

## Tenth Circuit Affirms Lower Court Ruling on Meaning of “User” in DMCA §512(c) Safe Harbor

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Title II of the Digital Millennium Copyright Act (DMCA) offers safe harbors for qualifying service providers to limit their liability for claims of copyright infringement. To benefit from the Section 512(c) safe harbor, a storage provider must establish that the infringing content was stored “at the direction of the user.” 17 U.S.C. § 512(c)(1). The statute does not define “user” and until recently, no court had interpreted the term.

Last May, [we wrote about a Colorado district court decision](#) that interpreted what “storage at the direction of a user” means in the context of online media — specifically, the business model of Examiner.com, a “content farm” style site which posts articles written by independent contractors on popular topics of the day. The dispute before the lower court centered on whether Examiner.com was entitled to protection under the § 512(c) safe harbor. More specifically, the question became whether the contributors to the Examiner (who had to sign an “Examiners Independent Contractor Agreement and License” before receiving permission to post to the site) were “users” under § 512(c), that is, were the plaintiffs’ photographs stored on defendant’s system at the direction of the site’s contributors or stored at the direction of the defendant.

In [BWP Media USA, Inc. v. Clarity Digital Group, LLC](#), 2016 WL 1622399 (10th Cir. Apr. 25, 2016), the appeals court affirmed the lower court’s holding that the infringing photographs were not uploaded at the direction of the defendant and Examiner.com was protected under the DMCA safe harbor. The Tenth Circuit found that, in the absence of evidence that the defendant directed the contributors to upload the plaintiffs’ photographs to the site, the defendant’s policies (e.g., prohibiting use of infringing content in the user agreement, having a repeat infringer policy and offering contributors free access to a licensed photo library) showed that the photographs were stored at the direction of the “user.”

According to the court, the word “user” in the DMCA should be interpreted according to its plain meaning, to describe “a person or entity who avails itself of the service provider’s system or network to store material.” Notably, the court flatly rejected the plaintiff’s argument that the term “user” should exclude an ISP’s or provider’s employees and agents, or any individual who enters into a contract and receives compensation from a provider. Refusing to place its own limitations on the meaning of “user,” the Tenth Circuit stated that a “user” is simply “anyone who uses a website — no class of individuals is inherently excluded,” even commenting that “simply because someone is an

employee does not automatically disqualify him as a ‘user’ under § 512.”

To quell any fears that such a natural reading would create a “lawless no-man’s-land,” the court noted that the term “user” must be read in conjunction with the remainder of the safe harbor provision. As such, a storage provider will only qualify for safe harbor protection when it can show, among other things, that the content was stored at the direction of a “user,” that the provider had no actual knowledge of the infringement, that there were no surrounding facts or circumstances making the infringement apparent, or that upon learning of the infringement, the provider acted expeditiously to take down the infringing material. See 17 U.S.C. § 512(c)(1)(A). Thus, the relevant question isn’t who is the “user,” but rather, who directed the storage of the infringing content – as the court stressed, there is no protection under § 512 when the infringing material is on the system or network as a result of the provider’s “own acts or decisions”:

“When an ISP ‘actively encourag[es] infringement, by urging [its] users to both upload and download particular copyrighted works,’ it will not reap the benefits of § 512’s safe harbor. However, if the infringing content has merely gone through a screening or automated process, the ISP will generally benefit from the safe harbor’s protection.”

The opinion maintains the relatively robust protections of the DMCA safe harbor for storage providers that follow proper procedures. In the court’s interpretation, the term “user” is not limited by any relationship with the provider, essentially removing the concept of the user from the safe harbor analysis and placing the emphasis on the remaining requirements of the statute (which, regardless, are frequently the subject of contention in litigation involving the DMCA safe harbor).

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