

## Ninth Circuit Holds that DMCA Requires Specific Knowledge of Copyright Violation for Service Provider Liability

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In an important decision on the issue of website operators' copyright liability for user-generated content, the U.S. Court of Appeals for the Ninth Circuit has refused to hold a site operator liable for copyright infringement based solely on its general knowledge that some of the third party content on its site may be infringing.

The Ninth Circuit's opinion in the case of *UMG Recordings v. Shelter Capital Partners* concerned the potential liability of video-sharing website operator, Veoh Networks, under one of the so-called "safe harbors" of the Digital Millennium Copyright Act (DMCA). Veoh operates a publicly accessible website that enables users to share videos with other users. The particular safe harbor Veoh invoked protects website operators and other "service providers" from liability for the copyright infringement of others who provide content on their sites when the provider "expeditiously" takes down the allegedly infringing content residing on its servers in response to a notice from a copyright owner that the content is infringing. In this case, UMG argued that Veoh's general knowledge that infringing content resided on its servers was sufficient to deprive Veoh of the protections of the DMCA's safe harbor for infringing content. The Ninth Circuit disagreed and affirmed the district court in upholding summary judgment for Veoh.

There was no question that Veoh acted expeditiously to remove allegedly infringing content from its servers upon receipt of a DMCA notice alleging that specific content on its site was infringing. However, UMG claimed that Veoh's actions were "too little, too late" due to Veoh's late adoption of filtering technology to detect infringing material and Veoh's takedown of only the specific videos identified in DMCA takedown notices.

In finding that Veoh was entitled to the DMCA safe harbor, the Court first found that Veoh's functions in connection with video uploads by users fell within the safe harbor requirement that the uploaded content was on Veoh's website was "by reason of the storage at the direction of the user." In so holding, the Court found that Veoh's automatic processes of creating Flash files and/or "chunks" of videos to facilitate streaming and downloading did not deprive Veoh of the safe harbor for "storage at the direction of the user." The Court reasoned that such a narrow interpretation of that language would render the safe harbor meaningless. The Court also noted that, by contrast, the DMCA safe harbor for providing transient (peer-to-peer or P2P) communications in Section 512(a) requires that the third party material not be modified in any way. That restriction does not apply to DMCA Section 512(c) (Information Residing on Systems or Networks at Direction of Users) at issue here.

The Court then addressed UMG's claim that Veoh had "actual knowledge" of the infringing activity, which would deprive Veoh of the DMCA safe harbor, if true. UMG raised numerous factors that could have tipped off Veoh to the presence of infringing content on its servers, such as the presence of music videos without any license from a rights holder. As the Court pointed out, however, many music videos do not require licenses, such as originally created music or music provided with permission of the rights holder. On this point, the Court followed the Supreme Court's 1984 *Sony* decision, holding that a product "capable of substantial noninfringing uses" (like a VCR in that case) does not violate copyright law just because it is capable of being used for copyright infringement. As the Court noted, the safe harbor provisions of the DMCA *presume* that websites such as Veoh's may be used for infringing purposes. Accordingly, "the general knowledge that one's services could be used to share infringing material [ ] is insufficient to meet the actual knowledge requirement . . . ."

The Court reached the same conclusion regarding the safe harbor condition that, "in the absence of [actual] knowledge, [the service provider] is not aware of facts or circumstances from which infringing activity is apparent." Ultimately, the Court refused to shift the safe harbor burden from the copyright owner to the service provider. The Court noted that shifting the burden could violate other DMCA provisions that specifically exempt service providers from having to monitor or investigate content and could result in the removal of noninfringing content.

Finally, the Court addressed UMG's claim that Veoh violated the safe harbor condition that it not "receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." The Court followed its reasoning in the knowledge provisions discussed above, *i.e.*, a service provider "must be aware of specific infringing material to have the ability to control that infringing activity within the

meaning of” the safe harbor provision of the DMCA.

This is the first case decided by a U.S. Court of Appeals on the obligations of a service provider claiming protection under the DMCA safe harbor where the service provider has general knowledge that there may be infringing material on its website. So long as the service provider acts expeditiously to remove allegedly infringing materials when statutorily compliant and specific takedown notices are received, the safe harbor will not be lost. It will be interesting to see whether other appellate courts—including the Second Circuit, where the issue is on appeal in the *Viacom v. YouTube* case with a decision expected soon—follow the Ninth Circuit or whether a split in the circuits arises that could merit Supreme Court review.

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