

Legal Alerts

DMCA Update: Is Your Website in Compliance?

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Websites Must Comply by End-of-2017 with New Copyright Office Rules that May Threaten Safe-Harbor Protections under the Digital Millennium Copyright Act

Does your website allow users to post comments or other content, such as text, photos, videos or other potentially copyrighted works? If so, you must comply with the United States Copyright Office's new rules by the end of 2017.

In December 2016, the Copyright Office enacted a final rule regarding the Office's transition from a paper directory of registered entities and their agents to an electronic directory. Businesses must take additional steps by December 31, 2017 to preserve their registration with the Copyright Office and maintain safe-harbor protections under the Digital Millennium Copyright Act (DMCA) against liability for user-generated content that infringes third-party copyrights:

1. Disclose the entity's basic information and designated agent (the person who receives and triages take-down requests) on their website.
2. Register the entity and designated agent with the Copyright Office's electronic directory.
3. Understand a new Ninth Circuit ruling on moderator-approved user content.

Rewind: What the DMCA and safe-harbor is about and the new Copyright Office rules

Originally enacted in 1998, the safe-harbor provision of Title II of the DMCA limits the liability of website owners whose users post unauthorized or infringing content (i.e., someone else's video, image, song or other copyrighted works). These protections apply only in the event that:

1. The website owner acts quickly to remove the content upon notice of infringement by a copyright owner;
2. The website owner has registered their business and website with the Copyright Office; and
3. The website owner has the required language on their website.

If a website owner does not meet the above requirements, the website owner may be sued by a copyright owner for infringing materials that are posted on their site (with or without their knowledge).

To qualify for these safe-harbor protections, business owners must designate an agent who will receive and review infringement-claim notices.¹ The agent, designated by the business owner and on-file with the Copyright Office, will typically be an employee of the business or some other third-party business they hire

to act as the official representative to accept all infringement complaints and to determine whether to remove any illegal material posted on their website.

The Copyright Office enacted additional rules at the end of 2016 that impact business owners who have already designated an agent as well as for those that have not.² Before the end of 2017, a business owner must:

1. Post certain information about their entity (or entities) and designated agent on their own website(s) (see details below); and
2. Update this information about their entity (or entities) and designated agent with the Copyright Office (see details below).

(1) Disclose certain information about your entity and agent on a website

To comply with the agent-designation requirements, the business owner must provide the following information in a publicly-accessible location on its website:

- Full legal name of the business (for each separate legal entity);
- Physical street address of the business (post office boxes require waiver);
- Alternative names of the business (trade names, website names and URLs, etc.);
- Name of the designated agent and the agent organization; and
- Contact info for the designated agent, (mail or post office box address, telephone number and email).³

When the above information changes, the business must make timely updates to ensure the information displayed on the website is current and accurate.

(2) Update information about their entity and designated agent with the U.S. Copyright Office

The business must also provide the same information above to the Copyright Office, essentially re-registering their entity or entities with the Copyright Office and re-designating an agent to receive and manage take-down requests. Under the new rules, all designations must be done electronically. Businesses that designated an agent with the Copyright Office before December 1, 2016, must re-designate the agent electronically in order to maintain an active designation, with the grace period running until December 31, 2017. All designations not made electronically will become invalid after December 31, 2017.

Businesses must also renew their registration with the Copyright Office every three years. A designation with the Copyright Office will expire three years after it is registered. The business can renew the designation by amending it (if a correction or update is needed), or resubmitting it without amendment. Each amendment or resubmission begins a new three-year period for that designation.

(3) Be aware of a new Ninth-Circuit ruling in favor of copyright owners

On April 7, 2017, the Ninth Circuit decided in *Mavrix Photographs, LLC v. LiveJournal, Inc.* to limit safe-harbor protections for sites that use moderators to review user-submitted posts for appropriateness and copyright violations. It determined that the DMCA's safe-harbor protections only apply when infringing material is posted at the direction of users. They do not apply when moderators approve user posts before they go live, in which case the moderators become agents of the website owner and the content ceases to be posted at the direction of the user. Therefore, if a site uses moderators that pre-approve posts before they go live, the Ninth Circuit's interpretation means that the DMCA's safe-harbor provisions will not offer protection if the moderator-approved posts violate third-party copyrights.

¹ See 17 U.S.C. § 512(c)(2).

² See 81 F.R. 75695-01 (Nov. 1, 2016).

³ 37 C.F.R. § 201.38(b)(4).

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