

# The Oscars and Online Piracy: How ISPs Can Prepare for Copyright Infringement Claims

By: Madeleine Goldfarb and Heidi Schmid

**T**he Academy Awards, which aired on February 22, mean trophies and prestige for a few fortunate nominees. These Oscar winners revel in the global recognition of their work during the months that follow awards season; yet, during this time, Internet Service Providers may experience an onslaught of copyright infringement notifications and potential subpoenas.

This year, after the Oscar nominations were announced, there was a 385% worldwide increase in illegal online piracy of nominated films. In the months following the Oscars, as copyright owners begin to respond to the surge of infringing activity, ISPs may witness the effects of online piracy. Here, ISPs can be pulled into infringement claims when they receive notices of infringing activity and when copyright holders attempt to obtain subscriber information that ISPs may have a duty to keep confidential. If past years are any indication, the coming months will be a particularly important time for ISPs to properly prepare and protect themselves from potential copyright infringement liability.

## How ISPs Are Involved

The Digital Millennium Copyright Act (“DMCA”) is a federal law that bans unauthorized downloading and sharing of copyrighted material and heightens the penalties for copyright infringement over the Internet. Under the DMCA, copyright owners may bring lawsuits against end users over illegal sharing and downloading of copyrighted material. ISPs can become involved in these infringement cases as middlemen; ISPs hold user information that copyright owners need in order to name individual downloaders as defendants in a lawsuit. If the copyright owner escalates the matter and decides to file a suit against a subscriber, the ISP may receive a subpoena, which is a court ordered request to the ISP for subscriber information.

While no lawsuits have been filed yet over piracy of the 2015 Oscar nominations, past years suggest that copyright owners could attempt to sue end users for illegal sharing, usually through peer-to-peer downloading and uploading of files through programs such as BitTorrent. In 2011, the owners of the Best Picture winner, *The Hurt Locker*, attempted to sue thousands of end users in *Voltage Pictures, LLC v. Does 1–5,000*, 818 F. Supp. 2d 28 (2011). *Voltage Pictures* ultimately abandoned this case for several reasons, including the fact that ISPs would not release the thousands of requested subscriber names and because of potential jurisdictional and court procedural issues. Last year, the owners of *The Dallas Buyers Club* sued hundreds of end users in a series of cases, *Dallas Buyers Club, LLC v. Does 1–16*, 2014 U.S. Dist. LEXIS 101596 (W.D.

Wis. July 25, 2014) among others. The *Dallas Buyers Club* film owners filed a number of cases in different federal courts across the country. Some of the cases against unnamed defendants were dismissed, but in others, the owner continues to attempt to gather from ISPs the names of the subscribers alleged to have illegally downloaded or uploaded the movie.

## What ISPs Should Do to Protect Themselves

ISPs may soon see an increase in peer-to-peer infringement notices from copyright owners, alerting them that subscribers have illegally uploaded or downloaded copyrighted material on the ISP’s network. To protect ISPs from liability for peer-to-peer subscriber infringement, the DMCA offers “safe harbor” immunity to qualifying ISPs. To be eligible under the DMCA’s safe harbors, ISPs must meet the following conditions:

- 1) Not interfere with copyright owners’ technical ability to identify their copyrighted works. An ISP cannot conceal, delete, or suppress potentially infringing activity from its network.
- 2) Adopt, implement, and inform customers of a repeat infringer policy. A repeat infringer policy is one that provides for an ISP’s response to multiple instances of infringing activity by a single subscriber or account holder. ISPs should notify subscribers of the policy—usually a notice in a subscriber agreement or publication on the ISP’s website will suffice. ISPs can have different policies dictating how they respond to and address repeat infringement from a single subscriber. The most important part of the policy is that it must provide for termination of subscribers or account holders who repeatedly infringe copyrighted material. Many larger companies employ a “six strikes” policy. This means that if the ISP receives six notices of infringing activity by a single subscriber within a certain time period, it must terminate that account. One way to have an effective repeat infringer policy is to use a strike system in conjunction with a time period. For example, a policy could provide for termination after six strikes within 60 days.
- 3) Have a system and designated agent in place for copyright owners to report cases of infringement. In order to designate an agent to receive infringement notices, ISPs need to file a designation form along with a \$105 filing fee with the U.S. Copyright Office.
- 4) Properly comply with notices of claimed infringement. Copyright owners can send a notice of peer-to-peer infringement to an ISP, alerting the ISP that they have detected illegal

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uploading or downloading by a specific IP address on the ISP's network. In order to follow a repeat infringer policy, an ISP needs to know which subscribers have infringed on multiple occasions. Accordingly, when an ISP receives notification that one of its subscribers has illegally downloaded or shared copyrighted material, the ISP should track and keep records of the IP address listed in a notice of infringement. This will allow an ISP to know which, if any, of its subscribers have repeatedly infringed copyrights, and take necessary action based on a repeat infringer policy.

The DMCA's safe harbor provisions are an important way for ISPs to protect themselves from liability in copyright infringement cases. Taking the time to follow these steps is a key safeguard against liability for subscriber copyright infringement—particularly with the recent post-Oscars uptick in peer-to-peer piracy.

## What ISPs Should Do if They Receive a Subpoena

If a copyright owner escalates the infringement matter and brings a lawsuit against an infringing subscriber, an ISP may get a subpoena demanding that subscriber's name. Although ISPs must obey a valid subpoena, revealing customer information can be risky. It is essential to carefully review a subpoena to ensure it is proper under the DMCA. In order to be valid under the DMCA, a subpoena must either include or follow a notice of infringement; the notice must: (1) be signed; (2) identify the copyrighted work; (3) identify the infringing material or action; (4) provide contact information for the copyright owner; (5) state the copyright owner has a good faith belief that the alleged infringement occurred; and (6) state that the information is accurate. The subpoena itself must authorize or order the ISP to provide the subscriber information. ISPs should make sure a subpoena meets all requirements and is valid before revealing any customer information. Reviewing and complying with valid subpoenas is another important aspect of DMCA compliance.

## Conclusion

Copyright infringement cases create challenges for ISPs who must strike a balance when complying the DMCA. ISPs must follow their own repeat infringer policies and address customer privacy information very carefully. As past years demonstrate, the months following the Academy Awards can lead to a batch of new copyright infringement notices. ISPs should take the time to follow these steps to limit liability stemming from subscriber copyright infringement. □

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