

A woman with dark hair, wearing a blue blazer, is looking at a laptop screen. Her hands are clasped in front of her chin. The background is a light, blurred office setting.

Model Policy

# Digital Millennium Copyright Act

(Safe Harbor Provision)

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## Background Information

In 1998, the Digital Millennium Copyright Act (“DMCA”) was enacted to address certain copyright issues related to online content. Title II of the DMCA, titled the “Online Copyright Infringement Limited Liability Act”, provides online service providers (“OSP”) a “safe harbor,” or liability protection, from copyright infringement in certain circumstances. In relevant part, the DMCA defines an online service provider as “a provider of online services or network access, or the operator of facilities therefor.” Therefore, an OSP would include real estate brokerages and any individual brokers or agents who provide or host websites, including but not limited to, websites or online portals that allow consumers to search real estate listings and other real estate information over the internet, or who provide other online services.

Prior to the DMCA, an OSP could be held liable for material posted or stored on its website even if the material was posted by a third-party user. Given the nature of real estate brokerages’ and/or agents’ websites, it would be extremely difficult, even impossible, for a company or agent to screen every post or submission by every user for infringing material; therefore, it would be easy to inadvertently host copyrighted material. Now, as long as the OSP meets certain requirements, an OSP is protected from liability for copyright infringement, when users, not the online service provider, post or submit infringing content on the OSP’s network or system, like a website.

In order to ensure liability protection under the “safe harbor” provision, an OSP must meet the following requirements:

1. The OSP must not have actual or apparent knowledge that the material is infringing;
2. The OSP, if it has the right and ability to control the infringing activity, must not receive a financial benefit that can be directly attributed to the infringing activity; and
3. Upon receiving a notice of claimed infringement (a “takedown notice”), the OSP must act quickly to remove or disable access to it. A takedown notice is a written notification from a copyright holder to an OSP requesting that infringing content be removed from an OSP’s system or network.<sup>1</sup>

In addition to these requirements, an OSP must have designated an agent with the United States Copyright Office to receive takedown notices and paid the applicable fees. Contact information for the “Designated Agent” must also be available on the website, including the name, address, phone number, and email address of the agent. Information about the OSP, including the OSP’s full legal name and physical street address, as well as any alternate names<sup>2</sup>, must also be available on the website. Finally, the

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<sup>1</sup> To be an effective takedown notice, the notice must include the following: 1) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; 2) identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; 3) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit OSP to locate the material; 4) information reasonably sufficient to permit OSP to contact the complaining party, such as the party’s address, telephone number, and, if available, an electronic mail address at which the party may be contacted; 5) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and 6) a statement that the information in the notification is accurate, and under penalty of perjury, that complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

<sup>2</sup> Any name the public would be likely to use to search for the OSP’s designated agent in the Copyright Office’s online directory of designated agents, including all names under which the OSP is doing business, website names

OSP must adopt and reasonably implement, and inform users of a policy that provides for termination, in appropriate circumstances, of users who are repeat infringers; and the OSP must accommodate and not interfere with standard technical measures.

In addition to the liability protection already mentioned, OSPs can also limit their liability for removing material that ultimately may prove not to be infringing. The DMCA provides an additional safe harbor for an OSP if the OSP follows these additional steps:

1. Once the claimed infringing material is removed or access is disabled, the OSP must take reasonable steps to provide notice to the user who originally posted or submitted the content, letting him or her know that the content has been removed or disabled. This user may decide to send a counter notice.<sup>3</sup>
2. Upon receiving a counter notice, the OSP must provide the user who sent the original takedown notice with a copy of the counter notice, and inform that user that the OSP will replace the removed material or enable access to the material in ten (10) business days.
3. The OSP must then replace the removed material or enable access to the material not less than ten (10) nor more than fourteen (14) business days after receiving the counter notice, unless the OSP's designated agent first receives notice from the user who originally posted or submitted the content that he or she has filed an action seeking a court order to restrain the other user from engaging in infringing activity relating to the claimed infringing material.

## **Policies (recommended only; may be edited by company)**

- 1 Brokerages and any individual agents who maintain or host websites must do the following:
  - A. Designate a DMCA agent and disclose contact information on the website, including the name, address, telephone and email address of the designated agent, as well as the legal name, any alternate name(s), and address of the OSP.
  - B. Register with and pay the applicable fees to with the United States Copyright Office. To do this, begin by going to <http://dmca.copyright.gov/login.html> to login or create an account.
  - C. Adopt a policy and inform users of the website that the OSP may terminate users who are repeat infringers. (See sample policy for an example).
- 2 The designated DMCA agent must comply with the following:
  - A. Designated agents who receive a valid DMCA takedown notice must remove or disable access to the claimed infringing material as quickly as possible. Once the material is removed or disabled, the designated agent will provide written notice to the user who posted or submitted the material.
  - B. If the designated agent receives a valid counter notice, the designated agent must provide the user who sent the original takedown notice with a copy of the counter notice, and inform that

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and addresses (i.e. URLs), software application names, and other commonly used names. Separate legal entities are not considered alternate names.

<sup>3</sup> To be an effective counter notice, the notice must include the following: 1) a physical or electronic signature of the user; 2) identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled; 3) a statement under penalty of perjury that the user has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; 4) the user's name, address, and telephone number, and a statement that the user consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the user's address is outside of the United States, for any judicial district in which the service provider may be found, and that the user will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

user that the OSP will replace the removed material or enable access to it in ten (10) business days. The designated agent must then replace the removed material or enable access to the material not less than ten (10) nor more than fourteen (14) business days after receiving the counter notice, unless the designated agent first receives notice from the user who originally posted or submitted the content that he or she has filed an action requesting a court order to stop the other user from engaging in infringing activity.

