21-2949(L)

21-2974(CON)

IN THE

United States Court of Appeals for the Second Circuit

CAPITOL RECORDS, LLC, a Delaware Limited Liability Company, CAROLINE RECORDS, INC., a New York Corporation, VIRGIN RECORDS AMERICA, INC., a California Corporation, EMI BLACKWOOD MUSIC INC., a Connecticut Corporation, EMI APRIL MUSIC INC., a Connecticut Corporation, EMI VIRGIN MUSIC, INC., a New York Corporation, COLGEMS-EMI MUSIC, INC., a Delaware Corporation, EMI VIRGIN SONGS, INC., a New York Corporation, EMI GOLD HORIZON MUSIC CORP., a New York Corporation, EMI UNART CATALOG INC., a New York Corporation, STONE DIAMOND MUSIC CORPORATION, a Michigan Corporation, EMI U CATALOG INC., a New York Corporation, JOBETE MUSIC CO., INC., a Michigan Corporation,

Plaintiffs-Appellants,

v.

VIMEO, INC., a Delaware Limited Liability company, AKA VIMEO.COM, CONNECTED VENTURES, LLC, a Delaware Limited Liability Company,

Defendants-Appellees,

DOES, 1-20 INCLUSIVE,

Defendants.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, AND COPYRIGHT ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

As required by Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), National Music Publishers' Association, Recording Industry Association of America, and the Copyright Alliance state that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
STATEMENT OF INTEREST OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 5
ARGUMENT 7

I. Licensing Is Sufficiently Complicated That It Would Be Obvious To A Reasonable Person With Minimal Familiarity With Licensing That Amateur Video Creators Did Not Obtain Adequate Licenses. 7

A. Music Licensing Is Complicated. 8

B. Most Digital Platforms Negotiate with Rightsholders to Permit their Users to Add Licensed Music to their Videos. 17

C. The District Court's Decision Ignores the Complexity of Licensing...21

II. It Is Obvious That The Fair Use Doctrine Does Not Apply To Any Of The Videos At Issue Here. 22

III. Vimeo Exercises Unique Curatorial Control Over The Videos It Hosts. 27

TABLE OF AUTHORITIES

CASES

Campbell v. Acuff-Rose Music, Inc.,
510 U.S. 569 (1994) 24, 25

Capitol Records, LLC v. ReDigi Inc.,
910 F.3d 649 (2d Cir. 2018) 26

Capitol Records, LLC v. Vimeo, LLC,
826 F.3d 78 (2d Cir. 2016) 5
972 F. Supp. 2d 500 (S.D.N.Y. 2013) 6, 27
No. 09-CV-10101 (RA), 2021 U.S. Dist. LEXIS 101663
(S.D.N.Y. May 28, 2021) .... *passim*

Cariou v. Prince,
714 F.3d 694 (2d Cir. 2013) 25

Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.,
150 F.3d 132 (2d Cir. 1998) 24

Infinity Broad. Corp. v. Kirkwood,
150 F.3d 104 (2d Cir. 1998) 23, 26

UMG Recordings, Inc. v. Shelter Cap. Partners LLC,
718 F.3d 1006 (9th Cir. 2013) 29

Ventura Content, Ltd. v. Motherless, Inc.,
885 F.3d 597 (9th Cir. 2018) 29

WNET v. Aereo, Inc.,
722 F.3d 500 (2d Cir. 2013) 10

STATUTES

17 U.S.C. § 106 15

17 U.S.C. § 107 .... 24, 25, 26

17 U.S.C. § 512 3

OTHER AUTHORITIES

All You Need Is Love, TheBeatles.com. 9

Hunter Anderson, *A Guide To Key Pay Sources In Mexico: SACM, ANDI, EJE*, SongTrust Blog (Sept. 20, 2021) 17

ASCAP, *A Checklist for Using Music in Film or other Audio-Video Content* 11, 15

ASCAP, *ASCAP Repertory Search*..12

ASCAP, *ASCAP Repertory Search: Rain On Me* 12

ASCAP, *Collecting International Royalties* 17

ASCAP, *Common Licensing Terms Defined*. 9

ASCAP, *FAQs for YouTube Content Uploaders* 19

BMAT, *BMAT For Publishers* 28

BMI, *BMI and Performing Rights* 15

BMI, *International Agreements With Foreign Performing Rights Organizations* 17

Jeff Brabec & Todd Brabec, *Music Money and Success: The Insider's Guide to Making Money in the Music Business* (8th ed. 2018) 9

Jeffrey Brabec & Todd Brabec, *Music Royalties 101*, 1 USC ENT. L. SPOTLIGHT 41 (2017) 21

Mark Cersosimo, *Here's exactly how to license music for marketing videos, plus helpful music resources*, Vimeo.com (Sept. 3, 2021) 24

Copyright Compliance and Data Deduplication, ACRCloud 28

Easy Song Team, *What is a Print License?* (Sept. 3, 2021) 16

Easy Song Team, *What is a Synchronization License?* (Dec. 22, 2021).................14

Easy Song Team, *What Type of License Do I Need for YouTube?* (Sept. 9, 2021) 19

Joshua P. Friedlander & Matthew Bass, Recording Indus. Assoc. of America, *Year-End 2021 RIAA Revenue Statistics* (Mar. 9, 2022)....................................20

Getting Permission, CopyrightKids.org 11, 12

Global Music Rights, *Search Catalog* 12

Gameli Hamelo, *A Guide To Key Pay Sources In Ireland: IMRO, MCPSI*, SongTrust Blog (Oct. 5, 2021) 17

Amanda Hess, *How Lip-Syncing Got Real*, N.Y. TIMES, Sept. 29, 2021 17

How Content ID works, YouTube Help...28

Identification, AudibleMagic.com 28

Al Kohn & Bob Kohn, *Kohn on Music Licensing* (4th ed. 2009) 24

Akos Lada et al., *How does News Feed predict what you want to see?*, Tech at Meta (Jan. 26, 2021) 28

Edward Lee, *Fair Use Avoidance In Music Cases*, 59 B.C. L. REV. 1873 (2018) 23

Amanda Montgomery, *How Tiktok Has Created An Ecosystem That Both New Music And Back Catalogs Can Thrive In*, SynchBlog (Jan. 17, 2021)......... 18, 23

Music Matters, *Why Music Matters* 16, 18, 19

Music Recognition, Gracenote 28

Dmitry Pastukhov, *How Music Synchronization Licenses Work: Inside Movie, Advertisement, and Video Game Sync Licensing*, Soundcharts Blog (Sept. 3, 2019) 10

SESAC, *Licensing FAQs* 15

SESAC, *Repertory* 12

Murray Stassen, *Tiktok and Universal Music Group Sign Global Licensing Deal*, Music Business Worldwide (Feb. 8, 2021) 16, 18, 23

U.S. Copyright Office, *Copyright Registration for Sound Recordings*, Circular 56 10

Vimeo Helpdesk, *Does fair use give me free reign to reuse any material I want without getting permission?*, Vimeo.com..23

Vimeo Helpdesk, *Using Music in Your Videos*, Vimeo.com 14

Vimeo Helpdesk, *What do the four fair use factors mean?*, Vimeo.com................26

YouTube Operations Guide: Using Content ID, YouTube Help.............................28

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are organizations whose members create and disseminate a wide variety of sound recordings and musical compositions. Their members license music to a variety of third parties, including to streaming, social media, and video-sharing platforms.

The National Music Publishers' Association ("NMPA") is the principal trade association representing the United States music publishing and songwriting industry. Over the last century, NMPA has served as the leading voice representing American music publishers before Congress, in the courts, within the music, entertainment, and technology industries, and to the public. NMPA's membership includes "major" music publishers affiliated with large entertainment companies as well as independently owned and operated music publishers of all sizes representing musical works of all genres. Taken together, compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical compositions licensed for commercial use in the United States.

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[1] No party or party's counsel has wholly or partly authored this brief, or contributed money intended to fund preparing or submitting the brief. No person other than *amici* has contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4).

The Recording Industry Association of America ("RIAA") supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA's several hundred members—ranging from major American music groups with global reach to artist-owned labels and small businesses—make up the world's most vibrant and innovative music community. RIAA members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States.

The Copyright Alliance is dedicated to advocating for policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators. It is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization. The Copyright Alliance represents the copyright interests of over 1.8 million individual creators and over 13,000 organizations across the entire spectrum of creative industries, including graphic and visual artists, photographers, writers, musical composers and recording artists, journalists, documentarians and filmmakers, and software developers, as well as the small and large businesses that support them.

Amici's members depend on effective copyright enforcement to protect the recorded music and musical works that they create, invest in, distribute, and license. Most internet platforms today play by well-known rules to offer their users the

valuable service of using and enjoying copyrighted music in authorized and legitimate ways. But some don't. *Amici* therefore have a significant interest in the proper interpretation of the Digital Millennium Copyright Act provisions establishing the proper bounds of "right and ability to control" and "red flag knowledge," 17 U.S.C. §§ 512(c)(1)(A)(ii), (c)(1)(B). Whether and how internet service providers are barred from invoking the DMCA's safe harbor protections because they possess "the right and ability to control" users' "infringing activity" or because their employees have knowledge "of facts or circumstances from which infringing activity is apparent," *id.*, delimits the effective scope of legal protections for songwriters and musical artists' creative work.

Amici agree with Plaintiffs that the record in this case establishes that Vimeo exercised editorial control that amounted to substantial influence over its users' activities and that its employees knew facts that made the infringement at issue obvious. Given the evidence of Vimeo employees' knowledge of copyright and licensing, the district court's speculation that Vimeo employees might have reasonably believed the use of entire songs was licensed or authorized by fair use is plainly wrong.

Amici write separately to explain why the district court's contrary conclusions cannot be squared with a basic understanding of the music industry and related

technology. As to red flag knowledge, the record in this case demonstrates that even in 2006, the music industry was evolving to thrive in a streaming world. Music publishers and record companies work hand-in-hand with legitimate digital service providers to expand the possibilities for user-created content while fairly protecting the property rights of songwriters, artists, and music companies. Anyone with a passing familiarity with the music business—never mind the extensive familiarity of Vimeo's employees—would understand how unlikely it is that an amateur user posting a home-recorded video of someone lip-syncing to a full-length sound recording of popular music had obtained the necessary licenses. They would also find it obvious that such use of a full-length sound recording of a hit song, without any alteration, was not fair use.

Vimeo's employees would have been well aware of how copyrighted music was being used in such videos because they exercised an atypical degree of editorial control for an internet platform. The typical "hands off" practices of some internet content hosts—which use automated systems for basic site maintenance or accessibility-enhancing functions and steer clear of editorial interference—contrast sharply with Vimeo's human engagement. Vimeo's bespoke curation practices constituted substantial influence over their users' infringing videos and should have disqualified Vimeo from the safe harbor.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized that "innumerable facts . . . might make infringement obvious" when a digital service provider's employees "have expertise or knowledge with respect to the market for music and the laws of copyright." *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94, 97 (2d Cir. 2016). The district court acknowledged that Vimeo employees had the expertise—they understood "licensing as a concept" and "may have been able to determine that the fair-use doctrine did not apply in the obvious case." *Capitol Records, LLC v. Vimeo, LLC*, No. 09-CV-10101 (RA), 2021 U.S. Dist. LEXIS 101663, at *20, *22 (S.D.N.Y. May 28, 2021). Yet the district court held that even so, only two facts could make infringement obvious: (i) specific "knowledge . . . of the likelihood that specific users . . . did not have authorization for the music in their videos," *id.* at *20, and (ii) specific knowledge that a video was not a parody or otherwise qualified as fair use, *id.* at *22.

But both of these facts are virtual stand-ins for actual knowledge of infringement. The district court's rule thus impermissibly collapses the distinction between "red flag" knowledge and actual knowledge, which must be a "real difference," even if it "may not be vast." *Capitol Records*, 826 F.3d at 97. What's more, the district court's speculation that it would be reasonable for a Vimeo

employee to assume authorization or fair use cannot be squared with its acknowledgement of Vimeo employees' familiarity with the music industry. A reasonable employee who understands how licensing and fair use are supposed to work must be able to apply those concepts in at least some circumstances—and especially the easy cases at issue here. Licensing is far too complex for a reasonable employee who understands the concept—and even describes it as "confusing" and "painful," 2021 U.S. Dist. LEXIS 101663, at *20—to assume that an amateur user who posted a video of a dance routine or lip-sync to a full-length hit song had obtained the many needed licenses to legitimately make use of a copyrighted song in that video. Ditto for fair use. The videos at issue here present precisely the sort of "obvious case," *id.* at *22, that sophisticated employees of a business that regularly profits from popular copyrighted music would be able to recognize.

The district court also wrongly held that Vimeo "lacked the right and ability to control infringing activity." *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 526 (S.D.N.Y. 2013). Vimeo's detailed review and hands-on curation of users' content stands in stark contrast to the automated mechanisms employed by other sites for basic site maintenance functions. Such "substantial influence" over—and profiting from—users' infringing activity falls within the heartland of the kind of control Congress intended to disqualify a digital platform from the safe harbor.

Songwriters, artists, and music companies have worked hard to develop a thriving marketplace for licensed online music, making it easy for digital platforms and their users to lawfully and legitimately enrich their content, while protecting the rights of copyright holders. The district court's blinkered construction of "right and ability to control" and "red flag" knowledge undermines this hard-won equilibrium by encouraging digital platforms to build business models that profit from the obviously infringing use of music.

ARGUMENT

I. Licensing Is Sufficiently Complicated That It Would Be Obvious To A Reasonable Person With Minimal Familiarity With Licensing That Amateur Video Creators Did Not Obtain Adequate Licenses.

The district court acknowledged evidence that Vimeo employees had a working knowledge of licensing, yet still concluded such employees could reasonably assume that amateur users posting videos of dance routines and lip syncs to popular songs had obtained licenses, unless the employees had specific knowledge otherwise. But that default assumption is nonsensical to anyone who understands licensing, even at a rudimentary level. Music licensing is complicated, and sufficiently difficult for amateur users to navigate that no Vimeo employee could reasonably assume that amateur users had jumped through all the necessary wickets (and paid the requisite royalties). That is why other digital service providers have

negotiated licenses or arrangements at the platform level that allow their users to use copyrighted music in an authorized way, securing the rich musical content for their platforms that such licenses enable while helping users and protecting copyrights. These sorts of arrangements—and not one-off deals between leading songwriters' publishers and artists' record labels and a person posting a home video—are how amateur videos on digital platforms are almost always licensed. Absent such platform-level or blanket arrangements—which Vimeo contemplated but rejected, *see* Appellants' Br. 13-14—no reasonable employee would simply assume an amateur video's use of music was properly licensed.

A. Music Licensing Is Complicated.

Navigating music licensing, especially for a layperson, can be overwhelmingly complex. For every song, there are multiple copyrights, held by multiple people or companies. First, there is a copyright in the composition, *i.e.*, the lyrics, melody, and structure—akin to the sheet music. The composition copyright belongs to the songwriter, lyricist, and/or composer. For instance, Dolly Parton wrote the music and lyrics for "I Will Always Love You," and therefore she (and/or her publisher) holds the composition copyright. Often, more than one songwriter will share ownership of the composition; John Lennon and Paul McCartney share song-writing credit (and therefore the composition copyright) for "All You Need Is

Love."[2] Sometimes producers also share song-writing credit. In practice, permission from *all* the songwriters on a given composition is required for a license. *See* Jeff Brabec & Todd Brabec, *Music Money and Success: The Insider's Guide to Making Money in the Music Business* 104, 246 (8th ed. 2018). Further complicating matters, composition copyrights are often managed by a music publisher, who partially owns the composition copyright and administers it on behalf of the songwriter (called a "co-publishing" arrangement). As partial owner of the copyright, the publisher is entitled to a portion of the licensing fee or royalties. And each songwriter on a particular composition will have her own publisher or administrator.

Second, in addition to the composition right for the music and lyrics, there is also a copyright for a sound recording (or "master" recording), which contains a performing artist's particular expression of the underlying musical composition. This copyright "encompasses what you hear: the artist singing, the musicians playing, the entire production."[3] There can be many masters for a single composition—for instance, Dolly Parton and Whitney Houston have separate

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[2] *All You Need Is Love*, TheBeatles.com, https://tinyurl.com/93d77xht.
[3] ASCAP, *Common Licensing Terms Defined*, https://tinyurl.com/2p8rebem.

recordings of "I Will Always Love You." Each master recording has its own copyright and may be owned by different record labels.[4]

Using already-recorded music in a video requires multiple licenses from the above copyright holders. Dissemination of a composition on the internet is considered a public performance, *see, e.g.*, *WNET v. Aereo, Inc.*, 722 F.3d 500, 504 (2d Cir. 2013), so it requires a public performance license. Use of the composition in an audio-visual work requires an additional "synchronization" or "synch" license. 6 *Nimmer on Copyright* § 30.02[F][3] ("A license is necessary if an existing musical composition is to be used in synchronization or 'timed-relation' with an audiovisual work."). And a separate "master use" license is needed to use a particular sound recording. These distinct licenses are needed even if the songwriter is the same person as the performing artist.[5] Thus, for Dolly Parton's recording of her own song, two separate entities may own or control the copyrights to the composition (a publishing company or administrator) and sound recording (a record label), and both must grant licenses.

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[4] U.S. Copyright Office, *Copyright Registration for Sound Recordings*, Circular 56, https://tinyurl.com/scd8bnvh.
[5] Dmitry Pastukhov, *How Music Synchronization Licenses Work: Inside Movie, Advertisement, and Video Game Sync Licensing*, Soundcharts Blog (Sept. 3, 2019), https://tinyurl.com/2p8wuanv.

Given the several licenses and copyright holders, a user attempting to license the use of a song for an amateur video must take many steps.[6] To understand how this would work in practice, imagine a user named Jane who wants to make a video of herself dancing to the popular Lady Gaga and Ariana Grande song "Rain On Me."

Step zero is for Jane to be aware of licensing and understand what licenses are needed and how to obtain them.

Assuming Jane even knows that she must acquire licenses, she first needs to figure out who the song's publishers are so she can obtain synch licenses from them for the compositions. If Jane has a CD case, it may have publisher information. She can also try an internet search, but here it does not yield results for the publishers of "Rain On Me." Alternatively, there are four performance rights organizations (PROs)[7] that represent songwriters and publishers, and they each have searchable databases, including contact information for publishers of the songs in their repertories. All songwriters and publishers must belong to one of the PROs, but membership is exclusive, so each songwriter or publisher is a member of only *one.*[8]

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[6] *See, e.g.*, ASCAP, *A Checklist for Using Music in Film or other Audio-Video Content*, https://tinyurl.com/2uje2uvw.
[7] BMI, ASCAP, GMR, and SESAC
[8] *Getting Permission*, CopyrightKids.org, https://tinyurl.com/2p8wncfe.

Because the PROs provide publisher information only for the writers they represent,[9] Jane may have to search all four PRO databases to find contact information for *each* publisher for a single song.

If Jane types "Rain On Me" into the GMR database search,[10] the song does not come up, so Jane moves on to try the SESAC database.[11] This time, there are a dozen songs entitled "Rain On Me." She must figure out which, if any, is the song she is interested in. If she searches for the title "Rain On Me" and artist "Gaga" or "Grande," there are no hits, so Jane assumes that none of the dozen songs entitled "Rain On Me" in the SESAC database are the one she wants. Next, she tries ASCAP, which displays songs in both the ASCAP and BMI repertories.[12] Searching for song title "Rain On Me" pulls up 418 results, but searching for that title and performer "Grande" yields one result—the song she is looking for![13] Now Jane has information on the songwriters and publishers.

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[9] *Id.*
[10] Global Music Rights, *Search Catalog*, https://tinyurl.com/ys4esxym.
[11] SESAC, *Repertory*, https://tinyurl.com/4f3y6vpu.
[12] ASCAP, *ASCAP Repertory Search*, https://tinyurl.com/2p8s2m5s.
[13] ASCAP, *ASCAP Repertory Search: Rain On Me*, https://tinyurl.com/5n6pdw7m.

Search for:

Title | rain on me | Performer | grande | SEARCH

Filter by:

SONGVIEW — Combined view of ASCAP and BMI works | ace — Works in the ASCAP Repertory | ascap100% — Works 100% controlled by ASCAP

RAIN ON ME

ISWC: T3000669701 Work ID: 908692623

Total Current ASCAP Share: 32.65%

Writers

ASCAP controls: 19.37%

Writers	PRO	IPI
BRESSO MARTIN JOSEPH LEONARD	BMI	491660145
BURDEN JEREMIAH	BMI	87728527
BURNS MATTHEW	BMI	598330808
CHARLES NIJA	BMI	874280709
GERMANOTTA STEFANI	BMI	519338442
GRANDE ARIANA	ASCAP	664244638
PARKER BETTY WRIGHT	ASCAP	51226808
RIDHA ALEXANDER	GEMA	448323454
TUCKER MICHAEL KEVIN	BMI	1060400226
WILLIAMS VERNETTA LYNN	BMI	516411484
YACOUB RAMI	BMI	259437338

Publishers

ASCAP controls: 13.28%

Publishers	PRO	IPI
BOYSNOIZE PUBLISHING GMBH Contact Info	GEMA	671994006
GRANDARIMUSIC Contact Info	ASCAP	681703244
MICHAEL DIAMOND MUSIC [1] Contact Info	NS	689502996
NAMPHUYO PUBLISHING INC Contact Info	NS	49738343
THESE ARE SONGS OF PULSE Contact Info	ASCAP	739228421
UNIVERSAL MUSIC CORPORATION Contact Info	ASCAP	31312147

Additional Non-ASCAP Publishers

For this song, there are 11 songwriters. ASCAP lists 6 publishers, but also notes that there are “Additional Non-ASCAP publishers.” ASCAP includes contact information for the 6 publishers it represents. Jane will need to ask those 6 publishers if they have information for the other rightsholders, so she can contact the non-ASCAP publishers whose contact info is not listed on ASCAP’s page. Once she locates contact information, Jane must call, email, or write a letter to each of the publishers, explaining how and why she wants to use “Rain On Me,” and, if the publisher responds, potentially negotiate a synch license with each publisher. This negotiation encompasses not only the price but also, among other terms, the duration of the license (*e.g.*, 3 months, 1 year, or in perpetuity), the length of the music that can be used (*e.g.*, a short clip or the entire song), and the allowable use of the video

(*e.g.*, a one-time showing or repeated viewing). This process "can be challenging"[14] because synchronization licenses are not compulsory; songwriters and their publishers can set any fee they wish, take as long as they need to grant the license, or simply refuse. Because it is uncommon for an individual user to seek a synch license, this process may be an uphill battle for Jane. Publishers have hundreds of thousands, or even millions, of songs in their respective catalogues. Publishers' limited licensing resources are devoted to negotiating lucrative synch placements for their writers—whether by selling licenses for a song's use in film, TV, or commercials, or by negotiating catalogue-level synch licenses for large platforms like Facebook, Instagram, Snapchat, and TikTok. Time and resources do not typically allow publishers to respond to and negotiate one-off synch licenses with the hundreds of millions of individual internet video platform users.

Next, Jane would *also* have to obtain an additional license from the PROs—the performance license.[15] *See, e.g.*, Vimeo Helpdesk, *Using Music in Your Videos*, Vimeo.com, https://vimeoott.zendesk.com/hc/en-us/articles/360057440493-Using-

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[14] Easy Song Team, *What is a Synchronization License?* (Dec. 22, 2021), https://tinyurl.com/mexj4t3f.

[15] As explained in more depth below, most digital service providers that host user-generated content, such as YouTube, have their own performance licenses so that users need not obtain these to post videos on their sites. Vimeo has no such license.

Music-in-Your-Videos ("[F]or the purposes of using a song for your live or on-demand video, you need to acquire a public performance license by getting in contact with a performance rights organization."). The catch is that PROs generally provide only "bulk licenses," covering their entire repertory.[16] ASCAP suggests that a user looking for a public performance license for a single song may need to contact the publisher directly.[17] Even if this performance license can be obtained from the same entity as the synchronization license, Jane must be savvy enough to specifically seek a license granting the *public performance* right in addition to the synch license, which covers the copyright holder's separate, *reproduction* right. *See* 17 U.S.C. § 106(1), (4). Because the vast majority of public performance licenses are granted by the PROs, synch licenses generally do not include the performance right. Nevertheless, Jane will somehow need a license or licenses covering the public performance *and* reproduction rights from *all* of the publishers and/or PROs representing *all* of the writers of "Rain On Me."

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[16] ASCAP, *A Checklist for Using Music in Film or other Audio-Video Content*, https://tinyurl.com/2uje2uvw; BMI, *BMI and Performing Rights*, https://tinyurl.com/46ey3d4; SESAC, *Licensing FAQs*, https://tinyurl.com/2p9d3pvh.

[17] ASCAP, *A Checklist for Using Music in Film or other Audio-Video Content*, https://tinyurl.com/2uje2uvw.

With the synch and public performance licenses in hand, Jane still needs to obtain the master recording license from the record label. She would once again use an internet search to find the contact information for the correct rightsholder. Of course, video licensing for master recordings is typically handled at the business-to-business level (as exemplified by the licensing deals between record labels and TikTok and other video platforms),[18] not by individual users. If Jane manages to make contact with the record label, she will likely need to provide detailed information about her project so that the label can assess the type of use and the scope and terms of the proposed license. Once Jane provides this information, and only after she receives a response, she can begin negotiations.

Finally, if Jane is displaying any song lyrics in the video, she will also need to obtain a print license.[19] Once again, this requires contacting the publishers and negotiating with them. The print license is separate from both the synch license and the public performance license.

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[18] *See, e.g.*, Murray Stassen**,** *Tiktok and Universal Music Group Sign Global Licensing Deal*, Music Business Worldwide (Feb. 8, 2021), https://tinyurl.com/25z6ewvm; Music Matters, *Why Music Matters*, https://tinyurl.com/yc26erk9.

[19] Easy Song Team, *What is a Print License?* (Sept. 3, 2021), https://tinyurl.com/442pbnyz.

Only after Jane has secured these licenses does she have a right to create a dance routine video and disseminate it. These licenses, however, may cover United States rights only. Because Vimeo is available globally, Jane would also need to obtain authorization for all foreign territories where Vimeo is available. The specific rights needed differ from country to country, as do the entities that license and collect royalties for those rights (though United States PROs may sometimes have relevant relationships with international organizations).[20]

B. Most Digital Platforms Negotiate with Rightsholders to Permit their Users to Add Licensed Music to their Videos.

Videos with music are hugely popular and an essential part of the business models of many digital platforms. *See* Appellants' Br. 14-15, 38 (describing evidence that lip sync videos were an important source of Vimeo traffic and that Vimeo staff wanted to ensure that highlighted videos contained good music); *see also* Amanda Hess, *How Lip-Syncing Got Real*, N.Y. TIMES, Sept. 29, 2021, at C1, *available at* https://tinyurl.com/2p955u2m. But digital services know that individual

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[20] *Compare, e.g.*, Hunter Anderson, *A Guide To Key Pay Sources In Mexico: SACM, ANDI, EJE*, SongTrust Blog (Sept. 20, 2021), https://tinyurl.com/wp3vfxdc, *with* Gameli Hamelo, *A Guide To Key Pay Sources In Ireland: IMRO, MCPSI*, SongTrust Blog (Oct. 5, 2021), https://tinyurl.com/2p8mx7tx. *See* ASCAP, *Collecting International Royalties*, https://tinyurl.com/3j2e4h4k; BMI, *International Agreements With Foreign Performing Rights Organizations*, https://tinyurl.com/3ach2r7r.

users like Jane do not hunt down scores of copyright holders, negotiate the terms of multiple distinct licenses, and pay royalties to upload a video of themselves dancing to "Rain On Me." For that reason, many other digital platforms have partnered with music companies: they have obtained licenses that allow their users to legitimately upload videos that use popular music from an entire catalogue of copyrighted songs. These business-to-business licenses have fostered a thriving market for amateur videos featuring the world's most popular music.

For instance, even though short-form videos uploaded by users to TikTok feature only brief clips of songs, TikTok has negotiated and obtained licenses from both publishers and record companies that allow its users to easily utilize popular songs.[21] In fact, numerous platforms that offer short-form video services, including Facebook and Snapchat, have obtained licenses from one or more of the major record companies.[22] Usually, this licensing does not happen on a work-by-work basis; rather, these services often enter into licensing agreements with record companies for entire catalogues. The platforms obtain authorization to use copyrighted works, and the copyright owners then receive royalties from the platforms. Many platforms

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[21] *See, e.g.*, Stassen, *supra* note 18; Amanda Montgomery, *How Tiktok Has Created An Ecosystem That Both New Music And Back Catalogs Can Thrive In*, SynchBlog (Jan. 17, 2021), https://tinyurl.com/4ahjcz47.
[22] *See* Music Matters, *supra* note 18.

providing short-form video services (including TikTok, Facebook, Instagram, and Snapchat) have also obtained licenses from music publishers, by negotiating direct deals with larger publishers and offering opt-in agreements to smaller publishers where royalty pools are distributed to the participating publishers.

YouTube uses a slightly different model. Although it did not obtain a synch license covering the entire platform, YouTube has offered publishers the option to participate in its ContentID system since 2006. *See* Appellants' Br. 14. Through ContentID, publishers can submit their catalog to YouTube and if YouTube detects a publisher's song in a video (using the ContentID software), YouTube notifies the publisher and the publisher can choose whether to receive ad revenue from the video or have the video taken down. YouTube has also obtained licenses from the PROs for the public performance of works in their catalogs, as well as master recording rights.[23] Such platform-wide arrangements provide an efficient and cost-effective way for rightsholders to allow individual users like Jane to access content for online videos.

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[23] ASCAP, *FAQs for YouTube Content Uploaders*, https://tinyurl.com/pbx3z6df; Easy Song Team, *What Type of License Do I Need for YouTube?* (Sept. 9, 2021), https://tinyurl.com/2fvmyed5; Music Matters, *supra* note 18.

These platform-level licenses have helped created a robust marketplace for authorized amateur videos that make use of popular music. Thousands of licensed videos are posted to various platforms every day, resulting in hundreds of millions of dollars in annual revenue for songwriters, recording artists, music publishers, and record companies.[24] The overwhelming majority of this revenue is collected from licensed platforms like Facebook and TikTok, not from individual amateur video creators like Jane.

Like dozens of other online services, including many of its competitors, Vimeo could have sought to obtain licenses from music publishers and record companies, which would have ensured that its users' incorporation of music into their videos was authorized. Such licenses negotiated by digital platforms ensure that their users can easily, and legitimately, avail themselves of copyrighted content. But Vimeo chose to reject these user-friendly licensing options. *See* Appellants' Br. 13-14. Instead, Vimeo left users to their own devices, relying on a wholly *un*reasonable theory of how the music licensing business works.

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[24] Joshua P. Friedlander & Matthew Bass, Recording Indus. Assoc. of America, *Year-End 2021 RIAA Revenue Statistics* 3 (Mar. 9, 2022), https://tinyurl.com/yeywd63h.

C. The District Court's Decision Ignores the Complexity of Licensing.

The district court's decision threatens to undo the foundations of the robust digital music market by condoning Vimeo's "see nothing" approach in reliance on a theory that cannot be squared with what a reasonable employee who understands "licensing as a concept," 2021 U.S. Dist. LEXIS 101663, at *20, would find obvious. The district court ruled that even employees generally familiar with licensing could reasonably assume, absent actual specific knowledge otherwise (such as knowledge that a particular artist *never* licensed their music, *id.* at *15-*16), that an individual amateur user navigated the complicated process to appropriately license songs from each publisher and record company. But the only reasonable belief is precisely the opposite.

When employees are generally familiar with music licensing, as the district court held here, those employees know enough to know that it is wildly implausible that a single amateur user, let alone thousands of them, recognized the need for licenses, navigated the process, and paid to obtain synchronization, performance, and master recording licenses. *See, e.g.*, Jeff Brabec & Todd Brabec, *Music Royalties 101*, 1 USC ENT. L. SPOTLIGHT 41, 46 (2017) (internet posters of "[u]ser generated content . . . obviously do not seek out licenses for the music they may use"). When an amateur video creator uploads a video using entire hit songs, it would be obvious

to any reasonable person with passing familiarity with music licensing that such a video is not authorized, absent some indication otherwise (e.g., "with permission").

And the evidence of Vimeo's employees' knowledge of music licensing shows even greater expertise; employees recognized that music licensing is "confusing," "painful," and almost always accomplished at the platform level—an option that Vimeo rejected. *See* Appellants' Br. 14, 56. If the district court is right that no reasonable jury could find red flag knowledge here, despite the evidence of Vimeo employees' knowledge of the implausibility of amateur users obtaining licenses, then red flag knowledge is effectively eliminated as a distinct carve-out from the DCMA safe harbor.

II. It Is Obvious That The Fair Use Doctrine Does Not Apply To Any Of The Videos At Issue Here.

As with licensing, the district court imputed wholly implausible beliefs, rather than reasonable ones, to employees familiar with fair use. The district court rightly acknowledged that Vimeo's employees know enough that they "may have been able to determine that the fair-use doctrine did not apply in the obvious case." 2021 U.S. Dist. LEXIS 101663, at *22. The court went wrong when it held that the videos in suit are not "obvious cases" where fair use does not apply. *See id.* Even under the most basic understanding of fair use, it is obvious that the use of a full, unedited song for purposes of a lip-sync or dance video is not fair. Anyone who reads the news

knows that even a brief clip of a song used on TikTok requires licensing and royalties;[25] you don't have to be the "next Nimmer," or even a copyright lawyer, to understand as much. And the record shows that Vimeo employees told users that adding copyrighted music to a video "generally" constitutes infringement. Appellants' Br. 59. While Vimeo employees may not know when fair use applies in every case, it is obvious that fair use does not apply in the easy cases where popular songs are lifted wholesale for lip sync and dance videos.

The use of an entire, unedited song in a lip sync video is a clear-cut case of infringement where no difficult legal questions are presented. *See, e.g.*, *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) ("[G]enerally, it may not constitute a fair use if the entire work is reproduced." (citing Nimmer on Copyright, § 13.05[A][3] at 13-178 (1997))); *see also* Vimeo Helpdesk, *Does fair use give me free reign to reuse any material I want without getting permission?*, Vimeo.com, https://vimeo.zendesk.com/hc/en-us/articles/224818507-Does-fair-use-give-me-free-reign-to-reuse-any-material-I-want-without-getting-permission- ("[Y]ou can't copy someone else's work and then simply claim fair use."). There is not a *single* case that has ever found the use of an entire song to be fair use. *Cf.*

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[25] Stassen, *supra* note 18; Montgomery, *supra* note 21.

Edward Lee, *Fair Use Avoidance In Music Cases*, 59 B.C. L. REV. 1873, 1878 (2018) (besides the parody use of *part* of a song in *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569 (1994), "only one federal case has recognized a songwriter's fair use in copying or borrowing parts of another composition . . . [a] sampling of 35 seconds of a [spoken word] sound recording"). No one could plausibly assume fair use for the videos here.

The district court attempted to distinguish use of a complete song in a video from "a mere facsimile of copyrighted material," 2021 U.S. Dist. LEXIS 101663, at *22, but making an entire unedited song the background to a lip sync video is equally obvious. It has been clear for decades that this precise use requires licensing. The synchronization and master recording licenses, and the well-developed markets for obtaining them, prove as much. *See* Al Kohn & Bob Kohn, *Kohn on Music Licensing* 1086-86, 1095, 1544-45 (4th ed. 2009); *see also, e.g.*, Mark Cersosimo, *Here's exactly how to license music for marketing videos, plus helpful music resources*, Vimeo.com (Sept. 3, 2021), https://vimeo.com/blog/post/music-resources-for-your-videos/. That market alone cuts strongly against fair use, because uses that act as substitutes for licensed uses in established markets are not fair. *See Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc*., 150 F.3d 132, 145 (2d Cir. 1998); *see* 17 U.S.C. § 107(4) ("the effect of the use upon the potential market for or value of the

copyrighted work" is a factor in determining fair use). Because the songs here are copied in full "with little added or changed," they are a "superseding use, fulfilling demand for the original." *Campbell*, 510 U.S. at 587-88.

Each of the other three fair use factors, 17 U.S.C. § 107, likewise confirms what Vimeo itself said: "unauthorized use of a popular song in the background of your video" is a "clear violation" of copyright. 2021 U.S. Dist. LEXIS 101663, at *22.

The "nature of the copyrighted work," 17 U.S.C. § 107(2), is "expressive" and "creative," and thus squarely within the realm of core copyright protection. *Cariou v. Prince*, 714 F.3d 694, 709-10 (2d Cir. 2013). This factor inarguably weighs against fair use.

So does "the purpose and character of the use," 17 U.S.C. § 107(1). For example, per Vimeo's instructions, users were to make lip sync videos by videoing themselves "mouthing along to a song," then "sync it with a high quality copy of the song in an editing program." 2021 U.S. Dist. LEXIS 101663, at *29 n.3. There is no "nonprofit educational purpose[]" involved. *See* 17 U.S.C. § 107(1). Nor is such a use "transformative," as with a parody or criticism of the original work. *Campbell*, 510 U.S. at 579-80. The act of combining an audio work with visuals does not "transform" the audio work—if it did, no movie or TV show would ever need to

obtain a license for use of a song. Users uploading videos that accompany a full song "make[] no change in the copyrighted work [and] provide[] neither criticism, commentary, nor information about it." *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 660-61 (2d Cir. 2018).

Finally, the "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," 17 U.S.C. § 107(3), maximally disfavors fair use, as the videos use entire songs. "[T]he more of a copyrighted work that is taken, the less likely the use is to be fair . . . generally, it may not constitute a fair use if the entire work is reproduced." *Infinity Broad. Corp.*, 150 F.3d at 109 (citation and internal quotation marks omitted). As Vimeo itself (now) states on its website, "using a great deal of the copyrighted work weighs against fair use." Vimeo Helpdesk, *What do the four fair use factors mean?*, Vimeo.com, https://vimeo.zendesk.com/hc/en-us/articles/224976228-What-do-the-four-fair-use-factors-mean-; *see also* ECF 189-8 (Exhibit R) at 2 (Vimeo website circa 2013 explaining that "using much of the copyrighted work will weigh against fair use").

In sum, despite clear precedent to the contrary and every fair use factor weighing against, the district court's decision allows employees familiar with the music industry to blindly assume that adding a full, unchanged song to a lip sync or dance routine video is fair use. This is implausible under well-established law.

III. Vimeo Exercises Unique Curatorial Control Over The Videos It Hosts.

The district court's holding that Vimeo "lacked the right and ability to control infringing activity," *Capitol Records*, 972 F. Supp. at 526, reflects a fundamental misunderstanding of Vimeo's distinctive editorial control processes, which stand in stark contrast to the processes of other internet service providers. Reversal on this issue will not open the floodgates because, as Appellants argue, Vimeo's substantial human, editorial control handily meets the "right and ability to control" standard of exercising "substantial influence" over users' content. *See* Appellants' Br. 35-42. A comparison of Vimeo's content-and-creativity-focused human control to the typical automated rules-based solutions employed by other internet service providers illustrates the extensive nature of Vimeo's influence over user content.

Unlike Vimeo, most websites use automated services to detect copyright infringement, and automatic algorithms to detect and remove, or alternatively to promote, certain content. Just as platform-wide licensing practices solve the problem of ensuring users have ready legitimate access to protected content, an array of software solutions provide automated solutions for detecting infringing content. For example, Audible Magic is a service used by Facebook, Twitch, Instagram, and

SoundCloud, among many others.[26] Audible Magic analyzes the audio properties of a digital file and "distill[s] from these a unique set of values (a 'fingerprint') that can be matched against a large library of 'reference fingerprints' . . . that correspond to copyright content." Expert Report of Ellis Horowitz, Ph.D, ECF 87-1 at 43. YouTube has developed Content ID, similar automated software of its own.[27] There are several different vendors providing similar automated services.[28]

Websites like Facebook also use automated algorithms to demote or promote certain content. For instance, Facebook "determines which posts show up in your News Feed, and in what order, by predicting what you're most likely to be interested in or engage with . . . based on a variety of factors, including what and whom you've followed, liked, or engaged with recently."[29] Because these algorithms are based on machine learning, the platforms themselves do not know in advance, let alone control, the content the algorithms promote.

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[26] *Identification*, AudibleMagic.com, https://tinyurl.com/ynt437jt.
[27] *How Content ID works*, YouTube Help, https://tinyurl.com/2p8uwchj; *YouTube Operations Guide: Using Content ID*, YouTube Help, https://tinyurl.com/2tcfubvk.
[28] *See, e.g.*, *Copyright Compliance and Data Deduplication*, ACRCloud, https://tinyurl.com/y9nbtthv; BMAT, *BMAT For Publishers*, https://tinyurl.com/4trm7esc; *Music Recognition*, Gracenote, https://tinyurl.com/2p85rbve.
[29] Akos Lada et al., *How does News Feed predict what you want to see?*, Tech at Meta (Jan. 26, 2021), https://tinyurl.com/2p9xjdtv.

Some courts have found that, depending on the particular facts, such automated content algorithms or routine automated network monitoring, including removal of pornography, disinformation, and copyrighted material, may not rise to the level of "substantial influence" sufficient to disqualify an internet service provider from the DMCA safe harbor. *See Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 613 (9th Cir. 2018); *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013).

But Vimeo, in contrast, relies on human curation and interaction to control users' content not only for rules violations, but also to make editorial judgments about whether content is sufficiently creative or hews closely enough to the Vimeo brand. *See* Appellants' Br. 35-42. Vimeo itself touts this human editorial control as "a big difference" from "other sites" because it is "not just an algorithm, it's people, we're watching this stuff." *Id.* at 39. Because this control differs substantially from typical website maintenance both in terms of Vimeo employees' personal involvement and the nature of their editorial, artistic judgments, it comfortably falls within the category of hands-on websites Congress intended to disqualify from the safe harbor.

CONCLUSION

The judgment should be reversed.

April 19, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 6,217 words, and thus complies with the type-volume limitation set forth in Rules 21(d)(1) and 29(a)(5) of the Federal Rules of Appellate Procedure and Local Rule 29.1(c).

s/Hyland Hunt
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April 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on April 19, 2022, I served the foregoing brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

s/Hyland Hunt
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