
Precautions for Online Service Providers - Lessons Learned from Napster

2001-03-13

While recent court decisions concerning beleaguered online music swapping service Napster, Inc. are rightly viewed as having significant importance for the online music industry, several of the holdings have much broader implications for the online world. In particular, the Ninth Circuit's recent holding in [A&M Records, et al. v. Napster, Inc.](#), sheds new and important light on the protection from copyright infringement liability available to online service providers (OSPs) under the 1998 Digital Millennium Copyright Act (DMCA).

As discussed in our [April 11, 2000 Email Alert](#), Section 512 of the DMCA offers OSPs protection from liability for copyright infringement when users post or transmit infringing material by means of an OSP's services. Congress intended the definition of OSP to be read broadly, and a company does not need to be in the business of providing Internet access or other traditional online services in order to qualify as an OSP. Although it is not clear that all web site owners are covered by this definition, web site owners which allow third parties to post information, or which link to other web sites, should at least consider qualifying under this safe harbor in the event that the statute is interpreted broadly enough to cover them.

OSPs must comply with a number of requirements in order to qualify under one of several safe harbors created by the DMCA. Most importantly, to be protected an OSP must:

- not have actual knowledge of an infringement;
- not derive financial benefit from the infringement;
- take down or block infringing material once it has been notified of the infringement and received other information about the infringing material and the ownership of the copyrighted material, as specified in the DMCA and discussed in our [April 11, 2000 Internet Alert](#); and
- adopt copyright compliance policies relating to the termination of repeat offenders' accounts and other specified matters.

However, and most notably, an OSP is not required under the DMCA to "police" its service to identify or detect infringements.

Napster, provider of a service that allows users to create directories of compressed music files and to search the directories of other users, argued that it was an OSP eligible for immunity under the DMCA. The District Court rejected this argument, holding that Section 512 was not intended to shelter a "contributory" copyright infringer such as Napster (that is, "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.")

The Ninth Circuit, while affirming the District Court's decision in substantial part, reversed the lower court's holding on the DMCA's safe harbor. First, the Ninth Circuit cited legislative history to hold that the safe harbor could protect a service provider against a claim of contributory infringement. Second, it held that Napster had raised genuine questions as to whether (1) Napster qualified under the DMCA definition of a protected OSP (the district court held that it did not), (2) copyright owners must give a service provider "official" notice of infringing activity in order for it to have knowledge or awareness of that infringing activity on its system, and (3) Napster established a sufficient copyright compliance policy under the statute.

Every company that offers products or services over the Internet should keep these factors in mind when structuring its online service offerings. In particular, each service provider should implement and post a detailed copyright compliance policy that conforms with the requirements of the DMCA (see our [April 11, 2000 Internet Alert](#) for information on those requirements).

More difficult is the issue of responding to notices, or alleged knowledge, of infringements occurring on an online service. When the DMCA was being debated in Congress, large service providers argued that it would be virtually impossible for them to police their huge networks for individual copyright infringements. The compromise that was struck requires aggrieved parties to notify service providers of alleged infringements, and gives service providers a chance to remove infringing material from their services, before liability is imposed. A significant question raised by the Napster case is the type of notification that is required before a service provider can be held liable, and the level of detail required in each notification.

This issue was raised again in a recent Maryland case, [ALS Scan v. RemarQ Communities](#). ALS is a marketer of "adult" photographs. RemarQ is an ISP that hosts two newsgroups on which a number of ALS photos were illegally posted. Although ALS notified RemarQ of the alleged infringements occurring on its newsgroups, RemarQ did not take down the posted materials, arguing that ALS's notification was not sufficiently detailed, and that the newsgroups included a significant quantity of non-infringing material. While the trial court ruled in favor of RemarQ, the Fourth Circuit reversed, stating that ALS substantially complied with the notification requirements of the DMCA and that RemarQ should have removed the infringing material. An appeal to the full Fourth Circuit is expected.

The lessons to be learned from these recent decisions are clear: all providers of online services should implement and post policies regarding copyright infringement by users, and respond quickly and effectively to notifications of copyright infringement. While the exact parameters of compliance with each of these requirements is still being developed in the courts, service providers who do not address these issues face the risk of losing the protection from copyright infringement actions which may be available under the DMCA.

Jorge Contreras
jorge.contreras@haledorr.com

Jeffrey Morgan
jeffrey.morgan@haledorr.com

© 2001 Hale and Dorr LLP

This alert is provided with the understanding that it does not constitute the rendering of legal, tax or other professional advice or services by Hale and Dorr LLP or its attorneys.