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Introduction

I. Background

In 1998, the U.S. Congress passed the Digital Millennium Copyright Act (DMCA), enacted as the Online Copyright Infringement Liability Limitation Act (OCILLA) found at 17 U.S.C. § 512 *et seq.* Why? Congress recognized that digital content can be easily copied, making those online service providers (OSPs) that transmit, host, store, or index illegal copies of copyrighted material on their servers or systems liable for online contributory copyright infringement by virtue of such functions. Congress hoped to provide greater certainty to OSPs concerning their legal exposure for online copyright infringements occurring in the normal course of their activities. Even one copyright infringement could bankrupt an OSP. Because of that risk, Congress created four safe harbors for OSPs that immunize OSPs from monetary damages for copyright infringement. Google was launched in 1998, Napster in 1999, and Facebook, YouTube, Twitter, and Pinterest thereafter. Without the DMCA, popular websites such as these and millions of others would not have emerged, search engines would not have been developed, and the Internet and web would not be the robust resource and communication medium it is today.

safe • harbor

Definitions (2)

1. A harbor or haven that provides safety from weather or attack.
2. A provision in a *law* that gives a party *protection from liability* or penalty on the condition that the *party performed its actions in compliance with defined standards*.

Since the first edition of this handbook was published in 2012, more than 400 DMCA cases have been litigated, resulting in new case law that affects the implementation of the DMCA for both OSPs and Copyright Owners. In addition, the U.S. Copyright Office established an entirely new electronic process for registering DMCA Designated Agents. Now, all OSPs—including those who previously designated an agent under the old “paper” system—must have electronically filed with the U.S. Copyright Office its Designated Agent before the end of 2017 to retain DMCA safe harbor protection. If an OSP did not electronically file before the end of 2017 but did file using the old “paper” system, the OSP does *not* have DMCA safe harbor protection and should electronically file its Designated Agent *immediately*. Otherwise, the OSP is at risk for being sued for contributory copyright infringement, thereby also risking its entire business.

This second edition discusses case law updates, guides the OSP through the new electronic registration procedure, and provides a step-by-step process for the OSP, Copyright Owner, and alleged Infringer to comply with DMCA, as interpreted in today’s online environment.

II. The DMCA Is a Process

If the OSP follows the strict DMCA process, it will enjoy immunity from copyright infringement relating to its transmission, caching, storing, or indexing of infringing material on its servers, system, network, or website. The process includes the following steps.

Eligibility. To qualify for the safe harbors, OSPs must meet certain prerequisites relating to the functions of transmitting, caching, storing, or indexing online content. The liability limitations apply to networks “operated by or for the OSPs,” thereby protecting both the OSPs that directly provide an online service or network and the upstream or downstream hosts and operators.

Take-Down Notice. If a Copyright Owner identifies an infringement committed by someone who posted or uploaded an infringing copy to an OSP's servers, system, network, or website, the Copyright Owner may serve a notice of the infringement on the OSP, commonly referred to as a DMCA "take-down" Notice.

Removal of Content. In response, the OSP must "expeditiously" take down the infringing material from the OSP's servers, system, network, or website.

Counternotification. After the infringing material is taken down by the OSP, the alleged Infringer may then challenge the take-down through a Counternotification on the basis the material was improperly taken down as a result of a "mistake or misidentification."

"Put Back" of Removed Content. Upon receipt of the Counternotification, the OSP must "put back" or "enable" the material it previously removed or disabled.

Copyright Owner Lawsuit. The allegedly infringing material remains on the OSP's servers, system, network, or website unless the Copyright Owner subsequently sues the alleged Infringer for direct copyright infringement within a prescribed time. Once the OSP receives a copy of the Lawsuit Notice, it must again "permanently" remove or disable the infringing material from the OSP's servers, system, network, or website until such time as the lawsuit is settled out of court or a judgment is rendered.

III. Definitions

For ease of reference and for purposes of this handbook, the following definitions apply:

"Content" means any material or creative work eligible for copyright protection under "Copyright Law." Content includes text, writings, photographs, motion pictures, audiovisual works, and sound recordings. The DMCA refers to "Content" as "material."

"Copyright Law" means the "the United States Copyright Act of 1976," 17 U.S.C. § 101 *et seq.*, and the cases and federal regulations promulgated under this act.

"Copyright Owner" is the person or entity who owns the Copyright. If the Creator has not sold or transferred the copyrights to the Content, then the Creator is the Copyright Owner.

"Creator" means the person who first created the original Content.

"Designated Agent" means the trusted person who is designated and serves as the official representative of the OSP to receive DMCA

take-down Notices and Counternotifications and who is registered with the U.S. Copyright Office.

“*DMCA*” means title II of the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 *et seq.* (United States).

“*DMCA Counternotification*” or “*Counternotification*” means the written notice the Infringer sends to the OSP if the Infringer takes the position that the OSP made a mistake or misidentified the Content when it removed or disabled the Content identified in the DMCA take-down Notice.

“*DMCA take-down Notice*” or “*take-down Notice*” or “*DMCA Notice*” means the written notice the Copyright Owner sends to the OSP that begins the DMCA Notice and take-down process.

“*Infringer*” means an *alleged* Infringer—the person who the Copyright Owner alleges has copied or distributed the Copyright Owner’s original Content without the Copyright Owner’s permission and who has uploaded or posted the Copyright Owner’s Content without the permission of the Copyright Owner.

“*ISP*” means Internet service provider, service provider, or online service provider. *See* definition of “OSP.”

“*Lawsuit Notice*” means either: (1) the notice the Copyright Owner sends, if any, to the OSP that informs the OSP that the Copyright Owner has filed a copyright infringement lawsuit against the Infringer; or (2) a copy of the actual infringement complaint filed against the Infringer. The complaint must include a request for a court order to restrain the Infringer from engaging in further infringing activity.

“*OSP*,” “*service provider*,” “*Internet service provider*,” “*provider*,” or “*ISP*” means a qualifying provider of online services or network access, or the operator of facilities therefor, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a User, or the caching, indexing, or storage of Content or material of the User’s choosing, without modification to the Content. “OSP” is used in this handbook instead of “ISP,” although both abbreviations have the same meaning.

“*Safe Harbors*” means the four DMCA safe harbors for eligible OSPs that provide immunity from monetary damages for contributory copyright infringement if the OSP transmits, caches, stores, or indexes infringing Content on its servers, system, network, or website.

“*TOS*” means the Terms of Service (sometimes also called the “Terms of Use”), which is a legal contract that sets forth the terms under which the OSP provides its online services and sets forth the rules and responsibilities of Users of the OSP’s services or system. The TOS is posted on the OSP’s website.

“*UGC*” means User Generated Content that the User transmits, uploads, or stores on the OSP’s service or website. UGC is not provided by the OSP but by third-party Users of the OSP’s website or services.

“*User*” or “*subscriber*” means any person who avails him- or herself of the OSP’s system or network to transmit, send, upload, post, store, or search for Content on, through, or to an OSP’s servers, system, network, or website. An alleged Infringer is also a User. The DMCA refers to Users as “subscribers.”