Technological Platform → Evolution

New platforms → enhanced content outlets
  • enforcement not a problem
  • need for licensing institutions

• new outlets
  • major enforcement problems
The Digital Enforcement Pyramid

- Direct Enforcement
  - Digital Rights Management
  - DMCA §1201
  - Contract
- Indirect Enforcement
  - Sony doctrine
  - DMCA §512
  - Fair Use
- Self-Help Strategies
- Inducement/Tort Theories
  - Grokster
- Copyright Enforcement in the Digital Age
  - Immunities/Safe Harbors
    - Sony doctrine
    - DMCA §512
    - Fair Use
  - Indirect Enforcement
    - Digital Rights Management
    - DMCA §1201
    - Contract
  - Direct Enforcement
    - Fair Use
    - making available?
Who has the policing burden on the Internet?

- Content Owners
- Search Engines
- Government
- Software Vendors
- Everyone
- ISPs

1998
Digital Millennium Copyright Act (1998)

§ 512 Limitations on liability relating to material online

OSP SAFE HARBOR

§ 1201 Circumvention of copyright protection systems

DMCA Anti-circumvention Provisions

§ 1201 No Copying
- Section 1201
- Single use only
- Limited Authorized Access
- Device Trafficking
- Device Trafficking
- (a)(1) Breaking & Entering
- (a)(2) Device Trafficking
- (b) Device Trafficking
- primary purpose
- limited comm significance or marketed to circumvent

§ 1202 Management Information
- (a) False
- (b) Removal or Alteration

§ 1203 Remedies
- § 1204 Criminal Remedies

Various Exemptions
- Selected Limited Waiver for Designated Use
- Reverse Engineering for Interoperability
- Privacy - Deactivation of “Cookies”
- Shopping Privilege for Nonprofit Libraries
- Law Enforcement, Encryption, etc.
DeCSS

DVD Content Scrambling System (CSS)

DMCA Exceptions
- reverse eng §1201(f)
- encryption res §1201(g)(4)
- security testing § 1201(j)

Fair Use
1st Amendment

2600: The Hacker Quarterly
Eric Corley
a/k/a Emmanuel Goldstein

www.2600.com
DeCSS

Links
www.DeCSS.com
www.findDeCSS.com
www.DeCSSrUS.com

www.DeCSS.com

Universal City Studios v. Corley, 273 F.3d 429 (2d Cir.)

DMCA

Triennial Anti-Circumvention Exemptions

1. Compilation of blocked websites
3. Obsolete software/video game formats
4. Reading books aloud
5. Movie excerpts at film school
6. Firmware – cell phone network access
7. Sony Rootkit fix
8. Jailbreaking cell phones

White House/FCC Back Legalizing Phone Unlocks . . . but Not iPads

2010

Back Legalizing
Phone Unlocks . . .
but Not iPads

March 4, 2013

Jailbreaking Anti-Circumvention Exemptions

DMCA

Anti-circumvention Provisions

1st Generation Cases:

2nd Generation Cases:

T520 Laser Printer
**Markets**
- low profit

**Aftermarkets**
- high profit

---

**T520 Laser Printer**
- $373

**Toner Cartridges r Us**
- Remanufactured Lexmark T5210
- $165

**Form TX Certificate of © Registration Lexmark Printer Engine Program**

**DMCA**
DMCA

**Lexmark v. SCS, 387 F.4d 522 (6th Cir. 2004)**
- reverse engineering to achieve interoperability w/ lock-out codes permissible under copyright law
- no TPM protecting engine program

**Chamberlain Group v. Skylink Tech, 381 F.3d 1178 (Fed. Cir. 2004)**
- no violation of anti-trafficking ban because Chamberlain failed to prove:
  - lack of authorization; or
  - © infringement or how Skylink product infringes ©

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**Blizzard Entertainment**

**World of Warcraft**

- **GameStar**
  - World of Warcraft
  - 50 spell
  - 3000+ words
  - 4 smart books

- **Battle.net**

---
Market

Aftermarket

$49.99

$14.99 per month

$179.88 per year
Digital Millennium Copyright Act (1998)

§ 512 Limitations on liability relating to material online

§ 1201 Circumvention of copyright protection systems

© Enforcement on the Internet: Web 2.0
DMCA: OSP SAFE HARBOR

17 USC §512

Eligibility
1. Adopt, implement, & inform subscribers of termination policy for repeat infringers
2. Adopt standard technical measures used by © owners to identify and protect © works

OSP

Notification of Infringement
Counter-notification

Most Forms of Injunctive Relief

a. Transmitting Material
b. System Caching
c. Storing Material
d. Linking
Digital Millennium Copyright Act (1998)

§ 512 Limitations on Liability Related to Online Materials

(c) Information Residing on Systems or Networks at Direction of Users.

(1) In general.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.
Email noted the presence of a *South Park* clip and questioned whether it should be left on the site because “its copyrighted material.”

if you remove the potential copyright infringements . . . site traffic and virality will drop to maybe 20% of what it is.

To: Jawed Karim, Chad Hurley
From: Steve Chen
Jawed, please stop putting stolen videos on the site. We're going to have a tough time defending the fact that we’re not liable for the copyrighted material on the site because we didn’t put it up when one of the co-founders is blatantly stealing content from other sites and trying to get everyone to see it.
To: Chad Hurley, Steve Chen
From: Jawed Karim
Reporting that he had found a “copyright video”
“Ordinarily I'd say reject it, but I agree with Steve, let’s ease up on our strict policies for now. So let’s just leave copyrighted stuff there if it's news clips. I still think we should reject some other things tho…”

From: Chad Hurley
ok man, save your meal money for some lawsuits! ;) no really, I guess we'll just see what happens.

To: Steve Chen
From: Chad Hurley
Subject: budlight commercials
we need to reject these . . . too

To: Chad Hurley
From: Steve Chen
Subject: budlight commercials
can we please leave these in a bit longer?
another week or two cant hurt.

From Jawed Karim
added back all 28 bud videos.
Digital Millennium Copyright Act (1998)

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(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

DMCA §512(c)(1)(A)(ii)

“not aware of facts or circumstances from which infringing activity is apparent”
The phrases “actual knowledge that the material or an activity” is infringing, and “facts or circumstances” indicating infringing activity, describe knowledge of specific and identifiable infringements of particular individual items. Mere knowledge of prevalence of such activity in general is not enough.

As stated in *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007):

The DMCA notification procedures place the burden of policing copyright infringement-identifying the potentially infringing material and adequately documenting infringement-squarely on the owners of the copyright. We decline to shift a substantial burden from the copyright owner to the provider....


DMCA §512(c)(1)(A)(ii)

“not aware of facts or circumstances from which infringing activity is apparent”

<table>
<thead>
<tr>
<th>Specific URL Knowledge</th>
<th>General Knowledge</th>
</tr>
</thead>
</table>
Digital Millennium Copyright Act (1998)

§ 512 Limitations on Liability Related to Online Materials
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   (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
   (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

DMCA Legislative History
H.R. Rep. No. 105-551(I)
The “red flag” test has both a subjective and an objective element. In determining whether the service provider was aware of a “red flag,” the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a “red flag” - in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances-an objective standard should be used.
The Specificity Requirement

Under § 512(c)(1)(A), knowledge or awareness alone does not disqualify the service provider; rather, the provider that gains knowledge or awareness of infringing activity retains safe-harbor protection if it "acts expeditiously to remove, or disable access to, the material." 17 U.S.C. § 512(c)(1)(A)(iii). Thus, the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material, because expeditious removal is possible only if the service provider knows with particularity which items to remove. Indeed, to require expeditious removal in the absence of specific knowledge or awareness would be to mandate an amorphous obligation to "take commercially reasonable steps" in response to a generalized awareness of infringement.

. . . The plaintiffs contend that requiring awareness of specific infringements in order to establish "aware[ness] of facts or circumstances from which infringing activity is apparent" renders the red flag provision superfluous, because that provision would be satisfied only when the "actual knowledge" provision is also satisfied.

. . . But contrary to the plaintiffs' assertions, construing § 512(c)(1)(A) to require actual knowledge or awareness of specific instances of infringement does not render the red flag provision superfluous. The phrase "actual knowledge," which appears in § 512(c)(1)(A)(i), is frequently used to denote subjective belief. See, e.g., United States v. Quinones, 635 F.3d 590, 602 (2d Cir. 2011) ("[T]he belief held by the defendant need not be reasonable in order for it to defeat ... actual knowledge."). By contrast, courts often invoke the language of "facts or circumstances," which appears in § 512(c)(1)(A)(ii), in discussing an objective reasonableness standard. See, e.g., Maxwell v. City of New York, 380 F.3d 106, 108 (2d Cir.2004) ("Police officers' application of force is excessive ... if it is objectively unreasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").

The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or "subjectively" knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person.
DMCA §512(c)(1)(A)(ii)
“not aware of facts or circumstances from which infringing activity is apparent”

Specific URL Knowledge
General Knowledge

To: Steve Chen
From: Chad Hurley
Subject: budlight commercials
we need to reject these . . . too

From Jawed Karim
added back all 28 bud videos.

To: Chad Hurley
From: Steve Chen
Subject: budlight commercials
can we please leave these in a bit longer?
another week or two cant hurt.

July 4, 2005

Chad Hurley co-founder
Steve Chen co-founder
Jawed Karim co-founder
From: Chad Hurley
start being diligent about rejecting copyrighted / inappropriate content,” noting that “there is a CNN clip of the shuttle clip on the site today, if the boys from Turner would come to the site, they might be pissed.”

From: Jawed Karim
the CNN space shuttle clip, I like. we can remove it once we’re bigger and better known, but for now that clip is fine.

From: Steve Chen
we should just keep that stuff on the site. I really don’t see what will happen. what? someone from CNN sees it? he happens to be someone with power? he happens to want to take it down right away, but what? in two weeks later, we get a cease & desist letter, we take the video down.

August 9, 2005
Reverse Remand
Summary Judgment: Safe Harbor Still Applies!

Public Performance

§106. Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
§101. To perform or display a work “publicly” means —
(1) to perform or display it in a place open to the public or any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

“Public” Performance Right Covers Some Private Performances
The Choice is Yours...
If you live in New York City, there’s an Aereo plan that’s right for you.

<table>
<thead>
<tr>
<th>Try for Free</th>
<th>Day Pass</th>
<th>Monthly 8</th>
<th>Monthly 12</th>
<th>Annual</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free</td>
<td>$1</td>
<td>$8</td>
<td>$12</td>
<td>$80</td>
</tr>
<tr>
<td>No credit card required to sign up</td>
<td>Plus 10 free days to watch whatever you’ve recorded</td>
<td>Add your second month for free</td>
<td>Add your second month for free</td>
<td>Add three extra months for free, that’s just $2.42 a day</td>
</tr>
</tbody>
</table>

More, invite your friends to join and earn a free month for each friend who signs up, up to three months.

*Service availability and prices in New York City and times subject to change. For terms and conditions, see aereomarket.com. No credit card required to sign up. Plus, get six free days to watch whatever you’ve recorded. Add your second month for free. Add your second month for free. Add three extra months for free, that’s just $2.42 a day. Please check with your local provider for availability.
We are sympathetic with the view that performances ... given at such places as clubs, lodges, and camps, should ordinarily be considered public performances. We have given thought to defining “public performance” in the statute, but we believe it would be virtually impossible to formulate a definition that would draw an appropriate line between public and private performances. We would prefer to rely upon the courts to reach the proper result in particular situations.  p. 29
A. BASIC APPROACH OF THE BILL

Of the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by advancing technology in all fields of communications, including a number of future developments that can only be speculated about.

Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright.
A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest.

It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of "fair use," may severely curtail the copyright owner's market for copies of his work. Likewise, it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."

The rights we believe should already be in progress.
Clause 2 or the definition of “publicly” in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that “transmit or otherwise communicate a performance or display of the work to the public by means of any device or process.” The definition of “transmit” – to communicate a performance or display “by any device or process whereby images or sounds are received beyond the place from which they are sent” – broad enough to include all conceivable forms and combinations of wired or wireless communications media.

Under the bill, as under the present law, a performance made available by transmission to the public at large is “public” even though the recipients are not gathered in a single place, and even if there is no direct proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as . . . the subscribers of a community antenna television service; they are also applicable where the transmission is capable of reaching different recipients at different times, as in the case of sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public. To make these principles doubly clear, the committee has amended clause (2) of the definition of “publicly” so that it is applicable “whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”

. . . Essentially, a CATV system no more than enhances the viewer’s capacity to receive the broadcaster’s signals; it provides a well-located antenna with an efficient connection to the viewer’s television set. It is true that a CATV system plays an ‘active’ role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be ‘performing’ the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968) (footnotes omitted); see also *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) (development and implementation of new functions, such as program origination, sale of commercials and interconnection, does not convert the entire CATV operation into a ‘broadcast function’ subjecting the CATV operator to copyright infringement liability).
COPYRIGHT LAW REVISION

SEPT. 3, 1976—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT
together with
ADDITIONAL VIEWS

SECTION 111. SECONDARY TRANSMISSIONS

Introduction and general summary

The complex and economically important problem of "secondary transmissions" is considered in section 111. For the most part, the section is directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works.

The number of cable systems has grown very rapidly since their introduction in 1950, and now total about 3,450 operating systems, servicing 7,700 communities. Systems currently in operation reach about 10.8 million homes. It is reported that the 1975 total subscriber revenues of the cable industry were approximately $770 million.

Pursuant to two decisions of the Supreme Court (Fortnightly Corp. v. United Artists Television, Inc., 382 U.S. 390 (1968), and Teleprompter Corp. v. CBS, Inc., 415 U.S. 394 (1974)), under the 1909
Public Performance

§101. To perform or display a work "publicly" means —

(1) to perform or display it in a place open to the public or any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.
One of the “primary purposes” of the 1976 Act was to overturn *Fortnightly* and *Teleprompter* which held that CATV systems were more analogous to viewers who merely amplify signals than broadcasters perform © works.

The Transmit Clause suggests that an entity may transmit a performance through multiple, discrete transmissions. Subscribers constitute the public.
The Act defines “perform” in “active, affirmative terms” which implies a volitional element.

*Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990)

To “Perform” a Work

§101. To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.
“Fall” verb
2. to come or go down suddenly from a standing position

Does Perform © Works?

Rejects “guilt by resemblance” to Cable TV.
The Act defines “perform” in “active, affirmative terms” which implies a volitional element.

Current Policy
Evolution of the Statute
Legislative Purpose
General Legislative History
Specific Legislative History
Structure of Statute
Statutory Text

*Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990)
Whither Volition Doctrine?

1. Codification of ?

2. Dormant Tort Doctrine awakened by the digital age?
   - Causation/volition straightforward in the analog age
   - But with causation/volition becomes salient

But can system design implicate causation/volition?