

PERFECT 10 v. CCBill

In *Perfect 10 v. CCBill*, the U.S. Court of Appeals for the Ninth Circuit issued an important decision interpreting both the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (CDA). These two statutes provide the basic framework in the United States for limitations on an Internet service provider's liability for third party content. The Ninth Circuit's ruling reflects the general trend of courts interpreting these statutes in an expansive manner helpful to Internet companies.

I. The District Court's Decision

CCBill and related companies provide hosting and credit card processing services for independently operated adult websites. For example, if a consumer wants to access a particular site, CCBill obtains the consumer's credit card number and deals with the credit card company on behalf of the site's operator. Perfect 10, a publisher of an adult magazine and the operator of an adult website, alleged that some of the images that appear on sites hosted by CCBill were copied from its website and magazine. It sued CCBill for copyright infringement and violation of the publicity rights of its models. The district court found that CCBill qualified for the DMCA's safe harbors, but that the CDA did not provide immunity against the publicity rights claims.

II. The Ninth Circuit's CDA Holding

The court's most far-reaching holding concerns the CDA. Section 230(c)(1) states that a provider of an interactive computer service shall not be treated as the publisher or speaker of information provided by another person. Courts have interpreted this provision broadly to immunize Internet service providers from liability for third party content, with two exceptions set forth in the statute. First, Section 230 does not shelter a service provider from federal criminal (as opposed to federal civil and state civil and criminal) liability. Second, Section 230 does not provide immunity to a service provider with respect to "any law pertaining to intellectual property."

The question the Ninth Circuit considered is whether a state right of publicity is a form of intellectual property within the meaning of the statute. The court observed that the statute did not define the term "intellectual property." It noted that while the scope

of federal intellectual property is well defined, state intellectual property laws are not uniform and bear many different names. The court reasoned that “[b]ecause material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from various state law regimes.” Accordingly, the court construed intellectual property in the CDA to mean “federal intellectual property.”

This means that the CDA now provides service providers with immunity from secondary liability for state intellectual property claims such as rights of publicity, misappropriation, and theft of trade secrets. This obviously is a significant narrowing of the intellectual property exception to the CDA’s safe harbor.

III. The Ninth Circuit’s DMCA Holding

The Ninth Circuit’s DMCA rulings are more complex. Perfect 10 argued that CCBill did not adopt and reasonably implement a policy for terminating repeat infringers, which is a threshold requirement for receiving the DMCA’s protection. *See* 17 U.S.C. § 512(i)(1)(A). The court observed that the DMCA did not specify when termination of a repeat infringer would be appropriate. It concluded that the standards for qualifying for the hosting safe harbor in 17 U.S.C. § 512(c) provided the maximum that could be required of service providers in their repeat infringer policies. Thus, a compliant policy for terminating repeat infringers would require the service provider to terminate the accounts of subscribers if it: 1) had actual knowledge of their infringing activity; 2) was aware of facts and circumstances from which their infringing activity was apparent; or 3) had received notification of claimed infringement that met the Section 512(c)(3) requirements.

This conflation of Section 512(c) and the repeat infringer policy is an innovation. Copyright scholar David Nimmer has argued that the policy should apply only to parties determined by a court to be infringers. The Ninth Circuit here clearly set a less generous standard, particularly since mere allegations of infringement could trigger termination.

Moreover, the court found that claims of infringement made by a non-party are relevant to determining whether the termination policy has been reasonably implemented.

However, the court did not specify how many claims must be made for a person to be considered a repeat infringer. Thus, service providers still have relatively little guidance concerning this important threshold requirement for DMCA protection.

Nonetheless, the court's discussion of the specific elements of Section 512(c) is very helpful for interpreting that provision in the notice and takedown context. First, although Perfect 10 appears to have conceded that each of its notices may have been insufficient individually, it asserted that the various documents it provided CCBill, taken together, provided all the information required by Section 512(c)(3). After noting that takedowns could have "drastic consequences" such as removing speech protected by the First Amendment, the court found that "[p]ermitting a copyright holder to cobble together adequate notice from separately defective notices ... unduly burdens service providers."

Second, the court interpreted the "red flag" test very favorably for service providers. Under Section 512(c), a web host must take down content once it is aware of facts and circumstances from which infringing activity is apparent. In the DMCA's legislative history, this was referred to as the "red flag" test. Perfect 10 argued that domain names such as "illegal.net" or "stolencelebritypics.com" constituted red flags that would give the web host awareness of infringing activity. The Ninth Circuit disagreed, stating that such names might constitute an attempt to increase the "salacious appeal" of the sites, rather than an admission that they are infringing.

Similarly, Perfect 10 argued that password hacking websites obviously infringed. Here, too, the Ninth Circuit disagreed:

We find that the burden of determining whether passwords on a website enabled infringement is not on the service provider. The website could be a hoax, or out of date. The owner of the protected content may have supplied the passwords as a short term promotion, or as an attempt to collect information from unsuspecting users. The passwords might be provided to help users maintain anonymity without infringing on copyright. There is simply no way for a service provider to conclude that the passwords enabled

infringement without trying the passwords, and verifying that they enabled illegal access to copyrighted material. We impose no such investigative duties on service providers. Password-hacking websites are thus not per se ‘red flags’ of infringement.

The court made another ruling helpful to service providers in the context of Section 512(a), which applies to mere conduits. For some websites, CCBill provides only the credit card services, and not hosting services. CCBill argued that since it provided the connections for the digital transmission of credit card information, it should be able to take advantage of the Section 512(a) mere conduit exception with respect to these transmissions. Perfect 10 responded that Section 512(a) applies only to the transmission of infringing material. Reading the language of Section 512(a), the court found no requirement that the transmissions must be infringing: “It would be perverse to hold a service provider immune for transmitting information that was infringing on its face, but find it contributorily liable for transmitting information that did not infringe.” Since “[t]he Internet as we know it simply cannot exist if those intervening computers must block indirectly infringing content ... [s]ervice providers are immune for transmitting all digital online communications, not just those that directly infringe.”

The Ninth Circuit did make one ruling problematic to service providers. A web host can receive the Section 512(c) safe harbor only if it “does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.” Observers have long wondered whether this standard was different from the similarly worded judge made test for vicarious copyright liability, one of the two forms of secondary copyright liability. The Ninth Circuit held that the two standards should be interpreted in a consistent manner. As a practical matter, this means that in the Ninth Circuit, the DMCA does not provide service providers with a safe harbor against vicarious liability. This produces the somewhat anomalous result that the DMCA provides a service provider with more protection if it is a direct infringer than if it is a vicarious infringer.