**17.30 Copyright—Affirmative Defense—Limitation on Liability for Information Residing on Systems or Networks at Direction of Users (17 U.S.C. § 512(c))**

The defendant contends that the defendant is a service provider and therefore is not liable for copyright infringement because the infringement was caused by information residing on the defendant’s systems or networks at the direction of users. The defendant has the burden of proving each element of this defense by a preponderance of the evidence.

The defendant is eligible to use this defense 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;

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; and

Fifth, is facing liability for copyright infringement based on information residing on the defendant’s systems or networks at the direction of users.

This defense applies if the defendant:

First, either (a) lacked actual knowledge that the material or activity on the system or network was infringing, or (b) was not aware of facts or circumstances from which specific infringing activity was apparent, or (c) upon obtaining knowledge or awareness acted expeditiously to remove or disable access to the material;

Second, while having the right and ability to control the infringing activity, did not receive a financial benefit directly attributable to the infringing activity; and

Third, upon receiving a valid notification of claimed infringement, acted expeditiously to remove or disable access to the material.

If you find the defendant has proved all 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 17 U.S.C. § 512(c), (i), and (k).

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 17.28 (Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications). For an instruction on the requirements for a valid notice of claimed infringement, *see* Instruction 17.29 (Copyright—Affirmative Defense—Limitation on Liability for System Caching).

**Liability for Acts of Moderators or Similar Persons:** Applying the common law of agency, a website may be liable for the acts of its unpaid moderators or other third parties who select, screen, or curate the site’s content. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1055(9th Cir. 2017) (holding that “common law agency principles apply to the analysis of whether a service provider like LiveJournal is liable for the acts of [its] moderators”).

**Information Residing on Systems or Networks at the Direction of Users:** Information residing on systems or networks need “not actually reside on [the defendant’s] servers.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1042-43(9th Cir. 2013) (concluding that storage of “torrent” files that do not contain infringing content themselves, but are used to facilitate copyright infringement, would be “facially eligible for the safe harbor”).

**Actual Knowledge of Infringement:** Actual knowledge of the specific infringing material is required; general knowledge that the defendant’s services could be used for copyright infringement is insufficient. *UMG Recordings, Inc. v. Shelter Cap. Partners, LLC*, 718 F.3d 1006, 1022(9th Cir. 2013). Notifications about copyright infringement from a party who is not the copyright holder does not provide actual knowledge of infringement under § 512(c)(1)(A)(i). *Id.* at 1025.

**Awareness of Facts or Circumstances from which Specific Infringing Activity Is Apparent (Also Known As “Red Flag” Knowledge):** “Red flag knowledge arises when aservice provider is aware of facts that would have made the specific infringement objectivelyobvious to a reasonable person.” *Mavrix*, 873 F.3d at 1057 (internal quotation marks and citation omitted). A fact orcircumstance from which infringing activity is apparent must be about a specific instance ofcopyright infringement. *Id.*; *see also UMG Recordings, Inc.*, 718 F.3d at 1024( concluding that news reports discussing general problem of copyrightinfringement on website and CEO’s acknowledgment of this general problem were not enough tomeet the knowledge requirements under § 512(c)(1)(A)). However, evidence that the defendant actually knew about specific infringingactivity could suffice to make that infringing activity apparent*. Columbia Pictures Indus., Inc.*,710 F.3d at 1043 (holding that evidence that defendant encouraged and assisted users whowere infringing copyright in “current and well-known” works created “red flag” knowledge ofinfringement). A characteristic of the website itself must be very apparent to qualify as a fact orcircumstance from which infringing activity is apparent. *Perfect 10, Inc. v. CCBill LLC*, 488F.3d 1102, 1114 (9th Cir. 2007) (holding that website names such as “illegal.net” or“stolencelebritypics.com” do not automatically function as red flags signaling infringement); *see**also UMG Recordings, Inc.*, 718 F.3d at 1022-23 (“[H]osting a category of copyrightable content”with knowledge that “services could be used for infringement is insufficient to constitute a red flag.”). Although notices from noncopyright holders do not convey actual knowledge ofinfringement, they can serve as red flags that make infringing activity apparent. *Id.* at 1025.

**Financial Benefit Directly Attributable to Infringing Activity/Right and Ability to Control:** The requirement that the service provider have not received a financial benefit directlyattributable to the infringement activity applies “in a case in which the service provider has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B). To have “the right and ability tocontrol,” the service provider must exert “substantial influence on the activities of users.” *UMG**Recordings, Inc.*, 718 F.3d at 1030 (citation omitted). “Substantial influence” may include high levels of controlover the activities of users; “purposeful, culpable expression and conduct”; active involvementby the service provider in the listing, bidding, sale and delivery of items offered for sale; orcontrol of vendor sales through the previewing of products prior to their listing, the editing ofproduct descriptions, or the suggesting of prices. *Id.* (quoting *Viacom Int’l, Inc. v. YouTube, Inc.*,676 F.3d 19, 38 (2d Cir. 2012)).

“In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one.” *Mavrix*, 873 F.3d at 1059 (9th Cir. 2017) (quoting S. Rep. No. 105-190, at 44 (1998)). The relevant inquiry regarding direct financial benefit is “whether the infringing activity constitutes a draw for subscribers, not just an added benefit.” *Perfect 10*, 488 F.3d at 1117 (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). A “one-time set-up fee [or] flat, periodic payments” for the service provided does not qualify. *Id.* at 1118 (citation omitted). “The financial benefit need not be substantial or a large proportion of the service provider’s revenue.” *Mavrix*, 873 F.3d at 1059 (citation omitted).

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