

OH SNAP! TIME TO FACE TEMPORARY COPYRIGHT INFRINGEMENT

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I. INTRODUCTION

Over the past decade, social media has increasingly become an essential part of Americans' everyday lives. As of 2017, eighty percent of Americans had a profile on at least one social media platform.¹ Not only has social media become extremely popular for typical users, it has also become a massive marketing tool for celebrities, athletes, politicians, and anyone looking to create and maintain a personal brand.² As a growing number of people use social media, the chance that it will be used as a platform for copyright infringement increases.³ Social media platforms, like all service providers⁴ on the Internet, are regulated by the Digital Millennium Copyright Act (the "DMCA"), which addresses copyright infringement on the Internet.⁵ Despite the rapid evolution of social media,

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¹ See *Percentage of U.S. Population with a Social Media Profile from 2008-2017*, STATISTA, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/> [<https://perma.cc/7Y2N-GQAA>].

² See generally Karla Rodriguez, *The Most Influential Celebrities on Social Media*, US WEEKLY (Oct. 20, 2017), <https://www.usmagazine.com/celebrity-news/pictures/the-most-influential-celebrities-on-social-media/> [<https://perma.cc/SW8D-XVLJ>].

³ See *Number of Social Network Users Worldwide from 2010 to 2021 (In Billions)*, STATISTA <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> [<https://perma.cc/8CH8-94HB>].

⁴ The DMCA's definition of service provider encompasses platforms as well. See *Liability Protections for Online Service Providers Under the DMCA and CDA*, BEA & VANDENBERK (Mar. 31, 2011), <https://www.beavandenberk.com/ip/copyright-tm/liability-protections-for-online-service-providers-under-the-dmca-and-cda/> [<https://perma.cc/8U58-9E4Q>].

⁵ See generally Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. §§ 101, 104, 104(a), 108, 112, 114, 117, 701, 512, 1201-05, 1301-32, 701; 28 U.S.C. § 4001 (1998)).

the DMCA has remained unchanged since its 1998 addition to Title 17 of the United States Code.⁶

This paper focuses on the widespread, unlicensed use of copyrighted music in both permanent social media posts (that remain on the platform indefinitely) and temporary social media posts (that expire within twenty-four hours) and asserts that the DMCA is inadequately equipped to address the development and proliferation of temporary social media posts. The DMCA has failed to police copyright infringement across many social media platforms, and in the absence of an update to the DMCA, this infringement will persist.

First, this paper establishes a framework for understanding social media by exploring three popular social media platforms that feature temporary posting: Facebook, Instagram, and Snapchat. Next, it explains the DMCA and how it is intended to regulate copyright infringement on the Internet, how the courts have applied the DMCA, and how service providers have responded to those decisions. The following section addresses how copyright infringement is regulated for both permanent and temporary posts and shows how the DMCA fails to adequately regulate the use of copyrighted music across temporary posts. The next section refutes several arguments that challenge this paper's assertion of widespread copyright infringement. Finally, this paper posits three options for addressing this regulation gap: (1) stick to the status quo and maintain current regulation, (2) increase enforcement of existing regulations and controls, or (3) update copyright law and the DMCA by requiring content providers to actively monitor and seek out copyright infringement.

The DMCA is ill-equipped to handle social media as it has evolved today, and the result has led to widespread copyright infringement across many social media platforms. Although some social media platforms, like Instagram, have attempted to introduce features, which enable users to easily post properly licensed music, these attempts still fall short of addressing the problem.⁷ Either society and copyright holders must accept that these social media uses are an exception to existing copyright law, or the law must change in order to address temporary social media.

II. UNDERSTANDING SOCIAL MEDIA

When it comes to examining social media, it is necessary to understand the different platforms and the types of content that users can post on those platforms before discussing how the DMCA attempts to regulate these entities. There are two types of posts that are relevant to the

⁶ *Id.*

⁷ See discussion *infra* Section IV(d).

discussion of copyright infringement: permanent social posts (permanent posts) and temporary social media posts (temporary posts). Both permanent and temporary posts may remain on the platform or on archival sites even after deletion.⁸ Unless the original poster deletes their own post or the hosting social media platform removes the post for violating its terms and conditions, a permanent post will remain on the platform and can be viewed by either all users or a select group of users based on the original poster's privacy settings.⁹ Alternatively, a temporary post expires either immediately after a designated recipient(s) opens it or after a certain time period, typically twenty-four hours.¹⁰

This paper focuses on Facebook, Instagram, and Snapchat because each popular platform offers the user a temporary posting ability. This paper goes on to examine the lack of regulation of temporary posts on these platforms and argues that the DMCA is ill-equipped to handle this newest form of social media posts.

A. Facebook

Facebook is a free social networking platform, which allows users to create their own individual profiles in order to share text, pictures, and videos and to send messages to other profiles. Facebook users can also follow their favorite brands, companies, restaurants, and other organizations by following the respective entities' official Facebook pages. Facebook also allows users to join groups, create and share events, and use Facebook Marketplace to post classified ads.¹¹ On May 18, 2012, Facebook's IPO was launched as the largest technology-based initial public offering in the history of the United States at that time.¹² As of the third quarter of 2018, Facebook connects over 2.2 billion active users on

⁸ See *Are Social Media Posts Permanent?*, THIRD PARENT.COM (Nov. 9, 2013), <http://blog.thirdparent.com/are-social-media-posts-permanent/> [<https://perma.cc/DX6X-WAFQ>].

⁹ See *Terms of Service, Section 3(2)*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/3TR6-BET5>]; See generally *How Do I Hide or Delete Posts I've Shared From My Page?*, FACEBOOK, <https://www.facebook.com/help/252986458110193> [<https://perma.cc/3P76-QMYG>] (explaining how users can delete posts).

¹⁰ See, e.g., *Stories, Help Center*, INSTAGRAM, <https://help.instagram.com/1660923094227526> [<https://perma.cc/FVW5-9AMC>] [hereinafter *Stories, Instagram Help Center*].

¹¹ See Margaret Rouse, *Definition: Facebook*, TECHTARGET.COM (Aug. 2014), <https://whatis.techtarget.com/definition/Facebook> [<https://perma.cc/WHH6-AKVZ>].

¹² See *If You Had Invested Right After Facebook's IPO (FB, TWTR)*, INVESTOPEDIA (Aug. 14, 2015), <https://www.investopedia.com/articles/markets/081415/if-your-would-have-invested-right-after-facebooks-ipo.asp> [<https://perma.cc/TNF4-9AWJ>].

its platform.¹³ Facebook users can share posts after registering as an individual or as an official page.¹⁴ Depending on a poster's privacy settings, an individual user or page may share a post—whether text, photos, videos, or some combination of the three—either publicly (allowing all Facebook users to view it) or privately (allowing only the Facebook users that the poster has already connected with to view it).¹⁵ These permanent posts can be posted to the user's or page's own timeline, where all the user's or page's posts are listed or onto another user's or page's timeline.¹⁶ Facebook also has a temporary posting function via Facebook Stories.¹⁷ In September 2016, Facebook began testing a temporary story feature on Messenger, its private messaging app, before launching Facebook Stories in the full Facebook app in March 2017.¹⁸ Facebook Stories are short photos or videos shared from a user's or page's account that every other unique user may view up to two times before they automatically disappear after twenty-four hours.¹⁹

B. Instagram

Instagram is an online photo-sharing social network that allows users and entities to edit their photos and videos with unique filters and post them to their personal Instagram pages.²⁰ Instagram first launched on the Apple App Store on October 6, 2010 and gained one million users

¹³ *Number of Monthly Active Facebook Users Worldwide as of 3rd Quarter 2018 (in Millions)*, STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [<https://perma.cc/M2GG-YKS8>].

¹⁴ *See* Juan Ramos, *Facebook Page vs Facebook Profile: Do You Know the Difference?*, HOOTSUITE (June 9, 2014), <https://blog.hootsuite.com/facebook-page-vs-facebook-profile/> [<https://perma.cc/FX9P-GA9P>].

¹⁵ *See* *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/325807937506242/> [<https://perma.cc/UPN2-XHMY>].

¹⁶ *See* Vangie Beal, *Facebook Timeline*, WEBOPEDIA, https://www.webopedia.com/TERM/F/facebook_timeline.html [<https://perma.cc/UY54-MAEM>].

¹⁷ *See* Ash Read, *Facebook Stories: Everything You Need to Know About Facebook's Latest Features*, BUFFER (Mar. 28, 2017), <https://blog.bufferapp.com/facebook-stories> [<https://perma.cc/3YDF-BU5B>].

¹⁸ *See id.*; *see also* Casey Newton, *Facebook Launches Stories to Complete Its All-Out Assault on Snapchat*, VERGE (Mar. 28, 2017), <https://www.theverge.com/2017/3/28/15081398/facebook-stories-snapchat-camera-direct> [<https://perma.cc/GV9F-S3K6>].

¹⁹ *See* Read, *supra* note 17.

²⁰ *See* Margaret Rouse, *Definition: Instagram*, TECHTARGET.COM (May 2017), <https://searchcio.techtarget.com/definition/Instagram> [<https://perma.cc/6ADX-QTYA>].

within three months.²¹ Instagram continued to grow over the next several years, leading to its acquisition by Facebook in April of 2012 with thirty million users at that time.²² As of August 2018, Instagram had over one billion active monthly users, placing it third among social networks with the most active users, behind Facebook and YouTube, but ahead of Twitter by over 500 million users.²³ Although Facebook owns Instagram, the sites operate largely separately with different apps and features, which provides a unique perspective on regulating copyright infringement discussed below.

When Instagram was originally launched, its users could only share permanent posts with pictures and captions edited through the app.²⁴ Instagram users are either unverified individuals or businesses, celebrities, and other popular individuals who are verified through the website.²⁵ As opposed to Facebook, there is not necessarily a distinction between individual users and pages. Businesses' pages look fairly identical to individual users' pages, barring the addition of a blue Verified Badge to Instagram pages that are verified by Instagram (a designation reserved for larger accounts subject to being impersonated).²⁶ In June 2013, Instagram began allowing its users to post fifteen-second videos to their pages as well, before extending the time limit to sixty seconds in March 2016.²⁷

Instagram users can also post temporary posts to their Instagram story,²⁸ just as they can on Facebook.²⁹ In August 2016, Instagram

²¹ See Marty Swant, *This Instagram Timeline Show's the App's Rapid Growth to 600 Million*, ADWEEK (Dec. 15, 2016), <https://www.adweek.com/digital/instagram-gained-100-million-users-6-months-now-has-600-million-accounts-175126/> [<https://perma.cc/P528-CGR4>].

²² See *id.*

²³ See Priit Kallas, *Top 15 Most Popular Social Networking Sites and Apps [August 2018]*, DREAMGROW (Aug. 2, 2018), <https://www.dreamgrow.com/top-15-most-popular-social-networking-sites/> [<https://perma.cc/BQT7-DA63>].

²⁴ See Elise Moreau, *What is Instagram, Anyway?*, LIFEWIRE (Sep. 5, 2018), <https://www.lifewire.com/what-is-instagram-3486316> [<https://perma.cc/3FB9-9A58>].

²⁵ See *Verified Badges*, INSTAGRAM, <https://help.instagram.com/854227311295302> [<https://perma.cc/VA2B-MQ62>] (explaining how verified badges work).

²⁶ See *id.*; see also *Setting Up Your Page*, FACEBOOK, <https://www.facebook.com/business/learn/set-up-facebook-page> [<https://perma.cc/E2TC-GABG>] (explaining how to set up a Facebook page for your business).

²⁷ See Colleen Taylor, *Instagram Launches 15-Second Video Sharing Feature, With 13 Filters and Editing*, TECHCRUNCH (June 20, 2013), <https://techcrunch.com/2013/06/20/facebook-instagram-video> [<https://perma.cc/ZG3L-ZA7U>]; see Casey Newton, *You Can Now Record 60-Second Videos in Instagram*, VERGE (Mar. 29, 2016), <https://www.theverge.com/tech/2016/3/29/11325294/instagram-video-60-seconds> [<https://perma.cc/5T9L-YZ7D>].

²⁸ An Instagram story is a temporary post that a user can share from their account as either a photo or a video. The post remains on that user's account for twenty-four hours or until

launched its temporary posting feature, which allows users to post temporary stories to their pages that last twenty-four hours or until the poster deletes them, whichever comes first.³⁰ Despite the twenty-four-hour time limit on stories, each user's stories are archived in a special section of the Instagram app where they alone can view them again or re-share them.³¹

C. Snapchat

Snapchat is a social networking platform that users can download and use on their phones and other mobile devices, such as tablets.³² Snapchat allows users to send photos or videos to someone that last up to ten seconds before they disappear. The Snapchat app first launched on the Apple App Store in July 2011.³³ By October 2012, the app was processing over twenty million images per day.³⁴ As of August 2018, Snapchat had over 200 million active monthly users.³⁵ Snapchat is often considered the original, true proliferator of temporary social media.

Snapchat began and still stands as a true temporary-post-based social media platform. Snapchat users do not have pages or the ability to share permanent posts.³⁶ Instead, Snapchat began by allowing the transfer of temporary pictures that disappeared from the viewer's perspective after the viewer opened them.³⁷ In December 2012, the app began to allow users to share temporary videos with one or more Snapchat friends.³⁸ In 2013, Snapchat added the My Story feature, allowing users to post

the user deletes it and may be viewed as many times as desired by any other user on Instagram, provided that they have access to that user's account (i.e. If the user who posts has a private account, only those users that it has allowed to follow the account may see the temporary story at all.).

²⁹ See *Stories, Instagram Help Center*, *supra* note 10; Read, *supra* note 17.

³⁰ See Josh Conline, *Instagram Launches "Stories," A Snapchatty Feature for Imperfect Sharing*, TECHCRUNCH (Aug. 2, 2016), <https://techcrunch.com/2016/08/02/instagram-stories> [<https://perma.cc/L5QJ-VJ23>].

³¹ See *Stories, Instagram Help Center*, *supra* note 10.

³² See generally *Try Snapchat*, SNAP INC., <https://www.snapchat.com/download> [<https://perma.cc/5FVZ-APL4>].

³³ See *Snapchat Timeline*, SNAPCHAT MARKETING: BLOG (Dec. 11, 2017), <http://www.snapchatmarketing.co/snapchat-timeline/> [<https://perma.cc/RCM3-YH3C>] [hereinafter *Snapchat Timeline*].

³⁴ See *id.*

³⁵ See Kallas, *supra* note 23.

³⁶ See Christina Newberry, *How to Use Snapchat: A Guide for Beginners*, HOOTSUITE: BLOG (Jan. 9, 2018), <https://blog.hootsuite.com/how-to-use-snapchat-beginners-guide/> [<https://perma.cc/489E-YB6A>].

³⁷ See *id.*

³⁸ See *Snapchat Timeline*, *supra* note 33.

temporary images or videos to their Snapchat stories that could be viewed for up to twenty-four hours by their friends or followers.³⁹ This feature was innovative at the time and arguably was copied by both Facebook and Instagram for their temporary posting functions.⁴⁰

III. REGULATING COPYRIGHT ON SOCIAL MEDIA PLATFORMS

All of the aforementioned platforms, like all social networking platforms, are subject to copyright acts, which include the DMCA.⁴¹ This section describes the DMCA and how it currently regulates all online media. This section also provides a brief overview of judicial application of the DMCA and describes the response by social media platforms to these judicial decisions.

A. The Digital Millennium Copyright Act

In 1996 the World Intellectual Property Organization (WIPO), a special agency of the United Nations, introduced the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).⁴² Both treaties were signed by the United States along with ninety-six other countries.⁴³ The WCT is a special agreement concerning the copyright protection of authors' works on digital forms of media.⁴⁴ The WCT recognized in its preamble the "profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works," and it sought to protect authors using those mediums.⁴⁵ In the same vein, the WPPT sought to protect beneficiaries in the digital environment, including "(i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds)."⁴⁶

³⁹ *See id.*

⁴⁰ *See* Constine, *supra* note 30.

⁴¹ 17 U.S.C. § 512 (2018).

⁴² *See generally* World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 [hereinafter WIPO Copyright Treaty]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

⁴³ *See id.*; *Contracting Parties*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16 [https://perma.cc/M6HH-92CJ].

⁴⁴ *See* Julie S. Sheinblatt, *The WIPO Copyright Treaty*, 13 BERKELEY TECH. L.J. 535, 535-36 (1998).

⁴⁵ *See* WIPO Copyright Treaty, *supra* note 42, Preamble.

⁴⁶ *See Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996)*, WORLD INTELLECTUAL PROP. ORG.,

The WCT, although signed by the United States in 1997, was not binding in the United States until October 28, 1998, when President Bill Clinton signed the DMCA into law.⁴⁷ The DMCA was drafted in response to the growing number of Internet users who transferred protected data, including music, text, and film, in peer-to-peer file-sharing platforms.⁴⁸ Although many of the world's most famous file-sharing platforms would not arrive until a couple years later, the United States sought to address mounting demands and complaints from copyright holders by enacting the DMCA.⁴⁹

The DMCA is an addendum to existing United States copyright law. It is comprised of five titles: the WIPO Copyright and Performances and Phonograms Treaties Implementation Act (codifying the two aforementioned treaties), the Online Copyright Infringement Liability Limitation Act, the Computer Maintenance Competition Assurance Act, Miscellaneous Provisions, and the Vessel Hull Design Protection Act.⁵⁰ The DMCA provides guidance on a variety of copyright concerns including “the circumvention of copyright protection systems, the integrity of copyright management information, and civil remedies and criminal offenses and penalties.”⁵¹

One of the most relevant parts of the DMCA, to this paper, grants a safe-harbor to service providers, which are defined as “entit[ies] offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.”⁵² The law protects service providers from liability for

http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html
[<https://perma.cc/EY3D-EN3F>].

⁴⁷ See Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860. The DMCA was signed into law on October 28, 1998 and contained regulations regarding the use of copyrighted media on the Internet in the new digital age.

⁴⁸ See Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 356–57 (2008).

⁴⁹ See *id.* See generally Richard Nieva, *Ashes to Ashes, Peer to Peer: An Oral History of Napster*, FORTUNE (Sep. 5, 2013), <http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/> [<https://perma.cc/C4X6-V6PK>].

⁵⁰ See generally Amy P. Bunk, *Validity, Construction, and Application of Digital Millennium Copyright Act (Pub. L. No. 105-304, 112 Stat. 2860 (1998))*, 179 A.L.R. FED. 319 (2002).

⁵¹ *Id.*

⁵² 17 U.S.C. § 512(k)(1) (2018); Cf. *Internet Service Provider (ISP)*, TECHOPEDIA, <https://www.techopedia.com/definition/2510/internet-service-provider-isp> [<https://perma.cc/P339-Z4J2>]. Note that a service provider, as defined by the DMCA, is not to be confused with Internet Service Provider, which is an entity providing general access to the Internet.

“injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider”⁵³

The DMCA also prescribes the requirements for service providers to qualify for the safe harbor.⁵⁴ Service providers are required to have a policy that provides for the termination of users who are “repeat infringers,” and the service provider must “accommodate[] and . . . not interfere with standard technical measures.”⁵⁵ Additionally, the DMCA outlines procedures that copyright holders can use to protect their content from infringement.⁵⁶ Under the DMCA, a copyright holder can submit a DMCA Takedown Notice to the designated agent of a service provider, “search engine, host or other type of site- owner/manager” to remove material that is infringing the copyright holder’s rights.⁵⁷ The burden is then on the service provider to review the takedown notice and remove the infringing content.⁵⁸

Many websites offer online forms to easily and electronically submit a takedown notice. If a website infringing a copyright holder’s content has no formal process, then a copyright holder can submit a traditional letter with a set of standard elements to assert a copyright claim.⁵⁹ These elements include their signature, identification of what work is being infringed, contact information, and standard boilerplate language provided by 17 U.S.C. § 512(c)(3).⁶⁰ An additional requirement of the DMCA is that service providers send the contact information of a designated agent who is responsible for handling takedown notices to the Register of Copyrights, so their contact information is available in a central location to copyright holders.⁶¹

⁵³ 17 U.S.C. § 512(a).

⁵⁴ 17 U.S.C. § 512(i).

⁵⁵ 17 U.S.C. § 512(i)(1).

⁵⁶ *Id.*

⁵⁷ 17 U.S.C. § 512(c)(3) (outlining the elements of a takedown notice).

⁵⁸ *See id.*; *see also* *Submit a Copyright Takedown Notice*, YOUTUBE, <https://support.google.com/youtube/answer/2807622?hl=en> [<https://perma.cc/GS57-H2JB>].

⁵⁹ *See generally* 17 U.S.C. § 512.

⁶⁰ Standard statements to be included in a DMCA Takedown Notice include: the copyright holder has “a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law,” and “the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.” 17 U.S.C. § 512(c)(3).

⁶¹ 17 U.S.C. § 512(c)(2) (2010); *see also* *DMCA Designated Agent Directory*, U.S. COPYRIGHT OFFICE, <https://copyright.gov/dmca-directory/> [<https://perma.cc/86YN->

B. Judicial Application of the DMCA

The courts have interpreted the DMCA, and their decisions provide substantial guidance on the DMCA's text. Examining some of the landmark decisions interpreting the DMCA helps explain how the law is applied to service providers and why it fails to protect copyright holders today.⁶²

The beginning of the 21st century is marked by a myriad of judicial decisions regarding application of the DMCA. *Viacom Int'l, Inc. v. YouTube, Inc.* was a landmark Second Circuit case interpreting the DMCA, which pitted Viacom, the copyright holder "home to premier global media brands" such as Nickelodeon, MTV, BET, Comedy Central, and many others,⁶³ against YouTube (and Google, as owner of YouTube), the service provider and "consumer media company . . . that allows people to watch, upload and share personal video clips."⁶⁴ Viacom filed suit in 2007, alleging direct and secondary copyright infringement based on the "public performance, display, and reproduction of their audiovisual works on the YouTube website."⁶⁵ In short, YouTube, as a service provider, allowed users to upload videos containing copyrighted material owned by Viacom to their website.⁶⁶ YouTube's system was not actively seeking out infringing content absent registration by copyright holders in their detection system or upon request of a copyright holder via takedown notice.⁶⁷ Thus, YouTube was home to 79,000 videos that contained unauthorized, copyrighted material owned by Viacom.⁶⁸

The question at issue in the case was whether the safe-harbor provision of the DMCA required YouTube to have actual or constructive knowledge of the infringing activity in order to be held liable for copyright infringement.⁶⁹ The district court granted YouTube's motion for summary judgment under the 17 U.S.C. § 512 safe harbor and dismissed Viacom's

7EV9] (providing the directory for the agents who receive DMCA takedown notifications).

⁶² See discussion *infra* Section IV.

⁶³ *About Viacom*, VIACOM, <http://www.viacom.com/about/pages/default.aspx> [<https://perma.cc/ZG3K-MMLG>].

⁶⁴ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012) (internal citation omitted) [hereinafter *Viacom II*].

⁶⁵ *Viacom II*, 676 F.3d at 28.

⁶⁶ See *id.*

⁶⁷ See *id.*; see also *How Content ID Works*, GOOGLE: YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/EDC4-4FSF>] [hereinafter *How Content ID Works*].

⁶⁸ *Viacom II*, 676 F.3d at 26.

⁶⁹ See *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010) [hereinafter *Viacom I*].

copyright infringement claims, holding that YouTube's lack of awareness of the infringement as a service provider afforded it safe harbor to escape liability.⁷⁰

On appeal, the Second Circuit overturned the decision in part, holding that, although YouTube did not have any affirmative duty to seek out infringing content under the DMCA, the common law doctrine of willful blindness could be applied.⁷¹ The court defined willful blindness as “‘conscious avoidance’ amounting to knowledge where the person ‘was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’”⁷² In April 2013, the district court ruled again in favor of YouTube.⁷³ During the appeal process, a settlement was reached between the two parties which, though perhaps fortunate for the parties, denied copyright scholars and DMCA-governed companies definitive answers regarding these complicated issues.⁷⁴

More recent cases have held that service providers have no affirmative duty to seek out users' copyright infringement.⁷⁵ In June 2016, the Second Circuit held in *Capitol Records, LLC v. Vimeo, LLC* that Vimeo, a video-sharing site similar to YouTube, was entitled to the § 512 safe harbor despite the fact that an employee of the service provider saw a video uploaded by a user that “includes substantially all of a recording of a recognizable copyright music.”⁷⁶ The court further stated that Congress' intent in the DMCA was not to penalize service providers for infringement of which they were unaware and that Congress did not intend to create an affirmative obligation for providers to “scour matter posted on their services to ensure against copyright infringement.”⁷⁷ In other words, service providers are liable only for awareness of complaints from copyright holders of infringing content, rather than awareness based on common knowledge that content posted to their platform is potentially

⁷⁰ See *id.* at 526–27.

⁷¹ *Viacom II*, 676 F.3d at 41–42.

⁷² See *id.* at 35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003)).

⁷³ *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013) [hereinafter *Viacom III*].

⁷⁴ See Jonathan Stempel, *Google, Viacom Settle Landmark YouTube Lawsuit*, REUTERS (Mar. 18, 2014), <https://www.reuters.com/article/us-google-viacom-lawsuit/google-viacom-settle-landmark-youtube-lawsuit-idUSBREA2H11220140318> [<https://perma.cc/EGN2-RGVZ>].

⁷⁵ See generally *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016) [hereinafter *Capitol Records II*]; *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016).

⁷⁶ *Capitol Records II*, 826 F.3d at 96.

⁷⁷ *Id.* at 90.

infringing material.⁷⁸ In October of 2016, the Second Circuit held in *EMI Christian Music Group, Inc. v. MP3tunes, LLC* that in order to defeat the safe harbor granted to service providers, “the burden falls on the copyright owner to demonstrate that the service provider acquired knowledge of the infringement, or of facts and circumstances from which infringing was obvious, and failed to take down the infringing matter”⁷⁹

Although service providers do not have an explicit, affirmative duty to seek out infringing content, the courts have not been as kind to service providers when the platforms fail to implement a functional repeat-infringer policy. In *BMG Rights Mgmt. v. Cox*, the court affirmed that because Cox “knew accounts were being used repeatedly for infringing activity yet failed to terminate those accounts,” it failed to meet the repeat-infringer requirement for safe harbor eligibility.⁸⁰ Instead, the court held service providers must “(i) adopt a policy that provides for the termination of service access for repeat infringers; (ii) inform users of the service policy; and (iii) implement the policy in a reasonable manner” to qualify for safe harbor eligibility under the repeat infringer condition of the DMCA.⁸¹ For example, the service provider in *Capitol Records, Inc. v. MP3tunes, LLC* met this burden by tracking the source and web address of every song transferred onto the service provider’s site from a third party, terminating accounts of repeat infringers, and responding to takedown notices.⁸²

C. Response to Judicial Application

Despite the lack of an affirmative duty to monitor for infringing content, YouTube has developed a system to actively seek out copyright infringement and avoid an assertion of willful blindness.⁸³ In June 2007, YouTube began testing its Content ID service, which allows copyright owners to report the ownership of their content within YouTube’s system

⁷⁸ *Id.*

⁷⁹ *EMI Christian Music Grp., Inc.*, 844 F.3d at 92.

⁸⁰ *BMG Rights Mgmt. (U.S.) LLC v. Cox Commc’n., Inc.*, 881 F.3d 293, 300 (4th Cir. 2018).

⁸¹ *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 511 (S.D.N.Y. 2013) [hereinafter *Capitol Records I*] (citing *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2012)).

⁸² *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 639 (S.D.N.Y. 2011); *cf.* *Capitol Records, Inc. v. MP3tunes, LLC*, No. 07 Civ. 9931 (WHP), 2013 WL 1987225, at *2 (S.D.N.Y. May 14, 2013) (noting that while a repeat infringer policy is a condition of eligibility, the existence of a policy does not obfuscate a service provider from eligibility in the event of willful blindness).

⁸³ *See Viacom II*, 676 F.3d 19, 41-42 (2d Cir. 2012); *How Content ID Works*, *supra* note 67.

for automatic detection.⁸⁴ This allows copyright owners, like Viacom, to assert their ownership of copyrighted material with Content ID prior to its infringement. By placing their content within the system to be detected for infringement, the infringing posts are immediately removed without Viacom having to find the infringing material, file a takedown notice with YouTube, and wait for YouTube to receive the letter and remove the infringing content.⁸⁵

Rather than having the infringing content removed, copyright owners can allow their content to remain on YouTube but share in the ad revenues through monetization of those infringing videos.⁸⁶ In this way, the copyright owner has the option of restricting the use of its content or effectively submitting to the reality of the Internet, where copyrights are inevitably infringed, but copyright owners may receive compensation for that infringement.

Additionally, Content ID can be used during live streaming events. Although, those posting streaming content have complained about the inadvertent removal of non-infringing content in real time, ending their stream in the process.⁸⁷ Nevertheless, the overall benefits of Content ID have proven fruitful for YouTube in protecting itself from liability and for copyright owners looking to protect their content.⁸⁸ Although this system predates the filing of the *Viacom* case, the system is still in use today and is YouTube's major tool for avoiding liability for infringing content posted to its site.⁸⁹

As a result, many other social media platforms have adopted their own forms of auto-detection software to examine the media on their platforms.⁹⁰ While judicial interpretation of the DMCA makes it fairly clear that there is no affirmative duty to seek out infringing content, it

⁸⁴ See Kevin J. Delancey, *YouTube to Test Software to Ease Licensing Fights*, WALL ST. J. (June 12, 2007, 11:59 PM), <https://www.wsj.com/articles/SB118161295626932114> [<https://perma.cc/699M-KTJC>].

⁸⁵ See *How Content ID Works*, *supra* note 67.

⁸⁶ See *id.*

⁸⁷ See Tim Cushing, *YouTube Kills Livestream of Convention When Audience Starts Singing 'Happy Birthday'*, TECHDIRT (Oct. 15, 2013, 10:57 AM), <https://www.techdirt.com/articles/20131014/15323524876/youtube-kills-livestream-convention-when-audience-starts-singing-happy-birthday.shtml> [<https://perma.cc/C2LA-QU33>].

⁸⁸ See Patricia Hernandez, *YouTube's Content ID System Gets One Much-Needed Fix*, KOTAKU (Apr. 28, 2016) <https://kotaku.com/youtubes-content-id-system-gets-one-much-needed-fix-1773643254> [<https://perma.cc/BM9P-D5XB>].

⁸⁹ See generally Allegra Frank, *YouTube Is Changing the Content ID System in an Effort to Help Creators*, POLYGON (Apr. 28, 2016) <https://www.polygon.com/2016/4/28/11531228/youtube-content-id-changes-copyright-dispute-jim-sterling> [<https://perma.cc/QNG5-C7YV>].

⁹⁰ See discussion *infra* Section IV(a).

seems that many social media platforms are preemptively trying to avoid the same legal trouble YouTube faced. This detection software is present on Facebook and Instagram and is discussed in the proceeding section.

IV. THE GAP IN SOCIAL MEDIA REGULATION

This section examines how social media is currently regulated to explain the regulatory gap regarding temporary posts. First, it explains how the DMCA is used to regulate permanent posts across the three social media platforms, Facebook, Instagram, and Snapchat. Next, this section details the DMCA's attempt to regulate temporary posts across the three social media platforms. Finally, this section explains how the DMCA is unable to adequately regulate many social media accounts that are using music in their temporarily posted videos, leading to widespread copyright infringement.

These platforms have heeded YouTube's aforementioned legal troubles, and they adopted stronger tools and protections than required by the explicit language of the DMCA to prevent copyright infringement across their permanent posting features. This section also demonstrates how the regulation of temporary posts achieves only minimal compliance with the DMCA and explains that although these methods are legally sufficient on their face, they are far from effective in preventing copyright infringement.

A. Enforcing Copyright on Permanent Posts

This section examines how social media platforms attempt to regulate copyright infringement within the guidelines of the DMCA and evaluates the effectiveness and shortcomings of current regulation.

Facebook offers an electronic form with a standard procedure for filing a DMCA takedown notice if a copyright holder believes that their work has been infringed by a user's post.⁹¹ The form's questions ask whether there is a copyright claim or trademark claim; then, the site offers users the option to learn more about copyright claims or to describe what type of copyright claim the infringed party has.⁹² There are a number of

⁹¹ See *Reporting Copyright Infringement*, FACEBOOK, <https://www.facebook.com/help/400287850027717/> [https://perma.cc/Z9H8-AG6V]; *Reporting a Violation or Infringement of Your Rights*, FACEBOOK, <https://www.facebook.com/help/contact/634636770043106> [https://perma.cc/R5ZS-RSZZ].

⁹² See *Copyright Report Form*, FACEBOOK, <https://www.facebook.com/help/contact/1758255661104383> [https://perma.cc/4M3D-LSMT] [hereinafter Facebook Copyright Report Form].

messages that appear to ward off users from filing false copyright claims and accusations, and any user looking to submit a copyright claim must click that they have read and acknowledge the messages in order to proceed to each subsequent step of the reporting process.⁹³ If a user is insistent that they have a viable copyright infringement claim, they are given one final warning to discourage inaccurate reporting before they can electronically provide their contact information, the content in question, their proof of ownership of the copyrighted work, and a declaration statement.⁹⁴

Additionally, permanent posts on Facebook are monitored through Facebook's detection system, Rights Manager.⁹⁵ In 2016, Facebook launched Rights Manager, a "set of admin and workflow tools that help publishers and creators manage and protect their video content on Facebook at scale."⁹⁶ Like YouTube's Content ID, Rights Manager can be used to monitor both live streaming content and all permanent videos to detect infringement or block the live stream.⁹⁷

Instagram offers essentially the same Rights Manager tools as Facebook for addressing copyright infringement via permanent posts⁹⁸ and live streaming videos.⁹⁹ Users on Instagram can report any instances of copyright infringement electronically via Instagram's Help Center form.¹⁰⁰ Users are asked to submit the same documentation and information as on Facebook, and Instagram suggests that they include a URL of the infringing material as well.¹⁰¹ The reporting system is identical to

⁹³ See *id.* for an example of one disclaimer from Facebook's form: "In most countries, copyright is a legal right that protects original works of authorship, such as books, music, film and art. Generally, things like names, titles, slogans or short phrases aren't considered to be original enough for copyright protection. Copyright also doesn't generally protect facts or ideas, but it may protect the original words or images that express a fact or idea. For more information on copyright, visit the copyright section of our Help Center."

⁹⁴ See *id.*

⁹⁵ *Rights Manager*, FACEBOOK, <https://rightsmanager.fb.com> [<https://perma.cc/24YQ-TVY8>] [hereinafter Facebook Rights Manager].

⁹⁶ See Lior Ben-Kereth & Analisa Tamayo Keef, *Introducing Rights Manager*, FACEBOOK (Apr. 12, 2016), <https://media.fb.com/2016/04/12/introducing-rights-manager/> [<https://perma.cc/C4UW-QALB>].

⁹⁷ See *id.*; Facebook Copyright Report Form, *supra* note 92; *Protect Your Instagram Content with Rights Manager*, FACEBOOK, <https://www.facebook.com/help/publisher/212679769276903> [<https://perma.cc/R8EY-V4QP>] [hereinafter *Protect Your Instagram Content with Rights Manager*].

⁹⁸ See *Protect Your Instagram Content with Rights Manager*, *supra* note 97.

⁹⁹ See Ben-Kereth & Keef, *supra* note 96.

¹⁰⁰ See Copyright Report Form, INSTAGRAM, <https://help.instagram.com/contact/552695131608132> [<https://perma.cc/X5Z9-437T>].

¹⁰¹ See *id.*

Facebook's and offers the same warnings and messages, which a reporter must click through and acknowledge before submitting a copyright claim.¹⁰² Although Facebook launched Rights Manager in 2016, Instagram did not implement an infringement-detecting system until 2018.¹⁰³ Rights Manager works identically in Instagram as it does on Facebook, allowing content owners to have their material actively detected in permanent Instagram videos and blocks users from using the copyrighted material as their own, without requiring the copyright holder to file a takedown notice for each infringement.¹⁰⁴ However, unlike YouTube, Instagram does not generate revenue on its own and has no monetization feature.¹⁰⁵ While Instagram users can seek outside revenue and funding by posting ads and endorsing products through posts, Instagram itself does not generate revenue for popular users. Rights Manager therefore only functions as a tool for remove infringing content but does not affect the monetization of posts.¹⁰⁶ All permanent Instagram videos and live streams are assigned a unique ID that can be used to assist Instagram in identifying any infringing content and addressing complaints.¹⁰⁷

Snapchat allows people to report copyright infringement by answering a series of questions on their Snapchat Support page.¹⁰⁸ Snapchat requests screenshots or screen captures of the infringing content to evaluate takedown notices.¹⁰⁹ Although Snapchats are supposed to disappear after viewing, they do not actually disappear entirely as Snapchat stores these private pictures or videos past their immediate expiration or twenty-four-hour expiration.¹¹⁰

¹⁰² *See id.*

¹⁰³ *See generally* Steve Weiss, *Instagram Rights Manager to Protect Branded Content*, MUTESIX (Feb. 28, 2018), <https://blog.mutesix.com/instagram-rights-manager-to-protect-branded-content> [<https://perma.cc/NNW4-4J6F>].

¹⁰⁴ *See id.*

¹⁰⁵ *See* Anthony Carbone, *How to Grow and Monetize Your Instagram Account*, TNW (Jan. 12, 2016), <https://thenextweb.com/socialmedia/2016/01/12/how-to-grow-and-monetize-your-instagram-account> [<https://perma.cc/G4C2-HX9K>].

¹⁰⁶ *See id.*

¹⁰⁷ *See* Weiss, *supra* note 103.

¹⁰⁸ *See Reporting Copyright Infringement*, SNAPCHAT: SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/co/report-copyright> [<https://perma.cc/GX6U-8T4H>].

¹⁰⁹ *See id.* Ironically, Snapchat asks users to screenshot the infringing content and describe the content to provide proof of infringement, although when a user screenshots a poster's content, the original poster is notified. In other words, Snapchat is designed to be a place to share pictures and videos that users do not intend to exist on the Internet forever, and thus asking users to screenshot the offending material is antithetical to Snapchat's original purpose.

¹¹⁰ *See* Alyson Shontell, *Actually, Snapchat Doesn't Delete Your Private Pictures and Someone Found a Way to Resurface Them*, BUS. INSIDER (May 9, 2013), <https://www.businessinsider.com/snapchat-doesnt-delete-your-private-pictures-2013-5>

B. Enforcing Copyright on Temporary Posts

The use of temporary posts on social media is already expansive and is rapidly increasing.¹¹¹ In June 2017, Instagram Stories had 250 million active daily users, and by November 2017, that number had risen by twenty percent, to 300 million daily active users.¹¹² As of December 2016, twenty-five percent of Snapchat's 158 million active users posted at least daily to their Snapchat story.¹¹³ Although Facebook Stories has not emerged as a popular platform for temporary social media posts, the lack of popularity is probably due more to users' preferences for Instagram and Snapchat than user apathy toward temporary posting in general.¹¹⁴ However, Facebook has started granting some users the ability to upload their Instagram stories simultaneously to Facebook as stories to encourage the use of Facebook Stories.¹¹⁵

In contrast to Facebook and Instagram, Snapchat does not have any active monitoring system for copyright infringement.¹¹⁶ This may be due to the fact that all media posted to Snapchat by users is essentially temporary and disappears within twenty-four hours for stories, immediately after the recipient opens the snap message, or thirty days after a privately shared snap message is left unopened (excluding corporate postings through the Discover page).¹¹⁷ The short duration of posts does not seem to warrant Snapchat's active monitoring. Thus, the only

[<https://perma.cc/KQ86-MXCD>]; see also Harry Guinness, *Is Snapchat Really Deleting My Snaps?*, HOW-TO GEEK (Jan. 4, 2017), <https://www.howtogeek.com/287101/is-snapchat-really-deleting-my-snaps> [<https://perma.cc/NFR2-AK7R>]. This raises policy questions due to the fact that Snapchat assures users that the snaps that they send disappear after viewing or their twenty-four hour expiration.

¹¹¹ See Josh Constine, *Instagram Stories and WhatsApp Status Hit 300M Users, Nearly 2X Snapchat*, TECHCRUNCH (Nov. 1, 2017), <https://techcrunch.com/2017/11/01/instagram-whatsapp-vs-snapchat> [<https://perma.cc/6T9C-U6QF>].

¹¹² See *id.*

¹¹³ See Snap Inc., Registration Statement (Form S-1) at 61, 90 (Feb. 2, 2017), <https://www.sec.gov/Archives/edgar/data/1564408/000119312517029199/d270216ds1.htm> [<https://perma.cc/PLK4-TB34>].

¹¹⁴ See Chris Welch, *No One Is Using Facebook Stories, So Facebook Is Borrowing Instagram's*, VERGE (Sept. 6, 2017), <https://www.theverge.com/2017/9/6/16264166/facebook-stories-fail-instagram-please-help> [<https://perma.cc/Q77N-HTSS>].

¹¹⁵ See *id.*

¹¹⁶ See *Snap Inc. Terms of Service*, SNAP INC. (Sept. 26, 2017), <https://www.snap.com/en-US/terms> [<https://perma.cc/3P38-DXJU>] (listing features of Snapchat and presenting DMCA Takedown Notices as the only method to challenge copyright infringement on the mobile app).

¹¹⁷ See *Discover*, SNAPCHAT: SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/a/discover> [<https://perma.cc/BBB4-ULJH>]; see also Newberry, *supra* note 36.

procedure for copyright holders to address copyright violations on Snapchat is to find the infringing content and report it by answering a series of questions on their Snapchat Support page.¹¹⁸ Despite the fact that Rights Manager has the technology to detect copyright infringement within permanent posts and livestreams, neither Facebook nor Instagram has, at this time, adapted Rights Manager or any other detection software to monitor the temporary posts on their platforms.¹¹⁹

Because the social media platforms have no affirmative duty to seek out infringing content under the DMCA, often the only moderation for copyright violations within temporary posts on these platforms is initiated by a DMCA takedown notice from another user on the platform.¹²⁰ Rather, the DMCA only requires social media platforms to “expeditiously” address the DMCA takedown notices they receive.¹²¹ However, “expeditiously” is an ambiguous term, and in practice, the takedowns usually take one to three days.¹²² Based on this timeframe, even if a copyright holder immediately detects an infringing post right after it was shared and reported it to the platform, the post would still likely remain on the platform for the full twenty-four hours before removal. To that end, this method of takedown tacitly permits some degree of copyright infringement and may only be effective at taking down or reprimanding repeat infringers, as described below. While the law requires some form of infringement takedown action, influencers and celebrities on these platforms are also powerful endorsers of the platforms,

¹¹⁸ See SNAPCHAT, *Reporting Copyright Infringement*, *supra* note 108.

¹¹⁹ See Ally Mnich, *Protect Your Instagram Content with Rights Manager*, VYDIA (Jan. 9, 2018), <https://vydia.com/protect-your-instagram-content-rights-manager> [https://perma.cc/Y94N-9ZRF] (“[A]s of now, users will not be able to protect their Stories”).

¹²⁰ See discussion *supra* Section III(b).

¹²¹ See 17 U.S.C. § 512(d)(1)(C) (2018).

¹²² See Jonathan Bailey, *How Long Should a DMCA Notice Take*, PLAGIARISM TODAY (Dec. 5, 2008), <https://www.plagiarismtoday.com/2008/12/05/how-long-should-a-dmca-notice-take> [https://perma.cc/4WVV-ASM2]; see also Artistic License, *Instagram Take Down Process*, ARTISTIC LICENSE, <https://www.artistic-license.org/takedowns/instagram-takedown-process/> [https://perma.cc/6NAC-LNP6] (noting that Instagram usually takes 2-5 days to remove infringing content and only within 24 hours if you’re “lucky”); Christina Peters, *Your Images Got Stolen – How to Do a DMCA Takedown Notice*, FOOD PHOTOGRAPH BLOG (July 16, 2018), <https://foodphotographyblog.com/your-images-got-stolen-how-to-do-a-dmca-takedown-notice/> [https://perma.cc/YL6F-YG5H] (stating that “good hosting companies” will respond within 1-3 days). See generally *Snapping the DMCA: Can Creators Protect Themselves on Snapchat?*, COPYRIGHTCHICK (Sept. 1, 2017), <https://copyrightchick.com/2017/09/01/snapping-the-dmca-can-creators-protect-themselves-on-snapchat/> [https://perma.cc/ANC2-98N6] (outlining the difficulties of filing DMCA notices for Snapchats given the DMCA Takedown process and the temporal nature of Snapchats).

which begs the question of how judiciously these platforms will reprimand the users that uphold the value of their platforms.¹²³

Platforms are required to track repeat infringers and remove their accounts. This requires copyright holders to identify and repeatedly file DMCA takedown notices with platforms for content posted by the same accounts, and this requires social media platforms to follow through on their responsibility to terminate these accounts.¹²⁴ For temporary posts, copyright holders must timely identify an infringer and file a copyright claim before a social media platform is required to take action.¹²⁵ While this might be feasible for some of the largest accounts, this temporal element necessitates constant monitoring and action, which is much more challenging than monitoring permanent posts that do not disappear after twenty-four hours.

Interestingly, the platforms are not discouraging this unlicensed use of music by any means either. As opposed to restricting the use of music in Snapchat videos, the Snapchat app does the opposite and even encourages the use of music via several app features.¹²⁶ In 2015, Snapchat launched a function that allows the app to detect a music track playing on the user's device, allowing the user to upload the soundtrack to the background of their own Snapchat video.¹²⁷ In 2016, Snapchat added Shazam, a mobile application that automatically recognizes music and media playing aloud, allowing users to detect music playing anywhere.¹²⁸ While these features do not directly encourage users to include said music in their videos, they certainly emphasize Snapchat's involvement with music and the proliferation of music in Snapchat videos.¹²⁹

¹²³ See Kaya Yurieff, *Snapchat Stock Loses \$1.3 Billion After Kylie Jenner Tweet*, CNN (Feb. 23, 2018), <http://money.cnn.com/2018/02/22/technology/snapchat-update-kylie-jenner/index.html> [<https://perma.cc/L592-MR58>] (noting how Kylie Jenner's negative comments about Snapchat lead to a major decrease in the Snap Inc. stock price).

¹²⁴ See 17 U.S.C. § 512(i)(1).

¹²⁵ See discussion *supra* Section III(b).

¹²⁶ See Brian Sutich, *Snapchat Tips: How to Add Music to Your Snaps*, APP FACTOR (June 27, 2016), <https://theappfactor.com/snapchat-tips-add-music-snaps> [<https://perma.cc/7DKY-KYG4>].

¹²⁷ See Stuart Dredge, *Snapchat Gets More Musical with Update Adding Audio to People's Snaps*, GUARDIAN (Feb. 19, 2015), <https://www.theguardian.com/technology/2015/feb/19/snapchat-gets-more-musical-audio-snaps> [<https://perma.cc/TP9A-CKF8>].

¹²⁸ See *What Is Shazam*, SHAZAM, <https://support.shazam.com/hc/en-us/articles/204438738-What-is-Shazam> [<https://perma.cc/7GW4-ZUWU>]; Natt Garun, *You Can Now Shazam a Song from Within Snapchat*, VERGE (Dec. 13, 2016), <https://www.theverge.com/2016/12/13/13936586/shazam-now-inside-snapchat-update> [<https://perma.cc/EVY3-YQBD>].

¹²⁹ See Garun, *supra* note 128.

C. The Gap in Regulation

While an individual user sharing temporary posts with music in the background with a limited friend list still qualifies as copyright infringement, the major copyright issue does not concern these small accounts. Instead, the issue lies with the social media influencers or users on any or all of the social media platforms who have established credibility in an industry and generate revenue by posting ads on their highly followed accounts.¹³⁰

There are many different types of influencers across various genres of promotion, products, and branding, such as fashion, technology, and makeup influencers.¹³¹ These accounts often have hundreds of thousands of followers, and they generate revenue by running paid promotions or ads or by creating their own ads for different products and brands¹³²—sometimes with unlicensed copyrighted music in the background of their videos.¹³³ While these accounts certainly share permanent posts that are subject to the DMCA and can be adequately addressed, they also often use temporary posts to promote themselves, their own products, or their endorsers, all of which are only subject to the DMCA’s inadequate reach.¹³⁴

¹³⁰ See generally *What is a Social Media Influencer?*, PIXLEE, <https://www.pixlee.com/definitions/definition-social-media-influencer> [<https://perma.cc/KZY8-LA5T>]; Clare O’Connor, *Earning Power: Here’s How Much Top Influencers Can Make on Instagram and YouTube*, FORBES (Apr. 10, 2017), <https://www.forbes.com/sites/clareoconnor/2017/04/10/earning-power-heres-how-much-top-influencers-can-make-on-instagram-and-youtube> [<https://perma.cc/FVJ9-MFTT>].

¹³¹ See generally Clare O’Connor, *Forbes Top Influencers: Meet the 30 Power Players Making a Fortune on Social Media*, FORBES (Apr. 10, 2017), <https://www.forbes.com/sites/clareoconnor/2017/04/10/forbes-top-influencers-meet-the-30-power-players-making-a-fortune-on-social-media/#49085d9613c8> [<https://perma.cc/8W5J-NZBM>].

¹³² See *id.*; Werner Geysler, *Meet the Top 25 Influencers Crushing it on Instagram*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/top-25-instagram-influencers/> [<https://perma.cc/7VWX-9VJ8>] (highlighting the accounts of some of the top social media influencers on Instagram and their specialties/follower counts).

¹³³ See, e.g., Kardashiansnaps, *Kylie Announces The Vacation Collection + Swatches*, YOUTUBE (June 11, 2017), <https://www.youtube.com/watch?v=FIVdBxsMt6w> (last visited Dec. 2, 2018) (playing songs from several artists including “Love Galore” by SZA and “Butterfly Effect” by Travis Scott); Luke Toft, *Social Media Influencers and Infringement Concerns*, FOX ROTHSCHILD (Feb. 28, 2018), <https://advertisinglaw.foxrothschild.com/2018/02/social-media-influencers-infringement-concerns> [<https://perma.cc/8GEL-CUUX>].

¹³⁴ *The Rise of Influencer Marketing on Snapchat*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/the-rise-of-influencer-marketing-on-snapchat/> [<https://perma.cc/5VXR-B9U8>].

The most extreme example of this unauthorized use of copyrighted music occurs on celebrity accounts, which are followed by millions of users.¹³⁵ One example is a celebrity who turned to Snapchat to increase his fame and brand value, becoming a household name through his Snapchat notoriety.¹³⁶ While Snapchat does not share the number of followers its users have, DJ Khaled's Instagram now has almost ten million followers today (up from two million users at the time of his introduction to Snapchat in 2015).¹³⁷ DJ Khaled's Snapchat videos often feature others' music in the background that he has inferably not licensed, while he either sings along to it or simply plays it loud enough such that it is audible and identifiable.¹³⁸ Given his influence, this music can be heard by millions of people. In 2015, at the beginning of his rise to fame, his Snapchat stories were each viewed by over three million people daily,¹³⁹ a staggering number and a perfect example of how quickly music can be disseminated through these snaps. Some people have even created online playlists featuring every song that has been played in any one of DJ Khaled's snaps, further exemplifying how these temporary posts leave more than just a temporary impact.¹⁴⁰

Another major social media influencer is Kylie Jenner, whose rise to fame as a member of the Kardashian family has been accelerated by her social media use.¹⁴¹ Her Snapchat account is one of the most followed accounts on the platform, and her Instagram account has over 117 million

¹³⁵ See Bobby Finger & Lindsey Weber, *2016: The Year Social Media Replaced Celebrity* P.R., VANITY FAIR (Dec. 21, 2016), <https://www.vanityfair.com/style/2016/12/celebrity-social-media-replacing-pr-publicists> [<https://perma.cc/6YJU-LPFT>] (demonstrating the wide reach of celebrity accounts, and their use in celebrity branding and marketing).

¹³⁶ See *DJ Khaled: The Making of a Snapchat Superstar*, BBC NEWS (Nov. 26, 2016), <http://www.bbc.com/news/av/magazine-38111429/dj-khaled-the-making-of-a-snapchat-superstar> [<https://perma.cc/MKQ2-J8XS>].

¹³⁷ See *id.*; *Instagram Statistics Summary for DJ Khaled*, SOCIAL BLADE, <https://socialblade.com/instagram/user/djkhaled> [<https://perma.cc/Y2NE-JJDD>].

¹³⁸ See Shahil, *DJ Khaled Dancing on Snapchat!!!! Pt. 2*, YOUTUBE (June 17, 2017), <https://www.youtube.com/watch?v=3OM8xC1UyIE> [<https://perma.cc/7HMX-GLWB>] (containing a compilation of DJ Khaled's temporary Snapchat stories, compiled by a user who ripped the videos from the Snapchat app using third-party software).

¹³⁹ See Jesse Wojdylo, *How Many Views Does DJ Khaled Get on His Snapchat Stories?*, WOJDYLO SOCIAL MEDIA (Dec. 30, 2015), <http://wojdylosocialmedia.com/views-dj-khaled-snapchat-stories> [<https://perma.cc/NUX6-WB9E>].

¹⁴⁰ See Jimmy Amash, *DJ Khaled's Snapchat Soundtrack*, SPOTIFY, <https://open.spotify.com/user/jimmyamash/playlist/2OPTiZxjVFKLshWCw2OlhJ> [<https://perma.cc/F6ND-59HM>] (featuring a collection of all songs played in the background of DJ Khaled's Snapchat Stories).

¹⁴¹ See generally *Twenty-Five Top Snapchat Influencers*, IZEA (June 7, 2017), <https://izea.com/2017/06/07/top-snapchat-influencers> [<https://perma.cc/MJ7T-SCGP>].

followers.¹⁴² The impact of having millions of followers should not be underestimated. For example, when she tweeted in February 2018, “Sooo does anyone else not open Snapchat anymore? Or is it just me... ugh this is so sad,” Snapchat’s stock plummeted six percent, losing about \$1.3 billion in value.¹⁴³ Both her Snapchat and Instagram accounts post temporary stories featuring unofficial and official ads for her cosmetics company, Kylie Cosmetics, which is slated to become a billion-dollar brand in the near future.¹⁴⁴ While the Kylie Cosmetics brand has its own separate social media accounts, which carefully curate posts and feature no copyrighted music, Kylie’s personal account often advertises the upcoming product releases while playing popular music in the background. When she does this, she is essentially using that music to promote her product without paying or acquiring actual permission to use it.¹⁴⁵

These examples demonstrate social media influencers’ immense power over their own brands, the products they advertise, and, in actuality, the social media platforms themselves.¹⁴⁶ However, social media influencers gain the commercial benefits of using copyrighted music to promote products without paying copyright holders any licensing fees.¹⁴⁷ Additionally, while neither Snapchat nor Instagram support functions allowing users to download these temporary posts, a quick search on YouTube exposes many compilations of these influencers’ “snaps,”

¹⁴² See Kylie Jenner (@kyliejenner), INSTAGRAM, <https://www.instagram.com/kyliejenner/?hl=en> [<https://perma.cc/UT4Y-EW8A>]; Avery Hartmans, *Here Are the 10 Most-Followed Instagram Accounts in 2017*, BUS. INSIDER (Nov. 29, 2017), <https://www.businessinsider.com/instagram-top-10-people-2017-2017-11> [<https://perma.cc/37KQ-NGY3>] (stating that Kylie Jenner has the seventh most followed Instagram account across the platform).

¹⁴³ Yurieff, *supra* note 123.

¹⁴⁴ Marianne Mychaskiw, *Kylie Cosmetics Is Set to Become a \$1 Billion Dollar Brand*, INSTYLE (Aug. 9, 2017), <http://www.instyle.com/beauty/kylie-cosmetics-kylie-jenner-1-billion-dollar-brand> [<https://perma.cc/LSN5-ZFK4>].

¹⁴⁵ See Kylie Cosmetics (@kyliecosmetics), INSTAGRAM, <https://www.instagram.com/kyliecosmetics/?hl=en> [<https://perma.cc/9XFH-P6Y4>]; see also Kylie Snaps, *NEW Kylie Jenner Song Compilation # 7*, YOUTUBE (June 28, 2016), https://www.youtube.com/watch?v=tBo_Frg0Foo [<https://perma.cc/DU7P-2GQL>] (demonstrating Jenner’s use of copyrighted background music in temporary Snapchat videos); Kylie Snaps, *Kylie Jenner REVEALS KOKO COLLECTION on Snapchat*, YOUTUBE (Nov. 5, 2016), https://www.youtube.com/watch?v=fanJy7_fYUA [<https://perma.cc/YY8Z-KTHE>] (further demonstrating Jenner’s use of copyrighted background music).

¹⁴⁶ See Yurieff, *supra* note 123; see also Kimberlee Morrison, *Here’s Why Influencer Marketing Is All the Rage on Social Media Now*, ADWEEK (Feb. 19, 2016), <http://www.adweek.com/digital/influencer-marketing-isnt-what-about-the-fame> [<https://perma.cc/7LAA-9BBT>].

¹⁴⁷ See discussion *supra* Section IV(b).

exemplifying the fact that these posts are far from temporary.¹⁴⁸ To that end, the use of music in temporary social media postings is not minor but, in fact, has a massive reach and an enormous, lasting impact.

D. Instagram's Partial Solution

In May 2018, after the initial drafting of this paper, Instagram adopted a partial solution to the use of licensed music on their Instagram stories. Instagram partnered with Spotify, an online digital music service, allowing users to attach songs to their Instagram stories so that they can legally play the music.¹⁴⁹ Attaching the song to an Instagram story generates a small button on the story directly linking users to the Spotify application to listen to the full song.¹⁵⁰ It also allows the artists of the song to get more streams of their music. The feature will soon be added to Facebook's temporary posts as well.¹⁵¹

While this partnership certainly gives users an option to use licensed music, this partial solution still generates a host of issues. First, the addition of this feature does nothing to remove the ability of users to continue using music in the traditional, infringing way. By using music in the background and not the new Spotify-linking feature, the post will not link to the artist's original work, and thus the benefit to artists who have licensed their music to Spotify is absent. Relatedly, there is a significant library of music that is not on Spotify¹⁵² that could conceivably be infringed by using the traditional method of including music in Instagram stories. Notably, much of this music is from popular artists who have chosen to license their music to a competing service, such as Jay-Z, who has exclusively licensed his albums to Tidal, a competing digital music platform.¹⁵³

Although this feature is helpful for some artists, it is not sufficient for flagging every infringement that occurs. Artists can still report

¹⁴⁸ See, e.g., Savage Dan Productions, *DJ Khaled Snapchat Video Compilation*, YOUTUBE (Dec. 2, 2015), <https://www.youtube.com/watch?v=U3POE3iTD6o>; Kylie Snaps, *NEW Kylie Jenner Song Compilation # 7*, *supra* note 145.

¹⁴⁹ See Colin Stutz, *Spotify & Instagram Partner So Users Can Share What They're Listening to in Stories*, BILLBOARD (May 1, 2018), <https://www.billboard.com/articles/business/8430172/104spotify-instagram-stories-users-share-what-listening-to> [<https://perma.cc/A6V3-B9HQ>].

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Kailla Coomes, *From Aaliyah to Garth Brooks, Here Is the Music You Can't Find on Spotify*, DIG. TRENDS (May 25, 2018), <https://www.digitaltrends.com/music/artists-not-on-spotify> [<https://perma.cc/9AMB-8H8G>].

¹⁵³ *Id.*

infringements that they are aware of through DMCA takedown notices.¹⁵⁴ While this paper describes the shortcomings in this procedure, at the very least DMCA takedown notices offer an avenue to address this infringement that, although inefficient, is not very complex.¹⁵⁵ While the Spotify feature allows Instagram users to legally link to copyrighted music in their personal temporary posts, it does not address the problem that occurs when music is used for a commercial purpose, and the user has not acquired the appropriate commercial license for an advertisement.¹⁵⁶

Although this feature offers a legal avenue for Instagram users to play music in their posts and potentially introduce more people to artists and their music, it is not a complete solution to all types of music copyright infringement on the platform.

V. REFUTING ARGUMENTS AGAINST COPYRIGHT INFRINGEMENT

While this paper argues that the use of unauthorized music on temporary social media posts is clearly infringement, several defenses can be posited to argue the opposite. This section examines some of these arguments and then refutes the idea that these posts are not infringement and that there is not an applicable solution to address these posts.

A. It's Temporary or a One-Time Use So It's Not Infringement

One defense to the charge of infringement is that temporary postings may not be infringement at all. In other words, given the temporal nature of these posts, they do not infringe copyright and are not in violation of the DMCA. However, 17 U.S.C. § 501 states that copyright infringement occurs when “anyone . . . violates any of the exclusive rights of the copyright owner as provided by § 106 through § 122 or of the author as provided in § 106A(a).”¹⁵⁷ The statute alone makes no declaration of how many times infringement must occur but rather indicates that any use of copyrighted material can qualify copyright infringement.¹⁵⁸

Further, 17 U.S.C. § 1101 does not state a minimum for how many times a work must be infringed before a copyright infringement claim can

¹⁵⁴ See discussion *supra* Section IV(b).

¹⁵⁵ *Id.*

¹⁵⁶ See *Commercial vs. Non-Commercial Music*, MUSICBED, <https://www.musicbed.com/knowledge-base/commercial-vs-non-commercial-music/117> [<https://perma.cc/776M-QVWS>].

¹⁵⁷ 17 U.S.C. § 501(a) (2018).

¹⁵⁸ See *id.*

be made.¹⁵⁹ The statute states that an unauthorized act occurs when “[a]nyone who, without the consent of the performer or performers involved—(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation.”¹⁶⁰ In other words, recording a live performance without permission is itself a violation of U.S. Copyright Code, even before any redistribution of that performance occurs.¹⁶¹

Courts use a variety of factors to assess whether copyright infringement occurs, such as fair use and incidental use.¹⁶² While these factors are assessed to make a qualitative judgment on whether infringement has occurred, repeated infringement is not a necessary factor. The temporary nature of the social media posts and their twenty-four-hour expiration should not exculpate these posts from qualifying as copyright infringement.

B. Personal Social Media Accounts Don’t Require Licensing

Alternatively, a second possible defense is that a Snapchat account is a personal account, and the stories shared with music are just for the user’s followers and should somehow escape the requirement of licensing. A synchronization license is required to play music in the background of a video or other created content, such as a television show, movie, commercials, and other videos.¹⁶³ Synchronization licenses are negotiated with composers or artists of the track, which can be found by searching through the BMI Repertoire.¹⁶⁴ These posts are clearly visual media containing music either in the background or in connection with the video’s content, and thus if they do require any license, they require a synchronization license.¹⁶⁵ Although it is possible that these synchronization licenses are being obtained, it is more likely, based on the number of different songs that these accounts use and the fact that some

¹⁵⁹ 17 U.S.C. § 1101(a)(1).

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *See* discussion *infra* Section V(c) (explaining how fair use factors are evaluated to determine if infringement has occurred or whether the de minimis exception applies).

¹⁶³ *See Types of Music Licenses*, MEGA, <http://megalv.com/types-of-licenses> [<https://perma.cc/54E4-S2G7>].

¹⁶⁴ *See BMI Repertoire*, BMI, <http://repertoire.bmi.com/StartPage.aspx> [<https://perma.cc/7AG4-58T6>].

¹⁶⁵ *See Types of Music Licenses*, MEGA, <http://megalv.com/types-of-licenses> [<https://perma.cc/54E4-S2G7>].

are used the day that they come out,¹⁶⁶ that these licenses are not being obtained, and thus all use of this music is technically copyright infringement.

C. It's Fair Use or Incidental Use

One could raise a defense of fair use to argue against the assertion that these temporary stories are all instances of copyright infringement.¹⁶⁷ Under 17 U.S.C.A. § 107, fair use of a copyrighted work stands as a potential defense to infringement.¹⁶⁸ Fair use is defined as the use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹⁶⁹ In other words, a fair use exemption means copyrighted material has been used without permission from the copyright holder, but it is not infringement because it was used in such a way, either quantitatively or qualitatively, that does not warrant being categorized as infringement. Several factors are evaluated to determine whether the fair use exemption applies, including:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (4) and the effect of the use upon the potential market for or value of the copyrighted work.¹⁷⁰

All of these factors may be weighed against each other, but the fourth factor may be dispositive.¹⁷¹

For example, the use of a song in the background to complement the advertisement of a cosmetic product in a Snapchat story would likely fall right under 17 U.S.C.A. § 107(1) as having a commercial nature.¹⁷²

¹⁶⁶ See Savage Dan Productions, *supra* note 148; Kylie Snaps, *NEW Kylie Jenner Song Compilation # 7*, *supra* note 145 (showing an example of where Kylie Jenner has posted to her Snapchat a series of songs that she has presumably not licensed behind videos).

¹⁶⁷ See generally 17 U.S.C. § 107 (2018).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., *Fitzgerald v. CBS Broadcasting, Inc.*, 491 F. Supp. 177 (D. Mass. 2007) (outlining the general framework for evaluating copyright claims).

¹⁷² See 17 U.S.C. § 107(1).

On the other hand, an argument could be made regarding the amount and substantiality of the portion of the copyrighted work used based on the third factor under § 107.¹⁷³ Courts have found that copyright infringement occurs when the amount copied is more than *de minimis*, focusing on “whether the admitted copying occurred to an extent sufficient to constitute actionable copying.”¹⁷⁴ Further, courts focus on both quantitative and qualitative components.¹⁷⁵ “Qualitative” means the abstraction to which the works are compared, and “quantitative” means how much of the work appears.¹⁷⁶

For example, in many of the temporary stories posted by Kylie Jenner advertising her makeup, the qualitative prong is clearly met because users are able to discern the audio as she uses it in the background for the purpose of providing music.¹⁷⁷ The quantitative prong is also met because the audio can also be played in a series of connected temporary stories for several minutes, and the sound is not distorted or hidden by any means.¹⁷⁸ In *Ringgold*, the use of a poster in the background of a full HBO show for intermittent spurts of 1.86 to 4.16 seconds, totaling 26.75 seconds, met the quantitative prong of copyright infringement.¹⁷⁹ Thus, a court would likely find that the use of music prominently played in the background of a series of commercial snaps for its entirety would meet the quantitative prong.

Additionally, in *Byrne v. British Broadcasting Corp.*, the Southern District of New York held that if the purpose of a post were to “entertain, rather than inform,” even if included under the title of “news broadcast,” fair use would not be an applicable defense.¹⁸⁰ Applying *Byrne*, it seems reasonable to conclude that a social media influencer playing music while lip syncing¹⁸¹ would stand as an entertainment purpose, and courts would not likely accept a claim that the demonstration of a product with music in the background would qualify as an informational or educational purpose.

However, there are instances where it is difficult to discern whether a social media influencer is playing music for an entertainment or a commercial purpose under the ambiguous common law fair use

¹⁷³ See generally *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

¹⁷⁴ *Id.* at 75.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See, e.g., *KardashianSnaps*, *supra* note 133.

¹⁷⁸ See *id.* (demonstrating how the songs play longer than 10 seconds as multiple Snapchats are strung together).

¹⁷⁹ *Ringgold*, 126 F.3d at 76–77.

¹⁸⁰ *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001).

¹⁸¹ See Andy Boxall, *Now You Can Give Your Video Snapchats a Soundtrack*, DIG. TRENDS (Feb. 19, 2015), <https://www.digitaltrends.com/mobile/snapchat-music-recording-video-news> [<https://perma.cc/S7LZ-MAJC>].

doctrine.¹⁸² For example, while the use of a copyrighted piece of music in an advertisement would very likely be commercial in nature, the distinction becomes less clear when a social media influencer is always essentially advertising themselves. It would be easy for the courts to view advertisements as they traditionally have, only considering posts that directly advertise a product and use copyrighted material as non-fair use.¹⁸³ On the other hand, it could be argued that all posts and media on a social media influencer's account contribute to their brand and commercial value,¹⁸⁴ and thus, all posts fall outside the fair use argument. While fair use does not likely ameliorate the responsibility of these social media users who are intentionally playing music in the background of their videos to enhance their commercially-purposed content, the distinction between which posts are commercial and which are not is still unpredictable and could be analyzed very narrowly or broadly.

Additionally, some members in the social media community are pushing to expand the definition of what qualifies as a transformative use of a work, which would qualify more social media posts under the fair use exception.¹⁸⁵ In other words, some argue that videos or posts using music for lip-syncing or as background to some other short temporary video should qualify as a transformative use of the work rather than direct copying and thus escape liability for infringement.¹⁸⁶ While the merits of these arguments are not evaluated here, they further the assertion that many of the posts on these social media accounts do not qualify as fair use and would require legal adaption to qualify for the fair use exception.

¹⁸² See Manal Z. Khalil, *The Applicability of the Fair Use Defense to Commercial Advertising: Eliminating Unfounded Limitations*, 61 FORDHAM L. REV. 661, 662–63 (1992) (highlighting the unpredictability in the fair use doctrine and explaining how it was difficult even before the advent of social media to discern whether a copyrighted piece was being used for commercial purposes).

¹⁸³ Brian Farkas, *The 'Fair Use' Rule: When Use of Copyrighted Material Is Acceptable*, NOLO, <https://www.nolo.com/legal-encyclopedia/fair-use-rule-copyright-material-30100.html> [<https://perma.cc/VS4B-G2R2>]; see, e.g., *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 715 (S.D.N.Y. 1978) (holding that the use of an artist's work for a commercial advertisement for a film was not fair use).

¹⁸⁴ See generally Kaley Hart, *How to Get Sponsored on Instagram: A Complete Guide to Getting Your First Paid Post and Quitting Your Day Job*, JUMPER MEDIA (Sep. 28, 2017), <https://jumpermedia.co/how-to-get-sponsored-on-instagram> [<https://perma.cc/9SAY-4ZMM>].

¹⁸⁵ See Laura Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1045 (2017); cf. Maya Fe Holzauer, *Copyright and Social Media: What Does it Meme?*, NE. U. L. REV. EXTRA LEGAL (May 13, 2018), <http://nulawreview.org/extralegalrecent/copyright-and-social-media-what-does-it-meme> [<https://perma.cc/A7H2-5C5E>].

¹⁸⁶ Cf. Holzauer, *supra* note 185.

Finally, one could argue that the use of music in these posts is just incidental use.¹⁸⁷ Incidental use occurs when copyrighted material partially appears in the background of a broadcast or recording—essentially it occurs when copyrighted material accidentally or without purpose appears in the middle of a longer recording.¹⁸⁸ In *Italian Book Corp.*, the court found that because the news broadcast was filming a festival and did not know that they would record the copyrighted music playing, inclusion of the copyrighted music was incidental and impossible to avoid.¹⁸⁹ In contrast, the copyrighted work used in part of the set design for the television show in *Ringgold* did not qualify as incidental use due to the fact that the defendants purposely placed the copyrighted poster without permission in the set.¹⁹⁰ Even though the poster was not a focal point of the scene, it still did not qualify for an incidental use exception because of its purposeful placement.¹⁹¹ Therefore instances in which music is simply audible in the background of a temporary post on social media may be incidental use. Conversely, when the videos use music to highlight their advertising or demonstration of a product or when the subject of the video is lip syncing to the music,¹⁹² then this is more clearly intentional use.

D. It Is Unfeasible to Regulate Temporary Posts

Finally, one might assert that there are simply not any solutions to deal with the rapid infringement via temporary posts. However, this argument is faulty based on the current practice of synchronization licensing in the United States, which is fairly robust and widely accepted.¹⁹³ When an individual or entity wants to use the music of any artist or artists, that individual can acquire a synchronization license from the appropriate composer by searching one of the licensing databases such as the BMI Repertoire.¹⁹⁴ While obtaining synchronization licenses for every small temporary post would likely be undesirable for both music

¹⁸⁷ See 17 U.S.C. § 114(j)(2) (2018).

¹⁸⁸ See *id.* (defining incidental use).

¹⁸⁹ *Italian Book Corp. v. ABC*, 458 F. Supp. 65, 68 (S.D.N.Y. 1978).

¹⁹⁰ See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997).

¹⁹¹ See *id.*

¹⁹² See, e.g., *KardashianSnaps*, *supra* note 133.

¹⁹³ See *BMI Repertoire*, *supra* note 164. BMI Repertoire is a service on which those looking to play or music can obtain one single license depending on their intended use, and pay a single fee to use all the music within BMI's database, avoiding legal claims against them for unauthorized use.

¹⁹⁴ See *Licensing FAQ*, BMI, <https://www.bmi.com/licensing> [<https://perma.cc/DXU7-2L99>].

users and the copyright holders, some other type of licensing system could be used to address this use. Thus, the solution is not to just tacitly allow this infringement to occur.

Similarly, one might assert that there is not a technical solution to feasibly address these posts given their quantity and the fact that they are temporary. However, the technology already exists to address copyright infringement in real time during live streams on Facebook and Instagram. Companies like Facebook could invest resources into adapting their live stream copyright detection software to detect copyright infringement in temporary posts within the twenty-four-hour time frame.¹⁹⁵ For some reason social media platforms have not yet publicly introduced a means of applying their detection systems to temporary posts. Thus, these users have escaped liability for their infringing videos featuring copyrighted music, barring instances where a hypothetical copyright holder happens to be alerted to a Snapchat video using their music and files the necessary DMCA takedown notice.¹⁹⁶

It is possible that there is an exorbitant cost to monitor all of these temporary stories as opposed to just the permanent posts; however, the consequence is the tacit acceptance of rapid copyright infringement.¹⁹⁷ The technology could be further developed, but these platforms have yet to apply the technology due to dubious technological abilities or some other unascertained reason.

VI. POTENTIAL SOLUTIONS TO THE GAP

This section examines the possible solutions for the aforementioned gap in regulation.¹⁹⁸ Three possible options can be adopted: ignoring the problem and sticking to the status quo of regulation, forcing users to work within existing controls and technologies, or updating the DMCA to address the evolution of social media. Each solution is evaluated in order to determine the viable options to copyright holders and social media platforms alike.

¹⁹⁵ See Ben-Kereth & Keef, *supra* note 96; Mike Masnick, *Facebook Launches Its Own Version of ContentID, Which Will Soon Be Abused to Take Down Content*, TECHDIRT (Apr. 13, 2016), <https://www.techdirt.com/articles/20160413/09154834169/facebook-launches-own-version-contentid-which-will-soon-be-abused-to-take-down-content.shtml> [https://perma.cc/BDX6-E25T].

¹⁹⁶ See discussion *supra* Section III(b) (demonstrating how there is no affirmative duty to seek out the content, thus leading to the mentioned result).

¹⁹⁷ See discussion *supra* Section III(b).

¹⁹⁸ See discussion *supra* Section V.

A. Solution One: Status Quo

The first solution is to stick with the status quo and ignore the temporary posts as potential copyright infringement. While these posts might legally be copyright infringement, it is possible that copyright holders are not interested in removing the infringing content. For example, LeBron James, arguably the best professional basketball player in the world, has forty-four million followers.¹⁹⁹ LeBron James frequently posts videos of himself lip syncing to newly released rap and hip-hop music, often helping up-and-coming artists gain massive exposure or highlighting new music by established artists.²⁰⁰ An artist featured on LeBron James' Instagram would more than likely feel elated and would welcome the exposure, as would their record label or other possible copyright holders of the artist's music.²⁰¹ Accordingly, the copyright holder would likely not be interested in filing a DMCA takedown notice to remove the content.

Ideally, all copyright holders would be happy that their music was being played on any influencer's temporary posts and would welcome the exposure. However, more likely, many copyright holders are not aware of the infringement. Social media influencers are immensely powerful, having been described as the future of marketing²⁰² and ambassadors for brands.²⁰³ One of the paramount tips for being a social media influencer is consistent content, which often includes advertisements and posts through temporary posting.²⁰⁴ The current system requires copyright holders to

¹⁹⁹ LeBron James (@kingjames), INSTAGRAM, <https://www.instagram.com/kingjames/?hl=en> [https://perma.cc/L93R-W5E4].

²⁰⁰ Elias Leight, *How LeBron James Became Hip-Hop's Most Important Fan*, GENIUS (Nov. 30, 2017), <https://genius.com/a/how-lebron-james-became-hip-hop-s-most-important-fan> [https://perma.cc/4KSR-FDXF]; see, e.g., Thomas Clark, *LeBron James Jamming to Tee Grizzley- First Day Out*, YOUTUBE (June 15, 2017), <https://www.youtube.com/watch?v=EG8GtYFVjzI> [https://perma.cc/Q9GF-KJ6L] (reproducing one of LeBron James's Instagram posts, which featured a song that became widely searched soon after his posting).

²⁰¹ See Leight, *supra* note 200 (noting how one artist, Kendrick Lamar, sent music to LeBron James for him to debut on his Instagram account).

²⁰² See Jelle Fastenau, *Under the Influence: The Power of Social Media*, MEDIUM (Mar. 6, 2018), <https://medium.com/crobox/under-the-influence-the-power-of-social-media-influencers-5192571083c3> [https://perma.cc/43V8-8ND2].

²⁰³ See also Evan Varsamis, *Are Social Media Influencers the Next Generation Brand Ambassadors?*, FORBES (June 13, 2018), <https://www.forbes.com/sites/theyec/2018/06/13/are-social-media-influencers-the-next-generation-brand-ambassadors/#28c65d48473d> [https://perma.cc/QR5F-86VP].

²⁰⁴ See Alexis Short, *5 Tips on Becoming a Social Media Influencer*, eZANGA (July 11, 2018), <https://blog.ezanga.com/blog/5-tips-on-becoming-a-social-media-influencer> [https://perma.cc/ABT6-NBXX] (describing the importance of consistent posting); see, e.g., Huda Kattan (@hudabeauty), INSTAGRAM,

become aware of the infringing content either by discovering it themselves or by notification from another user and then to file a timely DMCA takedown notice.²⁰⁵ Even if a timely DMCA takedown notice is filed, more often than not, the infringing content would not be removed before its twenty-four-hour expiration, and thus copyright holders would likely have to rely on the poster being a repeat infringer in order to inflict any meaningful repercussion under § 512(i)(1). Thus, many instances of infringement are likely never discovered by copyright holders, and the current requirement—or lack thereof—of social media platforms to regulate these temporary posts is not sufficient to prevent this infringement.

Additionally, there is also the possibility that the social media platforms are not interested in, or are fearful of, restricting their biggest influencers. As discussed, some of the most major influencers on these platforms can have an enormous effect on the platform's stock price and the health of their companies.²⁰⁶ While the Kylie Jenner example is fairly extreme, if social media platforms were to begin vigorously policing their influencers, without regulation requiring all platforms to regulate content the same way, platforms could face backlash and accordingly sacrifice their own stability.²⁰⁷

Collectively then, it seems that, although copyright infringement is occurring, the burden placed on content providers does not require them to address copyright infringement in an adequate time frame when it comes to temporary social media.²⁰⁸ Absent judicial action or the drafting of new legislation, copyright infringement will persist under this system, and content providers will likely not be held accountable. While maintaining the status quo is the easiest of options for service providers, it fails to address many concerns, and on the whole, it upholds a system that is fraught with copyright infringement of varying degrees and places a large

<https://www.instagram.com/hudabeauty/?hl=en> [<https://perma.cc/ABT6-NBXX>]. Huda Kattan is an influencer with over 28 million followers, who posted over 25 temporary stories in a twenty-four-hour period on October 28-29, 2018.

²⁰⁵ See discussion *supra* Section III(b).

²⁰⁶ See Yurieff, *supra* note 123.

²⁰⁷ Vine provides a recent example of this phenomenon. Vine was a very popular social media app several years ago until, among other issues, the top influencers on the app moved to YouTube after Vine failed to compensate them for their videos. While this compensation is a separate issue from infringement, it highlights an example where influencers collectively shunned an app for a decision it made, and lead to its eventual demise. See Yuyu Chen, *Swinging from Vine: More than Half of Top Vine Influencers Have Left the Platform*, DIGIDAY (May 17, 2016), <https://digiday.com/media/swinging-vine-half-top-influencers-left-platform> [<https://perma.cc/YN42-UCNH>].

²⁰⁸ See discussion *supra* Section IV(b).

burden on copyright holders to monitor public accounts as much as they possibly can.

B. Solution Two: Enhancing Existing Controls

An alternate solution would be to use the existing controls in place for permanent posts and apply them to temporary posts across social media. One option would be to require synchronization licensing for all accounts that use music in the background of their social media posts, just as movies, television shows, and other visual media producers are required to do.²⁰⁹

Practically, the focus would be on educating and requiring larger social media influencers that use their account for commercial purposes to license music for their use first, before requiring all users to do the same. Requiring only a subset of users to license their music might seem discriminatory, and it is not hard to imagine that the social media platforms would be hesitant to deter or place a cost on these users that are so valuable to their own success.²¹⁰ One solution would be to force all verified users to pay the licensing fees; however, this could transform the verified badge²¹¹ into a punishment rather than a desired benefit for users and would likely raise major backlash. Additionally, any type of required licensing would be difficult to regulate and would require a large educational campaign, likely by the social media platforms, to encourage and require their users to obtain such licenses should they intend to use music in their posts.²¹²

Another solution would be to require Facebook and Instagram to expand their already existing detection software to these temporary posts and require Snapchat to develop their own infringement detection technology or license one from another social media platform. First, these

²⁰⁹ See generally Joy Butler, *Music Licensing: The Difference Between Public Performance and Synchronization Licenses*, COPYRIGHT CLEARANCE CTR. (May 16, 2017), <http://www.copyright.com/blog/music-licensing-public-performance-license-synchronization> [<https://perma.cc/7MC2-MFPL>].

²¹⁰ See *What is a Social Media Influencer?*, PIXLEE, <https://www.pixlee.com/definitions/definition-social-media-influencer> [<https://perma.cc/KZY8-LA5T>] (stating that influencers are popular across all the social media platforms); see also O'Connor, *Earning Power: Here's How Much Top Influencers Can Make on Instagram and YouTube*, *supra* note 130 (demonstrating the high value social media influencers have to social media platforms and their advertising revenue).

²¹¹ See *Verified Badges*, INSTAGRAM, <https://help.instagram.com/854227311295302> [<https://perma.cc/VA2B-MQ62>] (explaining how verified badges work).

²¹² See generally Butler, *supra* note 209 (describing music licensing as “not rocket science, but . . . also not intuitive”).

Content ID-type systems are not per se required by law and requiring them to apply to temporary posts by judicial action might be unfeasible.²¹³ It can be inferred that creating new affirmative duties would require an update to their system. Given the frequency of these posts, it would require a lot more computing power to address them. While the technological ability exists to use detection software for real time live streams, it is not clear whether these platforms currently have the ability to use this software on a widespread basis for the hundreds of millions of daily active users.

Additionally, there are some complicated implications to enhancing the existing systems in place without revising them. Some argue that systems like Content ID, known as algorithmic systems, are fraught with mistakes and lead to far too many false positives and subsequent low accountability.²¹⁴ Additionally, the system of using intermediaries to regulate copyright infringing content on major social media platforms creates a privatized system without transparency, and lack of transparency furthers these problems by creating incentives for maintaining this inefficient status quo.²¹⁵ To that end, one might argue that even if the technology is available to adapt our existing systems to auto-detect all content across all platforms, the result might be a system with new problems.²¹⁶

The overall concern under this solution of enhancing existing controls is the uneven rollout and the enormous amount of cooperation from the social media platforms. While the forthcoming third solution forces social media platforms to act directly, the enforcement of synchronization licenses as a policy measure requires judicial action, or some other measure or penalty, to scare the social media platforms of the repercussions for failure to cooperate. Attempting to solve the problem by enhancing the existing law might be burdensome and difficult to install, as opposed to just drafting a new law entirely. However, working with existing controls is a solution that could be adopted in some form and expanded, rather than updating the law to address these new technological forms.

²¹³ See generally *Viacom II*, 676 F.3d 19, 27–28 (2d Cir. 2012) (holding that there is no affirmative duty to seek out infringing content and thus no need for Content ID detection).

²¹⁴ See Niva Elkin-Koren & Maayan Perel, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473, 492–93 (2016) (describing how current auto-detection systems function and how they often fail to accurately and adequately scrub service providers of infringing content and instead over-remove content, an equally large problem).

²¹⁵ See *id.* at 518.

²¹⁶ See *id.* at 516.

C. Solution Three: New Law

The third and final solution requires an update or amendment to DMCA and United States copyright law that provides an affirmative duty for content providers to monitor all forms of social media posted on their social media platforms. The courts have held specifically that there is no affirmative duty for service providers to seek out copyright-infringing content on their platforms under the DMCA.²¹⁷ However, given the fact that technology can automatically detect infringing content, if the standard were changed to require service providers to search for infringing content, the use of technology could efficiently assist in the removal many of the infringing posts or even the infringing users if they are repeat offenders.

While this puts a burden on the service providers, this burden is not unlike the burden posed by the current DMCA takedown notice procedure.²¹⁸ The social media platforms are already required to address DMCA concerns. Although adding an additional requirement to actively search for these infringers might be technologically different, it is not inconsistent with existing law in the sense that these providers are already subject to regulation that requires them to address copyright infringement and takedown notices. However, an affirmative duty to seek out infringing content would probably require large teams of reviewers to check for false positives.

This affirmative duty could require service providers to seek out infringing content but not necessarily remove it. In other words, systems could be developed where copyright holders register their content. They can then either be alerted to infringing content instantly and given the option to remove it or have it automatically removed. Systems that give copyright holders this option keep the balance of authority in the copyright holders' hands, allowing them to retain the benefit from desirable exposure from a popular influencer like LeBron James.²¹⁹ For some artists, this would be preferable to a mass deletion of positive exposure. Additionally, these systems could add further settings to allow copyright holders to control their content, such as the ability to have their content removed from social media influencers with a specified threshold of

²¹⁷ See generally *Capitol Records II*, 826 F.3d 78 (2d Cir. 2016); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 89 (2d Cir. 2016). Although drafted to regulate pornographic material online, the Communications Decency Act (CDA) joined the DMCA as another extremely protective statute for Internet service providers. Both the CDA and the DMCA would have to be repealed in order to remove this non-publisher liability exemption for Internet service providers and force them to take on an affirmative duty to remove infringing content. See 47 U.S.C. § 512 (2018).

²¹⁸ See 17 U.S.C. § 512(c).

²¹⁹ See Leight, *supra* note 200.

followers, allowing them to restrict the use of their music from small influencers that they may not be aware of versus having a valuable feature being automatically removed.

Further, there is a question of incentivizing the platforms to enforce this affirmative duty to regulate. Critics have argued in the past that one of the problems with requiring the service providers themselves to monitor the content is that it incentivizes platforms or service providers to either over-censor and remove false positives or under-censor and ignore infringing content.²²⁰ However, if controls were added that allow copyright holders and social media platforms to continue sharing the infringing media legally, while allowing both parties to share in its monetization, an incentive would be created for these platforms to ensure the proliferation of this approved infringing content. In other words, searching for infringing content would not be for the purpose of removing it, but instead the incentive would be to ensure that profits are maximized and shared between the platform and the copyright holder, similar to YouTube's solution of enabling monetization its videos today.²²¹

The new law would also have to regulate whether the social media platforms had the responsibility of identifying all copyrightable content or simply having a system that allows for copyright holders to identify and mark their content. In other words, Content ID on YouTube only works when copyright owners mark their content in the system so that it can be auto detected.²²² It could be an insurmountable burden to require service providers to develop a library of all copyrightable material to search; however, requiring social media platforms to adopt a Content ID-type system that allows copyright owners to file ownership for their content and to have their material detected by the service providers seems like a fair compromise for the social media platforms and copyright holders alike.

VII. CONCLUSION

At their respective inceptions Facebook was a website to connect friends at Harvard, Instagram was an application to post pictures with

²²⁰ Many have described the lack of incentive that exists for service providers to either not remove any content or to risk removal of content that puts them at risk. However, YouTube has shown that these are not the only two options, and a middle ground can be created where copyright holders are protected while social media platforms are still incentivized to uphold copyright protections. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1385 (2004) (describing the risk of over-removal to avoid liability).

²²¹ See *How Content ID Works*, *supra* note 67.

²²² *Id.*

unique filters, and Snapchat was a way to send a disappearing message to private friends.²²³ Regardless of their creators' intentions, these platforms and applications have evolved into massive electronic networks, news sources, video hosting platforms, marketing and branding essentials, and globalizing tools that have revolutionized the world in which we live.²²⁴ As the use of these platforms continues to grow,²²⁵ the necessity to update copyright regulations to address the platforms and their new features must grow too.

While the DMCA adequately addresses permanent postings on social media platforms through the use of takedown notices, copyright law has failed to effectively address infringing content on temporary social media. The use of temporary social media continues to rise, and in the absence of regulation, the copyright of many owners is being violated and will continue to be violated for both commercial and non-commercial purposes.²²⁶ While posting a single temporary story containing background music to a social media platform that is viewed by a small group of friends might seem harmless, the use of social media by major influencers as an occupation and the subsequent unauthorized use of copyrighted music is blatant copyright infringement. Without an update to the DMCA, this infringement will continue to persist. Adopting a solution with an affirmative duty to service providers to seek out copyright infringing material is not overly burdensome on social media platforms in the name of ensuring copyrights and the rights of copyright owners remain intact.

²²³ See discussion *supra* Section II.

²²⁴ See discussion *supra* Section II.

²²⁵ See *Number of Social Network Users Worldwide from 2010 to 2021*, *supra* note 3.

²²⁶ See discussion *supra* Section IV(b).