



What Your Business Needs to Know about Copyright:

Navigating the DMCA's Safe Harbor and Notice and Takedown Provisions

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The DMCA's "Safe Harbor"

- ❖ One purpose of the DMCA was to give "innocent" on-line service providers a "safe harbor" from liability for copyright infringement committed by their users.



A Typical DMCA Scenario

- ❖ ACME ONLINE runs a website where users can post and share photos with their friends.
- ❖ ACME ONLINE received a letter in which an individual complained that there were over 100 images posted on ACME ONLINE's website that infringed her copyrights.
 - *Is ACME ONLINE protected by a DMCA safe harbor?*
 - *Is the copyright owner's notice & takedown letter DMCA compliant?*





Agenda

- ❖ What Is The DMCA's "Safe Harbor"?
- ❖ Considerations For The Online Service Provider
- ❖ Practical Tips For Copyright Owners
- ❖ Takeaways



The DMCA's Safe Harbors For Service Providers

What is a Service Provider?

- ❖ “[A]n entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.”
- ❖ “A provider of online services or network access, or the operator of facilities thereof.”

The Google logo is displayed in its characteristic multi-colored font, with the letters 'G', 'o', 'o', 'g', 'l', and 'e' in blue, red, yellow, blue, green, and red respectively.



The Safe Harbor Has Its Limits ...

- ❖ The DMCA does not provide a safe harbor for everything a service provider does.

- ❖ A service provider must be engaged in one of the following activities:
 - Transmitting or routing allegedly infringing material
 - Caching allegedly infringing material
 - Storing or hosting allegedly infringing material at direction of users
 - Providing links to allegedly infringing material



Transitory Communication Exemption – § 512(a)

- ❖ Known as the “conduit” safe harbor provision.
- ❖ This exemption limits the service provider's liability when it transfers digital information at another's request.
- ❖ The service provider must meet the requirements set forth in § 512(a).



System Caching Exemption – § 512(b)

- ❖ This exemption limits a service provider's liability for retaining for a limited time unmodified copies of material made available by someone other than the service provider that a subscriber directs to be transmitted.
- ❖ Many conditions set forth in § 512(b) must be met.
- ❖ § 512(b) service provider: Google – automatic system caching



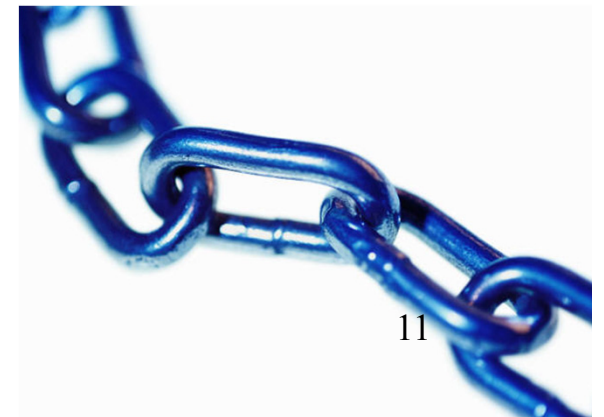
Exemption for Infringing Material Posted on Web Sites – § 512(c)

- ❖ Known as the “storage” safe harbor provision.
- ❖ This exemption protects service providers from liability for infringement of copyright by reason of the storage or posting of infringing material on a website.
- ❖ § 512(c) service providers include: YouTube, Facebook, Second Life, Kodak’s Photobucket, Veoh, eBay, *etc.*

Linking Exemption – § 512(d)



- ❖ § 512(d), titled “Information location tools,” provides a safe harbor from liability for a service provider that infringes a copyright by “referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.”





A Service Provider's Considerations Under The DMCA



To Fall Within the DMCA's Safe Harbor, a Service Provider Must ...

1. Appoint a designated agent to receive notifications of claimed infringement.
2. Not have actual knowledge or awareness of infringement.
3. Act "expeditiously" to remove infringing material.
4. Not receive a financial benefit directly attributable to the infringing activity.
5. Adopt, reasonably implement, and inform its users of a policy that provides for their termination should they repeatedly infringe copyrighted material.
6. Not interfere with standard technical measures used to identify and protect copyrighted works.



Designated Agent

- ❖ An individual registered with the U.S. Copyright Office who receives notices of claimed infringement on behalf of a service provider.
- ❖ The service provider must provide contact information for its designated agent on its website.
- ❖ A list of designated agents is available on the U.S. Copyright Office's website:
http://www.copyright.gov/onlinesp/list/a_agents.html

Don't Turn "A Blind Eye to 'Red Flags'"

- ❖ In order to obtain the safe harbor, a service provider cannot have knowledge of ongoing infringing activities.
- ❖ This "knowledge" standard is defined as "actual knowledge" or "willful ignorance."
- ❖ Congressional Report: "if the service provider becomes aware of a 'red flag' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action."





If a Service Provider Receives a Proper Takedown Notice, It Must ...

- ❖ “Expediently” remove the allegedly infringing material.
- ❖ Take reasonable steps to notify promptly the alleged infringer that it has removed its content.

The Alleged Infringer's Counter-Notice

- ❖ The DMCA also provides that a user whose material has been removed or disabled may provide a “counter-notification” to the service provider.
- ❖ The notice must:
 - Include name and contact information, telephone number, and signature.
 - Identify the alleged infringing material and its location on the network (before removal).
 - Declare under oath that the service provider wrongly removed the alleged infringing material.

How to Handle a “Repeat Infringer”

- ❖ A service provider need not affirmatively police its users for evidence of repeat infringement.
- ❖ Service providers must have termination policies that remove individuals who repeatedly infringe.
- ❖ These policies must be “reasonably implemented.”
- ❖ The termination policies must be made public.





The Copyright Owner's Considerations Under The DMCA



As a Copyright Owner, Your Takedown Notice Must ...

1. Include your signature
2. Identify your allegedly infringed copyrighted work(s)
3. Identify “substantially all” of the allegedly infringing material and provide the service provider with information reasonably sufficient to permit it to locate the material
4. Include information reasonably sufficient to permit the service provider to contact you
5. State that you have a good-faith belief that use of the material in the manner complained of is not authorized
6. State that the information in your take-down notice is accurate and that you either are the owner of the copyrighted work or are authorized to act on behalf of the owner

Copyright Owner's Good Faith Belief

- FR *Lenz v. Universal Music Group:*
–Let's Go Crazy!



- FR Fair Use analysis is required
- FR § 512(f): Misrepresentation: If you misrepresent your claim of infringement, you could be liable for monetary damages that resulted from the improper removal of the alleged infringer's material.

Takeaways

- ❖ If you are a service provider:
 - Do not assume that your company is a service provider, review the individual exemptions of the DMCA first.
 - Designate your company's agent with the Copyright Office.
 - Respond quickly (24 hours) to claims of infringement.

- ❖ If you are a copyright owner:
 - Monitor the Internet for material infringing your copyright – service providers will not do it for you.
 - Make sure your notice and takedown letter sufficiently identifies the allegedly infringing material (provide the URL).
 - Be sure you have a valid basis before sending a takedown notice.



Copyright Webinar Series

- ❖ Our next copyright webinar will take place in the fall – look for an invitation this September.
- ❖ Please visit our Copyright Webinar Series website to access archived slides and audio for past events and to view schedule updates for 2011:

www.fr.com/copyright-webinars



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