

Notice and Take Down for Copyright Infringement

CODE OF PRACTICE

Preamble

This Code of Practice addresses the problem posed by increasing quantities of copyright infringing material on the Internet by setting out simple and clear procedures which Rightsholders and Intermediaries can follow when they discover such material. When a Rightsholder becomes aware of copyright infringing material on the internet, if he/she is aware of the identity of the Content Provider responsible he/she may contact the Content Provider directly demanding that the material be removed forthwith. If for any reason this is not possible or desirable, or if such direct action does not produce the required result, the following Notice and Takedown procedures can be followed.

This Code aims to provide Rightsholders with a fast track Notice and Take Down remedy capable of handling a large volume of cases, without the need for cumbersome and costly legal action. At the same time it allows Intermediaries to respond quickly and comply with requests to take down infringing content, without themselves incurring any additional liability in responding to a valid Notice or Counter Notice (giving an effective Safe harbour). Safe harbour from legal liability is intended to be guaranteed to the Intermediary through a legal underpinning given to this code by an appropriate mechanism.

The Code sets out a model form of Notice, sufficient to inform Intermediaries of the presence and details of infringing material which the Copyright Holder is asking to have 'taken down', while also allowing Content Providers the opportunity to challenge that assertion and to secure the reinstatement of the material in question if appropriate. Such provision will also serve to protect freedom of expression as any disputed cases could then revert to the normal and full legal processes that are already available.

It is expected that this Code will work in the vast majority of copyright cases that are not likely to be contested and without risk of abuse. Its operation relies upon the positive consensus of those who use it, and the method

adopted (Code of Practice with legal underpinning) should be capable of consensual amendment to keep pace with evolving technological and market developments.

The procedures set out in the Code follow the key elements of the NTD system which is provenly successful in the USA, to which, although simpler, it is comparable. In addition to the adoption of a system which is known to work well, a degree of synchronisation is also desirable if worldwide piracy is to be combated effectively.

Scope: This Code of Practice applies to copyright only, covering copyright infringement of literary, musical, artistic and other copyright works, or criminal offences under the Copyright, Designs and Patents Act 1988. It does not extend to other forms of illegality such as libel, obscenity, breach of confidence, contempt of court or official secrets or human rights offences. It applies only to material hosted on a Hosting Provider's server(s) as addressed in Regulation 19 of The Electronic Commerce (EC Directive) Regulations 2002 and does not yet address infringements committed using Peer to Peer or other technologies.

Interpretation / Glossary

The terms used in this Code shall have the meanings below. In case of uncertainty the meaning shall be taken as that used in Directive 2000/31/EC.

Rightsholder- Any natural or legal person holding copyright or a related right in a creative work, or their agent or exclusive licensee.

Hosting Provider (HP) – Entities that provide hosting services (e.g. web space, FTP space, Usenet services, etc.). This may include, Internet Service Providers who also provide Internet access, companies who only offer specific services (e.g. web hosting or Usenet access) or, for example, educational institutions, which own and manage their own servers for hosting content..

Content – Any information represented electronically as computer files or records.

Hosting – The storage of content on an HP's servers at the direction of a user of the service.

Content Provider – The natural or legal person who, as a user of the hosting service, caused the content to be hosted.

Site – The http or ftp facilities offered by a natural or legal person.

Remove – Action by an HP to delete content or an entire site from its servers.

Block access – Action by an HP to prevent access to content or an entire site hosted on its own servers.

Take Down – Action by the HP to remove or block access to content or an entire site hosted on its own servers.

Signature – A name, given in a notice or counter notice, which identifies the natural or legal person serving the instrument.

THE PROCEDURES

The Notice

1. **HPs** should identify and publish on their website [and as part of their RIPE object] contact details for a “Contact Point” to whom the **Notice** should be sent. HPs may also wish to state on their websites and in their publicity material that they participate in the code.

In the absence of such a contact point, Rightsholders should serve notice to the address specified by the HP in the contact details mandated by R6 of the eCommerce Regulations 2002.

Best Practice: Rightsholders should include the phrase “Copyright Takedown Notice” in the subject line of notices sent by email, to enable automatic routing of the notice to the appropriate contact point within the HP. HPs should, where practicable, provide an auto respond function to acknowledge receipt of notices.

***Note:** A Rightsholder who discovers infringing content on the Internet needs to be able to know who the carrier / intermediary is and by referring to the HP’s own website, or by performing a “WHOIS” query learn to whom the Notice should be sent. For HPs this can be seen as part of their customer services.*

2. A model pro-forma **Notice** and a **Counter Notice** are attached as Annex I to this Code. This is intended for common usage, but HPs and rightsholders if they prefer, may agree their own pro-forma, provided that this includes all the information and complies with all the conditions listed below.

3. A **Notice** shall be valid for the purposes of this code if it provides
 - a. the name of the rightsholder and the person serving the Notice if that person is not the rightsholder
 - b. confirmation that the complainant has authority to act on behalf of the copyright holder or owner of the exclusive right that is allegedly being infringed
 - c. the address of the complainant (physical, electronic, fax and telephone number, where applicable) to which the HP is asked to respond
 - d. identification of the copyright work claimed to have been infringed (or if multiple copyright works on a single online site are covered by the Notice, a list of a representative sample of those works)
 - e. identification of the allegedly infringing material which the copyright holder asks to be removed together with sufficient information which enables the HP to identify the site or USENET post and the material in question (if multiple infringing works on a single online site are covered by the Notice, a list of a representative sample of those works)
 - f. a declaration that either the complainant has attempted to contact the content provider without receiving expeditious satisfaction or that the complainant believes that contacting the content provider directly would not result in expeditious satisfaction
 - g. a signed Declaration of good faith [on pain of perjury / to the best of their knowledge and belief] that the complaint is genuine and that the allegedly infringing material is not otherwise authorised by the copyright holder, his / her agent, nor by law.
 - h. A statement of submission to the jurisdiction of the English courts, for purposes of this matter.

4. **Processing the Notice**

The HP will determine the validity of the **Notice** by checking that it has been properly completed and that it complies with the requirements listed above. If the **Notice** does not comply [substantially] with each of

these requirements, it may not be valid and it should be referred back to the complainant.

If the **Notice** has been forwarded to the wrong HP or the HP in receipt of the **Notice** is unconnected with the infringing site or, in the case of USENET posts if the post or posts in question is/are not present on a news server operated by the HP, it also may not be valid and should be returned to sender.

If the **Notice** complies with the requirements listed above, and has been correctly served, the HP shall have actual knowledge of the allegation of infringement as addressed in Regulation 22 of The Electronic Commerce (EC Directive) Regulations 2002.

5. **Acting on the Notice**

- a. Upon receipt of a valid **Notice** the **HP** should expeditiously attempt to contact the **Content Provider** responsible for the site or post in question, passing on the Notice [, with an assigned, unique, ticket number,] and requiring that Content Provider
 - i. expeditiously remove the infringing material or disable access to it or to the whole site in question - or
 - ii. Submit a valid **Counter Notice** (where justifiable) challenging the complaint (see d)

And inform the Content Provider that any counter notice received will be passed to the Rightsholder.

- b. In the event that no **Counter Notice** is returned expeditiously by the Content Provider, the HP shall act expeditiously to **'take down'** or disable access to the material in question.
- c. After the allegedly infringing material has been 'taken down' by the HP, it shall still be open to the Content Provider to submit a Counter Notice in accordance with (d) below if he / she has not previously done so, asking for the material to be "put back".
- d. A **Counter Notice** shall be valid for the purposes of this code if it:
 - i. Properly identifies the person serving the Counter Notice, giving name and adequate contact details and asserts his / her authority to contest the Notice.

This assertion should confirm:

EITHER that he / she is the operator of the site or the original poster of the USENET post, and that he /she has responsibility for the presence and availability of the material in question.

OR that he / she is legal representative of the operator of the site or the original poster of the USENET post and that he /she is acting for, has confirmed the identity of, and has been authorised to receive service on behalf of the entity with responsibility for the presence and availability of the material in question.

- ii. includes an assertion that the use of the material in the manner complained of does not infringe copyright, and explains in sufficient detail why not. In cases where this reason is that the use of the work in the manner complained of was licensed, the counter notice should identify the nature and the grant of the licence, include sufficient detail to enable the Rightsholder to identify the licence - this will include an explanation of how the CP was given the licence and must include name & address where this is a factor (i.e. where licence is not, e.g. GPL etc). Such information should include: name of licensor, rights granted, date licence was granted, term of licence, territory etc.
- iii. includes a signed Declaration in good faith [on pain of perjury / to the best of their knowledge and belief] that the information given in the Counter Notice is correct and complete.
- iv. Includes statement of submission to the jurisdiction of the English courts, for purposes of this matter.

Counter Notices and Disputed Cases

Upon receipt of a **Counter Notice** the HP shall expeditiously inform the original complainant that the **Notice** has been challenged and pass on the Counter-Notice to the Rightsholder.

Following this the HP will expeditiously reinstate the material in question (put back).

If the matter remains in dispute and the HP is not able or does not wish to adjudicate on the issue, it should inform the complainant and the

matter should revert to arbitration or the normal legal process. Steps taken under the code, including Notices, may be relevant as evidence, if admissible. The requirement to reinstate the material shall not prevent the HP from taking any action it may choose, up to and including termination of service, against the content provider under the HP's Terms of Service.

***Note:** In a minority of cases – it is hoped very few – effective NTD under this Code may prove impossible. If so, it may be advisable in any subsequent legal action to put the HP or content provider on formal notice via a Letter Before Claim. Existing legal remedies, such as applications for injunctions, or actions for damages, will remain available.*

Notes

Provision of 'Safe Harbour' for HPs

While a practical Notice and Take Down system can work on a voluntary basis according to agreements reached between individual Rightsholders and HPs, this is less efficient since it will vary in operation, but it also leaves HPs legally exposed if something were to go wrong or where the HP becomes caught up in an unresolved dispute between Rightsholder and Content Provider, either or both of whom might threaten legal measures over action taken by the HP.

The effectiveness of this Code lies in the legal underpinning given to it, which specifies that an HP who complies with a valid Notice or Counter-Notice under the Code will not incur legal liability relating to the material concerned from the complainant or content provider respectively (what is referred to informally as the "safe harbour").

Copyright Notice and Takedown

To: [ISP contact]

RE: [Rightsholder] the copyright holder / owner of an exclusive right in the work(s) listed below.

From: [Name & contact details of person serving notice]. I am the Rightsholder / authorised representative of the rightsholder. (Delete as appropriate).

The following copyright works are the subject of an infringement. This is an [exhaustive list / representative sample].

[list works here]

The infringing material is hosted on servers operated by you and may be located as follows:

[location(s) of file(s) / USENET message ID(s) or representative sample thereof]

I have attempted to contact the content provider responsible without receiving a satisfactory response / I believe that contacting the content provider directly will not result in a satisfactory response. (Delete as appropriate).

I therefore require that you expeditiously remove or block access to [the material above / the entire site hosting the material indicated by the representative sample above] (Delete as appropriate).

I hereby declare in good faith [on pain of perjury] / to the best of my knowledge and belief] that this complaint is correct and complete and that the allegedly infringing material is not otherwise authorised by the copyright holder, his / her agent, nor by law. For the purposes of this matter I submit to the jurisdiction of the English courts.

Signed _____ Date: _____

Counter-Notice

To: [ISP contact]

RE: Copyright Notice [reference communication received from HP]

From: [Name, street address, telephone number, email address of person serving counter-notice]. I am the operator of the site or the original poster of the USENET post, or the operator's/poster's authorised representative [state capacity in which representative is acting] and I have responsibility for the presence and availability of the material in question.

I believe that the use of the material in the manner complained of does not infringe copyright. My reasons for holding this belief are as follows:

[list reasons why such use is not an infringement]

My position is supported by the following information:

[give sufficient details of any other relevant information in support of these statements (eg any actual or implied licence believed to have been previously given)]

I therefore require that you [expeditiously reinstate / refrain from removing or blocking access to] [the material in the original complaint / the entire site hosting the material indicated by the representative sample in the original complaint] (Delete as appropriate).

I hereby declare in good faith [on pain of perjury / to the best of my knowledge and belief] that the statements made in this counter-notice are correct and complete. For the purposes of this matter I submit to the jurisdiction of the English courts.

Signed _____ Date: _____

Notes:

The operator/poster should normally give their own name & address, unless they have good reason not to.

In cases where the Counter Notice asserts a defence of licensed use, include sufficient detail to enable the Rightsholder to identify the licence - this will include an explanation of how the CP was given the licence and must include name & address where this is a factor (ie where licence is not, e.g. GPL etc). Such information should include: name of licensor, rights granted, date licence was granted, term of licence, territory.

Your chances of reversing a takedown request may be greatly enhanced by providing the fullest possible information.