Copyright Alert

Io v. Veoh—DMCA Covers Video Upload Site Charged With Exposing Skin Flicks

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In an important decision with potential implications for the *Viacom v. YouTube* suit and for every website that hosts user-supplied content, a Magistrate Judge in the Northern District of California has granted summary judgment against a publisher of "adult" films on the ground that an "Internet Television Network" that enables the sharing of user-provided video content was protected from copyright liability by a safe harbor of the Digital Millennium Copyright Act, 17 U.S.C. § 512(c). *Io Group, Inc. v. Veoh Networks, Inc.*, No. C06-03926 (N.D. Cal. Aug. 27, 2008).

The DMCA does not contemplate, the court concluded, that "Veoh shoulder the entire burden of policing third-party copyrights on its website (at the cost of losing its business if it cannot). Rather, the issue is whether Veoh takes appropriate steps to deal with copyright infringement that takes place." The court concluded that Veoh did. Surveying a range of DMCA requirements, the *Veoh* decision provides a useful map for websites that host user-submitted content seeking to navigate into the DMCA's safe harbors.

Factual background and procedural posture

Io Group is a producer, marketer and distributor of erotic entertainment products, including films. Veoh offers user-submitted video content, as well as commercially produced videos licensed from sources such as Turner, CBS, Us Magazine and Road & Track Magazine.

Veoh now offers advertising opportunities associated with its video content, but did not do so at the times relevant to the lawsuit, nor did it charge any membership or subscription fees. As is typical for such websites, Veoh had positioned itself to claim the protection of the DMCA's user storage safe harbor by offering the statutorily-specified process for copyright holders to request that infringing matter be taken down, by adopting a repeat infringer policy, and by taking other steps required for DMCA compliance.

In June 2006, Io discovered that clips from ten of its copyrighted films had without authorization been uploaded to and viewed on Veoh. Without availing itself of the take-down remedies provided by the DMCA or making any other demand, Io filed suit for copyright infringement.

Coincidentally, however, before Veoh learned of the action, Veoh independently decided to bar pornographic content from its site and terminated access to all erotic content on Veoh (including the Io video clips).

The parties stipulated that the case be heard by a Magistrate Judge. On cross-motions for summary judgment, the court considered the sufficiency of Veoh's policies and practices to satisfy the DMCA's requirements for safe harbor eligibility. In granting summary judgment to Veoh, Magistrate Judge Howard R. Lloyd assessed these requirements, providing useful guidance on how much policing for infringement of one's site is enough to meet the statutory requirements.

Rulings on DMCA requirements

1. ***Repeat infringer policy***. Eligibility for the safe harbor requires that online service providers adopt, reasonably implement and inform subscribers of a policy providing for the termination in appropriate circumstances of repeat infringers. The court held that Veoh reasonably implemented its policy where:

- "Veoh often responds to infringement notices the same day they are received, or at most, within a few days."
- After a second infringing posting, the user's account is terminated, all content provided by that user is disabled (unless also published by another non-terminated user), and the user's email address is blocked so that a new account cannot be opened with that same address.
- Veoh generates a "hash," or digital "fingerprint," for each video file, which allows Veoh to terminate access to any other identical infringing files and prevent additional identical files from being uploaded by any user.
- Since its site had been launched, Veoh had terminated over one thousand repeat infringers.

We note that the court did not hold all of the foregoing steps to be *necessary*, but found them *sufficient* to establish that Veoh reasonably implemented its repeat infringer policy.

Io contended that the Veoh policy was insufficient because Veoh does not prevent repeat infringers from reappearing on Veoh under a pseudonym, using a different email address, nor did Veoh block additional use from the infringer's IP address. Noting that Io provided no evidence any repeat infringer had actually done so and that the DMCA imposed no duty to affirmative monitor for infringement, the court rejected Io's position.

2. ***"At the direction of a user."*** DMCA Section 512(c) limits a service provider's liability "for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." 17 U.S.C. § 512(c). The court rejected Io's argument that video files on Veoh were made available by Veoh, not "at the direction of a user," based on the fact that Veoh converted each user-submitted video into Flash format and created "screencaps" (still screen shots) to represent the videos in search results.

"Veoh has simply established a system whereby software automatically processes user-submitted content and recasts it in a format that is readily accessible to its users," the court observed. "But Veoh does not itself actively participate or supervise the uploading of files. … [V]ideo files are uploaded through an automated process which is initiated entirely at the volition of Veoh's users."

3. ***"Red flag" test***. The court rejected each of several arguments that Veoh was aware of facts and circumstances from which infringing activity was apparent, rendering it ineligible for the safe harbor. First, the court held, Io's copyright registrations did not provide notice to Veoh because the clips submitted by users omitted any copyright notices. Second, while one video did contain an Io trademark, it did so only several minutes into the clip, and Veoh was not shown to have been aware of it. Third, the professional nature of the content did not constitute a "per se 'red flag' of infringement" in light of the high quality level of the video equipment available to the general public today, whose use results in there often being "little, if any, distinction between 'professional' and amateur productions." Nor did the absence of a statutorily-required notice regarding records concerning the age of sexual performers in these explicit films put Veoh on appropriate notice; the issue was copyright infringement, not whether there was a violation of statutory age-record-keeping requirements.

4. ***Acting expeditiously to remove infringing material upon knowledge or awareness***. Veoh has a "Flag It!" feature, allowing users to bring to Veoh's attention material that may be objectionable for various reasons. Io argued that Veoh willfully blinded itself to notice of infringing matter because the list of reasons on the "Flag It!" feature no longer includes a choice for "appears to contain copyrighted material." The court rejected Io's argument, noting that "the 'Flag It!' feature itself contains a notice, prominently displayed at the top of the 'Flag It!' dialog box, directing copyright owners to a link with instructions for submitting a copyright infringement notice …."

5. ***Right and Ability to Control Infringing Activity***. An online service provider is ineligible for the safe harbor if the OSP receives a direct financial benefit from infringing activity it has the right and ability to control. Acknowledging that "[p]recisely what constitutes the requisite right and ability to control … is somewhat hard to define," the court embarks on a long and discursive analysis, holding in the end that Veoh did not have the right and ability to control which would render it ineligible for the safe harbor, even if Veoh also derived direct financial benefit from infringement. Key points of the court's analysis include:

- Something more is required, for the "right and ability to control," than simply "the ability of a service provider to block or remove access to materials posted on its website or stored on its system." (Several other earlier decisions have reached a similar conclusion.)
- "Veoh's right and ability to control its system does not equate to the right and ability to control *infringing activity*" since (unlike Napster), Veoh does not exist solely to provide the site and facilities for infringement.
- "There is no evidence that Veoh can control what content users choose to upload before it is uploaded."
- Contrary to Io's view, Veoh has no obligation to prescreen all of the hundreds of thousands of videos its users upload; it is sufficient if Veoh "police[s] its system to the fullest extent permitted by its architecture." Veoh's use of digital fingerprint technology, among other factors, indicates that "Veoh has taken steps to reduce, not foster, the incidence of copyright infringement on its website."

- Veoh need not change its business operations – by hiring more employees or decreasing its operations – in order to prevent infringement. "Declining to change business operations is not the same as declining to exercise a right and ability to control infringing activity."

Although the court's analysis of the control issue is less than completely lucid, what it seems to come down to is that enterprises which appear to exist largely to promote infringement and make little effort to prevent it will be held to have the right and ability to control infringing activity, while those that make reasonable efforts to control infringements which are merely incidental to their lawful businesses will not.

Injunctive Relief Held Moot

Online service providers eligible for the safe harbor enjoy immunity from money damages and are liable only for limited injunctive relief. Since, however, Veoh removed all matter that infringed Io's copyrights even before learning of the lawsuit, and since it no longer allows any adult content, the court deemed injunctive relief moot and granted summary judgment to Veoh.

The *Veoh* decision addresses many practical questions faced by website operators hosting user-supplied content. However, the fact that it was written by a magistrate judge and is not completely clear in its analysis of supervision and control could affect its persuasive influence on other courts. In particular, it will be interesting to see what influence the decision may have in the closely watched case of *Viacom v. YouTube*.

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