

Copyright Registration

DMCA is a powerful tool to attack an infringer

COPYRIGHT REGISTRATION IS a great concept. In order to put the world on notice of your ownership of certain creative works, the government allows you to send a copy of your work to the U.S. Copyright Office, and it will maintain the records for you. For a small registration filing cost, you get “standing” to sue someone who is infringing and become eligible to recover “statutory damages” and attorney fees from the defendant. In today’s world that means your lawyer can file a lawsuit, and if the matter is tried several years later (after six figures in attorney and expert fees), you can hope to one day successfully force the defendant to pay you. Obviously this is not a real appetizing option for most small businesses.

The problem with theft of images, text, content and code in the virtual world is very real. Many businesses believe that unless they have a registered copyright on their creative works there is little that can be done about theft. In fact, that used to be the case. The best tactic available to protect unregistered creative works formerly involved racing over to the copyright office and filing an application, often after losing the right to recover statutory damages and attorney fees. Not any more, though.

In the 1990s, Congress passed the Digital Millennium Copyright Act (DMCA). It included a very powerful tool to quickly attack the theft of unregistered copyright-protected materials so victims of theft of creative works can reach out into cyberspace and aggressively pursue an infringer. This tool, known as the “takedown notice,” requires a website host to pull down an allegedly infringing website or page merely upon receipt of a specified notice from the owner or its lawyer. No lawsuit is necessary. The implications to the host are significant: the failure to pull it down exposes the hosting company to liability for copyright infringement under traditional doctrines of law, and it also loses immunity created by the DMCA. The law giveth, and the law taketh away.

There are issues still being worked out on the legal side with respect to takedown notices. Not all companies are hosts of the infringing materials, and it is unclear whether search engines have a responsibility to suspend advertising



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and remove indexed-search results for a site upon receipt of a DMCA notice. Most will do so when pressed by legal counsel. It is likewise unsettled as to whether an upstream ISP can be forced to terminate service to a hosting company once immunity is lost and the hosting company has copyright-infringement liability. There are many legal issues yet to be decided, but the tool is still highly effective in resolving many of the online infringement problems on the web.

If the takedown notice is used improperly, there are significant financial implications to the issuer. A takedown notice puts a company out of business, and you may be liable. I still cringe when I see these automated services offering DMCA takedown-notice issuance. The format of this tool is not its problem. Your big challenge, if you try to do this on your own, is to interpret a very complex area of law, determine your rights and then apply that law to the facts to identify infringement. Sometimes it is simple, and anyone can do it. Sometimes it is complex. But by no means is this a do-it-yourself remedy. 📧

The information in this article is not intended to be legal advice. Always consult your attorney when faced with legal issues.

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“Web User Agreements”

AUGUST 2006
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