1. Circuit Split, Section 411:
   1. Registration Approach - registration is not made until application is accepted
      1. 11th circuit - *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*
      2. 10th circuit - *La Resolana Architects, PA v. Clay Realtors Angel Fire*

1. Application Approach - application alone is enough
   1. 9th circuit - *Cosmetic Ideas*
   2. 5th - *Apple Barrel Prods.*
   3. 7th circuit - *Chicago Bd. Of Educ.*
   4. 8th circuit - No circuit decision? Just district decisions

1. The 2nd Circuit - Undecided: *Psihoyos v. John Wiley & Sons, Inc.*
   1. The circuit is undecided, the districts are almost unanimous in their use of the registration approach. Haven't found cases in which courts in 2nd circuit use the application approach
   2. N.D. - doesn't seem to have taken a stance yet
   3. S.D. - registration approach. Very obviously registration approach
      1. *Zuma Press, Inc. v. Getty Images (US), Inc.*
      2. *Gattoni v. Tibi, LLC*
      3. *Silver v. Lavandeira* (noting that, although a few courts in the Second Circuit have held that a pending application for registration satisfies § 411(a), “the emerging consensus among courts in this district is that the mere filing of applications and payment of the associated fees is insufficient, as a matter of law, to meet the statutory requirement that a copyright be registered prior to the initiation of an infringement action”)
      4. *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publishing Co.*
   4. E.D. - registration approach
      1. Not especially clear: more detailed reading required. *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F.Supp.2d 280 (E.D. N.Y. 2002)
   5. W.D. - registration approach
      1. *Lumetrics, Inc. v. Blalock*

1. Motion to dismiss to be granted requires a court to use the registration approach. If they use the Application approach, we'll have to use the safe harbor defense
2. The courts will almost certainly use the registration approach. Making it easier for motion to dismiss. If they do use the application approach issues:
   1. Was the filing of copyright sufficiently "prior" to the filing of suit?
   2. Has she paid fees?

1. Safe Harbor Defense - needs A (any part) AND B AND C
   1. The Statute (which incorrect
      1. Section 512(c): A service provider shall not be liable for monetary relief if the service provider
         1. Does not have knowledge the material is infringing OR (subjective standard - see *Viacom Intl., Inc. v. Youtube, Inc. (differentiating between 512(c)(1)(A)(i*) & (ii))
         2. In absence of knowledge, is not aware of facts from which infringing activity is apparent OR (objective standard - the reasonable person would have known - - see *Viacom Intl., Inc. v. Youtube, Inc*)
         3. Upon obtaining such knowledge, removes/disables the material
      2. does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
         1. What is "has the right and ability to control such activity"?
            1. To be safe harbor eligible, can't have "right and ability".
            2. Right and ability seems to be high level of observation and control over users and their uploads
            3. See *Viacom v. YouTube* (finding right and ability to control requires something more than the ability to remove or block access to materials posted on a service provider's website.)
            4. See *Perfect 10, Inc. v. Cybernet Ventures, Inc.* ( finding control where the service provider instituted a monitoring program by which user websites received “detailed instructions regard[ing] issues of layout, appearance, and content.”)
      3. Upon notification of claimed infringement remove/disable the material claimed to be infringing.
   2. Our LSFs
      1. Archer is not aware of who posted video
      2. Archer can remove infringing videos
         1. They do not need to affirmatively monitor. (*Viacom v. YouTube (holding "DMCA safe harbor protection cannot be conditioned on affirmative monitoring by a service provider."))*
      3. They monitor infringement notices
      4. Archer has a way to block repeat infringers, which is required under 512(i)(1)(A)
   3. Information that would be helpful:
      1. Did they make money off the video?
         1. *Viacom v. YouTube* (finding that there is no specific knowledge requirement on 512(c)(1)(B)
      2. Did they know it was infringing?
         1. Would the reasonable person have known?
      3. Once they received the claim did the remove/block the video?
         1. This essential under 512(c)(1)(A)(iii) & (C). *Viacom v. YouTube (*holding removal/disabling of the material required for safe harbor).
         2. Did they receive notification outside of the suit?
            1. 512(c)(3)
            2. It appears that Janeway may not have notified before filing suit. They didn't receive notice, effects their knowledge of the infringement.

*UMG Recordings, Inc. v. Shelter* (finding informal emails insufficient notice)

* 1. 512(c) is the correct section to apply
     1. *Viacom v. YouTube* (applying 512(c))
     2. *UMG Recordings, Inc. v. Shelter Capital Partners LCC (*applying 512(c) to a site similar to YouTube)
  2. Additional cases
     1. *Capitol Records, LLC v. Vimeo*
        1. copyright owner was required to establish that personnel of internet service provider either knew video was infringing or knew facts making that conclusion obvious to an ordinary person who had no specialized knowledge of music or the laws of copyright.
        2. the burden falls on the copyright owner to demonstrate that the service provider acquired knowledge of the infringement, or of facts and circumstances from which infringing activity was obvious, and failed to promptly take down the infringing matter, thus forfeiting its right to the safe harbor; the plaintiff is entitled to take discovery of the service provider to enable it to make this showing
     2. *EMI Christian Music Group, Inc. v. MP3Tunes*

1. Outside the Scope of 106A (the Visual Artists' Rights Act)
   1. Music Video is NOT a visual art
      1. It is audiovisual § 101
      2. Even if audiovisual was a work of art, they may NOT be promotional. Janeway's use of her logo at the beginning of the video additionally weakens her argument.
   2. Visual Artists' Rights Act (§ 106A) ONLY applies to works of visual art
   3. Janeway is making claims under 106A. These claims are easily defended against (as 106A does not apply)
   4. *Scott v. Carlson*, (holding that neither audiovisual material nor promotional logos are a visual art, and that their creators do not afford the special rights under 106A)
   5. *Kleinman v. City of San Marcos* (finding that an item which was a distinctive symbol of the owner's business did not qualify as a work of visual art)

**Cases**

***(DOUBLE CHECK VOLUMES, REPORTERS, & Abbreviations)***

*Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC.*, 856 F.3d 1338 (11th Cir. 2017).

*Cosmetic Ideas, Inc. v. IAC/Interactivecorp*, 606 F.3d 612 (9th Cir. 2010).

*Apple Barrel Prods., Inc. v. Beard,* 730 F.2d 384, 386–87 (5th Cir.1984).

*Chicago Bd. of Educ. v. Substance, Inc.,* 354 F.3d 624, 631 (7th Cir.2003).

*La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005).

Note: abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick*

*Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120 (2nd Cir. 2014).

*Zuma Press, Inc. v. Getty Images (US), Inc.*, 123 U.S.P.Q.2d 1167 (S.D. N.Y. 2017).

*Gattoni v. Tibi, LLC*, ?????? (S.D. N.Y. 2017)

*Lumetrics, Inc. v. Blalock*, 23 F. Supp.3d 138 (W.D. N.Y. 2014)

*Silver v. Lavandeira*, ????? (S.D. N.Y. 2009)

*Capitol Records, Inc. v. Wings Digital Corp.*, 218 F.Supp.2d 280 (E.D. N.Y. 2002)

*Muench Photography, Inc. v. Houghton Mifflin Harcourt Publishing Co.*, ???? (S.D. N.Y. 2012)

*Viacom Intl, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2nd Cir. 2012).

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

*Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146 (C.D. Cal. 2002).

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

*EMI Christian Music Group, Inc. v. MP3Tunes, LLC*, 884 F.3d 79 (2nd Cir. 2016).

*Scott v. Carlson*, 2017 WL 3599249 (W.D. VA 2017)

*Kleinman v. City of San Marcos*, 597 F.3d 323 (5th Cir. 2010).