

Copyright Infringement: Enforcement is Double-Edged

Locating perpetrator is key

As attorneys specializing in the litigation of Internet disputes, not a day goes by that we do not hear about a small online business getting ripped off through the theft of online content. Sometimes the property taken is a website or part of a website. Other times it is certain code or an e-book. But whenever it happens, you can be sure of one thing: It has value to the thief. Perhaps the perpetrator is a programmer taking a lazy "short-cut", or someone looking to benefit from your optimized site by getting a more favorable indexed position on a major search engine. Of course, the most common type of infringer is one who tries to take your business away from you by using your own property. Let's walk through a process you should implement in order to assess what your next step should be when you learn that your valuable content or property has been stolen.

You may discover the theft from a customer email, an automated electronic monitoring service report, or search engine results. The first thing to do is to try and determine the scope and extent of the infringement. Once you have done this, create a record of the infringement. The simplest method is to print out the infringing content, or save the content in an offline format. Then you should research the infringer and find out as much as you can about the site(s) involved, the owner, the web host and the upstream provider. Take a look at the archives and see if the site used to reveal information about the operator that is missing now. This won't take long, but these efforts will hopefully garner the information necessary to make an informed, and smart, business decision.

If you are inclined to make assessments concerning the law of copyright as it applies to your situation, visit the copyright office home page for a nice overview on the law. The search engines are also great sources for information about copyright infringement. Be forewarned, however, that some of the information is right, some of it is wrong, and some of it is simply shortsighted and overly simplistic. For instance, under the DMCA (Digital Millennium Copyright Act) you can personally serve a "take down notice" on an infringer's host and get the infringing materials pulled off of the site. Sometimes that approach is adequate and it will work fine. Other times it backfires: the notice is ignored except that upon receipt the web host brazenly facilitates the transfer of the site to a host in another country where the DMCA does not apply. You really have three options: File the "take down notice" yourself, forget about the infringement, or hire a lawyer.

While you are searching the web about copyright infringement,

you will likely find extensive references to the law of copyright. Missing is a discussion about the strategic and tactical considerations that go into pursuing an infringer. Since every situation is different, it is impossible to go through every scenario. This is where legal counsel can be of real assistance. You are looking for quick and definitive decisions and actions. Legal counsel needs to recommend a course of action after considering the impact, and implications, of issuing a cease and desist notice to the infringer, issuing a DMCA "take-down" notice, issuing a demand letter to the web host for damages for contributory copyright infringement, drafting a lawsuit and enclosing it with the communications, filing copyright applications, and/or filing suit. The decision on how to proceed at this point could mean the difference between immediate submission by the infringer to your demands, and six figure attorney's fees with the infringing site using your property, and still competing against you, but now resting comfortably in Uzbekistan, outside the reach of any US authority.



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Every situation is different and the remedies available are truly double-edged swords. A cease and desist letter could cause the infringer to remove the stolen content, or it could be a warning for the infringer to duck and hide. A demand letter to a web host could result in the infringing website being pulled down, or it could motivate the host to assist its client in moving the site offshore. A lawsuit could result in an almost immediate court order requiring the infringer to cease its use of your creative works, but expensive temporary restraining orders rest in many a lawyer's files, unserved (and ineffectual) because the infringer can't be found.

Let's hope your copyright infringement claim is a "clean" one (someone operating a legitimate business in the US). Your focus can then be on making a smart business decision with a very manageable downside and lower risk, and also with a reasonable expectation of getting your lawyer's fees and monetary damages paid. Remember that the tools of this trade are double edged swords, so make sure you consider all of the strategic and tactical issues before acting. Oh, and if you are a victim of one of the more nasty infringers out there, he may look like he is in New York, or California, or Florida. No matter where you think he may be, no matter where his web host is located, no matter what address is on his site, and no matter what address he used to register his domain names, my guess is that if you really want to find him, try the beautiful white beaches of the Caribbean. ☞

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