

Copyright Compromises: Creators' Rights, ISP Efficiency & Consumer Welfare

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George Mason University School of Law

Section 512

“A service provider shall not be liable . . . for infringement of copyright **by reason of . . .**”

Four “safe harbors”

- (a) transitory communications
- (b) system caching
- (c) storage of user directed content
- (d) information location tools

512: Conditions for Eligibility

To be eligible for safe harbors, ISPs must (inter alia):

- comply with **takedown notices** (512(c))
- reasonably implement a policy for **termination of repeat infringers in appropriate circumstances** (512(i))

512(m): Protection of Privacy

ISPs are **not** required to

- **monitor their services**
- **affirmatively seek facts indicating infringing activity**

“Memorandum of Understanding”

Entered into on 7/6/2011 between:

- **Content Owner Representatives**
 - (RIAA, MPAA)
- **Participating ISPs:**
 - AT&T, Verizon, Comcast, Cablevision, Time Warner
- **Participating Content Owners**
 - MPAA members (Disney, Paramount, Sony, Fox, Universal, Warner Bros.)
 - RIAA members (UMG, Warner Music, Sony, EMI)

“Center for Copyright Information” (CCI)

Governance and funding:

- split 50/50 between Content Owners and ISPs.

Activities consist of:

- **Educational program**
- **Online information center**
- **System for Reducing Instances of P2P Online Infringement**

“Methodologies”

Content Owner Representatives will develop written methodologies designed to:

- detect
- and provide evidence that

identified content was distributed through P2P technology.

“Methodologies”

Each Participating ISP will develop methodologies to:

- match identified IP addresses to subscribers' accounts,
- keep a record of repeat alleged infringers, and
- apply Mitigation Measures

“Independent Expert”

CCI shall retain an **independent and impartial technical expert** to:

- **review** the Methodologies on ongoing basis
 - including review with recognized privacy experts
- recommend **enhancements**
- issue “**findings of inadequacy**” if methodology is fundamentally unreliable

with the goal of ensuring and maintaining **accuracy and security**.

“Copyright Alert Program”

Each Participating ISP will develop, implement and independently enforce a **Copyright Alert Program.**

- Triggered by receipt of ISP Notices from Content Owner Representative
 - Only one in any 7 day period.
- 6 Alerts with escalating warning language
- Mitigation Measures

“Four Step Sequential Framework”

- “Initial Educational Step”
 - 2 notices
- “Acknowledgement Step”
 - 2 notices requiring acknowledgment
- “Mitigation Measures Step”
 - 1 notice requiring acknowledgment
 - Mitigation Measure

“Mitigation Measures”

- temporary reduction in uploading and/or downloading transmission speeds;
- temporary step-down in the Subscriber’s service tier;
- temporary redirection to a Landing Page until the Subscriber contacts the ISP;
- temporary restriction of Internet access;
- temporary redirection to a Landing Page for completion of a meaningful educational instruction on copyright; or
- other comparable measures.

“Post Mitigation Measures Step”

Consists of:

- further Mitigation Measure Copyright Alert
- reapplication of same or different Mitigation Measure
- Warning that subscriber may be subject to lawsuit and/or termination under TOS.

After this point, ISP:

- Is not required to issue any more Alerts to subscriber.
- Continues to track number of ISP Notices received for that subscriber.

“Reset”

If subscriber gets no ISP Notices for 12 months, they get their record purged and start with a clean slate.

Review Procedure

Subscribers can seek review of Alerts on following grounds:

- Misidentification of account
- Unauthorized use of account
- Authorization
- Fair use
- Misidentification of file
- Work published before 1923

Review Procedure

- Reviews to be coordinated by an **Administering Organization**.
- Each review resolved by individual Independent Reviewer, who is a neutral lawyer.
- Subscriber must pay a filing fee of \$35 (refunded if subscriber wins).

DMCA Termination Policy

“[T]his Agreement does not and is not intended to create any obligation on a Participating ISP to adopt, implement, enforce, or otherwise take any action in furtherance of a DMCA Termination Policy . . .”

512(i): Conditions for Eligibility

The limitations on liability established by this section shall apply to a service provider only if the service provider:

(B) accommodates and does not interfere with **standard technical measures**.

As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and:

- (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;
- (B) are available to any person on reasonable and nondiscriminatory terms; and
- (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

“Initial Educational Step”

Consists of up to 2 notices, each of which:

- includes, at a minimum, the information contained in the ISP Notice regarding the alleged infringement
- informs the Subscriber that:
 - copyright infringement is illegal as well as a violation of the Participating ISP’s AUP or TOS,
 - there are lawful methods of obtaining copyrighted works,
 - continuing and subsequent receipt of Copyright Alerts may result in the Participating ISP taking action by the application of Mitigation Measures,

“Acknowledgement Step”

Consists of up to 2 notices, each of which:

- **Requires acknowledgement** of receipt
 - E.g., by click through landing page or pop up.
- States that **acknowledgment constitutes agreement immediately to cease**, and/or instruct other users of the Subscriber’s account to cease infringing conduct.
- **Warns of possibility that ISP may provide relevant identifying information about the Subscriber** and the Subscriber’s infringing conduct to third parties, including Content Owner Representatives or their agents and law enforcement agencies.

“Mitigation Measures Step”

Consists of one alert that:

- requires acknowledgement
- tells subscriber what Mitigation Measure will be applied
- tells subscriber they have 14 day notice period in which to request review before measure is applied

If no review is requested, **Mitigation Measure** is applied.