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The DMCA and Repeat Infringers

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The [recent agreement](#) between big media companies and big Internet service providers (ISPs) concerning online copyright infringement has the law and technology world abuzz. ISPs like Comcast, Verizon, and Time Warner Cable have agreed to implement a system under which subscribers who repeatedly and illegally download copyrighted content will have their Internet access impeded and maybe even terminated.

This is big news, and it will probably receive more attention in this IP Viewpoints series. But the purpose of this column is to put this agreement in context, because much of what the companies have agreed to do appears to be an extension of a system that Congress set up more than 10 years ago in the Digital Millennium Copyright Act (the DMCA).

When Internet use became a widespread phenomenon in the 1990s, it was unclear whether websites, message boards, e-mail services, ISPs, and similar services would be liable for the copyright infringement that sometimes occurred when their users sent or stored content online. The DMCA provided a partial answer to that question by creating several “safe harbors” that insulated online services from copyright liability (as discussed in previous IP Viewpoints columns by [Peter Menell](#), [Randy Picker](#), and [myself](#)). It made clear that the routine, automated workings of the Internet would not be bogged down in unresolved and troublesome copyright questions. The certainty that the DMCA provided paved the way for innovations like YouTube, Facebook, and the Google search engine.

Within the DMCA’s technical language, however, resides this provision:

“The limitations on liability ... shall apply to a service provider only if the service provider ... has adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers....”

In other words, in order to take advantage of the DMCA’s safe harbors, an online service must show, among other things, that it terminates the accounts of any user who repeatedly uses the service to infringe copyright. And it’s not enough to articulate such a policy; you have to implement it, really mean it (as Napster and Aimster discovered, to their detriment).

But what exactly is a “repeat infringer”? No one knows for sure, and courts have rarely had a chance to interpret the term. Technically anyone who infringes more than once can be considered “repeat,” and a few cases have accordingly made it clear that a service that terminates a user after a second or third offense satisfies this requirement.

The real question, however, is how much more permissive than that an online service’s policy can be without departing from the DMCA’s requirement. Can a service allow five instances of infringement before terminating? Ten? And what counts as an instance in the first place? If a user illegally downloads a dozen songs in one sitting, is that a single act of infringement, or 12?

The agreement between the media companies and the ISPs can be seen as an attempt to clarify some of these gray areas. It requires the ISPs to impose a series of escalating responses to instances of infringement – starting with sending warnings, then requesting acknowledgment

from the users, and finally slowing down or temporarily terminating the user's Internet access. The ISPs would exercise the latter option only after four or five instances of infringement, with grace periods in between and chances for the user to defend his or her behavior.

Although the parties explicitly state that "nothing in this Agreement alters, expands, or otherwise affects any Participating ISP's rights or obligations under the DMCA," a court asked to determine who counts as a "repeat infringer" and what constitutes "reasonabl[e] implement[ation]" of a policy would be hard pressed to ignore widespread industry practice. So if the agreement is implemented (and survives antitrust scrutiny), we may finally get an answer to some of the questions that have plagued the DMCA since its enactment in 1998. Is it a good answer? That's an issue I'll leave for a future column.

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