**17.27 Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined (17 U.S.C. § 512(i), (k))**

The defendant qualifies as a service provider of network communication services if the defendant:

First, engaged in transmitting, routing, or providing connections for online communication, between points specified by a user, of material of the user’s choosing, without modification to the content of the material;

Second, adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers; and

Third, accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works.

**Comment**

Service providers of network communication services are defendants “who act only as ‘conduits’ for the transmission of information,” and do not “select which users will communicate with each other” or perform nonconduit functions. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1041 (9th Cir. 2013) (citations omitted). This limitation applies whether the nonconduit functions are “automatic or humanly controlled.” *Id.* at 1042 (citations omitted).

**Reasonably Implemented Policy for the Termination of Users Who Are Repeat Infringers:** A reasonable policy for the termination of users who are repeat infringers requires the defendant to have a “working notification system, a procedure for dealing with DMCA-compliant notifications, and . . . [to] not actively prevent copyright owners from collecting information needed to issue such notifications.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) (collecting cases). However, the notification system does not have to be perfect. *Id.* at 1110 (concluding that defendant’s infringement log, which “largely kept track” of infringing users despite some omissions, satisfied the reasonably implemented policy requirement). To decide whether a policy was reasonably implemented, the jury may consider the defendant’s response to valid notifications of claimed infringement from the plaintiff and nonparty copyright holders; it may not consider the defendant’s response to invalid notifications of claimed infringement. *Id.* at 1112-13; *see also Ventura Content, Ltd. v. Motherless, Inc*., 885 F.3d 597, 617-19 (9th Cir. 2018) (holding that the jury could not reasonably conclude the website operator failed to reasonably implement repeat infringer policy when the operator terminated over 1,320 users for alleged infringement and only nine alleged repeat infringers “slipped through”).

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