



# HOSTINGTECH

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## Are your software licenses in order?

The Business Software Alliance is investigating companies that seem to be violating their software licenses — and the hosting sector is a primary suspect.

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Robert Holleyman  
CEO, Business Software Alliance

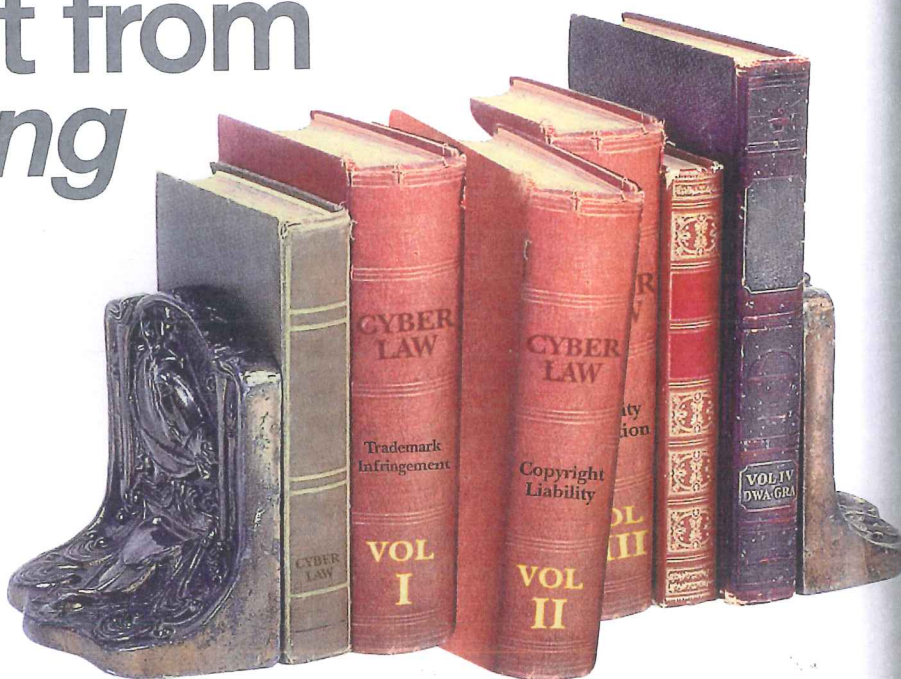


# © Copyright from copy-wrong

Service providers can be held accountable for copyright infringement by their users. Fortunately, the DMCA provides protection, if you follow a few basic guidelines.

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One day you get a call from a lawyer. He says a site you host is using his client's copyrighted material, such as text, images, or music. He demands you immediately disconnect the site and says he will sue you if you do not. You call your client and ask if he would be willing to take his site down or at least modify it. Your client does not agree. In fact, he threatens to sue you for breach of your hosting contract and interfering with his business if you disconnect him. Now what do you do? Thankfully, the DMCA (Digital Millennium Copyright Act) offers you some protection.

You can also take comfort in the old adage "Ignorance is bliss." Until you have some reason to believe there is something objectionable about a site, courts will generally not hold you liable for merely hosting the site; however, once you have been put on notice that the site contains troublesome material, you need to take affirmative steps in order to avoid being held responsible.

The DMCA, which Congress passed in 1998, did not change traditional copyright law as it applies to the Internet, but rather gave to ISPs (a legal definition of service providers that includes access providers, Web hosts, and application service providers, among others) a number of safe harbors for avoiding monetary copyright liability. The company must follow the somewhat complicated DMCA rules, timetables, and procedures, which include certain measures that the host must take before the dispute arises. By implication, the DMCA gives aggrieved copyright owners a tool to help shut down infringing websites quickly, without the service provider getting caught in the middle of a battle between the ostensible copyright owner and the alleged miscreant.

## Safe harbor prerequisites

In order to be eligible for the safe-harbor protections provided by the DMCA, a service provider must meet at least four prerequisites: First, it must adopt and implement a policy that informs subscribers or account holders that the service provider will terminate, in certain circumstances, subscribers or account holders who repeatedly infringe on copyrights held by others. Web hosts


should incorporate prohibitions against infringing trademarks, copyrights, or other intellectual property rights of others into their terms-of-use agreements, and they should inform customers that their accounts will be terminated for repeatedly making or posting unauthorized copies.

Second, the service provider must have previously designated an agent to receive notifications of claimed copyright infringements. The completed form should be mailed to the Copyright GC/I&R office, along with the \$20 fee payable to the Register of Copyrights. That information must also be posted on the service provider's website in a place accessible to the public. Many service providers designate a special e-mail address for receiving DMCA notifications. You can view the Copyright Office's list of designated agents at [www.loc.gov/copyright/onlineesp/list](http://www.loc.gov/copyright/onlineesp/list).

Third, the service provider must not receive a financial benefit directly from violations. A direct financial benefit can exist where the availability of infringing material acts as a significant draw for customers. A regular website hosting service would easily qualify as not receiving a direct financial benefit, and this is the type of service that Congress meant to protect. On the other hand, a company like Napster would not qualify because, in a case that was recently decided by the federal Court of Appeals for the Ninth Circuit, copyrighted music files were a significant draw to its service.

Fourth, the service provider must not have actual knowledge that the material or an activity using the material is infringing on copyrights or be aware of facts or circumstances that make the violation apparent.

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## Notification from the copyright owner

Under the DMCA, an aggrieved copyright owner begins the DMCA notice and take-down process by sending the service provider's designated agent a notification that "substantially complies" with the following requirements:

- an electronic or physical signature of the person authorized to act on behalf of the owner of the intellectual property interest;
- identification of the copyrighted work;
- identification of the material that is allegedly violating that copyright, along with information reasonably sufficient to permit the service provider to locate the material;
- the address, telephone number, and e-mail address of the complaining party;
- a statement by the complaining party that he or she has a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; and
- a statement by the complaining party that the information in the notice is accurate, and under penalty of perjury, the complaining party is authorized to act on behalf of the copyright owner or licensee.

The copyright owner must substantially — not perfectly — comply with the notice requirements. A federal court recently held Internet auction house eBay was not liable for sales of counterfeit DVDs that occurred on eBay because the plaintiff's notice failed to substantially comply with

the DMCA's written notice requirements. Specifically, the court ruled the plaintiff's failure to state it had a good faith belief the works were violating copyrights, and the failure to state under penalty of perjury it was the copyright owner or the owner's agent, was fatal to the plaintiff's claim against eBay. The court also found the plaintiff had not given eBay enough written information for it to determine which auctions were offering bootleg copies of the movie and which were offering genuine authorized copies; so the plaintiff's oral and written notices to eBay did not trigger any duty by eBay to take down the infringing content.

## Take-down

Upon receiving the notice from the copyright owner or upon otherwise learning the material in question infringes the copyrights of another, the service provider must act expeditiously to remove or disable access to the material. The statute does not define "expeditiously."

Although a website owner might feel aggrieved about the site being partly or completely disabled by a service provider, the DMCA provides immunity to a company that:

- acts in good faith in disabling a site or removing material from the site that is claimed to be in violation;
- acts based on facts or circumstances from which infringement is apparent;
- takes reasonable steps to promptly notify the service subscriber it has removed or disabled access to the material on the website; and
- complies with the counter-notification and reinstatement procedures.

## Criminal liability

### A lawsuit is bad enough, but do hosting providers also need to fear criminal charges?

There are few, if any, reported cases in the United States of a service provider being criminally prosecuted for hosting a website; however, it could be criminally liable for the content of a site in several different scenarios, and hosts should be aware of those possibilities.

First, there are some statutes that place an affirmative duty on persons to police the use of their facilities or services, after having been notified of the wrongful use of those facilities. Second, knowingly possessing certain types of electronic material is a crime, and the host could be considered in possession of those files if they are stored on the host's servers. Third, a person who knowingly provides assistance in carrying out crimes, and who does so with the purpose and intent that the crimes can be committed, can be prosecuted as aiding and abetting the crime under traditional principles of criminal law.

As a general rule, your hosting contract should prohibit illegal activity on the site and give you the right to suspend or terminate service if you believe the website contains illegal material, is being used in an illegal way, or would otherwise subject you to criminal liability.

Recognizing the difficulties that could result from holding service providers criminally liable for content posted by others on hosted sites, several bills have been introduced in Congress that aim to give these providers immunity from criminal prosecution for merely hosting websites. H.R. 3716, introduced by Representative Robert Goodlatte (R-Va), intends to keep ISPs (a legal definition that includes access providers, Web hosts, and application service providers, and others) from being criminally liable for acts by third parties, as long as the ISP did not intend to facilitate any crime. Although some states have passed laws giving ISPs limited immunity, as of this writing, no federal bills have become law. Given the dearth of cases holding ISPs criminally liable, ISPs have little to worry about and need not proactively seek out problematic sites. ❧

## Counter-notification and reinstatement

Once the service provider has notified the owner of the problematic website that content on the site has been removed or disabled, the website owner can send a counter-notification to the provider asking the content to be reinstated. The counter-notification must substantially include:

- a physical or electronic signature;
- identification of removed material and its former location on the site;
- a statement under penalty of perjury that the subscriber has a good faith belief the material was mistakenly removed or disabled;
- the subscriber's name, address, and telephone number; and
- certain statements of consent to legal jurisdiction and service of process.

The service provider must then send a copy of the counter-notification to the person who sent the original notice and notify him or her that the website content will be reinstated within 10 business days. The service provider may then reinstate the content within 10 to 14 business days following receipt of the counter-notice, unless the complaining party sends notice to the service provider that it has filed a lawsuit seeking to restrain the website operator from infringing.

To summarize, a service provider or hosting company wishing to avail itself of the safe harbor protections of the DMCA should ensure its hosting policy and contracts advise people that their service may be terminated if they repeatedly violate others' copyrights, designate an agent to receive notice of alleged copyright infringement, file the designation with the copyright office, post the designation on the provider's website, ensure the agent designation remains accurate and up-to-date, and if the host receives notice of alleged copyright infringement, act quickly in accordance with the procedures and timetables set forth in the DMCA.

If the host does not follow the procedures necessary to take advantage of the DMCA safe harbor, the host's liability would likely be determined under traditional copyright principles. ❧