

LiveJournal's DMCA spat over celebrity pics raises questions for websites (C.A.9)

(April 12, 2017) - Social media platform operator LiveJournal Inc. might not be able to dodge copyright liability for users' allegedly infringing photos moderators posted to one of its community websites, a federal appeals court has ruled.

Mavrix Photographs LLC v. LiveJournal Inc., No. 14-56596, 2017 WL 1289967 (9th Cir. Apr. 7, 2017).

Mavrix Photographs LLC, which makes most of its money licensing celebrity pictures, convinced the 9th U.S. Circuit Court of Appeals to question whether LiveJournal qualified for the Digital Millennium Copyright Act's safe-harbor defense.

Section 512(c) of the DMCA, [17 U.S.C.A. § 512\(c\)](#), allows online platforms to avoid liability for users' infringement so long as the companies comply with certain statutory requirements.

For example, to be eligible for the safe harbor, accused platforms must not have actual knowledge or ignore certain "red flags" about the infringing material on their systems.

Because there were factual issues about whether the community moderators qualified as LiveJournal's agents and whether they had actual or red-flag knowledge about Mavrix's copyrighted photos, the three-judge panel reversed the trial court's decision to dismiss the case and remanded.

'The story isn't over'

"LiveJournal's loss at the 9th Circuit is of high interest to well-known websites (like Pinterest, Etsy and YouTube) that rely on user submitted photos," said intellectual property attorney Case Collard, a partner at Dorsey & Whitney in Denver, who is not involved in the case.

He noted website owners, including LiveJournal, may still argue they fall within the DMCA's safe harbor.

"The story isn't over for LiveJournal — the fight will return to the trial court — but this move could increase copyright lawsuits against websites that allow users to submit content," he said.

Meaghan A. Kent, counsel to the IP group at Venable LLP in Washington, said the decision signals to online platforms that using moderators may be a bad idea in terms of copyright liability.

"If an [online platform] that hosts third-party content wants to stay within the DMCA safe harbor, it either should not use moderators, or at least not use them to evaluate whether there is copyright infringement," she said.

'Oh No They Didn't' community

LiveJournal operates a community website called Oh No They Didn't, where users submit celebrity gossip, photos and links.

Mavrix says it saw its copyrighted celebrity photos on ONTD and sued LiveJournal for infringement in the U.S. District Court for the Central District of California on April 1, 2013.

Mavrix never sent takedown notices under the procedures set forth in the DMCA, but LiveJournal promptly removed the allegedly infringing photos once it learned about Mavrix's lawsuit, according to the 9th Circuit opinion.

The District Court granted LiveJournal's motion for summary judgment, finding the company did not know about the allegedly infringing posts and immediately removed them once it did. *Mavrix Photographs LLC v. LiveJournal Inc.*, No. 13-cv-517, 2014 WL 6450094 (C.D. Cal. Sept. 19, 2014).

Mavrix appealed.

Moderators as agents?

According to the 9th Circuit opinion, written by Judge Richard A. Paez, the safe harbor insulates online platforms from liability only for user-submitted infringing content.

Although users submitted the allegedly infringing Mavrix photos, LiveJournal recruited and trained moderators — both paid and volunteer — to screen and publicly post user submissions, the 9th Circuit said.

If the moderators acted as LiveJournal's agents, then posting Mavrix's copyrighted photos to the community website could be attributed to the social media platform, which could mean the DMCA's safe harbor would not apply, the panel said.

The panel directed the District Court to determine the moderators' status as agents, considering LiveJournal's level of control over them and evidence that the company ratified the screening criteria they used.

Even if the moderators were LiveJournal's agents, Mavrix will still need to show the company or the agents had actual or red-flag knowledge of the infringing material, the opinion said.

Practical effects

Several IP attorneys who have been watching the case noted some takeaways for website operators and copyright owners.

"This decision should put social media companies on notice to, at the very least closely follow this case on remand and educate its 'moderators' on the DMCA, particularly its 'red flag' exception," said Nancy

A. Del Pizzo, an IP partner at Rivkin Radler LLP in Hackensack, New Jersey.

Luke DeMarte, a partner at Michael Best & Friedrich in Chicago, warned IP owners about the practical effects of this decision.

"While copyright owners are likely pleased with this decision, they should be careful what they wish for," he said. "At a time when copyright holders are increasingly pressuring online services to exert more control over user content, *Mavrix* will probably incentivize online communities (especially those in Silicon Valley) to put their heads in the sand and exert less control over user content."

Lee J. Eulgen, an IP and technology partner at Neal Gerber & Eisenberg in Chicago, echoed this sentiment.

"Naturally, website operators often wish to monitor their sites to try to keep off abhorrent content, but this decision will create dissonance for those operators about whether maintaining a human review process is really a good idea (at least with regard to the risk of copyright liability)," he said.

Marsha Hoover, principal and chair of the IP group at Chicago-based Goldberg Kohn, agreed.

"One implication of the decision is that any exercise of judgment by the operator of a website about whether to post content makes the operator ineligible for safe-harbor protection because the material is then not posted 'at the direction of the user,'" she said.

"The decision raises important questions," she added. "Is the harbor only safe if an operator is sailing blind to all offensive and illegal content? Are websites that make at least some effort to weed out copyright infringement in a worse position than those who make no effort at all?"

Kirkland & Ellis partner Diana Torres said the decision should not surprise practitioners, but she suspects it does.

"The court applied basic agency principles to people performing employment-type services for a profit-based entity, without regard to whether those people were actually paid for their services or were functioning as 'volunteers,' she said.

"To the extent other ISPs have similar practices, this ruling should give them sufficient pause to assess their own practices," she added.

By Melissa J. Sachs

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