



Could Your Free Wi-Fi Cost You A Bundle?

BY DAVID BAKER

Wi-Fi is everywhere and much of the time it is offered for “free.” Starbucks offers it. So, too, does McDonald’s. In fact, you may even be offering it yourself. And, while many businesses understand that it is a great way to bring in new customers and business, many do not understand the potential implications of allowing relatively unfettered access to the Internet.

Recently, we’ve had a number of clients learn about the implications the hard way. They received what are known as DMCA “takedown” notices. And with those takedown notices, they have received demand letters from Beverly Hills law firms, movie studios, and television networks threatening lawsuits and potential monetary damages reaching into the hundreds of thousands of dollars. Suddenly, free Wi-Fi access may not seem like such a great idea.

DMCA Takedown Notices. Without getting too technical, DMCA is an acronym for the Digital Millennium Copyright Act of 1998, a federal law making it unlawful to produce and disseminate technology, devices, or services intended to circumvent measures that control access to copyrighted works (commonly music, movies, and television shows). The DMCA also provides an exemption from direct and indirect liability of Internet Service Providers (“ISP”)s and other intermediaries provided they adhere to certain

guidelines, such as forwarding demand letters to their users when they received them from the owner of copyrighted material. By doing so, the ISP’s can avoid liability altogether.

Typically, the cause of the problem for clients has been misuse of the Wi-Fi by someone who illegally downloaded a recent Hollywood movie without paying for it or uploaded popular music they did not own or posted otherwise inappropriate material on the Internet. The problem for our clients has been that they

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were not directly involved in the illicit activity, but they were the ones who furnished the Wi-Fi (and thereby access to the Internet) and by doing so created potential liability for themselves. Many of them have compounded the problem by not implementing and enforcing appropriate “terms of use” for those they have allowed to use the Wi-Fi.

A Recent Case. In one recent case, a client, who provides “free” Wi-Fi as part of its overnight rental agreement with visitors, received a DMCA takedown notice from its ISP alleging the purportedly unauthorized copying and distribution of a video depicting Kim Kar-

dashian in an intimate moment. The takedown notice included correspondence from a Beverly Hills attorney who claimed to be acting on behalf of a copyright enforcement company and the alleged owner of the video content, an adult entertainment company. It was unclear from the notice and the letter if the video content actually was owned by the entertainment company, but, significantly, the content had not been registered with the U. S. Copyright Office.

Upon closer examination of the attorney’s letter correspondence and additional research concerning the attorney’s business practices and those of the copyright enforcement company, it appeared the attorney was acting on behalf of the copyright enforcement company and himself in the hopes of (a) securing a settlement with the client, and (b) impressing the entertainment company enough to convince it to contract with the copyright enforcement company for future enforcement of the entertainment company’s sizable copyright library. Apparently, this has been a common practice for certain attorneys and copyright enforcement companies since a series of class action lawsuits, resulting settlements, and court orders in cases involving the unlawful, unauthorized file sharing of content using BitTorrent technology file sharing. This has allowed them to pursue other potential infringers and thereby leverage monetary settlements from them.

Premature Settlements. Through the use of “web crawlers (also known as “spiders”), copyright enforcement companies are able to identify certain unauthorized downloads of multimedia content and then pass along the information to attorneys who send a demand letter, citing copyright infringement, to the ISP for the address at which the download occurred which then sends along a copy of the demand letter

with a DMCA takedown notice. The recipient is prompted to access a "case number" using a "password" (all of it having been provided in the demand letter), to "settle" the copyright infringement at a Website dedicated for this sole purpose and which is owned and operated by the copyright enforcement company. Presumably, if they are paid, then the copyright enforcement company forwards the "settlement" moneys (or at least a portion thereof) to the rightful copyright owner. At this point, there is nothing overtly illegal about these "copyright enforcement" activities however distasteful they may be.

Potential Monetary Damages. With all of this in mind, it is important to understand that if someone used the client's Wi-Fi system to unlawfully download illicit content, this work first would have to be registered with the U. S. Copyright Office in order for the entertainment company to initiate a lawsuit against the client. However, if it was registered and a lawsuit was filed and the entertainment company (or its assignee) successfully proved a case for copyright infringement against the client, then the entertainment company would be entitled to either *actual damages* (i. e. , monies lost to the entertainment company or accrued to the client by virtue of the infringement) OR *statutory damages* of between \$750 and \$30,000 per copyrighted work. In addition, if the entertainment company were able to prove the infringement was intentional, then statutory damages could be increased by the court to \$150,000 per occurrence. [17 U. S. C. § 504]

Likely Repercussions. DMCA takedown notices and threats of copyright infringement litigation are serious and should be given the attention they deserve. However, it is important to understand that the instances of potential copyright infringement over the Internet number in the millions every single day and not every such instance is of equal importance to copyright holders. If a movie studio or television network chased down every person who illegally downloaded a movie or otherwise violated the DMCA, they would put themselves out of business because the return would not warrant the expense of the pursuit. Indeed, absent proof that a business providing free Wi-Fi acted intentionally to infringe a copyright, there is very little incentive for the copyright owner to register the copyright and then file and prosecute a copyright infringement lawsuit. If nothing else, the likely recovery of monetary damages is so small that it argues strongly against copyright owners taking any further action (unless the offending activity continues and/or substantially increases).

General Recommendations. Consequently, unless there is more to the infringement than a one-time mistake or lapse in judgment, businesses would be well served to take the following actions to preempt problems and to protect themselves should they ever arise:

1. Create and implement a fairly stringent "Wi-Fi Guest User Policy" that includes a properly-worded "terms of use" disclosure statement;
2. Using an experienced outside company, implement a technological filter that prevents unauthorized access to the Wi-Fi;
3. Require customers, visitors, and anyone else using the Wi-Fi to sign an acknowledgment of the "terms of use" (on hard copy in pen or via a "click through" on the company Website);
4. If Wi-Fi users do not agree to the terms of use, then do not grant them access to the Internet;
5. Maintain copies of the new Policy (plus any amendments) as well as all signed disclosure statements;
6. If a DMCA takedown notice or a demand letter is received, do not ignore it;
7. Keep a copy of the DMCA takedown notice and forward it to legal counsel for a quick review; and

8. If legal counsel recommends further action, follow the attorney's recommendations. Usually, they can help develop a useful strategy for how best to proceed.

And, finally, there may be some value in confirming that the company's insurance policy (or policies) provides defense and indemnity for these types of situations. If there is ever any actual litigation to enforce third party copyrights, you will be very glad that you planned for it.



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