

Secondary Copyright Liability and the Telecom Industry

Since the passage of the Digital Millennium Copyright Act ("DMCA") over five years ago, there have been several cases addressing the scope of the DMCA and the protection from liability thereunder. In addition, several court cases have expounded contributory liability theories for third party copyright infringement that may affect the telecommunications industry. Specifically, there is a potential that a network carrier may be exposed to liability for copyright infringement by its users. In this brief advisory, we highlight the scope of protection from potential contributory liability for third party copyright infringement allowed under the DMCA and the steps an entity must take to attempt to gain protection from such liability.

The Copyright Act and Secondary Liability

The Copyright Act does not explicitly state causes of action for contributory or vicarious liability for copyright infringement by others. However, recent case law applies these doctrines in several fact scenarios that may affect the telecommunications industry:

- ▶ **Vicarious Copyright Infringement:** liability for vicarious copyright infringement has been found when a defendant possesses the legal right and ability to monitor the infringing conduct of the direct infringer, and has a direct financial interest in the exploitation of the copyrighted materials.
- ▶ **Contributory Copyright Infringement:** liability for contributory copyright infringement has been found where a defendant with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.

The Four "Safe Harbors" under the Digital Millennium Copyright Act

The DMCA defines four specific "safe harbors" that protect service providers from monetary liability and greatly limits the scope and availability of injunctive relief for copyright infringement arising out of the conduct of users of the provider's network or system. The protections extend to any theory of copyright liability, including direct liability, contributory infringement, and vicarious liability.

- ▶ **"Conduit" Harbor:** provides broad protection for transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider.
- ▶ **"Caching" Harbor:** limits a service provider's liability for "caching" activity performed by network servers to facilitate access to material that has been requested online by others.
- ▶ **"Storage" Provision:** protects the provider from remedies for storage, at the direction of a user, of material on the provider's system or network.

- ▶ **“Information Location Tools and Links” Harbor:** protects a service provider that provides links or directories (“information location tools”) to infringing information, again subject to certain specified conditions.

Service Provider

The DMCA defines “service provider” in two ways, each applicable to different subsections.

- ▶ For the “Conduit” Harbor, a “service provider” is an entity offering the transmission, routing or providing of 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.
- ▶ For all of the other subsections, a “service provider” is more broadly defined as a provider of online services or network access, or the operator of facilities therefor. This latter definition is broad enough to encompass businesses that provide network access to their employees and universities that provide access to their students.

Actions Required by Service Provider

- ▶ **Designate Agent:** service providers must designate an agent to receive notification of claimed infringements, the Register of Copyrights is to maintain a directory of these agents.
- ▶ **Termination Policy:** A service provider must develop, implement, and publicly post or provide to account holders a policy of ter-

minating the accounts of subscribers that are repeat offenders.

- ▶ **Take Down:** when properly notified of an infringement, the service provider must expeditiously remove or disable access to allegedly infringing material.
- ▶ **No Liability for Takedown:** a service provider will not held liable for the good faith “taking down” of material or for disabling access to a site based on facts and circumstances from which infringing activity is apparent, regardless of whether the material is ultimately determined to be infringing.

Proper Notification of Claimed Infringement Requirements

A valid notification from a copyright owner must be provided to the designated agent of the service provider with the following requirements:

- ▶ written communication to the ISP or its agent including signature of a person authorized to act on behalf of the copyright owner;
- ▶ identification of the copyrighted work claimed to have been infringed;
- ▶ identification of the material claimed to be infringing;
- ▶ information reasonably sufficient to permit the ISP to contact the complaining party;
- ▶ a statement by the complaining party of its good faith belief that use of the material is not authorized by the copyright owner; and
- ▶ a statement that the notification information is accurate.

For more information, please contact:

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