



# IP Watch™

Intellectual Property Law Alerts from Ober|Kaler's IP Group

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## Copyright Concerns

*This IP Watch examines two issues that arise with copyright-protected materials: one dealing with unauthorized use and reproduction of content that you've created, and the second with the proper way to include others' work in your own. Copyright protection can be a complex issue, partly because it extends to many different types of work, and partly because it is overlaid with a regulatory scheme that is not always intuitive. We routinely help our clients to navigate all of these concerns so that they can focus on creating a great final product. As always, please feel free to contact us if you have any questions or feedback regarding this issue. — Jed Spencer*

## Protecting Your Online Turf

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You have just created a website for your company containing photographs, fancy graphics, articles you have written, and a detailed description of what makes your company special (all, original works of authorship) You upload your new content to your company's site, looking forward to the new business that your updated site is certain to attract. The next day, your friend calls to tell you that she's seen some of your website content on a competitor's website, with the names changed to look like your content belongs to your competitor. What can you do?

When online content comprises "original works of authorship fixed in any tangible medium of expression," it is subject to copyright protection under the federal Copyright Act. The Copyright Act covers a host of Internet content: text, music files, video clips, photographs, graphics, and even software. Copyright protection gives owners of works the exclusive right to reproduce, distribute, adapt, and publicly perform and display the works, subject to certain exceptions such as fair use. The ease with which information can be accessed and disseminated through the Internet has made infringement easier and more prevalent. Fortunately, the Digital Millennium Copyright Act of 1998 (DMCA) encourages online service providers, such as website hosts, to work with the owners of infringed works to quickly remove infringing material.

The DMCA affords online service providers with a "safe harbor" from liability for copyright infringement if certain requirements are met. The DMCA's expansive definition of a "service provider" covers operators or providers of online services or network access. For example, a service provider would include entities such as Internet service providers, email hosts, and chat room hosts. Web page hosting

<http://www.jdsupra.com/post/documentViewer.aspx?fid=6459d57e-dfe2-4a0d-bae7-0d6e76509a74>  
services, such as the host of your competitor's infringing site in our hypothetical, are also included as service providers.

To qualify for the safe harbor, a service provider must satisfy four conditions. First, the service provider cannot have knowledge that it is carrying infringing material or of facts that make the infringement apparent. Second, the service provider cannot receive a direct financial benefit from the infringing activity if it has a right to control the user. Third, upon receiving proper notice from a copyright holder, the service provider must act expeditiously to remove or disable access to material that is claimed to be infringing. Finally, the service provider must properly designate an agent to receive notices of alleged infringement.

The third condition comprises the DMCA "notice and take-down" procedure that the owner of infringed works can use to remove infringing material. The service provider's designated copyright agent must be sent written notice of the infringement, signed by a party authorized to act on behalf of the owner, that identifies the infringed and infringing works, confirms that the identified use of the infringed works is not authorized, provides the contact information of the signatory, and verifies both that the information contained within the notice is accurate and that the signatory has the authority to act on behalf of the owner. Failure to satisfy any of these requirements may result in a defective notice that does not trigger the service provider's obligation to remove or disable access to the infringing material. On the other hand, a proper DMCA notice will usually result in quick action by the service provider because failure to do so will remove the service provider from the DMCA's safe harbor, exposing it to liability for copyright infringement.