

## WSGR ALERT

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DISTRICT COURT IN CALIFORNIA RULES IN FAVOR OF DMCA  
SAFE-HARBOR DEFENSE FOR VIDEO-HOSTING SITE**Overview**

On August 27, 2008, the United States District Court for the Northern District of California issued an important decision in *Io Group, Inc. v. Veoh Networks, Inc.*<sup>1</sup> that merits careful consideration by companies and individuals involved with user-generated content on the Internet, specifically the Digital Millennium Copyright Act (DMCA) and the application of its safe harbors.

The plaintiff, Io Group, Inc. (Io), sued the defendant, Veoh Networks, Inc. (Veoh), for copyright infringement arising out of clips from its copyrighted films that had been uploaded by users and viewed on Veoh's video-hosting website.

The court granted Veoh's motion for summary judgment, holding that Veoh qualified for the safe harbor under Section 512(c) of the DMCA for content stored on a service provider's system or network at the direction of a user. In doing so, the court found it more efficient to address Veoh's safe-harbor defense without considering Io's summary judgment motion on copyright-infringement liability. The court addressed the issues in this order because Veoh's successful DMCA safe-harbor defense narrowed Io's remedies to limited injunctive relief that, ultimately, was itself moot because the infringing content already had been removed from the site.<sup>2</sup>

**Facts**

Io, doing business as Titan Media, produces, markets, and distributes a variety of adult entertainment products, including a number of films with registered copyrights. Veoh provides software and a website (veoh.com) that enables the sharing of both user-submitted and professionally produced videos over the Internet.

In its suit, Io claimed that between June 1, 2006, and June 22, 2006, it discovered that clips from 10 of its copyrighted films had been uploaded and viewed on veoh.com without its authorization. Io did not notify Veoh that it believed its copyrights were being violated until it filed suit against Veoh on June 23, 2006. By that time, Veoh no longer permitted adult content on its site and already had removed the 10 allegedly infringing clips owned by Io.

Both parties ultimately filed motions for summary judgment. As noted above, Veoh sought summary judgment that it qualified for safe-harbor protection under the DMCA as an online service provider, while Io moved for summary judgment on liability. Because the safe-harbor question significantly impacted liability, the court addressed Veoh's safe-harbor defense first.

**Analysis***Safe-Harbor Threshold Requirements*

The court began by noting that to qualify for any of the four DMCA safe harbors, an online service provider must satisfy the threshold requirements under Section 512(i) of the DMCA by (1) being a "service provider"; (2) adopting, reasonably implementing, and informing subscribers of a policy providing that it may, in appropriate circumstances, terminate the accounts of repeat infringers; and (3) accommodating, and not interfering with, "standard technical measures" used by copyright owners to identify or protect copyrighted works.<sup>3</sup>

Io did not dispute that Veoh met the first and third threshold requirements above. Rather, Io contended that Veoh did not implement its repeat-infringer policy in a reasonable manner. Although no statutory definition exists for what "reasonably implement" means, the Ninth Circuit has held that a service provider reasonably implements a policy if it has a working notification system and a procedure for dealing with DMCA notifications, and it does not actively prevent copyright owners from collecting information needed to issue such notifications.<sup>4</sup> The same case held that an implementation is reasonable if, under appropriate circumstances, the service provider terminates users who repeatedly or blatantly infringe copyrights.<sup>5</sup>

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<sup>1</sup>No. C06-03926 HRL (N.D. Cal. Aug. 27, 2008).

<sup>2</sup>*Id.* at \*10.

<sup>3</sup>*Id.* at \*12.

<sup>4</sup>*Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

<sup>5</sup>*Id.*

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The court held that Veoh met the threshold requirements for DMCA safe-harbor protection. Specifically, the court rejected lo's argument that Veoh's policies were inadequate because they did not track IP addresses or prevent repeat infringers from reappearing on Veoh under a pseudonym or different email addresses. The court noted that Section 512(i) of the DMCA "does not require service providers to track users in a particular way or to affirmatively police users for evidence of repeat infringement."<sup>6</sup> The court pointed to Veoh's procedures for dealing with copyright notifications and copyright-infringement claims, and held that Veoh's practices satisfied the standard enunciated by the Ninth Circuit.<sup>7</sup>

### DMCA Section 512(c) Safe Harbor

The court next addressed the requirements for the DMCA safe-harbor provision under Section 512(c), which provides protection from liability for information residing on systems or networks at the direction of users:

In essence, a service provider is eligible for safe harbor under Section 512(c) if it (1) does not know of infringement; or (2) acts expeditiously to remove or disable access to the material when it (a) has actual knowledge, (b) is aware of facts or circumstances from which infringing activity is apparent, or (c) has received DMCA-compliant notice; and (3) either does not have the right and ability to control the infringing activity, or—if it does—that it does not receive a financial benefit directly attributable to the infringing activity.<sup>8</sup>

lo challenged Veoh's compliance with these requirements on several grounds, all of which were rejected by the court.

### Content Stored at Direction of Users

lo's first claim was that Veoh did not store infringing content "at the direction of a user" due to Veoh's creation of Flash-formatted files and still-image "screencaps" of videos used to assist in video viewing and searching. The court noted that the issue was whether Veoh should be ineligible for the safe harbor "because of automated functions that facilitate access to user-submitted content on its website."<sup>9</sup> Although users did not themselves create these files and images, they were created by an automated process initiated when users uploaded video files. Noting that this was an issue of first impression in this context, the court found that Veoh was not disqualified from the safe harbor on this ground: "Here, Veoh has simply established a system whereby software automatically processes user-submitted content and recasts it in a format that is readily accessible to its users."<sup>10</sup>

### Actual Knowledge of Infringing Activity

lo's second claim, that Veoh possessed "actual knowledge of infringing activity," also was quickly dispatched by the court, which noted that lo failed to provide notice to Veoh of any claimed copyright infringement through a DMCA notice. Therefore, there was no question that Veoh lacked actual knowledge of the alleged infringing activity.<sup>11</sup>

### Apparent Infringing Activity

lo's third claim was that Veoh was aware of several signs of "apparent infringing activity." The court explained that this so-called "red

flag" test examines "whether the service provider deliberately proceeded in the face of blatant factors of which it was aware."<sup>12</sup> The court found no such awareness because none of the videos uploaded by users contained lo's copyright notices and there was no evidence that Veoh was aware of but ignored a trademark notice that appeared in one of the clips. The court added: "Nor is this court convinced that the professionally created nature of submitted content constitutes a per se 'red flag' of infringement sufficient to impute the requisite level of knowledge or awareness to Veoh. Indeed, with the video equipment available to the general public today, there may be little, if any distinction between 'professional' and amateur productions."<sup>13</sup>

### Acts Expeditiously to Remove or Disable Access to Material

The fourth claim brought by lo, that Veoh failed to act expeditiously to remove or disable access to infringing material, also failed. The court found that when Veoh receives a DMCA-compliant notice of copyright infringement, it responds and removes noticed content as necessary on the same day the notice is received or within a few days thereafter. Moreover, the court took note of Veoh's content-flagging system that enables copyright owners to submit notices of copyright infringement.<sup>14</sup>

### Right and Ability to Control Infringing Activity

The court also rejected lo's final claim that Veoh (1) had the right and ability to control the infringing activity and (2) received a financial benefit directly attributable to such activity. Although both prongs must be met for a service provider to lose the benefit of the DMCA safe harbor, the court did not

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<sup>6</sup> *lo Group*, at \*16.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*17.

<sup>9</sup> *Id.* at \*18.

<sup>10</sup> *Id.* at \*20.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at \*21.

<sup>13</sup> *Id.* at \*21-22.

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address the “financial benefit” prong because it found that Veoh lacks the right and ability to control the infringing activity.<sup>15</sup>

The court reached this conclusion despite the fact that Veoh had conducted occasional “spot checks” for infringing content and had established and enforced policies regarding the removal of infringing content and the termination of repeat offenders. Such actions were deemed the right and ability to control the Veoh system as opposed to the right and ability to control the *infringing activity*, a critical distinction in the legal analysis.<sup>16</sup> Under Ninth Circuit precedent, a party exercises the relevant control over an infringer when it has both a legal right and a practical ability to stop or limit the infringing content.<sup>17</sup> The court found no evidence that Veoh could control the content that users choose to upload *before* it is uploaded, and prescreening each submission before it is published on the site is not a viable option, given the hundreds of thousands of videos uploaded.

The court also distinguished this situation from the *Napster*<sup>18</sup> case by noting that “Napster existed solely to provide the site and facilities for copyright infringement, and its control over its system was directly intertwined with its ability to control infringing activity.”<sup>19</sup> According to the court, unlike Napster, Veoh does not seek to encourage copyright infringement. Instead, Veoh has “taken steps to reduce, not foster, the incidence of copyright infringement on its website,” and there is no evidence that Veoh “failed to police its system to the fullest extent permitted by its architecture.”<sup>20</sup>

The court also rejected what it called lo’s “not-so-subtle suggestion . . . that, if Veoh cannot prevent infringement from ever occurring, then it should not be allowed to exist.”<sup>21</sup> lo argued that Veoh should have fundamentally changed its business operations, such as by verifying the source of all incoming videos, to prevent infringing activity from occurring on its site. As noted by the court, “Declining to change business operations is not the same as declining to exercise a right and ability to control infringing activity.”<sup>22</sup>

Having rejected all of lo’s arguments, the court found that there was no genuine question of fact regarding whether Veoh qualified for the safe-harbor protection under Section 512(c) of the DMCA. Thus, summary judgment was granted to Veoh.

### Conclusion

The holding of this case is significant. While the court noted in its conclusion that “the decision rendered here is confined to the particular combination of facts in this case and is not intended to push the bounds of the safe harbor so wide that less than scrupulous service providers may claim its protection,” it also stated that the DMCA was not intended to require online service providers “to shoulder the entire burden of policing third-party copyrights on its websites (at the cost of losing its business if it cannot).”<sup>23</sup> Instead, the DMCA “was intended to facilitate the growth of electronic commerce, not squelch it.”<sup>24</sup> While it is not possible to predict how other courts may rule in other cases, this decision will undoubtedly provide some

guidance regarding compliance with the DMCA’s safe-harbor provisions.

Wilson Sonsini Goodrich & Rosati’s media practice is uniquely positioned to assist clients in this highly complex and evolving area of the law. Our Internet and copyright litigation practice currently is handling a host of DMCA-related litigation matters all over the country. Attorneys in our media practice regularly advise clients in this area, bringing to bear deep experience in the converging area of media and technology, including a diverse blend of backgrounds in entertainment law and the music and film industries. For more information, about this or other media law issues, please contact Cathy Kirkman, Gary Greenstein, Jeff Ulin, Brian Mendonca, Lila Bailey, or another member of Wilson Sonsini Goodrich & Rosati’s media practice. Special thanks to Jason Lake, Clark Asay, and Raghu Seshadri for their significant contributions to this WSGR Alert.



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<sup>14</sup> *Id.* at \*23.

<sup>15</sup> *Id.* at \*24.

<sup>16</sup> *Id.* at \*24-25.

<sup>17</sup> *Id.* at \*24.

<sup>18</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>19</sup> *lo Group*, at \*28.

<sup>20</sup> *Id.* at \*26-29.

<sup>21</sup> *Id.* at \*30.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*31.

<sup>24</sup> *Id.* at \*30.