

Capitol Records v. Vimeo: The Peculiar Case of Pre-1972 Sound Recordings and Federal Copyright Law

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INTRODUCTION

In *Capitol Records, L.L.C. v. Vimeo, L.L.C.*, the U.S. Court of Appeals for the Second Circuit held that the “safe harbor” provisions of Section 512 of the federal Copyright Act covered state law claims against an online service provider for infringement of pre-1972 sound recordings.¹ The evidentiary basis for this conclusion was slender. At the heart of the decision was the court’s surmise that Congress must have intended to cover state law “copyright,” because a contrary interpretation would undermine the policy objectives of the Digital Millennium Copyright Act (DMCA). In reaching its decision, the court apparently misread the Copyright Act and misunderstood both the nature of state law protection for pre-1972 sound recordings and the trade-offs that underlay the DMCA.

We submit that this holding of *Vimeo* should not be followed by courts in other circuits, however sympathetic its policy underpinnings may be.² It is doubtful that Congress considered state law “copyright” claims in passing the DMCA, or that it meant to include them under § 512. As a policy matter, it probably should have done so. But had it done so, Congress almost certainly would have said so explicitly, and would have altered other provisions of the DMCA to achieve a fairer result for owners of rights in pre-1972 sound recordings than the Second Circuit did. Congress could, for example, have protected pre-1972 sound recordings under § 1201 et seq., or otherwise provided those recordings with greater protection under the Copyright Act.³ The court’s focus on only *one* policy objective of the DMCA led it to interpret the Copyright Act in an implausible manner that benefits online

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1. 826 F.3d 78 (2d Cir. 2016).

2. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (the process of interpreting the Copyright Act “is not a free-ranging search for the best copyright policy, but rather ‘depends solely on statutory interpretation.’” (quoting *Mazer v. Stein*, 347 U.S. 201, 214 (1954))).

3. 17 U.S.C. §1201 et seq. protects against bypassing or decrypting technological means of protection for copyrighted works. This provision, which currently applies only to works protected by federal copyright, was passed as part of the DMCA.

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service providers (OSPs), at the expense of owners of pre-1972 sound recordings, and the unique position of those recordings under copyright law. The central issues in this case that concern pre-1972 sound recordings are more appropriately under Congressional purview, as the Second Circuit should have recognized.

And indeed, Congress should act to resolve these issues, particularly now, in view of the conflicting treatment of state law claims between *Vimeo* (concerning the safe harbor in § 512 of the Copyright Act)⁴ and the Ninth Circuit's sweeping conclusion in *Perfect 10, Inc. v. CCBill, L.L.C.*⁵ that state law intellectual property claims are barred by § 230 of the Communications Decency Act (CDA).⁶ Accordingly, we recommend legislation to address this issue and to resolve other problems and inconsistencies that have arisen due to the peculiar situation of pre-1972 sound recordings and federal copyright law, as discussed below.

In Part I, we discuss the legal status of pre-1972 sound recordings as necessary background to evaluating the Second Circuit's decision in *Vimeo*. Part II discusses that decision in greater detail, and Part III explains the flaws in the court's rationale. In Part IV, we address the Second and Ninth Circuits' contradictory views concerning the treatment of state law claims against OSPs under § 512 of the Copyright Act and § 230 of the CDA. In Part V, we explain that it is up to Congress to change the role of pre-1972 sound recordings in the federal copyright scheme, and argue that the time is ripe for Congress to exercise that power. We conclude in Part VI.

I. THE LEGAL STATUS OF PRE-1972 SOUND RECORDINGS

Sound recordings are “works that result from the fixation of a series of musical, spoken, or other sounds.”⁷ Sound recordings were first protected by federal copyright law effective February 15, 1972, but that law operated only prospectively, to protect sound recordings created on or after that date.⁸ Sound recordings created prior to February 15, 1972 (“pre-1972 sound recordings”) are not and never have been protected by federal copyright law.⁹ Owners of rights in pre-1972 sound recordings continue to rely on state law protections in order to protect their rights in such works, as they did prior to the federalization of sound recording protection.¹⁰ Many pre-1972 sound recordings, such as those by Frank

4. 17 U.S.C. § 512.

5. 488 F.3d 1102 (9th Cir. 2007).

6. 47 U.S.C. § 230.

7. 17 U.S.C. § 101.

8. The Sound Recording Amendment, Pub. L. No. 92-140, § 3, 85 Stat. 391 (1971), passed on Oct. 15, 1971, granted copyright protection to sound recordings fixed on or after its effective date, which was four months later, on February 15, 1972. Even though the effective date of federal protection was February 15, 1972, for ease of reference we refer to sound recordings created prior to that date as “pre-1972 sound recordings” and those created on or after February 15, 1972 as “post-1972 sound recordings.”

9. *Id.*; see 17 U.S.C. § 301(c).

10. See UNITED STATES COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 5 (2011), <https://perma.cc/W4U5-4FN8> [hereinafter “Copyright Office Report”];

Sinatra, Elvis Presley, Ella Fitzgerald, the Beatles, and the various Motown performers, retain significant commercial value.

When Congress passed the Copyright Act of 1976, it made unmistakably clear that sound recordings created prior to February 15, 1972 would remain protected exclusively by state law until they passed into the public domain. Section 301(c) of the Copyright Act provides:

With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067 . . . Notwithstanding the provisions of Section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.¹¹

Owners of copyrights in pre-1972 sound recordings must turn to state laws to protect their rights. State laws, however, do not provide a uniform, integrated form of protection. Instead, they provide a patchwork of laws that protect sound recordings on different terms in different states. Many state laws that protect pre-1972 commercial sound recordings are not “copyright” laws but instead sound in unfair competition, misappropriation, or other torts.¹²

Capitol Records, Inc. v. Spies is illustrative. There, an Illinois appellate court reversed the trial court’s denial of a preliminary injunction against the distributor of unauthorized copies of plaintiff’s sound recordings. It held that Spies could be liable for unfair competition, even though Spies wasn’t passing off the recordings as originating with him.¹³ According to the court, Spies appropriated the plaintiff’s product by copying and selling its recordings. It was competing with Capitol by

see generally Michael Erlinger, Jr., *An Analog Solution in A Digital World: Providing Federal Copyright Protection for Pre-1972 Sound Recordings*, 16 UCLA ENT. L. REV. 45, 51–56 (2009).

11. 17 U.S.C. § 301(c). As passed, the law provided February 15, 2047 as the end date for protection of pre-1972 sound recordings, but twenty years was added to that date under the Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998). Not all pre-1972 recordings will be protected in all states until 2067; it depends on the relevant state law. For example, some states have chosen to end protection earlier. *E.g.*, Cal. Civ. Code § 980 (a)(2).

12. Eva E. Subotnik & June M. Besek, *Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings*, 37 COLUM. J. L. & ARTS 327, 337 (2014) (“States may treat unauthorized reproduction and distribution of pre-1972 sound recordings as unfair competition or misappropriation, a violation of ‘common law copyright,’ or as another type of civil wrong.”); Program on Information Justice and Intellectual Property, Washington College of Law, American University (under the supervision of Peter Jaszi with the assistance of Nick Lewis), PROTECTION FOR PRE-1972 SOUND RECORDINGS UNDER STATE LAW AND ITS IMPACT ON USE BY NONPROFIT INSTITUTIONS: A 10-STATE ANALYSIS 8 (CLIR and Library of Congress 2009) [hereinafter “Jaszi Study”] (“States may protect sound recordings by criminal statutes (e.g., unauthorized distribution laws), by civil statutes, or through common law theories such as common law copyright and the doctrine of unfair competition (along with its relative, the doctrine of misappropriation” (citation omitted)). The Jaszi Study also lists conversion and right of publicity as possible claims. *Id.* at 19-22. *See* Melville and David Nimmer, NIMMER ON COPYRIGHT § 8C.03[B] (2017) [hereinafter NIMMER ON COPYRIGHT].

13. *Capitol Records, Inc. v. Spies*, 264 N.E.2d 874 (Ill. App. 1970).

selling the same product, without the necessity of hiring performers or otherwise expending money necessary to create a rendition of the songs at issue.¹⁴

Liberty/UA, Inc. v. Eastern Tape Corp. provides another example of state law protection outside the rubric of “copyright.”¹⁵ Liberty/UA, the authorized manufacturer and distributor of certain pre-1972 sound recordings, sued Eastern Tape, which was copying plaintiff’s recordings onto magnetic tapes and selling them in competition with the plaintiff. Liberty/UA “claim[ed] no statutory or common law copyright in its recordings,” so the question before the court was whether defendants’ conduct amounted to “unfair competition” under state law.¹⁶ The court concluded:

In appropriating the fruits of plaintiff’s initiative, skill, effort and expense to their own use, defendants obviously circumvent a great portion of the cost of engaging in the recording business. They thereby gain substantial competitive advantage over plaintiff. This conduct, it seems to us, amounts to unfair competition and is subject to restraint.¹⁷

Prior to the effective date of the 1976 Copyright Act, federal copyright law protected only published works.¹⁸ Once a work was published, it generally lost protection under state law, but it gained protection under federal copyright law—as long as it was published with copyright notice.¹⁹ If, however, a work was published without copyright notice, it was usually relegated to the public domain, no longer entitled to protection under state or federal law.²⁰ This division between state and federal law largely disappeared with the Copyright Act of 1976, which unified copyright under a single federal law, and preempted most state law that was “equivalent” to copyright, with the notable exception of the laws that protected pre-1972 sound recordings.²¹

States presumably protect *unpublished* pre-1972 sound recordings under “common law copyright,” but there are few cases dealing with such recordings.²² As cases arose concerning unauthorized copying and distribution of sound recordings, before and after the effective date of the 1976 Copyright Act, states

14. *Id.* at 877. *Accord* *CBS v. Melody Recordings, Inc.*, 341 A.2d 348 (N.J. Super. Ct. 1975); *Capitol Records v. Erickson*, 82 Cal. Rptr. 798 (Cal. Ct. App. 1969); *see also* *A & M Records, Inc. v. M.V.C. Distrib. Corp.*, 574 F.2d 312, 314 (6th Cir. 1978) and cases collected therein.

15. 180 S.E.2d 414 (N.C. App. 1971), *cert. denied*, 181 S.E.2d 600 (N.C. 1971).

16. *Id.* at 415.

17. *Id.* at 416. *See* *CBS, Inc. v. Garrod*, 622 F. Supp. 532 (M.D. Fla. 1985), *aff’d without opinion*, 803 F.2d 1183 (11th Cir. 1986); *Mercury Record Prods. v. Econ. Consultants, Inc.*, 218 N.W.2d 705 (Wis. 1974), *cert. denied*, 420 U.S. 914 (1975).

18. H.R. Rep. No. 94-1476, 94th Cong. at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745. Under the 1909 Copyright Act, certain categories of works (e.g., lectures, dramatic works, musical compositions) could be registered as unpublished, in which case their terms ran from the date of registration and deposit. *See* NIMMER ON COPYRIGHT, *supra* note 12, at § 7.16[A][2][c]; *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929 (2d Cir. 1942).

19. NIMMER ON COPYRIGHT, *supra* note 12, §§4.04, 7.02[C][1].

20. *Id.* §7.02[C][1].

21. 17 U.S.C. §301; H.R. Rep. No. 94-1476, 94th Cong. at 129-33 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745-49.

22. *See* Copyright Office Report, *supra* note 10, at 32.

were faced with the fundamental unfairness of depriving sound recordings of state law protection upon publication, when they were ineligible for federal protection. Many states resolved this conundrum by protecting sound recordings under another body of law that would provide similar protections, such as unfair competition or misappropriation, as discussed above. Some states continued to call protection for published sound recordings “copyright,” modifying state law to provide that protection for sound recordings would continue after publication because they were ineligible for federal protection.²³

II. THE SECOND CIRCUIT’S DECISION

Vimeo is an OSP that permits users to post videos on its site, some of which contained unauthorized copies of sound recordings. Capitol Records sued Vimeo for, *inter alia*, infringement of sound recordings in which Capitol owned the rights (some pre- and some post-1972) posted on Vimeo’s service.²⁴ Vimeo invoked the § 512(c) safe harbor in its defense, arguing that it had expeditiously removed all sound recordings claimed to be infringing upon receipt of valid notifications, and otherwise met its obligations under § 512(c). Capitol argued that § 512(c) did not cover pre-1972 sound recordings, and therefore Vimeo’s conduct had to be evaluated under common law principles of direct and secondary liability.

Section 512 of the Copyright Act was passed as part of the Digital Millennium Copyright Act in 1998.²⁵ Section 512 provides “safe harbors,” or limitations on liability, for “infringement of copyright” by OSPs in connection with certain activities.²⁶ Section 512(c) provides that an OSP “shall not be liable . . . for infringement of copyright” if the OSP’s *users* post infringing material on its service, provided that the OSP complies with certain requirements.²⁷ Most notably, upon a valid notification, the OSP must “respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of

23. *Capitol Records, Inc. v. Naxos of America, Inc.*, 4 N.E.2d 540 (N.Y. 2005). *But see Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 70 N.E.3d 936 (N.Y. 2016) (“[W]e note that sound recording copyright holders may have other causes of action, such as unfair competition, which are not directly tied to copyright law. Indeed, in the present case, plaintiff prevailed in the District Court on its causes of action alleging unfair competition and unauthorized copying of sound recordings . . . Thus, even in the absence of [common-law copyright protection], plaintiff has other potential avenues of recovery.”); *cf. Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 650 (S.D.N.Y. 2011) (analyzing unfair competition claims for infringement of state rights in pre-1972 sound recordings separately from analysis of whether “common-law copyright” claims fell within the DMCA).

24. The other issues involved in the suit, particularly the possible existence of “red flag knowledge” and “willful blindness” on Vimeo’s part, though extremely important, are not the subject of this article.

25. Pub. L. No. 105–304, 112 Stat 2860 (1998).

26. There are four types of service provider activities protected under section 512: (a) transitory digital network communications, (b) system caching, (c) storing information posted by users on a system or network; and (d) providing information location tools that may direct users to infringing material. If a service provider qualifies for a safe harbor it is exempt from monetary damages and its activities can be enjoined only in very limited circumstances. 17 U.S.C. § 512(a)–(d).

27. 17 U.S.C. § 512(a).

claimed infringement.”²⁸ The OSP has no duty to monitor its site, but if it has actual knowledge of infringing materials or activities, or is “aware of facts or circumstances from which infringing activity is apparent” (sometimes referred to as “red flag knowledge”), it must act “expeditiously” to remove or disable access to the infringing material.²⁹ An OSP that qualifies for the § 512(c) safe harbor may not be liable for monetary relief and is subject to only limited injunctive relief.³⁰

The district court held in Capitol’s favor on this issue, concluding that pre-1972 sound recordings were not covered under § 512.³¹ It relied on a December 2011 Copyright Office Report³² and a decision of the New York Appellate Division,³³ both of which had concluded that pre-1972 sound recordings are not embraced within the § 512 safe harbors.³⁴ The district court ultimately concluded that it is for Congress, not the courts, to extend the Copyright Act to pre-1972 sound recordings.³⁵

The Second Circuit panel in *Vimeo* held to the contrary.³⁶ The court acknowledged that under 17 U.S.C. § 501, an “infringer of copyright” is one who violates rights of the author or copyright owner under §§ 106 through 122, or § 602 of the Copyright Act. It nonetheless interpreted the phrase “infringement of copyright” in § 512 to include *any* type of “copyright infringement,” not only infringement of federal copyright.³⁷ According to the court:

A literal and natural reading of the text of section 512(c) leads to the conclusion that its use of the phrase “infringement of copyright” *does* include infringement of state laws of copyright. One who has been found liable for infringement of copyright under state laws has indisputably been found “liable for infringement of copyright.”³⁸

The *Vimeo* court asserted that Congress did not include the limiting phrase “under this title” in § 512, so to conclude that OSPs could be liable for

28. *Id.* § 512(c)(1)(C). For a thorough explanation and application of the “safe harbor” requirements, see *Capitol Records, LLC v. Escape Media Grp., Inc.*, No. 12-CV-6646 AJN, 2015 WL 1402049 (S.D.N.Y. Mar. 25, 2015).

29. 17 U.S.C. § 512(c)(1)(A). Other requirements for taking advantage of the safe harbor include the OSP naming a designated agent to receive notifications, *id.* § 512(c)(2)(A), and taking action against repeat infringers. *Id.* § 512(i)(1)(A). Moreover, an OSP cannot qualify for this safe harbor if it receives a “financial benefit directly attributable to the infringing activity” where the OSP has the “right and ability to control the activity.” *Id.* § 512(c)(1)(B).

30. 17 U.S.C. § 512(c).

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

32. Copyright Office Report, *supra* note 10. An author of this essay was involved in drafting the Copyright Office Report.

33. *UMG Recordings v. Escape Media Grp., Inc.*, 964 N.Y.S.2d 106 (App. Div. 1st Dep’t 2013).

34. *Vimeo*, 972 F. Supp. at 536–37 (citing Copyright Office Report, *supra* note 10, at 130–32; *UMG Recordings*, 964 N.Y.S.2d at 110–12). *But see* *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp.2d 627, 640 (S.D.N.Y. 2011).

35. *Id.* at 537.

36. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016).

37. *Id.* at 89.

38. *Id.*

infringement of copyright under state laws was a “strained interpretation” of that provision.³⁹

The court rejected Capitol’s argument that interpreting § 512(c) to include state law claims was inconsistent with § 301(c) of the Copyright Act. It held that § 301(c)’s prohibition on federal limitations of state law rights and remedies associated with pre-1972 sound recordings did not bar application of § 512 to state law claims, asserting that this constituted “a tiny exception to” § 301(c).⁴⁰ The court asserted that this “exception” was the result of an explicit, not an implied, partial repeal of § 301(c), stating that “the partial repeal of § 301(c) was by the explicit statement in § 512(c) that ‘[a] service provider shall not be liable . . . for infringement of copyright’”⁴¹

The overarching basis for the court’s decision was that interpreting § 512(c) to exclude state law claims would defeat the purpose Congress sought to achieve in the DMCA: encouraging OSPs to invest in internet services by relieving them of copyright liability for user-posted content.⁴²

III. THE SECOND CIRCUIT’S REASONING IS FLAWED

The *Vimeo* court maintained that Congress must have intended state law copyright claims to be included in § 512(c); otherwise, the goal of the DMCA—to protect OSPs—would be thwarted. We consider in section A the nature of Congress’s general intent with respect to the DMCA, and whether the *Vimeo* court’s determination effectuated it. In section B, we evaluate whether Congress intended to amend § 301(c) of the Copyright Act, which says that pre-1972 sound recordings will not be limited by Title 17 until 2067, at which time those sound recordings will enter the public domain. In section C, we consider the proper interpretation of “infringement of copyright” in § 512 in the context of the Copyright Act.

A. EFFECTUATING CONGRESSIONAL INTENT

1. What Was Congress’s Intent Concerning § 512 and Pre-1972 Sound Recordings?

There is no contemporaneous evidence that Congress intended to include pre-1972 sound recordings in § 512(c); instead, the court imputed intent from the perceived consequences of excluding pre-1972 sound recordings from § 512(c), as seen eighteen years after the statute was passed.

The Second Circuit seemed incredulous that Congress could have failed to include pre-1972 sound recordings in § 501(c), because such an omission would

39. *Id.*

40. *Id.* at 92.

41. *Id.*

42. *See, e.g., Vimeo*, 826 F.3d at 89-90, 92-93.

undercut the statute's goal of protecting Internet service providers. But this observation is made with the benefit of eighteen years of hindsight.

In 1998, the drafters of the DMCA did not anticipate the scope and extent of online copyright infringement.⁴³ The statute was developed when physical media were still the principal means by which sound recordings were distributed, before peer-to-peer file-sharing and other efficient means of copying and "sharing" protected works. The focus of the drafting effort was federal copyright law. There was no evidence that Congress or service providers were concerned at that time about state law concerning pre-1972 sound recordings.

In the absence of any reference to pre-1972 sound recordings in the DMCA or its legislative history, the court imputed Congressional intent concerning those sound recordings based on a constricted view of the legislative intent underlying the DMCA. For example, the court stated:

[W]hat Congress intended in passing § 512(c) was to strike a compromise under which, in return for the obligation to take down infringing works promptly on receipt of notice of infringement from the owner, Internet service providers would be relieved of liability for user-posted infringements of which they were unaware, as well as of the obligation to scour matter posted on their services to ensure against copyright infringement. The purpose of the compromise was to make economically feasible the provision of valuable Internet services while expanding protections of the interests of copyright owners through the new notice-and-takedown provision.⁴⁴

The court concluded, therefore, that Congress must have intended to include pre-1976 sound recordings in § 512; otherwise, OSPs would not be insulated from liability under state law.

One problem with this reasoning is that Congressional intent with respect to the DMCA is far more complex than the court recognizes. The court acknowledges the legislation's goals with respect to OSPs, but fails to consider its goals with respect to copyright owners. In fact, the process of drafting the DMCA was initiated for the purpose of changing domestic law to permit the United States to join the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁴⁵ The two most significant changes required were (1) legal protection against bypassing or decryption of technological access controls on copyrighted works (and against trafficking in devices or services designed to circumvent technological access

43. See, e.g., *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003) (observing that "the legislative history of the DMCA betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works"); cf. Note, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on Youtube*, 44 HOFSTRA L. REV. 237, 237-38 (2015); Note, *Viacom v. Youtube: A Proving Ground for DMCA Safe Harbors Against Secondary Liability*, 24 ST. JOHN'S J. LEGAL COMMENT. 811, 843 (2010).

44. *Vimeo*, 826 F.3d at 89-90.

45. See S. Rep. No. 105-190, 105th Cong. 2d Sess. (1998) at 65 (statement of Sen. Leahy); see generally David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002).

controls), and (2) providing protection for “copyright management information” attached to a work.⁴⁶ As the Senate report accompanying the DMCA explains:

Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. Legislation implementing the treaties provides this protection and creates the legal platforms for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music software, and literary works that are the fruit of American creative genius. It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.⁴⁷

This proposal to advance the protection of intellectual property in the digital age drew the ire of some members of the technology industries, who worried that increasing copyright protections could stifle innovation in the digital world.⁴⁸ Professor Nimmer describes this conflict as a “chicken-and-egg problem”: copyright holders would require assurances against rampant illicit copying before they would be willing to permit the digital transmission of their works, given the facility with which digital technology permits copying; however, online service providers might require assurances against massive secondary copyright liability before they would build the infrastructure required to develop the Internet’s potential.⁴⁹ For this reason, the DMCA contained provisions to assuage the fears of both constituencies.

Ultimately, copyright holders gained certain benefits from the DMCA, and suffered certain disadvantages. The same is true for OSPs. The *Vimeo* court’s solicitude for OSPs, however, caused it to minimize any adverse effects on right holders.

The court’s suggestion that the new notice and takedown provision “expand[ed] protections of the interests” of owners of rights in pre-1972 copyright owners in exchange for the safe harbors provided to OSPs in § 512⁵⁰ misperceives the central compromise in the DMCA. The DMCA did involve a quid pro quo, but on a grander scale. By and large, § 512 was not a provision that right holders sought. Service providers wanted it to limit their liability for online infringements of copyright; this was hardly the right holders’ goal.⁵¹ Right holders, on the other

46. These provisions were ultimately codified in Chapter 12 of the Copyright Act.

47. S. Rep. No. 105-190, 105th Cong. 2d Sess. (1998) at 8.

48. See, e.g., Denise Caruso, *Global Debate over Treaties on Copyright*, N.Y. TIMES (Dec. 16, 1996), <https://nyti.ms/2K55rtA> (summarizing the hostile stance toward the treaties initially taken by some in the tech community).

49. Nimmer, *supra* note 45 at 916–17 (quoting S. Rep. No. 105-190, 105th Cong. 2d Sess., at 8 (1998)) (footnotes omitted).

50. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 89–90 (2016).

51. Before the DMCA was passed, copyright holders could of course demand that an OSP take down infringing content; if the OSP refused, the copyright holder could seek an injunction against continuing infringement under 17 U.S.C. § 502, and potentially money damages under 17 U.S.C. § 504.

hand, wanted Title I of the DMCA to help safeguard their works in the digital environment and enable the United States to adhere to the WIPO Treaties.

As *Nimmer on Copyright* explains:

Simultaneous with the enactment of Sections 1201 and 1202, which basically augments the arsenal of copyright proprietors, other features of the Digital Millennium Copyright Act limit copyright owners' rights, in order to preserve copyright law's delicate balance. Most notably, just as Title I of the omnibus law, the WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, in general expands the rights of copyright owners, so Title II, the Online Copyright Infringement Liability Limitation Act, in general constricts those rights.⁵²

But pre-1972 sound recording owners are not eligible for the true *quid pro quo*—the protections provided by §§ 1201 and 1202 of the Copyright Act. Section 1201, for example, provides important protection against circumvention of technological protection on copyrighted works, and against trafficking in devices or services designed to circumvent protection on access or copying. Section 1201(a) provides: “No person shall circumvent a technological measure that effectively controls access to a work protected *under this title*.”⁵³ So pre-1972 sound recording right owners are prevented from taking advantage of § 1201, since their works aren't protected under Title 17. Section 1202 is silent on this issue, but the references to “notice of copyright” in the definition of “copyright management information” do not embrace pre-1972 sound recordings, and we are not aware of any case indicating the applicability of § 1202 to pre-1972 sound recordings.⁵⁴

2. Interpreting § 512(c) to Encompass Federal and State “Copyright” Claims Does Not Protect OSPs from All State Law Claims

The Second Circuit's opinion misconceives the nature of state law protection for pre-1972 sound recordings. Many state laws that protect pre-1972 commercial sound recordings are not “copyright” laws but instead sound in unfair competition, misappropriation, or other torts.⁵⁵

The Second Circuit nonetheless seems to have read “copyright” in § 512 to include *all* state laws that protect against copying of pre-1972 sound recordings, ignoring the distinctions among state law claims.⁵⁶ Section 512 simply does not

52. 4 NIMMER ON COPYRIGHT, *supra* note 12, at § 12A.16 [D] (citations omitted).

53. 17 U.S.C. §1201(a)(1)(A) (emphasis added).

54. *Id.*

55. See Part II *supra* and authorities collected in note 12 *supra*.

56. See *Vimeo*, 826 F.3d at 89-90. The scope of the court's holding is not clear. One could argue that it referred only to state law “copyright” claims because New York calls protection for pre-1972 sound recordings “copyright,” even when those recordings have been published. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 263-64 (N.Y. 2005). If that is the correct reading, then the status of copyright-like torts against unauthorized copying and distribution of pre-1972 sound recordings remains an open question, but the observations in this paper are nonetheless relevant. The better view seems to be that the court intended to embrace all state law claims equivalent to copyright when it referred to state law copyright claims, since it did not discuss the relevance of New York law or the possible existence of other state law claims. However, the rationale articulated by the court—

support this reading.⁵⁷ Taking the court at its word, the opinion seems to hold that state laws which *describe* themselves as “copyright” are subject to section 512 of the Copyright Act, but other types of state law intellectual property rights such as those in the nature of unfair competition or misappropriation remain outside the ambit of section 512, because they are not called “copyright.”⁵⁸ That holding does not solve the policy problem that the court ostensibly addressed with respect to § 512. It does not free OSPs from potential liability for state law claims.

One could try to generously read the holding as covering a more amorphous group of state causes of action that the court would find sufficiently “copyright-adjacent” to warrant inclusion—but if so, the court’s “copyright is copyright” rationale falls apart.⁵⁹

Moreover, if Congress meant to include state “copyright” and “copyright-like” claims (i.e., claims with similar effect) within the ambit of § 512(c), using the term “copyright” is insufficient. When Congress sought to preempt state law in favor of a uniform federal copyright law, it used this language to preempt “copyright” and “copyright-like” claims⁶⁰:

On and after January 1, 1978, all legal or equitable rights that are *equivalent to any of the exclusive rights within the general scope of copyright* as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to *any such right or equivalent right in any such work under the common law or statutes of any State*.⁶⁰

Thus, if Congress had intended to include all types of state law claims concerning pre-1972 sound recordings within the liability-limiting scope of section 512, it knew how to do so.

essentially, “copyright” means “copyright,” see *Vimeo*, 826 F.3d at 86—does not support that holding, as explained *infra*.

57. See COPYRIGHT OFFICE REPORT, *supra* note 10, at 30-32 (explaining that a common law copyright claim differs from one grounded in unfair competition or conversion, and describing the nature of common law copyright).

58. The court’s rationale also leads to the suggestion that violating *foreign* jurisdictions’ “copyright” provisions might be “infringement of copyright.”

59. *Vimeo*, 826 F.3d at 89 (“One who has been found liable for infringement of copyright under state laws has indisputably been found ‘liable for infringement of copyright.’” (quoting 17 U.S.C. § 512(c))).

60. 17 U.S.C. § 301(a) (2012) (emphasis added). Note that the provision governing pre-1972 sound recordings, *id.* § 301(c), is explicitly made an exception to this provision.

B. DID CONGRESS INTEND TO AMEND SECTION 301?

1. Nothing Bars Congress from Amending § 301, but It Is Unlikely to Have Done So Silently.

Congress is free to amend § 301(c), but it is doubtful it would have done so silently, given the longstanding exclusion of pre-1972 sound recordings from federal copyright law.

Two things are plain from the face of § 301(c) of the Copyright Act. First, when Congress passed this section, as part of the 1976 Copyright Act, it did not intend to annul or limit any state law concerning pre-1972 sound recordings, and second, it intended then that those recordings would not be subject to federal copyright law.

In *Vimeo*, Capitol Records argued that interpreting § 512 to include claims concerning pre-1972 sound recordings would be inconsistent with § 301(c). The Second Circuit responded by explaining that Congress was always free to change the law. That proposition is indisputably true. But until Congress amends the federal Copyright Act to include all state law claims concerning pre-1972 sound recordings (and, accordingly, to extend § 301's preemptive effect to these claims), claims concerning those works remain outside the scope of the federal copyright law. Congress is free to change the law, but the Second Circuit is not free to change the law on Congress' behalf. But that, in effect, is what the *Vimeo* court did.⁶¹

The Second Circuit rationalizes that Congress did not allude to § 301(c) in § 512 of the DMCA since it was effecting only “a “tiny” exception” to § 301(c) that does not nullify the general rule of non-preemption.⁶² This casual dismissal of plaintiffs' rights is troubling. The court read § 512 to cut off virtually all means to recover damages for unauthorized duplication of pre-1972 sound recordings from Internet intermediaries, some of which may be deriving considerable profit from pre-1972 sound recordings on their services. It is not a “tiny” abrogation of state law to deprive copyright owners of the right to seek redress from those deriving commercial gain from their works, but rather a significant abrogation of that right, squarely at odds with section 301(c).⁶³

If one were to take the holding of *Vimeo* at its word, every statutory limitation on copyright would extend to *all* state law “copyright-type” rights, because none of them use the formulation “under this title” to delimit the term “infringement of

61. The Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) restored copyright to certain foreign works that were in the public domain in the United States, including certain pre-1972 sound recordings. The Statement of Administration Action, reproduced in NIMMER ON COPYRIGHT, *supra* note 12, at App. 44, which serves as the legislative history for this legislation, specifically discusses its effect on pre-1972 sound recordings. *Id.* at 44-20 to 21.

62. *Vimeo*, 826 F.3d at 90, 92. Moreover, this argument is also inconsistent with the court's concern that Congress couldn't possibly have meant to exclude from the safe harbor so many works that were likely to be the objects of online infringement.

63. See *UMG Recordings v. Escape Media Grp., Inc.*, 964 N.Y.S.2d 106, 111 (App. Div. 2013) (“Any material limitation, especially the elimination of the right to assert a common-law infringement claim, is violative of section 301(c) of the Copyright Act.”).

copyright.”⁶⁴ That interpretation, as applied to pre-1972 sound recordings, would effectively read § 301(c) entirely out of the Copyright Act.⁶⁵

Surely Congress would have signaled this change.

2. Congress Did Not Partially Repeal § 301(c) Expressly or by Implication.

Like all but one of the other courts to consider the question,⁶⁶ the *Vimeo* court correctly acknowledged that holding § 512 to apply to state intellectual property protections would carve out an exception to § 301(c), constituting a partial repeal of the latter provision.⁶⁷

The *Vimeo* court asserted that the partial repeal of § 301(c) was not a “repeal by implication,” but rather an express repeal, due to the “explicit statement” in § 512(c) that “[a] service provider shall not be liable . . . for infringement of copyright[.]” and that therefore the stringent rules regarding repeal by implication were inapplicable.⁶⁸ Its conclusion is puzzling as it seems at odds with the widely accepted legal distinction between express and implied repeals: an express repeal requires that Congress actually identify the repealed statute and “overtly state with specificity” that the new law trumps the old.⁶⁹ When it does so, any potential

64. See 17 U.S.C. §§ 107-122. The phrase “under this title” does appear occasionally in these sections, but never to delimit “copyright infringement.” See, e.g., *id.* § 109(a) (referring to “the owner of a particular copy or phonorecord lawfully made under this title.”).

65. *Contra Vimeo*, 826 F.3d at 92 (“The exception does not come close to nullifying the general rule[.]”).

66. Compare *UMG Recordings*, 964 N.Y.S.2d at 111 (noting that holding § 512 to cover state intellectual property rights would create an irreconcilable conflict with § 301(c)), and *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 536–37 (S.D.N.Y. 2013) (same), with *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 640 (S.D.N.Y. 2011) (“[T]his Court concludes that there is no conflict between section 301 and the DMCA’s safe harbors for infringement of pre-1972 recordings.”). In *MP3tunes*, the court based its holding on the observation that “section 301(c) does not prohibit all subsequent regulation of pre-1972 recordings[.]” apparently thus reading into § 301(c) an indication that it only applied to liability limitations enacted before 1972. *MP3tunes*, 821 F. Supp. 2d at 641. Subsequent cases and commentators have found this to be an unsupportable reading of the statute with no relation to its text, as do we. See COPYRIGHT OFFICE REPORT, *supra* note 10, at 130–32 (criticizing *MP3tunes*); *UMG Recordings*, 964 N.Y.S.2d at 109, 111 (same).

67. *Vimeo*, 826 F.3d at 92 (describing its holding as creating a “tiny exception” to § 301(c)).

68. *Id.*

69. *Patten v. United States*, 116 F.3d 1029, 1033 (4th Cir. 1997) (quoting *Gallenstein v. United States*, 975 F.2d 286, 290 (6th Cir. 1992)) (internal quotation marks omitted); see also *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Eng’rs*, 619 F.3d 1289, 1296 (11th Cir. 2010) (“An explicit repeal occurs when the later statute explicitly identifies the earlier statute it is repealing.” (citing 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 23:7 (7th ed. 2010))); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 12 (1st Cir. 2005) (finding no explicit repeal where the later-enacted provision did not “mention” the earlier-enacted provision by name); *CSX Transp., Inc. v. Pub. Utils. Comm’n of Ohio*, 901 F.2d 497, 502 (6th Cir. 1990) (“To find that a later statute has [expressly] repealed an earlier one, we have required that ‘the later law designates the statute repealed in such manner as to leave no doubt as to what statute is intended.’” (quoting *Equitable Life Assur. Soc. of U.S. v. Grosvenor*, 426 F. Supp. 67, 71 (W.D. Tenn. 1976), *aff’d*, 582 F.2d 1279 (6th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979))); *Demby v. Schweiker*, 671 F.2d 507, 512 n.6 (D.C. Cir. 1981); *cf.* *United States v. Fausto*, 484 U.S. 439, 453 (1988) (noting that “[r]epeal by implication of an express statutory text” is strongly disfavored because “it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change”).

separation of powers issue evaporates, because the court can simply follow the express will of Congress by treating the two identified statutes in the manner prescribed. Obviously, that is not the case here; no one contends that any part of the DMCA mentions § 301(c) at all. Rather, the partial repeal of § 301(c) effected by the *Vimeo* decision falls neatly within the rubric of a repeal by implication.

Repeal by implication is generally disfavored.⁷⁰ Was there a partial repeal by implication of § 301? “In a statutory construction case, the beginning point must be the language of the statute;”⁷¹ further, “[w]hen the words of a statute are unambiguous, . . . this first canon is also the last: judicial inquiry is complete.”⁷² The *Vimeo* court purportedly applied this canon, known as the “plain meaning rule,” in reaching its determination that § 512 carved out an exception to § 301(c).⁷³ Yet, on its face, the court’s reasoning disregards the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” because “[s]tatutory language ‘cannot be construed in a vacuum.’”⁷⁴

To ascertain the “plain meaning” of § 512 in this context, a court is required to consider the meaning of § 301(c) as it relates to § 512, as well as any other relevant provisions within the Copyright Act, rather than reading the provision in isolation.⁷⁵ Where there are multiple plausible accounts of the meaning of two pieces of statutory text within the same statutory framework, the “plain meaning” canon selects the interpretation that results from reading the legislative framework as a “harmonious whole.” This is the method to be applied when there is one meaning which would result in conflict, and another of which would give effect to both provisions. The aim is not to isolate provisions in a way that causes unnecessary conflict within the statutory scheme.⁷⁶ Thus the “plain meaning” of §

70. *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002) (citing *Morf v. Bingaman*, 298 U.S. 407, 414 (1936)).

71. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)).

72. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (citations and internal quotation marks omitted).

73. *Vimeo*, 826 F.3d at 89-90.

74. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)); *see also King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (discussing “the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.” (citations omitted)); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010; *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991).

75. As discussed below, the court acknowledged that it should read § 512 in light of § 501, but it failed to properly consider § 301(c). Thus, the court did not completely set aside the rule; rather, it applied it selectively.

76. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (U.S. 2000) (“A court must . . . interpret [a] statute ‘as a symmetrical and coherent regulatory scheme,’ and ‘fit, if possible, all parts into an harmonious whole.’” (citations omitted)); *see also Roberts*, 566 U.S. at 100 (same); *Mass. Museum Of Contemp. Art Found., Inc. v. Buchel*, 593 F.3d 38, 51 (1st Cir. 2010) (reading provisions of the Copyright Act together, in accordance with “the rule that provisions of a single act should be construed in as harmonious a fashion as possible” (quoting *United States v. Maravilla*, 907 F.2d 216, 231 (1st Cir. 1990))).

512, when properly read in light of § 301(c), is that it applies only to federally protected sound recordings.⁷⁷

However, the court alternatively rested upon the ground that one of the legislative purposes of § 512—to protect OSPs from excessive suits—mandates reading it to carve out an exception to § 301(c).⁷⁸ An unambiguous plain meaning generally means that courts must not embark upon a wide-ranging investigation of the statute’s meaning.⁷⁹ However, it is true that in “rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,”⁸⁰ as established by “the most extraordinary showing of contrary intentions,”⁸¹ courts sometimes “look to other materials.”⁸² As will be discussed below, it is far from clear that the legislative purpose is inconsistent with a plain reading of the statute. In this case, however, the court would have needed to show even more than that, because it was attempting to carve out an exception to a statutory rule, constituting a partial implied repeal of § 301(c).

This implicates the doctrine that proscribes construing statutes to find that they repeal one another by implication unless they are “in ‘irreconcilable conflict’ It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, ‘when two statutes are *capable of co-existence*, it is the duty of the courts . . . to regard each as effective.’”⁸³ This means that courts should not find that Congress impliedly repealed a statute “unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that

77. Further, as discussed in Section IV(B)(3) *infra*, when read in light of § 501, § 512 applies only to federal copyright infringement generally.

78. *Vimeo*, 826 F.3d at 90.

79. See *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (Chin, J.) (Because the plain language of the [statute] is clear, . . . the Court need not engage in an analysis of [its] legislative history or purpose.” (citing *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999)).

80. *United States v. Ron Pair Enters, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

81. *Garcia v. United States*, 469 U.S. 70, 75 (1984).

82. Michelle Schuld, Note, *Statutory Misinterpretation: Small v. United States Darkens the Already Murky Waters of Statutory Interpretation*, 40 AKRON L. REV. 751, 770 (2007). This exception has been heavily criticized on the basis of what some observers see as its tendency toward permitting judges to read their desired result into the statute. See, e.g., *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 473-74 (1989) (Kennedy, J., concurring in judgment) (“Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice I should think the potential of this doctrine to allow judges to substitute their personal predilections [sic] for the will of the Congress is so self-evident . . . as to require no further discussion of its susceptibility to abuse.”).

83. *Radzanower v. Touche Ross Co.*, 426 U.S. 148, 155 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)) (emphasis added).

the words of the later statute shall have any meaning at all.”⁸⁴ Further, even when such ‘incapability of coexistence’ is demonstrated, the earlier statute will only be repealed “to the minimum extent necessary” to reconcile the two provisions.⁸⁵

The point of this doctrine is that for courts to find that statutes have been repealed by implication cuts to the very core of the Constitutional separation of powers. Statutes often (if not always) represent attempts to reconcile competing policy interests, and it is not the courts’ job to second-guess the balance Congress has struck.⁸⁶ Indeed, were courts to go about holding statutes to have been repealed whenever they found that the purpose of one was impeded by another, Congress would be effectively powerless to design such a balance. Thus, the crux of an appropriate implied repeal holding is a finding that Congress clearly and manifestly *intended* to repeal the statute, such that, by holding it to have been implicitly repealed, the court is more or less just correcting a drafting error.⁸⁷ As a result, “[t]he ‘cardinal rule’ that repeal by implication is disfavored is even stronger when the two acts were enacted close in time,” because that fact tends to reinforce the notion that Congress intended the statutes to work together as part of a coherent scheme.⁸⁸ Here, § 512(c) was enacted only one day after § 301(c) was reenacted and its duration was extended, which provides additional strong evidence that Congress did not intend to repeal the one by operation of the other.⁸⁹

The question thus becomes whether an interpreting court can possibly reconcile §§ 301(c) and 512(c) while still giving “any meaning at all” to their terms. As explained above, it is not only possible but natural to read § 512(c) as applying only to the federal copyright scheme and not to the state scheme because of: (1) the definition of “infringement of copyright” embodied in § 501(a)⁹⁰ and (2) the dual system of sound recording protection embodied in § 301(c). Indeed, several courts have read the statute in this manner.⁹¹ On the whole, the *Vimeo* court’s fundamental policy argument holds no water; it does not suffice to warrant an implied repeal of section 301(c). Whether or not the interaction of §§ 512 and 301(c) produces great copyright policy, the two provisions can and do coexist.

84. *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)).

85. *Radzanower*, 426 U.S. at 155 (quoting *Silver v. New York Stock Ex.*, 373 U.S. 341, 357 (1963)) (internal quotation marks omitted).

86. *See Stewart v. Abend*, 495 U.S. 207, 230 (1990); *cf. Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123-24 (1980) (Rehnquist, J., for a unanimous court) (holding that, where potentially undesirable consequences of a statutory framework “were intended by Congress in striking an appropriate balance between [competing] interests,” an argument that an exception should be read into the statute “is properly addressed to Congress, not to this Court.”).

87. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981).

88. *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002) (citing *Morf v. Bingaman*, 298 U.S. 407, 414 (1936)).

89. *See UMG Recordings, Inc. v. Escape Media Group, Inc.*, 964 N.Y.S.2d 106, 112 (App. Div. 1st Dep’t 2013). That a statute like § 301(c) appears “outdated” or even difficult to comprehend does not mean that its clearly articulated policy may be simply ignored by an interpreting court (though it is an excellent reason for Congress to revisit the statute).

90. *See* Section III(B)(3) *infra*.

91. *UMG Recordings*, 964 N.Y.S.2d at 111; *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 536-37 (S.D.N.Y. 2013).

Therefore, under the long-established standard articulated by the court, implied repeal in this instance is improper because “[t]he courts are not at liberty to pick and choose among congressional enactments.”⁹²

3. Interpreting “Infringement of Copyright” in § 512

The *Vimeo* court claimed that including state law copyright claims in § 512(c) was a “literal and natural” reading of the statute.⁹³ We disagree.

Capitol Records argued that the term “infringement of copyright” in § 512 should be defined consistently with the definition in § 501(a) of an “infringer of copyright”—that is, “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122.”⁹⁴ Accordingly, in Capitol’s view, “infringement of copyright” in § 512 refers to violations of §§ 106 through 122.

The court countered that the definition of “infringer of copyright” in § 501(a) is not intended to be exclusive, reasoning that “within the terms of the Copyright Act, infringements are specified that are not among those specified in sections 106–122.”⁹⁵ Therefore, according to the court, § 501(a) “is in no way incompatible with interpreting the safe harbor as applying to infringement of state copyright laws.”⁹⁶

The *Vimeo* court reasoned that “[t]o state that conduct x violates a law is not the same thing as saying that conduct x is the only conduct that violates the law.”⁹⁷ This is apparently a direct rejection of the *expressio unius* canon of statutory interpretation: the explicit inclusion of one thing implies the exclusion of things not stated.⁹⁸ As a matter of semantics, the court’s statement is true, but as a matter of statutory interpretation, it defies both common practice and common sense.⁹⁹

The court cited § 1309 of Title 17 as an example of an infringement of copyright that does not arise under §§ 106 to 122 of the Copyright Act. That citation is inapposite. Chapter 13 does not provide *copyright* protection for vessel hulls, but rather provides a limited *sui generis* form of design protection.¹⁰⁰ As such, a violation of a right under Chapter 13 is obviously not an “infringement of copyright,” and it does not support the proposition that § 501(a) leaves room for infringements of copyright not specified in its text. Nor do the other chapters in Title 17 after the Copyright Act (which is codified at chapters 1–8) provide support for the court’s point. Chapter 9 provides *sui generis* protection for mask works;¹⁰¹

92. *Morton*, 417 U.S. at 551.

93. *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 89 (2d Cir. 2016).

94. 17 U.S.C. § 501(a) (2016).

95. *Vimeo*, 826 F.3d at 89.

96. *Id.*

97. *Id.*

98. *Setser v. United States*, 566 U.S. 231, 238 (2012).

99. To the extent that the court was drawing a distinction between a definition of “infringer” and of “infringement,” that is of course a distinction without a difference. One cannot infringe without being an infringer.

100. NIMMER ON COPYRIGHT, *supra* note 12, at § 8A.01.

101. *Id.*

Chapter 11 provides protection against unauthorized fixation of musical performances,¹⁰² and Chapter 12 protects against unauthorized circumvention of technological protection or removal of copyright management information.¹⁰³ None of these chapters give rise to claims of *copyright* infringement. Only Chapter 10, which regulates digital audio recording devices and media by establishing a levy system, can realistically be said to come within the scope of *copyright* law—and it does not provide any further examples of “infringement of copyright” beyond the rights enumerated in § 501(a).¹⁰⁴

The notion that one can commit federal copyright infringement or be an “infringer of copyright” without infringing any provisions of the federal Copyright Act is a troubling expansion of federal law. Nevertheless, the *Vimeo* panel held that the term “infringement of copyright” includes *any* type of copyright, including state law rights. Whenever Congress wanted to limit the scope of a provision in the Copyright Act, according to the court, it did so by including the phrase “under this title.”¹⁰⁵ On the other hand, whenever Congress was silent, the relevant provision stretched beyond the explicit subject matter of the federal Copyright Act.¹⁰⁶

Unfortunately, that is false. Congress simply did not use the phrase “under this title” consistently throughout the Copyright Act.

The phrase “under this title” is mainly used in a few discrete ways across the Copyright Act. On occasion, it is used to describe the works in which a federal copyright might vest; the relevant formulation is “a work protected under this title.”¹⁰⁷ However, Congress did not use this formulation consistently. Notably, § 114(a) of the Copyright Act provides that “[t]he exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4).”¹⁰⁸ It is obvious from the content of this provision that Congress intended it to refer only to sound recordings protected by the Copyright Act, i.e., “under this title.” However, Congress did not say so explicitly—contrary to the *Vimeo* court’s supposed rule of interpretation. The natural conclusion from this inconsistent usage would be that Congress uses the phrase “works protected under

102. Chapter 11 is grounded not on the Copyright Clause, but on the Commerce Clause. *Kiss Catalog, Ltd. v. Passport Int’l Prods.*, 405 F. Supp.2d 1169, 1173 (C.D. Cal. 2005).

103. Chapter 12 adds “new torts” to the Copyright Act with “their own distinct remedies.” NIMMER ON COPYRIGHT, *supra* note 12, at § 12A.18[A]. Section 1201(c) (1) was included to ensure that nothing in section 1201 would “. . . affect rights, remedies, limitations or defenses to copyright infringement.” *Id.* As Congress stated, “these . . . provisions [in Chapter 12] have little, if anything, to do with copyright law.” H. Rep. No. 105-551, Part 2, 105th Cong., 2d Sess. 24 (1998).

104. See NIMMER ON COPYRIGHT, *supra* note 12, at § 8B.01 n.5, citing S. Rep. No. 102-294, 102nd Cong. 2d Sess. 52 (1992) (“. . . nothing in chapter 10 . . . is intended to have any effect on any person’s rights or remedies under chapters 1 through 9”).

105. *Capitol Records, LLC*, 826 F.3d at 89.

106. *Id.*

107. See, e.g., 17 U.S.C. § 201(a) (2016) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”); *id.* § 1201 (“No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”).

108. *Id.* § 114(a).

this title” as simply a helpful formulation to capture all of the types of works protected by the Copyright Act, rather than as a limitation.

The most consistent use of “under this title” in the Act is where Congress wishes to describe civil enforcement of copyright. It generally uses the term “civil action under this title” to make that distinction.¹⁰⁹ This formulation makes sense: a civil action under the Copyright Act invokes various procedural and substantive rules that are specific to the Copyright Act.¹¹⁰

The closest that Congress seems to have ever come to the type of usage contemplated by *Vimeo* is in § 106, which describes the exclusive rights of “the owner of copyright under this title.”¹¹¹ However, here, “under this title” is modifying “owner of copyright,” not just “copyright”—which points to the fact that there is an entire chapter of the Copyright Act governing the issue of ownership in a copyright.¹¹²

On the other hand, every single time that Congress describes a limitation on copyright liability—like § 512—it omits the phrase “under this title.” For instance, the exception for “fair use of a copyrighted work” is in no way delimited;¹¹³ neither is the list of acts that “are not infringements of copyright” in § 110.¹¹⁴ We know from § 301(c) that none of these limitations are intended to limit state law rights in pre-1972 sound recordings,¹¹⁵ yet under the rationale of *Vimeo*, every single one of them could apply to such rights.

In summary, Congress uses the phrase “under this title” only in limited circumstances, and inconsistently at that. In the circumstances most directly relevant to *Vimeo*—limitations on liability—Congress has in fact taken the opposite tack. It follows that the “under this title” argument does not support *Vimeo*’s reading of the Copyright Act.

One might reasonably ask why Congress used the phrases “infringement,”¹¹⁶ “infringement under this title,”¹¹⁷ and “infringement of any right under this title”¹¹⁸ interchangeably if what it really meant in every single case was “copyright infringement.” As Professor Nimmer observed with respect to a different conundrum raised by Chapter 12, “[i]t is a sad commentary on the puzzles

109. See, e.g., *id.* § 505 (“In any civil action under this title, the court in its discretion may allow the recovery of full costs . . .”); *id.* § 507 (“No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.”).

110. See generally *id.* §§ 501–13.

111. *Id.* § 106.

112. See generally *id.* §§ 201–05.

113. *Id.* § 107.

114. *Id.* § 110. See also, e.g., *id.* § 121.

115. See also *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 346 (S.D.N.Y. 2014) (discussing the question whether New York state law recognized a fair use defense to infringement of state rights in pre-1972 sound recordings).

116. See, e.g., *id.* 17 U.S.C. § 1202(a) (“No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement . . .”).

117. See, e.g., *id.* § 1201(j)(2) (“Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title . . .”).

118. *Id.* § 1202(b).

surrounding the Digital Millennium Copyright Act to be forced to concede that there is no answer.”¹¹⁹

Put simply, § 512 did not need to delimit its scope by using the phrase “under this title,” because the phrase “infringement of copyright” accomplishes the same purpose. Section 501(a) of the Copyright Act provides that anyone who infringes the exclusive rights of the author, as set out in 17 U.S.C. §§ 106, 106A, and 602 and as delimited by §§ 107 through 122, “is an infringer of the copyright.”¹²⁰ The legislative history of this provision is clear that it is intended to be the “definition” of infringement in the Copyright Act.¹²¹ Because the function of a “definition” in a statute is to delimit what does and does not fall within the meaning of the term,¹²² it is apparent that the phrase “infringement of copyright” suffices to limit § 512 to actions arising under the Copyright Act, and therefore, adding “under this title” would have been simply redundant.

IV. THE TREATMENT OF STATE LAW CLAIMS UNDER THE CDA

Vimeo was not the first case in which a court struggled with statutory text in order to attempt to reconcile the status of pre-1972 sound recordings with federal Internet policy. That title belongs to *Perfect 10 v. CCBill*, a 2007 decision in which the Ninth Circuit held that intellectual property claims based on state law rights (including those that relate to pre-1972 sound recordings) were *wholly* barred by the Communications Decency Act (CDA).¹²³ Similar to *Vimeo*, the court employed dubious statutory interpretation in order to arrive at the policy result that it deemed prudent, resulting in substantial violence to the statutory scheme. While *CCBill* has not been followed outside the Ninth Circuit, as explained below, it is noteworthy that *Vimeo* creates a circuit split by treating state copyright equivalent claims as governed by § 512 of the Copyright Act and not by the CDA.

119. NIMMER ON COPYRIGHT, *supra* note 12, at § 12A.04 (2015); *see also* David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1342–43 (2004) (“[N]othing compares for sheer formal defects to the Digital Millennium Copyright Act (DMCA). . . . [I]ts execution leaves copyright law in shambles. . . . For sheer incoherence, the massive scope of the DMCA is nonpareil. . . . It is subject to endless contradictions and interpretive dead ends.” (footnotes omitted)).

120. 17 U.S.C. § 501(a).

121. H. COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., SUPP. REG.’S REP. ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 131 (Comm. Print 1965) (“It seems strange, though not very serious, that the present law lacks any statement or definition of what constitutes an infringement. Section 501(a) of the present bill is intended to supply that lack by providing: [text of § 501(a)].”). *See also* S. REP. NO. 101-305, at 5 (1990) (“Section 501(a) broadly defines a copyright infringer as ‘[a]nyone who violates any of the exclusive rights of the copyright owner. . . .’”); H.R. REP. NO. 94-1476, at 158 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5774 (observing that “[t]he bill, unlike the present law, contains a general statement of what constitutes infringement of copyright”—namely § 501(a)).

122. “As a rule, [a] definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.” *Burgess v. United States*, 553 U.S. 124, 130 (2008) (Ginsburg, J., for a unanimous court) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392–393 n.10 (1979)); *see also* *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

123. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007).

In a nutshell, the CDA insulates OSPs from most tort liability based on user-uploaded content that is hosted by the OSP.¹²⁴ An important exception in the statute carves out “any law pertaining to intellectual property,” which the CDA “shall [not] be construed to limit or expand.”¹²⁵ Earlier in 2007, the First Circuit observed that a trademark claim under Florida law was not governed by the CDA, though it held that the claim failed on other grounds.¹²⁶ But in *CCBill*, the Ninth Circuit rather startlingly held that “intellectual property” for purposes of the CDA meant only “federal intellectual property.”¹²⁷ Its entire analysis is as follows:

[S]tate laws protecting “intellectual property,” however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.¹²⁸

The condemnation of that holding has been almost universal among both courts¹²⁹ and commentators¹³⁰. The reason for this general disapprobation was

124. See Communications Decency Act, 47 U.S.C.A. § 230(c)(1) (2011).

125. *Id.* § 230(e)(2).

126. *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422–23 (1st Cir. 2007).

127. *CCBill*, 488 F.3d at 1118.

128. *Id.*

129. See *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 704 (S.D.N.Y. 2009) (Chin, J.) (discussing and rejecting *CCBill*, and holding that, “[b]ecause the plain language of the CDA is clear, as ‘any law’ means both state and federal law, the Court need not engage in an analysis of the CDA’s legislative history or purpose. Accordingly, I conclude, as a matter of law, that Section 230(c)(1) does not provide immunity for either federal or state intellectual property claims.” (citation omitted)); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 301 (D.N.H. 2008) (finding the holding of *CCBill* to be “simply unsupported,” and noting that there was “no reason to believe that reading § 230(e)(2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law—an obligation that persists under even [*CCBill*]’s construction of the CDA.”); See also *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 417 (S.D.N.Y. 2001); *UMG Recordings, Inc. v. Escape Media Grp., Inc.*, 948 N.Y.S.2d 881, 888 (N.Y. Sup. Ct. 2012), *rev’d on other grounds*, 964 N.Y.S.2d 106 (2013) (“This Court agrees [with *Atlantic Recording Corp.*] that the word ‘any’ in § 230(e)(2) means what it says.”) *Cf. Parisi v. Sinclair*, 774 F. Supp. 2d 310, 318 (D.D.C. 2011) (stating in dictum that the court was “not inclined to extend the scope of the CDA immunity as far as the Ninth Circuit” but ultimately avoiding the question); *UMG Recording, Inc. v. Veoh Networks, Inc.*, No. 600558/08, 2008 WL 5027243 (N.Y. Sup. Ct. 2008) (stating in dictum that “the weight of authority does not support the conclusion” that the CDA immunizes ISPs from state law intellectual property claims). *But see Curran v. Amazon.com, Inc.*, No. CIV.A. 2:07-0354, 2008 WL 472433, at *31 (S.D.W. Va. Feb. 19, 2008) (citing *CCBill* without analysis and in dicta).

130. See S. Michael Kernan, *Privacy in Social Media: The Right of Publicity*, 34 HASTINGS COMM. & ENT L.J. 363, 369–70 (2012); Joshua Dubnow, COMMENT, *Ensuring Innovation as the Internet Matures: Competing Interpretations of the Intellectual Property Exception to the Communications Decency Act Immunity*, 9 NW. J. TECH. & INTELL. PROP. 297, 307-08 (2010); Rachel A. Purcell, Note, *Is That Really Me?: Social Networking and the Right of Publicity*, 12 VAND. J. ENT. & TECH. L. 611, 623-24 (2010); Andrew J. Sabino, Note, *How Joe Schmo’s Name Could Transform the Internet: A Proposal to Preserve ISP Immunity Under the Communications Decency Act*, 45 NEW ENG.

perhaps best put by then-District Judge Denny Chin in *Atl. Recording Corp. v. Project Playlist, Inc.*: “The problem with [the *CCBill*] argument is that it lacks any support in the plain language of the CDA.”¹³¹

The holding in *CCBill* concerning state law intellectual property claims seems directly at odds with *Vimeo*. Under *Vimeo*, state “copyright” claims fall under § 512; plaintiffs can recover against an ISP, albeit only if the ISP fails to meet the requirements of § 512 and then is found directly or secondarily liable for infringement. Under *CCBill*, state law claims concerning pre-1972 sound recordings appear to be wholly barred. These cases demonstrate that the question of state law rights in pre-1972 sound recordings and their effect upon online entities has been troubling courts for some time.

V. ALTERING THE STATUTORY SCHEME FOR PRE-1972 SOUND RECORDINGS IS FOR CONGRESS

The Second Circuit embraced *Vimeo*’s argument that interpreting the law to exclude pre-1972 sound recordings would eviscerate the purposes of § 512, and accordingly those recordings must be included, despite the language in the statute. It overlooked the fact that Congress has made clear policy determinations on both sides. As the New York Supreme Court’s Appellate Division observed in *UMG Recs., Inc. v. Escape Media Group, Inc.*, when faced with this issue:¹³²

The statutory language at issue involves two equally clear and compelling Congressional priorities: to promote the existence of intellectual property on the Internet, and to insulate pre-1972 sound recordings from federal regulation. It is not unreasonable, based on the statutory language and the context in which the DMCA was enacted, to reconcile the two by concluding that Congress intended for the DMCA only to apply to post-1972 works . . . [D]efendants’ concerns about interpreting the statutes in the manner advocated by UMG are no more compelling than UMG’s concerns are about interpreting the statutes in the manner advanced by defendant.¹³³

That Congress intended § 512 to protect service providers does not support a judicial *post hoc* amendment of the statute to include state claims. The likely scenario was that Congress simply overlooked the situation of pre-1972 sound recordings, since they are not discussed in the legislative history.

L. REV. 913, 940 (2011) (arguing that right of publicity claims against ISPs *do* undermine the purpose of the CDA, but that the CDA as written does not protect against them); Kristina M. Sesek, Comment, *Twitter or Tweeter: Who Should Be Liable for A Right of Publicity Violation Under the CDA?*, 15 MARQ. INTELL. PROP. L. REV. 237, 251-55 (2011). *But see* Adam M. Greenfield, *Despite A Perfect 10, What Newspapers Should Know About Immunity (and Liability) for Online Commenting*, 4 J.L. & POL’Y FOR INFO. SOC’Y 453, 472-74 (2008) (arguing that policy would support applying the CDA to at least right of publicity claims).

131. *Atl. Recording Corp.*, 603 F. Supp. 2d at 703.

132. *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 964 N.Y.S.2d 106, 112 (N.Y. App. Div. 2013).

133. *Id.* at 112.

State law claims with respect to pre-1972 sound recordings are qualitatively different from copyright claims under federal law. The most fundamental problem with the *Vimeo* court's decision to include them under § 512 was that the court was not in a position to address the complexities of including them. It was unreasonable to perceive their inclusion as merely a binary decision. Had Congress meant to include pre-1972 sound recordings in § 512, it likely would have made additional changes to the law to ensure owners of those recordings were treated fairly. It might, for example, have decided to integrate pre-1972 sound recordings more fully into federal copyright law, or it might have provided owners of pre-1972 sound recording owners with a meaningful quid pro quo for the diminution of their state law rights. It likely would not have made inclusion in federal law dependent on whether the state claim was specifically called "copyright."

Congress has recently expressed interest in addressing the inclusion of pre-1972 sound recordings under federal copyright law, in whole or in part. In 2009, Congress requested the Copyright Office Report on Pre-1972 Sound Recordings,¹³⁴ in which the Copyright Office recommended legislation to bring pre-1972 sound recordings under the federal copyright law.¹³⁵ Congress is involved in a comprehensive review of the Copyright Act to determine what needs revision, since there has been no comprehensive revision since 1976,¹³⁶ and has heard from witnesses on this subject.¹³⁷ There is a bill currently pending in Congress that would provide owners of pre-1972 sound recordings with the same rights and remedies with respect to digital audio transmissions as copyrighted sound recordings currently enjoy.¹³⁸ In view of the current statutory language and the conflicting policy considerations, it would be appropriate for Congress to determine whether to include state "copyright-equivalent" claims under § 512, and further, whether pre-1972 sound recordings should be integrated more fully into the Copyright Act.¹³⁹

134. Copyright Office Report, *supra* note 10, at vii.

135. *Id.* at viii.

136. Press Release, US House of Representatives, Judiciary Committee, "Subcommittee to Hold First Hearing on Comprehensive Copyright Review" (May 15, 2013), <https://perma.cc/TD7Z-E62L>; U.S. House of Representatives, Judiciary Committee, US Copyright Law Review, <https://perma.cc/ESV9-BTPJ>.

137. *The Register's Call for Updates to U.S. Copyright Law Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Maria A. Pallante, Register of Copyrights of the United States), <https://perma.cc/CW9K-ZM42>; *Music Licensing Under Title 17 – Part 2 Before the Subcomm. on Courts, Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 2 (2014) (statement of Rosanne Cash, Americana Music Association), <https://perma.cc/3BBG-HGKY>.

138. CLASSICS Act, S. 2393, 115th Cong. (2018).

139. One concern with the status quo is that common law unfair competition or misappropriation claims concerning pre-1972 sound recordings might be deemed subject to the Communications Decency Act (CDA) § 230. *Compare Perfect 10, Inc.*, 340 F. Supp. 2d at 1108, *aff'd in part, rev'd in part and remanded*, 481 F.3d 751 (9th Cir. 2007) (holding that the immunity for intellectual property provided by the CDA does not apply to Perfect 10's Claim 6 for unfair competition under the [state law]) *with Atl. Recording Corp.*, 603 F. Supp. 2d at 702-703 (assuming, without discussion, that a state law unfair competition claim for protection of state intellectual property rights should be analyzed in the same way as a state "copyright" claim for the purpose of applying the CDA's intellectual property exclusion;

VI. CONCLUSION

Including all state law claims—both “copyright” and copyright-like causes of action—within the scope of § 512 is likely good policy. But that is not what Congress did when it enacted the DMCA. The *Vimeo* court should have left to Congress the decision whether and on what terms to include those recordings in § 512.¹⁴⁰ The court did not, and could not, bring all state law claims relating to pre-1972 copyright into the ambit of § 512, nor could it take into account the unique legal status of those recordings.

It is timely for Congress to address the outstanding issues concerning state rights in pre-1972 sound recordings, and in particular their relationship to the online economy. Congress should integrate pre-1972 sound recordings more fully and consistently into federal law. If it fails to act, courts will continue to struggle, and the result will be more decisions like *CCBill* and *Vimeo*.

holding that neither claim was barred) *and* *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 412 (S.D.N.Y. 2001) (denying motion to dismiss both Lanham Act claim and parallel state law unfair competition claim for trademark infringement). We believe this would be an incorrect result since these claims concerning unauthorized copying and distribution of pre-1972 sound recordings are genuinely “intellectual property” that should properly be excluded, but the possibility of a contrary decision remains.

140. *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring) (“Even if the proper interpretation of a statute upholds a ‘very bad policy,’ it ‘is not within our province to second-guess’ the ‘wisdom of Congress’ action’ by picking and choosing our preferred interpretation . . .” (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (Ginsburg, J.))).