



BEFORE THE UNITED STATES COPYRIGHT OFFICE

COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE IN RESPONSE TO THE REQUEST FOR ADDITIONAL COMMENTS ON THE SECTION 512 STUDY

The Library Copyright Alliance (“LCA”) submitted comments in response to the Copyright Office’s initial request for comments concerning its study of Section 512 of the Digital Millennium Copyright Act (“DMCA”). LCA also participated in the roundtable in New York. We are now pleased to submit these comments in response to the Office’s request for additional comments.

3. Divergent views on the effectiveness of the DMCA safe harbor system.

The Office correctly notes that participants in this inquiry have expressed widely divergent views of the overall effectiveness of the DMCA safe harbor system. In essence, stakeholders disagree whether the legislative compromise reflected by the safe harbor system still works. The Office asks how this divergence of views should be considered by policymakers. We submit that this debate concerning the continued effectiveness of legislative compromise within Section 512 misses the larger context in which Congress created the safe harbor system and in which the system must be evaluated. Congress enacted the safe harbor system in 1998 as one title of the much broader DMCA. This broader statute, in a separate title, established prohibitions on the circumvention of technological protection measures. These two titles were adopted together to create a

balanced approach to copyright enforcement in the Internet environment. Thus, the effectiveness--and fairness--of the safe harbor system should not be considered in isolation, but in relation to the effectiveness and fairness of the anti-circumvention provisions.

Judge Leval, in his recent decision in *Capitol Records v. Vimeo*, 826 F.3d 78, 89-90 (2d Cir. 2016), agreed with the characterization of Section 512 as a compromise:

what Congress intended in passing § 512(c) was to strike a compromise under which, in return for the obligation to take down infringing works promptly on receipt of notice of infringement from the owner, Internet service providers would be relieved of liability for user-posted infringements of which they were unaware, as well as of the obligation to scour matter posted on their services to ensure against copyright infringement. The purpose of the compromise was to make economically feasible the provision of valuable Internet services while expanding protections of the interests of copyright owners through the new notice-and-takedown provision.

But the compromise embodied by Section 512 is part of a larger compromise embodied by titles I and II of the DMCA. Title II created Section 512. Title I implemented the World Intellectual Property Organization's Copyright Treaty and Performances and Phonograms Treaty by creating prohibitions on the circumvention of technological protection measures and the removal of copyright management information. These provisions now constitute Chapter 12 of title 17, including the controversial Section 1201.

Title I and title II originally were introduced as separate bills (the WIPO Copyright and Performances and Phonograms Treaties Implementation Act and the Online Copyright Infringement Liability Limitation Act, respectively). The WIPO implementation bill was supported by the content industry and opposed by sectors of the technology industry. The safe harbor bill was supported by the online service providers and opposed by the content industry. In the face of this opposition, both bills stalled.

Senator Orrin Hatch, then Chairman of the Senate Judiciary Committee, in a bold legislative move, merged the two bills into one. He calculated that the content industry would be willing to accept the safe harbors in exchange for WIPO implementation. This calculation proved correct.

The content providers believe that Section 1201 has benefitted them enormously. In response to a notice of inquiry recently issued by the Copyright Office concerning Section 1201, the Association of American Publishers, the Motion Picture Association of America, and the Recording Industry Association of America filed joint comments stating that “the protections of Chapter 12 have enabled an enormous variety of flexible, legitimate digital business models to emerge and thrive....” BSA|The Software Alliance, the Copyright Alliance, the Software and Information Industry Association, the Entertainment Software Association, and Microsoft similarly asserted that Section 1201 has facilitated the secure online distribution of content.

In other words, the content providers applaud title I of the DMCA (Section 1201) as much as they complain about title II of the DMCA (Section 512). This is not surprising. Although Congress attempted to achieve a degree of balance within each title—although each title contains internal compromises—at the end of the day, the grand bargain of the DMCA was the marriage of the WIPO implementation and the safe harbor bills. As noted above, according to the content providers, title I has “enabled an enormous variety of flexible, legitimate digital business modes to emerge and thrive.” And according to the Internet industry, title II has “allowed the Internet to become what it

is today—a worldwide democratizing platform for communication, creativity, and commerce.”¹

Given the tradeoffs that Congress made in assembling the DMCA, the Office should not assess the impact of any title in isolation. In particular, any adverse impact content providers claim they suffer on account of the safe harbors in Section 512 must be weighed against the benefit they receive from Section 1201 (which has had an adverse impact on other stakeholders, including libraries).

8. Repeat infringer policies for mere conduits.

The Office asks about the standards for repeat infringer policies for mere conduits, as well as for reactions to the recent decision in *BMG Rights Management v. Cox Communication*, No. 1:14-cv-1611, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016). In the opening round of comments, LCA explained that libraries rely on the Section 512(a) safe harbor to provide Internet access to millions of Americans. Although LCA takes no position on whether Cox satisfied the DMCA’s repeat infringer condition imposed by 17 U.S.C. § 512(i)(1)(A), LCA believes that interpreting this provision as creating a uniform repeat infringer policy would undermine the federal objective of promoting broadband in libraries.

A. For Two Decades, the Federal Government Has Strongly Supported Broadband Availability in Libraries and Educational Institutions.

In 1996, Congress authorized the Federal Communications Commission (“FCC”) to support the expansion of broadband services in schools and libraries. In response, the

¹ Matthew Schruers, “Music Industry DMCA Letter Seeks to Turn Back Clock on Internet,” *Disruptive Competition Project*, <http://www.project-disco.org/intellectual-property/062116-music-industry-letter-seeks-to-turn-back-clock-on-internet/#.WHQCArYrK15>, June 21, 2016.

FCC developed the Schools and Libraries universal support mechanism (known as E-rate), which enables schools and libraries to receive Internet access and other telecommunications services at discounted rates. When E-rate was established, only 14 percent of the K-12 classrooms in the United States had Internet access. By 2010, 94% had at least some Internet access. Similarly, 28% of public libraries had Internet access in 1996, increasing to nearly 99% by 2010. John Carlo Bertot, et al., *2010-2011 Public Library Funding and Technology Access Survey: Survey Findings and Results 3* (2011), available at http://ipac.umd.edu/sites/default/files/publications/PLFTAS_Report2010-11_0.pdf.

Notwithstanding the success of the E-rate, there was growing awareness that many libraries and educational institutions would need significant upgrades to meet projected broadband bandwidth demand. Thus, expanding E-rate was a major focus of the National Broadband Plan (“NBP”), adopted by the FCC in 2010. The NBP stated that “[b]roadband can be an important tool to help educators, parents and students meet major challenges in education.” Federal Communications Commission, NBP at 224 (2010), available at <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

Consistent with the NBP, President Obama in June 2013 announced the ConnectED Initiative designed to accelerate getting “high speed Internet connectivity and educational technology into classrooms.” White House, Fact Sheet: Opportunity For All – Answering the President’s Call to Enrich American Education Through ConnectEd (Feb. 4, 2014), <https://www.whitehouse.gov/the-press-office/2014/02/04/fact-sheet-opportunity-all-answering-president-s-call-enrich-american-ed>. The ConnectED initiative

called for increased E-rate funding. Accordingly, the FCC in July 2014 adopted the E-rate Modernization Order to expand Wi-Fi networks in schools and libraries across the country while ensuring continued support for broadband connectivity to schools and libraries. FCC, Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (July 23, 2014), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0723/FCC-14-99A1.pdf. In December 2014, the FCC issued the Second E-rate Modernization Order, which increased options for schools and libraries seeking to purchase high-speed broadband and increased the E-rate spending cap from \$2.4 billion to \$3.9 billion. FCC, Second Report and Order, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (Dec. 19, 2014), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1219/FCC-14-189A1.pdf.

The Broadband Technology Opportunities Program (“BTOP”), funded by Congress through the 2009 American Recovery and Reinvestment Act, led to the disbursement of approximately \$4 billion in grants that required recipients to provide matching funds toward the total cost of their broadband infrastructure, adoption, and training projects. See National Telecommunications and Information Administration (“NTIA”), Broadband Technology Opportunities Program (BTOP) Quarterly Program Status Report at 2 (Jan. 2014), available at https://www.ntia.doc.gov/files/ntia/publications/ntia_btop_19th_quarterly_report.pdf. One in five libraries across the country received BTOP grant funding. American Library

Association, *U.S. Public Libraries and the Broadband Technology Opportunities Program* (May 2013), http://www.districtdispatch.org/wp-content/uploads/2013/05/uspl_btop_4.30.13_large.pdf.

B. A Uniform Repeat Infringer Policy Could Undermine the Achievements of the Federal Government’s Broadband Policy.

The federal government’s broadband policy has been enormously successful. Educational institutions provide Internet access to approximately 75 million K-12, college, and university students.

<http://nces.ed.gov/fastfacts/display.asp?id=372Educational>.² Approximately 75 million Americans also access the Internet through public libraries. In total, educational institutions and libraries provide broadband access to 125 million people in the United States.³

The DMCA’s safe harbor for providers of Internet access, 17 U.S.C. § 512(a), enables these institutions to provide this essential service without the specter of liability for onerous damages because of infringing user activity.⁴ The DMCA conditions availability of this safe harbor on service providers adopting, reasonably implementing, and informing subscribers of the service provider’s network of “a policy that provides for

² This includes 35 million students in public elementary schools; 15 million in public high schools; 5 million in private schools, and 20 million in colleges and universities.

³ There is some overlap in broadband users in schools and libraries; many K-12 students who have Internet access in their classrooms rely on Internet access in public libraries to do their homework.

⁴ The Conference Report on the DMCA states that under § 512, a higher education institution that provides Internet access “is eligible for the limitations on liability...to the same extent as any other service provider.” Conf. Rep. 105-796 at 74.

the termination in appropriate circumstances” of the accounts of subscribers “who are repeat infringers.”⁵

Significantly, 17 U.S.C. § 512(i)(1)(A) does not mandate a uniform repeat infringer policy. An educational institution’s complete termination of a student’s access to the campus network could adversely affect the student’s ability to participate in her courses, and therefore may rarely, if ever, be appropriate. Similarly, a library’s barring a user from accessing the Internet could prevent an unemployed person from applying for a job and thus have disproportionate personal costs.⁶ Because of the potentially dire consequences of access termination, libraries and educational institutions must have the freedom to craft their own repeat infringer policies that are appropriate to their unique circumstances and those of the alleged infringer. Additionally, implementing new repeat infringer policies more appropriate for commercial settings could impose costly administrative burdens on educational institutions and libraries they could ill-afford. Additional costs for copyright compliance would require off-setting cuts elsewhere in the institution’s budget.

The DMCA does not contemplate a uniform repeat infringer policy. Such uniformity would undermine the utility of the federal government’s investment in broadband in educational institutions and libraries.

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⁵ The Senate Judiciary Committee Report on the DMCA states that the Committee intends for the term “subscribers” to include “students who are granted access to a university’s system or network for digital online communications.” Sen. Jud. Comm. Rep. 105-190 at 52 n.24.

⁶ Consistent with their commitment to user privacy and the freedom to read anonymously, many libraries have open networks without individual accounts for users. Some libraries attempt to prevent infringement over their networks by blocking access to websites that host infringing content.