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MEMORANDUM[1]

To: **Clients, Colleagues, and Other Interested Persons**

From: **McKenzie Schnell, Casey Lide, Sean Stokes, Jim Baller**

Date: **October 2019**

Re: **DMCA Safe Harbors**

I. SECTION 512 OVERVIEW

The Digital Millennium Copyright Act of 1998 (DMCA)[2] added several major provisions to the Copyright Act that further delineated the rights and protections afforded to copyright owners and users in the digital age. The DMCA consists of five titles, of which Title II is of particular interest here.[3] Title II, the "Online Copyright Infringement Liability Limitation Act," specifically concerns Internet service providers. It adds Section 512 to the Copyright Act, which (1) limits the type of relief that can be sought by copyright holders pursuing copyright infringement claims arising from the activities of end users, and

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1 * Disclaimer: This memo is for informational purposes only. It is not intended as legal advice and should not be treated as such. For legal advice, please call us or other qualified legal counsel.

2 Full text available at: https://www.copyright.gov/legislation/pl105-304.pdf.

3 Title I includes the "World Intellectual Property Organization Copyright and Performances and Phonograms Treaties Implementation Act of 1998"; Title III adds the "Computer Maintenance Competition Assurance Act"; Title IV contains miscellaneous provisions; and Title V includes the "Vessel Hull Design Protection Act."

(2) protects service providers that follow certain specified procedures from potential liability to both copyright holders and alleged infringers, [4]

Section 512 establishes several "safe harbors," each corresponding to a specific and distinct function of a service provider:

- the "transmission" safe harbor (§512(a)) relates to conduit activities like transmitting, routing, or connecting;
- the "caching" safe harbor (§512(b)) concerns intermediate or temporary storage activities;
- the "storage" safe harbor (§512(c)) addresses hosting and posting activities; and
- the "information and location tools" safe harbor (§512(d)) concerns referrals to other resources and linking.

Internet service providers are not required to comply with Section 512, but doing so protects them from potential monetary damages relating to contributory copyright infringement and minimizes exposure to injunctions.[5] In *Viacom International Inc. v. YouTube, Inc*., for example, YouTube was saved from paying Viacom and other content owners billions of dollars because the court found that it was protected by the DMCA safe harbors.[6] Service providers that wish to take advantage of the DMCA safe harbors should be familiar with their distinct eligibility requirements, as well as the general requirements and procedures included in Section 512, as described in the following sections.

II. ELIGIBILITY

Service providers must take certain steps before they can take advantage of the protections afforded by the various safe harbors. Once a service provider satisfies the initial set-up requirements, it is eligible for the protections afforded in Section 512 so long as it meets the respective definition of "service provider" (described in footnote 4) and adheres to each of the specifications listed within each safe harbor.

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[4] As used in Section 512(a), "service provider" is defined as "an entity offering the transmission, routing or providing of connections for online digital communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. § 512(k)(1)(A).

As used in all other sections, "service provider" is defined as "a provider of online services or network access, or the operator of facilities, and includes an entity described in subparagraph (A)." 17 U.S.C. § 512(k)(1)(B).

[5] 17 U.S.C. § 512(a), (b), (c), (d).

[6] 2010 WL 2532404 (S.D.N.Y. 2010).

A. Initial Set-Up Requirements

To be eligible for safe harbor treatment, a service provider must: (1) designate an agent to receive copyright infringement notices, make that agent's contact information clearly available on its website, and register the agent with the Copyright Office; (2) adopt a termination policy for repeat copyright infringers that subscribe or access a system or network; and (3) accommodate standard technical measures designed to protect copyrighted works.

1. Agent

i. Designate agent

Under Section 512(c)(2), a service provider is required to designate an agent who may receive notifications[7] of claimed infringement. A designated agent may be an individual (e.g., "Jane Doe"), a specific position or title held by an individual (e.g., "Copyright Manager"), a specific department within the service provider's organization or within a third-party entity (e.g., "Copyright Compliance Department"), or a third-party entity generally. Only a single agent may be designated for each service provider.[8]

ii. Post agent's information

There is no specific location on a website where the designated agent's contact information should be posted, but the information must include the designated agent's name, street address, telephone number, and email address.[9]

iii. Register agent

In December 2016, the Copyright Office introduced an online registration system and an electronically-generated directory to replace the Office's old paper-based system and directory. If a designated agent cannot be located via a service provider's website, the

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7 Upon notification of claimed infringement, a service provider must "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be subject of infringing activity." 17 U.S.C. § 512 (c)(1)(C). We discuss the nuances of this process in greater detail in Section III ("Notice and Takedown Process").

8 Related or affiliated service providers that are separate legal entities (e.g., corporate parents and subsidiaries) are considered separate service providers, and each must have its own separate designation.

9 17 U.S.C. § 512(c)(2)(A).

agent's contact information can be accessed through the directory. To create an account for a designated an agent, a service provider must register with and use the Copyright Office's online system at https://dmca.copyright.gov/osp/login.html.

2. Termination policy

To qualify for a safe harbor, a service provider must demonstrate that it 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."[10] When deconstructed, this awkward provision has three components: "(i) **adopt** a policy that provides for the termination of service access for repeat infringers; (ii) **inform** users of the service policy; and (iii) **implement** the policy in a reasonable manner."[11]

Although subsection 512(i) does not specify the necessary components for a valid repeat infringer termination policy, "strike counting" mechanisms have historically been successful against judicial scrutiny.[12]

i. Adopt

Particularly if adopted as part of a more general copyright policy, the language providing for termination of service access for repeat infringers can be simple. For example, YouTube's policy states: "YouTube will terminate a user's access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer."[13] Microsoft's policy is also straightforward, stating "The Service Provider enforces a policy that provides

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10 17 U.S.C. § 512(i)(1)(A).

11 *Wolk v. Kodak*, 840 F.Supp.2d 724, 744 ("*Wolk*") (S.D.N.Y 2011).

12 *See, Viacom Int'l Inc. v. YouTube Inc.*, 718 F. Supp. 2d 514, 528 (S.D.N.Y. 2010) (YouTube's three strikes policy was reasonably implemented where it counted as "only one strike against a user both (1) a single DMCA takedown notice identifying multiple videos uploaded by the user, and (2) multiple take-down notices identifying videos uploaded by the user received by YouTube within a two-hour period"); *UMG Recordings v. Veoh Networks*, 665 F. Supp. 2d 1099, 1116 (C.D.C.A. 2009) (Veoh's policy is valid even though it "does not necessarily terminate users who upload multiple videos that are identified in a single DMCA notice") *Capitol Records v. Vimeo*, 972 F. Supp. 2d 500, 514-17 (S.D.N.Y. 2013) (Vimeo's policy which included a three strikes rule was not unreasonable simply because it treated notices received with a three-day window as one "strike" for the purposes of calculating whether a user is a repeat infringer).

13 https://kids.youtube.com/t/terms

for the termination in appropriate circumstances of the accounts of subscribers who are repeat infringers."[14]

ii. Inform

There are no formal specifications as to where a policy must be posted, but it is generally best to place it in a location that is easily accessible, like on a homepage, within a website's Terms of Use, or as a separate, easily accessible page titled "DMCA/Copyright Notice."

iii. Implement

There is no definition of "reasonably implemented," but the Court of Appeals for the Ninth Circuit has bifurcated the concept into a two-step assessment process.[15] First, a service provider must implement a policy.[16] A policy is "implemented" if it has a working notification system, employs effective procedures for dealing with DMCA complaints, and does not actively prevent copyright owners from collecting information needed to issue infringement notifications.[17] Second, the service provider's implementation of the policy must be reasonable.[18] A "reasonably implemented" policy can consists of a "variety of procedures" and "a service provider need not affirmatively police its users for evidence of repeat infringement."[19]

Although a "reasonably implemented" policy can consist of a "variety of procedures," the Fourth Circuit held that a valid termination policy must enforce the terms of its policy in a meaningful fashion.[20] In *BMG Rights Management*, Cox was sued for contributory and vicarious copyright infringement based on its subscribers' peer-to-peer filing sharing.[21] The court noted that while "Cox formally adopted a repeat infringer 'policy' . . . [it] had

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14 https://www.microsoft.com/info/MSDMCA.html

15 *See Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192, 1196 ("*Giganews*") (C.D. Cal. 2014) (citing *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109-10 ("*CCBill*") (9th Cir. 2007).

16 *Giganews*, at 1196.

17 *Id*.

18 *CCBill, at* 1109-11.

19 *Capitol Records v. Vimeo*, 972 F. Supp. 2d 500, 514 (S.D.N.Y. 2013).

20 *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293 ("*BMG Rights Mgmt.*") (4th Cir. 2018).

21 *Id*., at 300.

made every effort to avoid reasonably implementing the policy [because] in carrying out its thirteen-strike process, Cox very clearly determined not to terminate subscribers who in fact repeatedly violated the policy."[22] Consequently, Cox was determined ineligible for safe harbor protection.[23]

3. Standard technical measures

An Internet service provider must also "accommodate and not interfere with standard technical measures...used by copyright owners to identify or protect copyrighted works."[24] A standard technical measure is a standards process that is constructed pursuant to industry-wide agreement between stakeholders. To date, there is no broad consensus or statutory definition as to what constitutes a standard technical measure.[25]

B. Specifications for Each Safe Harbor

1. The Transmission Safe Harbor

Section 512(a) limits the liability of service providers where they merely transmit digital information from one point on a network to another, without creating or selecting the content. Telephone companies and companies that solely provide access to the Internet generally fall within this safe harbor.

Section 512(a) specifies the following conditions for eligibility:

- The transmission must be initiated by a person other than the provider.
- The transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.
- The service provider must not determine the recipients of the material.
- Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients and must not be retained for longer than reasonably necessary.

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22 *BMG Rights Mgmt.*, at 303.

23 *Id.*, at 305.

24 17 U.S.C. § 512(i)(1)(B).

25 *See Wolk*, at 745 providing image-editing software that could be used to remove watermarks and copyright notices is not "interfer[ing] with standard technical measures" within the meaning of the DMCA).

- The material must be transmitted with no modification to its content.

2. The Caching Safe Harbor

Section 512(b) limits the liability of service providers that retain copies of material provided by an end-user as a form of intermediate or temporary storage, and then transmit those materials when directed by an end-user. Section 512(b) specifies the following conditions for eligibility:

- The content of the retained material must not be modified.

- The provider must comply with rules about "refreshing" material—replacing retained copies of material with material from the original location—when specified in accordance with a generally accepted industry standard data communication protocol.

- The provider must not interfere with technology that returns "hit" information to the person who posted the material, where such technology meets certain requirements.

- The provider must limit users' access to the material in accordance with conditions on access (e.g., password protection) imposed by the person who posted the material.

- The provider must remove or promptly block access to any cached material that was originally posted without the copyright owner's authorization if the service provider is notified that (1) the infringing material has been taken down at the originating site, and (2) the complainant makes notes accordingly in its notice.

3. The Storage Safe Harbor

Section 512(c) limits the liability of service providers for infringement of material on websites hosted on their systems. "Examples of such storage include providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users."[26] Section 512(c) specifies the following conditions for eligibility:

- The provider must not have the requisite level of knowledge of the infringing activity.[27]

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[26] S. Rep. No. 105-190, at 44 (1998).

[27] A service provider does not have "the requisite level of knowledge" if lacks actual knowledge of the infringing activity or is unaware of facts or circumstances from which infringing activity is apparent ("red flag knowledge"). 17 U.S.C. § 512(c)(1)(A)(i)-(ii); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013) (while general knowledge is insufficient to

- If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.

- Any material that was posted without the copyright owner's authorization must be removed or blocked promptly once the service provider has been notified that (1) the infringing material has been taken down at the originating site and (2) the complainant makes notes accordingly in its notice.

4. The Information-and-Location-Tools Safe Harbor

Section 512(d) applies to any "infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link...."[28] Section 512(d) specifies the following conditions for eligibility:

- The provider must not have the requisite level of knowledge that the material is infringing. The knowledge standard is the same as under the limitation for information residing on systems or networks (i.e., the storage safe harbor).

- If the provider has the right and ability to control the infringing activity, the provider must not receive a financial benefit directly attributable to the activity.

- Upon receiving a notification of claimed infringement, the provider must expeditiously take down or block access to the material.

III. NOTICE AND TAKEDOWN PROCESS

A. Notice

Under the storage, caching, and information tools safe harbors, service providers must act "expeditiously to remove, or disable access to, the material that is claimed to be infringing" upon proper notification by copyright holders.[29] A notification is proper if it is in writing and

- contains the physical or electronic signature of claimant;

- identifies the work allegedly infringed;

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constitute actual knowledge or red flag knowledge, "specific knowledge of particular infringing activity" is sufficient).

[28] 17 U.S.C. § 512(d).

[29] 17 U.S.C. § 512(b)(2)(E); 17 U.S.C. § 512(c)(1)(C); 17 U.S.C. § 512(d)(3),

- identifies the allegedly infringing material sufficiently to permit its removal or limit access;

- provides information sufficient to contact the party providing the notice;

- contains a statement that the complaining party has a good faith belief that use of the material is not authorized; and

- contains a statement that the information in the notice is accurate and, under penalty of perjury, that either the owner or the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.[30]

A notice that fails to include all of the relevant information is not sufficient to demonstrate actual or red flag knowledge on the part of the service provider.[31] But if the notice contains requirements (2)-(4), the service provider must at least contact the complaining party to obtain the missing information or at least make reasonable efforts.[32]

B. Counter-Notice

The DMCA does not require service providers to implement a counter-notice policy giving end-users the opportunity to respond to claims of infringement. However, such a policy is available under Section 512(g) and if correctly invoked, offers protection from liability for taking down material and for restoring access to it.

According to Section 512(g)(3), a proper counter notification must be in writing, provided to the Internet service provider's designated agent and include the following:

- A physical or electronic signature of the subscriber

- Identification of the material that has been removed or disabled

- Location at which the material appeared prior to being removed or disabled

- A statement under penalty of perjury that the subscriber believes that the material was erroneously removed or disabled

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30 17 U.S.C. § 512512(c)(3)(A).

31 17 U.S.C. § 512(c)(3)(B)(i).

32 17 U.S.C. § 512(c)(3)(B)(ii).

- The subscriber's name, address, telephone number, and a statement that the subscriber consents to the jurisdiction of its respective judicial district