

Take Them Down

Don't Let Copyright Infringers Keep Using Your Creation on Their Website.

Everyone who puts creative work on a website lives in fear that someone else will take it and use it. Or should live in fear, because it is so common. Some people think photos, text, stories, poems, drawings and so forth put on a website are free for the using on another site. Some are just scofflaws and don't give a rusty nail. If you create that type of material and put it on a site—assuming you did not create it for hire—it is protected by copyright.

It is possible you will end up having to sue if what is in this article does not work, and you cannot sue if you don't register your creative with the Copyright Office. It is not expensive to register, and you do not need a lawyer, but it takes the office 10 months or more to complete the process. So if you think it is worth protecting, file to register it when you make it.

Now, back to what to do when someone rips it off onto his or her site. Just before the turn of the millennium, Congress added a useful procedure. It is called the Digital Millennium Copyright Act, Title 17, section 512, US Code (“DMCA”). If done carefully, and it is tricky, this procedure can get the offending site taken off the Web.

First, you want to start modestly, by giving written notice to the owner of the site that it is your stuff, it is copyright, and they need to take it done by a date certain or you will exercise your legal rights. Congress did not require this, but it might be enough to get the job done. People don't like to get caught robbing the cookie jar.

OK, let's say it does not. You are now going to use the DMCA. First, find out who is the online storage provider (OSP) or host for the infringing material. (You may need to contact a Web expert for help on this.) Next, write a statement under oath—an affidavit—that says:

1. In good faith, the complaining party believes there is material that either the complaining party has a copyright in or the complaining party is acting for someone with a copyright.
2. Identity or description of the copyright material.
3. Identity or description of the material stored and transmitted by the OSP that allegedly infringes.
4. How to reach the complaining party by phone, letter, or email.
5. The web address (URL) for the infringing material.

This must be signed by the complaining party—normally the copyright owner or their attorney. Don't add in anything else, especially not a rant against the rip-off artist or the OSP. Finally, look at the OSP's website for their abuse or use policy or for “legal.” You will most likely find the name and contact details for their agent for receiving this kind of affidavit, called a notice or complaint of copyright infringement. Send the notice to this agent, making sure you can prove you sent it.

The OSP is then supposed to notify their customer, the owner of the offending website, that they either have already taken down the page or they will within a very short time unless their customer sends a “counter-notice.” That is a statement, also under oath, that the page should not have been taken down and factually why. If their customer does send a counter-notice then a clock starts ticking. The OSP notifies the complaining party of the counter-notice and that party has 14 business days then to file a federal court suit against the alleged infringer. During the 14 days, the takedown *remains in effect*.

Some infringers will be scared enough by the notice from their host or OSP that they will just rebuild their page without the infringing or stolen material. That is great. Some will lead you on a wild goose chase through several OSPs.

An OSP need not take the material down, or in any way comply, but then they lose the defense of being innocent to being part of the copyright infringement. And often they are in a much better position to pay a damages award than the actual infringer, i.e. more vulnerable.

War story: an infringer used code written by this writer's client to run an entire website, after which the writer chased an infringer across four OSPs. The first OSP gave 24 hours notice, and then took down the website. The infringer went to another OSP, who refused to take the site down. (Their risk to the second OSP is they will be found complicit and liable.) So the writer found an intermediate host being used, and gave notice to the intermediate, which made it clear they wanted no part of this fight. They stopped intermediate hosting. Next thing that happened was infringer moved the entire site to another country that does not respect American copyrights (even though it is a party to the **World Intellectual Property Organization** or **WIPO**) treaty on copyright like the U.S. The writer's client is now waiting for the Copyright Office to issue the registration, retroactive to the filing date, so he can file suit for a court take down order and substantial money damages.

The take down provisions of the DMCA are not foolproof but can be quite effective and at low cost.

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