

Time to Zoom In on Application of DMCA Safe Harbor Defense

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In reversing a district court grant of summary judgment in favor of a social media platform, the US Court of Appeals for the ***Ninth Circuit*** ordered a deeper look at the degree to which the common law of agency affects a safe harbor defense to copyright infringement under § 512(c) of the ***Digital Millennium Copyright Act (DMCA)***. ***Mavrix Photographs, LLC v. LiveJournal, Inc.***, Case No. 14-56596 (9th Cir., Apr. 7, 2017) (Paez, J).

Mavrix, a photography agency specializing in celebrity vacation photos, sued LiveJournal for copyright infringement when 20 of its photographs were posted to a popular LiveJournal celebrity news community called “Oh No They Didn’t!” (ONTD). Mavrix did not utilize LiveJournal’s available notice and takedown procedures to notify LiveJournal of the infringements. When the lawsuit was filed, however, LiveJournal removed the posts containing the allegedly infringing photographs. At the district court, LiveJournal moved for summary judgment, citing the § 512(c) safe harbor provision under the DMCA, which protects service providers from liability for unintentional copyright infringement due to the service providers’ storage and hosting of copyrighted material posted “at the direction of” a third-party user so long as the service providers follow certain notice and takedown requirements under the DMCA. Finding that the § 512(c) safe harbor shielded LiveJournal from liability for copyright infringement arising from the Mavrix photos posted to its ONTD community, the district court granted summary judgment in favor of LiveJournal. Mavrix appealed.

On appeal, the Ninth Circuit examined whether Mavrix’s photos were truly “posted at the direction of the user” so as to trigger the § 512(c) safe harbor, or whether instead the posting of photographs that were first reviewed and approved by LiveJournal’s community moderators could be attributed to LiveJournal directly. The Court explained that the posting of the photos, rather than the submission, was the critical inquiry, and indicated that the case would turn on whether the acts of the LiveJournal community moderators could be attributed to LiveJournal. On this point, the Court determined that the district court erred in rejecting Mavrix’s argument that the moderators were LiveJournal’s agents, thereby making LiveJournal liable for their acts.

Considering the summary judgment record with regard to the organizational structure of the LiveJournal community moderators, and more specifically the moderators involved with the ONTD community, the Ninth Circuit found that there existed genuine issues of material fact as to whether the moderators were LiveJournal’s agents under the common law of agency. In particular, the Court

found that the evidence presented issues of material fact regarding whether the moderators had actual and/or apparent authority to act for LiveJournal, including evidence suggesting that LiveJournal’s policies provided explicit roles and authority to its moderators, that LiveJournal “relies on moderators as an integral part of its screening and posting business model,” and that LiveJournal maintained “significant control” over ONTD and its moderators. However, the Court also noted that other evidence may call into question the level of control that LiveJournal asserts over the conduct of its moderators, who are “free to leave and go volunteer their time in any way they see fit.” Moreover, the Court noted that any fact finder must also resolve whether LiveJournal’s moderators provide only accessibility-enhancing activities with regard to posted content (which does not incur liability for infringing posts), or whether their activities extend beyond the “automatic and limited manual activities”—such as reformatting posts or even screening for infringement—that courts have previously found to be merely accessibility enhancing.

Finding remand to be warranted, the Ninth Circuit noted that a fact finder must resolve the dispute regarding the status of the LiveJournal moderators as agents, and whether the Mavrix photos were posted at the direction of the users. In addition, the Court explained that under the DMCA, a fact finder must also determine whether LiveJournal had actual or “red flag” knowledge of the infringements, and whether LiveJournal financially benefitted from infringements that it had the “right and ability to control,” beyond just the capacity to remove or block access to posted content.

Thus, the Ninth Circuit reversed the grant of summary judgment in favor of LiveJournal and remanded for trial to address the factual questions relating to the application of the § 512(c) safe harbor with regard to LiveJournal’s business model.

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