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## Revoking the "Get Out of Jail Free Card": How Mavrix Photographs, LLC v. LiveJournal, Inc. Could Revolutionize User-Generated Safe Harbor Protections Under § 512(c) of the Digital Millennium Copyright Act

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**REVOKING THE “GET OUT OF JAIL FREE  
CARD”: HOW *MAVRIX PHOTOGRAPHS, LLC V.  
LIVEJOURNAL, INC.* COULD REVOLUTIONIZE  
USER-GENERATED SAFE HARBOR PROTECTION  
UNDER § 512(C) OF THE DIGITAL MILLENNIUM  
COPYRIGHT ACT**

*Caitlin Oswald\**

I. INTRODUCTION

On seven different occasions between 2010 to 2014, the popular celebrity gossip community Oh No They Didn’t! (“ONTD”) allowed more than twenty watermarked photographs belonging to celebrity photograph agency, Mavrix Photographs (“Mavrix”), to appear on its website without Mavrix’s permission.<sup>1</sup> These photographs were initially submitted to ONTD by the community’s online users, but were subject to review and approval by ONTD community moderators<sup>2</sup> before publicly appearing on the website.<sup>3</sup> As a result of ONTD’s continued posting of Mavrix’s copyrighted photographs, Mavrix filed a copyright suit against ONTD’s parent social media platform, LiveJournal Inc. (“LiveJournal”), alleging copyright

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Thank you to Professor Justin Hughes for solidifying my interest in intellectual property law and for your constant guidance as I researched and wrote this Comment. I dedicate this Comment to my parents and sister, for their steadfast love, support, and encouragement throughout my educational career.

1. Mavrix Photographs, LLC v. LiveJournal, Inc., 873 F.3d 1045, 1051 (9th Cir. 2017).

2. *See id.* at 1050. Nearly all major internet service providers that incorporate user-generated content into their business models are policed by content moderators. Moderators are frequently employed by websites to review users’ posts to ensure that they follow the internet service provider’s terms of service before being approved and publicly uploaded onto the website.

3. *Id.* at 1049.

infringement<sup>4</sup> for the more than twenty copyrighted photographs that the moderators allowed onto the ONTD website.<sup>5</sup>

When the case came before the United States Court of Appeals for the Ninth Circuit, a considerable question regarding the Digital Millennium Copyright Act's ("DMCA") section 512(c) safe harbor provision arose.<sup>6</sup> The court considered whether the acts of the ONTD moderators could be attributed to LiveJournal under the common law of agency. The court ruled that if an agency relationship existed between LiveJournal and the moderators, LiveJournal would be denied the section 512(c) safe harbor defense for copyright infringement and would likely be found liable.<sup>7</sup>

The conclusion reached by the majority of the court is significant to internet service providers ("ISPs") and copyright owners in the Ninth Circuit. Under current copyright law, copyright owners are responsible for detecting and reporting to an ISP that infringing content was found on its website. This allocation of responsibility has caused rampant online copyright infringement to occur undetected. *Mavrix Photographs, LLC v. LiveJournal, Inc.*<sup>8</sup> presented the Ninth

4. 17 U.S.C. § 106 (2017); *Definitions*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-definitions.html> (Copyright infringement occurs "when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.").

5. *Mavrix*, 873 F.3d at 1051.

6. 17 U.S.C. § 512(c) (2017)

("(c) Information residing on systems or networks at direction of users.

(1) In general. A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, 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—

(A)

(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;

(B) does not receive 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; and  
(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.").

7. *Mavrix*, 873 F.3d at 1048, 1054 ("We therefore have little difficulty holding that common law agency principles apply to the analysis of whether a service provider like LiveJournal is liable for the acts of the ONTD moderators. In light of the summary judgment record, we conclude that there are genuine issues of material fact as to whether the moderators are LiveJournal's agents.").

8. 873 F.3d 1045.

Circuit with an opportunity to further clarify the meaning and scope of the DMCA section 512(c) safe harbor immunity for ISPs who use online moderators. But technological companies warn that the court's ruling could dissuade ISPs from using moderators altogether if the use would cause technological companies to lose the section 512(c) safe harbor immunity, and thus, be liable for copyright infringement.

Part II of this Comment discusses the factual background of the case and relevant case law, while Part III provides a summary of the case. Part IV gives an account of the court's reasoning in concluding that there is a genuine issue of material fact regarding whether LiveJournal's moderators were agents of the ISP, thereby placing the company outside the safe harbor protection. Part V analyzes the court's reasoning in the context of past and recent court decisions regarding the section 512(c) safe harbor provision and discusses the potential legal significance the case's outcome could have in the Ninth Circuit. Part VI concludes that *Mavrix*'s shift away from granting ISPs total immunity under the DMCA safe harbor is a necessary step in the modern digital age and will not cripple ISPs' incentives to moderate user-generated content.

## II. BACKGROUND

### A. *The Digital Millennium Copyright Act's Safe Harbors*

Congress enacted the Digital Millennium Copyright Act<sup>9</sup> in 1998 when the internet was in its inception.<sup>10</sup> Congress's intent in passing the DMCA was to balance the protected rights of copyright holders with innovative technologies created by ISPs as the internet continued to develop.<sup>11</sup> Congress consequently created four "safe harbor" statutes under 17 U.S.C. § 512 that protect ISPs from the potential liability arising from claims of copyright infringement.<sup>12</sup>

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9. 17 U.S.C. § 512 (2017).

10. Liliana Chang, *The Red Flag Test for Apparent Knowledge Under the DMCA § 512(c) Safe Harbor*, 28 CARDOZO ARTS & ENT. L.J. 195, 198 (2010); Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L.J. 801, 802, 805–06 (2015).

11. H.R. Rep. No. 105-551 at 21 (1998).

12. *Viacom Int'l v. YouTube, Inc.*, 676 F.3d 19, 27 (2nd Cir. 2012) ("Congress elected to . . . create a series of 'safe harbors[]' for certain common activities of service providers.").

### B. Safe Harbor Threshold Requirements

To qualify for safe harbor protection, an ISP must be a service provider according to the statutory definition in section 512(k) and must meet section 512(i)'s "conditions of eligibility."<sup>13</sup>

Once the threshold requirements are fulfilled, an ISP must additionally fall within one of the four enumerated safe harbor requirements to qualify for immunity under the safe harbor.<sup>14</sup> Section 512 provides protection to ISPs in the following situations: "(a) transitory digital network communications; (b) system caching; (c) information residing on systems or networks at the direction of the users; and (d) information location tools."<sup>15</sup> The *Mavrix* case specifically focuses on section 512(c). When infringing material on a website or server is hosted by an ISP, 17 U.S.C. § 512(c) limits liability for copyright infringement that occurs "by reason of the storage at the direction of a user."<sup>16</sup>

### C. Historical Framework: *UMG Recordings, Inc. v. Shelter Capital Partners LLC*

The Ninth Circuit's 2013 opinion in *UMG Recordings, Inc. v. Shelter Capital Partners LLC*<sup>17</sup> held that Veoh satisfied the section 512(c)(1) threshold. The court ruled that safe harbor protections applied because the infringing material residing on Veoh's system was "stor[ed] at the direction of a user of material."<sup>18</sup> Users uploaded infringing videos to Veoh's website, and Veoh would automatically breakdown the file, assign permalinks to uniquely identify each video, and then make the videos available to users on the website.<sup>19</sup>

UMG argued for a narrow interpretation of the statutory phrase "storage at the direction of the user" because the facilitation of public access to the material went beyond mere storage.<sup>20</sup> UMG asserted that Veoh was not simply storing the material with the ISP because Veoh

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13. See Chang, *supra* note 9, at 199.

14. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1015 (9th Cir. 2013); see Chang, *supra* note 9, at 199.

15. Jennifer Bretan, *Harboring Doubts About the Efficacy of § 512 Immunity Under the DMCA*, 18 BERKLEY TECH. L.J. 43, 48 (2003).

16. 17 U.S.C. § 512(c)(1).

17. 718 F.3d 1006 (9th Cir. 2013).

18. *Id.* at 1020.

19. *Id.* at 1011–12.

20. *Id.* at 1016.

actively created flash files, downloaded files, and shared infringing material.<sup>21</sup> The court disagreed and explained that Congress intended a broader reading of the phrase “at the direction of the user” than UMG’s interpretation.<sup>22</sup> The language of section 512 (c) extends beyond mere electronic storage and applies to “access-facilitating” processes that automatically occur when a website’s user uploads material to an ISP.<sup>23</sup> The court reasoned that the “by reason of” language presumes that ISPs will provide public access to user stored material.<sup>24</sup> Hence, a ruling disqualifying Veoh from the safe harbor protections for providing public access to the stored material would run contrary to the legislative intent.<sup>25</sup>

The court noted that Veoh was permitted to modify user-submitted material to assist storage and access to the public under the broader rationale of section 512(c).<sup>26</sup> The court also explained that if Congress meant to disallow this action, it would have expressly included a limitation as it did regarding the narrow definition of “service provider.”<sup>27</sup>

The statute also provides that a user is unlikely to infringe solely by storing material on a server that no one can access.<sup>28</sup> This idea extends to activities that go beyond “merely storing material.”<sup>29</sup> Veoh employees, however, did not actively preview or supervise file uploading, “nor did [Veoh] preview or select the files before the upload [was] complete” and the material was made public.<sup>30</sup> Rather, Veoh made files accessible to the public by using an “automated process” that was entirely at the discretion of Veoh users.<sup>31</sup>

### III. STATEMENT OF THE CASE

LiveJournal is a social media platform that allows users to create personalized “thematic communities” where they can upload content

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1016–17.

25. *Id.* at 1017–18.

26. *Id.* at 1019–20.

27. *Id.* at 1020.

28. *Id.* at 1019.

29. *Id.*

30. *Id.* at 1020; *see* *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1138 (N.D. Cal. 2008).

31. *UMG Recordings, Inc.*, 718 F.3d at 1020.

and comment on posts related to a theme.<sup>32</sup> ONTD is a popular, human-moderated LiveJournal community thematically focused on celebrity news.<sup>33</sup> Users submit content that automatically uploads to LiveJournal's servers and is placed in a queue.<sup>34</sup> Moderators then review the user-generated submissions for breaking celebrity news, copyright infringement, pornography, and harassment.<sup>35</sup> Ultimately, moderators decide to either reject or publicly post the submissions on ONTD.<sup>36</sup>

During the relevant time period, unpaid ONTD moderators quickly reviewed user-generated content for compliance with LiveJournal rules, and approved content that conformed to those specifications on a massive scale.<sup>37</sup> The moderators were led by the "primary leader," Brian Delzer.<sup>38</sup> As primary leader, Delzer was a full-time paid employee of LiveJournal.<sup>39</sup> He performed moderator work, instructed ONTD moderators which "content they should approve[,] and select[ed] and removed moderators on the basis of their performance."<sup>40</sup>

Mavrix is a photography company that takes paparazzi photographs of celebrities in tropical locations and sells the photographs to celebrity magazines.<sup>41</sup> Mavrix claimed that ONTD's posts of its copyrighted photographs prevented Mavrix from profiting from the sale of these photographs to magazines because its business model relied on breaking celebrity news.<sup>42</sup>

From 2010 to 2014, ONTD posted Mavrix's photographs containing "generic watermarks," or the mark "Mavrixonline.com," in seven posts.<sup>43</sup> During that time, LiveJournal claimed that it did not possess a technological method to determine who approved the seven

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32. Mavrix Photographs, LLC v. LiveJournal, Inc., 873 F.3d 1045, 1049 (9th Cir. 2017).

33. *Id.* at 1049.

34. *Id.* at 1050.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1050–51.

43. *Id.* at 1051.

posts on ONTD.<sup>44</sup> Brian Delzer, the primary leader, also claimed that he did not approve the posts.<sup>45</sup>

Mavrix did not send a notice-and-takedown letter and, instead, brought an action for damages and injunctive relief against LiveJournal for copyright infringement in the U.S. District Court for the Central District of California.<sup>46</sup> Mavrix alleged that LiveJournal did not qualify for the section 512(c) safe harbor provision.<sup>47</sup> Mavrix argued that the “at the direction of the user” language of section 512(c) limited the safe harbor immunity to situations in which an ISP’s user stores infringing content on “a system or network controlled or operated by or for the service provider.”<sup>48</sup> In particular, Mavrix argued that third-party users did not upload the posts to LiveJournal’s communities.<sup>49</sup> Rather, Mavrix claimed the moderators acted as agents of LiveJournal by pre-screening the stored content and posting the infringing material on ONTD.<sup>50</sup> LiveJournal, on the other hand, asserted that it only provided the online platform to enable users to create blog communities, and was unaware of the alleged infringing material posts.<sup>51</sup>

The district court granted summary judgment in favor of LiveJournal, holding that the DMCA’s section 512(c) safe harbor provision protected LiveJournal from liability for copyright infringement.<sup>52</sup> Specifically, the court held that Mavrix’s photographs were publicly posted on ONTD “at the direction of the user” despite the moderators’ actions of screening and uploading every ONTD post.<sup>53</sup> Thus, the common law of agency did not apply.<sup>54</sup>

Mavrix appealed.<sup>55</sup>

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44. *Id.* at 1050.

45. *Id.* at 1051.

46. *Id.*

47. *See id.* at 1053 (“Mavrix, relying on the common law of agency, argues that the moderators are LiveJournal’s agents, making LiveJournal liable for the moderators’ acts. The district court erred in rejecting this argument.”).

48. *Mavrix Photographs LLC v. LiveJournal, Inc.*, No. SACV 13-00517-CJC(JPRx), 2014 WL 6450094, at \*5 (C.D. Cal. Sep. 19, 2014) (“[I]nfringing material has been emailed to the editor of a newspaper and resides on the newspapers servers, but is never made available to the public.”).

49. *See id.* at \*5 n.7.

50. *See Mavrix Photographs, LLC*, 873 F.3d at 1053.

51. *Mavrix*, 2014 WL 6450094, at \*1.

52. *Mavrix Photographs, LLC*, 873 F.3d at 1051.

53. *Id.* at 1052.

54. *Id.* at 1049.

55. *Id.* at 1051.



## IV. REASONING OF THE COURT

On appeal, Mavrix applied the common law of agency to contend that the ONTD moderators were LiveJournal's agents.<sup>56</sup> Mavrix asserted that LiveJournal was liable for the acts of its moderators and should be precluded from the section 512(c) safe harbor immunity.<sup>57</sup> LiveJournal countered and argued that the section 512(c) statute protected the company from damages for copyright infringement because the posts were stored "at the direction of a user."<sup>58</sup>

The *Mavrix* court began its opinion by explaining the eligibility for the section 512(c) safe harbor. The court ultimately held that there was a genuine issue of material fact regarding whether ONTD moderators were agents of LiveJournal.<sup>59</sup> Hence, the court found LiveJournal should most likely not be protected under the section 512(c) safe harbor provision.<sup>60</sup> To reach this conclusion, the court applied common law agency principles of actual and apparent authority and examined the amount of control LiveJournal held over its moderators.<sup>61</sup>

Under these principles, the court concluded that LiveJournal maintained sufficient control over its moderators for an agency relationship to exist.<sup>62</sup> To illustrate its reasoning, the court applied the Restatement (Third) of Agency to the facts of the case.<sup>63</sup> Overall, the court found that "reasonable jurors could conclude that an agency relationship existed" under the common law of agency.<sup>64</sup>

The Ninth Circuit also declared that if an agency relationship is found to exist, then the question of whether the ONTD content was

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56. *Id.* at 1053.

57. *Id.*

58. *Id.* at 1052.

59. *Id.* at 1054.

60. *See id.* at 1054, 1056 ("From the evidence currently in the record, reasonable jurors could conclude that an agency relationship existed.").

61. *Id.* at 1057.

62. *Id.* at 1055–56 ("LiveJournal maintains significant control over ONTD and its moderators. Delzer gives the moderators substantive supervision and selects and removes moderators on the basis of their performance, thus demonstrating control. . . . Further demonstrating LiveJournal's control over the moderators, the moderators' screening criteria derive from rules ratified by LiveJournal. . . . This evidence raises genuine issues of material fact regarding the level of control LiveJournal exercised over the moderators. From the evidence currently in the record, reasonable jurors could conclude that an agency relationship existed.").

63. *Id.* at 1054–55; *see* RESTATEMENT (THIRD) OF AGENCY (AM. LAW. INST. 2006).

64. *Mavrix Photographs, LLC*, 873 F.3d at 1056.

posted “at the direction of the user” must be answered.<sup>65</sup> *Shelter Capital* stated the content was either posted “at the direction” of the moderators in their screening and posting role, or the moderators played a passive “accessibility enhancing” role in posting the content.<sup>66</sup> According to the court, the crucial question was whether the manual reviewing and posting by the moderators was considered posting “at the direction of the user.”<sup>67</sup>

Having established that the district court erroneously failed to apply the common law of agency, the Ninth Circuit reversed the district court’s grant of summary judgment providing the defendant immunity under the section 512(c) safe harbor.<sup>68</sup> The case was remanded to the district court to reassess LiveJournal’s threshold eligibility for the section 512(c) safe harbor by: (1) “resolv[ing] the factual dispute regarding the moderators’ status as LiveJournal’s agents” and (2) “whether LiveJournal showed that Mavrix’s photographs were posted at the direction of the users.”<sup>69</sup>

#### V. ANALYSIS: THE NINTH CIRCUIT’S LOGICAL REFORMULATION OF THE SAFE HARBOR PROVISIONS

*Mavrix Photographs, LLC v. LiveJournal, Inc.* holds that moderators of online communities might be “agents” of the websites that they monitor, potentially causing ISPs to lose the copyright safe harbor if moderators allow infringing content to be posted publicly.<sup>70</sup> This holding has caused alarm among ISPs and could signal a dramatic shift toward a reshaping of the section 512(c) safe harbor in the Ninth Circuit.<sup>71</sup> According to the *Mavrix* court, if an ISP’s business model relies on users uploading photographs and videos, and moderators are

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65. *Id.* at 1031 (In the event that the moderators are found to be agents of LiveJournal, “the fact finder must assess whether Mavrix’s photographs were indeed posted at the direction of the users in light of the moderators’ role in screening and posting the photographs.”).

66. *See* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006, 1020 (9th Cir. 2013) (“Veoh does not actively participate in or supervise file uploading, ‘[n]or does it preview or select the files before the upload is completed.’ Rather, this ‘automated process’ for making files accessible ‘is initiated entirely at the volition of Veoh’s users.’ We therefore hold that Veoh has satisfied the threshold requirement that the infringement be ‘by reason of the storage at the direction of a user of material’ residing on Veoh’s system.”).

67. *Id.* at 1020.

68. *Mavrix Photographs, LLC*, 873 F.3d at 1056–57.

69. *Id.* at 1057.

70. *Id.* at 1054.

71. Terry Parker, et al., *The 9th Circ.’s Surprisingly, Alarming DMCA Decision*, LAW360 (May 11, 2017, 11:03 AM), <https://www.law360.com/appellate/articles/921199>.

used to screen and post content that they deem non-infringing, the DMCA will likely not shield copyright infringement that occurs on that website.<sup>72</sup> In order to fully explore the opinion, this Comment examines the question of agency among ISPs' moderators and the particular impact that the opinion may have on ISPs located within the Ninth Circuit.

*A. The Trial Court Should Find the Moderators to be Agents of LiveJournal According to the Common Law of Agency*

The ONTD moderators should be labeled as agents of LiveJournal according to the common law of agency. The Ninth Circuit properly applied the common law of agency in *Mavrix* because prior judicial decisions had already applied these agency principles in the copyright context to determine whether a service provider could be liable under the DMCA for the actions of internet moderators.<sup>73</sup> Therefore, the court should conclude that the moderators were agents of LiveJournal because they retained actual and apparent authority.

Agency is the fiduciary relationship that derives from the concept that one person, the principal, utilizes another, the agent, to act on his or her behalf.<sup>74</sup> In order to establish an agency relationship, the agent must have authority to act on behalf of the principal, and the principal must have the right and ability to control the agent's actions.<sup>75</sup>

Determining the principal's level of control over the agent is the most critical factor in deciding the agency issue.<sup>76</sup> The Ninth Circuit found that ISPs exercise sufficient control over moderators by not only having the power to hire or terminate them, but also by issuing detailed instructions to moderators concerning the appearance and layout of the website, as well as the content that may be posted on the website.<sup>77</sup>

LiveJournal established its intention to control ONTD and its moderators when it decided to "take-over" ONTD. ONTD was originally operated by unpaid moderators, but once ONTD became

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72. *Id.*

73. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1038 (9th Cir. 2017); *see also* *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 56 (1st Cir. 2012) ("Established law confirms agency principles may apply in the copyright context. . .").

74. *Id.*

75. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW. INST. 2006).

76. *Jones v. Royal Admin. Servs., Inc.*, 866 F.3d 1100, 1106 (9th Cir. 2017) (citing *United States v. Bonds*, 608 F.3d 495, 505 (9th Cir. 2010); *accord* *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096 (9th Cir. 2008)).

77. *Perfect 10, Inc., v. Cybernet Ventures*, 213 F. Supp. 2d 1146, 1159–60 (C.D. Cal. 2002).

LiveJournal's most popular thematic community, the company assumed command of ONTD to expand the website and to acquire more advertising revenue.<sup>78</sup> In order to obtain absolute control of the community, LiveJournal hired Brian Delzer as a full-time employee to act as the primary leader designated to supervise and control the activities of the moderators.<sup>79</sup>

The direct supervision of the moderators by Delzer created a supervisor-supervisee relationship. This type of relationship can be distinguished from the type of relationship in *Jones v. Royal Administration Services, Inc.*<sup>80</sup> In *Jones*, the court upheld the independent contractor status of telemarketers working for Royal because Royal did not directly supervise the telemarketer's calls, nor did it control the telemarketers' work hours.<sup>81</sup> Here, Delzer oversaw the moderators' work and expressly instructed the moderators regarding content to add to the website or to delete from the website.<sup>82</sup> Delzer also established control for the ISP as an administrative "owner" who added and removed moderators on the basis of their work performance.<sup>83</sup> While ONTD moderators were free to "go and volunteer their time in any way they [saw] fit," it can be argued that Delzer controlled the moderators' work schedules by adding a European moderator to oversee the website's content while the U.S. moderators were off duty or sleeping.<sup>84</sup> Thus, LiveJournal utilized Delzer to exert sufficient control over the moderators' work.

There are two main types of agency: actual and apparent.<sup>85</sup> Actual authority is separated into the two general categories of actual express authority and actual implied authority.<sup>86</sup> Actual express authority refers to when a principal enters into an express agreement with an agent authorizing him to engage in a particular act.<sup>87</sup> Actual implied authority refers to when a principal enters into an express agreement with an agent, but the principal does not specifically

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78. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1050 (9th Cir. 2017).

79. *Id.*

80. 866 F.3d 1100 (9th Cir. 2017).

81. *Id.* at 1106.

82. *Mavrix Photographs, LLC*, 873 F.3d at 1050.

83. *Id.* at 1049–50.

84. *Id.* at 1050, 1055.

85. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW. INST. 2006).

86. *Id.* §§ 2.01, 3.01.

87. *Id.* § 2.01.

authorize the agent to act in the action at issue.<sup>88</sup> However, the agent reasonably believes that the “authority for that action has been delegated to him” through the scope of his position.<sup>89</sup>

Apparent authority is created when a principal has no agreement with an agent authorizing the action, but a third-party reasonably believes that the agent has the authority to act with legal consequences for the principal.<sup>90</sup>

The district court erred in refusing to apply the common law of agency in the *Mavrix* case. Here, LiveJournal was a principal and the moderators were agents who undertook the particular action of monitoring the ONTD community on LiveJournal’s behalf.

The trial court should ultimately conclude that the ONTD moderators had actual authority because LiveJournal manifested its assent for the moderators to act on its behalf to approve or deny posts, while supplying the moderators with detailed instructions for approving or rejecting posts.<sup>91</sup>

First, there was a relationship of actual, implied authority because LiveJournal allowed the moderators to act on the company’s behalf by giving the moderators varying levels of authority to screen user-submitted content.<sup>92</sup> If a principal states the general nature of the action an agent is to perform, then an agent has implied authority.<sup>93</sup>

LiveJournal ran the website’s moderator sector like a business by creating a system comprised of three different levels of “administrator roles” among the moderators.<sup>94</sup> At the lowest administrator level, “moderators” screened user-submitted posts for child pornography and assured that each one contained celebrity news.<sup>95</sup> “Maintainers” were a step above moderators because they could delete posts and

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88. *Id.*

89. Eric Rasmusen, *Agency Law and Contract Formation*, HARV. L. SCH. JOHN M. OLIN CENTER FOR L., ECONS., AND BUS. DISCUSSION PAPER SERIES, May 8, 2001, at 5.

90. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW. INST. 2006).

91. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1059 (9th Cir. 2017).

92. *Id.* at 1054–55.

93. *Hawaiian Paradise Park Corp. v. Friendly Broad. Co.*, 414 F.2d 750, 755 (9th Cir. 1969).

94. *Mavrix Photographs, LLC*, 873 F.3d at 1024, 1054–55 (“Unlike other sites where users may independently post content, LiveJournal relies on moderators as an integral part of its screening and posting business model. LiveJournal also provides three different levels of authority: moderators review posts to ensure they contain celebrity gossip and not pornography or harassment, maintainers delete posts and can remove moderators, and owners can remove maintainers. Genuine issues of material fact therefore exist regarding whether the moderators had actual authority.”).

95. *Id.* at 1054.

remove moderators and users from ONTD.<sup>96</sup> At the highest administrator level was the single “owner” of a community.<sup>97</sup> The “owner” held the highest level of authority within the moderators because he had the power of a maintainer and could also remove maintainers from their positions.<sup>98</sup> The court accurately declared that ONTD’s moderators “performed a vital function in the LiveJournal[] business model.”<sup>99</sup> The duties performed by the moderators were solely for the benefit of LiveJournal. The moderators act like puppets, as they are told how to perform and are removed from their positions if they do not successfully perform or follow the rules.

Second, the moderators were given express instructions concerning the criteria for accepting or denying users’ posts. The LiveJournal moderators had to follow the ONTD rules that LiveJournal ratified.<sup>100</sup> The ONTD rules stated that the content needed to be recent and provided a list of sources from which material could not be posted.<sup>101</sup> These comprehensive rules constrained what the moderators could publicly post.

It was clear that the moderators were actively following LiveJournal’s detailed instructions because the moderators approved and posted only one-third of all user-submitted content.<sup>102</sup> Beyond merely screening ONTD for child pornography, LiveJournal required moderators to actively review posts to curate content for the website devoted to breaking celebrity news.<sup>103</sup> Therefore, the varying levels of authority among the moderators coupled with the explicit instructions

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96. *Id.* at 1049 (“Maintainers’ review and delete posts while also holding the authority to remove moderators and users from the community.”).

97. *Id.* (“Each community also has one ‘owner’ who has the authority of a maintainer but can also remove maintainers.”).

98. *Id.*

99. *Id.* at 1054.

100. *Id.* at 1055 n.11.

101. *Id.* at 1050. (“ONTD’s rules pertain to both potential copyright infringement and substantive guidance for users. . . . One rule instructs users to ‘[i]nclude the article and picture(s) in your post. . . .’ Another rule provides ‘Keep it recent. We don’t need a post in 2010 about Britney Spears shaving her head.’ ONTD’s rules also include a list of sources from which users should not copy material.”).

102. *Id.* While the fact that ONTD moderators only approved one-third of all user-submitted content could be indicative of the moderators’ level of inspecting the submitted content, that statistic actually depends on the number of posts that were submitted each month. The real question posed here is qualitative, not quantitative. This quantitative number is not significant when the moderators are actually undertaking a qualitative analysis of the content; this focuses on the type of content submitted and not the number of posts submitted.

103. *Id.*

regarding the screening of content exhibits that the moderators had the actual authority to act on behalf of LiveJournal.

The trial court should also find that an apparent authority relationship existed between LiveJournal and the moderators because the third-party ONTD users reasonably believed that the moderators acted on behalf of LiveJournal.<sup>104</sup> When a user's post was removed from ONTD following a DMCA takedown notice, for example, the user asked LiveJournal why the moderators removed the post.<sup>105</sup> The user argued that he or she faithfully followed ONTD's strict formatting guidelines, and the moderators had screened and approved the post.<sup>106</sup>

The ONTD user relied on the moderators to decide whether the post complied with the stringent thematic and copyright rules that LiveJournal had ratified.<sup>107</sup> The user showed that he or she reasonably believed that LiveJournal provided the moderators with the authority to act on its behalf in choosing which user-uploaded content to post by complaining to LiveJournal once the post was taken down from the website. Accordingly, the defined role that LiveJournal granted to its moderators created an apparent authority relationship.

*B. The Content Was Not Posted "At the Direction of the User"  
According to the Section 512(c)(1) Threshold*

The functions performed by ONTD's moderators after a user uploaded content to the LiveJournal server do not fall under the meaning of "storage at the direction of the user" because the web postings were posted on ONTD by the moderators, who should be considered agents of LiveJournal.

The Ninth Circuit created a circuit split by rejecting the Tenth Circuit's definition of the word "user" as applicable to section 512(c)(1).<sup>108</sup> The Tenth Circuit stated that "user" should be

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104. *Id.* at 1055; see RESTATEMENT (THIRD) OF AGENCY § 3.03 (AM. LAW. INST. 2006).

105. *Mavrix Photographs, LLC*, 873 F.3d at 1055 ("One user whose post was removed pursuant to a DMCA notice complained to LiveJournal 'I'm sure my entry does not violate any sort of copyright law. . . . I followed [ONTD's] formatting standards and the moderators checked and approved my post.'").

106. *Id.*

107. *Id.* at 1055 ("The user relied on the moderators' approval as a manifestation that the post complied with copyright law, and the user appeared to believe the moderators acted on behalf of LiveJournal. Such reliance is likely traceable to LiveJournal's policy of providing explicit roles and authority to the moderators.").

108. Parker, *supra* note 71.

understood according to “its plain meaning as ‘one who uses.’”<sup>109</sup> More specifically, the Tenth Circuit said, “a ‘user’ describes a person or entity who avails itself of the service provider’s system or network to store material.”<sup>110</sup> Under this analysis, an ISP’s employees could be considered “users,” and thus, be granted near blanket immunity for copyright infringement under section 512(c).<sup>111</sup>

However, the Ninth Circuit rejected the Tenth Circuit’s broad meaning of “user” to assert that employees are not “users” under section 512(c).<sup>112</sup> While Congress never defined the term “user,” common law of agency precedent affirms that an ISP is liable for the “acts of its agents, including its employees” under the DMCA.<sup>113</sup> *Columbia Pictures Industries, Inc. v. Fung*<sup>114</sup> furthered this idea when the Ninth Circuit explained that torrents stored on the ISP’s website that are uploaded by users of the website are eligible for the safe harbor, while torrents collected for storage by the ISP’s employees and uploaded would not be “facially eligible for the safe harbor.”<sup>115</sup> Thus, a “user” in the Ninth Circuit DMCA analysis should be interpreted as an entity who interacts with an ISP’s website, but is not an agent nor an employee of the website.

There is no question that ONTD users are initially adding infringing material to an “internal queue” in the LiveJournal server before the moderator reviews the content.<sup>116</sup> However, the important question is whether the ONTD moderators actively participated in posting the content online, not who submitted the photographs to the ISP, which was the district court’s focus on summary judgment<sup>117</sup> The court in *UMG Recordings, Inc. v. Shelter Capital Partners LLC* held that “posts are at the direction of the user if the service provider played no role in posting them on its website or if the service provider carried out activities that were ‘narrowly directed’ towards enhancing the

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109. *BWP Media USA, Inc. v. Clarity Dig. Grp., LLC*, 820 F.3d 1175, 1179 (10th Cir. 2017) (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1297 (10th ed. 2001)).

110. *Id.* at 1179.

111. *See id.* at 1180.

112. *Mavrix Photographs, LLC*, 873 F.3d at 1054.

113. *Id.* at 1053 n. 8; *see also* *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1038 (9th Cir. 2017) (“[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. . . .”).

114. 710 F.3d 1020 (9th Cir. 2017).

115. *Id.* at 1043.

116. *Mavrix Photographs, LLC*, 873 F.3d at 1050.

117. *Id.* at 1049; *BWP Media USA, Inc. v. Clarity Dig. Grp., LLC*, 820 F.3d 1175, 1181 (10th Cir. 2017).



accessibility of the posts.”<sup>118</sup> The *Mavrix* decision subsequently expanded *Shelter Capital*’s narrow decision. In order to be liable for copyright infringement under section 512(c)(1), an ISP must take an “active role” in uploading user-submitted content and perform more than accessibility enhancing functions such as reviewing submissions, automatic reformatting, or takedowns.<sup>119</sup>

While previous court decisions articulate that the safe harbor extends to software functions that “facilitate users’ access to the user generated content,” this statement does not apply to the facts in *Mavrix*.<sup>120</sup> Previous decisions dealt with automatic processes where the posts were still ultimately “at the direction of the user.” The ONTD posts, however, were not “at the direction of the user” because the moderators manually reviewed and reformatted the user-generated posts in an effort to bring the highest number of viewers to the website. LiveJournal’s intensive review process went beyond the automatic processes that the Ninth Circuit had previously ruled as protected under the section 512(c) safe harbor. Subsequently the ISP should not be afforded safe harbor protection.

LiveJournal was not “posting at the direction of the user” because the ISP was curating content for its business model by actively deciding which user submissions to post on ONTD. LiveJournal knew the content of each post uploaded to ONTD, unlike other ISP websites like YouTube. YouTube allows users to upload videos to their website from an electronic device by simply selecting a file and pressing a “virtual ‘upload’ button.”<sup>121</sup> YouTube is initially unaware of the content uploaded because users can upload video content to the website without the approval of moderators.<sup>122</sup> Unlike YouTube, LiveJournal was aware of the content posted on ONTD because users did not simply press an “upload” button to post content; rather, each user-generated post was screened by ONTD moderators before being posted to the website.<sup>123</sup> According to *BWP Media USA, Inc. v. Clarity*

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118. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1015–16 (9th Cir. 2013).

119. *Mavrix Photographs, LLC*, 873 F.3d at 1053 (citing *UMG Recordings, Inc.*, 718 F.3d at 1018).

120. *UMG Recordings, Inc.*, 718 F.3d at 1015–16.

121. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2nd Cir. 2012).

122. *Id.* at 35.

123. *Mavrix Photographs, LLC*, 873 F.3d at 1049.

*Digital Group, LLC*,<sup>124</sup> an ISP will normally benefit from the safe harbor protection “if the infringing content has gone through a screening or [an] automated process.”<sup>125</sup>

Additionally, ONTD moderators did not simply scan or “cursorily review” the user-uploaded material.<sup>126</sup> The moderators meticulously and manually sorted through the voluminous amount of content users uploaded to the ONTD server and only posted popular, attractive celebrity content that would be sure to draw visitors to the website.<sup>127</sup> The ONTD community rules clearly instructed users to deliver recent, legitimate content and to include the original source of the “articles and pictures in the post.”<sup>128</sup> LiveJournal obliterates the possibility of being considered a passive service provider by urging users to deliver content that was created by others. By encouraging users to send unoriginal material for the moderators to review, LiveJournal acts as a participant in the infringement of the copyrighted material.<sup>129</sup>

Therefore, once the court decides that the ONTD posts were not uploaded “at the direction of the user,” LiveJournal should be completely denied safe harbor protection under section 512(c).

### *C. Possible Ramifications for Online Service Providers in the Ninth Circuit after the Mavrix Decision*

LiveJournal complains that the court’s ruling will dramatically “reshape” the DMCA and will “cast an enormous cloud on service providers.”<sup>130</sup> However, even if the court ultimately finds that ONTD’s moderators are agents of LiveJournal, there will not be disastrous implications for ISPs in the Ninth Circuit because ISPs’ community-based business models cannot survive without the work of moderators.

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124. 820 F.3d 1175, 1181 (10th Cir. 2017).

125. *Id.* at 1181 (citing *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1020 (9th Cir. 2013)); *see, e.g., CoStar Grp., Inc. v. LoopNet*, 373 F.3d 544, 558 (4th Cir. 2004).

126. Parker, *supra* note 71 (citing *CoStar Grp., Inc. v. LoopNet*, 373 F.3d 544, 547 (4th Cir. 2004)).

127. *Mavrix Photographs, LLC*, 873 F.3d at 1050.

128. *Id.* (“[O]ne rule instructs users to ‘[i]nclude the article and pictures(s) in your post, do not simply refer us off to another site for the goods.’ . . . ‘Keep it recent. We don’t need a post in 2010 about Britney Spears shaving her head.’”).

129. *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 666 (9th Cir. 2017).

130. Melissa Daniels, *‘Moderators’ Ruling Could ‘Reshape’ DMCA, 9th Circ. Warned*, LAW360 (May 8, 2017, 7:15 PM), <https://www.law360.com/articles/921458>.

In response to the *Mavrix* ruling, technological industry giants Etsy, Pinterest, and Tumblr filed an amicus curiae brief warning that the Ninth Circuit's ruling will discourage ISPs from reviewing user-generated content if the moderation efforts would cause a loss of the safe harbor protection.<sup>131</sup> The ISP giants argue that they would be unfairly denied safe harbor immunity because they exceed the statutory requirements for preventing copyright infringement on their websites by employing moderators.<sup>132</sup> These ISPs believe the possibility of being held liable for employing moderators threatens not only the users who create and consume the posted content, but also harms the copyright owners' interests by discouraging efforts for the ISPs to identify and block infringing material that users submit.<sup>133</sup>

Although monitoring of user-submitted material is not required under 17 U.S.C. § 512(m), nearly all major commercial websites with user-generated content are "policed by human moderators."<sup>134</sup> Pre-screening, whether automated or human, has vast benefits.<sup>135</sup> It halts illegal content, such as child pornography, from being accessible to the masses, and retains material consistent with the website's standards enumerated in its terms of service.<sup>136</sup>

In addition, it seems unlikely that ISPs will shut down simply due to increased responsibility and potential liability.<sup>137</sup> As stated in

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131. Brief for Online Service Providers Etsy, Kickstarter, Pinterest, and Tumblr in Support of Appellee at 23, *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045 (9th Cir. 2017) (No. 14-56596), 2015 WL 3970267 at \*22.

132. *Id.* at \*11.

133. *Id.* at \*17.

134. Adrian Chen, *When the Internet's 'Moderators' Are Anything But*, N.Y. TIMES MAG. (Jul. 21, 2015), <https://www.nytimes.com/2015/07/26/magazine/when-the-internets-moderators-are-anything-but.html>.

135. At the moment, however, human moderation is more vital to ISPs for screening and filtering content than artificial intelligence because it is more accurate. See Olivia Solon, *Facebook is Hiring Moderators. But is the Job Too Gruesome to Handle?*, GUARDIAN (May 4, 2017, 5:00 AM), <https://www.theguardian.com/technology/2017/may/04/facebook-content-moderators-ptsd-psychological-dangers> ("You can have a situation where the words that are being typed by the end user are exactly the same but one is a casual joke and the other is a serious thing that needs escalation. . . . This requires intuition and human judgment. Algorithms can't do that."); see also Emma Woollacott, *YouTube Hires More Moderators as Content Creators Complain They're Being Unfairly Targeted*, FORBES (Dec. 5, 2017, 5:42 AM), <https://www.forbes.com/sites/emmawoollacott/2017/12/05/youtube-hires-more-moderators-as-content-creators-complain-theyre-being-unfairly-targeted/#4a8ee22c6a49> ("Human reviewers remain essential to both removing content and training machine learning systems because human judgment is critical to making contextualized decisions on content. . . .").

136. Brief for Online Service Providers Etsy, Kickstarter, Pinterest, and Tumblr in Support of Appellee, *supra* note 131, at 24.

137. Harris, *supra* note 10, at 854.

*Mavrix*, moderators play a vital role in ISPs' business models as "forces of stability and civility in the raucous digital realm."<sup>138</sup> This dominant business model has ISPs attempting to direct high traffic to their websites while employing as few people as possible.<sup>139</sup> As the website expands, however, there is a crucial need for more moderators to retain control over ISPs' communities.<sup>140</sup>

With the amount of content posted online daily, some of it inappropriate, the modern internet could not exist without moderators.<sup>141</sup> Content moderation permits ISPs to publish ample amounts of user-generated content while simultaneously "preserving the reputation of the ISP and protecting the user."<sup>142</sup> Moderators ensure that the posted material does not diverge from an ISP's theme or its terms, while also minimizing the risk that website visitors will encounter upsetting material.<sup>143</sup> ISPs' use of moderators can actually result in improved search engine rankings, which may eventually lead to an increase in user traffic to the website.<sup>144</sup>

The Ninth Circuit's decision in *Mavrix* will not ultimately cause ISPs like Facebook and Reddit to cease monitoring user-generated content all together. While ISPs argue that they will lose the safe harbor protection if they use a monitoring system, the fact is ISPs cannot survive without moderators. In conclusion, user-generated content comes with many risks. However, moderators play the key role in controlling the unpredictable content and ensuring the positive depiction of an ISP's brand.

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138. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1054 (9th Cir. 2017); Chen, *supra* note 134; see Alexis C. Madrigal, 'The Basic Grossness of Humans', ATLANTIC (Dec. 15, 2017), <https://www.theatlantic.com/technology/archive/2017/12/the-basic-grossness-of-humans/548330/> ("They must keep the content flowing because that is the business model: Content captures attention and generates data. They sell that attention, enriched by that data.")

139. Chen, *supra* note 134.

140. *Id.*

141. *Id.*

142. Jason Falls, *Why Content Moderation is Critical to Your Business*, ONE SPACE BLOG (Mar. 7, 2017), <https://www.onespace.com/blog/2017/03/why-content-moderation-is-critical-to-your-business/>; see, e.g., Sarah Frier, *Facebook Hiring 3,000 People to Monitor Live Video for Violence*, BLOOMBERG (May 3, 2017, 8:00 AM), <https://www.bloomberg.com/news/articles/2017-05-03/facebook-hiring-3-000-people-to-monitor-live-video-for-violence>; see also Sam Levin, *Google to Hire Thousands of Moderators After Outcry over YouTube Abuse Videos*, GUARDIAN (Dec. 5, 2017, 2:34 AM), <https://www.theguardian.com/technology/2017/dec/04/google-youtube-hire-moderators-child-abuse-videos> (YouTube announced in 2017 that it "would expand its total workforce to more than 10,000 people responsible for reviewing content that could violate its policies.")

143. Falls, *supra* note 142.

144. *Id.*

## VI. CONCLUSION

When the DMCA was established in 1998, ISPs and the safe harbor provisions did not exist. The goal of the section 512 safe harbor statute was to facilitate the expansion of the Internet while also protecting copyright owners. Flash forward to 2017, where ISPs play a major role in modern society with little or no legal consequences for utilizing copyrighted works on their websites. By narrowing the section 512(c) safe harbor, the Ninth Circuit in *Mavrix* has clearly sent a message to ISPs that total immunity will not be granted for copyright infringement. ISPs are no longer allowed to permanently dock themselves in the “safe harbor.” Going forward, if ISPs or their agents post infringing material on their websites, there will be legal consequences in the Ninth Circuit.