

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ATLANTIC RECORDING
CORPORATION, LAFACE
RECORDS LLC, SONY MUSIC
ENTERTAINMENT, UMG
RECORDINGS INC., WARNER
BROS. RECORDS INC.,

Plaintiffs,

v.

SPINRILLA, LLC and JEFFERY
DYLAN COPELAND,

Defendants.

Civil Action No.
1:17-CV-00431-AT

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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INTRODUCTION

Defendants own and operate a website and associated mobile apps known together as “Spinrilla,” an online music service that Defendants promote as “the 800-lb gorilla of free hip-hop mixtapes.” Plaintiffs allege in their Complaint that, through the Spinrilla website and apps, Defendants have willfully engaged in, and have knowingly contributed to, profited from and induced, the widespread infringement of Plaintiffs’ copyrighted sound recordings.

In their defense against Plaintiffs’ claims, Defendants rely chiefly on the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512, which established “safe harbors” to shield online service providers from monetary liability for copyright infringement in certain specified circumstances. Defendants contend that they “are shielded from liability by the ... DMCA” from Plaintiffs’ copyright infringement claims here. Answer ¶ 2, Dkt. No. 22, at 2. Defendants are wrong as a matter of law.

The DMCA imposes strict requirements of eligibility for the safe harbors, which Defendants have not satisfied. Most notably, to be eligible for protection under the DMCA safe harbor on which Defendants rely, an online service provider must, among other things, register with the United States Copyright Office a “[d]esignated agent” to receive notifications of infringement, *see* 17 U.S.C. §

512(c)(2), *and* “adopt[] and reasonably implement[], and inform[]” its users of a policy for terminating users who are “repeat infringers,” 17 U.S.C. § 512(i). Although the failure to meet either requirement would foreclose Defendants’ claim to the safe harbor, Defendants have failed to meet both. Accordingly, Defendants are ineligible for the DMCA’s safe harbor as a matter of law, and Plaintiffs are entitled to summary judgment on Defendants’ DMCA affirmative defense.

The issue of Defendants’ ineligibility for the DMCA safe harbor is ripe for adjudication now. There are no genuine disputes of material fact. Defendants have not registered a designated DMCA agent with the Copyright Office and have not adopted, communicated, or reasonably implemented a policy that prevents repeat infringement. Either of these undisputed facts alone renders Defendants ineligible for the protections of the DMCA. And, because Defendants have pinned their defense to liability almost entirely on the DMCA, a ruling now that Defendants are ineligible for the DMCA safe harbor will substantially streamline—if not end entirely—this litigation going forward. The Court should therefore grant Plaintiffs’ motion for partial summary judgment now.

BACKGROUND

Defendants launched Spinrilla.com in early 2013, promoting the website as “the 800-lb gorilla of free hip-hop mixtapes.” *See* Statement of Undisputed Facts

(“SUF”) ¶ 2. Through the Spinrilla website and associated mobile apps, users with an “artist account” upload “mixtapes” (*i.e.*, collections of sound recordings) that any other user can then download or stream for free. *Id.* ¶¶ 3-5. Since its launch, Spinrilla has become enormously popular, with millions of users visiting the Spinrilla website and millions more downloading the Spinrilla apps on their mobile devices. *Id.* ¶ 2.

Although Defendants contend that Spinrilla is a vehicle for “independent artists” to upload their own musical content for others to stream and download, *see, e.g.*, Joint Preliminary Report and Discovery Plan at 3-4, Dkt. No. 25. Plaintiffs allege that, in fact, vast amounts of the content available on Spinrilla is infringing, including thousands of unauthorized instances of Plaintiffs’ highly-valuable, copyrighted sound recordings. *See* Complaint ¶¶ 2, 69, Dkt. No. 1. Plaintiffs allege further that this massive infringement is by Defendants’ design and that the availability of infringing copies of Plaintiffs’ sound recordings serves as a draw to users of Spinrilla from which Defendants have reaped substantial ill-gotten profits. *Id.*

On fifty-nine occasions between March 4, 2015 and February 6, 2017, Plaintiffs, through their investigators at the Recording Industry Association of America (“RIAA”), sent notices to Defendants identifying more than 400 instances

of infringing copies of Plaintiffs' copyrighted sound recordings on the Spinrilla system. SUF ¶ 10. As part of that process, Plaintiffs sent targeted notices to Defendants once a week, every week, between July 27 and November 11, 2016, identifying infringements of Plaintiffs' copyrighted sound recordings by nine different Spinrilla "artist accounts." SUF ¶ 13. Several of these "artists" are responsible for uploading the most popular (*i.e.*, the most streamed or downloaded) "mixtapes" on all of Spinrilla, and all nine uploaded infringing content that was identified in multiple weekly notifications. *Id.* For example, one such "artist" uploaded a new mixtape each week for over *80 consecutive weeks*, each containing sound recordings that the RIAA identified to Spinrilla as infringing, including recordings by such well-known major label artists as Bruno Mars, The Weeknd, Missy Elliott, Common, and Ludacris. SUF ¶ 24.

Despite having received these regular infringement notices, Defendants did nothing to address any of the repeat infringers, all but one of these nine accounts have continued to operate on Spinrilla without interruption, and each of these "artists" continues to upload infringing content on a regular basis. SUF ¶ 18.

On February 3, 2017, Plaintiffs filed this action asserting claims of direct and secondary copyright infringement against Defendants. Complaint, Dkt. No. 1. On

March 15, 2017, Defendants filed their Answer, asserting the DMCA safe harbors as their primary affirmative defense. Answer ¶¶ 2, 9, Dkt. No. 22 at 2, 3.

LEGAL STANDARD

Any party may move for summary judgment as to a “part of each claim or defense.” Fed. R. Civ. P. 56(a). Summary judgment is proper if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A party opposing a motion for summary judgment must come forward with “competent evidence beyond the pleadings to show that there is a genuine issue for trial.” *S. Pilot Ins. Co. v. CECS, Inc.*, 52 F. Supp. 3d 1240, 1242 (N.D. Ga. 2014) (citing *Celotex*, 477 U.S. at 324-26). Where the movant has carried its burden under Rule 56(a), “[t]he non-moving party’s response to the motion for summary judgment must consist of more than conclusory allegations, and a mere ‘scintilla’ of evidence will not suffice.” *Camacho v. Nationwide Mut. Ins. Co.*, 13 F. Supp. 3d 1343, 1349 (N.D. Ga. 2014) (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)). “If the [non-moving party’s] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (internal citations omitted).

ARGUMENT

The DMCA's safe harbors were enacted as a compromise that sought to protect copyright holders from massive online infringement while also protecting innocent service providers whose services are used by others to infringe. *See, e.g., Mavrix Photographs, LLC v. LiveJournal, Inc.*, 853 F.3d 1020, 1026-27 (9th Cir. 2017) (discussing background of DMCA); *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) ("The DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for 'passive,' 'automatic' actions in which a service provider's system engages through a technological process initiated by another without the knowledge of the service provider." (citing H.R. Conf. Rep. No. 105-796, at 72 (1998); H.R. Rep. No. 105-551(I), at 11 (1998))). The strict eligibility rules for the DMCA safe harbors are intended to ensure that "[t]his immunity ... is not presumptive, but granted only to 'innocent' service providers...." *ALS Scan*, 239 F.3d at 625.

Moreover, "the DMCA's safe harbors, as with all immunities from liability[,] should be narrowly construed." *Capitol Records, LLC v. Escape Media Grp., Inc.*, No. 12-CV-6646, 2015 WL 1402049 at *10 (S.D.N.Y. Mar. 25, 2015) (quotation marks omitted; alterations in original). Defendants, like any "party asserting [the]

DMCA's safe harbor as an affirmative defense to a claim of copyright infringement[,] ha[ve] the burden of demonstrating entitlement to its protections." *Disney Enters., Inc. v. Hotfile Corp.*, No. 11–20427–CIV, 2013 WL 6336286 at *19 (S.D. Fla. Sept. 20, 2013); *see also, e.g., Mavrix Photographs*, 853 F.3d at 1027 (service provider "must establish 'beyond controversy every essential element,' and failure to do so will render [the service provider] ineligible for the ... safe harbor's protection." (citations omitted)). Defendants cannot meet this burden as a matter of law.

Defendants assert the "Section 512(c)" safe harbor, which applies when infringing content is stored on the service provider's system at the direction of a user of that system. Answer ¶¶ 2, 9, Dkt. No. 22 at 2, 3; 17 U.S.C. § 512(c). To qualify for the Section 512(c) safe harbor, the service provider needs to establish, at a minimum, *both* of the following: (1) that defendants properly complied with the DMCA requirements for registration and disclosure of a DMCA "designated agent," 17 U.S.C. § 512(c)(2); *and* (2) that defendants have adopted, communicated to users and "reasonably implemented" a policy for terminating users who are "repeat infringers," 17 U.S.C. § 512(i). Because both are necessary preconditions to eligibility for the DMCA safe harbor, Defendants' failure to satisfy *either one* of

these requirements automatically disqualifies Defendants from the protections of the safe harbor. As shown below, Defendants have failed to satisfy *both* requirements.

I. DEFENDANTS ARE INELIGIBLE FOR THE DMCA SAFE HARBOR BECAUSE THEY FAILED TO REGISTER A DESIGNATED AGENT WITH THE UNITED STATES COPYRIGHT OFFICE

As a prerequisite to the safe harbor, the DMCA requires service providers to identify and disclose a DMCA “designated agent”:

The limitations on liability established in this subsection apply to a service provider *only if* the service provider has designated an agent to receive notifications of claimed infringement ..., by making available through its service, including *on its website* in a location accessible to the public, *and* by providing to *the Copyright Office*, substantially the following information: (A) the name, address, phone number, and electronic mail address of the agent....

17 U.S.C. § 512(c)(2) (emphasis added). Under Section 512(c)(2), Spinrilla is not even *potentially* eligible for a safe harbor unless and until it has designated a DMCA agent both by identifying the agent on the Spinrilla website *and* by registering that agent with the Copyright Office.

It is undisputed that Defendants have not registered a designated DMCA agent for Spinrilla with the Copyright Office, as Section 512(c)(2) requires. *See* SUF ¶ 6. This single, undisputed fact by itself establishes that Defendants are ineligible for the DMCA safe harbor.

Congress was unequivocal that a service provider is eligible for the safe harbor “only if” it complies with Section 512(c)(2). The statutory language is clear and its mandate is express. Indeed, every court to decide the issue has held that failure to register a designated agent with the Copyright Office operates as a complete bar to the DMCA safe harbor. *See, e.g., Oppenheimer v. Allvoices, Inc.*, No. C 14-00499(LB), 2014 WL 2604033, at *5 (N.D. Cal. June 10, 2014) (holding that the defendant “may not invoke the safe harbor found in Section 512(c)(1) with respect to infringing conduct that occurred prior to [the defendant’s] designating a DMCA-related agent with the Copyright Office”); *Hotfile*, 2013 WL 6336286 at *26 (failure to register an agent with Copyright Office precludes defendants from claiming the protection of the safe harbor provision for the period prior to registration (citing *Perfect 10, Inc. v. Yandex N.V.*, No. C 12–01521 WHA, 2013 WL 1899851 at *3 (N.D. Cal. May 7, 2013))); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C 07-03952 JW, 2010 WL 5598337, at *6-7 (N.D. Cal. Mar. 19, 2010) (same), *aff’d in part, vacated in part* 658 F.3d 936 (9th Cir. 2011); *Perfect 10, Inc. v. Rapidshare A.G.*, No. 09-CV- 2596 H (WMC), 2010 WL 11509105, at *7 (S.D. Cal. May 18, 2010); *CoStar Grp. Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 697 n.4 (D. Md. 2001), *aff’d*, 373 F.3d 544 (4th Cir. 2004); *see also, e.g., BWP Media USA Inc. v. Hollywood Fan Sites LLC*, 115 F. Supp. 3d 397, 400, 403 (S.D.N.Y. 2015).

That Defendants may have included on the Spinrilla website an email address for the submission of notices of infringement is immaterial, as is the fact that Plaintiffs have sent notices of infringement to that email address. As the *BWP Media* court explained in materially identical circumstances:

[T]he statutory scheme expressly requires two publicly available, parallel sources of a service provider’s DMCA agent information (the service provider’s website and the USCO directory) in order for that provider to be shielded by the § 512(c) safe harbor. For this reason, Defendants’ assertion that agent information was provided on [their] websites cannot save [Defendants] from disqualification for the § 512(c) safe harbor. *See Perfect 10, Inc. v. Yandex N.V.*, No. C 1201521(WHA), 2013 WL 1899851, at *8 (N.D. Cal. May 7, 2013) (“The statute plainly specifies that a registered agent is a predicate, express condition — the safe harbor will apply ‘only if’ such agent has been designated and identified to the Copyright Office for inclusion in the directory of agents.”). Moreover, the fact that [Defendants] may have actually received notices of infringement, and consequently removed the images claimed to be infringing, is also insufficient. *See id.* (“[The defendant’s] objection that it received and processed the DMCA notices without having an agent registered with the United States Copyright Office is irrelevant to whether it complied with Section 512(c)(2)...”).

BWP Media, 115 F. Supp. 3d at 403.¹

¹ Defendants’ provision of an email address for the submission of takedown notices is also insufficient to satisfy the DMCA’s requirement that agent contact information on the service provider’s website include “the name, address, phone number, and electronic mail address of the agent....” 17 U.S.C. § 512(c)(2). The Spinrilla website includes only a bare email address, with no name, address or phone number. *See* SUF ¶ 7.

By not registering a designated agent with the Copyright Office, Defendants have failed to meet an express precondition for the DMCA safe harbor. And even if they were to register a designated agent tomorrow, it would still not relieve Defendants from liability for infringements occurring before that date. *See, e.g., BWP Media*, 115 F. Supp. 3d at 400 (“A service provider cannot retroactively qualify for the safe harbor for infringements occurring before the proper designation of an agent under the statute.”); *Oppenheimer*, 2014 WL 2604033, at *5 (same). For this reason alone, Defendants are ineligible for the safe harbor and Plaintiffs are entitled to summary judgment on this affirmative defense.

II. DEFENDANTS ARE ALSO INELIGIBLE FOR THE DMCA SAFE HARBOR BECAUSE THEY FAILED TO ADOPT, REASONABLY IMPLEMENT, OR COMMUNICATE TO USERS A “REPEAT INFRINGER” POLICY

A separate precondition of safe harbor eligibility—wholly independent of the requirement of registering a designated agent—is that the service provider

has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers[.]

17 U.S.C. § 512(i). This requirement includes three primary components: (1) that the service provider adopt a repeat infringer policy that provides for termination of users in appropriate circumstances, (2) that the service provider communicate that

policy to its users, and (3) that the service provider “reasonably implement” that policy. *Id.*; *see also, e.g., Escape Media*, 2015 WL 1402049 at *5. Defendants have failed to meet all three of these conditions, rendering them ineligible for the DMCA safe harbor.

A. Defendants Failed To Adopt And Communicate To Users A “Repeat Infringer” Policy And Have Already Admitted As Much

Until just this week, the terms of a repeat infringer policy were nowhere to be found on the Spinrilla website or on its associated apps. *See* SUF ¶ 9.² This is not surprising, as Defendants readily admit that they had never adopted—let alone communicated to users—a repeat infringer policy. According to Defendants, they “*had no motivation to create*” such a policy because they “believed” that their

² Within just the past few days, Defendants have added to the Spinrilla website and mobile apps a new “Terms of Service” page that provides, for the first time anywhere on the website or the apps, that purports to be a “Repeat Infringer” policy. SUF ¶ 9; Declaration of Carlos Linares, dated July 28, 2017, ¶¶ 19-20. Even if this new policy were to qualify as a repeat infringer policy, it cannot retroactively qualify Defendants for the DMCA safe harbor for infringements that pre-date its appearance. *Id.*; *see also, e.g., BWP Media*, 115 F. Supp. 3d at 400; *Oppenheimer*, 2014 WL 2604033, at *5. And, of course, merely stating a repeat infringer policy does not mean that the policy has been reasonably implemented, as discussed below.

alleged implementation of an automated content recognition service would prevent infringement from occurring on the Spinrilla system. SUF ¶ 8 (emphasis added).

Setting aside whether Defendants’ purported “belief” in the effectiveness of their alleged implementation of a content recognition service to prevent infringement was reasonable—which it obviously was not, given the hundreds of instances of infringement that Plaintiffs have regularly called to Defendants’ attention for nearly two years (*see* SUF ¶ 10)—such a belief cannot obviate the clear and unambiguous statutory requirement that, to be eligible for a safe harbor, Defendants must have adopted and communicated to users a repeat infringer policy.

In *Hotfile*, defendants also claimed that their program of allowing automatic removals of infringing content was sufficient to qualify them for the DMCA safe harbor. *See, e.g., Hotfile*, 2013 WL 6336286 at *23 & n.15. The court rejected that defense, holding that the program was “legally insufficient because, by its plain language, Section 512(i) requires user termination, thereby targeting future infringement from an individual who is deemed likely to recidivate.” *Id.* The court explained that, “while Section 512(c) requires service providers to remove infringing material, Section 512(i) targets the source of that infringement.” *Id.* Steps that a service provider “claims to have taken to prevent repeat infringement [that] relate to

[the] handling of particular files and not their users” are thus insufficient to meet the DMCA’s requirement of a repeat infringer policy. *Id.*

Defendants here are no different in this respect. Having failed to adopt and communicate to their users a repeat infringer policy, Defendants cannot avail themselves of the DMCA’s protections.

B. Defendants Have Failed To Reasonably Implement A Repeat Infringer Policy

“The requirement that service providers implement a repeat infringer policy is a ‘fundamental safeguard for copyright owners’ and ‘essential to maintain[ing] the strong incentives for service providers to prevent their services from becoming safe havens or conduits for known repeat copyright infringers.’” *BMG Rights Mgmt. (US) LLC v. Cox Commc’n, Inc.*, 149 F. Supp. 3d 634, 653 (E.D. Va. 2015) (quoting *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 637 (S.D.N.Y. 2011) (alteration in original), *aff’d sub nom., EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016), *cert. denied*, No. 16-1227, 2017 WL 1365643 (U.S. June 19, 2017)). Because they failed even to adopt—let alone communicate to users—a repeat infringer policy, Defendants had no policy to implement. For this reason alone, they are ineligible for the DMCA safe harbor.

Even if Defendants had adopted a repeat infringer policy—which they concede they did not—Defendants’ implementation of that policy could in no way

be regarded as “reasonable” for purposes of Section 512(i). In fact, although Plaintiffs sent infringement notices to Defendants for nearly two years preceding this lawsuit, Defendants claim to have terminated only *two* Spinrilla user accounts for copyright infringement from the inception of the business until the filing of this lawsuit. *See* SUF ¶ 19. Such utter disregard for the problem of repeat infringement on their service is not reasonable by any measure and deprives Defendants of eligibility for the DMCA safe harbor.

Indeed, in addition to their more general practice of sending infringement notices to Defendants for nearly two years, Plaintiffs sent targeted notices to Defendants at least once a week, every week, between July 27 and November 11, 2016 (a total of 23 separate notices), identifying more than 280 infringements of Plaintiffs’ copyrighted sound recordings by nine different Spinrilla “artist accounts.” *See* SUF ¶ 13. Several of these “artists” are responsible for uploading the most popular (*i.e.*, the most streamed or downloaded) “mixtapes” on all of Spinrilla, and all nine uploaded infringing content that was identified in multiple weekly notifications. *Id.* Despite having received these regular infringement notices, Defendants did nothing to address any of the repeat infringers. To this day—more than five months since the filing of this lawsuit—all but one of these nine accounts have continued to operate on Spinrilla without interruption, and each of these

“artists” continues to upload infringing content on a regular basis. *Id.* ¶ 19. In fact, since November 11, 2016, these accounts have uploaded unauthorized and infringing copies of Plaintiffs’ sound recordings that, taken together, have been downloaded by the public over *3 million times* and streamed over *11 million times*. *Id.* ¶¶ 22, 25, 28, 31, 34, 37, 40.

No reasonable implementation of a repeat infringer policy would allow the accounts of such extensive and blatant repeat infringers to continue in this manner. *See, e.g., BMG Rights Mgmt.*, 149 F. Supp. 3d at 658 (“To implement the repeat infringer policy contemplated by § 512(i), the penalty imposed by service providers must be termination. . . . Service providers cannot skirt the termination requirement by imposing something short of complete termination of a subscriber or account holder.”); *Escape Media*, 2015 WL 1402049 at *10-13 (granting summary judgment to plaintiff on DMCA defense where defendants merely restricted, rather than terminated, accounts of repeat infringers and where numerous such users “received DMCA takedown notices for an upload that occurred *after* the user had already received a prior DMCA takedown notice.” (emphasis in original)); *Hotfile*, 2013 WL 6336286 at *22 (granting summary judgment to plaintiffs on DMCA defense where defendants failed to terminate “61 users who had accumulated more than 300 notices each.”). Thus, even if Defendants had implemented a repeat infringer policy—

which even they admit they have not done—they did not do so “reasonably” and, accordingly, are ineligible for the DMCA safe harbor.

CONCLUSION

For the foregoing reasons, the Court should grant partial summary judgment in Plaintiffs’ favor on Defendants’ DMCA affirmative defense and hold that Defendants are ineligible for the DMCA safe harbor.

July 28, 2017

Respectfully submitted,

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I, Ava U. McAlpin, an attorney, hereby certify that the foregoing has been prepared with a font size and point selection (Times New Roman, 14 pt.) which is approved by the Court pursuant to Local Rules 5.1(C) and 7.1(D).

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CERTIFICATE OF SERVICE

I, Ava U. McAlpin, an attorney, hereby certify that on this 28th day of July, 2017, the foregoing papers were electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send electronic notification and a service copy of this filing to all counsel of record who have appeared in this matter.

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