

cyberlaw: the brave new e-world



By Anne F. Downey

## DMCA Takedown Notices

The Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, provides a safe harbor for online service providers, including website operators, that shield the providers from copyright infringement claims based on content posted by users. For example, if someone posts a bootleg copy of a movie on YouTube, the safe harbor shields YouTube from liability for copyright infringement if YouTube follows certain steps required by the DMCA.

There are actually two safe harbor provisions. The first safe-harbor provision relates to materials posted to a website at the direction of a user. This safe-harbor provision is found in Section 512(c), and it states that the operator of a website or other service will not be held liable for money damages for infringing content posted at the direction of a user as long as the operator:

- does not have actual knowledge that there is infringing content on the servers, or know any surrounding facts that would make the infringing use apparent;
- does not receive any financial benefit directly attributable to the infringing activity if the operator has the ability to control such activity; and
- acts expeditiously to remove or disable access to the infringing material upon obtaining knowledge or awareness that the material is infringing or upon receiving a properly drafted notice of infringement.

The second safe-harbor provision relates to links posted on the website. The safe-harbor provision found in Section 512(d) states that an online service provider will not be held liable for money damages “for infringement of copyright by reason of the provider

referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.” If a website operator links to material without knowing that it infringed someone’s copyright, the operator is shielded from liability so long as the operator:

- does not have actual knowledge that the material linked to is infringing, or know any surrounding facts that would make the infringement apparent;
- does not receive any financial benefit directly attributable to the infringing activity if the opera-

tor has the ability to control such activity; and

- acts expeditiously to remove or disable access to the infringing material (such as by taking away the link) upon obtaining knowledge or awareness that the material is infringing or upon receiving a properly drafted notice of infringement.

As noted above, in order to invoke the DMCA safe harbor, a website operator needs to jump through certain hoops. Specifically, the operator must:

1. post notice-and-takedown provisions at its website;
2. promptly take action in the event a copyright owner notifies the operator of infringing content that needs to be taken down; and
3. register the website’s DMCA agent with the U.S. Copyright Office.

With respect to the first hoop, a website’s Terms of Use page should include notice-and-takedown boilerplate referencing the Digital Millennium Copyright Act. The boilerplate comes directly from Section 512(c). It states that the complainant must describe the copyrighted work and where on the website it is being

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infringed, provide contact information, sign the complaint physically or electronically, and state that complainant has a good faith belief that the disputed use of the work is not authorized by law or the copyright owner.

Concerning the second hoop – taking prompt action if a takedown notice is received – the website operator does not necessarily need to remove the allegedly infringing content. The initial task is to determine if a proper takedown notice has been received. Notices that allege defamation, trademark infringement or other non-copyright infringement do not trigger a duty to remove user content (but removal may be wise). If, however, a proper notice is received, the website operator should expeditiously remove or disable access to the content and notify the user who posted the content that the material has been removed so that the user may file a counter-notice and, if a counter-notice is received, notify the copyright claimant and restore the material unless the claimant commences suit within 10 business days.

Regarding the third hoop – registering the website's DMCA agent with the U.S. Copyright Office – an Interim Designation form (available at [copyright.gov](http://copyright.gov)) should be completed, signed and mailed to the Copyright Office with a filing fee (\$105 base fee plus \$35 for each group of 10 or fewer additional website addresses). The Copyright Office does not issue a filing receipt. One can check the online database from time to time to see if the filing is posted.

Website operators may lose the safe harbor protections if they fail to institute an adequate repeat infringer policy. Section 512(i) provides that the safe harbor applies only if the operator has adopted and reasonably implemented, and informs subscribers and account holders of, a policy that provides for termination of repeat infringers. Hotfile lost the safe harbor protections when it failed to track users who were the subject of multiple takedown notices and even allowed users who had more than a hundred takedown notices to continue posting infringing material. Hotfile terminated only a few users, and only under threat of litigation. *Disney Enterprises, Inc. v. Hotfile Corp.*, 2013 U.S. Dist. LEXIS 172339 (S. D. Fl. 2013).

On the flip side, there have been many unwarranted takedown notices. While Section 512(f) provides that any person who knowingly materially misrepresents an infringement claim in a takedown notice shall be liable for any damages (including costs and attorneys' fees) incurred by the alleged infringer or website operator, a Section 512(f) claim is hard to win. Plaintiff must establish subjective bad faith, which is a difficult task. *Rossi v. Motion Pictures Ass'n of America*, 391 F. 3d 1000 (9th Cir. 2004).

Attorneys for business and non-profit clients who operate websites with user content should assist their clients in establishing policies and procedures that allow invocation of the DMCA safe harbor. The safe harbor offers significant protection and is well worth the burdens of establishing such policies and procedures. [B]

## in the public service

This month's column highlights some of the outstanding contributions of VLP's dedicated pro bono attorneys and staff. Through the generosity of our volunteer attorneys, equal access to justice is one step closer to reality for our vulnerable low-income clients.

**Lisa Coppola** was one of two attorneys statewide to receive the prestigious **NYSBA Empire State Counsel Outstanding Pro Bono Volunteer** award at the 14th annual Justice for All Luncheon at NYSBA's annual meeting in NYC. Lisa was recognized for her extraordinary work on her first VLP case. Lisa and her colleague, **Ryan Lema**, worked over 250 hours to win their client's asylum case. In addition to litigating on behalf of her clients, an Eritrean family with three young children, Lisa coordinated assistance efforts for her clients after their apartment burned down five days before their hearing. Even after the case was closed, Lisa continued to assist by donating her time and experience to train other volunteer attorneys interested in VLP immigration cases.

The Empire State Counsel Program salutes NYSBA members who have provided 50 hours or more of free legal assistance to persons of limited financial means. **Lisa Coppola, Joshua Dubs, Jessica Reich, and Michael Sciortino** donated 50 or more hours of pro bono legal services through VLP in 2014 and received the prestigious Empire State Counsel designation.

It was wonderful to see our local pro bono attorneys well represented in the Empire State Counsel Program Photo Gallery, prominently displayed at the annual meeting: **Patrick Sheldon** (134.5 hours); **Ryan Lema** (187.1 hours); **Spencer Durland** (612.7 hours); **Joshua Dubs** (64.63 hours); **Lisa Coppola** (140 hours); **Eric Glynn** (55 hours); **Karim Abdulla** (73.7 hours); and **Corey Auerbach** (98.6 hours).



By Gayle T. Murphy  
Pro Bono Coordinator  
Volunteer Lawyers Project, Inc.

Attorneys have many reasons for engaging in pro bono legal services. It was great to learn more about the importance of volunteering from three of our local attorneys featured in the Empire State Counsel Program Photo Gallery:

**Eric Glynn** stated that “we all chose to become lawyers because we want to help people. Pro bono work provides the opportunity to do that in the purest sense, to help those who truly need it, while using and developing our legal knowledge and talent. I cannot think of a single reason not to do it.”

**Karim Abdulla** does pro bono because “it's a great opportunity to give back to the community and do good for others who might not ordinarily be able to afford representation.”

For **Corey Auerbach**, “Pro bono is my way to ‘pay it forward’ for all those who have helped me

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