

# **COPYRIGHT IN CYBERSPACE**

## Peer-to-Peer (P2P) File Sharing and The Digital Millennium Copyright Act (DMCA)

In recent months, the recording industry has begun to aggressively pursue legal action against Internet users who use P2P file sharing programs to trade copyrighted music. Much of this effort has been directed at college students who use university provided Internet services. While the students themselves may be liable for infringement, the DMCA provides for limitations on liability to universities and other Internet Service Providers (ISP's) who meet certain requirements.

P2P file sharing is not illegal in itself. The file sharing is done using popular P2P software such as KaZaA and Morpheus. There are many useful and legal ways in which file sharing can be done. However, P2P software is extensively used to engage in infringement of copyrighted works including music, movies, computer software, video games and photographs.

The potential liability for copyright infringement using P2P software is enormous. For registered copyrighted material, the statutory damages range from \$750 to \$30,000 per infringed work. The amount may be raised to \$150,000 per infringed work for willful infringement. That is, the user knew or had reason to know, or recklessly disregarded the fact that her conduct was infringing activity. The amount may be reduced to \$200 per infringement where the defendant had no reason to know that her conduct was infringing. In addition, injunctions, costs and attorneys fees may be levied against the defendant.

Copyright infringement can be a crime. Serious penalties, including imprisonment, can be imposed on willful infringers seeking commercial advantage, or private financial gain. When the value of infringing copies reproduced or distributed exceeds \$1000, this may also be prosecuted as a crime.

The 1998 DMCA grants Internet service providers (ISP's) a limitation for liability for vicarious and contributory copyright infringement when users of the service infringe a third party copyright owner's rights. 17 D.S.C. §512. The limitations on liability are only available under certain conditions and where correct procedures are followed by the ISP.

The DMCA does not require ISP's to conform to its requirements nor does it alter other copyright law such as fair use. Any defenses available to an ISP in a lawsuit still apply, regardless of DMCA compliance. Compliance with the DMCA can provide for the quick disposal of certain infringement claims, including claims from the alleged infringer against the ISP for taking material down.

### Requirements for Limitation of Liability

An ISP will not be liable for infringement of materials stored or transmitted by a user or by providing links to an online location containing infringing material if:

1. it does not have actual notice of the infringing activity or if it removes the infringing material upon receipt of notice;
2. it does not receive a financial benefit from the infringing activity;
3. upon notice, it responds expeditiously to remove or disable the material; and
4. it has an agent designated to receive notifications whose name and address is on its Web site and is registered with the D.S. Copyright Office. 17 D.S.C. §§ 512(a), (b), (c), and (d).

The ISP must adopt and implement a policy providing for termination of service to repeat offenders. An ISP must accommodate and not interfere with "standard technical measures" used to identify and protect copyrighted works. 17 D.S.C. §512(i). An ISP is not required to affirmatively seek facts or monitor users to locate infringing activity. 17 D.S.C. § 512 (m).

### Notification from Complaining Party to ISP's

To be effective notice of an alleged infringement to the ISP, a notice must include the following:

1. a physical or electronic signature;
2. identification of the copyrighted work alleged to be infringed;
3. identification of the material alleged to be infringing;
4. information reasonably sufficient to allow the ISP to contact the complaining party;
5. a statement that the complaining party has a good faith belief that the use of the material is unauthorized; and
6. a statement that the complaining party is authorized to act on behalf of the owner. 17 D.S.C. §512 c (3)(a) . ,

The alleged infringements are ordinarily detected by "bots", a software tool used by copyright owners to monitor the Internet and detect unauthorized distribution of copyright material. This technology did not exist when the DMCA was enacted in 1998.

### Notice to the Alleged Infringer

An ISP may immediately disable access to or remove allegedly infringing material without being liable to the subscriber, provided the following procedures are followed:

1. promptly notify the subscriber that the ISP has removed or disabled access to the material;
2. provide the complaining party a copy of the subscriber's counter-notice (see below), if any, and informs the complainant that it will cease disabling access to the material or activity in 10 business days; and
3. cease disabling access to the material or replaces it in not less than 10 nor more than 14 business days following receipt of the counter-notice, unless, the ISP's designated agent receives notice that the complaining party has sought a court order to restrain the subscriber. 17 D.S.C. §512(g).

### Counter Notice from Subscriber

Although not required, the ISP's registered agent may inform the subscriber that a Counter-notification may be submitted if there is reason to believe the notification is mistaken. The counter notice must include the following:

1. 1. the subscriber's physical or electronic signature;
2. 2. identification of the material removed;
3. 3. a statement that the subscriber believes that the material should not have been removed; and
4. 4. name, address and telephone number and statement of consent to jurisdiction of the federal district court. 17 D.S.C. § 512(g)(3).

### Non-Profit Educational Institutions

There is a special section of the Act applicable to public colleges and universities. 17 D.S.C. § 512(e). This clarifies that not all activities of faculty or graduate students engaged in research or teaching will be considered the institution's activity. The faculty members or student's knowledge or awareness of infringing activity will not be attributed to the institution if:

The activity does not involve access to instructional materials that are or were required or recommended within the preceding three years for a course taught by that faculty member or graduate student;

1. The institution has not received more than two notices of infringement by such faculty or graduate student in the preceding three years; and,
2. The institution provides informational materials that -accurately describe and promote compliance with federal copyright laws.

#### Subpoenas

The DMCA allows a copyright holder to request a federal district court to issue a subpoena to the ISP requiring it to identify the individual who is responsible for the alleged infringement. This part of the DMCA was recently litigated in *RIAA v. Verizon*, 240 F.Supp.2d 24 (D.D.C. 2003). The court held that even though the "for profit" ISP was entitled to limited liability under the Act, it still must respond to subpoenas from copyright owners seeking information on infringing customers.