

Online "Takedown Notices" Infosheet.

(NOTE: The information below is for information purposes only, and, as such, should not be used in place of legal advice. Libraries should always consult with their attorney before determining the best course of action for their institution).

Q. Here is one more thing that I would like to ask on behalf of all public libraries in the state. Many have been contacted by their internet service providers letting them know that illegal activity has occurred from their IP address range. . All libraries want to know their liability and whether or not they need to respond to a threat that their service will be cut off unless they fix this issue. I think ALA may have some information, but it would be wonderful to get a statement from LM for Michigan's libraries

A. The letters these libraries are receiving are called "takedown letters." Takedown letters are notices from content rights holders (such as production companies, authors, media companies, etc.) to Online Service Providers (OSPs) notifying the OSPs of illegal activity occurring on their services. Takedown letters are a tool permitted under the Digital Millennium Copyright Act (DMCA) and are used to address the issue of illegal file downloads, piracy and illegal peer to peer sharing of (mostly) media files. The letters generally notify the OSP what illegal activity is occurring, and demand that the OSP address the activity through the removal ("takedown") of the illegally obtained or shared files that remain on the devices or network/servers of the OSP, and through the notification (by the OSP) to the alleged offending user of the OSP that the files have been removed, and that subsequent or continuing illegal activity by that user will result in the loss of access to services through the OSP.

The question above can be separated into two separate issues: 1) What liability does a Public Library face if one or more of their users engage in illegal file downloading or sharing on the Public Library Wifi, network or computers; and 2) How should Public Libraries respond to the receipt of such a letter?

Issue I. LIABILITY

Generally speaking, Network operators, entities that offer Public Wifi, and other OSPs are most likely NOT going to be liable for infringing activities occurring on their services UNLESS any ONE of the following is true:

- The entity or operator or OSP KNOWS about and ASSISTS the infringing activities
- CONTROLS the infringing activities
- Financially BENEFITS from the infringing activities

Note that compliance with any of the items listed above does not necessarily mean that liability is a conclusion – only that, under the existing copyright laws, and depending on the

facts of the particular situation, it is possible that the entity, operator or provider COULD be liable – the likelihood of liability increases.

The Digital Millennium Copyright Act “Safe-Harbor” Option:

The Copyright Act (17 US Code 100 et seq.) establishes guidelines under which works can be used by people other than the rights holder of the work. Digitized works are included as part of these laws. The DMCA was an act that amended the copyright laws to address certain issues that arose as a result of the proliferation of digitized works – especially creative works such as music and visual media.

Section 512 of the DMCA (17 US Code 512) addresses the liability of Online Service providers for the actions of their customers or users.

Within section 512, “Online Service Providers” are defined as:

17 USC §512(k)

(k) Definitions.-

(1) Service provider.-(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online 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.

(B) As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

Generally, courts have interpreted the definition broadly, and although there is not much authority that definitively addresses libraries, much of the scholarly literature as well as the industry and practical information that address the role of public libraries in digital copyright, acknowledge that Public Libraries are “OSPs” under the statutory definition (listed above).

So, We know that Public Libraries can be considered “OSPs” under the DMCA, and we know that section 512 of the DMCA provides a “safe harbor” for OSPs from liability for illegal acts committed by their users (A “safe harbor” is an exception that exempts a party from liability or fault for a violation of a particular statutory provision).

HOWEVER, in order to take advantage of the Safe Harbor under section 512 of the DMCA, an OSP (in this case, a Public Library) must comply with certain requirements (note that some are similar to the general standards for liability mentioned above):

- Must adopt, reasonably implement, and notify patrons of a policy that provides for the termination of access to the appropriate service (ie Library wifi, access to library PC or network, etc.) to users who are repeat offenders/infringers.

- Must NOT have actual knowledge that the material or an activity using the material on the system or network is infringing.
- Absent actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent.
- Upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to, the material.
- Does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- Upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity
- If the Library operates a network or system that enables users to store or save files to a library drive, server or device, the library will also have to appoint a "Designated Agent," whose responsibility will be to receive all "takedown notices" or notices of infringement and appropriately reply and follow correct procedure for addressing the alleged infringement. The "designated Agent" must be registered with the US Copyright Office, and must be identified, with contact information, in a publicly accessible location on the entity's or provider's webpage.

The Copyright Office has some helpful resources on how to designate an agent under section 512:

Online Service Providers – Service Provider Designation of Agent to Receive Notification of Claims of Infringement <http://www.copyright.gov/onlinesp/>

Interim Designation of Agent to receive Notification of Claimed infringement: <http://www.copyright.gov/onlinesp/agent.pdf>

NOTE: Compliance with section 512 Safe Harbor provisions are NOT mandatory. HOWEVER, as an Electronic Freedom Frontier states in their white paper on public WiFi and copyright concerns:

"Falling outside the safe harbors does not make you liable for infringement. Compliance with the requirements of the safe harbors is optional for service providers, not mandatory. The increased certainty provided by the safe harbors, however, creates a strong incentive for service providers to take advantage of them, if it makes sense for their operation."

Electronic Frontier Foundation, "Open Wifi & Copyright: A Primer for Network Operators," <https://www.eff.org/files/2014/06/03/open-wifi-copyright.pdf> (viewed 10/21/16).

ALSO NOTE: The bulleted list above is a general listing of the primary requirements to take advantage of DMCA section 512 safe harbors. The complete details of the requirements are organized within the statute (and can differ) according to the type of service, or network provided by the OSP. Since each institution and library can be different with respect to what

services they offer, Libraries seeking to determine a policy and whether to take advantage of the [section 512](#) safe harbor provisions should review (with their attorneys) the statutory language to understand the exact provisions that may apply to them.

To assist with this, The University of Texas, as part of its "[Copyright Crash Course](#)," has a handy explanation of the Safe Harbor provisions:

<http://guides.lib.utexas.edu/copyright/libraryISP>

Also, The American Library Association (ALA) recommends the following basic procedures to libraries concerned about online liability:

“What should libraries do?”

- *Name an agent.*
- *Remove alleged content at the request of a rights holder when it can be found.*
- *Keep records of the takedown notices received in order to identify repeat infringers if they can ever be identified.*
- *Place signs near public computer terminals about the copyright law similar to those notices that are used at public photocopiers. It can be as simple as, “Using library computers to copy and distribute copyright protected works may be an infringement of the copyright law (Title 17 U.S. Code).”*

From “Public Access Computers in Libraries and Liability Concerns”

http://www.ala.org/tools/atoz/dcma_and_libraries (viewed 10/20/16)

So, how does all of this translate to a Public Library receiving a notice?

It is generally acknowledged that any entity that provides online or Internet access to a group of users should have policies in place that govern how those users are expected to utilize the service(s) provided, and, procedures in place that dictate the steps that will be followed should a user fail to follow the established (and noticed) policies.

In other words, Public Libraries that offer online access to their patrons – whether that access is free public wifi, Internet and/or databases via in-house terminals, or the use of circulating digital devices to access the Internet – should all have posted policies that set out acceptable use policies for these services, as well as the ramifications to patrons who do not follow policies (such as the removal and deletion of illegally downloaded content and/or the suspension of service to repeat offenders). Policies should be posted in a place that is easily accessible to patrons, including on the website. Copyright notices (similar to those placed on copy machines under 17 US Code 108) should be posted on workstations or on devices used by the public to access the Internet or online services offered by the library. The posted language can be as simple as:

“Using library computers to copy and distribute copyright protected works may be an infringement of the copyright law (Title 17 U.S. Code)”

http://www.ala.org/tools/atoz/dcma_and_libraries

Libraries also need to have internal policies and procedures for how situations involving violations of online or digital polices will be handled (including who is responsible for handling such issues). It is generally thought that it is a good idea to keep copies of complaints and takedown letters in order to be able to identify and/or confirm the existence of repeat offenders. The law does not require libraries to track users, but complaints and notices from content owners may specify if an alleged offender is a repeat offender.

Training is also an integral piece of this. Library staff should also be knowledgeable about the library's digital and online policies in order to assist patrons and help to deter any illegal activity.

However, even the most vigilant public libraries will, at some time, likely receive a "Takedown Letter."

Responding to a Takedown Letter

"As discussed at the beginning of this sheet, a takedown letter is essentially a notice to an OSP from a copyright holder that notifies the OSP of infringing activity. Under the DMCA section 512, the takedown letter must contain the following information:

"To be effective, a "notice" must be a written communication to a service provider's designated agent that includes "substantially" the following:

- a. a physical or electronic signature of a person authorized to act on behalf of the owner;*
- b. identification of the copyrighted work alleged to be infringed;*
- c. identification of the material claimed to be infringing or which is the subject of infringing activity;*
- d. information sufficient to allow the ISP's [OSP's] designated agent to contact the complaining party, e.g., address, telephone number, and e-mail address;*
- e. a statement that the complaining party has a good faith belief that use of the material is unauthorized; and*
- f. a statement that the information in the notice is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner. (17 U.S.C. § 512 [c][3][A].)"*

<http://www.educause.edu/focus-areas-and-initiatives/policy-and-security/educause-policy/issues-and-positions/intellectual-property/dmca-faq> (**NOTE:** this site is aimed at higher education institutions, which have some differing obligations under the DMCA, but the takedown notice information in 17 US Code 512(c)(3) is applicable to public libraries as well as academic institutions).

Once a takedown letter is received, here are the steps that should be taken to best avoid liability – whether or not the library has decided to adhere to the safe harbor provisions of section 512:

- **FOLLOW** the library's established internal procedures for handling a copyright claim/takedown notice (see NOTE at end of part I).
- *At minimum*, **CHECK** (to the extent possible) to ensure that there are no copies of the allegedly infringing material(s) saved on any library workstation, device, server, etc. If there are any copies, **DELETE THEM**. The library is only responsible for the devices it has – If the library doesn't have their own server, etc., then they are not responsible for checking one. For example, the library is not responsible for a patron's private server, device, etc. School libraries will need to confer with their applicable IT personnel and coordinate compliance with existing school policy.
- **NOTIFY** the alleged infringing patron (if identifiable) that he alleged infringing materials have (or will be, depending on scenario and timing of notice) been deleted pursuant to a notice of infringement and library policy, and reiterate library policy on repeat infringement.

If the library complies with section 512, they will also need to know:

- If the alleged infringing patron responds with a "Counter Notification" (which is an explanation to the rights owner, permissible under section 512, detailing why the action taken was not infringing), then the library must **SEND** that counter notice on to the sender of the original takedown notice.

Libraries do NOT have to send a reply to the takedown letter, although several libraries respond with form responses that detail the policy and the steps that are routinely taken to deter illegal activity.

In the end, the Safe Harbor provisions of the DMCA can be very effective and reassuring to libraries providing digital access to their patrons, however, compliance can be cumbersome and confusing.

Before determining policy for your institution, it is strongly advised that libraries consult with their attorneys in order to determine the best practices for your library to avoid liability and still provide optimum service to your patrons.

It may also be helpful to note that Congress and the Registrar of Copyrights have held hearings, public comment periods and public roundtables to discuss possible changes to the Copyright act, including the DMCA. The ALA, ACRL, and ARL, through The Library Copyright Alliance, submitted a comment sheet that can be found [here](#)

For additional information, please see the information linked below:

(NOTE: Some of these sources have also been linked within the text of this sheet).

Michigan Library DMCA policies:

<http://www.kpl.gov/copyright.aspx> (designated agent notice on website)

<http://www.southfieldlibrary.org/about-us/general-information/about-this-site>

<http://www.aadl.org/aboutus/materials> (scroll down to DMCA notice)

<http://www.aadl.org/aboutus/policies/website>

General DMCA information for libraries & educational institutions

American library Association Resources:

http://www.ala.org/tools/atoz/dcma_and_libraries

<http://www.ala.org/advocacy/copyright/dmca/guidance>

Educause

<http://www.educause.edu/focus-areas-and-initiatives/policy-and-security/educause-policy/issues-and-positions/intellectual-property/dmca-faq> (this is aimed at higher educational institutions, but much of the info is applicable to public libraries too)

UT Copyright Crash Course

<http://guides.lib.utexas.edu/copyright/libraryISP#s-lq-box-wrapper-13200050>

<http://guides.lib.utexas.edu/copyright/libraryISP>

Electronic Frontier Foundation

<https://www.eff.org/files/2014/06/03/open-wifi-copyright.pdf>

NOLO Press (a self-help legal publisher)

<http://www.nolo.com/legal-encyclopedia/responding-dmca-takedown-notice.html>

U.S. Copyright Office materials

<https://www.copyright.gov/dmca-directory/> - Beginning Dec 2016, designated agents must now be registered online. This site provides a searchable list circa 2016 -, as well as instructions on registering, and additional information on responding to takedown letters.

http://www.copyright.gov/onlinesp/list/k_agents.html - Searchable list of registered "designated Agents" circa 1998-2016 from the Copyright Office.

<http://www.copyright.gov/policy/section512/> Copyright office Sec 512 study as part of Congressional and Registrar of Copyright review of copyright act. This site offers information on public comment regarding the efficacy and usefulness of the Takedown notice safe harbor.

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