

August 3, 2015

## District Court Rejects Plaintiffs' Narrow Construction of the Term "User" in the DMCA's Safe Harbor § 512

By [Pierre Grosdidier](#)<sup>1</sup>

The Internet is inundated with user-uploaded text, pictures, music, and videos, many of which are subject to copyright protection. This material appears to be available—*gratis*—at the click of a mouse on various media hosting websites owned and managed by online service providers (“**OSPs**”), e.g., YouTube. This online *divertissement* may be a violation of copyright law when the copyright owners do not grant permission to display their material. Each instance of infringing material may also be a breach of contract because the OSPs’ terms of use invariably forbid users from uploading copyrighted material absent permission from the rightful owners.

In *BWP Media USA Inc., v. Clarity Digital Group, LLC*, the court addressed the issue of who is a “user” under the Digital Millennium Copyright Act’s (“**DMCA**”) safe harbor provision, 17 U.S.C. § 512. No. 14-cv-00467, 2015 WL 1538366, at \*6 (D. Colo. Mar. 31, 2015). The significance of this decision is that OSPs can benefit from § 512 even when their own employees upload infringing copyrighted material on the OSP’s websites. An OSP’s liability for the posting of infringing material by its employees, at least in the District of Colorado, will likely turn on § 512(c)(1)(A), i.e., on whether the OSP knew or should have known of the infringement and what it did about it, not on the definition or scope of the term “user.” But even though § 512 imposes no obligation on OSPs to police their users, OSPs might be well advised to be alert to “facts or circumstances from which [their employees’] infringing activity is apparent,” and to act “expeditiously” when such activity is discovered.<sup>2</sup>

Despite the fact that infringing material resides on their servers, OSPs are largely immune from civil liability thanks to the DMCA’s § 512. This provision, also known as the Online Copyright Infringement Liability Limitation Act (“OCILLA”), shields qualifying OSPs from “infringement of copyright by reason of the storage at the direction of a user . . .”<sup>3</sup> OCILLA grants OSPs immunity for when users upload unauthorized copyrighted material—provided the OSPs follow certain rules. One of these rules is that the OSPs do not have knowledge of the users’ infringing activity.<sup>4</sup>

One source of ambiguity is that OCILLA does not define the term “user.” In *BWP*, the court defined a “user” as “a person or entity who avails itself of the service provider’s system or network to store material.” Significantly, this definition includes OSP employees who are also users of their employer’s hosting websites, which implies that OSPs can benefit from § 512’s safe harbor even when their own employees upload infringing copyrighted material.

Clarity Digital Group, the defendant in *BWP*, operated [www.examiner.com](#), a news website. Examiner.com staff initially vetted contributing authors, referred to as “Examiners,” and provided them with some content and editorial supervision, the exact extent of which was disputed. Examiners received some financial compensation

<sup>1</sup> Pierre Grosdidier is an associate in the Houston office of Haynes and Boone, LLP. His practice focuses on complex commercial litigation, especially lawsuits and arbitrations with strong technical elements. Pierre may be reached at [pierre.grosdidier@haynesboone.com](mailto:pierre.grosdidier@haynesboone.com) or 713.547.2272.

<sup>2</sup> 17 U.S.C. § 512(c)(1)(A).

<sup>3</sup> *Id.* § 512(c)(1).

<sup>4</sup> *Id.* § 512(c)(1)(A).

for their contributions but otherwise remained independent contractors. The Examiners' contract expressly prohibited them from including unauthorized copyrighted material in their posts, and warned that repeat violators could be terminated.

The plaintiffs claimed, and Clarity admitted, that the Examiner website "displayed 75 of plaintiffs' copyrighted photographs without permission." Plaintiffs first sent Clarity a take-down notice in July 2013, and then sued in February 2014 alleging various copyright infringement claims. In both instances, Clarity timely removed all the infringing photographs. Clarity sought summary judgment, arguing that it was entitled to immunity from plaintiffs' claims under the DMCA's safe harbor § 512(c) because Examiners, i.e., "users," had posted the infringing photographs acting independently of, and unbeknown to, Examiner.com staff.

The plaintiffs argued, *inter alia*, that the court should construe the term "user" narrowly to exclude an OSP's "owner[s], employee[s] and/or agent[s]." The plaintiffs acknowledged that the issue was one of first impression, but argued that the "case law dictate[d] that the word 'user' [wa]s a legal term of art for purposes of applying the safe harbor provision of the DMCA."<sup>5</sup> The plaintiffs further argued that, under the facts of the case, the Examiners were agents of the defendant and that, "[a]gents of an [O]SP are not users under the DMCA."<sup>6</sup> Simply stated, plaintiffs sought to defeat Examiner.com's safe harbor defense by excluding OSPs and their agents as "users" and by arguing that Examiners were the OSPs' agents.

The court rejected the plaintiffs' arguments and adopted the plain-language and dictionary-based definition of the term "user" stated above. The court first cautioned that plaintiffs could not use the term "user" to "distinguish between storage at the direction of the [OSP] and storage at the direction of third parties" because the DMCA already made this distinction without recourse to the term. Indeed, the DMCA's §§ 512(a)(1) and (b)(1)(A) speak of "person[s] other than the service provider." That the DMCA distinguishes between OSPs and third-parties without recourse to the term "user" "caution[ed] against plaintiff's [sic] interpretation."

The court also noted that § 512(c)(1)'s language did not support a distinction between service providers and third parties, as plaintiffs argued. Subsections 512(c)(1)(A)–(C) already incorporated the sort of OSP conduct that plaintiffs complained about. OSPs that breach these subsections cannot expect to qualify for the DMCA's safe harbor provision. OSPs cannot claim safe harbor protection for their own storage of infringing material, for example. Likewise, OSPs cannot claim protection from profit-making activities that they have "the right and ability to control." The court held that plaintiffs' narrow reading of the term "user," therefore, would be redundant in light of §§ 512(c)(1)(A)–(C), and contrary to the rule that courts should avoid statutory interpretations that make other provisions in the same statute unnecessary.<sup>7</sup>

The court remained unpersuaded by the cases cited by the plaintiffs. In *Capitol Records, LLC v. Vimeo, LLC*, for example, Vimeo employees uploaded infringing videos to Vimeo's website.<sup>8</sup> In that case, the court held that a triable issue existed regarding whether the employees were acting as §512(c) "users" or in their capacity as Vimeo employees (by implication, Vimeo could be charged with knowledge or awareness of the uploads under § 512(c)(1)(A)). Moreover, *Vimeo* was distinguishable because the alleged wrongdoers in that case were Vimeo

---

<sup>5</sup> Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 9, *BWP Media USA Inc., v. Clarity Digital Group, LLC*, No. 14-cv-00467 (D. Colo. Feb. 17, 2015) (Pacer Docket No. 63).

<sup>6</sup> *Id.* at 16.

<sup>7</sup> *BWP*, 2015 WL 1538366, at \*7 (citing *Freytag v. Comm'r*, 501 U.S. 868, 877 (1991) ("[our]cases consistently have expressed 'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'").

<sup>8</sup> 972 F. Supp. 2d 500, 517–18 (S.D.N.Y. 2013), *reconsideration granted*, 972 F. Supp. 2d 537 (S.D.N.Y. 2013).

employees, whereas Examiners were not defendant's employees. Other cited cases fared no better in the court's eyes, and none, the court noted, construed the term "user."

For the above-stated reasons, the court adopted its plain-language definition of "users," and held that the Examiners qualified as such. This result did not end the court's inquiry, however. OCILLA's safe harbor protection extends "only to content uploaded 'at the direction of a user.'"<sup>9</sup> The question was, therefore, whether the infringing pictures were uploaded at the direction of the Examiners, or at the direction of the defendant. Finding that the plaintiffs had adduced no evidence sufficient to support "a genuine dispute of material fact" as to this and other issues in dispute, the court granted defendant's motion for summary judgment.

OCILLA embodies a tension for copyright law, separate from its attempt to strike a balance between the interests of copyright owners and those of OSPs by preserving both sides' interests and incentivizing their cooperation.<sup>10</sup> As another court in the Southern District of New York reaffirmed, the DMCA's safe harbor § 512 should be narrowly construed, as should all immunities from liability.<sup>11</sup> This principle might arguably support a narrow construction of the term "user."

But Congress made clear its intent to shield qualifying OSPs from liability for their user's copyright infringement when it drafted the DMCA. As the Ninth Circuit Court of Appeals noted in *dicta*,

Congress explicitly stated in three different reports that the DMCA was intended to protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement.<sup>12</sup>

Moreover, § 512 imposes no obligation on OSPs to police their users or ferret out instances of copyright infringement. Instead, Congress placed the burden on copyright owners to identify instances of infringement and to give notice to the OSPs. A tension exists, therefore, between § 512's language and legislative history, which unambiguously supports the OSPs' immunity, and copyright case law in general, which would seem to circumscribe this immunity. *BWP* is a district court's most recent attempt to address this tension. It is unlikely to be the last—the *BWP* plaintiffs have filed a notice of appeal.

---

<sup>9</sup> *BWP*, 2015 WL 1538366, at \*8 (emphasis in original).

<sup>10</sup> *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 636 (S.D.N.Y., 2011).

<sup>11</sup> *Id.* (citing *United States v. Texas*, 507 U.S. 529, 534 (1993); *Fame Publ'g Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir.1975) (narrowly construing a statutory exception to copyright owners' exclusive rights)).

<sup>12</sup> *BWP*, 2015 WL 1538366, at \*5 (citing *UMG Recordings v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1028 (9th Cir.2013) (emphasis and quotations omitted)).