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Social Bookmarking Lacks the Flava of Copyright Infringement

Analysis of *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012)

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Flava Works, Inc., an adult video producer, sued myVidster, a "social-bookmarking" service, for direct and contributory copyright infringement in the Northern District of Illinois. Social-bookmarking services act as brokers between websites where videos are stored and Internet users who want to view them. myVidster allows users to find videos that they like on the Internet and "bookmark" them on myVidster's website. After receiving a "bookmark" request from users, myVidster embeds these videos on its website – allowing users to view the videos that are stored on the "bookmarked" website through the frame of myVidster's website interface. Finding that myVidster would likely be found liable for contributory copyright infringement, the district court granted Flava's motion for a preliminary injunction to prevent myVidster from enabling the copyright infringement and denied myVidster's motion for reconsideration. myVidster appealed the ruling to the Seventh Circuit.

On appeal, the Seventh Circuit held that the video producer, Flava, failed to establish a substantial likelihood of success on the merits of its contributory infringement claim and vacated the preliminary injunction.

Judge Posner's Opinion starts by blasting the district judge's determination that the relevant analysis on such a motion for a preliminary injunction is based on the single factor of the plaintiff's likelihood of success. Citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392-93 (2006), Posner reiterated the Supreme Court's instruction that irreparable injury could not automatically be presumed from a showing of copyright infringement and therefore must also be considered when determining the appropriateness of a preliminary injunction. However, the court did not address the issue because it was not raised by either party.

Addressing the issue of copyright infringement, the court reasoned that "as long as the visitor makes no copy of the copyrighted video that he is watching, he is not violating the copyright owner's exclusive right, conferred by the Copyright Act, 'to reproduce the copyrighted work in copies' and 'distribute copies … of the copyrighted work to the public.'" Thus, because myVidster's users were merely viewing, rather than downloading the videos, they were not infringers. "The infringer is the customer of Flava who copied Flava's copyrighted video by uploading it to the Internet."

Defining contributory infringement as "personal conduct that encourages or assists the infringement," it follows that "[t]he facilitator of conduct that doesn't infringe copyright is not a contributory infringer." Posner recognized that myVidster encourages its users to circumvent Flava's pay wall, which was a "bad thing to do," but such activity alone falls short of contributory infringement.

Posner further analyzed myVidster's liability for infringement caused by unauthorized public performance of the copyrighted works in violation of 17 U.S.C. § 106(4). The court noted two interpretations of what constitutes a "public performance." The first interpretation is that public performance occurs upon uploading the video – the moment that it is "communicated to the public in a form in which the public can visually or aurally comprehend the work." The court correctly determined that "[t]he first interpretation is hopeless for Flava. For there is no evidence that myVidster is contributing to the decision of someone to upload a Flava video to the Internet."

The second interpretation is that public performance occurs when the video is viewed. Posner recognized the argument that "myVidster is assisting the transmission by providing the link between the uploader and the viewer and is thus facilitating public performance." However, the court differentiated myVidster's conduct from that in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996) and *In re Aimster Copyright Litigation*, 334 F.3d 643, 653 (7th Cir. 2003).

The court concluded that, given the current facts of the case Flava could not establish grounds for a preliminary injunction and vacated the district court's order. However, it did note that Flava may be entitled to such preliminary injunctive, "if it can show, as it has not shown yet, that myVidster's service really does contribute significantly to infringement of Flava's copyrights."