

DMCA and monitoring – damned if you do, damned if you don’t?

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In this article, we discuss a recent Ninth Circuit decision relating to the summary judgment standard for a Digital Millennium Copyright Act (“DMCA”) affirmative defense. The ins and outs of the DMCA will be among of the topics at the 2017 seminar.

Earlier this month, the Ninth Circuit issued a ruling that will make it more difficult for Internet service providers to rely on the DMCA safe harbor to prevail at the summary judgment stage. In *Mavrix Photographs, LLC v. LiveJournal, Inc.*, Case No. 14-56596 (9th Cir. April 7, 2017), the court overturned the district court’s summary judgment finding for the defendant, ruling that the common law of agency applied and there was a genuine issue of material fact as to whether the moderators at issue in this case were “agents” of the defendant. This finding will make summary judgment harder to achieve for Internet service providers and may make them rethink the roles that moderators play in assessing content on their Web sites.

In *Mavrix*, a photography company sued LiveJournal for posting 20 of its copyrighted photographs online. Consistent with the existing case law, the court held that to be eligible for the Section 512(c) safe harbor, LiveJournal needed to show that the photographs at issue were posted “at the direction of the user.” But the issue for LiveJournal was that although users **submitted** Mavrix’s photos, it was LiveJournal that **posted** the photos after a team of volunteer moderators led by a LiveJournal employee reviewed and approved them. Thus, the court found that there was a genuine issue of material fact as to whether the DMCA safe harbor applied.

The court ruled that the common law of agency applies to the safe harbor defense and that the district court erred in rejecting, as a matter of law, the argument that LiveJournal’s moderators were agents, thereby making LiveJournal liable for their acts. The court held that based on the current evidentiary record, “reasonable jurors could conclude that an agency relationship existed.”

Many defendants will still be able to rely on the DMCA safe harbor despite the Ninth Circuit’s ruling in *Mavrix*—in fact, it is possible that even LiveJournal could prevail at trial. But this decision could make it more difficult for Internet service providers (particularly in the Ninth Circuit) to prove a DMCA defense when they have moderators involved in the process. Accordingly, while there are sometimes

benefits associated with involving moderators in publication decisions, service providers should carefully weigh those benefits against the risks of falling outside the safe harbor.

This is the second in a series of blog articles relating to the topics to be discussed at the 30th Annual Media and the Law Seminar in Kansas City, Missouri on May 4–5, 2017.

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National Law Review, Volume VII, Number 116

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