

QUICK & EASY STEPS TO AVOIDING COPYRIGHT INFRINGEMENT LIABILITY

by

Matthew A. Becker, Esq.

Overview

Over the past decade copyright infringement has become one of the most significant legal issues as it relates to internet service providers (AISPs@). Development of new technology has brought new and intricate methods for infringement and continues to challenge copyright owners as well as ISPs. Often the party responsible for the copyright infringement is difficult to locate or has no assets to seek a judgment against. As a result, victims of copyright infringement will often look for Adeep pockets@ to include in a lawsuit. Enter the ISP...

Under current U.S. Copyright law, an ISP can be held liable for copyright infringement even when committed by one of its customers without knowledge by the ISP. An innocent ISP can end up in court defending an expensive and hard to win copyright infringement lawsuit. In addition to incurring legal fees and costs in defense of the infringement claim, an ISP may be liable for damages arising from infringement. Damages for copyright infringement can be significant and can include: 1) any profits from the infringement; 2) statutory damages between \$750 - \$30,000 per infringement (increased to \$150,000 for willful infringement); and 3) costs and attorneys fees.

Protection for an ISP

Recognizing this problem (among others), Congress passed the Digital Millennium Copyright Act of 1998 (ADMCA@), to give the ISP a means for avoiding such liability. Under the DMCA, an ISP is defined broadly to include most providers of internet services and content. Title II of the DMCA provides a means for an ISP to avoid financial liability due to certain infringing activities of its subscribers. However, in order to avoid liability, the ISP must strictly adhere to the detailed requirements of the DMCA.

Limitations

The DMCA will only protect an ISP for infringement by its subscribers if the ISP has no actual awareness or knowledge of such infringements or infringing material. Additionally, the ISP's involvement must be limited to storage or transmission without any modification to the infringing materials. Any editing, revision, sale, or direct distribution for financial gain by the ISP may limit the protections of the DMCA.

Steps for Compliance with the DMCA

Designation of Agent.

Initially the ISP must designate an agent to receive infringement notices under the DMCA. The ISP must display the name, address, phone number and e-mail address of its agent on the ISP's website. The best place for such designation is within the copyright policy in the ISP's legal notices. Each new customer or subscriber of the ISP must review such policy. Additionally, the ISP must register the same information with the United States Copyright Office along with a \$20 filing fee.

Notification and Removal Policy.

The ISP must also implement the notification and removal policy established by the DMCA. This policy must be posted in the legal notices section and include the following information:

Notification. A party who believes their copyright has been infringed by a subscriber or user of an ISP must submit a proper notification to the ISP. The notification must include all of the following: 1) A physical or electronic signature of a person authorized to act on behalf of the copyright owner; 2) Identification of the copyrighted work claimed to have been infringed; 3) Identification of the material that is claimed to be infringing or to be the subject of the infringing activity that is to be removed or access to which is to be disabled as well as information reasonably sufficient to permit the ISP to locate the material; 4) Information

reasonably sufficient to permit the ISP to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address; 5) 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 law; and 6) 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 the copyright that is allegedly infringed.

In a recent decision, a federal circuit court interpreted the validity of an imperfect DMCA notification. The court held that the notification must only substantially comply with the above requirements to be valid. Therefore, depending upon the location of the ISP, perfection in the notification may not be required. Additionally, if the notification is missing certain information in order to be a proper notice, the ISP's agent has a duty to contact the person making the notice in order to get all of the necessary information.

Take Down Requirement. Once the ISP has received a proper notice, it must expeditiously remove or disable access (take down) to the alleged infringing material or information. The ISP must also immediately notify its subscriber or user that access to the material has been removed or disabled.

Counter-Notification. After the alleged infringing material has been removed, the user or subscriber who posted such material may provide the ISP with a counter-notification in order to re-enable the material. The counter-notification must include all of the following: 1) Physical or electronic signature; 2) Identification of the material that has been removed or to which access was disabled and the location at which the material appeared before it was removed or access to it was disabled; 3) A statement under penalty of perjury that the user or subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification; and 4) The user or subscriber's name, address, and telephone number, and a statement that she/he consents to the jurisdiction of the federal district court for the federal district in which she/he is located, and will accept service of process from the complainant.

If proper counter-notification is received by the ISP, it must take the following action: 1) notify the original claimant that it will replace the removed material or cease disabling access to it in 10 business days; and 2) restore or re-enable the material between 10 and 14 business days

from the date of the counter-notification.

Termination Policy.

Finally, the ISP must implement a policy to terminate services to its subscribers or users that are repeat copyright infringers. This policy must be posted on the ISP's website and provided to all users and subscribers.

Conclusion

While there continue to be many legal pitfalls for ISPs, the DMCA provides an effective means for avoiding copyright infringement liability in certain situations. However, it is important to set up a copyright legal policy which incorporates each of the requirements of the DMCA. Additionally, the ISP must operate within the requirements of the DMCA for all notifications, take-downs and counter-notifications.

****For any questions related to the above article, the DMCA or other copyright issues, contact the author directly at matt@beckerlawfirm.com or (619) 522-6760. Members of the CGI Scriptcenter newsletter receive a free consultation and intellectual property audit.****