

**MAVRIX’S MISGUIDED GUIDELINES:
AN OFFENSE AGAINST THE DMCA SAFE
HARBOR DEFENSE**

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I. INTRODUCTION

A. Legislative History

On May 11, 1998, Senator Orrin Hatch submitted the Senate Report on the Digital Millennium Copyright Act of 1998 (DMCA), which explained that the Act was “designed to facilitate the robust development and worldwide expansion of electronic commerce, communications,

* [Author’s byline goes here].

research, development, and education in the digital age.”¹ Section 512² “provide[s] certainty for copyright owners and Internet service providers with respect to copyright infringement liability online.”³ Section 512 is the focus of this article. After three months of negotiation between copyright holders and internet service providers,⁴ § 512 “clarifie[d] the liability faced by service providers who transmit potentially infringing material over their networks. In short, [§ 512] ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.”⁵

In passing the DMCA, Congress⁶ was reacting to the requests of internet service providers that wanted clarifications on the existing law of contributory and vicarious copyright infringement as applied to users of their websites.⁷ Rather than providing clarification on the existing law, the DMCA created new “safe harbors” to afford qualifying service providers “the benefit of limited liability.”⁸ The safe harbors limit liability for five categories of infringement, by preventing copyright owners from seeking “all monetary relief for direct, vicarious and contributory infringement [including] damages, costs, attorneys’ fees, and any other form of monetary payment” in addition to limiting the injunctive relief available to copyright owners.⁹ This limited liability allows tens of thousands of companies to add value to the United States economy,¹⁰ and it fosters a valuable forum for the market place of ideas.

This Note specifically focuses on the safe harbor in § 512(c) which “limits the liability of qualifying service providers for claims of direct, vicarious and contributory infringement for storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.”¹¹ Congress explained that “providing server space for a user’s [. . .] forum in which material may be posted at the direction of users” is an example of an instance that would qualify for

1. S. REP. NO. 105-190, at 1-2 (1998).

2. 17 U.S.C. § 512 originally comprised Title II of the Digital Millennium Copyright Act, Pub. L. 105-304, Title II, 112 Stat. 2860 (1998).

3. S. REP. NO. 105-190, at 1-2.

4. *Id.* at 9.

5. *Id.* at 2.

6. The House of Representatives also published a Report to explain their intentions in passing the DMCA and detail its legislative history, which used language identical to the Senate Report’s language. *See* H.R. REP. 105-551, at 50 (1998).

7. S. REP. NO. 105-190, at 19.

8. *Id.*

9. *Id.* at 20.

10. *See Old Directory of OSP Designated Agents*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/onlinesp/list/a_agents.html.

11. S. REP. NO. 105-190, at 43; H.R. REP. 105-551, at 53.

§ 512(c) safe harbor protection.¹² This example is nearly identical to the case at hand where LiveJournal provided service space for users to post material on its celebrity news forum.

In addition to defining the scope of this safe harbor, § 512(c) details notice and take-down procedures that copyright owners and websites must follow. Senator Hatch explained that, through this notice and take-down regime, the DMCA “preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”¹³ In doing so, the DMCA “provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”¹⁴

It is important to note, however, that the DMCA does not require copyright owners to notify websites of infringement.¹⁵ In order to receive safe harbor protection, websites “must ‘take down’ or disable access to infringing material residing on its system [whenever the website obtains] actual knowledge or [. . .] red flag [knowledge of infringing activity,] even if the copyright owner or its agent does not notify it of claimed infringement.”¹⁶

Congress passed the DMCA on October 12, 1998, and the statute was signed into law by President Bill Clinton two weeks later.¹⁷

B. Section 512(c)(1) Safe Harbor Statute

“A service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider-

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

does not receive a financial benefit directly attributable to the

12. *Id.*

13. S. REP. NO. 105-190, at 20; H.R. REP. 105-551, at 49-50.

14. *Id.*

15. S. REP. NO. 105-190, at 45; H.R. REP. 105-551, at 54.

16. *Id.*

17. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

infringing activity, in a case in which the service provider has the right and ability to control such activity; and

upon notification of claimed infringement [via a DMCA take-down request,] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing . . .”¹⁸

C. Issue

On April 7, 2017, the U.S. Court of Appeals for the Ninth Circuit recently reviewed a case in which a photo agency sued a blog for copyright infringement.¹⁹ The blog argued it was protected by the DMCA’s safe harbors, since the allegedly infringing photographs were posted by its users.²⁰ After reviewing the lower court’s decision that the blog was sheltered by the § 512(c) safe harbor, the Ninth Circuit remanded the case with new guidelines for determining whether the blog could be found liable for the posts.²¹ This article analyzes whether the Ninth Circuit’s guidelines were unduly restrictive and contrary to Congressional intent and to the public policies underlying the passage of the DMCA.

This Note will also detail the four guidelines that the Ninth Circuit requested the lower court follow including its guidelines on the interaction between the § 512(c) safe harbor and agency law, the requirement that information be stored at the direction of the user, the requirement that the service provider lack knowledge of infringement, and the requirement that the service provider lack financial benefit from the infringement that it had the right and ability to control. After reviewing those guidelines, this article argues that the Ninth Circuit’s guideline for determining whether an agency relationship exists is a fair and accurate reading of the statute and relevant case law. However, this article argues that the remaining guidelines—for determining whether the posts were made at the direction of the user, whether the service provider had knowledge of the infringing activities, and whether the service provider had a financial benefit from the infringement that it had the right and ability to control—undermine the public policies motivating the passage of the DMCA by unduly restricting the circumstances in which safe harbor protection is available to service providers, in a way that is contrary to the intent Congress had when passing the law.

18. 17 U.S.C. § 512(c)(1).

19. *Mavrix Photographs LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1048 (9th Cir. 2017).

20. *Id.*

21. *Id.* at 1049.

II. MAVRIX PHOTOGRAPHS, LLC V. LIVEJOURNAL, INC.

A. Parties

LiveJournal, Inc.²² is a website where users can “create and run thematic ‘communities’ in which they post and comment on content.”²³ LiveJournal complies with the DMCA’s notice and take-down procedures “by designating an agent and form to report infringement, and by promptly removing infringing posts and prohibiting repeat abusers from the community.”²⁴ These agents, or moderators, “review posts submitted by users to ensure compliance with the rules.”²⁵ One of those rules prohibits users from “[u]pload[ing], post[ing] or otherwise transmit[ing] any content that infringes any patent, trademark, trade secret, copyright, or other proprietary rights.”²⁶ It is also important to note that LiveJournal generates advertising revenue from its communities.²⁷

Oh No They Didn’t! (ONTD),²⁸ LiveJournal’s most popular community, allows users to submit content related to celebrity news, which is then reviewed and approved by moderators if it complies with guidelines regarding copyright infringement and other rules.²⁹ LiveJournal pays ONTD’s “primary leader” to work full-time on training the other “ONTD moderators on the content they should approve” and to review moderator performance.³⁰ However, despite ONTD’s rules against posting copyright infringing content, “approximately 84% of the posts on ONTD contain[ed] infringing material” from various sources.³¹

Mavrix Photographs LLC³² is a company that sells “photographs of celebrities in tropical locations” to celebrity magazines and relies on the news-breaking nature of those photographs to turn a profit.³³ Mavrix became aware that their photographs—some of which contained either a generic or Mavrix-specific watermark—were illegally posted on ONTD.³⁴ “Mavrix did not utilize LiveJournal’s notice and takedown

22. LIVEJOURNAL, <https://www.livejournal.com/>.

23. *Mavrix Photographs*, 873 F.3d at 1049.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1050.

28. LIVEJOURNAL: OH NO THEY DIDN’T! (JAN. 24, 2018), <http://ohnotheydidnt.livejournal.com/>.

29. *Mavrix Photographs*, 873 F.3d at 1059.

30. *Id.*

31. *Id.*

32. MAVRIX PHOTO, <http://www.mavrixphoto.com/>.

33. *Mavrix Photographs*, 873 F.3d at 1051.

34. *Id.*

procedure to notify LiveJournal of the infringements.”³⁵ Instead, Mavrix filed suit against LiveJournal, alleging seven posts on ONTD infringed its copyright in twenty photographs.³⁶ After being served and becoming aware that copyright infringing content was on ONTD, “LiveJournal removed the posts.”³⁷

B. Procedural Posture

The district court granted LiveJournal’s motion for summary judgment on the basis of the § 512(c) safe harbor, which shields internet service providers from liability for copyright infringement in user’s posts if the service providers comply with the DMCA’s notice and take-down procedure rules.³⁸ Specifically, the district court decided that agency law did not apply to the safe harbor analysis and that the infringing photographs were posted “at the direction of the user” despite approval being required by the moderators.³⁹ Additionally, the district court held that LiveJournal did not have knowledge or awareness of infringement,⁴⁰ nor the right or ability to control such infringement.⁴¹

The appellate court reviewed and reversed the district court’s decision, remanding the order “for further proceedings consistent with” the following guidelines.⁴²

C. Agency Law Guideline

In addition to its paid moderator, LiveJournal utilized volunteer moderators.⁴³ The appellate court held that “common law agency principles apply to the analysis of whether a service provider . . . is liable for the acts of [its] moderators,” since agency law also applies to other analyses of copyright infringement.⁴⁴ Therefore, if the moderators are the service provider’s agents, the service provider is liable for the moderators’ acts. However, this liability may be limited by the § 512(c) safe harbor.⁴⁵ Thus, the appellate court explained it is integral to first determine whether the moderators were agents of the service provider,

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1048.

39. *Id.* at 1048-49.

40. *Id.* at 1052.

41. *Id.* at 1054.

42. *Id.* at 1055.

43. *Id.* at 1045.

44. *Id.* at 1054.

45. 17 U.S.C. § 512(c)(1).

making the service provider liable for their actions.⁴⁶

The requirements of an agency relationship are two-fold: (1) “an agent must have authority to act on behalf of the principal,” and (2) “the person represented must have a right to control the actions of the agent.”⁴⁷

The appellate court held that “reasonable jurors could conclude that an agency relationship existed” in the LiveJournal case,⁴⁸ because “LiveJournal gave its moderators explicit and varying levels of authority to screen posts[,] the moderators performed a vital function in LiveJournal’s business model[, and] LiveJournal gave moderators express directions about their screening functions, including criteria for accepting or rejecting posts.”⁴⁹ Alternatively, the appellate court noted circumstances which could lead reasonable jurors to conclude that an agency relationship did not exist. For example, “the level of control that LiveJournal exerts over [moderators’] conduct” is called into question by the fact that volunteer moderators could come and go as they saw fit, and they could “reject submissions for reasons other than those provided by the rules.”⁵⁰ Thus, the district court’s summary judgment on this issue was reversed, since “there are genuine issues of material fact as to whether the moderators are LiveJournal’s agents,”⁵¹ and the issue was remanded for the lower court to reconsider.⁵²

D. Guideline on the “At the Direction of the User” Issue

The appellate court explained that the lower court must also determine whether the posts were made at the direction of the users or at the direction of the moderators.⁵³ If the posts were made at the direction of the moderators and there was an agency relationship, then the service provider would be liable for infringing posts made by the moderators. If the posts were made at the direction of the user, then service provider may raise the safe harbor defense, if the other requirements are also satisfied by the service provider. Posts are at the direction of the user if the moderators “did not actively participate in or supervise file uploading”⁵⁴ or if the moderators’ activities “are narrowly directed toward providing access to material stored at the direction of users.”⁵⁵

46. *Mavrix Photographs*, 873 F.3d at 1054.

47. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. C (AM. LAW +INST. 2006).

48. *Mavrix Photographs*, 873 F.3d at 1056.

49. *Id.* at 1054.

50. *Id.* at 1055.

51. *Id.* at 1054.

52. *Id.* at 1059.

53. *Id.* at 1058.

54. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1020 (9th Cir. 2013).

55. *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1092 (C.D. Cal.

The appellate court cited “automatic processes” that “reformat posts,” that “perform some technological change,” or “that screen for infringement or other harmful material like pornography” as examples of a moderator’s activities that are narrowly directed toward providing access.⁵⁶

Because the posts on LiveJournal were submitted to and screened by ONTD’s moderators, the appellate court directed the lower court to decide whether ONTD’s moderators’ reviewing and approving activities were narrowly directed “accessibility-enhancing activities or whether instead their extensive, manual, and substantive activities were beyond the automatic and limited manual activities [that the court has] approved as accessibility-enhancing.”⁵⁷ The appellate court suggested that, if the lower court finds ONTD’s moderators’ activities were beyond accessibility-enhancing (and there was an agency relationship), then the posts can be attributed to LiveJournal, since they were stored at the direction of the moderator and not at the direction of the user.⁵⁸

If the posts can be attributed to LiveJournal, then LiveJournal cannot seek protection in the DMCA’s safe harbors. If the posts cannot be attributed to LiveJournal and were instead at the direction of the user, LiveJournal may be able to seek protection in the DMCA’s safe harbors if LiveJournal also lacked knowledge of the infringement and lacked financial benefit from the infringement.

E. *Guideline on Knowledge of Infringement*

In order to meet the safe harbor threshold, the service provider must not have actual or apparent knowledge of the infringement.⁵⁹ “The actual knowledge provision turns on whether the provider actually or subjectively knew of specific infringement, while the [apparent knowledge] provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person.”⁶⁰

When assessing actual knowledge, courts look at the “service provider’s subjective knowledge of the infringing nature of the posts.”⁶¹ The most powerful (though not determinative) evidence of actual knowledge is a notification through a service provider’s notice and take-

2008).

56. *Shelter Capital*, 718 F.3d at 1020.

57. *Mavrix Photographs*, 873 F.3d at 1048-49.

58. *Id.*

59. 17 U.S.C. § 512(c)(1)(A).

60. *Viacom Int’l v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012).

61. *Mavrix Photographs*, 873 F.3d at 1032.

down procedures.⁶² To be clear, notification through the notice and take-down procedure is sufficient, not necessary, evidence of actual knowledge. If the court determines there was no actual knowledge of the allegedly infringing posts, then apparent knowledge must be assessed.⁶³

The lower court determined LiveJournal did not have actual knowledge, because Mavrix did not utilize LiveJournal's notice and take-down procedures.⁶⁴ However, the appellate court determined that "was an incomplete assessment of the issue" and that the lower court must also assess the moderator's subjective knowledge.⁶⁵ The appellate court explained that LiveJournal had apparent (or red flag) knowledge if it was "aware of facts that would have made the specific infringement 'objectively' obvious to a reasonable person."⁶⁶ This is a "high bar" that would lead a non-expert to conclude that the infringement was "apparent from even a brief and casual viewing."⁶⁷ The appellate court suggested this high bar may have been met, since "it would be objectively obvious to a reasonable person that material bearing a generic watermark or a watermark [specifically] referring to [Mavrix] was infringing."⁶⁸ In a footnote, the appellate court reminded the lower court that "the existence of a watermark, and particularly this watermark with a company name, is relevant to the knowledge inquiry."⁶⁹

If LiveJournal had actual or apparent knowledge of the infringing posts, then the service provider could be liable for copyright infringement, if the service provider did not "[act] expeditiously to remove, or disable access to, the material . . . upon obtaining such knowledge or awareness."⁷⁰

F. *Guideline on the Lack of Financial Benefit with the Right and Ability to Control*

Finally, in order to receive safe harbor protection, the service provider must show that it did not financially benefit from infringement that it had the right and ability to control.⁷¹

When determining whether a service provider financially benefited from the alleged infringement, "courts should take a common-sense, fact-

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Viacom*, 676 F.3d at 31.

67. H.R. REP. 105-551, at 58 (1998).

68. *Mavrix Photographs*, 873 F.3d at 1026.

69. *Id.* at 1060 n.14.

70. 17 U.S.C. § 512(c)(1)(A)(iii) (2010).

71. 17 U.S.C. § 512(c)(1)(B) (2010).

based approach, not a formalistic one.”⁷² Courts have found that service providers which attract advertisers by targeting “visitors who [seek] to engage in infringing activity” receive a financial benefit, since those service providers derive advertising revenues from the large number of visitors that consume the infringing content.⁷³ The appellate court notes that “the financial benefit need not be substantial or a large proportion of the service provider’s revenue.”⁷⁴ The financial benefit requirement will be satisfied if “there [is] a vast amount of infringing material on [the service provider’s] websites . . . supporting an inference that [the service provider’s] revenue stream is predicated on the broad availability of infringing materials for [its] users, thereby attracting advertisers.”⁷⁵ The appellate court then reminded the lower court that “approximately 84% of posts on ONTD contain[ed] infringing material,”⁷⁶ suggesting that the lower court should decide that the advertising revenues LiveJournal derived from ONTD constituted a financial benefit from the infringement.⁷⁷

When determining whether a service provider had the right and ability to control the infringement that it financially benefited from, the court suggested the service provider’s procedures at the time of the alleged infringement must be assessed.⁷⁸ Instead of assessing the service provider’s actions in regard to the alleged infringement in particular, the appellate court recommended the service provider’s general practices should be assessed.⁷⁹

The appellate court explained that the plaintiff must show that the service provider “exert[ed] substantial influence on the activities of the users. ‘Substantial influence’ may be shown by intentional acts constituting inducement of copyright infringement . . . or ‘high levels of control over activities of users.’”⁸⁰ This must be shown by evidence of “something more than the ability to remove or block access to materials posted on [its] website” such as prescreening or offering “extensive advice” and “detailed instructions regard[ing] issues of layout, appearance, and content.”⁸¹ Service providers do not lose safe harbor protection simply because they can terminate users and remove, block, or

72. S. REP. NO. 105-190, at 44 (1998).

73. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1045 (9th Cir. 2013).

74. *Mavrix Photographs*, 873 F.3d at 1059 (citing *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)).

75. *Id.* (quoting *Fung*, 710 F.3d 1020 at 1045).

76. *Id.*

77. *Id.*

78. *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1153 (N.D. Cal. 2008).

79. *Shelter Capital*, 718 F.3d at 1030.

80. *Id.*

81. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1182 (C.D. Cal. 2002).

locate infringing material.⁸² “The pertinent inquiry is not whether [the service provider] has the right and ability to control its system, but rather, whether it has the right and ability to control the infringing activity.”⁸³

The lower court concluded that LiveJournal did not have to have the right and ability to control infringement, since it did not have the “something more” required to meet that threshold.⁸⁴ However, the appellate court questioned “whether LiveJournal’s extensive review process, infringement list” of sources that have previously complained, and “blocker tool” used to prevent repeat offenders from posting, “constituted high levels of control to show ‘something more.’”⁸⁵

III. ANALYSIS

A. Agency Law Analysis

The appellate court’s guidelines for determining whether an agency law relationship exists is useful in determining whether the § 512(c) safe harbor is applicable in any given case.

It is necessary to evaluate whether an agency relationship exists in order to determine whether a service provider is liable for its moderators’ posts. As the Ninth Circuit previously explained in *Fung*, “[w]hen dealing with corporate or entity defendants, moreover, the relevant intent must be that of the entity itself, as defined by traditional agency law principles; liability cannot be premised on stray or unauthorized statements that cannot fairly be imputed to the entity.”⁸⁶ However, the impact of this determination on safe harbor analysis is limited. While it is true that “common law agency principles apply to the analysis of whether a service provider . . . is liable for the acts of [its] moderators,”⁸⁷ the § 512(c) safe harbor may limit that liability.

As the Senate explained in its report on the DMCA, the safe harbors are “not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.”⁸⁸ The existing principles of law applicable to safe harbor analysis include enquiring whether an agency relationship exists, since agency principles

82. *Shelter Capital*, 718 F.3d at 1027.

83. *Io Grp.*, 586 F. Supp. 2d at 1151.

84. *Mavrix Photographs*, 873 F.3d at 1054.

85. *Id.*

86. *Fung*, 710 F.3d at 1038 (citing *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937, 125 S. Ct. 2764, 2780, 162 L. Ed. 2d 781 (2005)).

87. *Mavrix Photographs*, 873 F.3d at 1052.

88. S. REP. NO. 105-190, at 19 (1998).

at common law have previously been applied when interpreting copyright laws.⁸⁹

It is also important to note that the DMCA did not seek to replace the role of agency law in determining copyright infringement on the internet. It is presumed that a statute does not overturn common law, unless it does so clearly and explicitly.⁹⁰ Thus, agency law and the DMCA work in tandem, since the DMCA did not clearly and explicitly rule out the application of agency law to determinations of copyright infringement in the online stratosphere.

The appellate court was correct to hold that an analysis of the agency relationship is necessary to determine LiveJournal's liability in this case, since there is a genuine issue of fact for the lower court to decide whether the illegal actions of ONTD's moderators can be fairly imputed to LiveJournal. For example, the fact that LiveJournal did not pay its moderators may be evidence that weighs against an agency finding, however this fact is not necessary for an agency relationship to exist.⁹¹ On the other hand, the Tenth Circuit has held that contractors who posted copyrighted photos of celebrities on Examiner.com were users, not agents, since "a 'user' is anyone who uses a website—no class of individuals is inherently excluded."⁹² The court went on to explain that even agents or employees of the service provider may still qualify as a user under the DMCA.⁹³

The lower court should determine whether an agency relationship exists between LiveJournal and its moderators. However, this determination is not determinative of whether the § 512(c) safe harbor applies. If the lower court determines that there is an agency relationship between LiveJournal and its moderators, then that simply means LiveJournal may be liable for its moderators' acts of copyright infringement absent any shelter from the § 512(c) safe harbor.

B. "At the Direction of the User" Analysis

The appellate court's guidelines begin to stray from Congress's intent with the next prong of § 512(c) safe harbor analysis. The appellate court explains that posts are at the direction of the user if the moderators "did

89. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

90. *State Eng'r of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 814 (9th Cir. 2003).

91. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. d (AM. LAW INST. 2006) ("Many agents act or promise to act gratuitously"); Model Civ. Jury Instr. 9th Cir. 4.4 (2007) ("One may be an agent without receiving compensation for services.").

92. *BWP Media USA, Inc. v. Clarity Digital Grp. LLC*, 820 F.3d 1175, 1180 (10th Cir. 2016).

93. *Id.*

not actively participate in or supervise file uploading”⁹⁴ or if the moderators’ activities “are narrowly directed toward providing access to material stored at the direction of users.”⁹⁵ While this is true, the appellate court is wrong to suggest that such “narrowly directed” activities exclude anything more than automatic processes that change some small technological aspect like reformatting or that screen for infringement, pornography, or other harmful material.⁹⁶

This suggestion is misleadingly narrow and reads limitations from other safe harbors into the § 512(c) safe harbor that do not exist in the text of the statute. While § 512(a) and § 512(b) restrict service providers to “automatic technical processes,” § 512(c) does not include such a restriction.⁹⁷ The appellate court’s suggestion that service providers cannot engage in activities more than automatic technical processes without losing § 512(c) safe harbor protection “rewrite[s] the DMCA safe harbors, importing constraints from other subsections into Section 512(c). If Congress had intended for Section 512(c) service providers to be confined as Section 512(a) and (b) service providers are, it easily could have said so. It did not.”⁹⁸ In fact, multiple courts, including this very circuit, have agreed with this argument in the past.⁹⁹ It is illogical for the

94. *Shelter Capital*, 718 F.3d at 1020.

95. *Veoh Networks*, 620 F. Supp. 2d at 1092.

96. *Mavrix Photographs*, 873 F.3d at 1054.

97. *Compare* 17 U.S.C. § 512(a)(2) (“a service provider shall not be liable for . . . copyright infringement . . . if . . . the transmission, routing, provision of connections, or storage is carried out through an *automatic technical* process without selection of the material by the service provider”) (emphasis added) and 17 U.S.C. § 512(b)(1)(C) (“a service provider shall not be liable for . . . infringement of copyright . . . in a case in which . . . the storage is carried out through an *automatic technical* process for the purpose of making the material available to users of the system or network”) (emphasis added) to § 512(c).

98. Brief for LiveJournal as Amici Curiae Supporting Appellee, *Mavrix Photographs LLC v. LiveJournal, Inc.*, 873 F.3d 1045 (No. 14-56596).

99. *See Io Grp.*, 586 F. Supp. 2d at 1147 (“Had Congress intended to include a limitation as to a service provider’s modification of user-submitted information, it would have said so expressly and unambiguously.”); *Veoh Networks*, 620 F. Supp. 2d at 1089.

Under UMG’s interpretation, § 512(c) would apply only to operational features that provide or constitute storage—and nothing more. But there is no language in § 512(c) that so limits its applicability. Congress did not provide merely that “a service provider shall not be liable for storing material at the direction of the user” or that “a service provider’s liability shall be limited only for conduct that is storage.” Instead, as the language makes clear, the statute extends to functions other than mere storage; it applies to “infringement of copyright *by reason of* the storage at the direction of a user . . .” 17 U.S.C. § 512(c). In short, the narrow construction of the statute that UMG advocates is not the one Congress enacted.

Id.; *Shelter Capital*, 718 F.3d at 1020 (“Had Congress intended to include such a limitation, it

court to suddenly depart from its previous reading of the statute.

Therefore, the appellate court's guidelines that the lower court decide whether ONTD's moderators' reviewing and approving activities were narrowly directed "accessibility-enhancing activities or whether instead their extensive, manual, and substantive activities were beyond the automatic and limited manual activities we have approved as accessibility-enhancing" is inappropriately limiting.¹⁰⁰ There are activities that are more than automatic processes—such as monitoring and preapproving posts—which a service provider should be able to engage in while retaining § 512(c) safe harbor protection. Although automatic processes are automatically considered accessibility-enhancing, it is not fair for the appellate court to suggest that anything more than automatic and limited manual activities necessarily make the post at the direction of the moderator, and thus unprotected by the safe harbor.

Congress did not intend to discourage moderators from monitoring websites for infringement.¹⁰¹ Nor did Congress require service providers to monitor or affirmatively seek infringing activity.¹⁰² Instead, the DMCA and other laws regulating the internet encourage active manual monitoring. For example, Congress enacted the Communications Decency Act¹⁰³ "to remove the disincentives to self-regulation."¹⁰⁴

Similarly, other courts have recognized the value in protecting websites that monitor for infringement. The Fourth Circuit refused to find a service provider liable for reviewing user-submitted content,¹⁰⁵ since "copyright holders benefit significantly from this type of response."¹⁰⁶ Thus, the Fourth Circuit found that accessibility enhancing activities include a service provider's manual screening.¹⁰⁷ If the Fourth Circuit refused to find the service provider liable for reviewing user submitted content, then this court should refuse to find LiveJournal liable for reviewing user submitted content as well. Service providers should not be penalized for moderating online content, since "[i]t is clear that Congress intended the DMCA's safe harbor for ISPs to be a floor, not a

would have said so expressly and unambiguously, as it did in the narrower definition of 'service provider.'").

100. *Mavrix Photographs*, 873 F.3d at 8.

101. H.R. REP. NO. 105-796, at 73 (1998).

102. 17 U.S.C. § 512(m)(1).

103. 47 U.S.C. § 230(c)(2) (no online service "shall be held liable" for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.").

104. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

105. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 547 (4th Cir. 2004).

106. *Id.* at 556.

107. *Id.*

ceiling, of protection.”¹⁰⁸

It would be illogical to punish services providers for monitoring content posted on their site by their users, since monitoring content serves Congress’s intent of having infringing content expeditiously removed from the internet. The Ninth Circuit’s guidelines that any prescreening of content may allow a lower court to find that the post was stored at the direction of the moderator will cause sites to avoid prescreening content all together. Fearing that moderators may open the service provider to liability by inadvertently approving a post that contains infringing material, service providers will prohibit prescreening user-submitted content. Instead, service providers will allow all user-submitted content to be stored on their site without prescreening by the moderators, and copyright owners will be forced to find and notify the service provider of the infringement before it gets taken down.

In a world where moderators do not prescreen content, copyright owners will feel a more onerous burden to patrol the internet for infringement, expending valuable resources in attempting to complete an impossible task. Online platforms host an unfathomably large amount of third-party content. For instance, 300 hours of video are uploaded to YouTube every minute,¹⁰⁹ and 500 million tweets are posted on Twitter every day.¹¹⁰ ONTD posts about 60 stories per day, which each routinely contain multiple photographs and receive between 100-500 comments.¹¹¹ It is virtually impossible for copyright owners to monitor all of this content on their own. Thus, Congress has smartly crafted an approach for removing infringing content from two directions.

Service providers and copyright owners work together to remove infringing content, by expeditiously removing or disabling access to infringing content after receiving a take-down request, and by prescreening and monitoring content to filter out illegal or undesirable content before and after it is posted without notification from the copyright owner. In other words, both the copyright owner and the service provider can play a role in preventing the storage of infringing content. The Ninth Circuit’s guidelines run the risk of criminalizing that second approach by eliminating a service provider’s § 512(c) safe harbor protection if prescreening or monitoring turns a post stored at the direction of the user into a post stored at the direction of a service provider’s moderator.

108. *Id.* at 555.

109. See *36 Mind Blowing YouTube Facts, Figures and Statistics—2017*, FORTUNE LORDS, available at <https://fortunelords.com/youtube-statistics/> (last accessed Oct. 29, 2017).

110. See *Twitter Usage Statistics*, INTERNET LIVE STATES, available at <http://www.internetlivestats.com/twitter-statistics/> (last accessed Oct. 29, 2017).

111. See generally *Calendar*, LIVEJOURNAL:OH NO THEY DIDN’T! <https://ohnotheydidnt.livejournal.com/2017/>.

As the Computer & Communications Industry Association discussed in their amicus brief to the court:

[T]here should be no legal distinction between service providers that inspect incoming content before it is posted, and those who remove objectionable or infringing content after it is posted. The latter type of provider clearly qualifies for a safe harbor if it promptly removes infringing material upon receipt of a DMCA compliant notice. The former type acts at least as responsibly, attempting to prevent improper content from being posted at all. Mavrix's reading of the law would perversely discourage such responsible behavior.

Thus, as a matter of law and sound policy, the DMCA allows services to continue valuable content-review efforts without risking losing the safe harbor because they do not remove material that may be infringing. Congress never intended to force services to choose between preserving their DMCA protections and taking steps to eliminate harmful and even unlawful uses of their services."¹¹²

C. Knowledge of Infringement Analysis

While portions of the appellate court's guidelines for determining whether the service provider has knowledge of infringement that would bar it from seeking § 512(c) safe harbor protection are accurate and helpful, the appellate court provided the lower court with improper guidance in three integral ways. First, the appellate court failed to make clear how high the apparent knowledge bar is. Second, the appellate court erred in deciding that watermarks can give a service provider red flag knowledge of infringement. Third, the appellate court's guidelines create a situation where service providers will be incentivized to limit or ban user expression, in direct contradiction to Congress's intention to turn the internet into a strong market place both for commerce and communication.

The appellate court was correct in finding the lower court's holding that LiveJournal did not have actual knowledge of infringement "was an incomplete assessment of the issue,"¹¹³ since the lower court failed to take the second step—considering whether the service provider had apparent knowledge in violation of § 512(c)(1)(A)(ii). If the service provider had a red flag that the infringing activity was occurring, then it cannot seek shelter in the § 512(c) safe harbor. As the court explained, this analysis

112. Brief for LiveJournal as Amici Curiae Supporting Appellee, *Mavrix Photographs*, 873 F.3d 1045 (No. 14-56596).

113. *Id.*

“turns on whether the provider was subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person.”¹¹⁴

As the appellate court correctly reminds the lower court, this is a “high bar” that would lead a non-expert to conclude that the infringement was “apparent from even a brief and casual viewing.”¹¹⁵ However, the court insufficiently guided the lower court in just how high this bar is. For example, the fact that 84% of the material on ONTD was infringing is not sufficient to constitute a red flag that the Mavrix photographs were infringing, since “general knowledge that [a service provider] hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag.”¹¹⁶ The service provider must have red flag knowledge of the specific infringement, not knowledge of infringement on its site generally.¹¹⁷

Additionally, the appellate court was incorrect in suggesting that the lower court could determine that “it would be objectively obvious to a reasonable person that material bearing a generic watermark or a watermark [specifically] referring to [Mavrix] was infringing.”¹¹⁸ This is not true.

There are two types of watermarks in this case. Generic watermarks included a notice that the photograph was copyrighted, while specific watermarks also included “Mavrixonline.com” to signal who owned that copyright.¹¹⁹ Contrary to the appellate court’s suggestions, neither of these watermarks could have reasonably raised a red flag for LiveJournal that the posts on ONTD were infringing, because watermarks do not raise a red flag that a user-submitted post contains an infringing photograph. Instead, generic watermarks notify a viewer that a photograph is copyrighted, and specific watermarks notify a viewer who owns that copyright. In other words, watermarks give service providers actual knowledge that a photograph is protected by copyright and, if it is a specific watermark, actual knowledge of who the copyright owner is. However, actual knowledge that a photograph is copyrighted is not “actual knowledge that the material . . . is infringing”¹²⁰ nor is it “facts or

114. *Viacom*, 676 F.3d at 31.

115. H.R. REP. 105-551, 58 (1998).

116. *Shelter Capital*, 718 F.3d at 1023.

117. *Viacom*, 676 F.3d at 30 (“As previously noted, the District Court held that the statutory phrases “actual knowledge that the material . . . is infringing” and “facts or circumstances from which infringing activity is apparent” refer to “knowledge of specific and identifiable infringements.” *Viacom*, 718 F. Supp. 2d at 523. For the reasons that follow, we substantially affirm that holding.”).

118. *Id.* at 9.

119. *Id.* at 3.

120. 17 U.S.C. § 512(c)(1)(a)(i).

circumstances from which infringing activity is apparent.”¹²¹

All photographs receive copyright protection simply by being taken,¹²² which is why it is important to make the distinction that knowledge that a photograph is copyrighted (or knowledge of who owns that copyright) is not sufficient to find knowledge of infringement. Many copyrighted, watermarked photographs are stored at the direction of the user on websites without infringing the copyright in that photograph. For example, the photograph could have been submitted by the copyright owner. Alternatively, the photograph could have been licensed some other way,¹²³ or the photograph could be in the public domain.¹²⁴ Additionally, the use could be fair,¹²⁵ the use could be tolerated or actively encouraged by the copyright owner,¹²⁶ or some other reason could allow the service provider to use the photograph without infringing the copyright.

In fact, Senator Hatch foresaw a situation almost identical to the facts in *LiveJournal* and explained that Congress intended to protect such a scenario under the § 512(c) safe harbor:

Absent such ‘red flags’ or actual knowledge, a directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be expected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.¹²⁷

If knowledge that a photograph is copyrighted (obtained by the presence of a watermark) were deemed to be sufficient actual or apparent

121. 17 U.S.C. § 512(c)(1)(a)(ii).

122. 17 U.S.C. § 102(a)(5) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include [. . .] pictorial, graphic, and sculptural works.”).

123. Brief for LiveJournal as Amici Curiae Supporting Appellee, *Mavrix Photographs*, 853 F.3d 1045 (No. 14-56596).

124. See generally Rich Stim, *Welcome to the Public Domain*, STANFORD COPYRIGHT AND FAIR USE CENTER (Jan. 21, 2018, 9:00 p.m.), <https://fairuse.stanford.edu/overview/public-domain/welcome/>

125. See generally 17 U.S.C. § 107.

126. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976 (2014) (citing *Tim Wu, Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619-20 (2008)).

127. S. REP. NO. 105-190, at 48 (1998).

knowledge that the material was infringing, then the § 512(c) safe harbor would be useless. Such a holding would require every service provider to individually determine whether each and every post is infringing without having the information necessary to determine whether one of the exceptions mentioned above applies. Such a scenario “run[s] afoul of Congress’s intentions, which were to give online services broad leeway to address user-submitted material with regard to objectionable content.”¹²⁸ In other words, the red flag standard allows service providers some flexibility to store user-submitted content on their site, since there are numerous reasons why that service provider may be allowed to store copyrighted content without infringing the copyrights.

LiveJournal did not have actual nor apparent knowledge that the user-submitted posts contained infringing material simply because some of those posts contained watermarks. It is reasonable for ONTD’s moderators to have assumed that Mavrix could have licensed or otherwise authorized or encouraged the user to submit the photograph to the ONTD blog. LiveJournal only became aware that the seven posts were infringing Mavrix’s copyright when Mavrix served LiveJournal with a lawsuit. At that point, LiveJournal expeditiously removed the posts, as required by § 512(c)(1)(C), thus LiveJournal is entitled to the limited liability that the safe harbor offers.

Separately, the DMCA gives leeway for the service provider to store content at the direction of the user, since doing so protects the user’s freedom of expression and prevents unnecessary censorship. If, as the appellate court suggests, service providers that prescreen content bear the burden of accurately determining whether each and every post is infringing, then service providers will undoubtedly err on the side of caution and censor content rather than approve it. This is contrary to Congress’s intent in passing the DMCA, which was to “not interfere with freedom of expression” by “not giv[ing] the online service providers an excessive incentive to censor.”¹²⁹

In fact, the Ninth Circuit agreed with this line of reasoning in the past. In *Perfect 10*, this very court refused to put the burden of determining whether photographs on *stolencebritypics.com* were infringing or lawfully acquired.¹³⁰ The Ninth Circuit previously held that copyright owners “squarely” bear the burden of “identifying the potentially infringing material and adequately documenting infringement.”¹³¹ In

128. Brief for LiveJournal as Amici Curiae Supporting Appellee, *Mavrix Photographs*, 853 F.3d 1045 (No. 14-56596).

129. 144 CONG. REC. H10618 (daily ed. Oct. 12, 1998) (floor statement of Rep. Frank); *see also* 144 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (floor statement of Rep. Frank).

130. *Perfect 10*, 488 F.3d at 1114-15 (9th Cir. 2007) (“We do not place the burden of determining whether photographs are actually illegal on a service provider”).

131. *Id.* at 1113.

analyzing the notification requirements in § 512(c)(3), the Ninth Circuit warned that the statute should not be interpreted in a way that will cause service providers to impede on or outright prevent users from exercising their freedom of expression.¹³² The Ninth Circuit should not depart from this holding.

D. *Financial Benefit with the Right and Ability to Control Analysis*

The appellate court was correct in guiding the lower court to “take a common-sense, fact-based approach, not a formalistic one,”¹³³ when determining whether a service provider financially benefited from the alleged infringement, since that language was used by Congress in describing its intent in passing the DMCA. The appellate court was also correct in pointing out that § 512(c)(1)(C) should be analyzed using a test with two separate prongs: one to determine whether the service provider financially benefited from infringement, and another to determine whether the service provider had the right and ability to control the infringement that it received a financial benefit from.¹³⁴ However, the appellate court gave improper guidelines for evaluating each of these prongs.

The appellate court inappropriately directed the lower court to find that the financial benefit prong could be satisfied if the lower court found “there [was] a vast amount of infringing material on [ONTD,] supporting an inference that [LiveJournal’s] revenue stream [was] predicated on the broad availability of infringing materials for [its] users, thereby attracting advertisers.”¹³⁵ The appellate court accurately points out that a sizable portion of ONTD’s posts contains infringing photographs and that LiveJournal derives advertising revenues from these posts, however this kind of activity is not what Congress intended to fulfill the financial benefit prong. Congress provided an example of a financial benefit by describing a scenario where the service provider collects “fees where the value of the service lies in providing access to infringing material.”¹³⁶ Here, LiveJournal did not charge its users to access the infringing material, instead ONTD’s value lied in its advertising.

The Ninth Circuit’s guidelines are misleading, because they suggest that the financial benefit prong is peripheral and lacks teeth, but that same

132. *Id.* at 1112 (“Accusations of alleged infringement have drastic consequences: A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.”).

133. S. REP. NO. 105-190, at 44 (1998).

134. *Mavrix Photographs*, 873 F.3d at 1058–59.

135. *Id.* at 1059 (citing *Fung*, 710 F.3d at 1045).

136. S. REP. NO. 105-190, at 44-45 (1998); H.R. REP. 105-551, at 54.

court formerly described the opposite as being true.¹³⁷ While the Ninth Circuit has previously found that the financial benefit prong was met when a service provider collected advertising revenues from a site that contained a plethora of infringing content, these facts alone were not sufficient to meet that prong.¹³⁸ In *Fung*, the court made the determination that 90-96% of the content on the service provider was infringing, and the service provider “actively induced infringing activity on [its] sites.”¹³⁹ LiveJournal, on the other hand, had significantly more non-infringing content on ONTD, and it did not actively induce its users to upload infringing photographs. Similarly, in *Ellison*, the Ninth Circuit found the financial benefit prong was not met, because there was not sufficient proof that “customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available.”¹⁴⁰ Like the service provider in *Ellison*, LiveJournal users did not subscribe to ONTD because of the available infringing material or cancel their subscriptions because it was no longer available.

Thus, it would be unfair to find that LiveJournal has received a financial benefit directly attributable to the infringing activity. Without explanation, the appellate court suddenly departs from its previous analysis that the financial benefit prong has bite and will only be satisfied in the most egregious situations. Since the appellate court’s guidelines do not align with Congressional intent and depart from its previous holdings, it must be rewritten.

As the appellate court adequately highlights, § 512(c)(1)(B) denies safe harbor protection if the service provider “receive[s] a financial benefit directly attributable to the infringing activity, *in a case in which the service provider has the right and ability to control such activity.*”¹⁴¹ It is insufficient for the lower court to find that LiveJournal received a financial benefit directly attributable to the infringing activity. The lower court must also find that LiveJournal had the right and ability to control that infringement. The appellate court’s guideline on making this determination is also unsuitable.

The appellate court was wrong to question whether LiveJournal’s prescreening process, list of sources that have previously filed take-down notices, and “blocker tool” used to prevent repeat offenders from posting were sufficient to show that LiveJournal had the right and ability to control infringement.¹⁴² Unfortunately, Congress did not explain its

137. *Fung*, 710 F.3d at 1044 (“At the same time, our opinions have not suggested that the “financial benefit” prong of § 512(c)(1)(B) is peripheral or lacks teeth.”).

138. *Id.* at 1045.

139. *Id.*

140. *Ellison*, 357 F.3d at 1079.

141. 17 U.S.C. § 512(c)(1)(B) (2010) (emphasis added).

142. *Id.*

intention behind including the additional requirement that “the service provider ha[ve] the right and ability to control” the infringing activity that it financially benefits from. However, multiple courts have interpreted this provision to mean a high level of control that shows ‘something more than the ability to remove or block access to materials posted on a service provider’s website.’¹⁴³

The court in *Ellison* put it best when it said

It is conceivable that Congress [would have] intended that [service providers] which receive a financial benefit directly attributable to the infringing activity would not, under any circumstances, be able to qualify for the subsection (c) safe harbor. But if that was indeed their intention, it would have been far simpler and much more straightforward to simply say as much. The Court does not accept that Congress would express its desire to do so by creating a confusing, self-contradictory catch-22 situation that pits 512(c)(1)(B) and 512(c)(1)(C) directly at odds with one another, particularly when there is a much simpler explanation: the DMCA requires more than the mere ability to delete and block access to infringing material after that material has been posted in order for the [service provider] to be said to have “the right and ability to control such activity.”¹⁴⁴

The question then becomes what type of control is sufficient to be “something more”? Some courts have held that “something more” occurs when “a service provider exert[s] substantial influence on the activities of users, without necessarily—or even frequently—acquiring knowledge of specific infringing activity.”¹⁴⁵ One such example included a service provider that “had a monitoring program in place [to enforce] detailed instructions regard[ing] issues of layout, appearance, and content,” and where the service provider “monitor[ed] images to make sure that celebrity images d[id] not oversaturate the content, [and] forb[ade] certain types of images.”¹⁴⁶ In essence, these courts have suggested that any attempt by a service provider to police its site is an exercise of substantial influence.¹⁴⁷

143. *Capitol Records, Inc. v. MP3tunes LLC*, 821 F. Supp. 2d 627, 645 (S.D.N.Y. 2011), *on reconsideration in part*, No. 07 CIV. 9931 WHP, 2013 WL 1987225 (S.D.N.Y. May 14, 2013); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wash. 2004); *CCBill*, 340 F. Supp. 2d at 1098 (D.Md.2001) (citing *Costar Group, Inc. v. Loopnet, Inc.* 164 F. Supp. 2d 688, 704, *aff’d*, 373 F.3d 544 (4th Cir. 2004)).

144. *Ellison*, 189 F.Supp.2d at 1061.

145. *Viacom*, 676 F.3d at 38.

146. *Perfect 10*, 213 F. Supp. 2d at 1173; *confirmed by Viacom*, 676 F.3d at 38 & *Shelter Capital*, 718 F.3d at 1030.

147. *See Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361,

This interpretation of the “right and ability to control” requirement is inconsistent with Congress’s intention to encourage monitoring for infringement by both service providers and copyright owners. When a service provider monitors its site for infringing content, it is exercising control over its system. Although the appellate court seems to suggest otherwise, control over the service provider’s system is not sufficient to meet the right and ability to control prong. The only thing sufficient to meet this half of the § 512(c)(1)(C) requirement is control over the infringing activity itself.¹⁴⁸ The court in *Veoh* made the distinction clear.

“Veoh is distinct from Napster in at least one significant respect. 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. (“In fact, as virtually every interested college student knew-and as the program's creator expressly admitted-the *sole purpose* of the Napster program was to provide a forum for easy copyright infringement.”).

Here, by contrast, Veoh’s right and ability to control its system does not equate to the right and ability to control infringing activity. Unlike Napster, there is no suggestion that Veoh aims to encourage copyright infringement on its system. And, there is no evidence that Veoh can control what content users choose to upload before it is uploaded. Plaintiff suggests that Veoh should be required to prescreen every submission before it is published. However, Veoh has submitted evidence indicating that it has received hundreds of thousands of video files from users. Plaintiff has presented no evidence to refute those numbers; and, this court finds that no reasonable juror could conclude that a comprehensive review of every file would be feasible.

Even if such a review were feasible, there is no assurance that Veoh could have accurately identified the infringing content in question.”¹⁴⁹

This analysis is much more closely aligned with the text of the statute and with Congress’s intent of promoting the prompt removal of infringing content without requiring service providers to police their sites. Thus, the appellate court should have guided the lower courts to find that the right and ability to control prong should focus on the right and ability to control

1375 (N.D. Cal. 1995) (right and ability to control where “police” powers exercised in past); *see also* A & M Records, Inc. v. Napster, Inc., 114 F.Supp.2d 896, 920–21 (online service’s improved methods of blocking users “tantamount to an admission that defendant can, and sometimes does, police its service.”).

148. *Id.* 586 F. Supp. 2d at 1151.

149. *Id.* at 1153 (internal citations removed).

the infringing activity—as the text of the statute states—rather than the right and ability to control its services.

In this case, LiveJournal had only the right and ability to control its services. Although a sizable portion of the photographs posted by users on ONTD were infringing, LiveJournal did not exist solely as a facility for copyright infringement. Nor was there a suggestion that LiveJournal encouraged copyright infringement on its system. In fact, there is sufficient evidence that LiveJournal not only sought to discourage copyright infringement, but there is also evidence that it actively prescreened posts to prevent copyright infringement. There is no evidence that LiveJournal can control what content users choose to upload before it is uploaded. Thus, no reasonable juror could conclude that a comprehensive review of every file would be feasible or that LiveJournal could have accurately identified the infringing content in question.

This appellate court’s guideline on the right and ability to control prong must be rejected, since it would find a service provider liable for prescreening posts—an act that serves Congress’s intention of preventing the storage of copyright infringing content.

IV. CONCLUSION

If the district court were to determine that LiveJournal is not entitled to limited liability under the § 512(c) safe harbor using the appellate court’s guidelines, “the profusion of online services that have benefited the public (as well as future ventures) would be imperiled by the threat of multi-billion dollar statutory damages awards. This is precisely the result that Congress meant to avoid when enacting the DMCA’s safe harbor provisions.”¹⁵⁰ The court’s guidelines “are not necessary to protect the interests of copyright owners,” considering the safe harbors promote “voluntary cooperation between content owners and service providers.”¹⁵¹

Before the Ninth Circuit’s ruling, the § 512(c) safe harbor achieved Congress’s intent to create a thriving economic market on the internet. The § 512(c) safe harbor has also helped Congress meet its intention of fostering the marketplace of ideas by transforming communication and creating a public forum integral to the democratic process, which allows users to “address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.”¹⁵² This economic and

150. Brief for LiveJournal as Amici Curiae Supporting Appellee, *Mavrix Photographs*, 873 F.3d 1045 at 1-2 (No. 14-56596).

151. *Id.*

152. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997).

communicative marketplace must be protected, and the § 512(c) safe harbor does that by ensuring service providers promptly remove or disable access to infringing content without burdening those service providers with onerous standards that would lead them to resort to censorship in an effort to avoid liability for infringing content posted by their users.

The Ninth Circuit's ruling provides service providers with one of two options: (1) do not prescreen content at all, or (2) if you do prescreen content, do so with perfect effectiveness. Considering the second option is impossible, the choice is illusory, and service providers will be required to ban the prescreening of content to avoid liability. This is contrary to Congress's intent, to the spirit of the statute, to the letter of the law, and to the good public policies that the safe harbors protect. Although "some monitoring may be beneficial in some circumstances, excessive monitoring would lead to over-blocking, threatening lawful content and speech in an effort to limit potential litigation."¹⁵³ The Ninth Circuit's guidelines will unfortunately lead more courts to hold service providers liable for the illicit acts of a small group of users. In turn, these service providers may stop monitoring and prescreening for infringement all together in order to avoid liability for their well-intentioned acts, which is in direct contradiction with Congress's hopes and dreams that lead to the passage of the DMCA.

Instead, the lower court should only follow these guidelines:

1. A post is stored at the direction of the user if the moderators "did not actively participate in or supervise file uploading"¹⁵⁴ or if the moderators' activities "are narrowly directed toward providing access to material stored at the direction of users."¹⁵⁵ Prescreening and monitoring posts for infringing content are activities narrowly directed toward providing access to the material stored at the direction of users that moderators can engage in without losing safe harbor protection under § 512(c)(1).
2. If the lower court finds that the service provider did not have actual knowledge of the infringement, then it must consider whether there was red flag evidence that would lead a non-expert to conclude that the infringement was "apparent from even a brief and casual viewing."¹⁵⁶ However, watermarks are not sufficient to meet the "high bar" that infringement was

153. Brief for LiveJournal as Amici Curiae Supporting Appellee, *Mavrix Photographs*, 873 F.3d 1045 at 18 (No. 14-56596).

154. *Shelter Capital*, 718 F.3d at 1020.

155. *Veoh Networks, Inc.*, 620 F. Supp. 2d at 1092.

156. H.R. REP. 105-551, 58 (1998).

- apparent.
3. The financial benefit prong has bite. Therefore, evidence that a service provider receives advertising revenues from a site with significant amounts of infringing content is not enough to satisfy the financial benefit prong, absent proof that the service provider induced its users to engage in infringement or proof that the users subscribed or unsubscribed depending upon the availability of infringing material.
 4. The right and ability to control prong is only met when the service provider had the right and ability to control the specific infringement. A service provider's right and ability to control its system is insufficient. Examples of a service provider having the right and ability to control the specific infringement includes hosting a facility that is used solely for copyright infringement, encouraging infringement on its system, or choosing what content users upload before they upload it. Prescreening or monitoring posts is not considered the right and ability to control the specific infringement, since such actions seek to prevent—not encourage—infringement. The court should not interpret the statute as requiring a comprehensive and accurate review of every file.
 5. Courts should not interpret § 512(c) in such a way that would incentivize service providers to limit or ban user expression or lawful commerce.

If these guidelines are followed, rather than the appellate court's guidelines, then Congress's intent of protecting the economic and communication marketplaces of the internet will be recognized by encouraging service providers to prevent copyright infringement by prescreening and moderating posts, rather than finding them liable for their mutually beneficial efforts.