
Safe Harbor Offers Protection against Copyright Infringement Suits Arising from Third-Party Content

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Section 512 of the Copyright Act, added by the recent Digital Millennium Copyright Act ([U.S. Copyright Office summary](#)), offers a safe harbor for "on-line service providers" (also known as "OSPs") against copyright infringement claims arising from the acts of others, provided that the OSP follows certain guidelines. This safe harbor is of interest to a wide variety of Internet companies, as the term "on line service provider" is defined broadly to include "a provider of on line services or network access, or the operator of facilities therefor..."

The term OSP clearly covers companies beyond Internet service providers ("ISPs"). Does it cover any company offering goods, services or information through its web site? Unfortunately, the Digital Millennium Copyright Act does not further define "provider of online services." A company does not need to be in the business of providing online services in order to qualify as an OSP. Commentators recognize that Congress intended this definition to be read broadly. Although it is not clear that this definition covers all web site owners, we recommend that each web site owner which allows 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.

This safe harbor protects OSPs from claims of monetary damages and certain broad injunctions due, for example, to information stored or posted by an on line user, or due to the

OSP directing users to other sites containing infringing materials by way of hypertext links and search engines. Given some courts' recent willingness to find liability for copyright infringement based on links to infringing material (see our [February 29, 2000 Internet Alert](#) on the Utah Lighthouse), this safe harbor could offer important and timely protection against such suits.

Initially Required Steps

To benefit from this safe harbor, certain steps must initially be taken by the OSP.

First, the OSP must designate an agent to receive notification of any claimed infringing activity (the "Agent"). The name, address, e-mail, and other contact information of the Agent must be made available on the OSP's web site at a location accessible to the public.

Second, the Agent's contact information must be submitted to the U.S. Copyright Office in Washington, D.C. ([sample letter](#)). The Copyright Office makes the Agent's contact information available to the public at www.loc.gov/copyright/onlinesp/list/index.html.

Third, the OSP must implement, and inform on-line users of, a policy for the termination of accounts for repeat infringers. In addition, the OSP must accommodate and not interfere with "standard technical measures" used by copyright owners to identify or protect copyrighted works. "Standard technical measures" are defined as measures that are generally accepted by the industry, are readily available, and do not impose substantial costs or burdens to the OSP.

Procedure for Handling Specific Assertions of Infringing Activities

Where a complaining party communicates to the OSP that its web site contains infringing

material posted by another, or that its web site directs users to infringing material located elsewhere, this safe harbor effectively provides (through what are sometimes referred to as "notice and take-down provisions") that an OSP must remove the material (or block access to it) based upon that communication only if the complaining party provides a written "notification" to the Agent that substantially:

- identifies the copyrighted work;
- identifies and provides the location of the material that is claimed to be infringing or the reference or link to the material or activity claimed to be infringing;
- contains information reasonably sufficient to permit the OSP to contact the complaining party;
- a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
- a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Thus, it would not be sufficient for the complaining party to merely call the OSP and demand that materials on the service provider's site be removed.

As a deterrent to providing false information, Section 512 also provides that if the complaining party knowingly misrepresents that materials are infringing, the complaining party will be liable for any damages incurred by the OSP resulting from the misrepresentation.

This safe harbor also limits the OSP's liability to the accused infringer in the situation where the OSP removes allegedly infringing material (or a link to the material) from its site, but the complaining party's allegations turn out to be false. In general, the OSP will not be liable for its removal of, or for disabling access to, allegedly infringing material pursuant to a "notification" of infringement as discussed above, where the OSP through the so-called "notice and pullback provisions:"

- promptly notifies the accused infringer of the removal of, or for disabling access to, the allegedly infringing material;
- upon receipt of a counter notification disputing any infringement by the accused infringer, provides the initially complaining party with a copy of the counter notification; and
- replaces the removed material within 10 to 14 business days after receiving the counter notification, unless notice is received from the initially complaining party that an action has been filed seeking to restrain the accused infringer from infringement.

To be effective, the counter notification must contain the information required by Section 512.

Significantly, this safe harbor is not predicated on the OSP monitoring its service or seeking facts indicating that infringing activity may be occurring.

Events Negating Protection Under Safe Harbor

The safe harbor will not apply under some circumstances. In particular, where the OSP has actual knowledge of the infringement or is aware of circumstances that would indicate infringement is apparent, the safe harbor would not protect the OSP unless its knowledge or awareness is expeditiously followed by removal of the infringing material. Except in specified instances, the OSP will not be considered to have "actual knowledge" of information that is insufficient to comply with the "notification" requirement defined in the notice and take-down provisions. Also, the OSP will not be protected where it receives a financial benefit directly attributable to infringing activity that it had the right and ability to control, or where the OSP did not expeditiously remove or disable access to the infringing material after receiving the required notification from the complaining party.

Web sites which allow third parties to post information, or which link to other web sites, would be well advised to consider following these "notice and takedown provisions." To qualify, we recommend that owners of such web sites submit to the U.S. Copyright Office the contact information for their agent to receive notification of any claimed infringing activity. The other procedures required to qualify for this safe harbor can be easily implemented through the web site's terms and conditions of use, and may afford protection against most accusations that the web site should be held liable for including or linking to information which, unbeknownst to the operators of the web site, infringes on other parties' copyrights.

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