

THE DIGITAL MILLENNIUM COPYRIGHT ACT

On October 28, 1998, President Clinton signed into law a very important statute governing electronic commerce. This statute is known as the Digital Millennium Copyright Act of 1998. Although the 1998 Act contains five parts, the part that is probably most widely relevant is Part II, which regulates liability for online copyright infringement. Part II is known as the Online Copyright Infringement Liability Limitation Act (which I'll refer to as the OLA)

The Copyright Act of 1976 (along with prior versions) gives the author or owner of written work (i.e., tangible expressions of ideas) certain exclusive rights, including the right to reproduce and display the work. Anyone who reproduces or displays copyrighted work without the owner's prior permission (which is called *infringement*) may be liable to pay the owner damages. The scope of liability for online copyright violations was uncertain under the 1976 Act. Congress intended to reduce this uncertainty by enacting the 1998 Act and in particular, the OLA.

The OLA focuses on service providers. There are two kinds of *service providers*, those who simply offer network services (such as transmitting, routing, and connecting data sent on the Internet) and those who provide access to network services (such as a local Internet service provider, known as an ISP, and a world wide web site host). As discussed below, the OLA exempts service providers from liability for copyright infringement in several respects. The first exemption applies to network service providers, and the remaining exemptions apply to ISPs.

1. Network Services. A network service provider will not be liable for the unauthorized reproduction or display of copyrighted work that is transmitted by or briefly stored in the provider's system if the provider is merely a passive conduit. A provider will not be a passive conduit if the provider does any of the following: (1) initiates the transmission, (2) selects the work that is transmitted, (3) selects the recipients, (4) stores a copy of the transmitted work for longer than is necessary to complete the transmission, (5) keeps a copy of the work in a manner so that the work is accessible to persons other than the intended recipients, or (6) modifies the work.

2. Cache Storage Services. An ISP will not be liable for the unauthorized reproduction or display of copyrighted work that the ISP stores temporarily (called cache storage), but only if all of the following circumstances exist. (1) The work is automatically uploaded onto the ISP's server and the upload is not initiated by the ISP; (2) The ISP did not modify the uploaded work; (3) The ISP's server complies with several technical specifications; and (4) The ISP must remove the work from its server if someone claiming to be the

copyright owner notifies the ISP that the uploaded work infringes on the owner's copyright. However, after removing the work, the ISP must notify its subscriber, and the ISP must reload the work if the subscriber reasonably challenges the removal. For example, the subscriber might claim that it is the true owner or that it has permission or some other legal basis to reproduce and display the work.

3. Server Storage Services. An ISP (including a web site host) will not be liable for the unauthorized reproduction or display of copyrighted work that they store their servers, such as the content of your web site. However, the exemption will only apply if the ISP implements the following. (1) The ISP must publicly designate an agent to receive notice of claimed infringements by posting that information on its web site and by filing a written designation with the United States Copyright Office. (2) The ISP must adopt and communicate to its subscribers a policy whereby the ISP will terminate subscribers who repeatedly post infringing work on the ISP's server. (3) The ISP must not prevent access to its server by copyright owners seeking to identify or protect their copyrighted works.

Even if an ISP complies with the above requirements, the exemption will not apply under any of the following circumstances. (1) The ISP knows or should know that the work infringes on the owner's copyright or the ISP fails to promptly remove the work after having such knowledge or after receiving notice of the infringement from the owner; or (2) The ISP was able to control the infringing activity and benefitted financially from the infringement.

The Internet is our modern day version of the Wild West. Whether the Internet can be "civilized" remains to be seen.