



Who Should Decide Fair Use on the Internet?

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Capitol Records v. Vimeo

EMI Blackwood Music v. Vimeo

- Vimeo is an OSP that permits users to upload and share videos
- 31.7 million videos, with approximately 43,000 new videos added each day
- No evidence suggested that Vimeo's employees had ever viewed the majority of the 199 Videos-in-Suit
- Court found that there was a triable issue of fact for 18 Videos-in-Suit, regarding whether Vimeo had at least red flag knowledge of infringement because of its employees' actions

Question presented

- Whether 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.
- Are employees of an OSP expected to perform a fair use analysis of videos that contain copyrighted materials?

§ 512(c) Safe Harbor Availability

- Does not have actual knowledge that the material or an activity using the material on the system or network is infringing
- Is not aware of facts or circumstances from which infringing activity is apparent
- Upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to the material

Viacom v. YouTube

- The difference between actual and red flag knowledge is not between specific and generalized knowledge, but instead between a subjective and an objective standard
- Actual knowledge turns on whether the OSP actually knew of specific infringement
- Red flag awareness turns on whether the OSP was subjectively aware of facts that would have made the specific infringement “objectively” obvious to a reasonable person

OSPs' Obligation to Review

- Who should perform the fair use analysis?
- How do you review the decision?
 - What is a reasonable view of fair use?
 - Does it need to be memorialized?
 - Does the person's judgment get different treatment if they are an attorney?
- What if the person designated to review is not notified of a video?

Benefits of OSP Fair Use Analysis

- Faster take-down of some videos
- Increased education of users uploading videos
- Users less worried of accidental infringement because OSP is more trusted to let them know when they've gone too far
- Centralization leads to efficiency for copyright holders who can't police well on their own

Problems of OSP Fair Use Analysis

- Current software can't automate the process
- OSP may err on the side of caution to avoid red flag knowledge
- No recourse for user who think the OSP made the wrong decision
- Does not help advance what court's consider fair use
- May increase use of copyrighted material
- May increase divide of content available in fair use/dealing states from stricter regimes

Agency problems for OSPs

- **Federal Circuit View:** Agent in a position of responsibility gains knowledge of a competitor's patent rights is company knowledge for willful infringement test.
 - What kind of policy needs to be in place?
- **General view:** An agent's knowledge of material facts is usually imputed to the principal, regardless of agent's role.
 - A principal may not defeat imputation of an agent's knowledge on the basis that by withholding information, the agent breached a duty owed to the principal or, in some other respect, did not benefit the principal.
- What if agent views content on site when not "on the clock?"