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# Internet Litigation

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## **Ninth Circuit Holds Web Site Can Lose DMCA Safe Harbor by Using Moderators**

Earlier this month, the Ninth Circuit Court of Appeals held that an online provider may become ineligible for the safe harbor provided by Section 512(c) of the Digital Millennium Copyright Act (DMCA) if its moderators help select content submitted by users. [*Mavrix Photographs, LLC v. LiveJournal, Inc.*, —F.3d—(9th Cir. Apr. 7, 2017).] The decision may signal a departure from the traditional expansive protection under Section 512(c), which protects Web sites from claims that user content infringes copyright if they expeditiously take down the content upon notice.

*Mavrix* concerns LiveJournal.com, a social networking service used to create “communities” where users can post and comment on a particular topic. LiveJournal’s most popular community—and the forum for the alleged infringement—is “Oh No They Didn’t” (ONTD), which focuses on celebrity gossip.

Not all submissions are posted to the ONTD community. Instead, users submit posts to volunteer moderators, who review them to ensure compliance with LiveJournal’s rules, including a prohibition on copyright infringement. In addition, LiveJournal pays one full-time employee, who, among other things, also reviews and approves posts.

*Mavrix Photo*, a “Celebrity News Photo Agency,” sued LiveJournal, claiming 20 of its photographs were posted on ONTD without

permission. Notably, *Mavrix* did not use LiveJournal’s notice and takedown procedure before filing suit. As soon as the lawsuit commenced, LiveJournal took the infringing pictures down.

The district court granted summary judgment to LiveJournal, finding it was protected under the DMCA’s safe harbor provision. [17 U.S.C. § 512(c).] The Court of Appeals reversed.

Under Section 512(c), a provider may claim safe harbor immunity if, in addition to complying with the DMCA’s technical requirements (e.g., having an appropriate notice and takedown policy), it can establish: (1) the infringing content is stored “at the direction of a user;” (2) the provider does not have actual or “red flag” knowledge of the infringing material; and (3) upon obtaining knowledge of the infringing material, the provider “acts expeditiously to remove, or disable access to, the material.” [17 U.S.C. § 512(c).]

The Ninth Circuit held that the safe harbor might not apply to LiveJournal because there were issues of fact as to whether the photos were stored “at the direction of the user.” It distinguished between a provider that passively allows infringing content to be posted and one that screens and posts allegedly infringing material. The court held the former is eligible for the safe harbor, but the latter may not be. A court should apply agency principles to decide whether a moderator’s actions can be imputed to the provider, removing it from the safe harbor’s protection.

Applying this rule to the facts before it, the Ninth Circuit held a reasonable juror could conclude that an agency relationship between

LiveJournal and its moderators existed because (1) LiveJournal selected moderators and provided them specific directions; (2) evidence existed suggesting LiveJournal users may reasonably have believed that the moderators had authority to act for LiveJournal; and (3) LiveJournal maintained significant control over ONTD and its moderators by providing substantive supervision and selecting and removing moderators. According to the court, whether the moderators were paid was not dispositive.

## **Conflicting Caselaw**

This portion of *Mavrix* is in tension with at least one other federal circuit court decision, *CoStar Grp., Inc. v. LoopNet, Inc.* [373 F.3d 544, 556 (4th Cir. 2004)], in which the Fourth Circuit held that a Web site’s automated *and* manual review of user photos, including for infringement, did not strip the site of the DMCA safe harbor. Although the *Mavrix* court suggested that automated review does not threaten a Web site’s protection, manual review does: “The question for the fact finder,” the court held, “is whether the moderators’ acts [are] merely accessibility-enhancing activities” or whether their acts go “beyond the automatic and limited manual activities we have approved as accessibility-enhancing.” As a result, providers may be more likely to stop screening for infringing content or, at a minimum, stop any manual review.

The Ninth Circuit discussed the remaining elements of the safe harbor “to provide guidance to the district court.” It held a provider cannot claim it has no actual knowledge of the infringement merely because the plaintiff does not provide notice of infringement, that is, send what are commonly referred to as “DMCA takedown notices.” Instead, *Mavrix* was entitled to take the depositions of the moderators to discover their subjective knowledge. Applying

agency principles, the moderator's knowledge of infringement could be imputed to the provider.

Even if Mavrix could not show actual knowledge of infringement, the Ninth Circuit suggested LiveJournal may have had "red flag" knowledge, that is, was aware of facts that would have made the specific infringement objectively obvious to a reasonable person. Some of the allegedly infringing photographs bore a watermark containing the URL for Mavrix's Web site. The court stated: "the fact finder should assess if it would be objectively obvious to a reasonable person that material bearing a generic watermark or a watermark referring to a service provider's website was infringing."

## Conclusion

LiveJournal's structure may create more complex questions under the DMCA than a traditional, exclusively volunteer-run "community."

The evidence suggests factual questions existed as to the extent of ONTD's only paid moderator's control. Theoretically, had LiveJournal not overseen its volunteers, the court may have reached a different conclusion.

Regardless, the Ninth Circuit's opinion may signal a narrowing of what historically has been a broad immunity, and is one of only a handful of appellate decisions discussing what it means to store content "at the direction of a user."

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