**17.29 Copyright—Affirmative Defense—Limitation on Liability for System Caching (17 U.S.C. § 512(b))**

If the defendant is a service provider and is facing liability for copyright infringement based on system caching of copyrighted material, the defendant is not liable for money damages.

The defendant contends that the defendant is a service provider and is not liable for copyright infringement because the intermediate and temporary storage of copyrighted material occurred during system caching. The defendant has the burden of proving by a preponderance of the evidence that the defendant is eligible to use this defense and that the defense applies.

The defendant is eligible to use the defense of system caching if the defendant:

First, is a service provider of network communication services, online services, or network access;

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

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

Fourth, designated an agent to receive notifications of claimed infringement, and made the agent’s name, phone number, and email address available on its website and to the Copyright Office.

The defense of system caching applies if:

First, the material was made available online by a person other than the defendant;

Second, the material was not transmitted to, from, or at the request of the defendant;

Third, the storage of the copyrighted material occurred through an automatic technical process;

Fourth, the system caching did not modify the content of the material;

Fifth, the defendant complied with the generally accepted rules concerning refreshing, reloading, or other updating of the material if specified by the person making material available online, unless the rules were used to prevent or unreasonably impair system caching;

Sixth, the defendant did not interfere with the ability for the material to return to the original provider of the information;

Seventh, if access to the material was limited by a condition, the defendant did not allow access to the material unless the requester satisfied that condition [; and]

[Eighth, the defendant expeditiously removed or disabled access to the infringing material or activity upon receipt of a valid notification of claimed infringement].

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.

[*Additional instruction to be given if the defendant received notice of claimed infringement*]

A valid notification of claimed infringement is a written communication provided to the defendant’s designated agent and must include:

First, a physical or electronic signature of a person authorized to act on behalf of the copyright owner;

Second, identification of the infringed copyrighted work or a representative list of infringed copyrighted works if there are multiple infringed works at a single online site;

Third, identification of the infringing material or activity, and information reasonably sufficient to permit the defendant to locate the material;

Fourth, information reasonably sufficient to permit the defendant to contact the complaining party;

Fifth, a statement that the complaining party has a good faith belief that the material infringed a copyright;

Sixth, a statement that the information in the notification is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner; and

Seventh, a statement confirming that the infringing material has previously been removed from the originating site, or access to it has been disabled, or a court has ordered removal or disabling of access.

If the notification does not meet all the above requirements, then it is invalid and cannot be used as evidence of the defendant’s knowledge of specific infringing activity. The defendant does not have a duty to expeditiously remove or disable access to infringing material or activity if the notice of claimed infringement is invalid.

**Comment**

This instruction is based on 17 U.S.C. § 512(b), (c)(3), (i), and (k).

The seventh requirement for valid notification applies only to the system caching affirmative defense. *See* 17 U.S.C.A. § 512(b)(2)(E). The requirement that the defendant expeditiously remove or disable access to the infringing material upon valid notification applies only if “(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and (ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.” *Id.*

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—Limitation on Liability for Transitory Digital Network Communications).

**Valid Notification of Claimed Infringement:** A copyright holder must meet these formal notification requirements for the notice of infringement to constitute evidence of either subjective or objective knowledge. *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013). A valid notification is a single written communication that substantially complies “with *all* of § 512(c)(3)’s clauses, not just some of them.” *Perfect 10, Inc. v. CCBill* *LLC*, 488 F.3d 1102, 1112-13 (9th Cir. 2007) (citations omitted) (finding that three separate notices, each of which was deficient in some way, cannot be combined to form one valid notice); *Luvdarts, LLC v. AT&T* *Mobility*, 710 F.3d 1068, 1072-73 (9th Cir. 2013) (holding that a mere list of plaintiff’s copyrighted works without any further information is not valid notification). The burden of identifying and documenting infringing material rests with the copyright holder, not the defendant. *Perfect 10*, 488 F.3d at 1113. The requirement that the complaining party have a good faith belief that the material infringed a copyright only requires “subjective good faith.” *Rossi v. Motion Picture* *Ass’n of Am. Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004). It does not require a copyright owner to “conduct a reasonable investigation into the allegedly offending website.” *Id*. at 1003.

“[B]efore sending a takedown notification under § 512(c),” “a copyright holder must consider the existence of fair use.” *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1153 (9th Cir. 2016); *see* Instruction 17.22 (Copyright—Affirmative Defense—Fair Use).

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