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'Safe Harbor' For Online Service Providers

Law360, New York (March 19, 2009) -- Another Federal court in California has given a broad reading to the "safe harbor" provisions of the Digital Millenium Communications Act ("DMCA") pertaining to providers of online services.

In UMG Recordings Inc. et al. v. Veoh Networks Inc. et al., 2008 US Dist. LEXIS 104980 (C.D. Cal, Dec. 29, 2008), the court rejected plaintiff's contentions that defendant's copying, processing and offering access to uploaded video content disqualified it from safe harbor immunity.

This is only the latest in a series of recent decisions which help define the parameters of the safe harbor and lay out a compliance road map for those whose Web sites permit posting of user-generated content (UGC).

Section 512(c) of the Copyright Act insulates online service providers from money damages for infringement "by reason of the storage at the direction of a user of material" that resides on the service provider's system, but only if the service provider satisfies a number of statutory requirements.

These include lack of actual knowledge of infringement, lack of financial benefit directly attributable to the infringing activity, compliance with the familiar "notice and takedown" procedures and the requirement to adopt, inform users of and reasonably implement a policy to terminate repeat infringers.

Veoh operates a Web site which, like YouTube, offers access to videos uploaded by users. It also offers access to copyrighted content licensed from sources such as Turner and CBS.

In August, 2008, Veoh had defeated a multi-pronged attack on its compliance with DMCA safe harbor obligations, in IO Group Inc. v. Veoh Networks Inc., 2008 U.S. Dist. LEXIS 65915 (N.D. Cal. 8/26/08).

Soon after that decision, UMG — which was already engaged in its own copyright infringement action against Veoh — filed a motion for partial summary judgment making a more fundamental attack on Veoh's safe harbor claim.

UMG asserted that Veoh's alleged infringement of UMG copyrights did not occur "by reason of the storage at the direction of a user," as required by Section 512 (c)(1), and that therefore Veoh could not qualify for safe harbor protection ab initio.

The basis for UMG's motion was that, like other websites whose purpose is to allow the sharing of UGC, Veoh does not simply store what it receives.

In order to organize, index and make the material more accessible, Veoh engages in four functions: (1) automatically creating "Flash-formatted" copies of all uploaded videos (in order to make them universally viewable), (2) automatically creating copies that break the video down into 256-kilobyte "chunks" (to make them easier to transmit), (3) allowing users to access uploaded videos via streaming, and (4) allowing users to download whole video files.

To UMG, the case was simply one of applying the plain meaning of the statute. It argued that the statute only limits liability for "storage at the direction of a user," and that the four functions "have nothing to do with 'storage' and "certainly are not done 'at the direction of a user.'" (UMG Reply Brief, p. 1).

The court agreed that the text of the statute resolved the issue. But it focused on the first three words of the clause in Section 512(a) — "by reason of the storage at the direction of a user" — and found the meaning to be "pretty clear."

It held that "'by reason of' means 'as a result of' or 'something that can be attributed to ... Therefore, when copyrighted content is displayed or distributed on Veoh it is "as a result of' or "attributable to' the fact that users uploaded the content to Veoh's servers to be accessed by other means." 2008 U.S. Dist. LEXIS 104980 at *23.

The safe harbor immunity would be meaningless, said the court, unless there was protection not only for the storage of user material but also the necessary functions for making that material accessible to others.

The DMCA's purpose, to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development and education in the digital age" (citing Senate Report 105-190, at 1-2 (1998)) would be thwarted, said the court, if service providers could be exposed to liability merely by providing access to works stored at the direction of users.

In so holding, the court put a 2008 gloss on the words "service provider" and "user" that may not have been foreseen when the DMCA was written.

The House Report on the DMCA gave as examples of the beneficiaries of section 512(c) those service providers who engage in “providing server space for a user’s Web site, for a chatroom, or other forum in which material may be posted at the direction of users.”

UMG argued that “service providers” protected by Section 512(c) are those entities that simply provide Web-hosting services, and that “users” are not individuals, but rather the operators of websites which store material on the web host’s system or network. (UMG Reply Brief, pp. 9-13).

In the distant past of 1997, the concept of “Web 2.0” was unknown, and the astonishing growth of UGC sites like MySpace (founded in 2003) and YouTube (2005) was far in the future.

At the Senate hearings on the service provider liability provisions, the only service provider industry testimony came from local and long-distance telephone companies and America Online (S. Rep. 105-190, p.6).

But the court gave UMG’s argument short shrift. It simply noted that a “service provider” is defined in Section 512(k) (1)(B) as “a provider of online services or network access, or the operator of facilities therefor,” and held without discussion that Veoh met the literal contours of this definition.

This is consistent with prior cases, relied on by the court, that bestowed safe harbor protection on operators of retail Web sites like Amazon and eBay: Corbis Corp. v. Amazon.com Inc. 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (protection against infringement by vendors who create Web sites using tools and forms provided by defendant); Hendrickson v. Ebay Inc., 165 F. Supp. 2d 1082 (C.D. Cal. 2001) (same); Hendrickson v. Amazon.com Inc., 298 F. Supp. 2d 914 (C.D. Cal. 2003) (protection against sale of infringing goods by users through website).

Regardless of what was envisioned in 1997, it is now clear that “service provider” protection under Section 512(c) can be claimed by anyone who operates a Web site that allows the posting of any content from users.

The court also relied on the August 2008 IO Group decision noted above. There, plaintiff had also challenged Veoh’s safe harbor protection based on, inter alia, Veoh’s copying of its files into Flash format. Plaintiff argued that this copying is not done “at the direction of a user” and therefore could not fall within the 512(c) safe harbor.

The court rejected plaintiff’s claim on two grounds. First, it noted the distinction between the protection given to “conduit only” service providers under Section 512(a) — which requires that the service provider transmit or route connections “without modification to the content of the material” — and the requirements for “service provider” status in Section 512(c), which include no such “no modification” limitation.

If Congress had wanted to impose a “without modification” restriction on 512(c) service providers, said the court, it could have done so. Therefore, Congress must have intended that 512(c) service providers enjoy some freedom to modify content uploaded by users.

Second, the court focused on the automated nature of Veoh’s processing, noting that because Veoh does not preview or select the files being copied into Flash format, or actively participate in or supervise the uploading of files, the copying is effectively done by the user, not by Veoh.

The IO decision gives significant comfort to service providers on two other important issues. The first concerned plaintiff’s claim that Veoh had failed to “reasonably implement” a policy of terminating subscribers and account holders who are “repeat infringers.” (Section 512(i)(A)).

Veoh showed that it (1) terminates accounts of those who upload infringing content after only a first warning; (2) disables all content previously provided by that user, and (3) generates a digital “fingerprint” for each uploaded video file, so that it can disable access to any identical file of a terminated user as well as prevent that file from being uploaded by any future user.

In addition, the terminated user’s email address is blocked so that a new account cannot be opened with that same address. Veoh asserted that it had already terminated 1096 users.

Plaintiff argued that there was a question of fact as to the reasonableness of this effort since terminated users could easily open new accounts using pseudonyms and different email addresses, and Veoh made no effort to verify new email addresses or otherwise reasonably track repeat infringers.

Nor did Veoh track users by their actual names or the Internet Protocol (“IP”) addresses of their computers.

The court rejected plaintiff’s argument. It reaffirmed prior Ninth Circuit law that “[t]o identify and terminate repeat infringers, a service provider need not affirmatively police its users for evidence of repeat infringement” (Perfect 10 Inc. v. CCBill LLC, 488 F.3d 1102, 1111 (9th Cir. 2007) and that a policy is “unreasonable only if the service provider failed to respond when it had knowledge of infringement.” (Id. at 1113).

It specifically held that there is no requirement to track IP addresses, since they do not distinguish among individual users (e.g., family members) who may share the same computer.

Finally, and most significantly, the court rejected plaintiff’s claim that Veoh lost safe harbor protection under Section 512(c)(1)(B) because it had the “right and ability to control the infringing activity" and received "a financial benefit directly attributable to such activity."

The statutory standard replicates the common-law test for vicarious infringement. Plaintiff claimed that Veoh's policies prohibiting a host of illegal activities on its site, and its conducting occasional spot checks of video files for compliance with its policies, demonstrated the requisite "right and ability to control."

But the court noted that, to be liable, the defendant must have the right and ability to control not just its own system but the "infringing activity" that occurs on it.

This means more than just having the ability to block or remove access to materials stored on its system; if that were enough, then any service provider who complied with the "notice and takedown" procedures would lose its immunity. In order to find vicarious liability, there must be "something more."

The court did not precisely define what that "something more" had to be, but contrasted Veoh with Napster in A&M Records Inc. v. Napster Inc., 239 F.3d 1004 (9th Cir. 2001), and the swap-meet proprietor in Fonovisa Inc. v. Cherry Hill Auction Inc., 76 F.3d 259 ((9th Cir. 1996).

There, the defendants either participated in or encouraged the direct infringement by its users, and had some ability to control what its customers either offered to share (in Napster) or brought to the swap-meet site (in Fonovisa). No such participation or encouragement was found here.

The court expressly held that Veoh had no obligation to prescreen hundreds of thousands of video files for infringement before allowing access to the system.

It also rejected plaintiff's contentions that Veoh should (1) seek to limit copyright infringement by obtaining the names and addresses of submitting users and the names of the producers of the video material submitted or (2) hire more employees and decrease its operations to increase its ability to police infringing activity.

Both recent Veoh cases thus rejected the demands of content owners seeking to shift the burden of policing infringement to the operators of UGC Web sites.

At least in the Ninth Circuit, Internet service providers who act promptly to take down infringements after notice, and otherwise comply scrupulously with the literal requirements of Section 512(c), need not fear financial liability for copyright infringement arising from the posting of UGC.

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