

# Law of the Level

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## In-Game Monitoring May Create Exposure to Copyright Liability Claims

In a traditional online game, users are required to abide by the Terms of Use ("TOU"). Companies, cognizant of the fact that not everyone will comply with the TOU, implement various enforcement measures such as automated filters, user-driven complaint systems, or a more involved in-game monitoring system utilizing Game Masters. As the popularity of user-generated content ("UGC") and user-customization has increased, ensuring TOU compliance has become increasingly costly and labor-intensive. Additionally, by granting users the ability to import copyrighted materials such as facial depictions, art, literary works, or music, the inclusion of UGC in online games potentially raises Digital Millennium Copyright Act ("DMCA") compliance issues.

The DMCA typically provides online game providers with a limited immunity against monetary damages for contributory copyright infringement. Instead of paying the copyright owner statutory damages for the value of the owner's actual loss, a company that remains DMCA-compliant is only required to provide injunctive or equitable relief (for example, removing infringing material or disabling a repeat infringer's access to its system). However, if a company is found to have observed but failed to act upon copyright infringements or "clear red flags of copyright infringement," it may lose DMCA protection.

### *What is Red Flag Knowledge?*

Red flag knowledge is a term used by courts to describe "an awareness of facts or circumstances from which infringing activity is apparent." This is a two-part test with both subjective and objective elements. Courts will look at the subjective awareness of the service provider—what specific facts came to its attention—and then determine whether, based on those facts, copyright infringement would have been apparent to an objectively reasonable person. This evidentiary threshold is a high one. To prove a company had red flag knowledge, the copyright owner must present evidence showing that the company proceeded in the face of blatant evidence or turned a blind eye to obvious red flags of copyright infringement.

Although companies are not required to actively police for copyright infringements, courts have held that a business which "buries its head in the sand" to avoid discovering red flags is liable for infringing uses of its system. Thus, while companies may be able to tailor their activities to minimize unintentional exposure to red flags, active avoidance could potentially qualify as willful blindness and violate the DMCA's safe harbor requirements.

## ***In-Game Monitoring and User Generated Content***

In-game monitoring systems are a potential source of red flag knowledge. Such mechanisms are typically designed to enforce TOU's using a number of different tactics. Common forms include filtering, in-game monitoring, and complaint-response systems.

### Filtering:

Filtering is a process commonly utilized by streaming media companies like MySpace.com and YouTube.com to ensure that prohibited materials are identified during their upload stage.

Gaming companies may elect to implement a variety of different filters (spam, profanity, etc.) and, typically, courts do not require that a particular filtering process be 100% fail-proof or that TOU-specific filters also identify copyright infringements. However, to the extent that such a filter picks up and identifies copyrighted materials—either through digital fingerprinting, employee identification, or other means—such identification may qualify as a red flag if the company's filtering and monitoring process is not properly structured. As a result, monitoring via filtration could potentially obligate a company to take down or disable access to the infringing items. Furthermore, a filter-based TOU system may frustrate users by denying them immediate access to their UGC. Thus, gaming companies might not find such systems to be a worthwhile investment.

### In-Game Monitoring:

Game Masters pose an interesting balancing issue. Unlike automated filters, the presence of in-game monitors creates a much higher possibility that a court will impute knowledge to the company because employees are physically present in the in-game environment and able to perceive any UGC included therein. The more time employees spend exploring a virtual world, the more opportunities they have to encounter instances of infringement. Even if most infringements are handled expeditiously, increased exploration of a virtual world multiplies the opportunities for Game Masters to stumble upon a red flag and fail to address it properly.

On the other hand, despite its dangers, in-game monitoring is one of the best means of ensuring TOU compliance. By actively patrolling the virtual world, Game Masters are able to immediately counteract TOU violations and their mere presence may have a deterrent effect on users who might otherwise engage in spamming, profanity, etc. Consequently, companies may wish to establish a comprehensive, written monitoring policy rather than eliminating in-game monitors altogether.

### Complaint-Response Systems for TOU:

With a TOU complaint-response system, there is a reduced risk of red flag knowledge. Much of the gray area which arises from the presence of Game Masters is eliminated since the company is not patrolling its virtual world or overseeing UGC uploads and, instead, merely addresses TOU complaints specifically enumerated by users. Yet, despite its potential benefits, a response-based system can be problematic.

Complaint-response monitoring requires user participation, which can result in a deluge of TOU and copyright reports—or the complete lack thereof. Thus, labor costs are difficult to project and playability may suffer. If there is a surge of TOU reports, the company may be unable to address all of them without taking on new employees. Failure to report any TOU violations could harm playability and alienate some users (especially children).

*Summary:*

Ultimately, while the optimal method of TOU-monitoring will depend on the specifics of a company, designing a TOU monitoring practice with an eye to potential DMCA issues is an important means of protecting against liability for copyright infringement. With increased flexibility in content creation and UGC comes increased risk of copyright infringement. Game designers must carefully consider the balance between gameplay and self-protection.

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