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"How Is The Liability Of Internet Service Providers Limited Under The Digital Millennium Copyright Act?"

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Abstract. In summary, the Digital Millennium Copyright Act (DMCA) attempts to curb infringing online activity. In doing so, it attempts to moderate the growth of internet technology by balancing the interests of both copyright holders and internet service providers. It imposes a secondary liability on the internet service provider; however, the limitation on the internet service provider's liability restricts the broad meaning of 'liability'. The internet service provider must meet the comprehensive procedures laid down by the Digital Millennium Copyright Act to obtain the safe harbor benefit. The purpose of this article is to determine and analyze who is eligible to be labeled as an internet service provider in order to evaluate and gauge the internet service provider's liability by discussing in what conditions the safe harbor provisions are implemented on the service provider to gain the protection. In addition, discovered whether the rights of both parties are protected. The lacuna in the DMCA must be cured so as to develop a legal system which protect both rights.

Keywords: liability of internet service provider, safe harbor, limitation on liability, notice and take down system.

1. Introduction

The advent of new technology often brings up controversial issues surrounding its use. The interconnection between law and technological material creates a precedential legal regime. In order to protect intellectual property and copyrighted work against massive piracy and insure the "growth and development of electronic commerce," the United States Congress adopted the DMCA to protect service providers against copyright infringement claims. Congress included section 512 on liability limitation to ensure service providers make necessary investments in advancing the speed and capacity of the internet. The discussion in this article will be limited to the internet service providers and their liability. In other words, to determine who is eligible to be termed an 'internet service provider' and in what circumstances an internet service provider's liability will be limited according to section 512. Determining the definition of an 'internet service provider' is very significant, since the first requirement for qualifying for safe harbor is to fit within the definition of 'internet service provider' (ISP). ISPs have a duty to disable the access of infringers to allegedly infringing material. The DMCA safe harbor provisions establish a series of requirements that limit the liability of the service provider. However, this limitation on liability is only available for qualified internet service providers that fit within the definition stated in statute.

2. Internet Service Providers

The term 'internet service provider' is defined ambiguously in section 512 of DMCA in twofold manner. Service provider defined so broad as to encompass technically new provider in future, in order to create

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limitations on the liability of ISPs [1]. It states that 'service provider' means a provider of online services or network access or the operator of facilities; nevertheless, 'online services' is not defined. This provision offers two views of this term (service provider). Firstly, a service provider "could mean any services offered online [2]". Therefore, it includes the service of making the copyrighted work available to internet users. The provider's action is just to conduit the infringing material for the communication of others. It transfers the infringed material through transitory communication. In other words, a third party carries out the transmission, automatically and without any selection by the service provider [3]. The second view is that, the term could mean services specific to being online. According to this definition, everyone who protects a website is a service provider, as well as anyone who provides online search services, except the entrepreneur who makes the content available, because they do not provide internet-specific services [4]. This view applies a broader definition, because of user action or/and content and conduit activity. It must qualify as a definition of 'internet service provider' which includes, "notice and take down" procedures, removing user internet access for infringing materials and lacking direct benefit [5]. The legislative history of the statute indicates that the legislators did not want to include every kind of business on the internet. The report of the Houses of Congress gives examples for service providers, which consist of enterprises that provide space for a third party as a service provider and not the website's operator. It is concluded that Congress did not intend to include a website operator, but the language it chose for 'service provider' is broad enough to not only include what was intended by Congress in 1998, but also, more internet entities [6]. Therefore, the entity cannot seek protection or claim the DMCA's safe harbor provisions unless the entity is assumed to be an 'internet service provider' for the purposes of the DMCA [7]. Therefore, as the main source that determines the meaning of a confusing term is the plain language of statute, the second view, that contains more internet entities and a broader meaning, is applied for the term 'internet service provider'. Section 512 of DMCA provides provisions to protect a service provider from liability from different sorts of copyright infringement, such as direct, contributory and vicarious. In order to gain the protection and become eligible under this provision, a service provider must have:

"adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of a policy that provides for termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers and accommodates and does not interfere with standard technical measures" [8]. Section 512-protected service providers are involved in, a) transitory digital network communications [9]; b) system caching [10]; c) information residing on systems or networks at the direction of users [11]; and d) information location tools [12].

Service providers are exempted from the temporary storage of copyrighted material by 'system caching' (section 512(b) of the DMCA) [13]. 'Caching' is a process that reduces the time for data retrieval by temporarily saving information. A service provider is exempted if: a) a person other than the service provider makes the material available online; b) the person described in subparagraph (a) transmits the material through the system or network to another person other than him/herself at the direction of that other person; and c) in order to make the material available to users of the system or network who, after the material is transmitted as in subparagraph (b), request access to the material from the person described in subparagraph (a), the storage is carried out through an automatic technical process [14]. Once the service provider receives a notice of infringing material, it must remove such material from its system [15].

Under section 512(e), there are also additional limitations available to non-profit educational service providers beyond the limitations above, Moreover, in facilitating the courts' application of the Act, section 512(n) provides that each of subsections (a), (b), (c), and (d) describes separate and distinct functions for the purposes of applying the section, and that whether a service provider qualifies for the limitation on liability in any one of these subsections will be determined solely by the criteria in that subsection, and will not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection. Internet service providers unintentionally or intentionally facilitate the distribution. They can argue that they are not the infringers because they do not share the files of the copyright owner, but they can facilitate infringement.

Therefore, they may be liable as contributory infringers to the copyright owner [16]. Since, due to the nature of the internet, establishing a direct infringement is difficult [17], and suing and prosecuting every individual is time-consuming work and is just like the teaspoon solution to an ocean problem, instead, the copyright holder is entitled to sue for contributor infringement. However, since the DMCA Act seeks to pay heed to both parties, it must give the duty of recognition to the copyright holder and not the internet service provider. As has been discussed, it is a burdensome and time-consuming job [18].

An internet service provider must meet the prerequisite threshold in order to take the benefit of safe harbor. For an internet service provider to qualify within the scope of the definition of 17.U.S.C.512, it must ensure that it observes the described criteria in section 512 (a) - (e) which consist of: serving as a network, information location tool or educational institution and its services are according to Section 512 (k)(1). It is a broad definition designed for internet service providers, and the courts have applied it broadly. In doing so, the Northern District Court of California held that: "…because Napster does not transmit, rout, or provide connections through its system, it has failed to demonstrate that it qualifies for the section 512 (a) safe harbors". It stated that Napster peer-to-peer technology was not covered by the scope of the 'service provider' definition, and that its activity had not been a conduit of transitory communications [19].

3. Secondary Liability

A person who indirectly infringes copyright may be held liable under secondary liability, while a copyright holder is protected against direct infringement under the copyright statute [20]. In this process, firstly, the infringer should be recognized. An infringer is a person who makes work available that is offered neither from the disseminator's own creation, nor with the permission of the creator, as well as no exception is applicable to such work [21]. However, the internet service provider can shield itself from liability when it pursues the correct procedural steps against an infringement allegation [22]. Basically, copyright protection is implemented under the statutory process, but in the absence of congressional mandate, the courts attempt to discover and confer a balance which heeds both the copyright holder and ISPs, such as in the case of *Sony Corp of America v Universal City Studio*. The case originated in 1970, when Sony produced video tape recorders (VCRs) which enabled the recording of copyrighted programs from television. Universal Studios and Walt Disney brought lawsuits against Sony for contributory infringement. The United States District Court for the Central District of California did not find Sony liable, based on Sony's defense, which stated that the manufacturer could not be liable for the infringement of purchasers of their products. However, the Ninth Circuit Court of Appeals imposed liability on Sony based on the fact that VCRs were produced and sold basically for recording TV programs, and all such programs were copyrighted material [23].

3.1. Limitations on Liability

ISPs require limitations on their liability for illegal customers who use internet services [24]. The safe harbor provisions, as a part of the Digital Millennium Copyright Act, enable the providers to limit their liability within certain statutory requirements [25]. ISPs articulate that they are 'mere conduit of information', and they act as a 'passive carrier' [26]. The service providers are shielded from liability under the DCMA safe harbor provisions by certain procedural steps [27].

3.1.1 Knowledge or Awareness

If a person with knowledge of the infringing activity induce or materially contributes to the infringing activity, may be held liable as a 'contributory infringer' [28]. The term 'actual' indicates existing knowledge. Moreover, the term 'knowledge' does not indicate full knowledge of all aspects of an activity, instead a basic identification and illegal nature of the activity is sufficient [29]. They neither have actual knowledge that the posting is infringing, nor are they "aware of facts or circumstances from which infringing activity is apparent". If the service provider becomes aware of apparent infringement, it must "act expeditiously to remove, or disable access to, the material" [30]. The service provider must notify the subscriber that the material has been taken

down in required steps [31]. In order to qualify for statutory immunity or safe harbor, the service provider must block the access of the infringing party. The plaintiff or aggrieved party must send a formal notice of infringing activity which includes all the required, detailed, information to the agent designated by the service provider. This notice includes the infringing material with the IP address, contact information, and a statement showing that material was copyrighted and that use of the material is not authorized by the law, or the copyright owner [32]. This notice must be complete to give the provider a duty to block access to the allegedly infringing material [33]. The ISP is denied safe harbor provision, if it has 'actual knowledge' about the apparent infringing activity. The ISP's contributory liability should hold liable, in terms that ISP fail to limit damage of copyright interests by receiving notice of infringing activity [34].

The question that arises at this point is of the amount of knowledge required for the service provider to take action, as well as what constitutes the apparent infringing activity. The minimum requirement of knowledge is that, as soon as the service provider receives a notice of copyright violation, it must be able to see the infringement by looking at the user's activities, conducting an investigation, and finding out that copyright infringement has occurred. In the case of *Corbis Corp v Amazon.com*, Amazon qualified for protection under the 17 U.S.C 512(c) safe harbor provisions as a service provider, incurring no liability, as their storage of infringing material was at the direction of a third party.

Furthermore, for liability to incur to the service provider, general knowledge of infringement is not sufficient. Rather, a specific and distinctive particular item must be exposed as being infringing. Furthermore, the court imply contributory liability just where bad faith intention are obvious [35]. General knowledge about the prevalence of infringement activity is not sufficient. In the case of *Viacom v YouTube*, the District Court held that "general knowledge that infringement is 'ubiquitous' does not impose a duty on a service provider to monitor or search its service for infringement". In addition, the court held that the service provider must have actual or constructive knowledge about a specific instance of infringement rather than a general knowledge of the infringed material. It must not be forgotten that, if the title of the file includes the name of a TV program or film and it is obvious that copyright holder did not authorize posting, a red flag would appear.

According to section, 512(c) 'actual knowledge' is also exclusively determined when infringing material is apparent under the same circumstances [36]. It might be said that the infringement becomes 'apparent' and the service provider with minimal investigation indicates it. However, the court held that a better approach to the red flag standard in *Viacom v YouTube* is that if the posting does not clearly reveal infringement, then the infringing activity is not sufficiently 'apparent'. In other words, if the 'fact and circumstances' require investigation, it is not a red flag. According to statute, there are two circumstances in which the red flag is hoisted: 'actual knowledge' of infringement and 'facts and circumstances' from which infringing activity is seen to be infringement.

3.1.2 Direct Financial Benefit

The service provider must not receive financial benefit when it has the ability and right to control such activity from being an infringing activity [37]. It should not hold liable for vicarious infringement. Regarding this matter, if a service provider accepts an advertisement targeting the infringing content, this is a direct benefit. And the website is obliged to remove the infringing material as soon as it knows that the content is infringing. Furthermore, this direct benefit can be accessed by making the website more attractive with free unauthorized content. Nevertheless, it might be necessary to show such attractiveness. By the same token, the copyright owner must show that such unauthorized content draws users to the site. Therefore, the plaintiff or copyright owner must show the nexus between the infringement and the benefit in order to disqualify the service provider from the safe harbor provisions. The copyright owner must prove vicarious liability by showing that a substantial and direct benefit derived from the infringing material and that it must be considered significant.

3.1.3 Right and Ability to Control Infringing Activity

The service provider will not be disqualified from safe harbor with mere 'direct financial benefit', rather it must have the 'right and ability to control' the infringing activity [38]. However, some incoherency seems to be present in this statute, since the service provider must have the ability to block access in case the material has been posted, to qualify for the exemption. Nevertheless, the service provider would already have been disqualified under section 512(c)(1)(C) whereby the service provider would gain the required knowledge from the user's activities. It is submitted that since this ability to block access which qualifies the service provider under section 512(c)(1)(B) causes disqualification from the exemption of safe harbor in sectionz512(c)(1)(A), this then makes the statute incoherent. Such inconsistency becomes apparent when a person considers that the required ability and control which qualifies the service provider under section 512(c)(1)(C) causes disqualification under section 512(c)(1)(B). Furthermore, if the service provider does not have the required ability under section 512(c)(1)(B) to block the access, it is disqualified under section 512(c)(1)(C).

4. Conclusion

We are now in a position of significant ambiguity in the balance between the copyright holder and the internet service provider. In light of the Digital Millennium Copyright Act safe harbor provisions, various analyses arise from contributory and vicarious liability in order to protect digital intellectual property. It is submitted that the safe harbor provisions must be carefully reviewed, to restrict any broad legislation that may have significant unintended consequences. It must be amended to narrow its scope, in order to protect both rights; since the broad scope of the take down procedure disrupts the balance. Unfortunately, it gives the chance of misuse under safeguard provisions and it increases the risk of wrongful take down and a greater checking system would be introduce to the notice and take down provision. Ultimately, there is a need for a more balanced legislation with constant and authoritative supervision.

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