**17.31 Copyright—Affirmative Defense—Limitation on Liability for Information Location Tools (17 U.S.C. § 512(d))**

The defendant contends that the defendant is a service provider and therefore not liable for copyright infringement because the infringement occurred in the context of the defendant’s provision of information location tools, such as a directory, index, reference, pointer, or hypertext link, to refer or link users to infringing material or activity. The defendant has the burden of proving 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 for providing information location tools or services.

The defense applies if the defendant:

First, lacked actual knowledge that the material or activity was infringing;

Second, was either (a) not aware of facts or circumstances from which specific infringing activity was apparent, or (b) upon obtaining knowledge or awareness or upon receiving a valid notification of claimed infringement, acted expeditiously to remove or disable access to the material; and

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

If you find that the defendant has satisfied these requirements, 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 but may assert other defenses.

**Comment**

This instruction is based on 17 U.S.C. § 512(d), as well as § 512(c)(2)-(3), (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 17.27 (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). For commentary on actual knowledge of infringement, awareness of facts or circumstances from which specific infringing activity is apparent, and financial benefit directly attributable to infringing activity, *see* Instruction 17.30 (Copyright—Affirmative Defense—Limitation on Liability for Information Residing on Systems or Networks at Direction of Users).

**Information Location Tools:** This defense applies only to “infringement of copyright *by reason of* the provider referring or linking users to an online location containing infringing material or infringing activity.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1116-17 (9th Cir. 2007) (explaining that § 512(d) did not create “blanket immunity” when a defendant provided users with a hyperlink to infringing material but also engaged in other infringing activity).

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