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CASES OF INTEREST

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Music Law Weekly Case Update For Music Industry Executives

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UMG Recordings, Inc. v. Veoh Networks, Inc., USCA Ninth Circuit, December 20, 2011

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- In a heavily litigated and much watched case, the Ninth Circuit upholds DMCA safe harbor protection from copyright infringement liability for video-sharing site and affirms dismissal of claims of secondary liability for copyright infringement against investors in the site.

Plaintiffs, record labels and music publishing companies, sued defendants, Veoh Networks, operator of a web site that allows users to share videos, and its investors, for infringement of music copyrights plaintiffs owned in some of the videos users had shared. The district court granted summary judgment to Veoh, holding that it was protected by the Digital Millennium Copyright Act (DMCA) "safe harbor" limiting service providers' 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." The district court also granted defendant investors' motion to dismiss the claims for secondary liability against them. Plaintiff UMG appealed both the summary judgment and the dismissal, and the Ninth Circuit panel affirmed.

As the court explained, the safe harbor provision, at 17 U.S.C. Sec. 512(c), limits the liability of web service providers 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." This safe harbor is only available to a web site that (i) "does not have actual knowledge that the material or an activity using the material [posted to the site] is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material."

Veoh allows users to post videos to its web site, after which automated processes make the video viewable by others and also extract data that helps others find the video for viewing. While Veoh employees do not review videos before they are made publicly accessible, Veoh does have procedures and systems to remove copyrighted videos posted to the web site without authorization. In the case, however, Veoh did not dispute that, at one point, visitors to its web site could view videos containing copyrighted content owned by UMG.

UMG asserted several reasons for why Veoh was ineligible for safe harbor protection under the DMCA, including that the infringements in question were not "by reason of the storage [of videos] at the direction of a user ..." UMG argued (among other things) that the safe harbor only protected infringements resulting "by reason of" storage on a web site,



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not a site's provision of access to stored videos. The Ninth Circuit rejected this argument, finding that the safe-harbor provision and other parts of the DMCA (e.g. the detailed notice and takedown provisions) presuppose that web sites will provide access to stored material. The Ninth Circuit also noted that the safe harbor would be ineffectual if it did not protect web sites from suits arising from their provision of access to copyrighted material.

UMG also argued that Veoh had knowledge of the infringing conduct and therefore was ineligible for the protection of the safe harbor provision. The Ninth Circuit disagreed, affirming that the district court's finding that UMG failed to rebut Veoh's showing that it initially lacked knowledge of any specific infringing material, and that when it did acquire such knowledge, it immediately removed the material.

The Ninth Circuit also rejected UMG's argument that Veoh must have known that copyrighted material was accessible through its site since Veoh provides access to music videos and, in general, many music videos are copyrighted. The Ninth Circuit noted that many music videos lawfully appear on Veoh's web site, such that the mere presence of music videos in general could not have given Veoh knowledge that some of these music videos were posted without authorization. The DMCA also places the burden on copyright owners to inform web sites about the presence and accessibility of infringing material and UMG had failed to identify any specific infringing videos to Veoh. The Ninth Circuit also rejected UMG's argument that Veoh, upon receiving notices from the Recording Industry Association of America, was obliged to search its web site and eliminate all unauthorized videos, noting that neither the DMCA nor court precedent imposed investigative duties on web sites as a condition for qualifying for the safe harbor.

The court also affirmed the district court's dismissal of the investor defendants for failure to state a claim, agreeing with the lower court that UMG had not alleged sufficiently that the investor defendants gave material assistance to Veoh or its users to help accomplish infringement. Acknowledging at the outset that allowing a claim for secondary liability against investors to proceed despite the fact that the service provider is shielded from liability by the safe harbor provision would be an illogical and anomalous result, the Ninth Circuit nonetheless considered the merits of plaintiff's claims and concluded that the district court properly dismissed the complaint. Conceding that funding alone did not meet the material assistance requirement for secondary liability, UMG argued that that the three investor defendants occupied three of the five seats on Veoh's board and worked in concert to take control of the company's operations by wielding majority control. The Ninth Circuit rejected UMG's argument, reasoning that, even assuming that exercising this kind of joint control could satisfy the material assistance requirement (which the court was not convinced it could), plaintiff had not alleged in its complaint that the three defendants ever agreed to work in concert to that end, and simply alleging that they had majority control of the board was insufficient.

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