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# Rough Justice: Extending the DMCA's Self-Policing “Take-Down” Model Beyond Copyright Law

Timothy Cahn  
Ryan Bricker



- Introduction
- Overview of Relevant Law
- Significant Interpretive Questions Under the DMCA
- Expanding “DMCA Model” into Other Areas of Law

## **47 U.S.C. §230 Dual Immunities**

A] Immunity for claims by users.

“(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].”

B] Immunity for claims by third parties.

47 U.S.C. § 230(c)

“(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

C] Exception for intellectual property violations

230(e) (2) “No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”

### A] Overview of 512

- Arises out need to address questions of contributory copyright infringement online and to balance competing interests of IP owners, fair use, and internet commerce.
- Provides directives for raising and resolving online copyright disputes.
- System relieves service providers of an affirmative duty to police their own sites/networks, so long as, when confronted with a copyright infringement, they expeditiously disable or remove it.
- Provides direction for copyright owners or agents to alert providers of infringements.
- Establishes service providers' obligations in response to notice given by a copyright owner or agent.
- Sets up basic requirements for ISP's to maintain safe harbor – e.g., Must adopt and reasonably implement a policy that provides for termination of account holders who repeatedly infringe copyrights; must inform subscribers of the policy; and must accommodate and not interfere with third party technical measures to identify copyright infringements

## Required Content of a 512 DMCA Notice

- Written communication directed to the Provider's designated agent
- Signed by person authorized to act on behalf of an owner of exclusive right that is infringed
- Identification of the copyrighted work claimed to be infringed
- Identification of the material claimed to be infringement and information reasonably sufficient to allow Provider to locate the material
- Statement that complaining party has good faith belief that use of the material is not authorized
- Statement under penalty of perjury that the party is authorized to act on behalf of rights holder.

## Take-down Process:

1. Provider receives compliant notice from copyright owner.
  2. If notice not formatted properly, but material can be identified, Provider must attempt to work with copyright owner. 512(c).
  3. Provider must expeditiously take down or disable file or material.
  4. If material posted by un-affiliated third party, this ends the matter, and Provider risks no liability for take-down.
  5. If material posted by Provider's subscriber or account holder, then Provider must promptly notify the subscriber that the material has been removed or disabled. 512(g).
  6. Subscriber/Poster sends Provider a counter-notification, containing the contents of 512(g)(3).
  7. Provider informs copyright owner that Provider will replace material within 10 days.
  8. Provider must replace material, unless copyright owner files a lawsuit. If so, the material stays off, pending court resolution.
- If Provider follows these rules, it cannot be liable for (a) posting material that may be infringing or (b) removing material that was wrongfully identified as infringing.



- What constitutes “standard technical measures” of a copyright owner, with which ISP’s must cooperate? When might access become too burdensome?
- What constitutes “apparent infringing activity” giving rise to an obligation affirmatively to disable or remove (i.e. “red flag” notice)?
- What consequences, if any, flow from complaining owner’s failure to file suit after material is replaced following a counter-notification?

### ■ What constitutes an actionable “misrepresentation” by complaining owner under 512(f)?

“(f) Misrepresentations. Any person who knowingly materially misrepresents under this section--

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.”

- Anecdotal evidence of expansion of DMCA model, in form at least.
- Sample ISP instructions re: trademark complaint (next page)
- Significance of ISP’s Terms of Use / Terms of Service.
- Reasons for exporting model?
- Types of legal claims included?
- In non-copyright context, however, may find that ISP requires more than notice under penalty of perjury, but evidence or something close to it.
- How much proof is enough? Who decides? Standards?
- Case Study: *Tre Milano v. Amazon.com, Inc.*, 2012 WL 3594380 (2d Dist., 2012).

# Sample ISP Non-Copyright application of DMCA Model

Dear Ryan Bricker,

Your email regarding [xxxxxxxxxxxxx] was forwarded to our department. Unfortunately, the email did not contain all of the information necessary for us to review a trademark claim. As per Go Daddy's Trademark Infringement Policy, available here [http://www.godaddy.com/agreements/ShowDoc.aspx?pageid=TRADMARK\\_COPY](http://www.godaddy.com/agreements/ShowDoc.aspx?pageid=TRADMARK_COPY), a notification of a claimed trademark violation must include all of the following information:

- The trademark, service mark, trade dress, name, or other indicia of origin ("mark") that is claimed to be infringed, including registration number.
- The jurisdiction or geographical area to which the mark applies.
- The name, post office address and telephone number of the owner of the mark identified above.
- The goods and/or services covered by or offered under the mark identified above.
- The date of first use of the mark identified above.
- The date of first use in interstate commerce of the mark identified above.
- A description of the manner in which the Complaining Party believes its mark is being infringed upon.
- Sufficient evidence that the owner of the website that is claimed to be infringing is a Go Daddy customer.
- The precise location of the infringing material.
- A good faith certification, signed under penalty of perjury, stating:
  1. The content of the website [identify website] infringes the rights of another party,
  2. The name of such said party,
  3. The mark [identify mark] being infringed, and
  4. That use of the content of the website claimed to be infringing at issue is not defensible.

When you send us all of the required information to substantiate your claim, we will initiate an investigation.

Thank you,

Ryan S.  
Trademark Claims  
GoDaddy.com, LLC

## Systemic Concerns from Such Expansion

- Does adoption of this model conceal basically unfettered discretion by ISP's?
- ISP's, arbiters in the take-down model, are not "neutrals" in the traditional understanding applicable to judicial and quasi-judicial proceedings.
- Lack of transparency in take-down decisions. No *stare decisis*. No guarantee of evenhandedness towards different parties.
- Adoption of the DMCA form without all of the substance distorts the bargain made by Congress and may not adequately protect users' or owners' legitimate rights. Example: Takedowns may occur routinely a) without notice to user and opportunity to object (as in 512g) and b) without the protection of a cause of action for owner misrepresentation (as in 512f).
- Recommendations: Phenomenon is Ripe for Academic focus and judicial or other government review. Note: 2006 Study in *Santa Clara Computer and High Technology Law Journal*.