Online News Association
Los Angeles, California

Internet Law: A Primer

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• October 1994
• Users postings to a Prodigy bulletin board accused Stratton Oakmont of criminal and fraudulent acts in connection with an IPO:
  › "major criminal fraud"
  › “cult of brokers who either lie for a living or get fired"
› Court found Prodigy could be held liable as the “publisher” of the postings

› Efforts to police created obligation to police effectively

› Lawyers recommended against policing
• Stratton Oakmont wouldn’t be decided the same way today
• Congress intervened to protect nascent Internet; didn’t like the advice lawyers were giving
• Didn’t want the law to discourage publishers from exercising responsible editorial judgment
• Communications Decency Act
  › ACLU v. Reno

• Section 230
  › “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.”
You Can Edit If You Really Want

• Covered claims
  › Libel
  › Invasion of privacy
  › Other torts
  › Breach of contract
  › Violation of fair housing laws
  › Etc.

• Claims outside § 230 immunity
  › Intellectual property
  › Federal criminal
You Can Edit If You Really Want

- The sticky advice is wrong
- In the U.S., you can edit if you really want
You Can Edit If You Really Want

• Protected activity
  › Move for relevance
  › Remove
  › Edit for indecency
  › Edit for length

  › Edit because you think it’s appropriate
    » Exercise of editorial judgment
The Outer Limits

- Can’t edit to insert the defamation or to change the defamatory gist and sting
- “My ex-husband is not an alcoholic.”
The Outer Limits

• Roommates.com (9th Cir. April 2008)
  › Roommate matching service violated federal Fair Housing Act by encouraging users to express discriminatory preferences
  › Fair Housing Laws
The CDA does not provide immunity for inducing third parties to express illegal preferences. Roommate’s own act – posting the questionnaire and requiring answers to it – are entirely its doing and thus Section 230 of the CDA does not apply to them.”
The Outer Limits

- Court: Roommates invited users to express unlawful preferences

- “By requiring users to provide [information about sex, family status, and sexual orientation] as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of the information.”
The Outer Limits

Contrast:

Lawyers Committee v. Craigslist
› (7th Cir. March 2008)
UGC Liability

• Practical Advice
  › UGC may not be the place to take litigation risk
  › If you limit editing to removing indecency, correcting typos, etc., run less risk of being accused of being publisher
    » Avoid vulnerability for “tightening” prose to make the ambiguous unambiguously defamatory
    » Trimming for length can lead to claims that you omitted the exonerating stuff

• Protection is statutory, not Constitutional
You Can Edit If You Really Want

• Congress got this right

• Without Section 230 (and the Safe Harbor provision of the DMCA), the UGC industry wouldn’t exist in the litigious U.S. (as we know it)

• Facebook, YouTube
• Section 230 immunity specifically does not apply to claims of copyright infringement

• To protect service providers against strict liability for infringing content posted by users, Congress enacted the Safe Harbor provision of the DMCA
DMCA Safe Harbor

• To find refuge in the Safe Harbor, online service providers must:
  › Have no actual or constructive knowledge of that material is infringing
  › Have no direct financial benefit from the infringement, if the OSP has the “right and ability to control”
  › Have registered with the Copyright Office an agent to receive notices of infringement
  › Act “expeditiously” to remove or disable
DMCA Safe Harbor

• To register a designated agent, go to www.copyright.gov
About Copyright
- Copyright Basics
- Frequently Asked Questions (FAQ)
- Current Fees
- Taking the Mystery Out of Copyright (for students and teachers)

Search Copyright Records
- Registrations and Documents
- Notices of Restored Copyrights
- Online Service Providers
- Vessel Hull Designs

Publications
- Circulars and Brochures
- Forms
- Fact Sheets
- Reports and Studies

Licensing
- Compulsory and Statutory Licenses

Preregistration
- Preregistration Information
- Preregister Your Work

How to Register a Work
- Record a Document

Law and Policy
- Copyright Law
- Federal Register Notices
- Current Legislation
- Regulations
- Mandatory Deposit
- Ruling
- Rulings Regarding the CRB
- More...

Related Links
- Patents and Trademarks
- Copyright Royalty Board
- More...

Contact Us | Legal Notices | Freedom of Information Act (FOIA) | Library of Congress | USA.gov

XML | RSS Feed | Email Updates

U.S. Copyright Office
101 Independence Ave, S.E.
Washington, D.C. 20559-6000
(202) 707-9000

Revised: 06-Oct-2009
Online Service Providers

Service Provider Designation of Agent to Receive Notification of Claims of Infringement

The Digital Millennium Copyright Act (DMCA), signed into law on October 28, 1998, amended the United States Copyright Act (Title 17 of the U.S.C.) to provide in part certain limitations on the liability of online service providers (OSP) for copyright infringement. Section 512(c) of the Copyright Act provides limitations on service provider liability for storage, at the direction of a user, of copyrighted material residing on a system or network controlled or made available by or for the service provider. If the service provider does not receive a proper DMCA takedown notice, it may avoid liability for the material by providing contact information to the Copyright Office and by posting such information on the service provider’s publicly accessible website.

Browse through the OSP directory of designated agents.

The Copyright Office published the DMCA regulations, the procedure by which a service provider may designate an agent to receive notifications of claimed infringement. The Copyright Office does not provide printed forms for designating an agent, but makes available on this website suggested formats for filing an Interim Designation or an Amended Designation. An Amended Designation will replace an Interim Designation and will become effective when the service provider posts it. A service provider may also file a designation in person by delivering it to the Public Information Office of the Copyright Office, James Madison Memorial Building, Library of Congress, 101 Independence Avenue, SE, Washington, DC 20559.

You may also prepare your own form, but should ensure that it includes all the information required in section 512(c)(1) or (f), as appropriate, of the DMCA regulations. Please note that the entire Interim Designation or Amended Designation that you submit will be posted on the Copyright Office’s website. If you include extraneous information that is not required by the DMCA regulations, that information will also be scanned and posted on the website.

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An Interim Designation or an Amended Designation should be accompanied by the Copyright Office that any notice since the regulations were published) payable to the Register of Copyrights. If mailed, the designation should be addressed to: Copyright Office, P.O. Box 70400, Washington, DC 20004. A service provider may also file a designation in person by delivering it to the Public Information Office of the Copyright Office, James Madison Memorial Building, Library of Congress, 101 Independence Avenue, SE, Washington, DC, Monday–Friday, 8:30 a.m. to 5:00 p.m. eastern time, except federal holidays.

The Copyright Office reviews each designation for obvious error (e.g., that the entity listed as the service provider does not include another legal entity as its alternative name) and to ensure that all designated agents are given notice of the DMCA regulations. The Copyright Office does not substantively examine the designations of agents for accuracy or for compliance with the law or with Copyright Office regulations. The fact that the Office has accepted a designation of an agent and has included it in the Office’s directory of agents should not be construed as a judgment by the Office that the designation is sufficient or error-free.

Definition: For purposes of section 512(c), a “service provider” is defined as a provider of online services (including providers of Internet access, providers of content, online辟g service providers, or systems or networks that offer to the public computerized access to works over the Internet, and the means for 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.

Mail the forms below to:

Copyright GC/18R
P.O. Box 70400
Washington, DC 20004

To designate an agent:

- Interim Designation of Agent to Receive Notification of Claimed Infringement (PDF format)
- Amended Interim Designation of Agent to Receive Notification of Claimed Infringement (PDF format)
- Directory of Agents

To see the list of designated agents:

- Directory of Agents
DMCA Safe Harbor

• Must include contact information for the registered agent on the site
  › including name, address, phone number and email address of the agent
• Usually handled in the terms of use
Copyright Basics

• Copyright protection was considered so fundamental to fledgling republic that it was baked into the Constitution
  › "No man but a blockhead ever wrote, except for money." Samuel Johnson

• To encourage creation, copyright scheme favors creators over acquirers
Copyright Basics

• Copyright isn’t something you apply for
  › Springs into existence upon “fixation”
• Copyright protects expression, not ideas or facts
  › Databases subject to only thin protection
    » Based on selection, coordination, and arrangement
Copyright Basics

• Copyright covers works of authorship
  › Written works
  › Photographs
  › Art
  › Video
  › Music
  › Websites
  › Computer programs
  › Etc.
Copyright Basics

• Exclusive Rights of Copyright Holder
  › Right to copy
  › Right to distribute copies
  › Right to make derivative works
  › Right to display
  › Right to perform
  › Sound recordings: right to make a digital audio transmission
Copyright Basics

• Employee’s works are owned by employer
• But freelancer or blog poster owns his work
• Exclusive rights (ownership or exclusive license) can only be conveyed in writing
• To obtain ownership of copyright as “work made for hire” must have writing and incant magic words
Copyright Basics

• If there’s no contract, just an implied license
  › Scope based on “custom and usage”
  › Print rights probably don’t yet imply web rights and vice versa
  › And “web” rights may not imply iPhone app rights
Copyright Basics

• Be sure your freelance contracts get you broad rights to publish electronically
  › Television vs. cable
  › Web vs. cellphone deck

• Be sure rights aren’t geographically limited
Fair Use

- Fair use doctrine balances societal interest in unfettered speech vs. societal interest in protecting creators to encourage creation

  › 4 Factors:
    » Purpose and character of the use
    » Nature of the work in question
    » Amount and substantiality used
    » Effect on the market for the original work

  › No hard and fast rules
Copyright Misconceptions

• “If a work doesn’t bear a copyright notice, it’s in the public domain.”
  » Don’t assume a work is in the public domain
  » Include your own notice
    • © [Date] Copyright Owner

• “If it’s not plagiarism, it’s not copyright infringement.”
• Offline businesses have long gathered information on their customers
  › Credit card companies
  › Supermarket/drug store discount cards
  › Promotional contests
• Efficiency of the Internet has bred discomfort, which is increasingly breading regulation
• Privacy is relatively modern construct
Privacy Policy Requirements

• If you collect personally identifying information on residents of California through a commercial website, you must have a privacy policy that complies with the California Online Privacy Protection Act

• Doesn’t matter whether you’re in CA
• Good news: it’s not burdensome
CA Privacy Policy Requirements

• Categories of information collected
• 3rd parties it’s shared with
• Notification of changes
• User review mechanism (if you have one)
• Effective date
• Adhere to stated policy
Privacy Policies

• A contract that binds you and favors your users

• Live within your stated policy
Privacy Policies

• Privacy Policy Is Binding

› FTC: failure to comply with articulated privacy policy = deceptive trade practice

› California law requires adherence

› Breach of contract

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Privacy Policies

• Typical Disclosures

› What’s collected
› How it’s collected
› How it’s used
› Whether it’s shared, and with whom
› Whether others collect information on site
› How information is secured

› Answers may not be obvious
Privacy Policies

• Drafting Tips

› Maintain flexibility
› Don’t over-promise
› Speak plain English
› Specify scope of policy
› Revisit your privacy policy regularly
Data Collection & Privacy

- Boucher bill – Discussion draft - 5/4/10
  - Would require any entity that collects personally identifiable information to:
    - Display a clearly written privacy policy describing collection, use & disclosure
    - Offer opt-out consent for 1st-party collection
    - Offer opt-in consent for sharing with 3rd parties (such as ad networks)
    - Offer opt-in consent for collection of sensitive information
Data Collection & Privacy

• Boucher Bill:

• Would apply offline as well as online
• Would preempt state law
• Would not create a private right of action
Other Privacy Issues

- COPPA prohibits knowing collection of personally identifying information from those under 13
  - Unless you have prior, verifiable parental consent
  - Compliance is burdensome
- Security breach notification laws in 30+ states require notice to customers if their PII is compromised
• From the perspective of a U.S. media lawyer, all other media lawyers are practicing without a net
  › No one else has Times v. Sullivan
  › No one else has Section 230 and the DCMA Safe Harbor
• If you publish anywhere, for all practical purposes, you publish everywhere
• But you can’t look to Singapore law every time you make an editorial decision
• Some comfort in cases declining to enforce foreign judgments obtained under laws inconsistent with “fundamental” U.S. laws
• HR 2745: Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act")
  › But you should look to the law of countries where your assets are located
  › And be sure you have libel insurance
Additional Resources

- Government Information
  - Copyright: www.copyright.gov
  - Privacy, advertising: www.FTC.gov
- Reporters Committee for Freedom of the Press
  - http://www.rcfp.org/
- Berkman Center for Internet & Society (Harvard)