

COPYRIGHT LAW BASICS FOR PHOTOGRAPHY-UNITED STATES PERSPECTIVE

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1. Copyright (and usage rights)

The basis for copyright protection in the United States is the Copyright Act -Title 17 of the United States Code. Section 102 of the Act protects “original works of authorship” that are “fixed in a tangible medium.” Photographs and other forms of visual images are protected under Section 102(5) of the Act, which refers to “pictorial, graphic, and sculptural works.” A copyright holder in a photograph is afforded a package of exclusive rights under Section 106 including reproduction rights, adaptation (derivative) rights, distribution rights and public performance and display rights.

Yet in order to enjoy these rights, the would-be copyright holder has to first satisfy the “original work of authorship” and “fixed in a tangible medium” requirements. Fixation merely requires the author to create something permanent and dispensable. The originality requirement only calls for independent creation and a *minimal* degree of originality. When the invention of photography was still young, there was question that mechanical reproduction of an object could be original but that speculation was put to rest in 1884 when the Supreme Court, in a case involving a portrait of Oscar Wilde in *Burrow-Giles Lithographic v. Sarony* held that photographs fit within the scope of copyright as writings that could exhibit the requisite originality to be entitled to protection. Since then, it has been generally presumed that any photograph exhibits originality due to the author’s choices regarding composition. Despite that, originality is still raised on occasion. One lower court has held that photographs of public domain art were not sufficiently original to be covered, but another court found that photographs of ornate frames met the requirement of minimal originality.

Copyright Notice

Since the United States joined the Berne Convention, effective March 1, 1989, no formal notice requirement or © is mandatory for works to be protected under U.S. law. Prior to that date, published works could fall into the public domain for lack of notice. While failure to use a notice no longer places the work in the public domain, it is still advisable to use a copyright notice with published works to inform users that your work is protected by copyright and to include copyright ownership in the metadata fields of digital photographs.

Duration of Copyright

Because copyright duration in the United States is complex, the following chart adapted from the Cornell Law school chart [<http://copyright.cornell.edu/resources/publicdomain.cfmis>] is useful to describe the term of protection for works under the different schemes.

Date of Work	Protected From	Term
Created on or after January 1, 1978	Original work fixed in a tangible medium of expression	Life of the author, plus 70 years. For works made for hire, anonymous & pseudonymous works, 95 years from publication, or 120 from creation, whichever is shorter.
Registered between January 1, 1964 and December 31, 1977	Publication with Notice	28 year original term, plus 67-year renewal term, which vests automatically without registering the renewal
Registered between January 1, 1950 and December 31, 1963	Publication with Notice, and works still in the first term had to be renewed in order to be protected for the second term	28-year original term, plus 67 years if properly renewed. Otherwise, no protection after the 28 th year (latest date December 31, 1991)
In the second (renewal) term between 1950 and 1978	Properly renewed for second term	Automatic extension for a total of 95 years (28 + 67)

Who is the Copyright Owner?

Since 1978, other than as an employee, the creator of a work owns the copyright, unless the creator transfers the rights to another in writing. If an employee creates a work within the scope of his or her employment, the employer is considered the owner of a “work made for hire.” In order for a work to be classified as a work made for hire, the creation must fall into nine enumerated categories under the Copyright Act (see Copyright Office Circular 9, available at <http://www.copyright.gov/circs/circ9.html> for detailed listing) In most instances, a free-lance photographer performing services on an assignment will not qualify as a work made for hire.

What is Protected and What is Not

Idea or Expression

In order to protect works in such a way that doesn’t preempt future works, copyright protects the expression of an idea, yet not the idea itself. Many photographers can independently take a photograph of the same subject, for example, a child at play, yet each has an original work, and none infringe upon the exclusive rights of the other. This idea/expression dichotomy may sound simple but like much of copyright, there are nuances and many shades of gray.

For example, if ideas can only be expressed in certain limited ways, the idea and the expression have merged and neither the idea nor the expression will enjoy copyright

protection. For example, a photographer who was known for photographing babies against a white background could not prevent other photographers from similarly creating photographs of babies against a white background. Many photographers can take photographs of waves crashing on a beach, or two business people shaking hands.

In general, the more creative a photograph, the more protection it is given from “knock-off copies.” In other words, the more original elements in a photograph that result from a photographer’s selection of poses, models and objects, the more ways the idea underlying the photograph could be expressed, and the more protection it may receive from subsequent purposeful copyright. The less choices a photographer makes, the less protection. That is why you might see many similar photographs of a popular tourist attraction, and each photographer can license their respective works without risk of infringement.

Limitations on Exclusive Rights

Fair Use

The exclusive rights of a copyright owner are limited by the doctrine of fair use under Section 107 of the Copyright Act. Fair use permits the use of copyrighted material without authorization to promote criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. This list is just an example and the doctrine is very flexible without hard and fast rules. Courts will analyze four factors to determine if the doctrine should apply on a case-by-case basis. The factors considered are: the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work (whether it is creative in nature or more factual); the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work. While not a factor in the statute, under the second factor, the nature of the use, courts will look at whether the second use replaces the first use or *adds* something new and is therefore *transformative*. If it is transformative, fair use is favored. Fair use is difficult to predict, as the definition of a derivative work, one of the exclusive rights, is the right to transform a work, such as creating a painting from a photograph. In cases where appropriation artists have used a photograph in collages, or have significantly altered the work, the court will find the use transformative and non-infringing but there are not bright lines.

Symbols, Words, Slogans

While copyright protects the broad subject matter of graphic works, it does not protect mere symbols. Nor does it cover short slogans such as “Have a Nice Day!” since the Act expressly excludes the protection of short words and phrases. However, some shapes and phrases have protection under trademark law.

Government Works

Works created for the United States government by its employees acting within the scope of their employment are not subject to copyright. This places government created work in the public domain, which is why anyone can obtain a government map or copy the circulars from the Copyright Office. WARNING: The subject matter of public domain works may still be subject to personality rights, trademark, or right of privacy e.g., soldiers in a Department of Defense photo.

Licensing

Copyright is separate and distinct from the object itself. A person can buy a photographic print, but will not own any of the exclusive rights under copyright unless those rights are acquired specifically. For example, the owner cannot permit reproductions of the print.

Copyright owners can permit many people to use the same work by creating different licenses with each user. The same image can be used simultaneously as a book cover, a billboard advertisement, and displayed on a website. If a licensee (user) wants to be the exclusive user of a photograph for a period of time, the agreement must be in writing. While non-exclusive license are not required to be in writing, using written agreements for all licensing transactions is recommended. It is important to be clear when specifying rights granted in a license as many disputes are the result of a misunderstanding as to the scope of use. Uses outside the scope of a license are considered an infringement of the owner's rights. Online terms of use or "click-through" agreements are considered writings and can sufficiently grant exclusive or non-exclusive rights in an image.

In licensing an image, it is also important to examine the subject of the image to determine if any works **within** the photograph may require other permission for certain uses, in particular stock image licensing, such as a copyrighted object, a recognizable person or products that may invoke trademark or trade dress rights.

More Information

The official website of the United States Copyright Office www.copyright.gov has the full Copyright Act, copyright basics, information circulars, forms and other helpful information, including information on how to register works.

2. Personality Rights

The Law of Privacy and Publicity for Photographers

There is no federal statute in the United States concerning rights of privacy or rights of publicity. The laws vary from state to state, with some states having express statutes, other states relying on common-law (cases) and some both. The terms rights of privacy and right of publicity tend to be confused, as the right of publicity arises out of a right of privacy. The right of privacy developed through legislation and court interpretation into four areas: intrusion, disclosure, false light and appropriation. The violation of right of privacy by appropriation is the area of most vulnerability to photographers and involves the unauthorized use of a person's photograph, name, likeness or voice for commercial purposes. This right of publicity applies to individuals, whether they are celebrities or not. In some states (such as New York) the right expires upon death of a person and in others (such as California), the right can be transferred to heirs upon death and last for a period of years, which is not uniform state to state. Typically the law of the domicile of the person that is the subject of the commercial use applies but some states attempt to apply their law if the injury occurs in their state. Even though the laws vary from state to state, all privacy law must permit uses that are protected by the First Amendment of the U.S. Constitution—freedom of press and freedom of expression. These rights outweigh an individual right of privacy. Consequently, even if a photograph is licensed or sold for a fee, it will not be “commercial use” under privacy law if the end use is an editorial (newsworthy) or expressive use (such as a photograph displayed as a work of art). More on what uses constitutes editorial follows below.

When should a photographer obtain a release?

If you want to make images available for commercial licensing in the U.S. including all forms of stock licensing, you will need to obtain releases authorizing broad commercial use from living people and authorizations from estates for deceased as most companies engaged in on-line stock or microstock licensing require broad release to accompany accepted images. Photographs, even taken of family and friends, cannot be used for commercial purposes without proper release. Sample release are available through trade associations, stock libraries and there are now electronic release forms for i-phone and smart phone apps ready to sign by the model. The electronic releases currently accepted by Getty Images are identified at http://contributors.gettyimages.com/article_public.aspx?article_id=1834#13. Getty Images also provides releases for models and property in multiple languages at https://contribute.gettyimages.com/producer/documents/Model_Release_English_Dec_2008.pdf. Corbis also provides release in multiple languages at its resource page. <http://contributor.corbis.com/knowledgebase#Resources>. Most photo libraries will accept images from photographers that have used these forms of release.

Editorial

Images intended for editorial uses do not require releases. Editorial use of an image is the use of an image to illustrate something that is newsworthy, cultural or of public interest. Courts in the U.S. do not question whether the public should be interested in the subject, just that there is interest. This includes news, entertainment, sports, music and other events. The First Amendment permits the recording of public events without consent from the subject. What is public is quite broad. If a celebrity is in a public space, even grocery shopping or in a park with a child, a photographer can take a photograph and license it to the media. Some states try to restrict the conduct of the paparazzi if it endangers the safety of others, but any laws must be very narrowly crafted to avoid violating the First Amendment.

Generally, if there is some relationship between a newsworthy article and the photograph, the use of the photograph will be considered editorial, even if the article is not directly about the subject of the photograph. If the use is editorial, incidental advertising or use of the product containing the editorial image is not considered infringing, such as the sale of a magazine or newspaper with a news image on the cover.

Property Releases / Releases for Animals

Many photographers ask if a model release is legally required for photographs of buildings and animals. The answer is almost never. Model releases are required if using a photograph of a recognizable **person's** likeness for commercial purposes, such as advertising or trade. While the laws vary from state to state, the common element is that privacy and publicity law applies to a **person**, not any inanimate object, such as a building, corporation, bird, reptile or animal (no matter how cute). The exception would be if the animal (dog or race horse, etc.) was a recognized character, such as a movie or TV character or the building represented the company's trademark. Then there might be a trademark claim, based on the argument that the commercial use by an unlicensed entity might cause confusion as to sponsorship or interfere with an already licensed user. A person's common pet would not be a trademark. Some photographers will obtain property release regardless, as advertising agencies and others are comfortable if images have releases and may not realize that there is no legal basis to require one. It simply avoids receiving a letter from someone who thinks that you are exploiting a photograph depicting their home or dog.

2. Design, Trademark and similar rights

One of the purposes of photography is to depict ordinary objects and people at work and play engaging in typical activities involving people using products of others. Occasionally a manufacturer will object to the use of a photograph for stock purposes of an object it manufactures asserting violations of "trademark," "trade dress infringement" or vague reference to "intellectual property rights." In most cases, the use of a photograph of an object will not violate any state or federal law if the product is part of the "image story" and not a

pure “product shot” without any other elements. Some stock agencies and trade associations contain lists of those entities that allege trademarks in objects, buildings and other products, merely to avoid customer aggregation. An item being on the list does not necessarily mean that the trademark rights are valid.

A photographic depiction of an object rarely infringes a trademark associated with the object, even if the design is registered. Trademarks are difficult to discuss with black and white rules as the nature of a trademark is not in the protection of the design or the art, but in the use of the object as the identifier of the source of goods. Even if goods depicted in a photograph are recognized by the manufacturer, recognition alone is not sufficient for trademark violation. The use of the photograph has to be in a way that causes confusion as to the source of the goods, or implies endorsement or association. Consequently, a stock photograph as it is displayed online among many thousands of images can never violate a trademark. It is only if a client uses the photograph in a trademark manner that the use of the photograph could potentially give rise to a trademark claim. Most end-user licenses restrict the use of an image as a trademark.

Trademark law encompasses both state and federal laws involving trademark registration, protection for unregistered marks under the federal Lanham Act, state and federal unfair competition claims and an anti-dilution trademark laws. In sum, it is difficult to summarize trademark law other than to identify and define the basic issues.

A trademark is defined as a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others. A service mark is the same as a trademark, except that it identifies and distinguishes the source of a service rather than a product. Trademarks deal with a mark, not the design of an object. For example, the SWOOSH design on a Nike baseball cap is the trademark, while the baseball cap is just the good. The SWOOSH mark indicates that the cap is licensed by Nike and is subject to Nike's manufacturing standards.

The very nature of a photograph, as a depiction of an object or activity, rather than as a design to indicate a source of goods tends to negate trademark use. It is a misuse of terms and a misunderstanding of trademark law for an owner of a mark to recognize its product as part of the composition of the photograph and assert a trademark violation.

Because it is impossible to anticipate the intended use of stock photographs for commercial use, logos and other unique features or buttons on an object should be removed from the photographs. In addition, with readily identifiable manufactured objects such as electronics, the photographs should not be shot head on but on an angle. This will avoid a claim where an actual competitor of the object depicted uses the photograph.

Trade Dress

Trade dress originally referred to the packaging of a product but the definition of trade dress has expanded over the years to encompass the shape and design of a product itself. Like trademark law, the product design must be used to denote the source of the goods. If a product feature is decorative and aesthetic with no source identifying role, it cannot be given exclusive rights under trade dress. Like a trademark, it is a symbol or device that carries a meaning. Trade dress can be registered as a mark or protected as unregistered trade dress under the federal Lanham Act. Examples of registered trade dress that function as a trade mark is the red LEVI tab affixed to the vertical seam of the back pocket of jeans, the shape of LIFESAVERS candy and its hole, and the three stripes on ADIDAS athletic shoes, the FERRARI DAYTONA SPYDER classic sports car, Black & Decker Snake Light flashlight, and the Rubik's cube puzzle.

For a product design to be granted protection as unregistered trade dress, the design must be "distinctive." The cases describe distinctiveness is either "inherently distinctive" where the mark is so arbitrary, fanciful or suggestive that it considered distinctive (in trademark law, Camel cigarettes are considered a distinctive mark because there is no natural association between a camel and cigarette).

Marks that are not inherently distinctive can acquire distinctiveness if they obtain "secondary meaning," another term of art used in trademark law. Simply put, secondary meaning is where, in the mind of the consumer, the primary significance of the mark is to identify the source of the product rather than the product itself.

Mere association with a particular product is not enough to acquire secondary meaning. Customers must care that a product comes from a particular company. Just recognizing the product and knowing who manufactured it is not sufficient to acquire secondary meaning and trade dress protection.

Copyright Enforcement: What to do when somebody uses your images without permission?

Whether To Bring A Copyright Claim

Copyright is a federal statute so all claims must be brought in the appropriate federal jurisdiction, usually where the defendant is located or where the infringing harm occurred. The federal rules of court must be followed, which can be complicated. It is expensive to file a claim, and the services of an attorney can add up. Bringing a federal action is usually reserved for when damages are substantial enough to warrant the expense, or you may be able to seek attorneys' fees. The Copyright Office is reviewing the need for an alternative system for claims of smaller value that would permit copyright owners to enforce copyright without all the formalities and expense of a conventional federal litigation. Any change would likely require a change in legislation and the legislative process in the U.S. is slow. To date, the only option is to bring a federal claim. As a result, many copyright owners, or their representatives, first attempt to resolve a claim without going to court, by sending a letter and trying to negotiate a retroactive license fee. If the infringing use is on a U.S. website, the process of sending a DMCA letter to the host ISP can be used to have the unauthorized photograph removed as explained in the DMCA section below. Because infringements can be worldwide, but laws are limited by nation, copyright claims in the U.S. can only be brought against defendants that have a presence in the U.S. If the defendant is located in another country, and that country has a treaty with the author's country, the author can bring a claim in the infringer's county. Unfortunately, many Internet pirates seek haven in countries with weak copyright laws and maintain servers in those countries, where there is less risk of being shut down.

If you choose to file a claim in court, the Copyright Act offers various remedies under Chapter 5 of the Act. Non-monetary damages include an injunction, a court order that stops the use completely or the destruction of the infringing materials. Monetary damages are profits of the infringer or your actual damages. The copyright owner, under certain circumstances, may elect statutory damages that permit a court to award damages from \$750 up to \$30,000, per work and increase the amount of damages up to \$150,000 if willful infringement is found. The prevailing party may seek attorney's fees and costs at the discretion of the court, but these fees are not mandatory. The Copyright Act provides for personal liability, even for corporate employees, in circumstances where the individual was instrumental in the infringement. In addition to civil action, there can be a criminal copyright action brought against infringers by the federal government in certain instances.

The Importance of Copyright Registration Under U.S. Law

A. Registration required to commence infringement action

Registration is not required for copyright protection, but is a prerequisite before United States authors can bring an action for infringement in federal court. While foreign authors may bring an action in federal court without securing a registration certificate, registration of the work before an infringement occurs will affect the type of damages available to the author. Authors can register works electronically by completing the applications and depositing copies of the work by following instructions for e-filing on the Copyright Office website www.copyright.gov.

If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages or profits will be available to the copyright owner. When the infringement is a use of an unregistered photograph, the typical measurement of actual damages is a license fee or a multiple thereof.

Dissecting The Infringement Case

When bringing a civil infringement suit, the party who claims their work was infringed must establish two main points: ownership of a valid copyright in the work and copying *protected* elements in the work.

When the actual work itself is copied, proof of copying is obvious. Some infringement claims are based on works that look similar to the original but there are some differences. In such a case, proof of copying is required. The test for unauthorized copying is two-part test. The first part requires proof that the infringer had access to the copyrighted work. The second part requires substantial similarities as to the items that are considered subject to copyright protection.

The general rule is, absent proof of access, courts turn to the works and compare them for striking similarities. In instances where the similarities are so pronounced to preclude any possibility of independent creation, access will be presumed. In cases where the similarities are subtle, a stronger showing of access is required. The second requirement is that the copied image must be "substantially similar" to the original. In the event of a lawsuit, a court or jury will compare the two photographs to determine if the images are substantially similar and examine those elements that are within the photographer's control, such as lighting, posing, angle, background, perspective, shading, color, and viewpoint. If the alleged infringer has deviated from the original image to the extent that the copy contains enough originality that it is really not a copy at all, no infringement will exist. A simple photograph, such as one of an existing natural subject, will gain less protection than a complex photograph—one that is more

contrived. In other words, the two "simple" photographs must be nearly identical to be found infringing.

Unless copying or the lack of copying is so obvious that a court can make a determination by examination alone, copying is factual a question for a jury to determine. Since lawsuits can be quite expensive, most cases settle. Whether a use without permission qualifies as a fair use, as described earlier in the chapter, is a question that the parties may ask the court to decide early on as well. In addition, there is a statute of limitations that requires claims to be brought within three years. If the infringement is continuing, the statute of limitations may limit the amount of damages. Because different courts interpret when the statute that cuts off a right to bring a suit begins, anyone with a potential copyright claim should consult with a knowledgeable attorney.

The Digital Millennium Copyright Act

The Digital Millennium Copyright Act ("DMCA") was signed into law on October 28, 1998. It serves to implement two World Intellectual Property Organization ("WIPO") treaties as well as a number of copyright related issues. Part of the DMCA includes Section 1202 of the Copyright Act, which protects the integrity of copyright management information ("CMI"). An example of CMI would be copyright ownership information in the metadata that is included with a digital image. This section acknowledges that, although the Copyright Act currently prohibits unauthorized copying of work, technology has enabled copying to be done with ease and often in the privacy of one's home. Since policing of such copying is unrealistic, technological "self-help" is necessary to encourage digital commerce. This section recognizes the need for CMI to function as self-help and prohibits the tampering with CMI.

Section 1202 addresses both false CMI and the removal or alteration of CMI. In order to be liable, the falsification or removal of the CMI must be done with knowledge (for criminal penalties) or with reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement. CMI is defined as identifying material about the work, the author, the copyright owner, and, in certain cases, the writer, director or performer of the work, the terms and conditions for use of the work, and such other information the Register of Copyrights may prescribe by regulation. Law enforcement, intelligence and governmental activities are exempt from this section.

A person may bring a civil action in federal court against anyone who violates this section. The court can reduce or remit damages if the violator proves that it was not aware and had no reason to believe that the acts constituted a violation. Non-profit libraries, archives, and educational institutions are entitled to a complete remission of damages in these circumstances. Criminal penalties apply to willful violation for purposes of commercial advantage or private financial gain. Penalties can range up to a \$500,000 fine or up to 5 years imprisonment for a first offence, and up to \$1,000,000 fine or 10 years imprisonment for a subsequent offence.

Notice and Take Downs

The DMCA is also a powerful tool to curb copyright infringement on the Internet. Internet service providers ("ISP") lobbied hard for a limitation of liability from copyright infringement actions, arguing that it was impossible to monitor the web. A service provider is defined as "an entity offering the transmission, 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." A "service provider" under the law is anyone who provides online service or network access, operates a facility that provides network access, or transmits, routes or provides connections for digital online communications between or among specified users, of unmodified materials of the users choosing.

A compromise was struck that gave an ISP a safe harbor from liability if they followed certain procedures and guidelines under Section 512 of the Copyright Act and the ISP falls within one of these four enumerated categories.

- 1) the provider merely acts as a data conduit, transmitting digital information from one point on a network to another at someone else's request (Section 512(a));
- 2) the provider regularly retains copies, for a limited time, of material that has been made available online by a person other than the provider, and then subsequently transmits them to a subscriber at his or her direction (Section 512(b));
- 3) the provider has infringing materials on websites hosted on their systems (Section 512(c)); or
- 4) the provider refers or links users to a site that contains infringing material (Section 512(d)).

However, an ISP must fulfill conditions for immunity. First, the provider must not have actual or circumstantial evidence of the infringing activity. Second, the provider must not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity. Upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material. In addition, upon notification of claimed infringement, the provider must respond expeditiously to remove, or disable access to the infringing material. If the provider does not violate any of these conditions and has in addition filed with the Copyright Office a designation of an agent to receive notifications of claimed infringement, then no monetary damages or injunctive relief may be ordered against the ISP.

It is important, however, for the copyright owner to provide proper notification of the infringement. Notice must be in written form, including a physical or electronic signature of a person authorized to act on behalf of the owner of the exclusive right that has been allegedly infringed, provided to the designated ISP agent, and must include a specified amount of information, including identifications of the copyrighted work and the infringing work, contact

information for the complaining party (address, telephone number, e-mail address), and the location of the infringing work. The complaining party must include a statement that it has a good faith belief that the use of the material is not authorized by the copyright owner, its agent, or the law. Whether the use may be fair use should be considered as well. A second statement is also required that information provided in the notification is accurate and, under penalty of law, that the complaining party is authorized to act on behalf of the owner of the exclusive right that is allegedly infringed.

To prevent fraudulent notification, the subscriber may file a counter-notification. The counter notice must contain a physical or electronic signature of the subscriber. It must also include identification of the material that has been removed, or access denied and the location of where the information appeared before it was removed or disabled as well as the standard statement under the penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of a mistake or a misidentification of the material to be removed. Finally, the counter notice should state the subscriber's name, address and telephone number and a statement that the subscriber consents to jurisdiction of the Federal District Court for the judicial district in which the address is located, or if the subscriber is outside the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person or its agent who provided the initial notification. If the counter-notification states that the infringing work was removed because of mistake or misidentification, the provider can put up the work again within 10 to 14 business days, unless you, as the copyright owner, file an action seeking a court order against the subscriber. The procedures for notice and counter notice are available on many websites, and some ISPs, including Google have specific forms users can complete.

The DMCA is meant to protect service providers that merely post websites without any knowledge or control of the contents. It also provides an efficient way for an owner of copyrighted work to have the work removed without any legal action, if no counter-notice is sent. Counter notices are rare, particularly if the work was posted without permission. Many complain that the burden for copyright owners to monitor sites under the DMCA is unreasonable as sites are not required to monitor for infringing works, and popular entertainment works are often reposted even after removal. Whether sites qualify for the DMCA safe harbor is still the subject of litigation in the U.S.

[Disclaimer: Copyright law in the US is complex, a mixture of federal statute and case law interpretation. One chapter cannot summarize all the issues and this chapter should not substitute for seeking competent legal advice. Many questions regarding the federal statute can be answered on the copyright office website, at www.copyright.gov.]