

Credit Card Companies Are Not Liable for Contributory Copyright Infringement

Article By:

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A defendant is liable for contributory copyright infringement if it knows of a third party's infringing activity and "induces, causes, or materially contributes to" the infringing conduct. For example, the designer and distributor of an electronic file sharing system was found liable by the United States Court of Appeals for the Ninth Circuit as a contributory infringer because users of that system utilized it to exchange massive quantities of copyrighted music. *A&M Records, Inc. v. Napster, Inc.* The Supreme Court similarly imposed contributory liability arising from the distribution of similar software that allowed for the exchange of copyrighted music on a peer to peer, rather than a centralized, basis. *MetroGoldwinMayerStudios, Inc. v. Grokster, Ltd.*

Against this pertinent legal background, you discover that your copyrighted works have been altered and are being sold on the internet. You immediately notify Visa and MasterCard and ask them to stop processing payments to the infringing website. They do nothing. Are they thus liable for contributory infringement of your copyright rights? In *Perfect 10, Inc. v. Visa International*, decided in July 2007, the United States Court of Appeals for the Ninth Circuit answered this question in the negative.

Credit card companies avoided liability

Perfect 10 publishes a magazine and operates a subscription website, both of which contain copyrighted images of nude models. In its lawsuit, Perfect 10 alleged that certain websites stole its proprietary images, altered them, and unlawfully offered the altered images for sale online. The defendants, Visa, MasterCard, and affiliated banks and data processing services, processed the payments to the offending website operators. Perfect 10 sent defendants repeated notices identifying the infringing websites but defendants ignored the notices and continued to process the credit card transactions for those websites.

The Ninth Circuit, in *Perfect 10*, distinguished the *Napster* and *Grokster* cases on the basis that the

services in those cases allowed users to locate and obtain infringing material. By contrast, the services provided by the credit card companies in *Perfect 10*, while making it easier for the infringing conduct to be profitable, did not help locate or distribute infringing images.

Perfect 10 also relied on a decision that pre-dated the proliferation of the internet, *Fonovisa, Inc. v. Cherry Auction, Inc.* There, a flea market owner was held liable as a contributory infringer for sales of pirated works occurring in the flea market. The *Perfect 10* court noted that in *Fonovisa*, the flea market operator increased the level of infringement by providing a centralized location where the infringing works could be bought and sold. By contrast, according to the *Perfect 10* court, the credit card payment systems do not make it easier to locate infringing works—the nature of the internet provides for that easy access to infringing works.

The *Perfect 10* court held that to find the credit card and related companies liable “would require a radical and inappropriate expansion of existing principles of secondary liability” and would violate the public policy of the United States to promote the continued development of the internet and preserve the free market that exists there.

The dissenting opinion would hold credit card companies liable

Judge Kozinski dissented from the majority opinion in *Perfect 10*, noting that the defendants “participate in every credit card sale of pirated images; the images are delivered to the buyer only after defendants approve the transaction and process the payment. This is not just an economic incentive for infringement; it’s an essential step in the infringement process.”

Judge Kozinski further believed the majority’s decision could not be squared with *Fonovisa*, noting that the “pivotal role” played by the flea market operator in *Fonovisa* “is played by the credit cards in cyberspace, in that they make ‘massive quantities’ of infringement possible that would otherwise be impossible.”

Judge Kozinski also disagreed that the majority’s decision would further the policy of the United States, stating “I am aware of no policy of the United States to encourage electronic commerce in stolen goods, illegal drugs, or child pornography. When it comes to traffic in material that violates the Copyright Act, the policy of the United States is embedded in the FBI warning we see at the start of every lawfully purchased or rented video: Infringers are to be stopped and prosecuted.” Judge Kozinski further rejected the notion that the majority’s decision would advance the goal of promoting the free market of the internet, noting “it does not serve the interests of a free market, or a free society, to abet marauders who pilfer the property of law-abiding” citizens and further stated that requiring the credit card companies to abide by their own rules, which prohibit them from servicing

illegal business, would not impair a competitive free market on the internet “any more than did the recent law prohibiting the use of credit cards for internet gambling.”

The *Perfect 10* decision reduces leverage

In light of the *Perfect 10* decision, if your intellectual property rights are violated, you cannot seek relief or damages against credit card companies who process the transactions, at least not in California and other states located within the jurisdiction of the Ninth Circuit.

Practically speaking, the *Perfect 10* decision eliminates a major lever that could have been used against infringers—the threat that their credit card processing facilities would be lost if they persisted in unlawful conduct. As Judge Kozinski’s dissent recognizes, without credit card facilities, internet businesses cannot survive. The decision also eliminates the credit card and related companies as potential deep pocket defendants to satisfy damages awards in infringement cases.

The full panoply of intellectual property rights and remedies are, of course, still available against direct infringers. In light of *Perfect 10*, it is thus more important than ever that you police your intellectual property and, if necessary, promptly pursue, where possible, those who are directly infringing on those rights.

If you are interested in hearing more from David Olson, you can access his blog "Laying Down the Law" at <http://olsonlaw.blogspot.com/>

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