Limiting Secondary Liability to Promote Innovation

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Next Great Copyright Act Conference

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Safe harbors for ISPs out of date?


STUCK
inTHE
90s

1990s Policymaking in the US

- **Enforcement in digital environment**
  - No Electronic Theft (NET) Act (1997)
  - Digital Theft Deterrence and Copyright Damages Improvement Act of 1999

1990s Policymaking

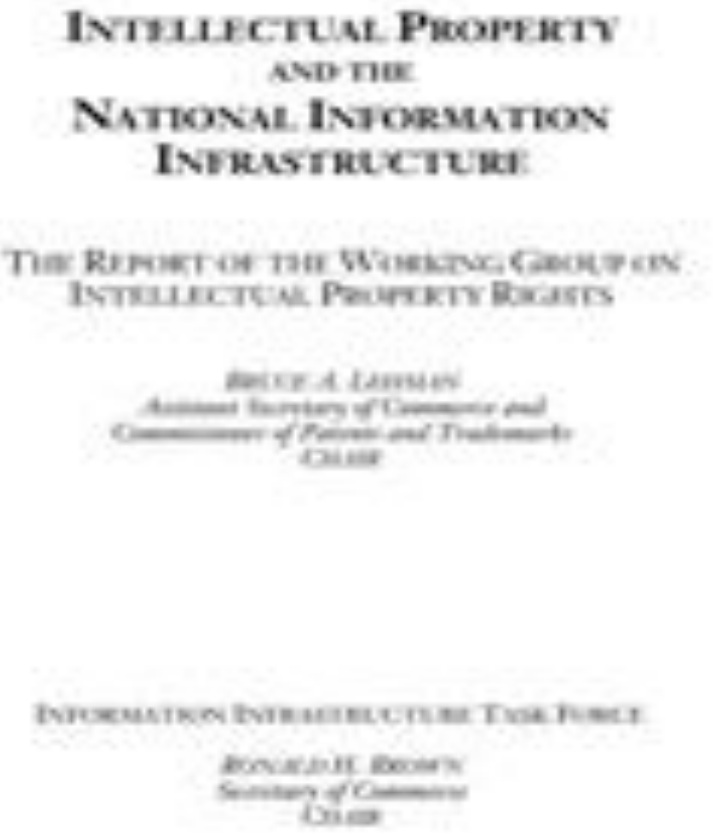
- **Industry-specific legislation**
  - Audio Home Recording Act of 1992
  - Satellite Home Viewer Act 1994/1999
  - Digital Performance Right in Sound Recordings Act of 1995
    - Targeted at satellite radio (celestial jukebox).
  - Fairness in Music Licensing Act of 1998

Indirect Liability

Courts expand reach

- Contributory Infringement
  - Knowledge of direct infringement – maintain *Sony*
  - "Material contribution" or "Substantial participation" in the infringement a.k.a. "assistance"
- Vicarious liability
  - "Control or supervision" of the direct infringer
  - "Direct" financial benefit derived from the infringement
- Coming attraction . . . inducement

Clinton Admin. White Paper



INTELLECTUAL PROPERTY
AND THE
NATIONAL INFORMATION
INFRASTRUCTURE

THE REPORT OF THE WORKING GROUP ON
INTELLECTUAL PROPERTY RIGHTS

BRUCE A. LEHMAN
Assistant Secretary of Commerce and
Commissioner of Patents and Trademarks
CHAIR

INFORMATION INFRASTRUCTURE TASK FORCE

RONALD H. BROWN
Secretary of Commerce
CHAIR

Clinton Admin. White Paper

- “Thus, the full potential of the NII will not be realized if the education, information and entertainment products protected by intellectual property laws are not protected effectively when disseminated via the NII.”
- Is this the right measure of success? If so, how does one measure “effective” protection?

How about?

- “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, § 8, cl.8

- Whether exclusive rights are sufficiently robust to attract creative and financial resources for cultural production

Framework decision

- Digital Millennium Copyright Act
  - Two digital network deals
    - WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998
    - Online Copyright Infringement Liability Limitation Act
  - Two industry-specific deals
    - Computer maintenance
    - Vessel Hull *sui generis* protection

Digital Millennium Copyright Act

- Grand Bargain (of sorts)
- Lock Down
  - 17 U.S.C. ch. 12
  - Premise – DRM will work
  - Conclusion – Protect DRM from hacks

http://www.flickr.com/photos/zimpenfish/

Digital Millennium Copyright Act

- **L**iberation
  - 17 U.S.C. § 512
  - Internet service providers freed from monetary liability for user's conduct if play by the rules

Digital Millennium Copyright Act

- Liberation
  - 17 U.S.C. § 512(c)
  - Primarily for digital landlords (web hosts) (ancestors of cloud services)
  - User Generated Content also contemplated
  - Geocities

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JESSICA LITMAN

Arguments for Change

- Takedowns ineffective
  - Ease of reposting
  - Ex parte relief plus DRM supposed to make content “safe” online
  - Inefficient diversion of resources
    - like stimulating an economy by digging holes and filling them back in.
  - Disproportionate effects for independents and SMEs.

Arguments for Change

- Takedowns unfair
  - Scale of social media beyond what was expected. Need to reallocate enforcement resource burden
  - Platforms profiting without being required to share. Profit and social value not aligned.

Proposals for Change

- Platform filtering at upload
  - Explicit requirement
  - Sunrise period
  - Induced by a “reasonable commercial measures” limit on limit on liability

Proposals for Change

- Burden shifting
  - Notice and stay down
  - Generalized notice as argued in *YouTube v. Viacom*

Cure is Worse than the Disease

- Resource diversion in take downs partially due to market failure
  - What we have here is a failure to license
  - When licensed content available, reduces attraction of unauthorized sources

Cure is Worse than the Disease

- Is the residual requirement for repeated take-downs tolerable?
- Yes

Cure is Worse than the Disease

- “Safety” of content on the Internet is the wrong measure.
- Correct question is whether Section 512 is undermining investments in producing and distributing culturally appealing works?
- If not, then let it go . . .


FROM THE CREATORS OF "TANGLED" AND "WRECK-IT RALPH"
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IN 3D AND real D 3D
www.disney.com/frozen

Bloomberg News

Disney Profit Tops Estimates as 'Frozen' Heats Up Box Office (3)

By Christopher Palmeri | February 06, 2014

Cure is Worse than the Disease

- SMEs and independents do have a disproportionate burden
- But, tailoring and SME solution infeasible
- Instead, licensing models that are emerging from battle of the titans likely to be better than legislative fix
- No evidence of cultural underproduction

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Block, Monetize, or Track Viewing Metrics — It's Automated, and It's Free

Overview

YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.

Commercial partnerships

Use of YouTube's copyright tools is free, and does not require any commercial partnership with YouTube. Content partners who would like to monetize their content can apply to join our YouTube Partner Program.

Send feedback

That's it? Nothing new?

- Two things
  - Updated rationale for the original compromise
  - Proposal to address overreaching take-downs

Justification

- In 1998/2000, justification for safe harbor primarily to prevent disproportionate liability for service providers.
- Focus on maintaining availability of basic Internet services

But, general proposition

- Limitations on liability are part of innovation policy.
  - General user's rights
  - Statutory licenses
  - Tailored limitations
    - E.g., safe harbors
    - Marrakesh Treaty

Safe Harbors

- Create a space for platform innovation
- Can manage risk through notice-and-takedown while building a user-attractive space

Safe Harbors

- By rendering the copyright risk manageable, Service Provider safe harbors enable innovations in social media
- Social media means publication and distribution platforms for wide range of authors

Safe Harbors

- Copyright owners get swift relief through notice-and-takedown.
  - (This aspect of the law should be refined. Automated takedown notices are overbroad and overly burdensome.)

Safe Harbors

- Need the flexibility to iterate with users

Post-DMCA

- *Viacom v. YouTube & Shelter Capital*
  - Correctly interpret 512(c) extensively
  - Generally favorable to ISP

Safe Harbors - Innovation

Takedown Abuse

- Automated, indiscriminate takedowns suppress expression without adhering to balance struck in Section 512
- Censorship or other abuses
  - E.g. Takedown for e-meter on eBay
- Data show that counter-notice too cumbersome to use.

Proposal – Lawful Use Flag

- If revising Section 512, need to require service providers to respect “lawful use” flag.
- Pre-emptive counter-notice
- Liability if rightsholder sends takedown
- Ditto if service provider takes down

Proposal – Lawful Use Flag

- Requirements
  - Uploader must provide accurate contact information and agree that this can be released to rightsholder who provides affidavit of need for information to bring suit
  - Amend § 512(f) to provide penalties for bad faith assertion of lawful use

Proposal – Lawful Use Flag

- Who would use?
  - "Larry's law"?
    - Certainly law professors making fair use of copyrighted works in public lectures
  - Broader point is the expressive value of law
    - Even with low use, educational value about asserting user's rights

- Copyright is a balance between providing a secure space for authors to enter the market with the promise of a reward

AND

- A secure space for innovators and users to create new social platforms that involve socially beneficial uses of copyrighted works
- The Next Great Act, need not substantially revise Section 512.