

ILN **IP** Insider



An International Lawyers Network IP Group Publication

Second Circuit Narrows 'Red Flag Knowledge' Exception to DMCA's Safe Harbor Protections for ISPs

BY MARC J. RACHMAN OF DAVIS & GILBERT LLP AND CLAUDIA G. COHEN OF DAVIS & GILBERT LLP ON AUGUST 24, 2016

POSTED IN CASE STUDIES, COPYRIGHT, ONLINE CONTENT, PROTECTION & ENFORCEMENT, UNITED STATES



In a long-standing case brought against the video platform Vimeo by several music publishers, the U.S. Court of Appeals for the Second Circuit recently set the bar high for copyright owners to succeed in their infringement claims against service providers based on allegations of “red flag knowledge.”

The Second Circuit, shedding some light on what is needed to establish red flag knowledge, rejected the publishers’ argument that Vimeo was not entitled to the Digital Millennium Copyright Act’s (DMCA) “safe

harbor” protections for numerous videos on Vimeo’s platform that included their copyrighted music because the facts and circumstances made the infringements apparent.

DMCA Safe Harbor

The DMCA was enacted in 1998 to update U.S. copyright law for the digital age. One of its intended focuses was to clarify the liability that an Internet service provider (ISP) faces when content that users post on the ISP’s network contains infringing material. Of particular concern was that ISPs would be hesitant to make the necessary investment in the expansion of the speed and capacity of the Internet if they were regularly faced with the threat of liability for user-generated content that potentially infringed on others’ copyrights. To that end, the DMCA includes a safe harbor that protects a qualifying ISP that posts user-generated content from copyright infringement claims if the ISP acts expeditiously in taking down the content upon becoming aware of it. The DMCA sets forth notice and takedown procedures to be followed by the rights holders and the ISPs in connection with the safe harbor. However, if the ISP was aware of “facts or circumstances” that would make infringement apparent, referred to as red flag knowledge, it loses the safe harbor protections.

The focus of the Vimeo appeal was whether red flag knowledge could be shown with evidence that an ISP’s employees viewed videos containing recognizable sound recordings, i.e., so well-known or famous that their content would obviously be copyrighted. The appeal also addressed whether willful blindness could be established by evidence that Vimeo’s employees allegedly encouraged its users to infringe.

District Court Action

In its case before the district court, plaintiffs alleged that, even though they had not sent takedown notices, Vimeo was nonetheless liable for copyright infringement for videos posted by users on Vimeo’s website that contained the plaintiffs’ copyrighted music. Plaintiffs argued that Vimeo was not eligible for the DMCA’s safe harbor because Vimeo had red flag knowledge of the infringement, given that there was evidence that its employees viewed videos containing the plaintiffs’ “recognizable” sound recordings. Plaintiffs also argued that knowledge should be imputed to Vimeo because there were a handful of emails in which Vimeo encouraged its users to post infringing content, and thus it was willfully blind to the infringement and should not be shielded by the DMCA.

The district court denied Vimeo’s motion for summary judgment, finding issues of fact as to whether Vimeo had red flag knowledge of the alleged infringement. In doing so, the district court held that red flag knowledge can be shown by evidence that an ISP’s employee viewed a video containing all or nearly all of a “recognizable,” copyrighted sound recording.

The main issues on appeal involved questions left open by the Second Circuit’s decision in *Viacom v. YouTube* concerning its holdings on red flag knowledge and willful blindness. In *Viacom v. YouTube*, the court held that: (1) an ISP would have red flag knowledge if it had actually known facts that would make the specific infringement objectively obvious to a reasonable person; and (2) an ISP can be deemed to have knowledge when it was willfully blind to specific instances of infringement. Clarification as to how these holdings applied to the facts of the *Viacom v. YouTube* matter were not resolved, as the case was settled after the Second Circuit remanded the case back to the district court.

Second Circuit’s Decision

In its decision, the Second Circuit provided guidance on the issues left open by its *Viacom v. YouTube* decision and disagreed with the district court’s interpretation of what evidence would be sufficient to demonstrate an ISP’s red flag knowledge of infringement. It held that the copyright owner has the burden to set forth evidence demonstrating that the ISP was subjectively aware of facts or circumstances that would make specific infringement objectively obvious to a “reasonable person” who lacks specialized knowledge about or expertise in music or copyright law.

The Second Circuit emphasized that the simple fact that a Vimeo employee viewed a video containing a copyrighted song was insufficient, without more, to make infringement obvious to a reasonable person. It noted, among other things, that the hypothetical “reasonable person” does not have an expertise in music and may not actually recognize the song in dispute, despite its popularity. It also explained that an ISP’s employee is not expected to be able to determine whether the use of a copyrighted song was authorized or licensed or to distinguish between infringement and fair use, i.e., the reasonable person is also not an expert in copyright law. Still, the Second Circuit found that a copyright owner is entitled to take discovery in order to meet its burden, and satisfactory evidence would include that the ISP’s reviewing employee was knowledgeable about music or copyright law and, therefore, knew facts that made the infringement obvious.

In addition, the Second Circuit agreed with the district court’s ruling that plaintiffs failed to demonstrate that Vimeo was willfully blind to music copyright infringement. The Second Circuit easily dismissed plaintiffs’ arguments based on Vimeo’s voluntary monitoring of its videos for visual (not audio) infringement and Vimeo’s alleged awareness of facts suggesting a likelihood of infringement that resulted in a duty to investigate further, finding them both unpersuasive. The court stressed that the DMCA relieves ISPs of the duty to screen for copyright infringement of any kind.

The Second Circuit also rejected plaintiffs’ argument that Vimeo had a policy of encouraging its users to post infringing videos. It found that a handful of isolated emails in which Vimeo employees encouraged users to post infringing content – out of the millions of videos posted on Vimeo – was not enough to show such a general policy, even in the face of one email where a Vimeo employee told a user: “[A]dding a third party’s copyrighted content to a video generally (but not always) constitutes copyright infringement under applicable laws ... Off the record answer ... Go ahead and post it” The Second Circuit also noted these isolated emails did not relate to the specific infringements complained about by the plaintiffs.

The Bottom Line

The bar is now set high in the Second Circuit for copyright owners to make the evidentiary showing necessary to establish that an ISP had red flag knowledge because it was aware of facts or circumstances that made copyright infringement obvious. An ISP does not have an affirmative obligation to police its websites for infringing content or to determine whether its users engaged in fair use. It does remain in the best interest of copyright owners to identify the specific infringing content that they want removed. They are also left with the opportunity to take discovery about an ISP’s content review procedures to establish a red flag knowledge claim. However, a copyright owner will still bear a heavy burden to show that an ISP actually knew about infringement by its users or was aware of facts or circumstances that made the specific infringing activity obvious, so that the ISP is no longer entitled to the DMCA’s safe harbor protections.

ILN IP Insider

Executive Offices

179 Kinderkamack Road
Westwood, NJ 07675

Tel: 201.594.9985/ Fax: 201.740.9765

About the ILN IP Specialty Group

Headed by Eddie Powell of Fladgate LLP, London, and Norman Zivin of Cooper & Dunham LLP, New York, New York, the ILN's Intellectual Property Group provides the platform for enhanced communication, enabling all of its members to easily service the needs of their clients requiring advice on cross-border transactions. Members of the group meet regularly at ILN conferences and industry events, and have collaborated on discussions and publications of mutual interest.

[Read More >](#)

STRATEGY, DESIGN, MARKETING & SUPPORT BY

LEXBLOG