

Law Offices

**Lutzker & Lutzker LLP**

Suite 450  
1000 Vermont Avenue, N.W.  
Washington, D.C. 20005  
Telephone (202) 408-7600  
Fax (202) 408-7677

Arnold P. Lutzker  
Susan J. Lutzker  
Carl H. Settlemeyer, III

**THE DIGITAL MILLENNIUM COPYRIGHT ACT**

**Highlights of New Copyright Provision Establishing Limitation of Liability for  
Online Service Providers**

**EXECUTIVE SUMMARY**

One of the principal provisions of the Digital Millennium Copyright Act ("DMCA") is a limitation on the potential money damages that Online Service Providers ("OSPs"), including libraries and educational institutions, could face when they function like a common carrier, allowing online users access to copyrighted material placed there by someone else. Rather than confront huge financial claims if the third party material infringes someone's copyright, OSPs can escape liability provided they comply with these new rules. *Since the statute takes effect immediately, it is urgent that all institutions act promptly to ensure that their systems are in compliance with the terms.* Note that the limitation does not apply to copyrighted material the OSP may place online itself, such as on its home page. Standard copyright rules, including proper clearance and fair use, apply to that material.

The statute defines a "service provider" as an entity that transmits, routes and connects users to online communications or provides online or network services, such as storing digital material, caching or providing location tools (directories, hyperlinks, etc). When dealing with copyrighted material available through its network, an OSP must be *passive*. It cannot place material online, modify content, store it longer than necessary or know that it infringes someone else's copyright. Its systems must operate automatically and it cannot chose recipients of transmissions. Finally, it must not directly profit from an infringement.

The statute requires that in order for an OSP to qualify, it must implement several novel requirements immediately. Institutions would be well advised to turn these matters over to an established committee that manages copyright policies, or to create a new group for that purpose. In light of the fact that the statute calls for taking prompt action and making informed decisions, such a body could find itself involved in important policy questions. Among the things an institution needs to do right away to qualify for the limitation are the following:

- *Designate an agent* to receive statutory notices from copyright owners about infringements and to send statutory notices to affected subscribers.
- *Advise the Copyright Office* of the agent's name and address and post that information on the OSP's website. The Copyright Office notice regarding Interim Regulations is available at <http://lcweb.loc.gov/copyright/onlinesp/> and the Interim Regulations are available at <http://www.aop.org/legis/interim.html>.

- *Develop and post a policy* for termination of repeat offenders and provide network users with information about copyright laws.
- *Comply with "take down" and "put back" notice requirements.*
- Ensure that the system *accommodates industry-standard technical measures* used by owners to protect their works from unlawful access and copyright infringement.

A special exception has been created for public and nonprofit institutions of higher education, which allows them to qualify for the limitation even when the offending user is a member of the faculty or a research graduate student. The law also gives immunity from third party user claims, provided there is a good faith compliance with the statutory rules. It should also be borne in mind that it is *not necessary* to actively monitor material on the Internet. *The limitation requires an OSP to take action when it has "actual knowledge" of an infringement (by facts brought to its attention or by notice from the copyright owner), but it does not impose the burden on the OSP to monitor or discover infringing behavior.*

In all, the limitation on liability gives library and educational service providers a critical legal exemption at a time when their exposure to online copyright infringement is growing, not only because of the increased volume of material on the Internet, but also because of several adverse court rulings. To make full and effective use of the limitation, each institution should take the time now to carefully review the details of the Act set forth in this memo.

## **DETAILED REVIEW OF OSP LIMITATION**

**The Problem:** Many Online Service Providers ("OSPs"), including libraries and educational institutions, have been exposed to a legal claim of copyright infringement without even knowing it. Under copyright rules, if someone copies, distributes or displays a copyrighted work publicly without authority of the copyright owner or its agent, then a violation of law has occurred. Even innocent infringements are subject to penalties. In addition to injunctive relief, a copyright owner prevailing in an infringement action may be entitled to receive actual damages and profits of the infringer, or statutory damages (\$500-\$20,000 per work infringed; up to \$100,000 per work in cases of willful infringement), plus attorneys fees.

One of the developments associated with the Internet has been the fact that valuable copyrighted works, such as new musical CDs and movies, are posted at renegade sites for anyone to download without paying a fee. This practice has driven some copyright owners to the courts for relief. However, since the source of the infringements is often an untraceable site in cyberspace, an alternative defendant has been the Internet service provider that links customers to these sites.

Traditionally, common carriers have been exempt from liability for copyright infringement because they merely provide the facilities that link sender and receiver and have no control over the actual content of the transmissions. Many libraries and educational institutions feel this describes their functions for patrons, students and faculty in connection with the Internet. However, in their capacity as OSPs, libraries and educational institutions do more. Technically, they provide software to link users to sites, they store information on their server and they facilitate recordings and displays by subscribers. Each of these activities is a function recognized in copyright law as an exclusive right of copyright owners. Copyright law also holds that helping someone else to violate copyright rights is an infringement, so-called "vicarious" or "contributory" infringement. Thus, when certain commercial OSPs were accused of violating copyright law, some courts held them liable for copyright infringement. The fact that an institution is "not for profit" does not eliminate exposure to the copyright infringement claim.

**The Solution:** To remedy this exposure, OSPs sought a limitation under copyright law. After two years of negotiations, the **Online Copyright Infringement Liability Limitation** was approved by Congress as part of the omnibus Digital Millennium Copyright Act. The new limitation greatly reduces an OSP's exposure to monetary damages. However, it does not exempt an OSP from legal action or injunctive relief. Nevertheless, it will serve as a first line of defense against a claim of copyright infringement and

is in addition to other copyright defenses and limitations, like fair use. Be forewarned: the rules are complex and require strict adherence to rigorous deadlines. Unless fully complied with, an OSP, even a non-profit institution, faces loss of the exemption and exposure to potentially large copyright damage claims.

This memo will summarize the salient features of the new limitation. It is incumbent upon libraries and educational institutions that choose to operate as service providers to understand the rules, establish internal mechanisms for compliance and monitor these activities. It may be anticipated that this hard-fought limitation will be subject to test cases to ensure full compliance. Again, since non-profit status does not immunize an institution from liability, do not presume that a test case involving a library or educational institution will not occur. In fact, because so many computer skilled people work or study at libraries and schools, an educational test case may be desired by copyright owners to narrow this limitation.

## ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

**Service Provider Defined.** The statute provides a definition of "service provider" for purposes of the limitation as follows:

- a. An entity offering the transmission, routing, or providing of connections for digital online communications between or among points specified by a user, or material of the user's choosing, without modification as to the content of the material as sent or received; and
- b. provider of online services or network access, or the operator of facilities therefor.

All entities whose services fit these descriptions, and the definition in (b) is intended to be broad, may qualify with regard to those activities. However, to the extent the functions of the OSP involve creation and posting of content, choosing recipients of messages or controlling users, the limitation does not apply and regular copyright rules respecting proper clearance, as well as fair use and other defenses, are applicable.

**Covered Activities.** The new provision covers most transitory digital network communications. Specifically, these are:

- Intermediate and transient storage of materials (such as Web pages or chat room discussions) in the course of transmitting, routing or providing connections;
- System Caching;
- Placing information on a system or network at the direction of users; and
- Use of information location tools, such as directories, indexes and hypertext links.

**Conditions for Qualifying for the Limitation.** To qualify fully for the limitation with regard to all covered OSP activities, a set of conditions for each specific function must be met. If an institution performs all the OSP functions, as most do, then all requirements must be met. The following summary breaks down the requirements into three pertinent categories.

### 1. *Material.*

1. The material must be made available online by someone other than the OSP.
2. The OSP cannot modify the material.
3. No copy of the material during intermediate storage shall be maintained longer than "reasonably necessary."
4. The OSP does not have "actual knowledge" that the material or the activity is infringing; more specifically,
  - it is not aware of facts or circumstances from which infringing activity is apparent; or
  - upon receiving such awareness, the OSP acts expeditiously to remove or disable

access to the site.

## 2. *Parties to the Transmissions.*

1. The transmissions must be initiated by or at the direction of another person and sent to another.
2. No copy of the material during intermediate storage shall be made accessible to another person.
3. The OSP must not select recipients.
4. The OSP does not receive a financial benefit directly attributable to the infringing activity, in a case in which the OSP has the right and ability to control the activity.

## 3. *Procedures.*

1. The transmission, routing, provision of connections or storage must be carried out through an automatic, technical process.
2. The OSP must follow rules relating to refreshing, reloading or other updating of the material.
3. The OSP cannot interfere with technology associated with the material, such as access requirements or preconditions for use, such as passcodes or fees.
4. The OSP must comply with
  - "notice and takedown" procedures, *i.e.*, upon "proper notification," expeditiously remove or disable access to the offending material, and
  - "counter notice and put back" procedures, *i.e.*, upon "proper *counter* notice," promptly notify copyright owner of dispute and replace material within two weeks, unless the matter is referred to court.

**Obligations of Copyright Owners.** The limitation has countervailing obligations of copyright owners. Among the most relevant are the following:

- When refreshing, reloading or updating material, the owner must adhere to generally accepted industry standard data communications protocols.
- As to the OSP's obligation not to interfere with technology controlling access to the material (e.g. passcodes and fees), the owner's technology must
  - not *significantly* interfere with the OSP's system or network performance with intermediate storage of material,
  - be consistent with generally accepted industry communications protocols, and
  - not extract information from the OSP's system or network about the person initiating the transmission that it could not have acquired through direct access to that person.
- Comply with notification requirements in connection with "notice and take down" procedures.

**Notice and Take Down.** "Notice and take down" is an essential part of the protections sought by the content community and forms a new regulatory regime for both OSPs and copyright owners. If a content owner reasonably believes that a site misuses copyrighted matter and it notifies the OSP according to statutory procedures, or if the OSP independently becomes aware of the facts and circumstances of infringement, then the OSP must expeditiously remove the material or disable public access to the site, or face loss of the limitation.

Among the elements of the notice and takedown process are the following:

- The OSP must have a designated agent to receive notices and it must use a public portion of its website for receipt of notices.
- The OSP must notify the U.S. Copyright Office of the agent's identity and the Copyright Office will also maintain electronic and hard copy registries of website agents.
- Proper written notification from a copyright owner to an OSP must include

- the name, address and electronic signature of the complaining party,
  - sufficient information to identify the copyrighted work or works,
  - the infringing matter and its Internet location,
  - a statement by the owner that it has a good faith belief that there is no legal basis for the use of the materials complained of, and
  - a statement of the accuracy of the notice and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner.
- Any misrepresentation of material facts will subject the offending party to claims for damages and attorneys fees.

**Good Samaritan Immunity and "Notice and Put Back."** If the OSP complies in good faith with the statutory requirements, the new law immunizes it from liability to subscribers and third parties; however, this immunity is conditioned upon affording the affected subscriber notice of the action. If a subscriber files a proper "counter notice," attesting to its lawful use of the material, then the OSP must "promptly" notify the copyright owner and within 14 business days restore the material, unless the matter has been referred to a court. The counter notice must contain these elements:

- The subscriber's name, address, phone number and physical or electronic signature.
- Identification of the material and its location before removal.
- A statement under penalty of perjury that the material was removed by mistake or misidentification.
- Subscriber consent to local federal court jurisdiction, or if overseas, to an appropriate judicial body.

**Special Rule Regarding Teaching and Research Employees of Public and Nonprofit Higher Educational Institutions.** The OSP regime also makes one special exception to the general rule that an institution is responsible for the acts of its employees. In recognition of the principles of academic freedom and scholarly research and the practice of administrators of higher educational institutions of not interfering with classroom work, the statute provides that faculty and graduate students employed to teach or research shall not be considered "the institution" for OSP purposes. Thus, if, for example, a member of the faculty posts infringing content, selects recipient of infringing matter or knows of an infringement, the institution would not automatically lose its right to the limitation.

The exception has three important qualifications:

- The faculty or graduate student's activities do not involve online access (including e-mail) to materials that were "required or recommended" within the preceding three years for a course taught by the employee at the institution.
- The institution has not received more than *two* notices of actionable infringement by the faculty or graduate student.
- The institution provides all users of its system or network informational materials on compliance with U.S. copyright laws.

If properly followed, the higher educational institution is not tainted by the actions of its teaching and research employees. As an institution, it would qualify for protection against money damage claims and could not be required to block access or terminate a subscriber. It could still be subject to other injunctive remedies, such as those involving preserving evidence.

**Privacy Rules.** The statute also recognizes the importance of protecting the privacy of a user's identity on the Internet. Procedures are established by which a complaining copyright owner may obtain the identity of individual subscribers from the OSP. The principal safeguard involves the content owner's compliance with a formal court request that will be issued by federal court clerks. If followed, this process will protect the OSP from liability under federal or state prohibitions

respecting release of information regarding individual subscribers.

**Other Key Requirements.** In addition to all these rules, the OSP must

- Develop and post a policy for termination of repeat offenders;
- Accommodate and not interfere with "standard" technical measures used by copyright owners to identify and protect their works, such as digital watermarking and access codes.

The Act makes clear that the OSP is *not required* to monitor its services for potential infringements. It does not have to seek out information about copyright misuse; however, it cannot ignore obvious facts.

**Implementation.** The new rules take effect immediately; therefore, a review of current practices is urgent for all service providers and their staffs. Implementation of system should occur as soon as practicable.

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