

**CCPL Policy Regarding The Digital
Millennium Copyright Act and
its Provision for Limitation of
Liability for Online Service
Providers**

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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.
- 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) A 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.*

- The material must be made available online by someone other than the OSP.
- The OSP cannot modify the material.
- No copy of the material during intermediate storage shall be maintained longer than “reasonably necessary.”
- 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.

- The transmissions must be initiated by or at the direction of another person and sent to another.
- No copy of the material during intermediate storage shall be made accessible to another person.
- The OSP must not select recipients.
- 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.

- The transmission, routing, provision of connections or storage must be carried out through an automatic, technical process.
- The OSP must follow rules relating to refreshing, reloading or other updating of the material.
- The OSP cannot interfere with technology associated with the material, such as access requirements or preconditions for use, such as passcodes or fees.
- 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 email) 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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**Interim Designation of Agent to Receive Notification
of Claimed Infringement**

Full Legal Name of Service Provider: Carroll County Public Library

Alternative Name(s) of Service Provider (including all names under which the service provider is doing business): _____

Address of Service Provider: 115 Airport Drive, Westminster, MD 21157

**Name of Agent Designated to Receive
Notification of Claimed Infringement:** Robert A. Kuntz

Full Address of Designated Agent to which Notification Should be Sent (a P.O. Box or similar designation is not acceptable except where it is the only address that can be used in the geographic location):
Carroll County Public Library, 115 Airport Drive, Westminster, MD 21157

Telephone Number of Designated Agent: 410-386-4500

Facsimile Number of Designated Agent: 410-386-4509

Email Address of Designated Agent: webmaster@ccpl.carr.org

Signature of Officer or Representative of the Designating Service Provider: _____
Date: _____

Typed or Printed Name and Title: Linda Mielke, Director

Note: This Interim Designation Must be Accompanied by a \$20 Filing Fee Made Payable to the Register of Copyrights.

Repeat Offender Termination Policy

Subscribers of the Carroll County Public Library Internet Service who create a web page that resides on the Carroll County Public Library Internet Server will adhere to the following Copyright polices:

1. You, as the author, take full responsibility for the content of your web page/site.
2. As the author you also state that nothing on your page/site is copyrighted material and that links to other servers have been approved by that organization.
3. You can not copy any other page and/or images without prior consent from the originator of the other page and /or images.
4. By submitting your web page/site, you are agreeing to these conditions.

Should these conditions not be adhered to, the following procedures will be followed.

1. If the Carroll County Public Library Designated Agent to Receive Notification of Claimed Infringement receives a legitimate and documented complaint about content on your web page/site, the material will be removed or public access to your web page/site will be disabled according to the policy and procedures of our **Notice and Take Down Policy**.
2. The Designated Agent will notify you of our action within 5 business days of receipt of the complaint.
3. You then may file a “counter notice” within 5 business days to the Designated Agent for Carroll County Public Library attesting to your lawful use of the material. Follow the policy and procedures of our **Notice and Put Back Policy**.
4. The Designated Agent will then notify the copyright owner of your “counter notice.”
5. The Designated Agent will restore the material or reestablish public access to the web page/site within 10 business days, unless the matter has been referred to a court.
5. If you fail to file a “counter notice” and continue to create web pages/sites that violate United States Copyright Law, after having been previously notified of this infringement, your account will be *canceled* and your money will *not* be refunded.
6. You may be granted a new account after two years time and you will comply with the same above conditions.

Notice and Take Down Policy

If a content owner believes that a site has misused copyright material and it notifies Carroll County Public Library following the procedures outlined below, the Carroll County Public Library will remove the material or disable public access to the site.

This policy and related policies will be made available on the Carroll County Public Library's web site, and will also be made available to all subscriber's who maintain web pages/sites on the Carroll County Public Library server.

An email link will also be available on the the Carroll County Public Library's web site for direct contact to the Carroll County Public Library's Designated Agent.

Notice and Take Down Procedures

1. A content owner must notify Carroll County Public Library of copyright infringement in the following manner:
 - A. Notify the Designated Agent of Carroll County Public Library in writing (via email or through the United States Postal Service), including the following information:
 - The name, address, and physical or electronic signature of the complaining party,
 - Sufficient documentation or information to identify the copyrighted work or works,
 - The infringing material and its location (web address),
 - A statement by the owner that it has a good faith belief that there is no legal basis for the use of 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.
 - B. Any misrepresentation of material facts will subject the offending party to claims for damages and attorney fees.
2. Upon verification of the above notification, the Designated Agent for Carroll County Public Library will then proceed with the following steps:
 - A. The Designated Agent will immediately remove or disable the link to the infringing web page/site.
 - B. The Designated Agent will notify the author of the web page/site of the infringement in writing within 5 business days of notification from the copyright holder.

Notice and Put Back Policy

If a web page/site author believes that their site is using the material in a lawful manner, and they notify Carroll County Public Library following the procedures outlined below, the Carroll County Public Library will restore the material or reestablish public access to the site.

This policy and related policies will be made available on the Carroll County Public Library's web site, and will also be made available to all subscriber's who maintain web pages/sites on the Carroll County Public Library server.

An email link will also be available on the the Carroll County Public Library's web site for direct contact to the Carroll County Public Library's Designated Agent.

Notice and Put Back ("Counter Notice") Procedures

1. A web page/site author must notify Carroll County Public Library of their lawful use of the material in the following manner:
 - A. Notify the Designated Agent of Carroll County Public Library in writing (via email or through the United States Postal Service), including the following information:
 - The author's name, address, and physical or electronic signature,
 - Identification of the material and its location before removal,
 - A statement by the author, under penalty of perjury, that the material was removed by mistake or misidentification, and
 - The author consents to local federal court jurisdiction.
 - B. Any misrepresentation of material facts will subject the offending party to claims for damages and attorney fees.
2. Upon verification of the above notification, the Designated Agent for Carroll County Public Library will then proceed with the following steps:
 - A. The Designated Agent will notify the copyright owner within 5 business days of the receipt of a "counter notice" from the web page/site author.
 - B. The Designated Agent will restore the material or reestablish public access to the web page/site within 10 business days, unless the matter has been referred to a court.