

From AffiliateTip.com

ARTICLE

It's Monday Morning... Is Your DMCA Notice Up?

By Linda L. Goodman, Esq.

Jan 4, 2006, 08:51

It's Monday morning and you have received a letter from a law firm whose letterhead is longer than the content of the letter itself. Over your second Latte, you realize that the author is the intellectual property attorney for a large corporation "XYZ".

This gentleman appears to have had one or two extra cappuccinos before writing this letter as he is claiming that your company's use of XYZ's "very famous logo" in your commercial email is a copyright violation.

It seems that XYZ believes that your company's use of XYZ's logo will inevitably cause confusion as to whether or not XYZ is endorsing your email. Finally, a demand is made to cease and desist use of this copyright material immediately!

Your options? Pass the letter around your office for a good laugh from your co-workers? Toss the letter into the round basket under your desk and assume the author is a lunatic? Or call your counsel and respond accordingly. Although the first two options are more intriguing, the legal reality is that each of these cease and desist letters must be reviewed and responded to accordingly.

As an Online Service Provider under Title II of the Digital Millennium Copyright Act, 17 U.S.C. Section 512 ("DMCA"), you must respect the legitimate rights of copyrights owners. As such, you must adopt an efficient notice and takedown procedure as required by the DMCA and described below. This policy will guide copyright owners in utilizing that procedure, and also to guide webmasters in restoring access to websites that are disabled due to mistake.

The DMCA provides a legal procedure by which any holder of a copyright may request any Online Service Provider to disable access to a website where the copyrighted work appears without the permission of such person. There are two parts to the legal procedure: (1) Writing a Proper DMCA Notice, and (2) Sending the Notice to a Designated Agent.

A Proper DMCA Notice will notify the recipient of the particular facts in writing and signed under penalty of perjury. It must identify the author as the owner of a copyrighted work(s), or a person "authorized to act on behalf of the owner of an exclusive right that is allegedly infringed."

It must also provide the authors contact information, including their name, street address, telephone number, and email address. The author must state that the notice is accurate under penalty of perjury and it must be either physically or electronically signed.

To exercise their DMCA rights, the claimant must send the DMCA Notice to the agent you have designated in your DMCA NOTIFICATION POLICY.

Don't have one of those? Then you definitely need to call counsel immediately because this posted notice is an important legal protection which should appear on each and every website owned and operated by your Company. This notice allows you one free mistake as to each copyright violation so long as corrective action is taken immediately upon notification. Without such notification or designated agent, you run a high risk of a copyright violation lawsuit.

This posted Notice should follow the procedures provided in the DCMA, which prescribed a notice and takedown procedure, subject to the webmaster's right to submit a Counter-notification claiming lawful use of the disabled works.

This same notice should notify all users of your system that they are expected to comply with applicable copyright laws. More importantly, it should notify the users that if you are notified of claimed copyright infringement, or otherwise become aware of facts and circumstances from which infringement is apparent, you will respond expeditiously by removing, or disabling access to, the material that is claimed to be infringing or to be the subject of infringing activity.

This same notice should be part and parcel of your Terms of Service Agreement as the Terms of Service Agreement should require all clients to use only lawfully-acquired creative works as website content or graphics. Further the Terms of Service Agreement should notify all users that their website may be disabled upon receipt of notice that infringing material is appearing there.

Although their privileges may be suspended, the user should be notified of their right to protest a DMCA notice by submitting a Counter-notification. This notification must state that access to their website was disabled due to operation of the notice and takedown procedure. Then identify the material that has been removed and designate its URL prior to removal.

Finally, provide the name, address and telephone number of the appropriate agent with a statement from that agent that a good faith belief was made that the material was removed or disabled as result of mistake or misidentification of the material and they consent to the jurisdiction of the Federal District Court for the judicial district in which the address is located. This notification should be sent to the designated agent in your online DMCA NOTIFICATION POLICY.

Notification should be given that you may, in your sole discretion, use all appropriate means to terminate user access to its system or network if they are found to be repeat infringers.

Once your DMCA NOTIFICATION POLICY is in place, the most important thing to remember is to respond to each and every cease and desist letter immediately.

Notify the sender that you have received the letter and according to your own posted policy you are investigating the claim

and will take corrective action as appropriate. Once your investigation is complete, notify the sender of your findings.

If you have found a violation, be sure to notify the sender of the corrective action you have taken. The policy combined with proactive attention on your part will inevitably avoid a long and costly copyright violation law suit.

Linda L. Goodman is the founder of The Goodman Law Firm, concentrating its practice in internet business law. Her firm's clients include Advertisers, Affiliates, Affiliate Networks and ISP's. Ms Goodman is a featured speaker at Affiliate Summit.

© Copyright 2005 AffiliateTip.com