[US] No Infringement of Copyright through the Use of Embed Codes

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On 2 August 2012, the U.S. Court of Appeals for the Seventh Circuit vacated a preliminary injunction that was issued against myVidster.com ("myVidster") for copyright infringement in violation of 17 U.S.C. §§ 106 (1) and (3) of the Copyright Act.

The main point of contention was whether myVidster infringed Flava Works Inc.'s ("Flava") exclusive right to "reproduce" and "distribute" its copyrighted videos (collectively "Reproduction and Distribution Rights") by allowing its visitors to view Flava's videos without Flava's authorization by clicking on bookmarks on myVidster.com. The Court held that myVidster is not a contributory infringer of Flava's Reproduction and Distribution Rights because the conduct it facilitates did not infringe Flava's copyright. While the Digital Millennium Copyright Act provides that a website is a contributory infringer for "referring or linking users to an online location containing infringing material," the Court did not extend that rule to this context because it found that "taken literally, it would make the publication, online or otherwise, of any contact information concerning a copyrighted work a form of contributory infringement." Instead, it found that "as long as the visitor makes no copy of the copyrighted video that he is watching, he is not violating the copyright owner's Reproduction and Distribution Rights." MyVidster allows its visitors to share videos they find on other websites by placing a link to the website on myVidster.com. When a myVidster visitor clicks on the link to view the video an embed code is triggered that transmits the video directly from the server that hosts the video to the user's computer. The Court explained that viewing a copyrighted video in this manner is equivalent to "stealing a copyrighted book from a bookstore and reading it." Thus while the Court conceded that viewing copyrighted videos in this manner is a "bad thing to do," it concluded that it is not infringing because the users did not upload or copy the videos.

The Court explained that myVidster would be liable for inducing copyright infringement if Flava could demonstrate that the video was uploaded by a myVidster member and that myVidster "invited people to post copyrighted videos on the Internet without authorization or bookmark them on its website." However, it found that even though myVidster knew that some of the videos bookmarked on its site infringed copyright it did not encourage its users to view the infringing material or profit from visitors who watch bookmarked videos.

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The Court further found that even if myVidster was a contributory infringer, "[its] effect on the amount of infringement of Flava's videos" might be too remote to warrant damages. For example, it found that the default setting on myVidster blocks the genre of films that Flava produces (gay pornography), there is no information in the record concerning Flava's market share or whether any visitors clicked on any of the bookmarks and thus watched Flava's videos, and Flava has identified only 300 bookmarks of copyrighted Flava videos. Moreover, while Flava claims that its sales have fallen by 30 to 35 percent and has lost more than $100,000 in revenue, the Court found that "the loss in revenue can't be ascribed entirely to myVidster" because Flava did not explain when the decline in revenue occurred and acknowledged that there are at least 12 similar websites that provide access to Flava's videos.

The Court also rejected Flava's contention that myVidster infringed its exclusive right "to perform [its] copyrighted works publicly" in violation of 17 U.S.C. § 106 (4) by activating the embed code that transmits its copyrighted videos from the server to the viewer's computer because it found that myVidster did not "transmit" Flava's videos, as required by Section 106 (4). The Court rejected the argument that "uploading plus bookmarking a video is a public performance because it enables a visitor to the website to receive (watch) the performance at will" because it found it "odd to think that every transmission of an uploaded video is a public performance." Instead, it held that: (1) a work is "transmitted" to the public when done "in a form in which the public can visually or aurally comprehend the work" and (2) performance begins by the actions of the viewer rather than the uploader of the copyrighted video. Applying this standard the Court found that myVidster did not "transmit" the copyrighted videos because it did not upload any videos. It thus explained that myVidster's actions are equivalent to "a magazine that lists the names and address of theatres where a video is being played" because neither "touch[es] the data stream" or "provide[s] a market for pirated works." However, it also requested "legislative clarification of the public-performance provision of the Copyright Act."

United States Court of Appeals for the Seventh Circuit, No. 11-3190, Flava v. MyVidster, 2 August 2012

https://www.eff.org/document/flava-works-v-myvidster-pi-appeal-posner

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