

# Contents

How to Use This DMCA Handbook	xvii
About the Author	xix

## **CHAPTER 1**

Introduction	1
<hr/>	
I. Background	1
II. The DMCA Is a Process	2
III. Definitions	3

## **CHAPTER 2**

Online Service Providers (OSPs or ISPs)	7
<hr/>	
I. Websites and Web Hosts	7
II. Search Engines and Directories	8
III. Cloud Networks	8
IV. Virtual Worlds	8
V. Content Aggregators	9
VI. Social Networking Websites	9
VII. Blogs and Blog Networks	10
VIII. Bulletin Boards/Message Boards	10
IX. File Sharing Websites	10
A. Usenet	11
B. P2P	11
C. Torrent Sites	12
D. Tor Network	13

E.	Document/Presentation Sharing Websites	13
F.	Photo/Art Sharing Websites	14
G.	Video Sharing Websites	14
X.	File Hosting	14
A.	Storage Websites	14
B.	Storage Lockers	14
C.	File Back-Up Services	15
XI.	Project Collaboration Websites	15
XII.	News Websites	15
XIII.	Advertising Networks	15

### **CHAPTER 3**

#### **Copyright Law Protection of Online Content** 17

---

I.	An Overview of Copyright Law	17
II.	Prior Copyright Law	18
III.	Current Copyright Law	18
IV.	Types of Content Covered by Copyright Law	19
A.	Text: Literary Works and Computer Programs	19
B.	Visual Arts and Images	19
C.	Audiovisual Works	20
D.	Music: Compositions and Sound Recordings	20
V.	Copyright Ownership	21
A.	General Rule: Creator Is Owner	21
B.	Joint Works/Joint Creators	22
C.	When the Creator Is Not the Copyright Owner	22
VI.	Exclusive Rights under Copyright Law	23
A.	Reproductions/Copies	24
B.	Distribution	24
C.	Display	25
D.	Performance	25

E. Derivative Works	25
F. Digital Audio Transmission for Sound Recordings Only	26
VII. What Does “Exclusive” Mean?	26
VIII. Copyright Registration	26
IX. Duration of Copyright	27
X. Statute of Limitations (Time Period to File a Lawsuit against the Infringer)	27

## **CHAPTER 4**

### **Online Copyright Infringement 29**

---

I. Types of Copyright Infringement	30
A. Direct Infringement	30
B. Contributory Infringement (Also Called “Secondary Liability”)	31
C. Induced or Facilitated Infringement	31
D. Vicarious Infringement	34
II. Remedies for Infringement	35
A. Monetary Damages	35
B. Injunctions and Restraining Orders	35

## **CHAPTER 5**

### **Defenses to Online Copyright Infringement 37**

---

I. Lack of Originality	37
II. Scènes à Faire	37
III. Invalid Copyright	38
IV. Public Domain	38
V. Express or Implied License	38
VI. Independent Creation	39
VII. Fair Use	39

VIII.	Estoppel	39
IX.	Abandonment of Copyright	40
X.	Misuse of Copyright	40
XI.	DMCA	40

## **CHAPTER 6**

### **Legislative History of the DMCA** **41**

---

I.	Background	41
II.	Stakeholder Interests Addressed by the DMCA	42
	A. Content Providers' and Copyright Owners' Concerns	42
	B. Online Service Providers' Concerns	43
	C. Public Interest: Access to a Global Marketplace	44
III.	Balance of Interests	44

## **CHAPTER 7**

### **How the DMCA Protects OSPs** **47**

---

I.	OSP Activities and Safe Harbors	47
II.	The OSP Is Not Liable to the Infringer or Copyright Owner If It Follows the DMCA Process	49
III.	The DMCA Does Not Change Underlying Copyright Law	49

## **CHAPTER 8**

### **How the DMCA Protects Content Creators and Copyright Owners** **51**

---

I.	Expeditious Removal of Infringing Content	51
II.	Administrative Subpoenas	52
III.	Injunctions against OSPs	52

**CHAPTER 9**

How the DMCA Protects Infringers 53

---

**CHAPTER 10**

Overview of the DMCA Take-Down Process 55

---

I. Take-Down Process Summary 55

II. Outcomes for the OSP, Copyright Owner, and Infringer 57

III. Remove or Disable, and Replace, Restore, or Enable 58

    A. Upon Receipt of a DMCA Take-Down Notice 58

    B. Upon Receipt of a Counternotification 59

**CHAPTER 11**

Limitation of Liability of Public or Nonprofit Educational Institutions 61

---

**CHAPTER 12**

Eligibility Requirements: Transmit Safe Harbor Defense 63

---

**CHAPTER 13**

Eligibility Requirements: Cache Safe Harbor Defense 67

---

**CHAPTER 14**

Eligibility Requirements: Storage Safe Harbor Defense 73

---

I. Storage Safe Harbor Prerequisite One: Service Provider 73

II. Storage Safe Harbor Prerequisite Two: Infringing Content Posted at the Direction of a User 74

    A. Automated Processing 74

B. Cases: Automated Processing	74
C. Human-Reviewed Processing	76
D. Cases: Human-Reviewed Processing	77
III. Storage Safe Harbor Prerequisite Three: Standard Technical Measures	78
IV. Storage Safe Harbor Prerequisite Four: Termination Policy	79
A. Adopt a Policy	79
B. Inform Users of the OSP's External Account Termination Policy	80
C. Implement the Policy in a Reasonable Manner	81
D. Cases: Account Termination	82
E. Termination of Account	84
V. Storage Safe Harbor Prerequisite Five: Designated Agent	84
VI. Storage Safe Harbor Prerequisite Six: No Actual Knowledge	85
VII. Storage Safe Harbor Prerequisite Seven: No Awareness of Facts or Circumstances	86
A. Red Flag Knowledge	86
B. Cases: Finding Red Flag Knowledge	87
C. Cases: Finding No Red Flag Knowledge	88
D. Willful Blindness	89
E. Cases: Willful Blindness	89
F. Summary of Actual Knowledge, Red Flag Knowledge (Awareness), and Willful Blindness	90
VIII. Storage Safe Harbor Prerequisite Eight: Expeditious Removal of Content	90
IX. Storage Safe Harbor Prerequisite Nine: No Financial Benefit	90
A. Right and Ability to Control Infringing Activity	91
B. Cases: Right and Ability to Control Infringing Activity	91
C. Financial Benefit Directly Attributable to Infringing Activity	93
D. Cases: Financial Benefit Directly Attributable to Infringing Activity	94
E. Measures to Combat Copyright Infringement	95

**CHAPTER 15**

Eligibility Requirements: Index Safe Harbor Defense	97
---	----

---

**CHAPTER 16**

Designating a DMCA Agent and Establishing DMCA Policies and Procedures	99
--	----

---

I. Steps to Designate an Agent and Determine OSP Policy	100
A. Step 1: Determine Whom to Designate as the OSP's "Designated Agent"	100
B. Step 2: Create a Designated Agent Registration Account at the U.S. Copyright Office	101
C. Step 3: Electronically File a Designation of Agent to Receive Notifications of Claimed Infringement	102
D. Step 4: Post the Designated Agent Information on Its Service and Website	107
E. Step 5: Decide If the OSP Will Provide a Form of DMCA Take-Down Notice That Will Be "Effective" If Properly Completed by the Copyright Owner	109
F. Step 6: Decide If the OSP Will Provide a Form of DMCA Counternotification That Will Be "Effective" If Properly Completed by the Alleged Infringer	110
G. Step 7: The OSP Must Decide How the Notices Are Sent to the OSP for Both the DMCA Take-Down Notice and Any Counternotification	111
H. Step 8: Create the DMCA External Policy	112
I. Step 9: Post the DMCA Policy on the OSP's System, Network, and/or Website	112
J. Step 10: Determine under What Circumstances the OSP Will "Terminate" the Account of a "Repeat Infringer"	112
II. Terms of Service and Privacy Policy	112

## **CHAPTER 17**

### **Starting the DMCA Take-Down Process:**

#### **Copyright Owner's Responsibilities under the DMCA 115**

---

I.	Elements of an “Effective” DMCA Take-Down Notice	116
II.	Proof of Misrepresentation	122
III.	Damages	123
IV.	Additional Information	124

## **CHAPTER 18**

### **OSP's Obligations after Receipt of a DMCA**

#### **Take-Down Notice 125**

---

I.	Steps to Follow	125
	A. Step 1: Review the DMCA Take-Down Notice to Make Sure It Is “Effective”	125
	B. Step 2: “Expediently” Remove or Disable Infringing Content or Infringing “Activity”	127
	C. Step 3: Take Reasonable Steps to Notify the Infringer That the OSP Has Removed or Disabled the Infringing Content	128
	D. Step 4: Tickle the OSP's Calendar for a Date That Is Five Days after the OSP Sends the Infringer Form 3	128
	E. Step 5: Terminate the Infringer's Account	129
II.	Case Examples Regarding DMCA Take-Down Notice Requirements	129

## **CHAPTER 19**

### **Infringer's Options in Response to a DMCA Take-Down Notice**

**131**

---

I.	Elements of an “Effective” Counternotification	132
II.	When Must the Infringer File the Counternotification?	134

III.	Personal Information about the Infringer	134
IV.	Where Can the Copyright Owner Sue the Infringer?	135
V.	Should the Infringer Send a Counternotification?	136

## **CHAPTER 20**

### **OSP's Obligations to the Copyright Owner and Infringer upon Receipt of a Counternotification** 139

---

I.	What If the OSP Does Not Receive a Counternotification?	139
II.	OSP's Obligations on Receipt of an Effective Counternotification	140
III.	Why the OSP Restores the Infringing Content	141
IV.	What Should the OSP Do If the Infringer Sends an Incomplete Counternotification to the OSP?	141

## **CHAPTER 21**

### **Copyright Owner's Considerations upon Receipt of a Counternotification** 143

---

## **CHAPTER 22**

### **OSP's Termination of a User's/Subscriber's Account under the DMCA** 145

---

I.	Enforcement of the DMCA Termination Provision	145
II.	Termination under Terms of Use	146

## **CHAPTER 23**

### **OSP's Obligations If It Receives a Lawsuit Notice before the Expiration of Ten Business Days after Its Receipt of a Counternotification** 147

---

## **CHAPTER 24**

OSP's Obligations If It Receives a Lawsuit Notice after It Has Restored or Enabled the Allegedly Infringing Content	149
---	-----

---

## **CHAPTER 25**

Copyright Owner's DMCA Remedies: Subpoenas, Injunctions, and Circumvention Lawsuits	151
--	-----

---

I. Administrative Subpoenas	152
II. Injunctions	153
III. Anti-Circumvention	155
A. Access Control Circumvention	155
B. Copy Control Circumvention	156
C. Exemptions to Prohibition against Circumvention	157

## **CHAPTER 26**

Problems with and Abuse of the DMCA	159
-------------------------------------	-----

---

I. False Copyright Infringement Claims	159
II. The DMCA Used to Extract a Ransom	160
III. Defensive Abuse	160
IV. Duty to Provide Truthful Information in All Notices	160
V. Fair Use	161
VI. DMCA Take-Down Notices That Have Nothing to Do with Copyright	161
VII. OSPs Devoted to Hosting Infringing Content on Servers Located Abroad	162
VIII. OSP Is Not Required to Validate Information in Notices	162
IX. No Public Database of Infringers	163

<b>DMCA Forms and Appendices Index</b>	<b>165</b>
<b>FORM 1A</b>	DMCA Policy to Post on OSP Website for Storage and Index Safe Harbors— <i>Without</i> Counternotification Form Information
	167
<b>FORM 1B</b>	DMCA Policy to Post on OSP Website for Storage and Index Safe Harbors— <i>With</i> Counternotification Form Information
	171
<b>FORM 2</b>	DMCA Take-Down Notice Sent by Copyright Owner to OSP (Fill-in or Automated)
	175
<b>FORM 3</b>	Letter the OSP Promptly Sends to Alleged Infringer
	179
<b>FORM 4</b>	Counternotification Sent by Alleged Infringer to OSP (Fill-in or Automated)
	181
<b>FORM 5</b>	Letter the OSP Sends to the Copyright Owner Re: Counternotification
	185
<b>FORM 6</b>	DMCA Policy Checklist for OSPs
	187
<b>APPENDIX A</b>	DMCA Designated Agent Directory Frequently Asked Questions
	191
<b>APPENDIX B</b>	Excerpt from YouTube’s Terms of Service Relevant to UGC and the DMCA
	199
<b>APPENDIX C</b>	YouTube’s Automated DMCA Take-Down Notice Process
	203
<b>APPENDIX D</b>	YouTube’s Automated DMCA Counternotification Process
	205
<b>APPENDIX E</b>	Example of Portion of Privacy Policy Regarding Information Provided to Copyright Owner Received from Alleged Infringer in Counternotification
	207
<b>APPENDIX F</b>	DMCA—17 U.S.C. § 512
	209
Index	221

Select documents and updates are  
available for download