BEFORE THE UNITED STATES COPYRIGHT OFFICE

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year.

LCA welcomes the opportunity to explain the importance to libraries of the safe harbors provided by Section 512 of the Digital Millennium Copyright Act (DMCA). The comments also address how some rights-holders have abused the DMCA's notice and takedown process, and propose possible amendments to curtail this abuse.

1. Are the section 512 safe harbors working as Congress intended?

The section 512 safe harbors are the result of extensive negotiations between rights holders and technology companies over two Congresses. Congress adopted both the statutory language and the report language drafted by these stakeholders with few, if any, changes. The safe harbors are working exactly as the stakeholders and Congress intended.

2. Have courts properly construed the entities and activities covered by the section 512 safe harbors?

The courts in general have properly interpreted section 512. The courts have correctly understood that Congress intended to establish a framework of shared responsibility between rights holders and service providers to address online infringement. This framework would balance the interests of rights holders, service providers and users to promote the development of a robust Internet and the creation of works of authorship. The circuit courts in decisions such as *Recording Industry Association of America v. Verizon*, *Ellison v. Robertson*, *CoStar v. LoopNet*, *ALS Scan v. Remarq*, *Perfect 10 v. CCBill*, *Verizon v. YouTube*, *UMG Recordings v. Shelter Capital Partners*, and *Lenz v. Universal Music Corp*. have maintained the balance Congress intended as they have interpreted and applied Section 512's complex provisions.

3. How have section 512's limitations on liability for online service providers impacted the growth and development of online services?

The section 512(a) "mere conduit" safe harbor in section 512(a) has enabled libraries to provide Internet access to its users; the section 512(c) "hosting" safe harbor has permitted to research libraries to serve as institutional repositories for open access materials; and the section 512(d) "linking" safe harbor has allowed libraries to provide information location services to users.

A. Internet Access

Not only large commercial entities such as Verizon and AT&T act as "service providers" within the meaning of section 512(k)(1)(A). Libraries play this role as well. In the United States, we don't have Internet cafes that provide users with the hardware necessary for Internet access. While Starbucks has Wi-Fi, it doesn't supply laptops. And

although increasingly more Americans at all income levels own smart phones, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare, on a smart phone. Libraries are the only source for free Internet connectivity and Internet-ready computer terminals for most Americans.

Public libraries provide the public with access to over 271,000 Internet-ready computer terminals.[1] In 2012, there were 340.5 million user-sessions on these computers. There were 227 computer uses per 1,000 visits to public libraries. Public libraries in rural areas had the highest ratio of Internet accessible computers: 7.5 computers per 5,000 people.

A 2013 survey by the Pew Internet and American Life Project found that 60% of those who used the Internet at a library in the past 12 months did research for school or work; 42% say they got health information; 42% say they visited government websites or got information about government services; and 23% say they looked for jobs or applied for jobs online.[2]

A study performed by the Information School of the University of Washington for the Institute of Museum and Library Services demonstrated the importance of the Internet access provided by public libraries to people below near or below the poverty line. The study found that in 2009, over 77 million people accessed the Internet from public

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[1] Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2012* (2015), https://www.imls.gov/sites/default/files/legacy/assets/1/AssetManager/PLS_FY2012.pdf.

[2] Pew Internet & American Life Project, *Libraries at the Crossroads*, http://www.pewinternet.org/2015/09/15/libraries-at-the-crossroads/. A 2013 survey also showed 16% of Internet users at libraries paid bills or did online banking and 16% took an online class or completed an online certification program. Pew Internet & American Life Project, *Library Services in the Digital Age* (2013), http://libraries.pewinternet.org/2013/01/22/Library-services/

libraries in the United States.[3] Forty-four percent of people below the poverty line used library computers for Internet access and other services. Among young adults below the poverty line, the level of usage increased to 61%.[4]

A 2012 study on the economic benefit of Texas public libraries found that Internet access via library computer terminals saved users over $300 million in 2011.[5] The Wi-Fi provided by the Texas libraries saved users over another $20 million. 62% of the Texas library directors said that the Internet access was "extremely beneficial" to users, while a further 20% indicated that it was "quite beneficial." 56% of the directors said that Internet access was the single most important resource provided by their libraries. The users' online activities included: performing homework for classes from grade school to college; taking continuing education courses; training and testing for job certifications and licenses; looking, and applying for, jobs; applying for unemployment benefits and social assistance; applying for disaster aid as well as finding family during and after natural disasters; working short–term, paid online jobs; developing and operating businesses by placing and receiving orders; researching price comparisons; marketing new products; using online banking; and filing taxes. Numerous library directors indicated that some users were running small businesses entirely via Internet at their library.

The Texas directors noted that even users with home Internet access use the library Internet access because of its greater bandwidth and faster service. Additionally,

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[3] Samantha Becker, *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries* 2 (2010), http://www.imls.gov/pdf/OpportunityForAll.pdf.
[4] *Id*. at 5-8.
[5] Bureau of Business Research, IC2 Institute, University of Texas at Austin, *Texas Public Libraries: Economic Benefits and Return on Investment*, 2012, at 39-42.

not all users have the option of Internet access at their residence. "Ranchers and others in rural area in particular have difficulty obtaining reliable and reasonably priced Internet at their residences." Further, numerous directors reported that users with laptops accessed their libraries' wireless service after normal hours; they cited examples of users parking near the library when the library was closed to access an Internet connection.

Lack of connectivity is more than a rural issue. A study of the public libraries in New York City found that 2.9 million residents don't have broadband access at home.[6] Thus, between 2002 and 2011, the libraries have increased their total number of public access computers by 89%. Between 2007 and 2011, the number of computer session logged at public computers in the city's libraries grew by 62%, from 5.8 million sessions in 2007 to over 9.3 million sessions in 2011.

The section 512(a) safe harbor for "mere conduits" has enabled libraries to provide Internet access without the specter of liability for onerous copyright damages because of infringing user activity. Any alteration of the DMCA's framework, either directly by amendment of 17 U.S.C. § 512(a) or indirectly by imposition of new obligations on Internet access providers, could have an adverse effect on the ability of libraries of all types to deliver a critical service to underserved and other user communities.[7]

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[6] Center for the Urban Future, *Branches of Opportunity,* 2013, at 6.

[7] At many colleges and universities, the libraries participate in the administration of campus-wide Internet access services. Under the Higher Education Opportunity Act, educational institutions have significantly more obligations to address copyright infringement by subscribers than do commercial Internet service providers. *See* http://www.educause.edu/library/higher-education-opportunity-act-heoa.

B. Institutional Repositories

With the growth of open access scholarly communications, libraries increasingly act as online institutional repositories where academic authors can post papers, articles, and theses.[8] The section 512(c) safe harbor shelters libraries from liability for infringing material that may be contained in the materials posted by third parties. Although libraries and other university departments thus far have received relatively few takedown requests for third party content posted on their websites, Elsevier has sent thousands of takedown notices to websites hosted by Harvard University, University of California-Irvine and academia.edu, a social networking site for academics. The articles targeted by these Elsevier notices typically have been posted by their authors, who may have transferred their copyright to Elsevier in the publication agreements. The publication agreements often allow authors to post their final, peer-reviewed manuscript of the articles, but not the final published version, i.e., as formatted by the publisher. Elsevier asserts that it pursued only "final version of published journal articles" posted without their authorization. The section 512(c) safe harbor provided a mechanism for libraries to avoid getting caught in the middle of a dispute between the authors and their publisher.

C. Information Location Tools

Libraries also rely on the section 512(d) safe harbor for information location tools. Librarians prepare directories that provide users with hyperlinks to websites the librarians conclude in their professional judgment to contain useful information. Section

[8] *See* Brianna Schofield and Jennifer Urban, *Takedown and Today's Academic Digital Library*, November 2015, available at file:///Users/jband/Downloads/SSRN-id2694731.pdf.

512(d) shelters a library from liability if the website linked to, unbeknownst to the library, contains infringing material.

One amendment would make this safe harbor even more useful to libraries. Currently, this safe harbor appears to be available only if the library, in compliance with section 512(c)(2), identifies on its website an agent to receive notifications of claimed infringement, and provides the Copyright Office with the agent's contact information. While the identification of the agent on the library's website makes sense, the requirement of providing the Copyright Office with the agent's contact information is a completely unnecessary bureaucratic burden. The Copyright Office's directory of agents serves no purpose. If the rights holder wants to notify the library's agent about infringing activity, the agent's contact information can be found directly on the library's website. There would be no reason for the rights holder to consult the Copyright Office's directory of agents. This requirement's only accomplishment is making it more difficult for website operators to qualify for the section 512(c) and (d) safe harbors. Accordingly, it should be repealed.

5. Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?

The framework Congress designed in 1998 does not need to be overhauled. While some Internet companies are well established, and might be able to afford the increased costs that would result from a reallocation of the responsibilities set forth in section 512, such costs would inhibit services by nonprofit institutions such as libraries, as well as startup companies. Moreover, the services enabled by section 512 have facilitated an explosion of creative activity. The "disintermediation" caused by Internet platforms has allowed more works to be created and widely disseminated than at any point in human

history. While the profit margins of some incumbent companies may have narrowed since 1998, the creative eco-system has never been healthier. Accordingly, the Copyright Office should not recommend any changes to section 512's architecture.

12. Does the notice-and-takedown process sufficiently protect against fraudulent, abusive, or unfounded notices?

Although the DMCA safe harbors have been extremely helpful to libraries in fulfilling their mission of providing their users with access to information, in some cases rights holders have abused the notice-and-takedown framework to target critical speech or restrict the fair use right.[9] The penalties for making misrepresentations in takedown notices under section 512 should be increased so as to create a more meaningful deterrent to abuse of the notice and takedown system.

Moreover, some rights holders provide libraries with incomplete takedown notices, and then do not respond to requests for additional information. At that point, the library must make the difficult decision of whether the notice "fails to substantially comply" with the provisions of section 512(c)(3)(A) so that the library would remain within the safe harbor without taking further action. In other words, some rights holders are not doing their part within the safe harbor framework, and this imposes additional burdens on libraries.

Additionally, the safe harbors can incentivize service providers to "over-comply" with the law. A service provider can retain its safe harbor only if it has adopted and implemented a policy for the termination of the accounts of repeat infringers. Section 512(i)(1)(A). To ensure that they comply with this repeat infringer requirement, some companies that provide Internet access to libraries that serve thousands of users have

[9] *See, e.g.*, http://www.chillingeffects.org/dmca512/.

threatened to terminate service to the library because one user allegedly engaged in infringing activity. In essence, these companies have adopted a "one strike and you're out" policy: a result we believe Congress did not intend.

Further, a recent study conducted by Joe Karaganis, Jennifer Urban, and Brianna Schofield found a high error rate in the notices generated by the automated notice-sending systems increasingly used by rights-holders. A random sample of DMCA takedown notices sent in 2013 reveals that 4.2% of the requests "were fundamentally flawed because they targeted content that clearly did not match the identified infringed work."[10] Additionally, over 28% of the notices had other characteristics raising concern about the validity of the claim, including over 7% targeting content with potential fair use defenses, and 10% leading to dynamic results or aggregator pages that made identifying the targeted content difficult. Thus far, these robo notices have been directed primarily at file-sharing sites or commercial search engines, not libraries. But this might change as institutional repositories grow. Moreover, even if the robo notices aren't sent directly to the library hosting the institutional repository, they may be sent to the search engine directing users to the institutional repository.

Notwithstanding the potential for abuse, we believe that the DMCA safe harbors overall have had a very positive impact on free speech by enabling the emergence of the Internet as "a unique and wholly new medium of worldwide human communication." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997). In that decision, Justice Stevens observed that "it is no exaggeration to conclude that the content on the

[10] Jennifer Urban, Joe Karaganis, and Brianna Schofield, *Notice and Takedown in Everday Practice* 11 (2016), *available at* http://ssrn.com/abstract=2755628. This study showed an even higher error rate for notices related to image search.

Internet is as diverse as human thought." *Id*. at 852. From the user's perspective, the Web is comparable "to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Id*. at 853. From the publishers' point of view, the Web "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information." *Id.* The DMCA safe harbors have encouraged commercial enterprises and nonprofit institutions such as libraries and universities to invest in the infrastructure and platforms that facilitates this "worldwide human communication" by placing reasonable limits on their liability for the infringing acts of their users.

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