**17.28 Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications (17 U.S.C. § 512(a))**

The defendant contends that the defendant is a service provider of network communication services and therefore is not liable for copyright infringement because the infringement occurred in the context of transitory digital communications. The defendant has the burden of proving the following elements of this defense by a preponderance of the evidence:

First, the defendant is a service provider of network communication services;

Second, the defendant did not initiate or direct the transmission of the material;

Third, the transmission, routing, provision of connections, or storage of the copyrighted material was carried out through an automatic technical process, and the defendant did not select the material;

Fourth, the defendant did not select the recipients of the material except as an automatic response to a request of another person;

Fifth, The defendant did not make the material accessible to anyone other than to anticipated recipients;

Sixth, the defendant did not keep the copyrighted material for longer than is reasonably necessary for the transmission, routing, or provision of connections; and

Seventh, the defendant transmitted the material through the system or network without modifying the content.

If you find that the defendant has proved each of these elements, your verdict should be for the defendant. If, on the other hand, you find that the defendant has failed to prove any of these elements, the defendant is not entitled to prevail on this affirmative defense.

**Comment**

This instruction is based on the Digital Millennium Copyright Act’s (“DMCA”) safe harbor provision for transitory digital network communications. *See* 17 U.S.C. § 512(a) and (k). The DMCA safe harbor provisions are affirmative defenses to copyright infringement. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045,1052 (9th Cir. 2017); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013). They “provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and (4) information location tools.” *Ellison v. Robertson*, 357 F.3d 1072, 1076-77 (9th Cir. 2004) (footnotes omitted).

The DMCA was “enacted to foster cooperation among copyright holders and service providers in dealing with infringement on the Internet.” *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1021-22 (9th Cir. 2013) (citing congressional legislative history). It is intended to mediate “competing interests in protecting intellectual property interests and in encouraging creative development of devices for using the Internet to make information available.” *Columbia Pictures*, 710 F.3d at 1024. This defense can be used by a service provider of network communication services when “the service provider merely acts as a conduit for infringing material without storing, caching, or providing links to copyrighted material.” *UMG Recordings, Inc.*, 718 F.3d at 1019 n.10 (internal quotation marks and citations omitted).

 For a definition of a service provider of network communication services, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined). For commentary on a reasonably implemented policy for the termination of users who are repeat infringers, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined).

**Kept for No Longer Than Reasonably Necessary for Transmission:** A period of fourteen days of temporary storage can qualify as storage for no longer than is reasonably necessary for transmission. *Ellison*, 357 F.3d at 1081.

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