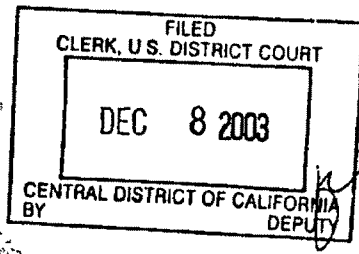
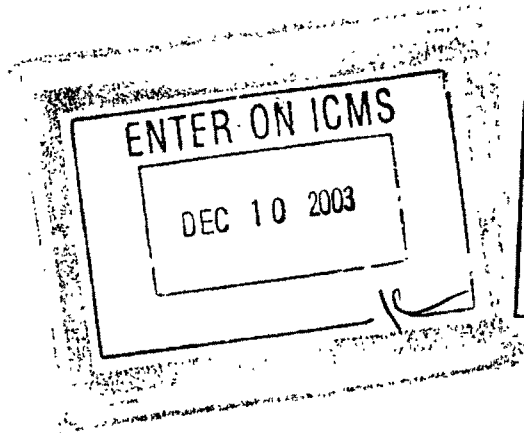


SEND



RECORDED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

United States District Court
Central District of California
Western Division

ROBERT HENDRICKSON,

Plaintiff,

v.

AMAZON.COM, INC., *et al.*,

Defendants.

CV 02-08443 TJH (PJWx)

Memorandum Opinion

Robert Hendrickson ("Hendrickson") owns the copyright to the movie *Manson*, which he has not released, or authorized to be released, in a digital video disc ("DVD") format. Thus, all copies of *Manson* sold in a DVD format infringe upon Hendrickson's copyright. 17 U.S.C. § 106(3).

On January 28, 2002, Hendrickson sent a letter to Amazon.com, Inc. ("Amazon"), notifying it that all copies of *Manson* on DVD infringe his copyright. On October 21, 2002, Hendrickson noticed that a *Manson* DVD was recently posted for sale by Demetrious Papaioannou ("Papaioannou") on Amazon's website. Two

56

1 days later, Hendrickson purchased a copy of the DVD from Papaioannou, using
2 Amazon's website credit services to facilitate the transaction.

3 Hendrickson, then, filed this action against Amazon and Papaioannou. He
4 asserts claims for direct copyright infringement against Amazon and Papaioannou, as
5 well as a vicarious copyright infringement claim against Amazon. Amazon moved for
6 summary judgment, asserting that it is not liable for direct copyright infringement, and
7 that it is protected against vicarious infringement by the safe harbor provision of the
8 Digital Millenium Copyright Act ("DMCA"), 17 U.S.C. § 512.

9 The party moving for summary judgment has the initial burden of establishing
10 that there is "no genuine issue as to any material fact and that [it] is entitled to a
11 judgment as a matter of law." Fed. R. Civ. P. 56(c). However, if the opponent has the
12 burden of proof at trial, the moving party does not have the burden to produce any
13 evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v.*
14 *Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Instead, ... the
15 burden on the moving party may be discharged by 'showing' ... that there is an
16 absence of evidence to support the nonmoving party's case." Consequently, on the
17 direct copyright claim, Amazon need only show that there is no evidence supporting
18 Hendrickson's allegation that it sold the *Manson* DVD.

19 Alternatively, if the moving party has the burden of proof at trial, that party
20 "must establish ... all of the essential elements of the claim or defense to warrant
21 judgment in [its] favor." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552, 91 L. Ed. 2d
22 at 274. Therefore, because Amazon is asserting an affirmative defense on the
23 vicarious liability claim, it must establish all elements of the safe harbor rule under the
24 DMCA.

25 Hendrickson's contention, that Amazon actually committed the infringing
26 activity by "selling" the *Manson* DVD, is based on "sales" documents, and an email

1 that was generated by Amazon subsequent to the purchase. These "sales" documents
2 are the Amazon website pages used by the seller and buyer to complete the purchase.
3 The email was an automatic notice sent to the seller after the purchase had been made
4 notifying the seller that Amazon had charged the buyer's account and that the seller's
5 account would be credited. Hendrickson has no viable evidence establishing that
6 Amazon was not merely an internet service provider ["ISP"], but rather was the direct
7 seller of the infringing item. An ISP is "a provider of online services or network
8 access, or the operator of facilities therefor" 17 U.S.C. § 512(k)(1)(B). Amazon
9 meets the DMCA's definition of an ISP. Indeed, all of the evidence points to the fact
10 that Papaioannou, not Amazon, was the actual seller. Thus, summary judgment in
11 favor of Amazon on Hendrickson's direct infringement claim against Amazon is
12 appropriate.

13 However, because Hendrickson did buy a *Manson* DVD from the Amazon
14 website, the Court will assume, for purposes of this motion, that Papaioannou
15 committed direct copyright infringement. By showing that there was direct copyright
16 infringement by an independent third party seller, vicarious liability may be
17 transferred to the party that provided the forum and facilitated the sale. *Fonovisa, Inc.*
18 *v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). In *A & M Records, Inc. v.*
19 *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), the Ninth Circuit extended its holding
20 in *Fonovisa* to the internet.

21 Because Amazon qualifies as an ISP under the DMCA, it is entitled to the safe
22 harbor affirmative defense against a claim of vicarious copyright infringement if it
23 establishes the following three elements:

24 A. It does not have actual knowledge that the material ... on the system
25 or network is infringing;

26 (ii) in the absence of such actual knowledge, is not aware of facts

1 or circumstances from which infringing activity is apparent; or
2 (iii) upon obtaining such knowledge or awareness, acts
3 expeditiously to remove, or disable access to, the material;

4 B. It does not receive a financial benefit directly attributable to the
5 infringing activity, in a case in which the service provider has the right,
6 and ability to control such activity; and

7 C. Upon notification of claimed infringement ... [it] responds
8 expeditiously to remove, or disable access to, the material

9 17 U.S.C. § 512 (c).

10 Hendrickson's January 28, 2002, letter to Amazon notified Amazon that all
11 *Manson* DVDs were unauthorized by the copyright owner and that any sales of such
12 DVDs conducted via the Amazon website would be infringing activity in violation of
13 his exclusive right to distribute pursuant to 17 U.S.C. § 106(3). Amazon asserts that
14 the letter neither substantially complied with the identification requirements of the
15 DMCA, nor was it consistent with the intent of the DMCA, which is to facilitate
16 robust development of the internet. The DMCA places the burden on the copyright
17 owner to monitor the internet for potentially infringing sales. "[A] service provider
18 need not monitor its service or affirmatively seek facts indicating infringing activity
19" House Report No. 551(II), 105th Congress, 2nd Session 1998, H.R. at 53 . To
20 allow a plaintiff to shift its burden to the service provider would be contrary to the
21 balance crafted by Congress. "The goal of § 512 (c)(3)(A)(iii) is to provide the
22 service provider with adequate information to find and examine the allegedly
23 infringing material expeditiously." H.R. at 55.

24 This Court previously granted summary judgment in favor of Hendrickson, in
25 a previous action, *Hendrickson v. Amazon.com, Inc.*, CV 02-07394 TJH (C.D. Cal.
26 2003), by deciding that his January, 2002, letter substantially complied with the

1 DMCA requirements as to eight named defendants. To determine the adequacy of
2 Hendrickson's notice, this Court considered the analysis by Judge Kelleher, in
3 *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d. 1082 (C.D. Cal. 2001) ("*eBay*"), in which
4 that court recognized that:

5 [T]here may be instances where a copyright holder need not provide [the
6 ISP] with specific item numbers to satisfy the identification requirement.
7 For example, if a movie studio advised [the ISP] that all listings offering
8 to sell a new movie that has not yet been released in ... DVD format are
9 unlawful, [the ISP] could easily search its website using the title ... and
10 identify the offensive listings."

11 *eBay*, 165 F. Supp. 2d at 1090.

12 However, because the DMCA is relatively new, the question as to how long an
13 adequate notice should remain viable is still unanswered. "[T]he Committee [did] not
14 intend [to] suggest that a provider must ... monitor its service" H.R. at 61. The
15 Committee, also, implied that both the copyright owner and the ISP should cooperate
16 with each other to detect and deal with copyright infringement that take place in the
17 digital networked environment. H. R. at 44. Thus, it was not the intention of
18 Congress that a copyright owner could write one blanket notice to all service
19 providers alerting them of infringing material, thus, relieving him of any further
20 responsibility and, thereby, placing the onus forever on the ISP. However, it is, also,
21 against the spirit of the DMCA if the entire responsibility lies with the copyright
22 owner to forever police websites in search of possible infringers.

23 In evaluating the balance crafted by Congress, courts traditionally employ a
24 strong presumption that the plain language of a statute expresses congressional intent.
25 *Ardestani v. INS*, 502 U.S. 129, 135-37, 112 S. Ct. 515, 520, 116 L. Ed. 2d 496
26 (1991). The Ninth Circuit has consistently refused to defer to interpretations that

1 conflict with plain statutory language. *Almero v. INS*, 18 F.3d 757 (9th Cir. 1994).
2 "If the term at issue has a settled meaning, we must infer that the legislature meant to
3 incorporate the established meaning unless the statute dictates otherwise." *S & M*
4 *Investment v. Tahoe Regional Planning Agency*, 911 F.2d 324, 327 (9th Cir. 1990).
5 The actual language of the DMCA is present tense. The service provider must have
6 knowledge that the actual material "is infringing". Alternatively, it must be aware that
7 infringing activity "is apparent". "The term activity is intended to mean activity *using*
8 the material *on the system* or network. The Committee intends such activity to refer
9 to wrongful activity that *is occurring on the site ...*" H.R. at 53 (emphasis added).
10 Because the language of the statute is present tense, it clearly indicates that Congress
11 intended for the notice to make the service provider aware of the infringing activity
12 that is occurring at the time it receives the notice.

13 In interpreting a similar section of the DMCA, Congress states "[O]n line
14 editors and catalogers would not be required to make discriminating judgments about
15 *potential* copyright infringements." H.R. at 58. Although, the interpretation is
16 referring to the reason for requiring the copyright owner to offer adequate notice, this
17 interpretation must be read in conjunction with the plain language of the statute in
18 addition to the intent of Congress that service providers not have to monitor their
19 websites indefinitely.

20 Moreover, the purpose behind the notice is to provide the ISP with adequate
21 information to find and examine the allegedly infringing material expeditiously. H.R.
22 at 55. If the infringing material *is on the website at the time* the ISP receives the
23 notice, then the information, that all *Manson DVD's* are infringing, can be adequate
24 to find the infringing material expeditiously. However, if at the time the notice is
25 received, the infringing material is not posted, the notice does not enable the service
26 provider to locate infringing material that is not there, let alone do it expeditiously.

1 Recognizing that Congress tried to craft a balance between the responsibilities
2 of the copyright owner and the ISP, there is a limit to the viability of an otherwise
3 adequate notice. Hedrickson's January, 2002, letter, claiming all *Manson* DVDs
4 violate his copyright, although adequate for the listings then on Amazon, cannot be
5 deemed adequate notice for subsequent listings and sales, especially, as here, when the
6 infringing item was posted for sale nine months after the date of the notice.

7 Under the DMCA, a notification from a copyright owner that fails to comply
8 substantially with § 512 (c)(3) "shall not be considered under [the first prong of the
9 safe harbor test] in determining whether a service provider has actual knowledge or
10 is aware of the facts or circumstances from which infringing activity is apparent." 17
11 U.S.C. § 512 (c)(3)(B)(i) & (ii). Thus, the first prong is satisfied.

12 To satisfy the second prong of the test, Amazon must show that it "does not
13 receive a financial benefit directly attributable to the infringing activity, in a case in
14 which the service provider has the right and ability to control such activity." 17
15 U.S.C. § 512 (c)(1)(B). Amazon does receive a financial benefit from its third party
16 sellers, so its only defense is to prove that it does not have the right and ability to
17 control such activity.

18 Here, the infringing activity is the sale of the unauthorized work, not the posting
19 of the listing. 17 U.S.C. § 106(3). There is no evidence to suggest that Amazon had
20 the ability to know that an infringing sale by a third party seller would occur.
21 Amazon's evidence established that it never possessed the DVD, and never had the
22 opportunity to inspect the item. Amazon merely provided the forum for an
23 independent third party seller to list and sell his merchandise. Amazon was not
24 actively involved in the listing, bidding, sale or delivery of the DVD. The fact that
25 Amazon generated automatic email responses when the DVD was listed and again
26 when it was sold, does not mean that Amazon was actively involved in the sale. Once

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26


a third party seller decides to list an item, the responsibility is on the seller to consummate the sale. While Amazon does provide transaction processing for credit card purchases, that additional service does not give Amazon control over the sale. In sum, Amazon's evidence shows that it did not have control of the sale of DVD,

As discussed above, Amazon could not respond to the notice of claimed infringement and remove, or disable access to, the material since the notice was no longer viable. Thus, the third prong of the safe harbor provision is not applicable.

Thus, Amazon has proven that it qualifies for the safe harbor affirmative defense of the DMCA. Consequently, to avoid summary judgment, the burden shifts to Hedricskon to introduce evidence which creates a triable issue of fact. *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1340 (9th Cir. 1987). Hendrickson has offered no such evidence. Thus, summary judgment in favor of Amazon is appropriate.

Therefore, Amazon's motion for summary judgment be, and hereby is, Granted.

Date: December 8, 2003


Terry J. Hatter, Jr.
United States District Judge