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# Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, to usher copyright law into the digital era. The ease and efficiency of digital copying and distribution seemingly threatened to increase infringing activity and undermine the rights of copyright holders. Some internet companies feared that if they were held liable for infringing material hosted on their platforms, it would impair their business models and stifle technological innovation. As a compromise, Congress created the DMCA “safe harbor” provisions, codified at 17 U.S.C. § 512 (section 512). These safe harbors shelter online service providers (OSPs) from liability for indirect copyright infringement on their platforms under certain conditions, while also encouraging OSPs to cooperate with copyright owners in combating infringement online.

## Copyright Basics

Copyright law grants creators of expressive works a set of exclusive rights in their creations. The central purpose of copyright law is to encourage the creation and dissemination of knowledge and learning by providing incentives for the creation of new works.

Copyright protection attaches to a broad range of creative expression, including literary works (including computer code); musical works; dramatic works; choreographic works; pictorial, graphic, and sculptural works; audiovisual works (movies and television); architectural works; and sound recordings. Copyright holders have the exclusive right to prepare derivative works, and to reproduce, distribute, and publicly display or perform their works. The current copyright term generally lasts for the life of the author plus seventy years. An important limitation on these rights is fair use, a judicially created doctrine that permits certain socially valuable uses (e.g., quotations for literary criticism) based on four factors: (1) the purpose and character of the use; (2) the nature of the underlying copyrighted work; (3) the amount and substantiality of the copyrighted work taken; and (4) the use’s effect on the market for the copyrighted work.

To enforce their rights, copyright holders may file lawsuits against alleged infringers—that is, persons who prepare unauthorized derivative works, or reproduce, distribute, or perform the copyrighted work without permission. Persons who take one of these actions themselves are called *direct* infringers. In some situations, third parties can be liable for the direct infringement of another person. *Vicarious* liability occurs when a third party has the legal right and practical ability to control infringing activity and receives a direct financial benefit from the infringement. *Contributory* liability arises when a third party has actual or constructive knowledge of specific instances of infringement, and

induces or materially contributes to the infringing conduct. Prior to the DMCA, internet companies that transmitted and stored user-generated content were concerned about the legal implications of hosting infringing material on or through their systems and platforms.

## The Safe Harbor Provisions

To address these concerns, the DMCA limits the liability of OSPs for copyright infringement. Section 512 includes four different safe harbors, limiting the OSPs’ liability for infringing material that OSPs (a) transmit, route, or provide connections for through their systems; (b) cache or temporarily store on their systems; (c) store on their systems at the direction of their users; and (d) link or refer to the online location of, by using information location tools, such as directories.

The safe harbor provisions do not generally require OSPs to monitor their own systems actively for infringing materials. With the growth of online platforms that exist primarily to host user-generated content (e.g., YouTube), the section 512(c) safe harbor has grown in significance.

## Eligibility for Safe Harbors

Each safe harbor provision has its own eligibility requirements, but there are three general requirements that apply to all four safe harbors.

First, the entity seeking protection under section 512 must meet the statutory definition of “service provider,” a definition that varies depending on which safe harbor provision applies. For section 512(c), a service provider is defined as “a provider of online services or network access, or the operator of facilities therefor.” This definition appears to be purposefully broad and is understood to encompass (at a minimum) providers offering email services, hosting services, and internet access. This definition seemingly includes entities that are not in the business of providing online services, but incidentally perform such functions (e.g., a media company with a website that hosts user comments).

Second, the OSP must “adopt[] and reasonably implement[] . . . a policy that provides for the termination in appropriate circumstances of” users who are determined to be “repeat infringers” of copyrighted material. The OSP must also inform users that it has a method of terminating repeat infringers’ accounts. The OSP’s process of identifying and sanctioning repeat infringers does not need to work perfectly to satisfy this provision. Cases such as *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597 (9th Cir. 2018), hold that the termination policy simply needs to work a reasonable amount of the time. This case also

suggests that the details of the repeat infringer policy need not be written, just that the site must inform subscribers of its policy in “appropriate circumstances.”

Third, the OSP must “accommodate[]” and cannot “interfere with standard technical measures” that exist to combat copyright infringement. The statute defines “standard technical measures” as those “used by copyright owners to identify or protect copyrighted works” and that were “developed pursuant to a broad consensus of copyright owners and service providers.” These measures must be available to all on “reasonable and nondiscriminatory terms” and must not “impose substantial costs on service providers.” The U.S. Copyright Office has questioned the efficacy of this provision, noting that there is nothing that currently qualifies as a “standard technical measure” because no measure with “broad consensus” has emerged through a “multi-industry . . . process.”

### Section 512(c) Eligibility Requirements

Under section 512(c), the most widely used safe harbor, OSPs must satisfy three further eligibility requirements.

First, an OSP cannot have actual or constructive knowledge of the infringing material on its platform. *Actual knowledge* arises when a copyright owner notifies an OSP of infringing material on its platform. *Constructive knowledge*, articulated in the “red flag” provision, arises when an OSP is “aware of facts or circumstances from which infringing activity is apparent” to a reasonable person. The bar for establishing knowledge under the red flag provision is generally considered to be high. In *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), for example, providing services to a site titled “stolencelebritypics.com” was insufficient to establish constructive knowledge of infringing content.

The knowledge requirement further demands that an OSP be aware of specific and identifiable instances of infringement; general awareness of infringing activity on its platform is insufficient. However, if an OSP deliberately employs measures to avoid learning about specific infringing material, such “willful blindness” may be considered equivalent to actual knowledge. If an OSP receives actual or constructive knowledge of infringement, it has a legal duty to “expeditiously” remove the infringing material through the takedown process described below.

Second, an OSP may take advantage of section 512(c) only if it “does not receive a financial benefit directly attributable to the infringing activity,” and it has the legal right and practical “ability to control such activity.” The courts’ understanding of direct financial benefit has evolved over time. Initially, courts seemingly favored a narrower interpretation, requiring that the infringing activity serve as a draw for paying customers, rather than simply an added benefit to the platform. More recently, however, courts appear willing to consider benefits such as advertising revenue in the direct financial benefit analysis.

For an OSP to exert the requisite amount of control to disqualify it from section 512(c)’s safe harbor, it must have substantial influence on its users’ activities, such as dictating the appearance of content, forbidding certain types

of material on its platform, or directly inducing users to upload infringing content. The ability of OSPs to remove material from their platforms or to exclude users is not in itself enough to constitute sufficient control.

Third, an OSP must designate an agent to receive notifications of infringing content hosted on its platform. The OSP must make the name and contact information of its agent available to the public on its website and register the designated agent with the U.S. Copyright Office.

### The Notice-and-Takedown Process

When an OSP is notified of infringing content on its platform, this triggers statutorily delineated procedures known as the notice-and-takedown process. First, the OSP must “expeditiously . . . remove[] or disable access to” the allegedly infringing material. Next, the OSP must take “reasonable steps” to notify the user who uploaded the infringing content about its removal. If the original uploader responds by sending a counter-notification to the OSP claiming the content was not infringing, the OSP must restore the removed content in ten to fourteen business days. The OSP is not required to restore the removed content if the person who submitted the takedown notice files an action in court against the original uploader within fourteen days of receiving the OSP’s notice of restoration and notifies the OSP of the pending lawsuit.

If an OSP does not abide by the above procedure, it can be held liable for infringement. Section 512 also creates a cause of action against “[a]ny person who knowingly materially misrepresents” content as infringing in a takedown notice. As part of this provision, copyright owners must consider common defenses to infringement, such as fair use, before sending a takedown notice.

### The Safe Harbors in Action

The U.S. Copyright Office recently reported on stakeholders’ opinions regarding section 512’s effectiveness. OSPs generally praised the provision, expressing the view that the safe harbors are vital to the growth and success of an open and innovative internet. On the other hand, many content creators and copyright holders criticized section 512, with some suggesting that a greater burden be placed on OSPs to police their own platforms for infringing content. They argued that OSPs now have the technological expertise to address infringement on a large scale, noting that the resources required for content creators to monitor the internet for infringement have proven to be prohibitively expensive. Many content creators cited an immense increase in takedown notices as an indication that section 512 has not “sufficiently addressed the continued proliferation of online infringement.”

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