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Mavrix Photographs, LLC v. LiveJournal, Inc.

U.S. Ninth Circuit Court of Appeals, No. 14-56596, 7 April 2017

The Ninth Circuit Court of Appeals decision sheds light on how the use of moderators by a website to screen user content submissions impacts on that website's ability to defend itself against copyright infringement claims under the US Digital Millennium Copyright Act.

Many online platforms use moderators to screen user content submissions. Some moderators are unpaid volunteers emerging from the user ranks. How does the use of moderators impact a site's ability to successfully defend itself against copyright infringement claims under the Digital Millennium Copyright Act¹ ('DMCA')? A recent decision by the U.S. Ninth Circuit Court of Appeals in *Mavrix Photographs, LLC v. LiveJournal, Inc.*² sheds light on this question.

Background

Mavrix takes and sells photographs of celebrities - often candid shots in tropical settings - to celebrity magazines³. LiveJournal⁴ is a social media platform featuring multiple communities in which users can post and comment on community themed content. LiveJournal's 2014 Terms of Service ('TOS') prohibited users from uploading infringing content⁵. Communities could also establish rules that did not conflict with the TOS. The platform utilised unpaid volunteers to screen user submitted posts.

These volunteers fell into the following categories: (1) moderators, who performed the review of submissions for compliance with the TOS; (2) maintainers, who were moderators who could also delete posts and remove non-compliant moderators and users; and (3) owners, one for each community, who acted as maintainers but could also remove maintainers⁶.

One of the LiveJournal communities entitled 'Oh No They Didn't!' ('ONTD') featured current celebrity news. ONTD

was the most popular LiveJournal community with its own 'household name'⁷. ONTD had an owner, nine moderators and six maintainers. In 2010, due to the growth and popularity of ONTD, LiveJournal hired Brendan Delzer, a moderator, as an employee to serve as ONTD's 'primary leader.' LiveJournal's intention in hiring Delzer was to exercise more control over ONTD and increase revenues by running advertisements on ONTD⁸.

The Mavrix lawsuit

In a 2014 complaint filed in the U.S. District Court for the Central District of California, Mavrix alleged that LiveJournal infringed Mavrix's copyrights by posting 20 of Mavrix's photographs in ONTD on seven separate occasions between 2010 through 2014⁹. The photographs involved, including images of singers Beyonce and Katy Perry, were submitted by users. The photos were reviewed and approved by an ONTD moderator before being posted. Several of the images also contain a watermark attributing the photo to Mavrix or its website¹⁰.

Mavrix chose to sue rather than follow LiveJournal's DMCA takedown procedure. LiveJournal removed each of the photos once it had notice of the complaint¹¹. LiveJournal responded to the lawsuit by asserting DMCA safe harbor protection as the images were "information residing on systems or networks at the direction of users"¹². LiveJournal filed a motion for summary judgment on that basis. The District Court found in favour of LiveJournal, agreeing that the photos

were posted 'at the direction of the user' and rejecting Mavrix's position that the review of all posts by the platform's moderators disqualified the platform from the "broad statutory language of the DMCA safe harbor"¹³. The District Court granted LiveJournal's motion for summary judgment, concluding that "LiveJournal is simply the operator of an online platform on which anyone can create his or her own individual blog or start a group blog based on shared interests"¹⁴. Mavrix appealed the District Court's decision.

Ninth Circuit analysis

The Ninth Circuit Court of Appeals undertook a *de novo* review of the District Court's grant of summary judgment. To sustain the summary judgment ruling, LiveJournal was required to demonstrate "beyond controversy every essential element" of the affirmative defence of the DMCA safe harbor¹⁵. On the threshold question of whether the Mavrix photos were posted at the direction of the user, the Ninth Circuit stated that the critical "inquiry turns on the role of the moderators in screening and posting users' submissions and whether their acts may be attributed to LiveJournal"¹⁶.

The Appellate Court analysed the case under the common law of agency. Mavrix argued that the LiveJournal moderators were agents of the platform, making LiveJournal liable for the moderators' actions of reviewing and approving the posts. The Court began by citing its earlier decision in which it had applied agency law

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continued

to determine that a service provider was responsible under the DMCA for copyright infringement by its employees¹⁷. The Court then reviewed the following undisputed facts to conclude that there are genuine issues of material fact as to whether the moderators are LiveJournal's agents:

- LiveJournal selected its moderators;
- The platform gave its moderators various levels of authority in screening posts, owners have greater authority than maintainers and maintainers have more authority than moderators;
- LiveJournal provided moderators with express direction and criteria for accepting or rejecting submissions;
- Although volunteers, moderators perform a 'vital function' in the platform's business model;
- Delzer, as the primary leader, supervised moderators, including their work schedules and removal; and
- At least one user relied upon moderator approval as a 'manifestation' that the submission complied with copyright law and believed that the moderator was acting on the platform's behalf¹⁸.

While each of the above facts might suggest that moderators are, in fact, agents of LiveJournal under agency law, the Court also cited these additional facts that weigh in the other direction:

- ONTD moderators are free to leave on their own accord;
- Moderators may volunteer their time as they see fit; and
- Moderators can reject user submissions for reasons beyond those established by the platform¹⁹.

The Appellate Court reversed the District Court's grant of summary judgment to LiveJournal. While the Court could have stopped there, it went on to the next question of, if the fact finder on remand finds that the moderators are LiveJournal's agents, did the moderators' actions fall within or exceed the permissible parameters of the DMCA safe harbor. The Ninth Circuit framed the question for the fact finder as "whether the moderators' acts were merely accessibility-enhancing activities or whether instead their extensive, manual and substantive

activities went beyond the automatic and limited manual activities²⁰."

The Court turned to the two remaining disputed requirements for establishing the safe harbor defence, namely whether LiveJournal had 'red flag' knowledge of copyright infringement and lack of any financial benefit from the infringement. The Ninth Circuit offered guidance to the District Court on these issues on remand. On the question of red flag knowledge, the Court noted that "the fact finder should assess if it would be objectively obvious to a reasonable person that material bearing a generic watermark or watermark referring to a service provider's website was infringing²¹."

Finally, on the question of whether LiveJournal lacked any financial benefit from the infringement, the Appellate Court pointed out that the platform receives advertising revenues based on the number of views to ONTD. Mavrix also alleged that approximately 84% of ONTD's content contained infringing material and that, in at least one instance, the platform permanently blocked content from a specific source. The Court concluded that "the fact finder should determine whether LiveJournal financially benefitted from infringement that it had the right and ability to control²²."

Implications going forward

The Ninth Circuit's decision has far-reaching DMCA safe harbor implications on platforms relying on moderators to screen user submitted content. For a site like LiveJournal, which relies on a network of moderators to keep user posts consistent with its business model, the likelihood is high that moderators will be found to be agents. If those moderators are supervised in any substantial way by a platform employee, the likelihood of a finding of agency increases further. Providing rules for moderators to follow, limiting moderators' discretion and exercising other controls over moderators all lend further support that the posting of content submitted by users is attributable to the platform and can eliminate the availability of a DMCA safe harbor defence.

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altogether. The practicality of this approach is limited. On ONTD, LiveJournal strives to maintain the freshness of its content and historically, only one third of user submissions are actually approved and posted. Moving to a non-moderator model would dramatically change and likely destroy the very nature of ONTD. A less extreme approach would be to utilise moderators, but provide them with more autonomy and less supervision and guidelines rather than express rules. This strategy would rely more upon the DMCA notice and takedown procedures to address copyright infringement. This approach would also have an impact on the nature of the platform, offering less control over content in the first instance.

Another question raised by the Ninth Circuit's decision is the potential impact on the moderators themselves. In this case, the ONTD moderators may find themselves being witnesses in discovery or even at trial. A moderator may also be named as a co-defendant. Whether this will impact a user's willingness to become a moderator also remains to be seen.

1. 17 U.S.C. §512(c)(1).
2. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, -- F.3d -- (9th Cir. Apr. 7, 2017) ('Ninth Circuit').
3. *Ibid.* at p. 8. Mavrix's website is located at <http://www.mavrixonline.com> (last visited 29 May 2017).
4. LiveJournal is found at <http://www.livejournal.com> (last visited 29 May 2017).
5. Ninth Circuit at p. 6. In April 2017, LiveJournal updated its current User Agreement to be based on Russian, rather than US law: <http://www.livejournal.com/legal/tos-en.bml>
6. *Ibid.* at p. 5.
7. *Ibid.* at pp. 5-6.
8. *Ibid.* at p. 6.
9. *Matrix Photographs, LLC v. LiveJournal, Inc.*, Case No. 8:13-cv-00517-CJC-JPR 9 (C.D. Cal. July 9, 2014) ('District Court').
10. Ninth Circuit at p. 9.
11. *Ibid.*
12. 17 U.S.C. §512(c)(1).
13. District Court at p. 10.
14. *Ibid.* at p. 18.
15. Ninth Circuit at p. 11.
16. *Ibid.* at p. 13.
17. *Ibid.* at p. 14, citing *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013).
18. *Ibid.* at pp. 16-18.
19. *Ibid.* at p. 19.
20. *Ibid.* at p. 20.
21. *Ibid.* at p. 24.
22. *Ibid.* at pp. 26-27.