

2. Have courts properly construed the entities and activities covered by the section 512 safe harbors?

The courts in general have properly interpreted section 512. The courts have correctly understood that Congress intended to establish a framework of shared responsibility between rights holders and service providers to address online infringement. This framework would balance the interests of rights holders, service providers and users to promote the development of a robust Internet and the creation of works of authorship. The circuit courts in decisions such as

, , , , and . have maintained the balance Congress intended as they have interpreted and applied Section 512’s complex provisions.

3. How have section 512’s limitations on liability for online service providers impacted the growth and development of online services?

The section 512(a) “mere conduit” safe harbor in section 512(a) has enabled libraries to provide Internet access to its users; the section 512(c) “hosting” safe harbor has permitted to research libraries to serve as institutional repositories for open access materials; and the section 512(d) “linking” safe harbor has allowed libraries to provide information location services to users.

A. Internet Access

Not only large commercial entities such as Verizon and AT&T act as “service providers” within the meaning of section 512(k)(1)(A). Libraries play this role as well. In the United States, we don’t have Internet cafes that provide users with the hardware necessary for Internet access. While Starbucks has Wi-Fi, it doesn’t supply laptops. And

although increasingly more Americans at all income levels own smart phones, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare, on a smart phone. Libraries are the only source for free Internet connectivity and Internet

libraries in the United States.³ Forty-four percent of people below the poverty line used library computers for Internet access and other services. Among young adults below the poverty line, the level of usage increased to 61%.⁴

A 2012 study on the economic benefit of Texas public libraries found that Internet access via library computer terminals saved users over \$300 million in 2011.⁵ The Wi-Fi provided by the Texas libraries saved users over another \$20 million. 62% of the Texas library directors said that the Internet access was “extremely beneficial” to users, while a further 20% indicated that it was “quite beneficial.” 56% of the directors said that Internet access was the single most important resource provided by their libraries. The users’ online activities included: performing homework for classes from grade school to college; taking continuing education courses; training and

B. Institutional Repositories

With the growth of open access scholarly communications, libraries increasingly
act

512(d) shelters a library from liability if the website linked to, unbeknownst to the

threatened to terminate service to the library because one user allegedly engaged in infringing activity. In essence, these companies have adopted a “one strike and you’re out” policy: a result we believe Congress did not intend.

Further, a recent study conducted by Joe Karaganis, Jennifer Urban, and Brianna Schofield found a high error rate in the notices generated by the automated notice-sending systems increasingly used by rights-holders. A random sample of DMCA takedown notices sent in 2013 reveals that 4.2% of the requests “were fundamentally flawed because they targeted content that clearly did not match the identified infringed work.”¹⁰ Additionally, over 28% of the notices had other characteristics raising concern about the validity of the claim, including over 7% targeting content with potential fair use defenses, and 10% leading to dynamic results or aggregator pages that made identifying the targeted content difficult. Thus far, these robo notices have been directed primarily at file-sharing sites or commercial search engines, not libraries. But this might change as institutional repositories grow. Moreover, even if the robo notices aren’t sent directly to the library hosting the institutional repository, they may be sent to the search engine directing users to the institutional repository.

Notwithstanding the potential for abuse, we believe that 10% of notices being us as

