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Amazon Acts Against DMCA Abuse

Minding Your Business on **April 26, 2023**

Competition between Amazon's third-party merchants is notoriously fierce. The online retail giant often finds itself playing the role of referee, banning what it considers unfair business practices (such as offering free products in exchange for perfect reviews, or targeting competitors with so-called "review bombing"). Last month, in the latest round of this push and pull, the online retail giant blew the whistle on several merchants who Amazon claims crossed a red line and may now have to face litigation in federal court.

On March 30, Amazon filed three lawsuits (available here, here and here) alleging that a collection of defendant merchants used Amazon's Brand Registry service (which helps third-party sellers detect and shut down counterfeiters and other trademark and copyright infringers) to issue numerous bogus Digital Millennium Copyright Act ("DMCA") takedown requests targeting competitors' product listings similar to their own, with one defendant going so far as to create "dummy" websites featuring clandestinely copied product photos that were then used to support supporting the takedown requests (*i.e.*, the defendants claimed their copied versions of the photos were the originals, and that the photos in the original product listings were infringing copies). The defendants allegedly misused Amazon's portal for reporting copyright and trademark infringement as a tool to suppress legitimate competition. In addition to injunctive relief, Amazon seeks yet-indeterminate monetary damages, including special damages – an apparent effort to make an example out of the defendants and signal that Amazon will go well beyond simply kicking bad actors out of its marketplace for this type of behavior.

To understand this suit and defendants' alleged scheme, one must understand the DMCA – including certain of its weak points. The DMCA creates a series of possible safe harbors for online service providers ("OSPs") whose platforms might be used by customers and other third parties to store or transmit copyright-infringing material (17 U.S.C. § 512). To qualify for protection, most OSPs' platforms have "Notice-and-Takedown" systems, through which copyright owners can flag infringing user posts for removal. So long as the service provider honors all takedown requests that meet certain basic criteria, among other safe harbor criteria, the DMCA allows the provider to avoid secondary liability for any infringing material that *isn't* flagged. The basic tradeoff of the DMCA is that it puts the burden on rightsholders to police platforms instead of the platforms themselves, so long as the platforms provide a means for the rightsholders to act when specific instances of infringement are discovered.

DMCA abuse is not a new phenomenon. Because the DMCA does not require OSPs to investigate takedown requests (many of which are now automated), the system allows legitimate rightsholders and bad actors alike to torpedo postings at will. Of course, rightsholders issuing takedown requests are required to certify under penalty of perjury that their requests are legitimate, but it is then up to the party whose content is taken down to submit a counter-request claiming noninfringement (or an affirmative defense like fair use). Because the OSP typically has no strong interest in whether the content stays up or comes down, it usually remains neutral while the rightsholder and posting party engage in the DMCA Section 512(g)'s prescribed back-and-forth. Even in the event that a takedown request is revealed to have been patently illegitimate, the OSP rarely has much incentive to pursue legal action, nor does such action typically make financial sense for the original poster (especially if the downed content has been restored). Thus, there is often little or no punishment for those who use the system in bad faith.

Here, however, the incentives are quite different. In the “typical” process contemplated by the DMCA, Amazon simply acts as a neutral middleman, shuffling notices and counternotices between the parties and taking down and putting up content as appropriate. It would not have a dog in the dispute, other than maintaining its DMCA protections. But in these cases, Amazon’s concern with Defendants’ alleged scheme isn’t really about intellectual property at all, as their takedown requests were merely a pretense to delist competitive listings. Amazon has a very different set of incentives when it comes to maintaining its third-party marketplace as a vibrant marketplace where merchants want to and can successfully sell their goods without being subject to DMCA abuse. In any case, Amazon has made plain that merchants on its platform should be wary of biting the hand that feeds them.

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