

How to Claim the Digital Millennium Copyright Act Safe Harbors for Online Service Providers

What is the DMCA Safe Harbor?

Under some circumstances, someone who does not directly infringe copyright (*i.e.*, actually commit the infringing act) may be held liable if they have somehow contributed to the infringement. Liability for such “indirect” infringement is referred to as “secondary liability.”

Countless websites infringe copyright without ever realizing it. This occurs not only when the website owner creates infringing content (a “direct” infringement), but also when a user posts infringing content, and potentially even when the site links to infringing content residing elsewhere (“indirect” infringement).

“But,” you say, “it’s not fair to hold my company liable for something our users/clients/members did!” Take heart – Congress agreed! You can protect your organization from liability for certain types of activities relatively easily, but you must take certain steps to claim that protection.

What does the Safe Harbor cover?

The Digital Millennium Copyright Act (“DMCA”) provides safe harbors for certain types of activities conducted by providers of different types of online services, including simply providing a publicly available website. Those activities are:

1. transmitting, routing, and providing connection to third-party content that your users choose to access
2. caching third-party materials that you make available to your users, but only if your users then request access from the original provider
3. storage of third-party materials at the direction of a user
4. providing information location tools, such as search engines and directories

When does the Safe Harbor apply?

The Safe Harbor applies under the following conditions, but only if you also follow the requirements discussed in the next section:

1. The content at issue is selected/posted by someone other than your organization (a third-party user).
2. You have no knowledge that the content infringes copyright.

3. The transmission, routing, and storage of third-party content is carried out by automated processes.
4. For storage of content made available by one of your users, you must not receive a financial benefit from activities that you have the right and ability to control. Unfortunately, what constitutes “ability to control” and “financial benefit” are not currently clear, although courts have pretty consistently held that the “right and ability to control” requires “more than the simple ability to block or remove infringing content.” Generally speaking, the less involved you are with reviewing and “handling” user-suggested posts, the less likely you are to lose this protection.

What do we have to do to be protected by the Safe Harbor?

The Safe Harbor applies if the above conditions are met and you take the following actions:

1. Accommodate and not interfere with standard technical measures used to identify or protect copyrighted works (*e.g.*, DRM).
2. Do not modify the content being transmitted.
3. Write and “reasonably implement” a policy of terminating repeat infringers. Should you have any repeat infringers, be sure to take action accordingly and in a timely manner.
4. Where access to the content at its original source (i.e., through a link on your site) is subject to conditions such as passwords or fees, you must provide access to that content only to users who have met those conditions.
5. Designate an agent to receive claims of infringement and register that agent with the U.S. Copyright Office. You can create an account and register your agent [here](#). *You must renew this registration every three years* through the online account. If you do not, you will lose protection under the safe harbor.
6. Provide contact information for your agent on your website (this is often done in the Terms of Use).
7. Abide by the DMCA “take-down” process.

A copyright owner who thinks their rights have been infringed by content available or accessible through a website that claims the Safe Harbor must submit a notice of complaint that complies with DMCA requirements.

A compliant notice must include the following:

- Reasonably sufficient details to enable you to identify the work claimed to be infringed or, if multiple works are claimed to be infringed, a representative list of such works (for example, title, author, URL);
- Reasonably sufficient details to enable you to identify and locate the material that is claimed to be infringing (for example, a link to the page that contains the material);
- The complainant's contact information;
- A statement that the complainant has a good faith belief that the use of the material identified as infringing is not authorized by the copyright owner, its agent, or the law;
- A statement, under penalty of perjury, that the information in the notification is accurate and that the complainant is authorized to act on behalf of the owner of the exclusive right that is alleged has been infringed; and
- The complainant's physical or electronic signature.

If you receive a complaint meeting the above requirements, you must "expeditiously" act to take down or block access to the allegedly infringing content. You may, but are not required to, provide notice to the user who made the content available, giving them the opportunity to submit a "counter-notice" disputing the claim of infringement. A counter-notice must include the following:

- Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or disabled;
- A statement, under penalty of perjury, that the counter-claimant has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material in question;
- The counter-claimant's name, address, and telephone number;
- A statement that the counter-claimant consents to the jurisdiction of the Federal District Court for the judicial district in which their address is located or, if the address is outside of the U.S., for any judicial district in which you may be found; and that the counter-claimant will accept service of process from the person who submitted a notice in compliance with section (c)(1)(C) of the DMCA, as generally described above; and
- The counter-claimant's physical or electronic signature.

If the counter-notice meets these requirements, you must:

- Send a copy of the counter-claim to the party who submitted the original notice of complaint;
- Inform the complainant that you will restore access to the disputed content within ten business days; and
- Restore access within ten business days unless the complainant informs you that a lawsuit has been filed.