
CHAPTER 15

The Digital Millennium Copyright Act

At common law, a person may be held liable for the wrongful conduct of another person if she aids, abets, or facilitates that conduct in some way – even if she does not personally perform the wrongful act herself. That is to say, courts allow lawsuits for contributory liability against those who hire, encourage, or help another person commit an unlawful act.

The fact that a person may be held liable for another person's communication by "facilitating" it should be a serious concern for anyone who hosts or operates a website or blog that allows users to post comments or other material to it. By providing a forum for users to publish words, images, etc. the host and/or website owner is facilitating the user's publication of those things. That puts any website that allows users to comment or upload content to the site at risk of contributory liability if a user decides to write or upload something that infringes a copyright.

Congress enacted Title II of the Digital Millennium Copyright Act ("DMCA") to ameliorate this risk. This portion of the DMCA sets out rules that are intended to balance the interests of copyright owners, on one hand, and those who provide Internet services -- ISP's, search engine services, email service providers, website hosting services, website owners, and bloggers. It does this by granting immunity from contributory liability to those providers – and only those providers – who comply with the DMCA's provisions.

One of the most important provisions is 17 U.S.C. § 512(c). It establishes a set of rules collectively known as the DMCA's "notice-and-take-down provisions." The Act provides that a service provider may not be sued for damages, and only injunctive relief may be issued against it, for copyright infringement based on the storage, at the direction of a user, of material that resides on a system or network controlled or operated by or for the service provider, if the service provider qualifies for the protections of the Act and complies with the notice-and-take-down provisions.

DMCA REQUIREMENTS

“ONLINE SERVICE PROVIDER”

The DMCA provides this immunity both to Internet Service Providers (ISP's) in the traditional sense, and also to “online service providers.” Section 512 defines an online service provider as “a provider of online services or network access, or the operator of facilities therefor.” There is no requirement that the service must be a paid one, so those websites and blogs that provide information or entertainment at no charge should come within the definition. A website or blog that facilitates the exchange of ideas and information by its users (sites with chat, instant message, user comments, guest bloggers, for example) arguably is providing a service to its users, whether they pay for those services or not.

NO DIRECT FINANCIAL BENEFIT

To receive DMCA protection, the service provider must not receive a financial benefit directly attributable to the infringing activity. This requirement does not apply to service providers (such as companies that provide telephone lines for a transmission) that have neither the right nor the ability to control the content of a site. Because website owners and bloggers do have the ability to control content (such as by removing objectionable content), the “no financial benefit” condition *does* apply to them.

If you are running a truly noncommercial blog or website, this condition usually will not be difficult to meet.

LACK OF INITIAL KNOWLEDGE OF INFRINGING CONTENT

The DMCA will not protect you if you actually know, at the time the user posts the material, that it infringes a copyright, or if you are aware of facts and circumstances making infringing activity apparent.

In most cases, a website owner or blogger will not have foreknowledge of the infringing nature of user-provided content because website users often share material without first informing the owner what it is they plan to post. In the rare case where a user gives advance notice of what he intends to post, however, and either tells you or it is readily apparent that the content intended to be posted infringes a copyright, then the DMCA will not protect you if you then authorize him to post it.

On the other hand, even if you do not have actual advance knowledge that a particular posting will infringe a copyright, you will not be able to invoke the DMCA if you actively encouraged or solicited site visitors to post material to the site that you knew or reasonably should have known were likely to be protected by copyright. (Hint: Don't encourage visitors to your site to upload recordings of other people's music so that other visitors to your site may listen to or download them royalty-free, for example.)

DESIGNATION OF COPYRIGHT NOTIFICATIONS AGENT

To receive the immunity that the DMCA offers, you must designate an agent to receive notifications of claimed infringement. Further, you must let people know who that agent is, and where to send notices of claimed infringement.

To satisfy this requirement, you must:

- 1) provide the Copyright Office with the name, address, phone number, and email address of the agent, together with any other contact information the Register of Copyrights may deem appropriate; and
- 2) provide this information to members of the public who visit your website or blog, such as by publishing it to a page on your site that is accessible to the public.

The Register of Copyrights may require payment of a fee to file a designation of a copyright notifications agent. Filing fees are subject to change. Current fees may be found at the Copyright Office website. As of October, 2016, the basic filing fee for a designation of agent is \$105. There is an additional fee of \$35 for groups of ten or fewer additional name you wish to list as alternative business names or domain names.

Completed forms should be sent, along with the filing fee, to the U.S. Copyright Office.

The Copyright Office maintains a directory of designated agents from the designations filed with the Office. A copyright owner or his agent may use the Office's directory of designated agents to find the designated agent of a service provider that is hosting claimed infringing material, and may use that information to send a notification of claimed infringement to the service provider's designated agent.

There is no required form for the designation, but it must contain all information the Register of Copyright specifies. A sample form meeting those requirements is provided in Appendix IV.

Should you go to all the bother and expense of designating a copyright notifications agent? The answer, as with many things, is: It depends. If you create all the content for your website or blog yourself, and you do not allow user comments, chat, messaging, or the like, then you probably do not need to designate a copyright notifications agent. If other people do or can contribute content to your site or blog (even if it's just user comments or an occasional guest-blog) then you should consider designating a copyright notifications agent. Even if you review user content before it is posted, appointing an agent and complying with DMCA requirements can still be a good idea. It can be very difficult, if not impossible, to know if a user comment or a guest blog contains infringing content or not. If it does, then you may be liable for contributory infringement unless you have appointed a copyright notifications agent and follow all the other required DMCA procedures.

ADOPTION OF REPEAT INFRINGERS POLICY

To qualify for the DMCA immunity, you must also implement a policy of terminating the accounts (or subscriptions, as the case may be) of anyone who uses your service (website or blog) to infringe a copyright more than once.

INFORM PEOPLE OF THE REPEAT INFRINGER POLICY

You must inform subscribers and account holders about the repeat infringer policy.

ACCOMMODATION OF COPYRIGHT-PROTECTION MEASURES

To receive DMCA immunity, you must accommodate, and not interfere with, with standard technical measures that are used by copyright owners to identify or protect copyrighted works, if accommodating them does not impose substantial costs on service providers or substantial burdens your system.

PROMPT REMOVAL UPON LEARNING OF INFRINGEMENT

Even if you did not initially know that a piece of user-provided content infringed a copyright, you must promptly remove or disable access to the material when you learn that it does. If you don't, then the DMCA will not insulate you from contributory liability for publishing the content.

PROMPT REMOVAL UPON NOTIFICATION OF CLAIMED INFRINGEMENT

This condition is different from the preceding one, in that it requires removal of user-provided content that someone *claims* is infringing, irrespective of whether it actually is or not..

NOTICE-AND-TAKE-DOWN PROVISIONS

As indicated above, an online service provider must remove or disable access to material upon receiving notification of claimed infringement. The provider is bound by this requirement, however, only if the notification is valid and properly served.

REQUIREMENTS FOR AN EFFECTIVE NOTIFICATION

To be effective, a notification must:

- 1) be in writing;
- 2) be signed (physically or electronically) by a person who is authorized to act on behalf of the copyright owner;
- 3) identify the work in which copyright is claimed, or set out a representative list if multiple works at a single website are covered in a single notification;
- 4) identify the material that is claimed to be infringing or to be the subject of infringing activity information reasonably sufficient to permit the service provider to locate the material;
- 5) state that the complainant 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;
- 6) provide the complainant's contact information, such as address, telephone number and/or email address; and
- 7) state that the information in the notification is accurate, and under penalty of perjury, the complaining party is either the copyright owner or authorized to act on behalf of the copyright owner.

A court is not supposed to consider a substantially defective notice when determining whether a service provider knew about infringing activity or had an awareness of facts or circumstances making infringement apparent.

Service on Website or Hosting Service?

Should DMCA copyright notifications go to the website owner's or the hosting service's notifications agent?

The answer depends on what you are trying to accomplish. If you want to preserve a claim against the website owner based on user-provided content, then serve the website owner's agent. If you want to preserve a claim against the hosting service, then serve the hosting service's agent. If you want to preserve claims against both, then serve them both.

If you want to preserve a claim against the hosting service for content the website owner himself uploaded, then you must serve the hosting service's agent.

You should be able to find contact information for the notification agent on the website or hosting service's website. If not, try searching the Copyright Office's online directory at:

http://copyright.gov/onlinesp/list/a_agents.html.

Go to WhoIs.com to determine who provides the hosting service for a website.

RESPONDING TO A NOTIFICATION

Upon receiving an effective notification, a service provider must promptly remove or disable access to the material that is claimed to be infringing or to be the subject of infringing activity. Failing to do so isn't illegal, but compliance with the requirement is necessary if an online service provider wishes to preserve the kind of immunity from contributory infringement liability that the DMCA offers.

ADDITIONAL STEPS TO AVOID LIABILITY TO CONTENT PROVIDERS

What if a website owner's (or hosting service's) removal of a user's content would violate an obligation owed to the user? For example, what if a blogger has a contract with a guest blogger to publish the guest blogger's piece for a specified period of time, but the blogger is served with a copyright infringement notification? The DMCA addresses the problem by providing that if a service provider wishes to avoid liability to a subscriber/user for

removing or disabling access to the subscriber's/user's material, then upon receiving a notification, the service provider must do the following things in addition to removing the material:

- 1) promptly notify the subscriber that it has removed or disabled access to the subscriber's material; and
- 2) comply with the requirements pertaining to counter-notifications, if served with one.

DUTY TO HELP CORRECT A DEFECTIVE NOTIFICATION

Generally, a notification that does not contain all of the elements required for an effective notification of claimed copyright infringement does not give rise to any obligation on the part of a service provider to remove or disable access to material that is claimed to be infringing a copyright. And a notice that does not substantially comply with the requirements is not to be considered by a court when determining whether a service provider knew about infringing activity or had an awareness of facts or circumstances making infringement apparent.

Apparently concerned that artists, musicians and other creative types might not dig legal technicalities, Congress imposed an affirmative obligation on service providers such as website owners to help these people out with their notifications, at least when they've gotten them almost right.

Specifically, the DMCA says that if a notification contains each of these four key elements:

- 1) identification of the copyrighted work claimed to have been infringed (or a representative list);
- 2) identification of the material claimed to be infringing;
- 3) sufficient information to permit the service provider to locate the allegedly infringing material; and
- 4) 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.

then a service provider receiving the notification must promptly try to contact the person or take other reasonable steps to help the person prepare and serve a notification that does substantially comply with the requirements. Otherwise, the attempted notification may be used as evidence against the service provider with respect to the question whether she knew about infringing activity or was aware of facts or circumstances making infringement apparent.

COUNTER-NOTIFICATIONS

Generally, a service provider may safely remove or disable access to material, if it is done in good faith response to a notification of claimed copyright infringement, or is based on facts or circumstances from which infringing activity is apparent. The user who provided the content may file a counter-notification, however, asserting that the material he provided does not, in fact, infringe a copyright.

A service provider is exempt from liability for removing or disabling access to a content provider's material only if:

- 1) the material was removed or access to it was disabled in good faith;
- 2) the material was removed or access to it disabled in response to a notification of claimed copyright infringement, or is based on facts or circumstances from which infringing activity is apparent;
- 3) the service provider takes reasonable steps promptly to notify the content-provider that it has removed or disabled access to it;
- 4) upon receipt of an effective counter-notification, the service provider promptly provides the person who served the notification of claimed copyright infringement with a copy of the counter-notification;
- 5) the service provider promptly informs the person who served the notification of infringement that it will replace the removed material or cease disabling access to it in 10 business days; and
- 6) the service provider replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification of claimed copyright infringement that such person has filed an action seeking a court order to restrain the content provider from engaging in infringing activity relating to the material on the service provider's system or network.

If a service provider complies with all DMCA requirements, then he will be protected both from liability to the copyright claimant and from liability to the content provider.

REQUIREMENTS FOR AN EFFECTIVE COUNTER-NOTIFICATION

To be effective, a counter-notification must substantially comply with the following requirements:

- 1) be in writing;
- 2) be signed (physically or electronically) by the subscriber;
- 3) be mailed or transmitted to the service provider's designated agent;
- 4) identify the material that has been removed or to which access has been disabled;
- 5) identify the location at which the material appeared before it was removed or access to it was disabled;
- 6) include a statement under penalty of perjury that the content provider has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled;
- 7) provide the content provider's name, address and phone number; and
- 8) state that the content provider consents to the jurisdiction of federal district court for the judicial district in which the address is located, or if the address is outside of the United States, for any judicial district in which the service provider may be found, and that the content provider will accept service of process from the person who provided notification of claimed copyright infringement or an agent of such person.

MISREPRESENTATIONS

Knowingly making false or misleading statements of fact in a notification or counter-notification may subject you to liability for damages.

17 U.S.C. § 512 provides for a civil cause of action for the recovery of compensatory damages, including attorney fees and costs, against a person who knowingly misrepresents that material or activity is infringing.

The same statute also provides for a civil cause of action for the recovery of compensatory damages, including attorney fees and costs, against a person who knowingly misrepresents that material or activity was removed or disabled by mistake or misidentification.

Making a false statement in a DMCA notice is also perjury, and may be punished accordingly.

WORKS NOT PROTECTED BY COPYRIGHT

The DMCA only applies to works that are protected by federal copyright law. It does not apply to works that are not protected by federal copyright law, such as public domain works and sound recordings made before 1972.

INDEMNIFICATION AGREEMENT

In addition to designating a DMCA copyright notifications agent and complying with other DMCA requirements, you may want to consider requiring guest bloggers, commenters and other content contributors to agree to indemnify you for any damages, attorney fees and litigation costs if you are sued for infringement on account of content they contribute.

TERMS OF USE AND COPYRIGHT POLICY

Your website or blog should include a Terms of Use and a Copyright Policy. These should incorporate the described DMCA notice-and-take-down provisions, describe your policy of terminating the accounts or subscriptions of repeat infringers, and provide contact information for your designated copyright notifications agent. They should also advise users of their rights and responsibilities, describe your rights and responsibilities, and describe the rights and responsibilities of copyright owners, under the DMCA.

The Terms of Service is also where you would want to set out your indemnification requirement as a condition of a person's use of your website or blog.

Finally, it wouldn't be a bad idea to include a clause in your Terms of Service requiring users to post only their own thoughts and words in comments, and to refrain from violating other people's rights in their comments.

OTHER PROVISIONS OF THE DMCA

Although the notice-and-take-down provisions in Title II of the DMCA are likely to be the most relevant to you, it is useful to be aware of what the other five titles of the Act are about.

ANTI-CIRCUMVENTION

Among other things, Title I prohibits circumvention of technological measures that have been taken to prevent access to a copyrighted work. Making or selling devices or services that are marketed or primarily used to circumvent these measures is also prohibited

Exceptions exist for:

- law enforcement and government activities
- nonprofit libraries, archives and schools, but only if done for the sole purpose of determining whether they wish to obtain authorized access
- reverse engineering by a lawful owner of a copy
- .encryption research
- protection of minors
- when necessary to protect a persons' privacy
- security testing.

Tampering with or removing copyright management information is also prohibited, as is distributing copies of products that have been tampered with or had such information improperly removed from them.

Copyright management information means information about the work, the author, the copyright owner, and if applicable, the performer, writer or director of the work, as well as the terms and conditions for use of the work, and any other information as the Register of Copyrights may prescribe.

Both civil remedies and strong criminal penalties are available to enforce this provision.

COMPUTER PROGRAM COPYING DURING COMPUTER USE OR REPAIR

Title III allows the lawful owner of a copy of a program to make reproductions or adaptations during the maintenance or repair of a computer he owns or leases, or when necessary to use the program in conjunction with a computer that is owned or leased by him. The exemption only permits a copy that is made automatically when a computer is activated.

MISCELLANEOUS PROVISIONS

The remaining provisions address a wide variety of things, such as statutory exemption amendments and hull designs.

KEY POINTS:

- ❖ The DMCA may protect website owners and bloggers from contributory liability for content posted by users and guests.
- ❖ The DMCA does not protect those who:

- know or have reason to know about infringing activity and do nothing to stop it; or
 - receive a direct financial benefit from the infringing activity, and have the right and ability to control it.
- ❖ To get the benefits of the DMCA you must:
- promptly remove or disable access to infringing material when you learn of it;
 - promptly remove or disable access to material upon receiving notice that it is claimed to infringe a copyright;
 - designate a copyright notifications agent;
 - implement, and inform subscribers and account holders of, a policy of terminating repeat infringers; and
 - accommodate measures that copyright owners use to identify or protect copyrighted works.
- ❖ Following DMCA procedures also protects you from liability for removing content pursuant to a proper DMCA notice.
- ❖ Do not make a misrepresentation in a DMCA notice or counter-notification.
- ❖ Publish DMCA-compliant Terms of Service and Copyright Policy on your site.
- ❖ Circumventing technological copyright-protection measures is generally prohibited, subject to some exceptions.
- ❖ Tampering with or removing copyright management information is generally prohibited.

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***This is an excerpt from **Website Law: The legal guide for website owners and bloggers**, by Tom James.

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