

Michael Elkin Discusses the DMCA's Safe-Harbor Provision with *Law360*

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Winston & Strawn partner [Michael Elkin](#) was quoted in the *Law360* article, "5 Tips For Staying Safely Inside The DMCA's Safe Harbor," published September 24, 2013.

The article discusses practical steps for service providers to avoid liability and stay within the Digital Millennium Copyright Act's safe-harbor provision for user-generated content. According to Mr. Elkin, it is wise to err on the side of caution when removing content that seems like infringement.

"If you're hesitating, just take it down and put the burden on the uploader," Mr. Elkin said. "Forget about what a 'reasonable person' would do. You're in a much better position in court if you take it down."

Sites are not required to actively seek out infringing content, but additional measures beyond mere responsive take-downs, such as automated filtering of unauthorized music or videos, can go a long way in court, Mr. Elkin noted.

"A lot of these cases turn on who is perceived to be wearing the white hat, on who is seen as doing the right thing to ferret out infringement," he said. "While active measures are not required, courts and judges tend to not leave their human sensibilities at home."

However, if companies have too much control over content – such as using direct human monitoring and review – they may no longer qualify for safe harbor, which was designed to limit liability for companies that cannot reasonably exert that kind of control. "There's a degree of control over infringing activity that could disqualify you from safe harbor," Mr. Elkin said. "It's a delicate balance."

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