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Digital Millennium Copyright Act Provides Limitation of Liability for Service Providers

The 1998 Digital Millennium Copyright Act (“DMCA”) includes a section entitled the “Online Copyright Infringement Liability Limitation Act” (“Act”) which grants a service provider a limitation of liability for vicarious and contributory copyright infringement when its subscribers infringe a third-party’s copyright online. The limitation is available only under certain conditions and when procedures prescribed in the Act are followed.

The DMCA does not require service provider’s to adhere to its procedures, nor does it supersede or alter existing statutory or case law related to copyright. Any defense which would otherwise be available to a provider remains available; however, adherence to the procedures allows a provider to quickly dispose of certain infringement claims without concern for liability either to the alleged infringer (for the removal of the material) or to the person claiming infringement.

Service Provider Defined

In order to qualify for any limitation on liability, an entity must first meet the definition of service provider under the DMCA. A service provider is defined as “an entity offering

transmission, routing, or providing connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received” or “a provider of online services or network access, or the operator of facilities thereof.” This broad definition includes network services companies such as ISPs, search engines, bulletin board system operators, and even auction web sites.

There are four major categories of network systems offered by service providers that qualify for protection under the safe harbor provisions. They include those who provide (1) conduit communications, (2) system caching, (3) storage systems, and (4) information location tools.

Prerequisites to Limitation of Liability Afforded Under the Act

A service provider will not be liable for either money damages or injunctive relief for copyright infringement for materials stored or transmitted by a user or by providing links to an online location containing infringing material or activity if:

(1) *It does not have actual knowledge of the infringing activity or*

knowledge of circumstances from which infringing activity is apparent or, if it becomes aware of such, acts expeditiously to remove it;

(2) *It does not receive a financial benefit from the infringing activity;*

(3) Upon notice of the infringing activity, *it responds expeditiously to remove or disable the material;*

(4) *It has an agent designated to receive notifications* whose name, address, phone number, and e-mail address are available on its web site and registered with the U.S. Copyright Office. The Copyright Office provides registration directions and a PDF form for registration at <http://www.copyright.gov/onlinep/agent.pdf>, and maintains publicly accessible online and printed lists of all designated agents;

(5) *It gives notice to its users of its policies regarding copyright infringement and the consequences of repeated infringing activity.* The notice can be a part of the contract signed by the user when signing up for the service or a page on the service

provider's web site explaining the terms of use of their systems. While there are no specific rules about how this notice must be made, it must be "reasonably implemented" so that subscribers and account holders are informed of the terms;

(6) It *includes in its copyright infringement policies a termination policy* that results in individuals who repeatedly infringe copyrighted material being removed from the service provider networks. This termination policy must be made public in the terms of use that the service provider includes in its contracts or on its web site;

(7) It accommodates and *does not interfere with standard technical measures* used to identify and protect copyrighted works.

A service provider is not required to monitor its service or affirmatively seek facts indicating infringing activity, nor is it required to remove or disable access to materials where doing so is otherwise prohibited by law.

Notification Procedures

The Act provides for a notification procedure which must be followed in order to take advantage of the limitation of liability. The procedure consists of the following basic steps:

- (1) Notice is sent to the service provider by the complaining party;
- (2) The service provider notifies the subscriber and removes or disables the allegedly infringing material;
- (3) The service provider provides a

copy to the complaining party of a timely counter-notice from the subscriber and notifies the complaining party that the removed or disabled material will be restored in no less than 10 and no more than 14 business days unless the complaining party notifies the provider that it has sought a court order for injunctive relief;

- (4) The service provider restores the allegedly infringing material if it has not received a timely notice from the complaining party that injunctive relief has been sought.

More detail regarding the notification procedure appears below.

① Notice from the Complaining Party to the Service Provider

To be effective, a notice must be a written communication to a service provider's designated agent which includes substantially the following:

- (1) A physical or electronic signature of a person authorized to act on behalf of the owner;
- (2) Identification of the copyrighted work alleged to be infringed;
- (3) Identification of the material claimed to be infringing or which the subject of infringing activity is;
- (4) Information sufficient to allow the service provider's designated agent to contact the complaining party (e.g., address and telephone and e-mail numbers);
- (5) A statement that the complaining party has a good faith belief that use of the material is unauthorized;

- (6) A statement that the information in the notice is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the owner.

To be effective, the notice must contain substantially all of the information referenced above. If the notice provides the information required in (2), (3), and (4) above (related to the identity of the work, the identity of the specific material within a work alleged to be infringing, and information sufficient to allow a service provider to contact the complaining party), but not (1), (5), and/or (6), the service provider has an obligation to attempt contact with the complaining party and take other "reasonable steps" to obtain a notice that complies with all requirements.

Thus, if a service provider has received all of the substantive information, it must attempt to obtain the following required information from the complaining party: (1) a physical or electronic signature; (5) a statement that it has a good faith belief that the use is unauthorized; (6) a statement that the information is accurate; and, under penalty of perjury, a statement that he, she, or it is authorized to act on behalf of the owner. If this information is not obtained after "reasonable" attempts, the service provider will not be considered to have actual knowledge of infringement or infringing activity and need not follow the remove and notify procedure described below.

② Notice to the Alleged Infringer

A service provider may immediately disable access to or remove the allegedly infringing material or activity without liability to the subscriber, regardless of whether

such material is ultimately determined to be infringing, if the service provider does the following:

- (1) Promptly notifies the subscriber that it has removed or disabled access to the material;
- (2) Provides the complaining party with a copy of the subscriber's counter-notification (discussed below), if any, and informs said party that it will cease disabling access to the material or activity or replace it in 10 business days; and
- (3) Ceases disabling access to the material or activity or replaces it not less than 10 nor more than 14 business days following receipt of the counter notice unless the service provider's designated agent receives notice that the complaining party has sought a court order to restrain the subscriber from engaging in the alleged infringing activity.

③ Counter Notice from Subscriber

Although the Act does not require it to do so, the service provider's designated agent may inform the subscriber that he or she may submit a counter notification if there is reason to believe the notification is mistaken. A counter notice from a subscriber must be a written

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communication to a service provider's designated agent which includes substantially the following:

- (1) The subscriber's physical or electronic signature;
- (2) Identification of the material removed or to which access has been disabled;
- (3) A statement under penalty of perjury that the subscriber has a good faith belief that removal or disablement of the material was a mistake or the material was misidentified;
- (4) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of the Federal District court (i) in the judicial district where the subscriber's address is located if the address is in the United States, or (ii) in any judicial district where the service provider may be found if the subscriber's address is located outside the United States.

Monitoring and Record Keeping

The Act does not require a service provider to monitor its service or to seek facts that would indicate infringing activity. Such policing activity, in fact, may have the effect

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of eliminating the liability limitation available under the Act because the provider would no longer be "unaware" of infringing activity—a prerequisite to invoking the liability limitation provided by the DMCA.

A record of all infringement notifications and counter notifications and actions taken in response to them will, however, provide relevant documentation which will allow an service provider to determine, if necessary, how many complaints have been received about a particular user.

Subpoenas

The DMCA allows a copyright holder to request that a federal district court issue a subpoena to the service provider requiring it to identify the individual who is responsible for the alleged infringement. A subpoena may be requested only after a notification of infringing activity has been provided to the service provider by the copyright owner. If a service provider receives such a subpoena, normal procedures for responding to subpoenas should be followed.

Fair Use

The DMCA does not alter the fair use provision of the Copyright Act.

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