

Locked Out: Zillow's Failure to Provide Insurer Timely Notice of DMCA Takedown Notice Precludes Coverage Under a Claims-Made Policy

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Last month the United States District Court for the Western District of Washington held that a Digital Millennium Copyright Act ("DMCA") Takedown Notice triggered a policyholder's obligation to notify its claims-made insurer. The case, *National Union Fire Insurance Co. v. Zillow, Inc.*, occupies a unique position at the intersection of copyright and insurance law. The case also stands as a warning to practitioners unfamiliar with insurance law principles that courts enforce notice requirements in claims-made policies more scrupulously than occurrence-

based policies.

The case originates out of a dispute between VHT, Inc., a property-photography company and Zillow, Inc., the popular website for real estate listings. Zillow held a limited license to use VHT's photographs on its website. After concluding that Zillow had violated its limited license, VHT sent Zillow a Takedown Notice under the DMCA. (Takedown Notices like the one in *Zillow* stem from the DMCA's safe-harbor provision for online service providers. See 17 USC § 512(c). The safe-harbor provision shields providers from copyright liability for infringing content on the provider's website. To fall within the safe-harbor, the infringing content must be posted by website users, not the provider. Another requirement for falling within the safe-harbor provision is that the provider must expeditiously remove the infringing content if notified about the copyrighted material.) Here, after receiving the Takedown Notice from VHT, Zillow failed to take down the subject pictures.

Nearly a year after sending the Takedown Notice, VHT sued Zillow. Zillow then notified its media-liability insurer, National Union Fire Insurance Company, of the lawsuit. National Union initially agreed to defend Zillow. After National Union learned of the earlier Takedown Notice, however, it informed Zillow that its policy did not cover the

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lawsuit. The National Union policy was a claims-made policy. A claims-made policy covers claims only if the actual claims are made during the policy period. It does not matter when the underlying occurrence took place, such as the posting of infringing material. National Union took the position that the claim was made at the time Zillow received the Takedown Notice, which took place under the previous policy, which National Union had also underwritten. Under the previous policy, Zillow was generally required to notify National Union of a claim within 45 days of the end of the policy period. Zillow argued the claim was made when VHT sued Zillow, not when Zillow received the Takedown Notice.

On a motion for judgment on the pleadings, the court agreed with National Union. In considering whether the Takedown Notice constituted a claim, the court noted that the policy defined a “Claim” as “(1) a written demand for money, services, non-monetary relief or injunctive relief; or (2) a Suit.” Because the Takedown Notice constituted a written demand for non-monetary relief, *i.e.*, demanding that Zillow take down the images, the court concluded that the Takedown Notice was a “Claim,” and that Zillow’s failure to notify National Union of the Takedown Notice within 45 days of the end of the previous policy period precluded coverage.

The court next considered Zillow’s argument that even if the Takedown Notice was a “Claim,” it was sufficiently distinct from the litigation such that the litigation was covered, even if pre-litigation expenses relating to the Notice were not. To succeed on this argument, Zillow had to persuade the court that the policy’s “relation-back provision” was inapplicable. A relation-back provision treats related claims as arising when the original claim is made. Under such provisions, the policyholder forfeits coverage for all aspects of a claim if it fails to notify the insurer when it first learns about the claim.

Zillow argued that the claims were unrelated. First, Zillow argued that the Takedown Notice and lawsuit were unrelated because they cited different provisions of the Copyright Act than the Takedown Notice. Second, Zillow pointed out that the lawsuit involved considerably more infringing images than the Takedown Notice. The court was unpersuaded. The court explained that what was important was that the Takedown Notice and the lawsuit both involved “the same relevant acts.” Because the Takedown Notice and lawsuit both involved allegations that Zillow had copyrighted VHT images on its website that extended beyond Zillow’s limited license, the court concluded the two claims arose out of the same relevant acts. Consequently, the court concluded that the two claims were related and Zillow did not comply with the notification requirements with respect to the Takedown Notice and the lawsuit.

Lessons abound for copyright and insurance law practitioners in *National Union Fire Insurance Co. v. Zillow, Inc.*. First, a copyright lawyer may see the legal effect of a Takedown Notice as relating solely to the DMCA’s safe-harbor provision. But a Takedown Notice may also trigger an insured’s obligation to notify an insurer of a claim. Here, Zillow did little to respond to the Takedown Notice. It would be unwise, however, for an insured to decline to notify an insurer of a Takedown Notice simply because the insured believed it had properly responded to the Takedown Notice. Oftentimes a

liability policy's obligation to provide defense costs can be as important, if not more important, than its obligation to indemnify for an actual judgment. If the copyright holder later brings suit, regardless of whether there is a strong safe-harbor defense, the insured will want to know its defense costs are covered.

Second, this case highlights the distinction between claims-made and occurrence-based policies when it comes to providing notice. Those more familiar with occurrence-based policies may have wondered why the court did not consider whether the delay prejudiced National Union. Due to the unique underwriting considerations attendant to claims-made policies, see *generally Stine v. Cont'l Cas. Co.*, 349 N.W.2d 127, 130-31 (Mich. 1984), a majority of courts enforce notification provisions in claims-made policies even absent prejudice. Consequently, the court in *Zillow* did not need to consider whether National Union was prejudiced by the late notice before enforcing the notice provision as written.

Third, even though a carrier need not show prejudice, policyholders should be mindful of the reasons for the notification provisions when deciding whether to notify an insurer. If Zillow had notified National Union about the claim, National Union arguably could have protected its interests. For example, National Union could have prevailed on Zillow to take down the infringing material and investigated whether there was other infringing material. Instead, National Union was powerless to do anything since Zillow failed to notify National Union of the Takedown Notice.

Fourth, policyholders will need to analyze the policy language and language of the Takedown Notice closely. Had the notice in *Zillow* simply notified the insured that there was infringing material on its website without demanding that Zillow take the infringing material down, the notice may not have qualified as a claim. Regardless, the insured should always err on the side of notifying the insurer of a claim. There is little downside to providing notice, while there can be enormous consequences for failing to provide notice. In *Zillow*, the underlying copyright case ended with a judgment of over \$8 million, plus attorneys' fees. Much, if not all, of this judgment would have been covered under Zillow's policy.

In sum, policyholders should review Takedown Notices carefully and consider carefully the reasons for the notification provisions when deciding whether to notify an insurer of a potential claim.