

There's Something New You Need to Know About Copyright Safe Harbor

by Steve Gillen and Sean Owens

If you operate a website where you allow either contributors or site visitors to post content or comments, there is something you need to know: As the website operator, you may be liable for any third-party claims that are triggered by what your contributors/users post or say—whether or not you were aware of what they were doing, and whether or not you have a contract with them or a posted policy prohibiting what it was they did.

The Allvoices Experience

Take Allvoices, for example. Allvoices operated what it called a “citizen journalism” website, where it invited a community of writers to contribute newsworthy content in return for cash. Allowing user posting and comments can be an effective way to foster engagement and traffic to a website, but it also creates exposure for claims resulting from what your users post or say on your site. Mindful of this exposure and of the powerful remedies available to copyright owners for infringement of their works, Allvoices included in its posted policy an express prohibition on the unauthorized posting by its writer-contributors of copyrighted third-party material.

Alas, one of its writers did just that (posting about 20 photos taken by a professional photographer at several concerts). Upon receiving a takedown demand from the photographer's lawyer, Allvoices removed the offending material. Other than that, it did not respond to the photographer's demand. So far, so good.

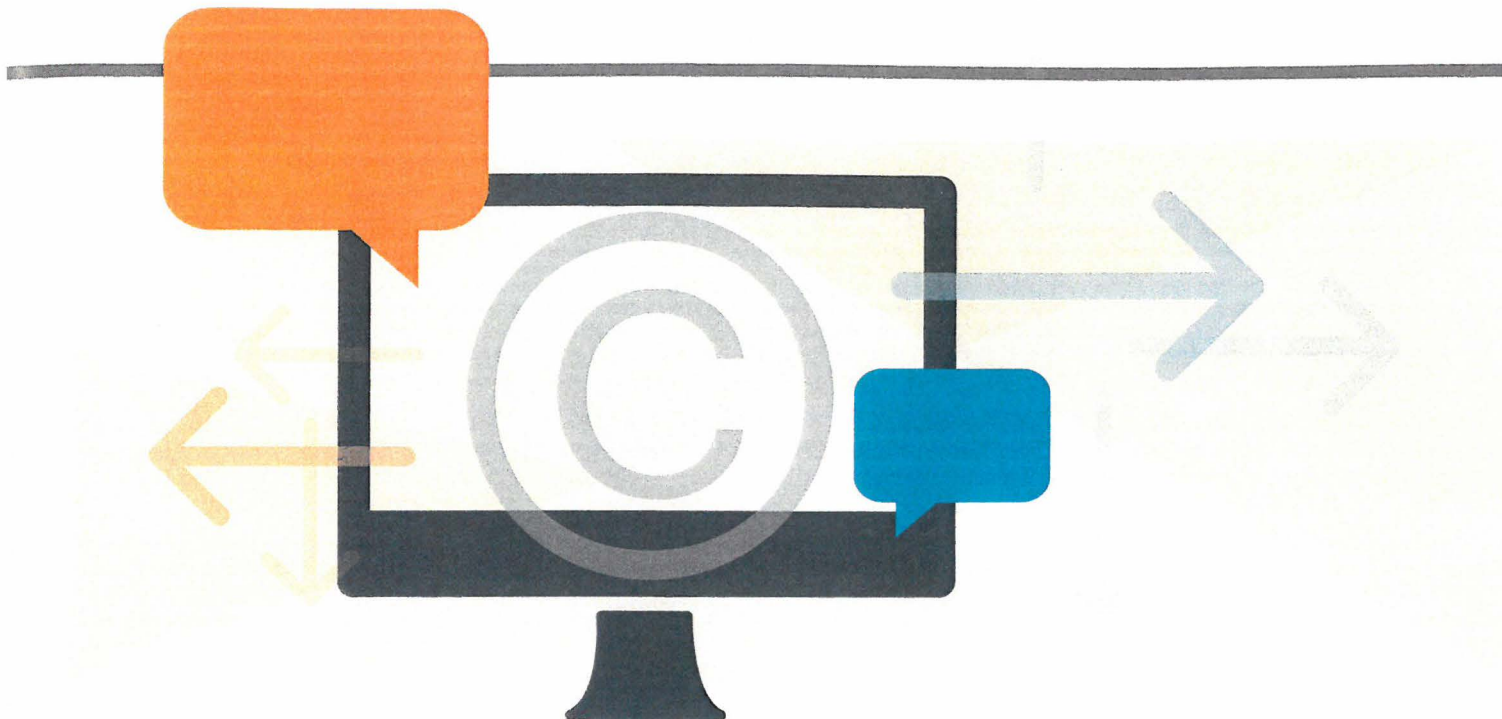
Unfortunately, the story did not end there. About two and a half years after Allvoices received the takedown demand (just under the three-year statute of limitations), it was sued by the photographer for copyright infringement. In response, Allvoices confidently asserted that it was entitled to the safe harbor provided to internet service providers by the Digital Millennium Copyright Act (DMCA). It had, after all, responded to the takedown demand by removing the accused material.

Safe Harbor Under the DMCA

Under the DMCA, operators of websites that allow user-generated content to be posted are insulated from liability for copyright infringement under certain conditions, including:

- You must publish on your site your policy for addressing repeated infringing activity, and that you terminate users who are repeat infringers.
- You must properly comply with a notice of claimed infringement when received, including prompt removal of the accused material.
- You must notify the user that the material has been removed.
- You must notify the copyright holder if proper counter-notice is provided by the user.
- You must restore the removed material if proper counter-notice is provided, and the copyright holder does not file suit within 10 days.

If you own or operate a website that allows users to post content online, then you are exposed for copyright infringement claims that result from unauthorized posting by your contributors.



- You must register your takedown agent with the Copyright Office.

Considering the significant potential liability that can arise due to actions by users of your websites, the DMCA provides extremely valuable and cost-effective protection to anyone operating interactive websites.

Lesson Learned

But, getting back to Allvoices, the photographer argued that Allvoices was not entitled to the safe harbor provisions of the DMCA because it had not registered its takedown agent with the Copyright Office in a timely manner. The United States District Court for the Northern District of California agreed, pointing out that the provisions of the DMCA plainly specify that a registered agent is a predicate, express condition to safe harbor.

The lesson here is a simple one: If you own or operate a website that allows users to post content online (text, images, video, etc.), then you are exposed for copyright infringement claims that result from unauthorized posting by your contributors. Although you can nonetheless take advantage of a safe harbor from those claims provided by the DMCA, you must comply with certain requirements in order to take advantage of that safe harbor.

A New Twist

With respect to the requirement that you register your takedown agent with the Copyright Office, a recent rule change means action is necessary to protect you from

potential liability for copyright infringement. On Dec. 1, 2016, the Copyright Office implemented a new electronic agent registration system. Even if your company has registered an agent in the past, you must now re-register that agent through the new electronic system. To avoid a lapse in protection, this new agent registration must occur no later than Dec. 31, 2017. Filing fees have been significantly reduced to \$6 per agent, regardless of how many domain names must be registered for a single company. Under the new system, registrations must be renewed every three years or they will lapse.

If your company has never implemented this protection under the DMCA, now is as good a time as any to register a takedown agent, to set up a system for docketing renewals, and to review your implementation of the DMCA Takedown Procedure to ensure that it satisfies all of the requirements of the law so that the safe harbor is there when and if you need it. ●



Steve Gillen is a lawyer and partner in the intellectual property firm of Wood Herron & Evans, and has focused his practice on publishing and media matters for 35 years. He can be reached at sgillen@whe-law.com.



Sean Owens is an attorney at Wood Herron & Evans, where his practice includes all aspects of trademarks, copyrights, and related fields involving media, advertising, privacy, licensing, and the internet. He can be reached at sowens@whe-law.com.