

Web Host Industry Review

DMCA: PROTECTING THE PROVIDERS

by Esther M. Bauer

The federal law protecting online service providers from the risk of copyright infringement is demanding and complex, as well as costly to providers failing to comply.

The Digital Millennium Copyright Act, which became law in October 1998, limits the liability of Internet service providers facing copyright infringement due to the actions of their customers. That protection is available, however, only after a hoster complies with the Act's intricate provisions.

"Most importantly, to qualify for the Act's protection, the Web hoster must comply with the Act's notice, takedown and counter notice provisions," says Martin H. Samson, an attorney with Phillips Nizer LLP of New York City who specializes in Internet-related issues.

Samson offers this scenario of the cumbersome reality:

Receipt of an appropriate notice of infringement generally will obligate the hoster to disable access to the material and send the offending Web site's operator notice of this activity.

The offending Web site operator can then have Internet access to the material restored by supplying the counter notice specified in the Act, stating that access to the materials was disabled as a result of mistake or misidentification of the material.

This triggers yet another notice obligation, this time from the Web hoster back to the copyright owner. The owner can again prevent the Web hoster from enabling access to the offending materials by giving notice of, and commencing a lawsuit seeking to restrain the subscriber

from, engaging in the infringing activity.

Providers should never ignore notices of copyright infringement regarding Web sites they are hosting, Samson says.

By ignoring such notices, providers forfeit the Act's immunity from monetary damages, which range from \$750 to \$30,000 per work infringed and up to \$150,000 per work for willful infringement. Attorney's fees and costs can also be recovered.

"Rarely will the fees paid to a hosting service by a particular client justify that risk," Samson says.

There has yet to be a court case where a hoster balked at taking down a site and a copyright owner proved his copyright was infringed and the hoster was responsible, he says.

The Act does not require a hoster to monitor customer sites, only to take action when notified of a violation.

Hosters also are required to designate an agent to receive infringement claims. The contact information must be listed on the Web hoster's site and at the U.S. Copyright Office, which publishes a list of all agents at www.copyright.gov/onlinesp/list/index.html.

The Act hasn't fulfilled its promise to give Web hosters a clear process for addressing copyright complaints, says Fred Von Lohmann, senior intellectual property attorney with Electronic Frontier Foundation of San Francisco.

"The Web hosting companies I have spoken to tell me that there are still many complaints that the DMCA doesn't address, like trademark and

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trade secret complaints, for example," he says.

A chief source of frustration is the "takedown" provisions. Many who invoke the provision provide incomplete information, but it's dangerous for Web hosts to ignore even an incomplete request, says Von Lohmann.

"Web hosting companies typically hew to a 'takedown first, ask questions later' process. We get lots of e-mail from people who have had their Web sites taken down as a result of spurious DMCA takedown demands.

"The notice and takedown provisions should be revised to give those who are unjustly accused of copyright infringement more protection from malicious 'takedown' demands," he says.

EFF, a donor-supported rights organization founded in 1990, has been working to reform the DMCA since before its enactment. EFF co-sponsors the Chilling Effects Web site to educate people about their legal rights regarding the DMCA provisions affecting Web hosting companies.

"We've also secured legal counsel for people who have had their Web sites unfairly taken down," Von Lohmann says.

Web hosting companies are under pressure to take down sites immediately upon receiving a mere allegation of copyright infringement, even if the allegation is unjustified.

"This has left many innocent Web sites hopping from hosting service to hosting service, trying to stay one step ahead of malicious 'takedown' requests. This result is bad for Web hosting companies, their customers, and the health of the Web," he says.

Ben Reytblat, CEO of Quadrix Solutions, a Piscataway, N.J.-based systems integrator and managed co-location solutions provider, says "DMCA was bad law the day it was signed (and) it still is."

"We don't think this was good law or even good

policy. It went entirely too far in the direction of content companies' interests, and did not consider adequately the legitimate concerns of technology companies, the academic community, and other 'fair use' communities," Reytblat says.

"It should be modified significantly to address these concerns. If that proves impossible, then it should be removed from the books entirely, and a new, equitable, copyright law introduced," he says.

The chief operating officer at Quadrix, Bill Van Emburg, says the DCMA is being used as a threat against security researchers.

In one case a security researcher chose not to release a paper on security flaws, due to a threatened lawsuit from the company that developed the product. Since others are not able to get the details of the problem, they cannot take appropriate actions to respond to the threat, Van Emburg says.

"This threat of legal action will cause a vulnerability to fail to be addressed in time to prevent a security breach. It's only a question of how severe the breach will be, and what the damages will be," he says.

B. Kiefer, vice president operations of ViaWest Internet Services of Denver, Co., says whenever he receives a request that copyright material be removed, "we contact the customer and do some education."

"We help them to understand the problems, how to remove the content and a timeline for expected corrective action on their part. If they don't comply, we disconnect them," he says.

The DMCA is "tough to enforce, and it merely seems like a good way to engage lawyers in chasing small revenue," Kiefer says.

Part of that sentiment is shared by Phillips Nizer's Samson, who says: "The simplest thing I can say about this Act is that it is not simple."