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# SHELTER THE STORM: CDA AND DMCA DEVELOPMENTS

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May 25, 2017

# HOW TO PROTECT YOUR COMPANY FROM LAWSUITS CONCERNING WEBSITE CONTENT?

# eCommerce Website Challenges

- **Things you can control:**
  - Don't use other content without permission
  - What your company's employees say online
- **Things that are more difficult to control:**
  - Postings by users on your:
    - > Website
    - > Social network
    - > Blog

# **COMMUNICATIONS DECENCY ACT -- CDA**

# What is the Communications Decency Act (CDA)?

- Section 230 immunity: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).



# Interactive Computer Service (ICS) vs. Information Content Provider (ICP)

- ICS qualifies for immunity; ICP does not
- “The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third party . . . .”  
*Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010)
- Close cases → immunity
- *Jane Doe No. 1 v. Backpage.com, LLC*, No. 15-1724, 2016 WL 963848 (1st Cir. Mar. 14, 2016)

# Three-Prong Test to Determine § 230 Immunity

## **(1) *Is defendant an ICS provider?***

- ICS is an “information service . . . that provides or enables computer access by multiple users to a computer server.” 47 U.S.C. § 230(f)(2)

## **(2) *Was the information provided by another ICP?***

- ICP is “any person or entity that is responsible, in whole or in part, for the **creation or development** of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3)

## **(3) *Does the claim treat defendant as a publisher/speaker of that third-party content?***

# Six Ways Plaintiffs Have Tried To Avoid § 230 Immunity

- (1) Defendant receives commissions from providing third-party content;
- (2) Contractual relationship with third party;
- (3) Materially contributed to content because edited or formatted material;
- (4) Solicited targeted content from third party or vouched for accuracy;
- (5) Failed to verify accuracy or warn that content was not verified; and
- (6) Knew content was false based on customer complaints/accounting reports, but failed to remove content.



# Immunity Applies to Commercial Conduct

- Charging “service” or “administrative” fees is irrelevant to CDA analysis
- Section 230 “was designed to ***promote the development of e-commerce, and more specifically, to prevent lawsuits from shutting down websites and other services on the Internet.***”  
*Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1122 (N.J. Super. Ct. Law Div. 2010)
- ***Hinton v. Amazon.com, LLC***, 72 F. Supp. 3d 685 (S.D. Miss. 2014)
- ***Caraccioli v. Facebook, Inc.***, 167 F. Supp. 3d 1056 (N.D. Cal. 2016)

# Exceptions to the CDA

- Section 230(e) states:
  - (e) Effect on other laws
    - (1) No effect on criminal law
    - (2) No effect on intellectual property law
    - (3) No effect on consistent State law
    - (4) No effect on communications privacy law (Electronic Communications Privacy Act of 1986 or similar State law)
- Claims that implicate the above laws do not fall within the ambit of § 230 immunity. *See Gen. Steel Domestic Sales, LLC v. Chumley*, No. 14-cv-01932, 2015 WL 4911585, at \*9 (D. Colo. 2015) (excluding Lanham Act claim)

## CDA: Sample Outlier Cases

- ***Beckman v. Match.com***, No. 13-16324, 2016 WL 4572383 (9th Cir. Sept. 1, 2016)
- ***Hassel v. Bird***, 247 Cal. App. 4th 1336 (2016)
- ***Huon v. Denton***, 841 F.3d 733 (7th Cir. 2016)

# **DIGITAL MILLENNIUM COPYRIGHT ACT -- DMCA**

# Digital Millennium Copyright Act

I. What Is the DMCA?

II. Safe Harbors: When they apply, when they don't

III. Key Case Discussion



# What is the DMCA?

- Title II, the Online Copyright Infringement Liability Limitation Act (OCILLA).
- Purpose of § 512(c): give service providers immunity in exchange for augmenting the arsenal of copyright owners by creating the notice-and-takedown mechanism.



# The DMCA's Safe Harbor: 17 U.S.C. § 512

- ***What are the safe harbors?***

- Limitations on liability, not copyright exceptions
- Falling outside the safe harbors does not make you liable for infringement
- Only copyright, not trademark or patent infringement, or other causes of action
- Apply only to "[service providers](#)" performing certain "functions"

# The DMCA's Safe Harbor

- ***Who is a "service provider" under the DMCA?***

- Narrow definition [512 (k)(1)(A)]: "entity offering the transmission, routing, or providing of connections for digital online communications between points specified by user..." i.e., Verizon or Comcast
- Broad definition [other than 512 (k)(1)(A)]: provider of online services or network access, or the operator of facilities therefore

***In re Aimster Copyright Litig.*** (7th Cir. 2003) (court had trouble imagining an online service that would not fall under the definition)



# Threshold Criteria for Safe Harbor Protection

- ***How does a service provider qualify for protection?***
  - *Inform* customers of its policies
  - Must have appointed an agent for receipt of notices and follow proper *notice and takedown* procedures
  - Must have adopted a policy that bans users who *repeatedly infringe copyrights*
  - Must accommodate standard technical measures used by copyright owners to identify infringements of copyrighted works
- *See* 17 U.S.C. § 512(i)

# Example of DMCA Takedown Notice

- <http://www.google.com/dmca.html>

## The Digital Millennium Copyright Act

It's Google's policy to respond to clear notices of alleged copyright infringement. Our response to these notices may include removing or disabling access to material claimed to be the subject of infringing activity and/or terminating subscribers. If we take action in response to a notice, we may try to notify the alleged infringer or the operator of the affected site.

We may also document notices of alleged infringement on which we act. We may forward the content in your notice to the nonprofit organization [Lumen](#), which publishes these notices after removing certain personal information. You can see an example of such a publication [here](#). For products like Google Web Search, we provide a link to the notice as published by Lumen in place of the removed content.

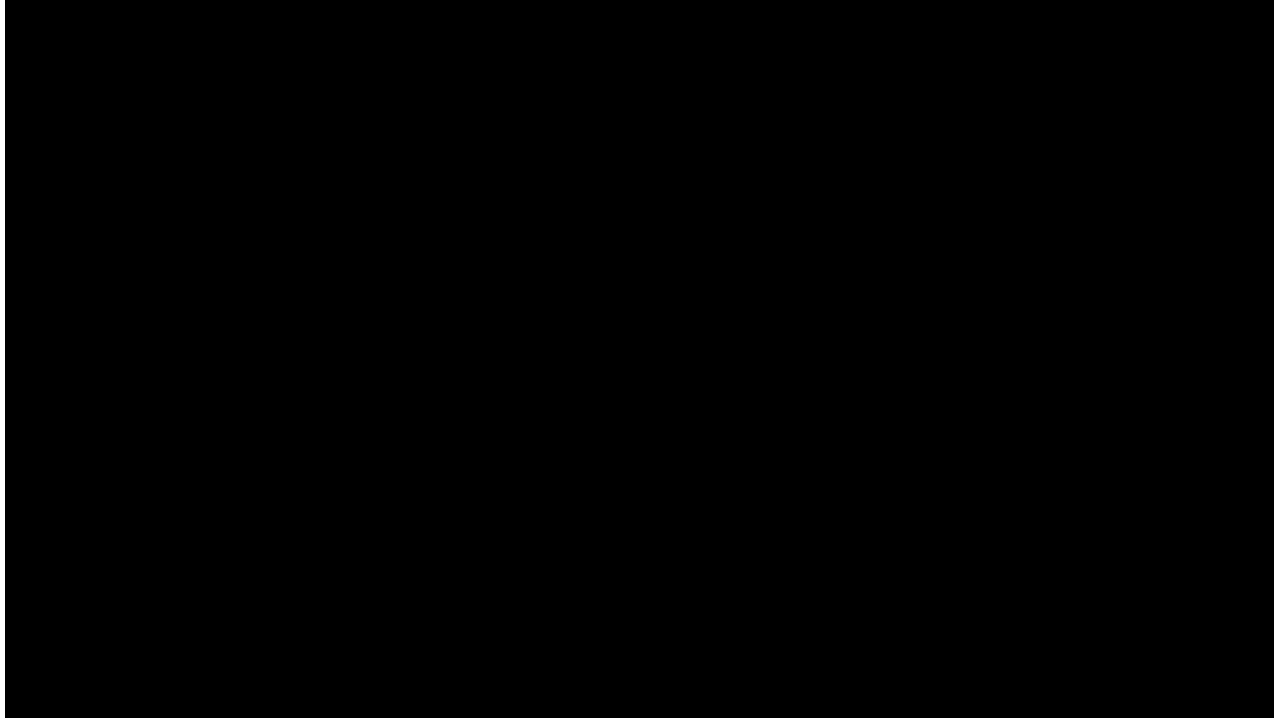
# Notice-and-Takedown Mechanism

- “A service provider shall not be liable . . . 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, if the service provider-- . . .
  - (C) upon **notification of claimed infringement** as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.” 17 U.S.C. § 512(c)(1).

# Notice-and-Takedown Mechanism

- **Written communication** provided to the service provider's **designated agent** that includes:
  - **(i)** Signature of a person authorized to act on owner of an exclusive right that is allegedly infringed
  - **(ii)** ID of the copyrighted work claimed to have been infringed
  - **(iii)** ID of material that is claimed to be infringing
  - **(iv)** Information sufficient to permit service provider to contact complaining party **(v)** A statement that the complaining party has a good-faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
  - **(vi)** A statement that the information in the notification is accurate, and, under penalty of perjury, that complaining party is authorized to act

# Good Faith Belief of Infringement: "Dancing Baby Case"



# *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. Sept. 14, 2015): “Dancing Baby Case”

- **Facts:** Plaintiff posted YouTube video of her children dancing to Prince’s *Let’s Go Crazy*. Defendant sent takedown notification to YouTube, and video was removed.
  - Copyright infringement
  - DMCA requires takedown notice
- **Issue:** Have copyright holders abused DMCA takedown procedures by failing to evaluate whether content qualifies as “fair use”?
- **Holding:** Yes. DMCA requires copyright holders to consider fair use before sending takedown notice. Triable issue = subjective good faith belief that plaintiff’s video was illegal
- **Note:** Petition for U.S. Certiorari

# What Constitutes Knowledge of Infringement?

- Actual knowledge, willful blindness, and red flag notice of infringement all provide sufficient basis
- Specific, identifiable instances of infringement
- Mere awareness of prevalence of infringing activity is not sufficient

# Knowledge – Willful Blindness/Duty to Monitor?

- DMCA specifies: no duty to monitor or seek facts indicating infringement
- Even when service providers possess sophisticated monitoring technology → under no obligation to use it to seek out infringement
- “Willful blindness” might be found if service provider was aware of high probability of infringement (specific, identified instances of infringement)



# What Is “Red Flag” Knowledge of Infringement?

- Awareness of facts and circumstances from which infringing activity is apparent
- “Objective” standard: provider must be “subjectively [actually] aware of facts that would have made the specific infringement objectively obvious to a reasonable person”

# Landmark Case: *Viacom v. YouTube*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013)

- Viacom sued YouTube for \$1B for "massive intentional copyright infringement"
- Summary judgment in YouTube's favor (DMCA's safe harbor provision). Viacom appealed
- Second Circuit vacated decision on April 5, 2012
- Sent back to district court. Court issued another order granting summary judgment in YouTube's favor. **Case is over; no money changed hands**

## Repeat Infringers: *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 840 F.3d 69 (2d Cir. 2016)

- Policy to terminate “repeat infringers.”
- **Facts:** MP3tunes.com provided “locker storage” service, charging users to store music on the MP3tunes server.
- **District Court:** Defendant not “repeat infringer,” and therefore safe harbor **may** apply, subject to jury’s finding on defendant’s knowledge. Court gave issue of safe harbor protection to jury, which returned verdict for plaintiff (\$48M, including \$7.5M punitive damages against CEO).

# *EMI Christian Music Group v. MP3tunes*

- **Issues on Appeal:**

- (1) Was court correct that defendant reasonably implemented repeat infringer policy?
- (2) Was court correct that jury's finding of red flag knowledge or willful blindness regarding pre-2007/Beatles songs was wrong as matter of law?

- **Second Circuit:**

- (1) No – too narrow a definition of “repeat infringer”
- (2) No – Sufficient evidence for reasonable jury to conclude that Defendant had red flag knowledge or was willfully blind to infringing activity

# EMI Christian Music Group v. MP3tunes

- **District Court:** User who downloads songs for personal entertainment cannot be repeat infringer. Repeat infringer must **know** the conduct infringes another's copyright.
- **Second Circuit:** District court's definition too narrow.
  - **[A] 'repeat infringer' does not need to know of infringing nature of its online activities.**
  - "A reasonable jury . . . could have determined that defendant consciously avoided knowing about specific repeat infringers using its services, even though infringement was rampant and obvious."

# *EMI Christian Music Group v. MP3tunes*

- Even if a service provider has a reasonably implemented repeat infringer policy, it relinquishes the DMCA's safe harbor if it:
  - (1) Has actual knowledge of material infringing; and
  - (2) Doesn't act fast
- Burden on copyright owner
- Robertson encouraged infringement could have led reasonable jury to find that Defendant had red flag knowledge

# Willful Blindness: *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016)

- **Facts:** ISP with website where members can post videos they create
  - Plaintiff claimed copyright infringement for 199 videos
  - ~43,000 new videos uploaded on site each day. Users post without intervention/active involvement from Vimeo's staff
  - “Employs a ‘Community Team’ curate content. ‘Like’ sign, commentary on a video, technical assistance, participate in forum discussions, inspect videos suspected of violating defendant's policies
  - Videos not inspected by Community Team

## *Capitol Records v. Vimeo*

- Vimeo's practice → Screen visual (not audio) content. Plaintiff argued this shows indifference/willful blindness
- Plaintiff also argued that statements made by defendant's employees show indifference/willful blindness and that defendant actively encouraged users to post infringing videos



# Capitol Records v. Vimeo

- **Issues:**

- (1) Does safe harbor of § 512(c) apply to pre-1972 sound recordings?
  - Yes
- (2) Evidence of viewing videos that played “recognizable” copyrighted songs sufficient to satisfy the standard of red flag knowledge?
  - No (relying on *Viacom*)
- (3) Shown general policy of willful blindness to infringement of sound recordings, which would justify imputing to defendant knowledge of specific infringements?
  - No

# (1) Pre-1972 Recordings

- Court holds that 2011 Copyright Office report is wrong
- “§ 101 does not include a definition for ‘infringement of copyright. ...This provision of § 501(a) is in no way incompatible with interpreting the safe harbor as applying to infringement of state copyright laws. To state that conduct x violates a law is not the same thing as saying that conduct x is the only conduct that violates the law.”

## (2) Red Flag Knowledge

- *Viacom*: To find red flag knowledge, ISP must have actually known facts that would make specific infringement claimed objectively obvious to reasonable person
- Mere fact that ISP employees viewed a video posted by a user insufficient

## (2) Red Flag Knowledge – Safe Harbor as Affirmative Defense

- Burden-shifting framework: Defendant has burden of showing safe harbor applies.
- On question of whether defendant should be disqualified based on plaintiff's accusations of misconduct, the burden shifts to plaintiff

## (3) General Policy of Willful Blindness

- Actual and red flag knowledge ordinarily must relate to “specific infringing material”
- Plaintiff argues, however, that defendant, in order to expand its business, actively encouraged users to post videos containing infringing material.
  - But “that evidence was not shown to relate to any of the videos at issue in this suit.”

**Agency issue: *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 853 F.3d 1020 (9th Cir. 2017)**



# *Mavrix Photographs v. LiveJournal*

- **Facts:** Celebrity photography company specializing in candid photographs of celebrities in tropical locations
  - Social media website with different communities: “Oh no they didn’t” (ONTD)
  - In 2010, Defendant sought **control** over ONTD to increase advertising revenue
  - Beyonce photo
  - Claimed Section 512(c) safe harbor because posted at direction of user

## *Mavrix v. LiveJournal* – Moderator Acts

- **Issue:** Does common law of agency apply to defendant's safe harbor defense?
- **Held:** Yes. Since there are factual disputes regarding whether moderators are defendant's agents, the district court's ruling of summary judgment for defendant reversed and case is remanded for trial



# Distinguishing *Mavrix* and *Capitol Records*

Case	Website Moderators	Defendant's Knowledge	Holding
<i>Mavrix v. LiveJournal</i>	<ul style="list-style-type: none"><li>• Defendant actively paid/employed "primary leader"</li><li>• Defendant gave instructions about screening content</li></ul>	Did not get to this stage (defendant failed threshold showing: to establish that content was at the direction of users)	<ul style="list-style-type: none"><li>• Remand for trial on question of agency; if no agency found, court must also conduct knowledge and financial benefit analysis</li><li>• Note: 9th Circuit decision</li></ul>
<i>Capitol Records v. Vimeo</i>	<ul style="list-style-type: none"><li>• No intervention or active involvement by Vimeo</li><li>• Vimeo's "Community Team" didn't review videos at issue</li></ul>	No knowledge as a matter of law	Safe harbor protection

# Safe Harbor: Dos and Don'ts

## Service provider *must not*

- Have actual knowledge of infringement, and be aware of facts or circumstances from which infringing activity is apparent – or must take down expeditiously once it does. 512(c)(1)(A)
- Receive any financial benefit directly from the infringing activity in situations where the service provider has control over such activity. 512(c)(1)(B)
- Prevent standard technical measures used to identify or protect copyrighted works. 512(i)(2)

## Service provider *must*

- Take down expeditiously on receipt of compliant DMCA notice. 512(c)(1)(A)(iii)
- Adopt, reasonably implement, and notify users of a policy for terminating repeat infringers. 512(i)(1)(A)
- File a Designation of an Agent to Receive DMCA takedown notices with the Copyright Office, and post notice on website. 512(c)(2)

# Biography



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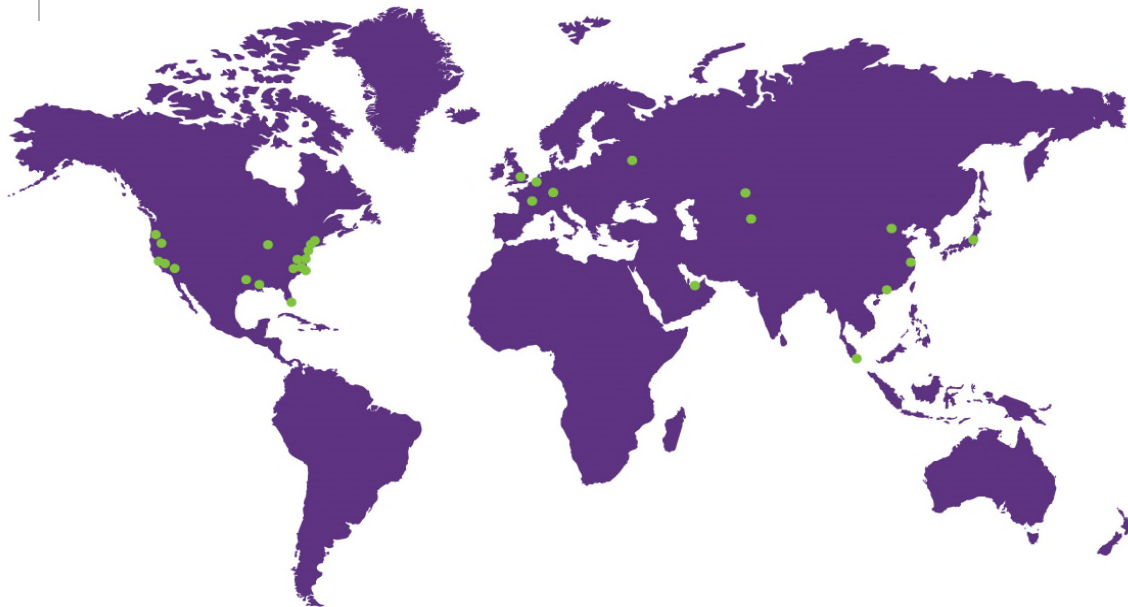
Elizabeth Herrington focuses her practice on complex corporate and commercial litigation across the United States, including management of related litigation. Beth represents domestic and international clients in high-profile commercial and class action lawsuits that involve fraud, contract claims, tax, trade secret theft, noncompete issues, and insurance disputes.

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