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Sam Castree III
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Author: Sam Castree, III, J.D Candidate, Class of 2013, Chicago-Kent College of Law

(For a more extensive treatment of this topic, including a proposed statutory solution, see Cyber-Plagiarism For Sale!: The Growing Problem of Blatant Copyright Infringement in Online Digital Media Stores in a forthcoming issue of the Texas Review of Entertainment & Sports Law.)

Online media distribution has become big business in recent years. For example, Apple sold 10 billion songs on its iTunes platform between April 2003 and February 2010, an average of 46 songs per second. So far in 2012, Amazon.com has sold 14% more e-books than traditional paper books. These and other online digital media stores allow individuals and companies big and small to distribute their creative works worldwide. However, the ease of copying electronic files also turns digital media stores into excellent opportunities for the unscrupulous to turn a quick, dirty payday. Numerous creators, typically lone individuals and small start-up companies, are seeing their works copied wholesale by plagiarists and sold in digital media stores.

Unfortunately, the Digital Millennium Copyright Act (DMCA), Congress's attempt to protect online service providers from secondary liability based on the actions of other Internet users, is not equipped to handle the widespread growth of digital media stores. In particular, two provisions of the DMCA's § 512(c) safe harbor for user-generated content are ripe for messy conflict because of ambiguities in the statutory language and contradictory interpretations by the courts. Absent a revision by Congress, these gaps will only be closed by costly litigation and appeals, something that many of the victimized creators cannot afford.

First, §512(c) may protect a service provider as long as that provider does not have knowledge of infringing content on its system or network. However, the DMCA explicitly relieves service providers of any duty to monitor the contents of their servers or to seek out infringing activity. Courts typically take this provision extremely seriously. However, some courts, like the Second Circuit in *Viacom International Inc. v. YouTube, Inc.*, have also adopted the idea of "willful blindness"; that is, a service provider cannot intentionally close its eyes to blatant infringement and still legitimately claim a lack of knowledge. Similarly, in *In re: Aimster Copyright Litigation*, the Seventh Circuit held that a service provider could not simply encrypt user data so as to intentionally keep itself unaware of the identity of infringers. However, beyond encryption, it is unclear to what extent willful blindness applies. Indeed, in *Viacom*, the Second Circuit merely remanded the matter to the district court with no more guidance than that the DMCA "limits—but does not abrogate—the doctrine" of willful blindness.

The implications for digital media stores are unclear. How red must a flag be before store operators must take action? If the exact same work is being sold by multiple authors in the same store, is that a fact "from which infringing activity is apparent"? If so, proving that the store operator was "aware" of the duplication should be easy enough. Stores often require a period of review by actual human beings before a work will be made available for sale; for example, every submission to Apple's App Store is reviewed by two people, and the process lasts around two weeks. For Amazon.com's Kindle Store, works are available about forty-eight hours after submission. During that time, the work will likely be checked only by an automated computer process. Can stores hide behind computerized

review, honestly claiming that they had no knowledge because no human ever checks the submitted works, and thus, could not know whether any particular submission infringed another?

Conversely, under the doctrine of willful blindness, is human review necessary? Could a store operator willfully blind itself to infringement by setting up an automated review of such exceptionally low quality that it fails to actually review anything? For example, a court might analogize from the Ninth Circuit's decision in *Ellison v. Robertson*, in which the court held AOL liable for inadvertently sending DMCA-mandated take-down notices to a non-existent e-mail address. Search Specialist Mike Essex ran a test of Amazon's review process. He "took the lyrics to the song 'This is the song that never ends' and repeated them over 700-plus pages. No formatting, just one continuous block of duplicate text." The resulting "work" was available for sale less than twenty-four hours later. A "review" system that like this may be so poor that a court might find that Amazon willfully blinded itself to such blatant copyright infringement. However, such a ruling might lead store operators to forego *any* sort of review process (which would be safe legally but perhaps not a sound business decision) for fear of falling short of the judiciary's standard.

Courts have also typically set the bar very high for what constitutes a forbidden "direct financial benefit" under § 512(c). For example, in *Perfect 10, Inc. v. CCBill LLC*, the Ninth Circuit held that even though the defendant received money from the infringing user, there was no direct financial benefit because the payments were made periodically and at a flat rate. However, the Northern District of Illinois has held otherwise; in *In re: Aimster Copyright Litigation*, that court held that charging a monthly service fee of only $4.95 to all users (infringing or not) was enough to constitute a financial interest. Defendant Aimster also solicited donations to help fund its lawsuit and sold its own merchandise on the website, all of which indicated to the court that "Aimster is very much a commercial enterprise and Defendants have a direct financial interest in the infringement by its users."

Unlike the foregoing, most digital media stores take a percentage of the sales price of the works sold and pass the rest on to the author. For example, Apple keeps thirty percent of the sale price of every program sold in the App Store and passes the rest on to the author. Similarly, Amazon.com has options that offer either thirty-five percent or seventy percent royalties to authors who publish Kindle e-books. This model seems even closer to having a "direct financial benefit" than the flat-rate model. But, since the courts cannot even agree whether a flat-rate payment is enough to subject a service provider to liability, the question remains open as to a digital media store operator's liability. A friendly court could very well extend the safe harbor to digital media stores like the App Store, which takes no *additional* profit from infringing works as compared to non-infringing works (an interpretation advocated by Professor Edward Lee). But, perhaps not. At the moment, only a lengthy battle in court is likely to resolve the issue.
