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Second Circuit Reinforces the Scope of the Digital Millennium Copyright Act's Safe Harbor Provision

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In *Capitol Records LLC v. Vimeo, LLC*, the Second Circuit issued a decision clarifying the Digital Millennium Copyright Act's ("DMCA") safe harbor provision, which protects certain Internet service providers from liability for copyright infringement when a user of the service provider's website posts infringing content on the site. The ruling also discussed what constitutes knowledge of infringement such that a provider could be held liable for user-posted content under an exception to the DMCA's safe harbor provision.

Under the DMCA, if a user posts content containing copyrighted material, and the provider receives a notification from the copyright owner that infringing material has been posted, if the provider acts quickly and removes the content, the DMCA will provide immunity to the provider in a copyright infringement suit.

Vimeo's (an Internet service provider) website permits users to post videos that they created, which the general public can then stream on the site. Prior to posting such videos, users must accept Vimeo's Terms of Service, which prohibits users from posting content which infringes upon another party's copyright.

Capitol Records filed suit against Vimeo, alleging that Vimeo was liable for copyright infringement due to nearly 200 videos posted by users on the site which contained music recordings owned by the record company. Vimeo argued that the DMCA shielded it from liability. However, Capitol Records argued that the DMCA's safe harbor provision did not apply to pre-1972 recordings contained in some of the videos.

The district court had agreed, granting Capitol Records' motion for summary judgment on the issue of Vimeo's liability for infringement regarding pre-1972 music recordings. The basis for this holding was that, because Congress only first included music recordings within the protections of federal copyright law in 1972, the DMCA's safe harbor provision did not apply to such recordings as they are only protected by state copyright laws. This position had been echoed in a United States Copyright Office report issued in 2011, which served as the basis for the district court's decision.

The Second Circuit disagreed, and determined that the term "infringement of copyright" as used within DMCA's safe harbor provision applies equally to both federal and state copyright laws. Thus, overturning the district court, the Second Circuit held that the language of the DMCA plainly demonstrated that the law protected Vimeo from liability for user infringement of both pre- and post- 1972 music recordings used in videos. This decision

enforces the scope of the DMCA and strengthens the protections of the law for Internet service providers.

Capitol Records had also argued that there was evidence Vimeo employees possessed "red flag" knowledge that made copyright infringement apparent, a factor that would have exempted Vimeo from the DMCA's safe harbor provisions. This evidence included employees' screening of videos to group them into certain categories or provide technical support to users, and emails from employees to users that failed to discourage users from posting content that included copyrighted music (i.e. an employee responded to an inquiry regarding Vimeo's policy for using copyrighted music in videos as "don't ask, don't tell"). Under the DMCA, for an Internet service provider to fall within the "red flag knowledge" exemption to the safe harbor provision, the provider must have actually known facts that would have made the claimed infringement obvious to a reasonable person.

While the district court agreed with Capitol Records that even a brief viewing by a Vimeo employee of a video containing a copyrighted recording constituted red flag knowledge, the Second Circuit held that there was no suggestion that a viewing of the video by a Vimeo employee demonstrated that the employee was aware of potential infringement—Capitol Records had not presented any evidence of the length of time that the employee viewed any certain video, that the employee even listened to the audio (as opposed to just viewing the video), or the existence of any facts that would have made infringement apparent to an ordinary individual. The Second Circuit concluded that an Internet service provider is not expected to have any heightened knowledge regarding copyright law, and ultimately remanded the issue of red flag knowledge back down to the district court to determine if any evidence of such knowledge existed anywhere in the record.

Finally, the Second Circuit also concluded that there was no evidence of "willful blindness" of infringement by Vimeo, and that "sporadic instances" of employees seeming to allow users to post videos containing copyrighted content did not justify the removal of Vimeo's protections under the DMCA.

The *Capitol Records* decision is important not only because it applies the safe harbor provision of the DMCA to material protected by state and federal copyright laws, but also because it sets forth that the mere viewing of potentially copyrighted material by an employee of a provider is not enough to strip a provider of its protections under the DMCA. This secures the DMCA as an important tool for Internet service providers to avoid infringement claims in an age where millions of videos are posted daily by users of sites like YouTube and Facebook.

If your institution has questions or concerns about this topic and you would like further information, please email Karen I. Levin at klevin@cullenanddykman.com or Ariel E. Ronneburger at aronneburger@cullenanddykman.com.

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