



News & Types: Intellectual Property & Technology Update

The Digital Millennium Copyright Act: Protections for Copyright Owners and Online Service Providers

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Practices: Intellectual Property & Technology

The advent of the internet and advancement in digital technology has resulted in rampant copyright infringement of copyrighted works, such as photographs, music, and movies. Often the infringing material is uploaded by a third party onto the website of an online service provider (“OSP”), like eBay®, a search engine, or other online service where end-users can post content. The Digital Millennium Copyright Act (“DMCA”), enacted in 1998, provides a procedure whereby copyright owners can get infringing materials taken down from websites and other online services. The DMCA also provides certain safe harbors for OSPs to limit their liability for copyright infringement from allegedly infringing third-party content uploaded to the OSP’s website. This article provides an overview of the DMCA protections afforded to copyright owners and OSPs, and the procedures that must be followed to receive such protections.

COPYRIGHT BASICS AND FAIR USE

Copyright law protects original works of authorship, such as literary works, musical works, motion pictures, sound recordings, pictorial, graphic and sculptural works, dramatic works, pantomimes and choreographic works and architectural works. To encourage the creation of original works, the Copyright Act provides authors with certain exclusive rights, including the right to control the reproduction and distribution of the work, as well as the right to control the making of derivative works of the original work. Unless an exception applies, any unauthorized use or copying of a copyrighted work is copyright infringement. Copyright owners can also sue third parties that induced the infringement or provided a direct infringer with the means to commit the infringement. Primary and secondary infringers may be subject to civil remedies and criminal sanctions.

The Copyright Act provides several exceptions to a copyright owner’s exclusive rights. One of the primary exceptions is the “fair use” exception. Fair use occurs when copyrighted materials are copied without permission for a limited purpose, such as to comment on or criticize a copyrighted work. News reporting, teaching and research are other examples of fair use. In addition, someone who creates a parody to make fun of the original work would not be liable for copyright infringement.

PROTECTIONS FOR COPYRIGHT OWNERS

When a copyright owner discovers that its copyright has been violated online, the DMCA allows the copyright owner to remove the alleged infringing material by issuing a “take-down notice” to the host of the website or the internet service provider (ISP) of the offender. The take-down notice must be a written communication with a physical or electronic signature of a person authorized to act on behalf of the copyright owner and include the following:

- identification of the copyrighted work claimed to have been infringed;
- identification of the material that is claimed to be infringing;
- contact information for the complaining party (address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted);
- a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
- 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 owner of an exclusive right that is allegedly infringed.

Upon receipt of a proper take-down notice, the alleged infringing materials should be promptly taken down and the OSP should notify the subscriber (person or entity that uploaded the infringing material) of the take down. Generally, an OSP shall not be liable to any person for any claim based on the OSP’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

SAFE HARBORS FOR OSPS

Title II of the DMCA provides safe harbors (limitations on liability for contributory and secondary infringement) for OSPs based on four types of conduct by the OSP:

- Transitory digital network communications (17 U.S.C. § 512(a))
- System caching (17 U.S.C. § 512(b))
- Storing information on systems or networks at the direction of users (17 U.S.C. § 512(c))
- Information location tools (referring or linking users to an online location containing infringing material, by using a directory, index, reference, pointer or hypertext link. (17 U.S.C. § 512(d))

Depending on which type of conduct the OSP is engaged in, the DMCA sets forth certain specific requirements which the OSP must comply with in order to avail itself of the safe harbor protections. In addition, for all types of conduct, in order for the safe harbors to apply, the OSP must:

- adopt and reasonably implement, and inform its subscribers and account holders of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the OSP’s system or network who are repeat infringers;
- not have actual knowledge that the material or activity using the material on the system or network is infringing or be aware of facts from which infringing activity is apparent;

- upon obtaining such knowledge or awareness, act expeditiously to remove, or disable access to, the material;
- not receive a financial benefit directly attributable to the infringing activity, in a case in which the OSP has the right and ability to control such activity; and
- upon notification of claimed infringement, respond expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

The DMCA requires an OSP to designate an agent who is authorized to receive notifications of claimed infringement and make available the name, address, phone number, and electronic mail address of the agent including by posting such information on its website. The Register of Copyrights maintains a directory of agents.

To protect against the fraudulent use of take-down notices, the DMCA also provides a mechanism whereby the alleged infringer can respond to the notice and the take down by sending a counter notification to the OSP if, in good faith, the alleged infringer firmly believes that there is no copyright infringement due to the fair use doctrine or for some other reason. The DMCA provides that for a counter notification to be effective it must be a written communication provided to the OSP's designated agent that includes:

- physical or electronic signature of the sender of the counter-notice;
- name, address, and phone number of the sender of the counter-notice;
- identification of the alleged infringing material and its location before it was removed;
- a statement under penalty of perjury that the material was removed by mistake or misidentification;
- counter notifier's consent to the jurisdiction of a federal court in the district where the counter notifier lives (if in the U.S.), or consent to the jurisdiction of a federal court in the district where the OSP is located (if the counter notifier is not in the U.S.); and
- consent to accept service of process from the party who submitted the take-down notice.

Upon receipt of the counter-notice, the OSP must send it to the copyright owner together with a statement that it will put the material back in ten business days unless a court order is filed preventing the alleged infringer from infringing any copyrights. The copyright owner can either withdraw its take-down notice or proceed to file suit for copyright infringement.

An OSP's failure to respond in a proper and timely manner to a take-down notice or to comply with any of the other safe harbor requirements set forth in the DMCA can expose the OSP to liability without the benefit of the safe harbors.

In summary, the DMCA provides copyright owners with an effective avenue to enforce their copyrights on the internet. It also affords meaningful protections to OSPs, who are often caught in the middle of a dispute between a copyright owner and an alleged infringer. OSPs must take care to be aware of and comply with their obligations under the DMCA to avail themselves of the DMCA's protections and should seek legal counsel upon receipt of a take-down notice.