

Safe Harbor for Service Providers in a Storm of DMCA Developments

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Los Angeles-based Litigation Attorney Diana Hughes Leiden co-authored the *The Recorder* article “Safe Harbor for Service Providers in a Storm of DMCA Developments” published on May 8, 2017. The article discusses the “safe harbor” provisions of the Digital Millennium Copyright Act (DMCA) which have provided protections to online service providers (OSPs) by limiting their liability for copyright infringement if certain requirements are met.

According to the article, these protections have paved the way for the innovation and expansion of internet businesses, allowing OSPs to potentially avoid crippling liability where they have taken reasonable steps to prevent infringing activity originating from third parties.

The article discusses a recent case involving a celebrity photography company which sued a blogging platform for copyright infringement after its photographs were posted by third-party users on a popular celebrity gossip forum. The blogging platform, which uses “community moderators” to screen, accept, and reject posts, was granted summary judgment in 2014. The court found that it sailed into Section 512(c) safe harbor, which protects OSPs from liability where the allegedly infringing content appears on its service “by reason of the storage at the direction of a user.” The court found that the posts at issue, created and uploaded by third-party users, were stored “at the direction of a user” and rejected the photography company’s argument that moderators were agents for purposes of copyright liability.

Online forums, blogs, and other OSPs may not be protected by Section 512(c) of the DMCA when relying on community moderators to regulate content on online services that depend on third-party content, and should review their policies and practices with respect to community moderators with these questions in mind.

The article also addresses the following questions:

- How much direction do OSPs provide to community moderators?
- Are there guidelines regarding allowable content, or are moderators free to decide what content to approve?
- What is the role of community moderators? Are they tasked simply with reviewing submissions to determine whether the content is relevant to the site, or are they also responsible for weeding out infringing or illegal content?

- What is the nature of the relationship between the OSP and the community moderators?
- Are they volunteers or paid employees? Are they held to certain performance standards to maintain their moderator status?
- Are they closely supervised by the OSP?

OSPs must keep afloat of the ever-changing tide of DMCA case law and the Copyright Office's requirements in order to ensure their eligibility for safe harbor protection.

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