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CLIENT ALERT

Ninth Circuit Provides Guidance on Repeat Infringer Terminations Under the DMCA

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A recent decision from the Ninth Circuit in *Ventura Content, Ltd. v. Motherless, Inc.* provides guidance on several vexed questions relating to the Digital Millennium Copyright Act (DMCA). Among other things, the decision addresses the extent to which the DMCA's protection depends on whether a service provider screens user-generated content and considers what it means to "adopt" and "reasonably implement" a repeat infringer termination policy. Case Nos. 13-56332, 13-56970 (9th Cir. Mar. 14, 2018).

Defendant Motherless owns and operates the adult website Motherless.com, which hosts pornographic content uploaded by the site's users; co-defendant Joshua Lange is Motherless' owner and sole employee. Ventura Content, a producer and distributor of adult movies, sued for copyright infringement after discovering 33 unlicensed clips of its movies on the Motherless.com website. On summary judgment, the district court held that Motherless was shielded from copyright liability by Section 512(c) of the DMCA, which applies to online service providers that store material "at the direction of a user." Ventura appealed, arguing that Defendants did not qualify for DMCA safe harbor for several reasons.

First, Ventura argued that Motherless' activity in screening material, categorizing or classifying it, and enabling users to locate it meant that storage was not "at the direction of a user" and thus fell outside the ambit of DMCA § 512(c). The court held that the mere fact that Defendants permitted subscribers to tag content and Defendants' actions in reviewing, organizing, and facilitating access to user-uploaded content did not change the fact that the content itself was uploaded and stored at the direction of users, not Defendants. The court distinguished this case from *Mavrix Photographs, LLC v. LiveJournal, Inc.*, where the Ninth Circuit held that a website's use of moderators to review user submissions for substance raised the possibility that material had actually been posted on the website at the direction of the moderators, not the users themselves. Here, by contrast, Motherless' "activities … were 'narrowly directed' towards enhancing the accessibility of the [user-submitted] posts," and thus within § 512(c).

Second, Ventura argued that Defendants' knowledge of the infringing content—including through its pre-screening of posts—disqualified them from safe harbor. But Ventura had no plausible evidence that Defendants had knowledge of the infringing activity, and "it would not be obvious to a reasonable person that the clips excerpted from Ventura movies were infringing."

Third, Ventura argued that the DMCA did not apply because Defendants had the right and ability to control infringement, and derived a financial benefit directly attributable to the infringing activity. The court found that Defendants lacked the required right and ability to control its users because it was unable to exert "substantial influence" on their activities; further, there was no evidence that any of Motherless' revenue was "distinctly attributable to the infringing material at issue."

Fourth, Ventura argued that Defendants failed to adopt and reasonably implement a policy of terminating repeat infringers in appropriate circumstances pursuant to § 512(i). The court held, over a spirited dissent, that Motherless' repeat infringer termination policy complied with DMCA
§ 512(i). The court first summarized factors that courts have considered in determining whether a service provider complies with § 512(i).

Factors that favor compliance include:

- maintaining a log of DMCA notices;
- blocking a subscriber's name and email address from uploads;
- putting email addresses from terminated accounts on a banned list; and
- prohibiting banned users from reopening terminated accounts.

Although Motherless did not keep a written list of subscribers who were alleged infringers, it saved each takedown notice and could track the number of times each user's content had been deleted in response, as well as the date and reason for each deletion. Motherless notified users if their uploaded material was deleted and prevented users from re-uploading previously deleted material.

Factors that cut against compliance include:

- changing the email address for notifications without providing notice of the change;
- participating in copyright infringement;
- allowing terminated users to rejoin the site; and
- refusing to terminate known repeat infringers.

There was no evidence Motherless had done these things.

Adoption and Implementation.

Motherless adopted a written policy of terminating repeat infringers, informing users that "[i]t is the firm policy of the [site] to terminate the account of repeat copyright infringers, when appropriate."

As for implementation, the court cited an earlier Ninth Circuit decision in *Perfect 10, Inc. v. CCBill LLC*, for the proposition that "a service provider 'implements' a policy if it has a working notification system, a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications." Here, there was no dispute that Motherless had a system for receiving and acting on notifications, and it did not prevent copyright owners from collecting information.

The details of Motherless' repeat infringer termination policy were not written down: instead, Lange—who personally reviewed every copyright complaint that Motherless received—used his "memory and judgment," and "not a mechanical test," to determine whether to terminate alleged infringers. When deciding whether to terminate a user, Lange considered seven factors:

1. the volume of complaints received;
2. the amount of linked content in the complaints;

3. the timespan between notices;
4. the length of time the alleged infringer's account had been active;
5. the amount of total content the account had;
6. whether the user was maliciously and intentionally uploading infringing content or uploading content without knowing the source; and
7. whether the takedown notices complied with the DMCA.

The statute does not require that policy details must be written, and the court recognized that where—as here—the owner who formulated the policy was also the one who executed it, "[t]here might not have been a need for anything in writing." The court found Motherless' implementation reasonable for purposes of § 512(i): the evidence showed that Motherless failed to terminate "less than one repeat infringer in 100,000 active users," and the DMCA does not require perfection, just "reasonable" implementation of the policy "in appropriate circumstances."

The evidence thus showed that Motherless had "adopted and reasonably implemented" its policy of terminating repeat infringers "in appropriate circumstances," and the court concluded that no reasonable trier of fact could conclude otherwise.

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