



DMCA Takedowns and Fair Use: Some Guiding Principles for Content Owners and ISPs

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The Internet is an extraordinary resource for individuals to find, create and distribute new works that make fair uses of existing copyrighted materials. As the same time, the Internet has also facilitated the creation and distribution of copyright-infringing works. The Digital Millennium Copyright Act's (DMCA) notice and takedown procedures provide a simple means for content owners and service providers to remove the latter type of material. However, those procedures have also been abused to cause the removal of clearly non-infringing material. For example:

- A voting machine company used the DMCA to force the take down of emails that revealed flaws in their machines. *See OPG v. Diebold*, 337 F.Supp.2d 1195, (N.D. Cal. 2004).
- A self-help group used bogus copyright infringement allegations to cause the removal of a documentary from YouTube and discover the identity of the persons who posted it. The company later withdrew the subpoena, but not before the documentary had been taken down and some identifying information revealed. *See* www.eff.org/legal/cases/landmark.
- Internet "griever" Michael Crook sent DMCA takedown notices to at least 30 web hosts in order to remove a screen shot of Crook being interviewed on Fox News. Crook did not own any copyright in the image and the use of it was a fair use in any event. Crook later publicly apologized for his actions, but not before causing widespread disruption to bloggers around the net. *See* www.eff.org/legal/cases/diehl_v_crook.
- The National Football League has twice demanded the takedown of a very short clip of the copyright notice that precedes every NFL game, posted by Law Professor Wendy Seltzer for use in her copyright class. *See* P. Lattman, "Law Professor Wendy Seltzer Takes on the NFL," *Law Blog-Wall Street Journal.com*, Mar. 21, 2007, (*available at* blogs.wsj.com/law/2007/03/21/law-professor-wendy-seltzer-takes-on-the-nfl/).
- A major entertainment company demanded the takedown of a political organization's parody of a television program, *The Colbert Report*. After first denying it had ever sent the takedown notice, the company admitted that it had issued the notice in error. *See* www.eff.org/legal/cases/moveon_v_viacom.
- Another major entertainment company demanded the takedown of a 29-second home video of a toddler dancing to Prince's "Let's Go Crazy" that was posted by the baby's mother. *See* www.eff.org/legal/cases/lenz_v_universal.

Takedown targets do have some options. They can send a note to the service provider denying infringement and agreeing to jurisdiction, should the owner wish to pursue a copyright claim. If the content owner does not sue within 10-14 business days, the disputed material can be put back up. But that procedure does not mean much where, as is often the case, the material in question is time-sensitive. For example, the counter-notice procedure would not help a political parodist whose mash-up commentary on a candidate was taken down one week before an election. An alternative is to sue for misrepresentation and declaratory judgment of non-infringement, but not everyone has the ability or resources to bring such a lawsuit. Moreover, responsible content owners and service providers have little interest in stifling creativity and free speech by taking down fair or substantially unobjectionable uses, much less responding to a lawsuit based on the takedown of such a use.

A better approach would be to stop improper notices from being issued in the first place, and help ensure that errors are rectified quickly. Toward that end, the Electronic Frontier Foundation, working with Stanford Law School's Fair Use Project is working to develop core principles for DMCA takedowns. Those principles could include the following:

1. Wide Berth for Transformative, Noncommercial Uses: While Internet users sometimes create and post content that comes close to the line between fair and improper use of copyrighted materials, users will often post content that a court is very likely to find to be a fair use—e.g., a parody of a television program that uses (and comments on) clips from that program. Taking down the latter type of content stifles creativity and diverts content owner resources from the primary objective of stopping the distribution of clearly infringing material. Therefore, content owners should avoid issuing DMCA takedown notices for content that makes non-commercial use of copyrighted material in a creative and transformative manner.
2. Human Review: At present, no computer program can substitute for human judgment when it comes to copyright infringement. Accordingly, in most cases, a takedown notice should not issue unless an appropriately trained human being has reviewed the allegedly infringing content.
3. Filters: In line with Principle 2, “filtering” technology generally should not be used to automatically remove, prevent the uploading of, or block access to content. However, filtering technology can help identify content that may be infringing. In addition, use of filtering technology to automatically remove or block content may be appropriate where the content can be reliably identified as almost certainly infringing. For example, automatic filtering may be appropriate where the content can be identified as an almost verbatim copy of a single copyrighted work.
4. Notice to Users: Too often, users aren't notified when material they posted has been taken down, and/or have trouble determining who has requested the takedown, why, and how to respond. In order to facilitate the prompt

resolution of disputes over content, service providers should take steps to notify users of the removal of material they have posted, the source of the request for the takedown, and the DMCA counter-notice procedure.

5. Informal Reconsideration: The DMCA counter-notice can be cumbersome and untimely. In order to facilitate a rapid response in cases where a takedown notice has been issued in error, content owners should create mechanisms for users to request reconsideration. Content owners should promptly review such requests and communicate the results of that review to users and service providers. Service providers should help ensure that users are aware of this mechanism.

Note: some content owners have already embraced this principle. For example, Viacom has set up a website and email “hotline,” promising to review of any reconsideration request within one business day and to ask service providers to restore the content if it determines that a takedown request was in error.

6. Restoration. If notified by a content owner that it has determined that a takedown notice was issued in error, service providers should immediately restore the disputed content.

Service providers should also reinstate disputed content upon submission of a DMCA counter-notice by the user who posted the disputed content, if the counter-notice appears to be in good faith.