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Subject: Does the DMCA Provide Safe Harbor to Mobile Network Operators the Way it Does For Internet Service Providers? – The Answer Is.....
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Does the DMCA Provide Safe Harbor to Mobile Network Operators the Way it Does For Internet Service Providers? – The Answer Is.....

Internet Service Providers (ISPs), have been finding safe harbor within the DMCA for intellectual property infringements by end users on the Internet for years. Although these safe harbor tactics leave rights holders out in the cold as they try to protect their investments in their IP assets, it is a legitimate argument on account of an ISP's rights within the DMCA. ISPs only provide the access to the Internet where you can find and download all kinds of things, including copyrighted materials that are also known as assets to rights holders.

However, the wireless carrier's use of safe harbor within the DMCA is a illegitimate argument when you notice the fact that they have built a dedicated pipeline that specifically transports copyrighted materials. The illegitimacy continues when you notice that they are making a direct financial gain in transporting these copyrighted goods. Multimedia messaging or MMS is the name of this new and dedicated pipeline that will one day transport much richer multimedia, peer2peer. Please do the math.

The basic premise of safe harbor via the DMCA is that the service provider has no direct knowledge, direct control or direct financial gain from the alleged infringements. Hear no evil, speak no evil, do no evil.

Here are a few excerpts from the DMCA:

TITLE II: ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

Title II of the DMCA adds a new section 512 to the Copyright Act³ to create four new limitations on liability for copyright infringement by online service providers. The limitations are based on the following four categories of conduct by a service provider:

1. Transitory communications;
2. System caching;
3. Storage of information on systems or networks at direction of users; and
4. Information location tools.

New section 512 also includes special rules concerning the application of these limitations to nonprofit educational institutions. The failure of a service provider to qualify for any of the limitations in section 512 does not necessarily make it liable for copyright infringement. The copyright owner must still demonstrate that the provider has infringed, and the provider may still avail itself of any of the defenses, such as fair use, that are available to copyright defendants generally. (Section 512(l)).

(end excerpt)

Now, even with just these snippets from the DMCA we can see how the ISPs have

been legitimately and successfully finding safe harbor within the DMCA all of these years. But did you notice how the heading says - ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION?

Here's another excerpt from the DMCA:

Limitation for Transitory Communications

In general terms, section 512(a) limits the liability of service providers in circumstances where the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else's request. This limitation covers acts of transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of a network. In order to qualify for this limitation, the service provider's activities must meet the following conditions:

- ! The transmission must be initiated by a person other than the provider.
- ! The transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.
- ! The service provider must not determine the recipients of the material.
- ! Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer than reasonably necessary.
- ! The material must be transmitted with no modification to its content.

(end excerpt)

Wow, now this appears to be a slam dunk case for ISP's AND mobile network's safe harbor. (I wonder why there is nothing pro-rights holder within the DMCA? But then, the law is the law and we have to respect that.) But remember, the DMCA was created in 1998 with a few amendments thereafter. Here again, the basic premise of safe harbor via the DMCA is that the service provider has no direct knowledge, direct control or direct financial gain of or from the "infringing activities" of end users on the Internet or other network. The MMS pipeline was deployed around 2003 by operators of mobile networks, (hmmm think about that). See no evil, speak no evil, make money?

Here's another excerpt from the DMCA:

Limitation for Information Residing on Systems or Networks at the Direction of Users

Section 512(c) limits the liability of service providers for infringing material on websites (or other information repositories) hosted on their systems. It applies to storage at the direction of a user. In order to be eligible for the limitation, the following conditions must be met:

- ! The provider must not have the requisite level of knowledge of the infringing activity, as described below. ! If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity. ! Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

(end excerpt)

Ok, now we're getting down to it. Anyone that studies law knows that it is all about the best argument and rarely about right vs wrong. First, notice that the title refers to – Systems or Networks at the Direction of Users. Doesn't this appear to be what wireless carriers provide? A mobile network is a separate communications system that just "meshes" with the Internet. So, we'll argue that this is exactly where these mobile network issues fit.

Repository – could that be a mobile device? Of course it is!

Does the service provider, (wireless carrier) have knowledge of the infringing activity? Well, if the provider built a dedicated MMS pipeline it is probably safe to assume they know there is MMS in this pipeline.

Is the provider receiving a direct financial benefit from this MMS being transported on the mobile network? Yes, of course. That is why they built the MMS pipeline.

Can they stop the infringing activity? Well, considering they are a part of the infringing activities the answer would be yes. They could simply close the MMS pipeline or simply compensate the rights holders in order to stop the infringing activities.

Did they take down or block the infringing activities when notified? It has been reported by Luvdarts LLC, a California based producer of MMS content that the wireless carriers notified of infringements of Luvdarts LLC's content did not take down or block the infringed content. It appears the only way they could possibly block it is to shut down the entire MMS pipeline, which contains Luvdarts LLC's copyrighted MMS content along with everybody else's copyright protected MMS content! Just like an injunction would do.

The bottom line is, they cannot pass this DMCA litmus test if the - Systems or Networks at the Direction of Users section is indeed applicable.

It is important to remember that MMS was deployed by wireless carriers on mobile networks after the DMCA, around 2003. See no evil, hear no evil, make money? Obviously, if the wireless carriers built this pipeline for the purpose of transporting MMS they surely know what is in this pipeline. Copyright protection subsists in all MMS.

So why would any rights holders with basic common sense allow the wireless carriers to get away with this?

Try this for an answer; the reason rights holders are allowing the wireless carriers to get away with transporting MMS without fair compensation to rights holders is because the media companies have not produced much if any commercial MMS content for this market - so they haven't noticed and the general public doesn't really care (yet)! But, you would think someone within those ranks could see where this was going and maybe even rally to help establish a new revenue stream while it is still doable. But that's another story.

The answer is – a transparent collective consisting of the wireless carriers, rights holders and other stakeholders that have a vote in the way the MMS data revenue is

split up. The DataRevenue.Org Doctrine is a blueprint for such a process. Contact me through our website, <http://datarevenue.org> if you would like a copy.