

TYPES NOT MAPPED YET September 24, 2021 | TTR not mapped yet | Michael L. Nepple

No more half measures: pleading infringer knowledge in contributory copyright infringement claims

A California judge has dismissed the copyright infringement and Digital Millennium Copyright Act (DMCA) claims of a photographer who sued Pinterest after he found his photos on the popular social media website. Professional photographer Blaine Harrington brought the claims against Pinterest, but the Court dismissed his lawsuit, finding that Harrington failed to plead sufficient facts to show that Pinterest “knew,” in some way, that his copyrighted photos were on the website, and that Pinterest’s automated removal of the photos’ embedded identifying information would aid a future copyright infringement. Not all is lost for Harrington, as the Court allowed him a last opportunity to amend his complaint to try to fix the deficiencies.

In [Harrington v. Pinterest, Inc.](#), a companion case to one [we previously wrote about](#), Harrington alleged that his copyrighted photos appeared on Pinterest, stripped of their copyright management information (CMI). Under the DMCA, CMI is “identifying information” about the work, the author, and the copyright owner, and often includes basic photographer contact information, website addresses, and licensing information.

As to the copyright infringement claim, Pinterest argued that it was an intermediary, and thus plaintiff was required to plead Pinterest’s “actual knowledge of specific acts of infringement.” Harrington did not allege that Pinterest had actual knowledge of specific infringements, but argued that his allegations under two actual knowledge equivalents - constructive knowledge and willful blindness - were sufficient.

Judge Edward J. Davila found that while constructive knowledge may sometimes act as an actual knowledge equivalent, Harrington failed to adequately plead Pinterest’s constructive knowledge. The Court held that while Harrington claimed at least two of his photos appeared on Pinterest, he failed to allege that “Pinterest knew or had reason to know” that the photos were on the Pinterest website, “much less that ... these photographs were infringing.” The Court specifically noted that Harrington failed to inform Pinterest of the two photos, and “any other instances of infringement” of his other photos.

Similarly, the Court found Harrington’s willful blindness theory, which requires allegations that the defendant subjectively believed infringement was occurring but took deliberate actions to avoid learning of the infringement, was insufficient. The Court noted Harrington’s failure to allege Pinterest’s subjective belief of infringement, and that he never “informed Pinterest of a single instance of infringement” of his photos.

The Court also dismissed Harrington’s DMCA claim, which requires a plaintiff to allege that the defendant either “knew” or had “reasonable grounds to know” that its actions involving CMI “will induce, enable, facilitate, or conceal an infringement.” Harrington alleged that Pinterest “did not have in place a system for screening Pins for copyright notices or other indicia” of ownership and that Pinterest “deliberately removes indicia of copyright ownership,” such as stripping the photos “of visible identifying source and/or [CMI], as well as metadata.” Harrington alleged that Pinterest’s removal of CMI “ensures that copyright owners cannot easily identify their works on Pinterest’s website,” which is required to send takedown notices to Pinterest. He further alleged that without CMI, he could not use simple keyword searches, and thus incurred expenses to hire third parties to conduct reverse image searches of the Pinterest site.

Pinterest argued that the “mere removal” of CMI is insufficient to state a DMCA claim because plaintiff must also allege how the removal will aid an infringement. The Court agreed, and found that Harrington’s DMCA claim was insufficient because he did not “allege any facts to show that Pinterest’s alleged distribution of photographs induced, enabled, facilitated or concealed any particular act of infringement by anyone, let alone a pattern of such infringement likely to recur in the future.”



Read along with *Davis v. Pinterest*, this decision holds that to plead contributory infringement under Ninth Circuit law, a plaintiff must allege sufficient facts showing the intermediary platform had actual or constructive knowledge of specific infringements, or that it had a subjective belief of likely infringement and took deliberate actions to avoid confirming its belief. Similarly, a DMCA claim requires more than an allegation that the defendant removed CMI, or distributed a work with CMI removed; a plaintiff must also allege how the removal or distribution will aid an infringement.

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