

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

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MEMORANDUM

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* Need to develop
best practices
for ISP & Internet
& how to handle
DMCA violations
- Include Jim S.
for best practices.

TO: TRACY COOK

FROM: JEFFREY DOUD *JMD*
Assistant Attorney General

RE: DMCA and Copyright Infringement for Public Library Users

DATE: February 27, 2017

ISSUE

Whether "safe harbor" provisions contained in § 512 of the Digital Millennium Copyright Act ("DMCA") apply to public libraries.

ANALYSIS

The issue of whether entities, such as public libraries, fall within the safe harbor provisions of the DMCA has never been decided by a Court, as far as I can see. Then again, I have not seen any case law involving a copyright holder suing a library, or any other entity that merely provided the computer and internet access, for infringing their copyright.

I believe that this question remains unanswered because most copyright holders are targeting the Internet Service Providers, i.e. Verizon, Charter, etc., in lieu of contacting the individual libraries. That seems to be the case with the examples that you have provided me. All of the examples you provided to me show that the ISP was contacted by the copyright holder, or their agent, and that communication was, in turn, forwarded onto the allegedly infringing library. ISPs have become the front line in the battle against copyright infringement.

Despite the fact that no library has been sued, under the DMCA, a colorable argument can be made that a library is responsible for any infringement conducted by the users of its publicly accessible computers. The definition of Online Service Provider is very broad. Moreover, a number of scholarly articles discussing copyright infringement implications for public libraries indicate that I am not alone in this opinion. Finally, the American Library Association seems to think that libraries fall under the DMCA as they have intervened in a number of DMCA cases as amicae. Based upon my research, I believe that a public library can be held liable for copyright infringement. At any rate, the most prudent course of action is to presume that a library can be held liable for any copyright infringement conducted by its users, and conform its actions accordingly.

However, because I am on the opinion that a library can be held liable under the DMCA, that also means that the library can take advantage of the safe harbor provisions set forth in § 512 of the DMCA. Section 512(a), otherwise known as the “mere conduit” safe harbor, protects libraries from claims of copyright infringement that provide Internet access to its users when they act only as a “conduit” through which the infringement occurs. Such an entity will be protected by the “mere conduit” safe harbor if: 1) “the transmission of the material was initiated by or at the direction of a person other than the service provider; 2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; 3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; 4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and 5) the material is transmitted through the system or network without modification of its content.

The section 512(c) “hosting” safe harbor has permitted research libraries to serve as institutional repositories for open access materials. This safe harbor precludes liability against the library “for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which

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infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

Finally, the section 512(d) "linking" safe harbor has allowed libraries to provide information location services to users, even if the links they provide are to pages or domains that host copyrighted work.

However, in order for a library to avail itself of these "safe harbors," it must comply with certain registration procedures set forth in § 512(c)(2). It must also implement certain notice and takedown procedures, which allows for the expeditious removal of copyrighted material that is stored on the particular library's computer system.

Just because a library may enjoy the protections of the safe harbors, and may enjoy immunity from suit, an ISP still has the right to terminate internet service to a public library if there is repeat infringement occurring. The most prudent course of action for each library is to implement, or at least review and strengthen, their copyright policies and notification to library users. It would also be a good idea for the libraries to work with their ISP and IT teams to design solution to combat copyright infringement, such as prohibiting access to certain peer-to-peer, BitTorrent, and other sites that are predominantly used to exchange copyrighted work. If something as simple as a different router can effectively prevent access to common sites that are known for copyright infringement, such a remedial step will prevent copyright infringement and the subsequent threat of service termination.

I caution that this is an ever-changing area of the law and, as with all areas of federal law, it is extremely convoluted. The legal ramifications of copyright infringement can be significant. I would encourage all libraries to consult with IT security teams to see what can be done to prevent copyright infringement, and avoid legal action or service interruption altogether.

I hope that this information is helpful to you. Should you have any additional questions, please do not hesitate to contact me.

jmd/clr
c: John Melcher