



# Open Wifi and Copyright:

A Primer for Network Operators



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Open networks provide Internet access to the public. Users do not need to subscribe—they simply connect their devices, often over a wireless connection. For instance, the City of San Francisco recently deployed a free, public Wi-Fi network along a three-mile stretch of Market Street.<sup>1</sup> Similarly, the Open Wireless Movement encourages owners of home Wi-Fi hotspots to open their networks to the public.<sup>2</sup>

Operators of open networks may worry that they could be liable if people use their networks to engage in copyright infringement. This white paper generally explains the scope and limits of secondary liability for the acts of users, and additional steps network operators may choose to take to further limit any legal risk.

This should not be taken as legal advice specific to any individual network operator. If you want such advice, please consult a lawyer.<sup>3</sup>

# 1. What is Copyright Infringement

Let's begin with some basics. First, you can only be held liable for the acts of your users if they have themselves violated copyright law. To have a “secondary” violation, there must first be a “primary” or “direct” violation.

## A. Direct Infringement

Copyright infringement occurs when somebody violates one of the exclusive rights of the copyright holder.<sup>4</sup> For instance, if a user downloads a copy of a movie without permission from the copyright holder, she may be liable for copyright infringement. Copyright is a “strict liability” rule, which means that it doesn't much matter whether or not the user *thought* she was breaking the law.<sup>5</sup>

To be liable for direct infringement, a person must have committed some voluntary act that caused the infringement to occur.<sup>6</sup> This is called the “volitional conduct” doctrine, and it's an important one for network operators because it cleanly distinguishes between service providers that act as passive *conduits* for network traffic, on the one hand, and providers that actively control the information users post and access on their networks.<sup>7</sup> If you are nothing more than a conduit for information packets, you shouldn't be legal responsible if those packets happen to contain infringing material.<sup>8</sup> As a federal district court in California explained back in 1995:

Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the copies to be made.<sup>9</sup>

Several federal appellate courts have followed the district court's ruling.<sup>10</sup>

## B. Secondary Liability

So, odds are that a court would not hold a network operator directly liable for copyright infringement based on the acts of users. But that doesn't end the analysis, because a copyright holder might try to claim that a service provider is indirectly responsible for the infringing acts of its users. This is called “secondary” liability.

Copyright law recognizes two types of secondary liability: “contributory” infringement and “vicarious” infringement.

*Contributory* infringement occurs when the second party (1) knows of the infringement and (2) “induces, causes, or materially contributes to the infringing conduct of another.”<sup>11</sup> For instance, a record store that sold blank tapes and encouraged customers to use its coin-operated “Make-a-Tape” machine to copy pre-recorded tapes was held liable for contributory infringement.<sup>12</sup> An ISP that actively and knowingly encouraged its users to use its service to download popular movies, without authorization, might be found liable on this theory.

Liability for contributory infringement depends largely on the ISP’s degree of control over the information its users transmit. In one leading case, an ISP hosted its users’ Usenet messages and distributed them to other Usenet servers around the world.<sup>13</sup> The court held that the ISP could be liable only if the copyright holder could prove (1) that the ISP was aware of the infringing material *and* (2) that the ISP nonetheless continued to store and distribute the material.<sup>14</sup>

A network operator could be *vicariously* liable for the acts of its users if it “(1) has the right and ability to control the infringer’s acts and (2) receives a direct financial benefit from the infringement.”<sup>15</sup> For instance, the owner of a dance hall was vicariously liable for copyright infringement where it hired an orchestra to play at the hall, and profited from the performance, even though it did not know the orchestra didn’t have permission to play some of the music it chose.<sup>16</sup>

This kind of liability depends on whether the ISP has the right and ability to control its users’ acts and whether the ISP received a direct financial benefit from a *specific* user’s infringing activities. If the ISP provides equal service to all of its users, it will be difficult to establish that it is benefiting from a specific user’s activities. If it is a noncommercial service, of course, the “direct financial benefit” prong will be even harder to prove.

In short, a network operator is unlikely to be held liable for the infringing activities of its users unless it knows about and assists those activities, or controls and financially benefits from them.<sup>17</sup>

### **C. DMCA Safe Harbors**

As explained above, in general a network operator should not be liable for its users’ activity as long as the operator merely acts as a passive conduit for Internet traffic. However, network operators who remain worried about legal risk can consider another option: the safe harbors provided by the Digital Millennium Copyright Act (“DMCA”).

In order to foster online expression and commerce, Congress crafted a set of safe harbors from copyright liability to “provide ‘greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.’”<sup>18</sup>

Under the DMCA, “service provider” includes “an entity . . . providing of connections for digital online communications.”<sup>19</sup> The definition of a service provider is broad, and includes those who do not operate communications equipment themselves. In one case, for example, a federal appeals court held that a payment processor for online content was a DMCA “service provider” even though it didn’t operate the alleged infringer’s Internet connection or transmit any infringing material.<sup>20</sup> Congress also intended that the term cover “subcontractors” of Internet service providers.<sup>21</sup> Arguably, this definition covers the providers of open Wi-Fi, such as municipalities, cafes and libraries.

The statute also clarifies the outer limits of a service provider’s obligations by, for example, making it clear that a service provider need not monitor its service or affirmatively seek facts indicating infringing activity in order to enjoy the safe harbor.

Under the DMCA, a network operator is sheltered from liability for “transmitting, routing, or providing transfers for” its users’ traffic if:

1. A “person other than the service provider” initiates the transmission.
2. The transmission is “carried out through an automatic technical process without selection of the material by the service provider . . . .”
3. The service provider does not choose the recipient of the transmission, other than to route the traffic automatically.
4. The service provider does not keep copies longer than necessary to transfer the traffic, and it cannot make copies available to anyone other than the recipient.
5. The service provider does not modify the content of the message.<sup>22</sup>

In short, ISPs qualify for this safe harbor if they act as passive *conduits* for network traffic.

In addition, there are two threshold requirements that service providers must meet in order to qualify the DMCA safe harbors. First, the provider must adopt a policy to terminate service for “subscribers and account holders” who are repeat in-

fringers.<sup>23</sup> Second, the operator must “accommodate[] and not interfere with standard technical measures” that copyright owners employ to protect their works, such as a watermark in a copyrighted image.<sup>24</sup>

A few final notes on the DMCA. First, falling outside the safe harbors does not make you liable for infringement.<sup>25</sup> Compliance with the requirements of the safe harbors is *optional* for service providers, not mandatory. The increased certainty provided by the safe harbors, however, creates a strong incentive for service providers to take advantage of them, if it makes sense for their operation. Second, the DMCA safe harbors only apply to copyright infringement (not trademark or patent infringement, or other causes of action). Most service providers, however, also enjoy broad immunity from state law causes of action as well as most federal civil claims, thanks to Section 230 of the Communications Decency Act (“CDA 230”).<sup>26</sup>

As a practical matter, this means that network operators have choices when, for example, they receive a complaint that someone is infringing using their network to engage in infringing activities. Usually such complaints will identify the alleged infringer via some form of IP address. If it is possible for the network operator to terminate a user associated with that address, and the operator has a repeat infringer policy, it can follow that policy. If the operator does not track users such that it is possible to terminate any particular user (e.g., a network that allows anonymous use, and/or assigns IP addresses in a highly dynamic fashion, such that it is not feasible to tie an IP address to any particular user), it can either ignore the notice or respond by explaining why it cannot comply with the request. Of course, either approach may invite further complaints but should not change the bottom line: a network operator is unlikely to be held liable for the infringing activities of its users unless it knows about and contributes to those activities, or controls and financially benefits from them.<sup>27</sup> Operators must determine for themselves what legal risks they are prepared to incur.

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<sup>1</sup> John Coté, *S.F. rolls out 3 miles of free Wi-Fi along Market Street*, SFGATE (Dec. 16, 2013, 10:02 a.m.), <http://www.sfgate.com/bayarea/article/S-F-rolls-out-3-miles-of-free-Wi-Fi-along-Market-5067616.php>.

<sup>2</sup> Open Wireless Movement, <https://openwireless.org/>.

<sup>3</sup> In other words, IAAL, but IANYL.

<sup>4</sup> 17 U.S.C. § 501

<sup>5</sup> Her intent can play a role in determining how much she has to pay in damages if she’s found liable. 17 U.S.C. § 504(c); see also *Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

<sup>6</sup> *Netcom*, 907 F. Supp. at 1370.

<sup>7</sup> *Id.* at 1372.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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<sup>10</sup> See, e.g., *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008) (“Cablevision’s contribution to this reproduction by providing the system does not warrant the imposition of direct liability”); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 551 (“Netcom made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct—specifically, the act constituting infringement—to become a direct infringer”).

<sup>11</sup> *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>12</sup> *Elektra Records v. Gem. Electric Distribs.*, 360 F. Supp. 821 (E.D.N.Y. 1973).

<sup>13</sup> *Netcom*, 907 F. Supp. at 1375.

<sup>14</sup> *Id.*

<sup>15</sup> *Netcom*, 907 F. Supp. at 1375.

<sup>16</sup> *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (2d Cir. 1971).

<sup>17</sup> Some copyright owners have tried to suggest that the owner of an open wifi network could be liable for infringement if it simply knew its wifi was being used, or could be used, to infringe copyright. This “negligence” theory has been firmly rejected by two federal courts. See *Liberty Media Holdings, LLC v. Tabora*, 2012 WL 2711381 (S.D.N.Y. July 9, 2012); *AF Holdings, LLC v. Doe*, 2012 WL 3835102 (N.D. Cal. Sept. 4, 2012).

<sup>18</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing S. Rep. No. 105-190, at 20 (1998)).

<sup>19</sup> 17 U.S.C. § 512(k)(1) (2006).

<sup>20</sup> *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1115-16 (9th Cir. 2007).

<sup>21</sup> See H.R. Rep. No. 105-551(II), at 50.

<sup>22</sup> *Id.* § 512(a)(1)-(5).

<sup>23</sup> 17 U.S.C. § 512(i)(1)(A).

<sup>24</sup> 17 U.S.C. § 512(i)(1)(B); see *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724 (S.D.N.Y. 2012).

<sup>25</sup> “The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.” (17 U.S.C. § 512(l)). See also *Perfect 10 v. CCBill*, 488 F.3d 1102, 1109 (9th Cir. 2007) (“These safe harbors limit liability but ‘do not affect the question of ultimate liability under the various doctrines of direct, vicarious, and contributory liability.’”)

<sup>26</sup> See, e.g., *Perfect 10 v. CCBill*, 488 F.3d 1102, 1118-19 (9th Cir. 2007) (CDA 230 preempts all state intellectual property statutes, including right of publicity); *Barrett v. Rosenthal*, 146 P.3d 510, 51 Cal.Rptr.3d 55 (Cal. 2006).

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