing in any relevant statute betrays any intention by Congress to undo this categorical rule.⁸⁰ Many indications suggest the answer is that simple. First, Congress repeatedly said it would not “annul or limit” state-law “rights or remedies.”⁸¹ In *U.S. Dep’t of Treasury v. Fabe*, the Supreme Court made it clear that Congress can be presumed to know that when it writes provisions like the DMCA safe harbor, the courts will treat them as imposing a “clear-statement rule” of non-preemption.⁸² Second, the term “infringement of copyright” has always been applied to federal copyright. This is consistent with section 501 of the Copyright Act (“Infringement of Copyright”), which refers specifically to federal rights defined by the Act.⁸³ Given section 301(c)’s clear and categorical language, in addition to the presumptions against implied repeal and state-law preemption, it would take a

74. See *Goldstein v. California*, 412 U.S. 546, 551-52 (1973).

75. Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

76. Pub. L. No. 94-553, § 301(c), 90 Stat. 2541, 2572 (1976).

77. Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2877-86 (1998).

78. See Pub. L. No. 105-304, 112 Stat. 2860.

79. H. COMM. ON APPROPRIATIONS, 111TH CONG., OMNIBUS APPROPRIATIONS ACT 2009, H.R. 1105, PUB. L. 111-8, LEG. TEXT AND EXPLANATORY STATEMENT 1769 (Comm. Print 2009).

80. See 17 U.S.C. § 301(c) (Pre-1972 recordings are governed by state-law, whereas subsequent recordings are governed by federal law).

81. 17 U.S.C. § 301(c) (2012).

82. See *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 507 (1993).

83. S. REP. NO. 94-473, at 141 (1975).

clear statement from Congress to yield the Second Circuit interpretation. The not-quite-conclusively-ruled-out construction is not persuasive.

The Second Circuit's "textual" and "structural" argument is also misplaced. Terms like "under this title" cannot be used to distinguish between provisions of the Copyright Act that apply only to federally-protected works and those that apply only to state-protected works.⁸⁴ Adopting this reasoning leads to absurd results. With limited exceptions, the Copyright Act preempts every equivalent state-law right.⁸⁵ Congress thus has no reason to draw federal-state distinctions on a provision-by-provision basis. Indeed, a phrase like "under this title," or "under this section," is merely used to order interactions between provisions of federal law.⁸⁶ The Second Circuit also sidesteps any consideration as to whether "under this title" is interchangeable with "under this subsection," or "under this section," which are common phrases not just to the DMCA, but the entire U.S. Code. The Second Circuit's interpretation gives transformative effect to an unremarkable statutory phrase.

CONCLUSION

The damage done by the Second Circuit's decision is not limited to these harms. This decision upends the law on which the music industry has come to rely. Because pre-1972 sound recordings remain so popular, the music industry routinely invests substantial sums to acquire, promote, and market these recordings.⁸⁷ Pre-1972 recordings are regularly licensed for a variety of uses, such as sampling an inclusion in movies, television, and video games. Before *Vimeo*, the owners and recording artists with rights in these recordings could rely on state-law to protect their interests. Whereas the Second Circuit holding in *Vimeo* turns this status quo on its head. In conclusion, the Second Circuit's interpretation of the DMCA safe harbor provision is unreasonable and merits review by the Supreme Court.

84. 17 U.S.C. §§ 301(a), (c), (d).

85. 17 U.S.C. § 301(a).

86. *See id.*

87. *See Plevan, supra note 4.*

