

STOPPING INTERNET COPYRIGHT INFRINGEMENT SHORT OF FILING SUIT

"Someone is using my photos and website design on the internet without permission. What can I do?" These questions arise more and more with the increased use of the internet in business. The technical answer is that you have a potential claim for copyright infringement. Filing a federal lawsuit under the Copyright Act, however, is not a realistic option for many businesses, particularly when monetary damages may not be at issue. The good news is that with the enactment of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C 512, victims of internet copyright infringement now have a more practical option for achieving the desired result - removing the infringing material from the internet - without filing a lawsuit.

The DMCA gives internet service providers ("ISPs") limited liability for copyright infringement in return for promptly removing copyright infringing material from the websites they host. The DMCA sets forth a notice and take down procedure that allows the copyright owner to directly notify the ISP that hosts the infringing party's website of the potential infringement.

Once the ISP receives a written notice containing 1) identification of the work claimed to have been infringed, 2) identification and location of the infringing material, 3) contact information for the copyright owner, and 4) statements that that claimant has a good faith belief that the use is unauthorized

and the notice is accurate and submitted by a person with authority to pursue the copyright owners rights, the DMCA requires that the ISP act expeditiously to remove or disable access to the infringing material in order to maintain its limited liability. *See* 17 U.S.C. 512(c).

However, as with any claim, a DMCA claim should be thoroughly investigated before a notice of infringement is issued. "Any person who knowingly materially represents [that material or activity is infringing] shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer . . . or by a service provider, who is injured by such misrepresentation. . . ." 17 U.S.C. 512(f).

The DMCA provides a more practical option for businesses to stop internet copyright infringement without having to incur the expense of filing suit. Moreover, results can oftentimes be achieved in a matter of weeks, as opposed to months or years.



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USING AND MODIFYING INDUSTRY FORM CONSTRUCTION CONTRACTS

A number of construction industry trade groups or associations, such as the American Institute of Architects (AIA) and the Design-Build Institute of America (DBIA), among others, have developed a variety of "standard form" construction contracts that have been used in the industry for many years, and are periodically updated. When engaging an architect or contractor, many owners are requested to sign these standard form agreements.

The beauty of these standard forms is that they are "tried and true," as they have been around for a number of years and have been the subject of extensive litigation interpreting their content. They are also very comprehensive and address the many contingencies that come up during the construction process.

But owners should avoid signing the standard form agreement without modifying the more heavy-handed, contractor-friendly provisions to make them fairer to the owner. For instance, the standard form agreements typically allow the contractor to recover delay damages and extend the contract time for completing the work, if the owner delays the contractor's work. Construction projects can require significant orchestration of effort, and the possibility of owner delay is common and sometimes cannot be controlled by the owners. Thus, we recommend modifying the standard form agreements to provide that an extension of time shall be the contractor's sole remedy for the owner's delay. There are a number of other provisions that allow the contractor to recovery damages for other types of delay, and likewise, we recommend a similar modification. This is just one example of a number of provisions that we recommend modifying when we represent the owner.

In addition to making the standard form agreements more owner-friendly, we also recommend modifying

them to reflect the owner protections afforded under the Louisiana Private Works Act. This Act allows subcontractors and suppliers to place a lien on the owner's property if the contractor fails to remit payment. It also allows the owner to protect itself against such liens by requiring the contractor to obtain a bond and file certain notices in the public records. The standard form agreements, without modification, do not require the contractor to comply with these requirements.

In sum, we highly recommend modifying the industry standard forms to protect the owner. The modifications are typically reflected in an addendum to the standard forms. Contractors are well-versed in these forms, are regularly asked modify them, and should be willing to do so in effort to make the agreement more balanced.



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