

December 10, 1998



DIGITAL MILLENNIUM COPYRIGHT ACT

The new Digital Millennium Copyright Act creates safe harbors from copyright infringement liability for service providers. Under the Act, a “service provider” includes anyone who operates a server linked to the Internet or a proprietary online service. Because only service providers who register with the Copyright Office can take advantage of most of these safe harbors (and because copyright holders should comply with the Act in giving notices of infringement) we strongly recommend that all clients and friends of the firm take notice of this new legislation. Anyone who provides hosting services on the Internet should register an agent with the Copyright Office as soon as possible in order to ensure access to this liability-limiting legislation. You should also consider making adjustments to your subscriber agreements to take these new provisions into account. (Under the Act, “subscribers” can be anyone using your services, whether or not they pay you.)

Why Was This Act Needed?

Copyright infringement is a strict liability offense — even if you don’t know you’ve copied material belonging to someone else, you can be subject to an injunction or damages order from a federal court. This poses a problem for online service providers, who may unwittingly “copy”

material posted by their subscribers. It also poses a problem for anyone with infringing material residing on his or her server.

The online service provider industry has argued strenuously over the last three years that it should not be held liable for infringing material posted by others because it has no way to police what is transmitted on its networks. Copyright holders, on the other hand, have argued that online service providers should bear responsibility because they are in a better position to prevent violations. The new Act represents a compromise between these camps.

What Does the Act Do?

The new Act includes provisions designed to insulate service providers (those providing Internet access and those operating proprietary networks) from copyright infringement liability. Providers will remain responsible for their own content, but will not be held responsible for content posted by others provided they meet the Act’s requirements. Once a provider has notice of an infringement, it may qualify for a safe harbor from liability by taking down the allegedly infringing material; there are also procedures for restoring such content if the

allegations are not pursued. Providers need to register with the Copyright Office in order to provide copyright holders and subscribers with an address at which the notices and counter-notices established by the Act can be received — and to be eligible for related safe harbor protections.

What Are the Safe Harbors?

In general, to the extent a service provider is merely sending on, saving, caching, or pointing to material automatically (without originating or modifying the material), it may be able to qualify for a limitation of its infringement liability. Service providers must also post a policy for terminating subscribers (users, even if non-paying, of the service provider's system), and must accommodate and not interfere with reasonable, industry-standard technical measures used to identify or protect copyrighted materials.

The Act protects service providers based on the function the service provider is performing. Here are some of the specific requirements the Act sets forth for its safe harbors:

1. Transit functions

The safe harbor applies only if somebody other than the service provider:

- (a) Initiates or directs the transmissions; and
- (b) Selects the material to be transmitted and the recipients of the material.

This safe harbor does not apply if the service provider:

- (a) Maintains a copy of the material for longer than reasonably necessary for transmission; or
- (b) Modifies the material's content during transmission.

2. System caching

The safe harbor applies only to material that is:

- (a) Made available online by somebody else such as an original website;
- (b) Transmitted by the original site to somebody requesting the material;

- (c) Stored only temporarily and automatically for the purpose of making the material available for requests by other subscribers; and
- (d) Unmodified in its content.

To qualify for this safe harbor, a service provider must:

- (a) Comply with rules specified by the original site governing refreshing, reloading, or otherwise updating material if these rules are consistent with generally accepted industry standards;
- (b) Not interfere with technology that records and relays information about the use of the material (such as measuring the number of "hits" on particular websites);
- (c) Limit access to cached material to subscribers meeting substantially the same conditions (such as registering, subscribing, paying a fee, etc.) that are required to access the material directly on the original site; and
- (d) Promptly remove or disable access to cached material upon receiving a notification of claimed infringement from a copyright owner where the notification also states that the material has been removed or disabled from the original site, or that a court has ordered the material to be removed or disabled from the original site.

3. Storing material at the direction of subscribers

This safe harbor applies on the following conditions:

- (a) A service provider must remove or disable access to material if it:
 - (i) has actual knowledge of infringement,
 - (ii) is aware of facts and circumstances that would make infringement apparent, or
 - (iii) receives a notification of claimed infringement from the copyright owner.

(b) A service provider cannot receive any financial benefit directly attributable to the infringing activity (as opposed to charging a flat fee for a subscription) if it has the right and ability to exercise control over the infringing activity.

4. Searching and location tools

This safe harbor applies under the following conditions:

- (a) A service provider must remove or disable access to material if it:
- (i) has actual knowledge of infringement, or
 - (ii) is aware of facts and circumstances that would make infringement apparent, or
 - (iii) receives a notification of claimed infringement from the copyright owner.
- (b) A service provider cannot receive any financial benefit directly attributable to the infringing activity (such as compensation from the infringing site based on the number of referrals from the service provider) if it has the right and ability to exercise control over the infringing activity.

Note: These descriptions do not capture all of the detail of the statute. You should analyze pertinent sections of the Act before deciding whether your business falls into particular categories.

How Do I Appoint An Agent?

The Copyright Office has established an online registry of service provider agents at <http://lcweb.loc.gov/copyright/onlinesp>. To see the

Copyright Office's home page, go to <http://lcweb.loc.gov/copyright>. On the home page, there is a suggested form for designation of agents — to get to it directly, go to <http://lcweb.loc.gov/copyright/onlinesp/#agent>. You will need to send a \$20 check with your designation, and you will have to provide your agent's contact information on your website.

What Do Copyright Holders Need To Do?

Copyright holders need to be active in looking for infringements and should develop a form that complies with the Act for notifying service providers of suspected infringements.

That form should:

- Identify the copyright holder;
- Provide contact information;
- Identify the allegedly infringing works;
- Identify the online location of the allegedly infringing works; and
- Provide a statement under penalty of perjury that the person providing the notice has authority to act on behalf of the copyright holder and has a good-faith belief that there is no legal basis for the use of the materials by the allegedly infringing party.

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