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The DMCA: A Safe-Harbor from Liability for Copyright Infringement or the "Thunder from Down Under"?

By Michael DeBlis

The Digital Millennium Copyright Act (DMCA) is a product of worldwide agreement by governments and corporations on ways to attempt to stem the tide of copyright infringement that has run rampant in the digital age. The DMCA came online in 1998 when people still watched DVDs and cars had CD players. The Act has not kept up with the rapid pace of technological advances; however, its protections against copyright infringement are necessary in today's world.

The DMCA Backstory

Services like Napster and sites like YouTube shook industries and terrified corporations as they allowed widespread illegal sharing of copyrighted work in digital form. Yet, those services and sites promised a new way for corporations to disseminate works of art. Still, movie studios and record companies alike feared losing millions seeing copies of songs and DVDs online for free almost as soon as they were released to the public for sale. Corporations wanted to make sure that a new sheriff would tame the internet "wild west." The DMCA was born to do that job. Companies and businesses engaged in the business of bringing the internet to your dorm room or streaming music to your Zune felt vulnerable to copyright lawsuits under proposed law at the time, and they felt they needed some protection . . . in the benefit of the public interest, of course.

A Safe Harbor from Lawsuits

A copyright violation lawsuit under the law as it stood pre-DMCA could have wiped out YouTube. Within the DMCA, however, there exist some provisions that protect "internet service providers" from liability for copyright infringement as long as these service providers follow certain procedures to ensure that users of their service are not engaged in copyright infringement. That exemption is commonly referred to as the "Safe Harbor" provision of the DMCA, found in Section 512.

We generally think of an internet service provider (ISP) as a company that delivers bandwidth and internet access into our homes, like Comcast/Xfinity or America On-Line (AOL for the old schoolers). Under the Safe Harbor provision, the definition of an ISP is broader. It includes companies that provide some kind of "service" to consumers, like a chat room. So then, you could set up your own chat room and ostensibly, you could be an ISP and avail yourself

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of Safe Harbor protection as long as you follow the steps needed to activate the protection.

The steps you would take to enable Safe Harbor protection include:

Posting Visible Disclaimers

Somewhere in your chat room welcome message and at the signup page, you would post a clear and easily comprehendible term of use (TOS) statement and disclaimers regarding the uploading or dissemination of any kind of works protected by United States or international copyright law.

Creating and Following a Policy of Identifying and Removing Copyrighted Material

YouTube has algorithms that notice whenever someone uploads certain movies or songs and flags them for removal. You would have to make a "reasonable" effort to find and remove actionable content from your chat room in this scenario.

Should someone accuse you, a service provider, of violating the DMCA, you could defend yourself by pointing out that you have taken significant action in an attempt to stop the violators when you find them. You should notify violators and stop frequent abusers.

Those who violate the DMCA rules should be notified of their offending action and reminded of the TOS and other relevant rules. To accomplish this, you may send out a "Cease and Desist" (C&D) letter. Normally, a C&D would come from the copyright owner who finds someone in violation of their right to distribute their protected work as they see fit. Such a letter would request the removal of the protected work from the internet within a specified period or face legal consequences permitted by the DMCA.

You, the service provider, would send a similarly worded note, requesting the removal of the material and/or asking them to discontinue the practice of distributing protected works. You can warn them of the potential consequences of the action regarding the use of the service as well as legal action from the copyright owner.

If you have someone using your service who, on more than one occasion, has run afoul of the TOS, you must police them, which may include suspending their ability to use your service from a short time or banning them outright.

What Is Wrong with the DMCA?

All but the internet anarchists agree that the distribution possibilities offered by the internet need to be policed. Some are in disagreement on whether the provisions of the DMCA are the right way to do so. Several criticisms make cogent points and may be addressed if there exist political bodies amenable to doing so.

By the Movie Industry for the Movie Industry

Some critics argue that the rules of the DMCA are slanted to protect Hollywood works and that the Motion Picture Association of America and the Recording Industry Association of America had far too much say in the creation of the rules. Since big corporations had a hand in creating the DMCA, one might expect that the rules favor those businesses. The law sets a high minimum for filing a claim.

The Punishment Does Not Fit the Crimes

Internet right activists note that the punishment for DMCA violations is too severe unbefitting a relatively minor, nonviolent action. They note that the DMCA has essentially criminalized a civil matter, one that would normally be worked out in civil court rather than fined like a speeding ticket. The law heaps heavy penalties on offenses per violation, and each instance of uploading a song or movie is a violation. So then, an offender who uploads 20 songs in your chat room is facing a maximum fine of $440,000.

The Fair Use Defense

One defense to DMCA claims is the "fair use" provision of copyright law. There is little settled agreement in the courts on what constitutes fair use, so what is protected in one jurisdiction is a violation in another.

The YouTube Example

The Safe Harbor provision ends up protecting copyright violation enablers like YouTube. As long as these services do enough to qualify for Section 512 protection, they will have less incentive to stringently police abusers. For example, YouTube's attempt to satisfy part of the requirements to be eligible under Section 512 was to institute a content-identifying algorithm. It has caused as many problems as it has solved.

Once YouTube's algorithm tags the protected work, it notifies the copyright owner. The owner then has the option to either:

- Block the uploaded work;
- Track the work so that the copyright owner can monitor views and other statistics; or
- Let the copyright owner make money from ad revenue.

The algorithm misidentifies protected work often, and it cannot tell whether the person uploading the work is using it within limits to qualify it for protection under the fair use provision of copyright law. So then, you might make a parody video, YouTube flags it and the unhappy target of your parody may have the right to make money from your protected work under YouTube rules.

Content creators like makers of parody and comedic videos abound on sites like YouTube. It is becoming an accepted way of getting noticed. Actor/activists like Milana Vayntrub and Issa Rae have turned web series into television notoriety, and in Ms. Rae's case, an HBO deal. Sites such as YouTube – service providers in DMCA parlance – still play an important role in helping creatives get seen. Creatives should consider putting content out there, but should not ignore protecting it under the DMCA and common law copyright principles.

Protecting Work under the DMCA

The DMCA does not require that the copyright holder take additional steps to protect work on the internet. As is always the case, your work earns protection from the time of creation. It, however, is important to take the following actions:

- Register your work as you would normally do. Register it with the copyright office.
- If you plan to upload the work to a personal website and stream it or offer it for download, post the appropriate DMCA and copyright law notices. Provide notice of the law to the offenders as well as the potential penalties afforded you by the law.
- Send out C&D letters.
- File a DMCA Takedown Notice.
- Consult an attorney.

It may not be an affordable proposition for you to go to federal court and sue someone for stealing your song or short film. You can ask another person nicely to remove the offending upload *via* email. That often works, as surprisingly many in the internet sharing community respond to simple requests. Others may respond better to something more formal. That would be the C&D letter.

Cease and Desist

As noted earlier, C&D letters constitute a formal request from the copyright owner either to a service provider, group, or individual to recognize the copyright owners' rights to distribute their own material (or, the person who has obtained such rights through an agreement).

The Takedown Notice

If asking nicely fails, there is a way to avoid filing suit under the Copyright Act, using a DMCA takedown notice. You contact the service provider of the offending party, be it a website owner, blogger, or general internet user. The notice will inform the service provider that one of their users has infringed your copyright. The service provider will be required to notify the infringing party of the takedown notice to give them a due process opportunity to respond with a defense (that is, fair use).

Normally at this point, the copyrighted work is removed, either by the ISP or the infringing party. The service provider usually threatens the infringing party that they will be in violation of the TOS if they keep up the behavior and be banned from whatever service the service provider provided.

On occasion, the alleged infringer will respond to the takedown notice with a counter notice. The counter notice may allege that the service provider removed the work at issue in error, or that the use of the work falls under the fair use provision.

Sending the counter notice starts a clock. The party who sent the takedown notice will then have 10 to 14 days to file suit under the DMCA. The action of filing suit will keep the removal of the work in place. If the person who claims the violation has occurred does not respond to the counter notice, the ISP may put the work in question back on the internet.

If you are the subject of a takedown notice and you want to file a counter notice, know that:

- Your counter notice must be substantive and truthful. Section 512 states that you must have "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." If you fib in your counter notice, you could find yourself subject to a perjury charge if someone finds you lied with intent.

- The takedown notice does not have to be about the posting of a copyrighted work. It could be regarding software that intends to circumvent Digital Rights Management (DRM) software or other protections. Attempting to circumvent protections is a violation of the DMCA.

- The takedown notice could be about a piece of software or an app that is substantially similar to another. Someone may believe that you stole some of their technology for your own product and that you're making money from it. If you are a video creative, you may have used footage or music you thought was in the public domain.

- The counter notice is a legal document, so it must be accurate, complete, and it must point to where the work at issue was/is located on the internet (including a URL is sufficient).

- Most service providers have a designated DMCA agent who does nothing but chase C&Ds and takedown notices. You will send your takedown notice or counter notice to this person. You should be able to find the contact information easily online as mandated by a recent DMCA update.

Whether dealing with a potential infringement on your copyrighted work or protecting yourself or your startup from an allegation of an infringement, you should talk to an attorney. The takedown notice dance is sort of an automated legal action and you should treat it as you would any lawsuit.

Fair Use

For some, fair use is a go-to defense of an allegation of copyright violation. Generally, fair use is a work that uses a protected work, but for some educational purpose, to comment on that work (or other works) or to merely report on the existence of this work or others. One can easily think of examples of each: a parody video, a concert review, or some entertainment news video. As long as your new work does not "transform" the original work or does not use too much of it, you can be safe in believing your use is fair.

The purpose of the use of the work is also an important consideration. Are you teaching a class on film? Are you an entertainment reporter with some credits? Are you posting a "how to" video on Adobe After Effects? Is the use of the work going to somehow diminish the holder's ability to profit from the work?

Some things you might consider to be fair use are going to attract copyright police. The battles between *Star Trek* fans and Paramount Pictures are legendary. "Trekkers" spent years believing their fan fiction and imaginative ship designs were harmless. Later, when Paramount sent out reams of C&Ds, fans looked for protection under the fair use doctrine, but there was none forthcoming. Even a "mashup," a quasi-parody/tribute of *Star Trek* and Dr. Seuss books were found to be in violation of copyright law. Trekkers argued that their work only enhances the interest of the franchise. No court has yet agreed.

Also, fair use doctrine accounts for the possibility of a genuine mistake. A rookie webmaster may not be up on their copyright law and they post a professionally taken photograph without either attribution or permission. Someone might accidentally capture 20 minutes of "The Walking Dead" while recording a birthday party and post it to the web.

Is the DMCA Broken and Can it be Fixed?

The issues regarding the fair use doctrine are not the fault of the DMCA as fair use predates the Act. The DMCA, however, has enough issues to be concerned with. Also, there does not appear to be much political will to make significant changes. Companies like YouTube supported the DMCA anti-circumvention provisions in exchange for expanded Safe Harbor protections. The Safe Harbor protections allowed YouTube to mature from a kind of video bazaar into a TV production company and noncable broadcaster as it avoided debilitating

copyright lawsuits. The DMCA's concerns with preventing the circumventing of DRM is dated as consumers move to streaming and concerns over protecting physical media are diminished.

The current system, it is believed, does a better job allowing corporations to protect their product, while it is too expensive for a small production company to protect its product. As is often the case when it comes to the internet, consumers and rights activists are examining the DMCA for areas that can be modernized, making it a more effective law for all.