

Print-on-Demand Marketplaces: An Art Haven or a Copyright Hell?

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I. INTRODUCTION

Art has historically been created through a variety of mediums: paint, clay, pencil, and many more traditional forms. One of the more recent forms of art, digital art, was developed during the 1960s and grew immensely in popularity after the creation of the internet.¹ Artists now have the capability of creating and sharing art through one device without having to send their piece to publishers like newspapers, magazines, or galleries. Websites like Flickr, DeviantArt, and even X (formerly Twitter) give artists a platform, essentially a virtual gallery, to upload pieces of their digital art for the world to view.

The world of the internet, however, poses difficulties in the world of copyrighting art. Art theft in the digital world is common, performed by

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1. Mick Grierson, *Creative Coding for Audiovisual Art: The CodeCircle Platform*, UAL RESEARCH ONLINE (2018), <https://ualresearchonline.arts.ac.uk/id/eprint/15056/>.

both humans and bots.² Social media users often steal other artist's pieces and claim them as their own. Art platforms will sometimes have complex terms or little to no licensing options. Now, users are stealing art from these platforms and using them to create merchandise such as T-shirts and blankets which they sell without compensation to or permission from the original artist. Websites like Redbubble, Zazzle, and Society6 have gained immense popularity for their print-on-demand process for creating merchandise.³ Although artists use these sites with the legal intention of earning profit from their own work, others have used these sites to profit off others' creations. Some artists have found unique ways to fight these advances, such as posting comical pieces shaming these offenders for stealing their work.⁴ Others have gone the legal route and have sued these merchandise makers for intellectual property theft and for violation of copyright law.

This Comment explores the role copyright law plays in operating these print-on-demand websites and the effect of these copyright laws on both infringing users and artists. First, this Comment examines the copyright policies of some of the most popular print-on-demand services. This Comment analyzes to what extent these policies protect their users from art theft and to what extent these policies exist to release these print-on-demand websites of liability. Then, it breaks down contributory copyright statutes and how these laws specifically allow artists to sue print-on-demand services who may not directly violate copyright law but who nevertheless assist or encourage the infringing activity of their users through lax policies. This Comment then discusses the legalities behind several contributory copyright infringement suits against popular print-on-demand services and how these decisions may affect both artists and such services moving forward. Lastly, this Comment lays out a possible solution for both print-on-demand services and copyright holders to dissuade future litigation.

2. Ashwin Rodrigues, *It's Never Been Easier to Steal Art*, MORNING BREW (Aug. 5, 2022), <https://www.morningbrew.com/daily/stories/2022/08/05/it-s-never-been-easier-to-steal-art>.

3. *Print on Demand Market Size Is Projected to Reach USD 39.03 Billion by 2031, Growing at a CAGR of 24.6%*: Straits Research, YAHOO FINANCE (July 10, 2023), <https://finance.yahoo.com/news/print-demand-market-size-projected-153000634.html>.

4. Siobhan Ball, *Artists Get Revenge on Art-Stealing T-Shirt Bots*, DAILYDOT, <https://www.dailydot.com/unclick/artists-get-revenge-on-art-stealing-t-shirt-bots/> (last visited Feb. 22, 2024).

II. WHAT ARE PRINT-ON-DEMAND MARKETPLACES?

A. *Their Role in the Artist Community*

Print-on-demand marketplaces allow aspiring artists to generate a profit from their passion through sale of their creations as merchandise. The onset of print-on-demand services in the early 2000s has caused a noticeable shift away from artists utilizing publishing houses or home printing methods toward using print-on-demand services to save capital.⁵ These print-on-demand marketplaces eliminate the hassle of individually reaching out to print shops or producing merchandise in-house.⁶ Moreover, artists do not need to invest in inventory and risk financial loss if their merchandise does not sell.⁷ Many artists print on demand as their primary source of income while others gain thousands of dollars a month simply by using print-on-demand marketplaces as a side hustle.⁸ Each marketplace differentiates itself through the products it sells and the amount of profit a user will receive per sale. Society6, for example, pays artists ten percent of every sale while Redbubble's default is twenty percent, but artists can increase or decrease that margin.⁹ Evidently, print-on-demand marketplaces have positively impacted many digital artists, allowing them to create a stream of revenue from their creative endeavors.

B. *Delving into the Copyright Policies of Print-on-Demand*

The copyright policies of print-on-demand services almost always reflect the same procedure. A copyright owner is provided means to submit notice to the service of possible infringing activity; the service will then either take down the alleged infringing work or reach out to the alleged infringer for further information.

5. Tony White, *The Evolution of Artists' Publishing*. 33 ART DOCUMENTATION: J. OF THE ART LIBR. SOC'Y OF N. AM. 227, 228 (2014).

6. Jelena Novaković, *A Female Artpreneur in a Digital Age—Definition, Challenges, and Potential Revenue Streams*, 3-4 J. OF WOMEN'S ENTREPRENEURSHIP & EDUC. 151, 159 (2021).

7. *Getting Started with Print on Demand as an Artist: What Do You Need to Know?*, TIZZIT (May 2, 2023), <https://tizzit.co/print-on-demand-for-artists/>.

8. Domonique Brown, *30-Year-Old Works '2 Hours a Day' on Her Side Hustle and Makes \$22,000/Month in Passive Income—Here's Her Typical Week*, CNBC (Nov. 23, 2023, 8:25 AM), <https://www.cnbc.com/2023/11/23/30-year-old-works-only-2-hours-a-day-on-her-side-hustle-makes-22000-month-in-passive-income.html>.

9. Jessica Elliot, *9 Creator Tools for Selling Your Artwork*, U.S. CHAMBER OF COMMERCE (Aug. 7, 2023) <https://www.uschamber.com/co/grow/sales/creator-tools-for-selling-your-artwork/>; *How Is My Payment Calculated*, REDBUBBLE, <https://help.redbubble.com/hc/en-us/articles/202270799-How-is-my-payment-calculated#baseprice> (last visited Feb. 22, 2024).

A platform with a relatively digestible or accessible copyright policy for users to read is Redbubble. Redbubble is a very active marketplace which was founded in Melbourne, Australia in 2006.¹⁰ Many artists have gained profits through the creation of stickers, shirts, and bags achieving high popularity amongst students especially. Redbubble has an IP and publicity rights policy accessible to users at the bottom of their website. Within the “IP/Publicity Rights Policy” page, trademark, publicity rights, and copyright laws are explained in layman’s terms so artists who may not have legal knowledge can gain a basic understanding of IP law.¹¹ For example, copyright is explained as law that “protects the expression of an original idea recorded in a tangible form.”¹² The policy goes on to state that the user must take full responsibility for the works they upload and display on the site.¹³ The procedure to take a stolen work down involves filling in a “notice and takedown report” which is accessible from the site’s IP policy.¹⁴ The report requires the copyright owner to provide a description of the matter being infringed upon, where the infringing content is located on the Redbubble site, a statement of good faith and accuracy, a signature of the IP owner, and the IP owner’s contact information.¹⁵ Redbubble takes art down as soon as a complaint of infringement is received so that, even during the review process, additional lost profits will not occur.¹⁶ If a complaint was believed to be made in error, a counter notice must be filed to reinstate the work.¹⁷ Additionally, proof of trademark or copyright in the form of source originals are not required by Redbubble.¹⁸

Redbubble’s IP policy was created to model the requirements set forth in the Digital Millennium Copyright Act (DMCA), a collection of copyright laws that creates limitations on the liability that can be placed upon online service providers.¹⁹ The DMCA provides a list of requirements for online providers to meet in order to gain eligibility for

10. *About*, REDBUBBLE, <https://www.redbubble.com/about> (last visited Feb. 22, 2024).

11. *Redbubble IP/Publicity Rights Policy*, REDBUBBLE, <https://help.redbubble.com/hc/en-us/articles/201579195> (last visited Feb. 23, 2024).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Brief of Appellee, LTTB LLC. v. Redbubble, Inc., 840 Fed. Appx. 148 (9th Cir. 2021) (CA No. 19-16464) 2020 WL 3406710.

protection from suit.²⁰ These requirements include the registration of a copyright agent, providing a means to contact that copyright agent, and offering an accommodating copyright policy that informs users of the service provider's system of terminating repeat infringers.²¹ Redbubble evidently performed its due diligence in creating an IP policy that protects them as much as possible from liability against their users since they directly modeled their policy on the DMCA. The policy is easily accessible to users via the homepage, reasonably informs users of Redbubble's procedure of terminating a repeat infringer, and states that Redbubble employs copyright agents.

Many other popular print-on-demand marketplaces have likewise created a policy that closely follows the DMCA. For example, Zazzle—a print-on-demand marketplace founded in Redwood City, California in 2005²² with countless products an artist can print and sell their work on—has linked to its copyright guidelines from its “Community Guidelines” page. Its copyright policy specifically states that Zazzle reserves the right to remove infringing content and terminate the accounts of those who infringe upon the intellectual property rights of others.²³ The page then lists the contact information for Zazzle's copyright agent before delving into the complaint procedure. An intellectual property owner whose work has been infringed upon must send notice to Zazzle's copyright agent. That notice must contain the signature of the copyright owner, a description of the work and where the infringement occurred on the Zazzle site, a statement of good faith and accuracy, and the copyright owner's contact information.²⁴ An alternative is provided via a link for reporting violations that is located on every product page.²⁵ If a creator believes their work has been taken down in error, a counter notice must be sent to Zazzle's copyright agent.

These copyright policies were tailored with the intent of releasing these print-on-demand websites from secondary liability. A perfect copyright policy, of course, cannot stop copyright holders from attempting to file suit against these print-on-demand websites. It is then

20. 17 U.S.C.A. § 512.

21. 17 U.S.C.A. § 512.

22. Ari Levy, *The Anti-Amazon That's Making Money: Zazzle*, CNBC (July 29, 2015, 1:05 PM), <https://www.cnbc.com/2015/07/29/the-anti-amazon-thats-making-money-zazzle.html>.

23. *Zazzle Copyright Policy*, ZAZZLE, <https://help.zazzle.com/hc/en-us/articles/220337367-Zazzle-Copyright-Policy> (last visited Feb. 23, 2024).

24. Zazzle, *supra* note 23.

25. *Id.*

up to the court to determine if a print-on-demand website performed its due diligence in following its own take-down and notice procedures.

III. LEGAL BACKGROUND AND ANALYSIS

A. *Copyright Infringement*

Art is considered copyrightable subject matter under 17 U.S.C.A. § 102.²⁶ Copyright owners have the exclusive right to reproduce their copyrighted work and to sell copies of their work for sale.²⁷ 17 U.S.C.A. § 107, also known as the fair use exception, permits the use of copyrighted work by someone other than the author under certain circumstances. Four factors are considered in determining if a copyrighted work can be used freely:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁸

If a court finds that the use of copyrighted material falls outside of the fair use exception based on the four codified factors; the user may be found liable for copyright infringement under 17 USCA § 501.

Direct copyright infringement under 16 USCA § 501 requires a plaintiff to show proper copyright ownership of the alleged infringed material, that the infringing party has violated one of the copyright holders exclusive rights as stated in 17 USC § 106, and volitional conduct by the defendant.²⁹ These exclusive rights include the right to reproduce or authorize the reproduction of copyrighted works, the preparation of derivative works, and the sale and distribution of any copies made of the copyrighted work.³⁰ Volitional conduct requires a plaintiff to show causation by the defendant or, in other words, that the defendant's conduct could reasonably be described as the direct cause of the infringement.³¹

What about those who do not actively participate in the infringing activity but play some sort of role in distributing the infringed work?

26. 17 U.S.C.A. § 102.

27. 17 U.S.C.A. § 106.

28. 17 U.S.C.A. § 107.

29. Gardner v. CafePress Inc., No. 3:13-CV-1108-GPC-JLB, 2014 WL 6890934, at *3 (S.D. Cal. Dec. 4, 2014).

30. 17 U.S.C.A. § 106.

31. VHT, Inc. v. Zillow Grp., 918 F.3d 723, 731 (9th Cir. 2019).

Contributory copyright infringement is not codified like other copyright laws but the Supreme Court has held that someone who knowingly contributes to another's infringement can be held liable.³² A party can be held liable for contributory copyright infringement if they satisfy two elements: knowledge of the infringement and material contribution of the infringing activity.³³ The court in *Ellison v. Robertson* clarifies each component in the context of online services.³⁴ The knowledge requirement extends to both actual and constructive knowledge, meaning if the party should have known about the infringing activity, the party may still be held liable.³⁵ As for material contribution to the infringement, simply providing a service that allows for the distribution of an infringing work is sufficient to find for contributory infringement.³⁶ In our modern world of technology, contributory liability is crucial for copyright owners to restrain the many infringers that exist on each website or marketplace.³⁷

Another theory of secondary liability is vicarious liability. Vicarious liability is when one infringes by proxy by profiting from the direct infringement of a work while declining to exercise the right to stop the infringing activity.³⁸ In order for a vicarious liability claim to move forward, the defendant corporation must have the "right and ability" to supervise and control the infringement that is occurring.³⁹ The plaintiff must also allege the defendant had a direct financial interest in the infringing activity.⁴⁰ The financial interest of the defendant must be gained by attracting users directly with the permission-infringing material on its site or program.⁴¹ In other words, the allowance of the infringement must be a draw for users to use the website. In contrast to contributory copyright infringement, vicarious infringement focuses on the defendants' right and ability to supervise the infringing activity rather than the defendant's actual or constructive knowledge of the infringement.⁴² Vicarious infringement also requires investigation into what is drawing

32. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984).

33. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

34. *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

35. *Id.*

36. *Id.* at 1078.

37. JAMES BOYLE AND JENNIFER JENKINS, *Secondary Liability for Copyright Infringement & Safe Harbors in the Digital Age*, INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY (2021).

38. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005).

39. *Perfect 10, Inc. v. Visa Intern. Serv. Ass'n*, 494 F.3d 788, 802 (9th Cir. 2007).

40. *Ellison*, 357 F.3d at 1076.

41. *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

42. *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at *9.

users to the defendant's service while contributory infringement requires no such investigation.⁴³

The creation of the web has drastically transformed copyright laws, including those governing secondary liability. The DMCA, discussed earlier as a model for many print-on-demand copyright policies, was created in 1998 to protect certain online services from liability.⁴⁴ The act immunizes service providers only under the circumstances that they lack actual knowledge of the infringement, are unaware of the circumstances from which the infringing activity is evident (also known as constructive knowledge), or when, upon gaining such knowledge, they respond quickly to block access to the infringing work.⁴⁵ In the case the provider is able to control the infringement, the provider also must not gain a financial benefit from the infringed work.⁴⁶ In determining constructive knowledge, courts examine whether the online service provider deliberately continued hosting infringing activity despite evidence of infringement.⁴⁷ Proper notice given by a copyright holder to a service provider can count as knowledge on the part of the provider, but only if a notice follows the requirements set out within the act.⁴⁸ In addition to lacking knowledge of the infringing activity, the provider must adopt a policy that allows for the termination of repeat infringers, implement that policy, and inform their clients of that policy in order to gain protection.⁴⁹ Most print-on-demand websites follow the DMCA's provisions in order to guarantee protection from liability, hence websites like Redbubble and Zazzle utilize a notice and take-down procedure.

With the existence of the DMCA's safe harbors and the presence of notice and take-down procedures, one might question how lawsuits against these print-on-demand marketplaces even exist. Copyright owners have evidently found sending take-down notices about multiple

43. *A&M Records Inc.*, 239 F.3d at 1023.

44. *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 602-603 (9th Cir. 2018).

45. The Digital Millennium Copyright Act of 1998, The U.S. Copyright Office, <https://www.copyright.gov/legislation/dmca.pdf> (December 1998).

46. The Digital Millennium Copyright Act of 1998, *supra* note 45.

47. Brian McMahon, *Different Directions the Digital Millennium Copyright Act and the Directive on Electronic Commerce Offer Similar Protections to ISPs*, 37 L.A. LAW. 28 (Mar. 2014).

48. An effective notice is one that has the signature of the copyright owner, the copyright owner's contact information, identification of the work being infringed upon, identification of the material the owner claims to be infringing, and a statement of good faith and accuracy from the copyright owner. *Hendrickson v. Amazon.Com. Inc.*, 298 F. Supp. 2d 914, 917-18 (C.D. Cal. 2003). 17 U.S.C.A. § 512 (West).

49. *Ellison*, 357 F.3d at 1080.

stolen pieces to be an arduous task.⁵⁰ Suing the marketplace directly for copyright infringement is still attainable without following the protocol set forth by the DMCA. If a copyright owner can prove secondary liability on the part of the marketplace without sending a take-down notice, the notice and take-down procedure created by the DMCA becomes moot.⁵¹ The knowledge requirement for contributory copyright infringement can still be fulfilled via certain exclusions within the DMCA's safe harbor provisions: willful blindness of the marketplace towards infringement or evidence users have been induced to infringe.⁵²

B. Case Law Involving Print-on-Demand Services

Despite an efficient and artist-friendly copyright policy, Redbubble has still been in a fair share of lawsuits regarding copyright infringement. One of those suits was against YZ Productions (YZ). YZ is a multimedia producer that has published several pieces of digital art through several platforms, including YouTube.⁵³ Many artworks are used to promote YZ products. Users on Redbubble began selling several pieces of YZ's work without consent and, as a result, YZ brought forth a complaint claiming both contributory copyright and trademark infringement.⁵⁴ In addition to being the original creator of certain art pieces, YZ provided proof of registration of several pieces with the U.S. Copyright Office.⁵⁵ Ultimately, the Northern District of California dismissed the complaint in Redbubble's favor for multiple reasons.

One of the main reasons the court dismissed the claims against Redbubble was that the contributory copyright infringement requirement to know or "have 'reason to know' of . . . [the] acts of infringement" was found to be unanswered.⁵⁶ The court stated that YZ failed to prove Redbubble's direct knowledge of the infringing activity and that simple notice of an "infringement" is not sufficient to prove specific knowledge.⁵⁷ This simple notice of infringement provided by YZ to Redbubble did not answer which pieces were infringing upon YZ's rights,

50. Eric Goldman, *How the DMCA's Online Copyright Safe Harbor Failed*, 3 NTUT J. INTELL. PROP. L. & MGMT. 195, 196 (2014).

51. *Id.*

52. *Id.* at 197.

53. YZ Productions, Inc. v. Redbubble, Inc., 545 F. Supp. 3d 756, 760 (N.D. Cal., 2021).

54. *Id.* at 761.

55. *Id.* at 760.

56. *Id.*

57. *Id.*

a crucial requirement in proving specific knowledge.⁵⁸ The contributory trademark infringement claims failed on a similar standard of knowledge. Although not specified by the court, it appears YZ didn't follow the notice and take-down protocol delineated by Redbubble for instances of copyright infringement. Redbubble requires a copyright owner to "provide where the . . . infringing content is . . . on the Redbubble site" when submitting a notice of infringement.⁵⁹

Regardless, the court in this case fails to address the precedent set in *Ellison v. Robertson* that states the knowledge requirement of a contributory copyright infringement claim includes constructive knowledge.⁶⁰ Should Redbubble reasonably have known that YZ was being infringed upon by one of Redbubble's users? The court in this case stated that a computer system operator must receive actual specific information of the infringing activity in order to qualify for the safe harbor protections provided by the DMCA.⁶¹ Even if Redbubble, or any online marketplace, understands that its system can be used to sell copyrighted material, this understanding does not constitute constructive knowledge under the requirements of the DMCA.⁶²

In 2015, The United States District Court of Kansas struck Zazzle's motion to dismiss a claim for contributory copyright infringement after several works from a fish illustrator was found on Zazzle's site.⁶³ The plaintiff, Joseph Tomelleri, is a fish illustrator whose work has appeared in several different books and magazines and which is used mainly for informational purposes.⁶⁴ Tomelleri found that over sixty of his illustrations were unlawfully reproduced on Zazzle's website without Tomelleri's consent.⁶⁵ Many of these illustrations were even registered by Tomelleri with the U.S. Copyright Office.⁶⁶ Tomelleri then filed suit against Zazzle alleging direct and contributory copyright infringement.⁶⁷

58. *Id.* at 757.

59. *Redbubble IP/Publicity Rights Policy*, *supra* note 11.

60. *YZ Productions, Inc.* 545 F. Supp. 3d at 760.

61. UMG Recordings, Inc. v. Shelter Cap. Partners LLC, 718 F. 3d 1006, 1021 (9th Cir. 2013).

62. *Id.*

63. A claim for vicarious liability was also made by Tomelleri but the court ultimately granted the defendant's motion for summary judgement because Tomelleri failed to provide evidence that the availability of infringing material attracted Zazzle users. *Tomelleri v. Zazzle, Inc.*, No. 13-CV-02576-EFM-TJJ, 2015 WL 8375083, at *4 (D. Kan. Dec. 9, 2015).

64. *Id.* at *1.

65. *Id.* at *4.

66. *Id.*

67. *Id.*

The court ultimately held that the defendant had satisfied both the specific knowledge component and the material contribution component required to be held liable under contributory copyright infringement and that Zazzle had engaged in assisting the infringement of Tomelleri's work.⁶⁸ Tomelleri sent Zazzle a cease and desist letter in regards to demanding the removal of his stolen work from the website. Zazzle acknowledged receipt of the cease and desist letter in their motion to dismiss.⁶⁹ Despite receiving the cease and desist letter, Zazzle continued to allow access to these infringed pieces of art on their website for almost nine months despite the knowledge that the work's copyright belonged to Tomelleri.⁷⁰

Zazzle's acknowledgement that they had received Tomelleri's notice along with Zazzle's choice to allow these infringing works on their site despite the notice was sufficient to answer the specific knowledge requirement for a contributory infringement claim.⁷¹ The material contribution component was also answered through the simple service Zazzle provides for printing the infringing images on various goods and profiting a royalty from the sale of these goods.⁷² Tomelleri's claim for contributory infringement was easily answered; therefore Zazzle's motion to dismiss was stricken by the court. Zazzle's failure to answer Tomelleri's notice in a timely manner demonstrates how the DMCA's protections can only go so far in protecting these online providers. If Zazzle had performed its due diligence in taking down Tomelleri's work, continued litigation would have been unnecessary. The case was ultimately settled in December 2015, over two years after the initial complaint was filed.⁷³

What is vexing is that Tomelleri brought suit against another print-on-demand marketplace known as SunFrog in 2024 and lost.⁷⁴ Tomelleri claimed that SunFrog, a now defunct marketplace, sold four of his fish illustrations on T-shirts, tumblers, and other products without his authorization.⁷⁵ The United States District Court for the Eastern District of Michigan ultimately dismissed Tomelleri's complaint, stating he did not provide enough facts to indicate that the marketplace induced or

68. *Id.* at *18.

69. *Id.*

70. *Id.*

71. *Id.* at *18.

72. *Id.* at *19.

73. Notice of Settlement, Tomelleri v. Zazzle, Inc., No. 13-CV-02576-EFM-TJJ, 2015 WL 8375083 at *3 (D. Kan. Dec. 9, 2015).

74. Tomelleri v. SunFrog, LLC, 2024 WL 940238 at *8 (E.D. Mich., 2024).

75. *Id.* at *1.

encouraged another to infringe Tomelleri's rights.⁷⁶ Why did the court not investigate the specific knowledge or material contribution claims like in the case against Zazzle? Tomelleri failed to sufficiently plead a *prima facie* contributory copyright claim within his complaint which requires stating facts that the marketplace induced their users to infringe.⁷⁷ Instead, Tomelleri uses the DMCA's safe harbor provision that frees a defendant of liability if they lack actual knowledge or awareness of the infringing activity.⁷⁸ The court then stated that these safe harbor provisions "serve as affirmative defenses available to Defendants, and not pleading standards Plaintiff is subject to."⁷⁹ Despite previous legal success in protecting his copyright, Tomelleri's case against SunFrog was dismissed over a relatively avoidable pleading problem.⁸⁰

Case law involving print-on-demand services and copyright have shown varied results, although all these cases have a resounding theme of the importance of the copyright holder's notice and the print-on-demand's subsequent actions. If a copyright holder does their due diligence in submitting a proper and full notice as required by the DMCA and the print-on-demand service fails to act or does not act fast enough, their protections are stripped and the court will likely favor the copyright holder.⁸¹ On the other hand, if the print-on-demand service properly blocks the infringed content that they have received notice of or if the notice is not specific enough for the print-on-demand service to have constructive or actual knowledge of the infringement, then the print-on-demand service will be protected from liability.⁸²

C. Trademark Cases and Print-on-Demand

Logos, designs, and symbols that specifically identify a good or service can be protected under trademark law.⁸³ Unlike copyright law, trademark law only protects identifiers that a person has an intention to

76. *Id.* at *3.

77. *Id.*

78. *Id.* at *7.

79. *Id.* At *7.

80. Eric Goldman, *Print-on-Demand Service Defeats Fish Illustrator's Copyright Claim*—Tomelleri v. Sunfrog, TECHNOLOGY & MARKETING LAW BLOG, <https://blog.ericgoldman.org/archives/2024/03/print-on-demand-service-defeats-fish-illustrators-copyright-claim-tomelleri-v-sunfrog.htm> (Mar. 6, 2024).

81. *Hendrickson*, 298 F.Supp.2d at 917.

82. *Tomelleri*, No. 13-CV-02576-EFM-TJJ, 2015 WL 8375083, at *18-19.

83. *What Is a Trademark?*, USPTO, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Apr. 11, 2024).

use in commerce to distinguish their goods.⁸⁴ Print-on-demand services have also faced their fair share of indirect trademark infringement suits from corporate entities. For example, clothing retailer Brandy Melville filed a suit against Redbubble claiming contributory trademark infringement.⁸⁵ Similar to the holdings of the contributory copyright infringement discussed previously, the court in this case stated that a defendant without specific knowledge of the infringement is not liable for contributory infringement.⁸⁶ There is also no duty placed on Redbubble to actively search for trademark-infringing activity within their website.⁸⁷ Therefore even if trademark law may provide elevated protection for certain works, the standards of knowledge are shared between copyright claims and trademark claims. Moreover, it may be harder for small artists to claim trademark protection especially if their original work was not used to distinguish a good or service.

D. A Possible Solution for Both Artists and Print-on-Demand Services

Copyright infringement is almost always seen as a negative. When an artist work is infringed, they are likely losing precious attention and, in turn, income. However, suing a giant corporation for copyright infringement is costly and extremely time-consuming, taking away an artist's time to create. Moreover, as shown in the previous section, the results of these suits are varied, with many artists coming away with very little or no compensation. One solution may be to shift perspective from considering infringement a bad thing to seeing it as profitable.⁸⁸

Other web services have developed unique ways to decrease the incentive to litigate by providing copyright owners an option to make money from the infringed work. YouTube, one of the most popular video sharing platforms in the world, has given copyright owners the option to share revenue with the infringer.⁸⁹ YouTube's Content ID feature allows copyright holders to upload their works as reference files.⁹⁰ Then the site will scan its database of videos to see if there are any that match the reference files.⁹¹ If there is a match, a user may then choose to either have

84. 15 U.S.C.A. § 1127.

85. Y.Y.G.M. SA v. Redbubble, Inc., 75 F.4th 995, 999 (9th Cir. 2023).

86. *Id.* at 1002.

87. *Id.*

88. Kristelia Garcia, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 316 (2020).

89. *Copyright*, YOUTUBE, <https://www.youtube.com/howyoutubeworks/policies/copyright/#making-claims> (last visited Apr. 11, 2024).

90. *Id.*

91. *Id.*

the work taken down (mimicking the notice and take-down procedures discussed previously) or monetize the video via ads.⁹² If the copyright holder chooses to monetize the video instead, they will receive the ad revenue produced from the video the infringer had posted.⁹³ The monetization option is one of the most popular options for rights holders, especially those in the music industry.⁹⁴

Print-on-demand services may want to adapt their policies to include some form of monetized infringement. Essentially this form of monetization would allow the copyright holder to opt out of statutory copyright protection on a case by case basis, however the service deems fit.⁹⁵ Copyright owners then would not have their rights stripped away from them but rather would be given a choice: report an infringer as normally required by the Digital Millennium Copyright Act or share profit with the infringer. In the case that an infringer's upload has garnered a large amount of traffic, this could be extremely beneficial for the copyright holder. Why bother trying to litigate against someone who has promoted your work for free, especially if you gain some form of profit from the infringed work? Unlike on YouTube, there is no way to make ad revenue on these print-on-demand websites but something as simple as providing copyright owners the option to split the profit between the copyright holder and uploader would likely decrease the amount of copyright suits being filed against these print-on-demand sites.

The monetization of infringed work might raise policy concerns if enacted poorly. Firstly, monetizing infringement would be an expensive process for any print-on-demand website to undertake. The website would have to maintain an entirely new database used purely to store copyrighted material along with a fingerprinting system to catch the infringing work.⁹⁶ The cost of creating these databases could outweigh the amount these print-on-demand services have paid or could expect to pay in litigation costs. Secondly, monetizing infringement could ultimately decrease creative output. Users would be encouraged to infringe rather than spend time creating their own unique work. Infringing would become an even easier way of making a profit since there would be a

92. *Id.*

93. *Id.*

94. In 2016, the Content ID monetization option accounted for fifty percent of the music industry's revenue from YouTube. Paul Reskinoff, *99.5% of All Infringing Music Videos are Resolved by Content ID*, *YouTube Claims*, DIGITAL MUSIC NEWS (Aug. 8, 2016), <https://www.digitalmusicnews.com/2016/08/08/copyright-problems-resolved-content-id/>.

95. Garcia, *supra* note 88 at 387.

96. Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 COLUM. L. REV. SIDEBAR 83, 96 (2012).

strong chance the copyright owner of the original work would share the proceeds rather than block the infringer. A print-on-demand service would then need to carefully consider whether the monetization of infringing work would be more advantageous than litigation and then tailor the monetization scheme to a format that still encourages users to create.

IV. CONCLUSION

Art theft in the digital age is impossible to stop completely.

Digital artists must deal with the unfortunate risk that any piece they post may be stolen and used for another's profit. The web, however, has also provided artists with many opportunities to create a living with their passions and share insights and works within a supportive community. Thus, the risk of theft is simply outweighed by these many benefits. Moreover, case law and statutory law lean toward providing artists copyright protection from even an "unknowing" print-on-demand service simply because that service acts as a conduit for thieves to profit off of artists' work. The DMCA may provide some protection for these marketplaces from liability, but at the same time, the act forces these marketplaces to create a notice and take-down procedure that favors copyright holders. Courts have also expressed leniency to artists who opt to not use the notice and take-down procedure of marketplaces as long as contributory copyright infringement can be properly pled.

Unfortunately, constant costly litigation may result in investors to pull funds from these marketplaces, ultimately driving many smaller marketplaces out of business.⁹⁷ Not only would this negatively affect startups and entrepreneurs in the print-on-demand marketplace space, artists may then be forced to choose between a small selection of big-name marketplaces that may not give them the commission they could have received from another marketplace that was forced out of business due to litigation. Print-on-demand websites should consider monetizing the infringements that occur on their sites to dissuade copyright holders from bringing suit. The likely benefits from monetizing infringement will outweigh the cons for both the artistic community and these large marketplaces.

97. Goldman, *supra* note 50 at 198.