

Internet Intermediaries and Liability

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Overview

- The Digital Challenge to Copyright
- Liability for Secondary Copyright Infringement
 - Common Law Doctrine of Secondary Liability
 - Cases

Digital v. Analog

- What is the difference?
- Why does it matter?

Secondary Copyright Infringement

- Contributory infringement
- Vicarious infringement

DMCA Title II

Online Copyright Infringement Limitation Act,
Limitations on Liability Relating to Material
Online, 17 USC 512

- 4 safe harbors
- General Conditions

Statutory Framework: DMCA Title II

- **512(a) Transitory Network Communications Safe Harbor**
(a) protects service providers who are passive conduits from liability for copyright infringement, even if infringing traffic passes through their networks.
- **§ 512(b) System Caching Safe Harbor**
(b) protects OSPs who engage in caching (i.e., creating copies of material for faster access) if the caching is conducted in standard ways, and does not interfere with reasonable copy protection systems.
- **§ 512(c) Safe Harbor Provision for Online Storage**
- **§ 512(d) Information Location Tools Safe Harbor**

General Conditions to DMCA Title II

- repeat infringers
- accommodates standard technical measures

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)

- Betamax video recorder
- “substantial noninfringing purpose”
 - Licensed use--PBS
 - “fair use” -- time-shifting

***A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)**

- Contributory Infringement
 - one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer
 - i.e., Knowledge + material contribution
- Vicarious Infringement
 - “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities”
 - i.e., Right and ability to supervise + financial benefit
 - financial benefit: “acts as a draw”

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2772 (2005)

- “respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement”
- “The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”

***Grokster*: Inducement**

- “rules of fault-based liability derived from the common law”
- The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or “entic[es] or persuad[es] another” to infringe, Black's Law Dictionary 790 (8th ed.2004), as by advertising.

User Generated Content

- Often incorporates copyrighted material
- Chinese Back Dorm Boys

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

- CWIE provides webhosting and related Internet connectivity services to the owners of various websites. For a fee, CWIE provides “ping, power, and pipe,” services to their clients by ensuring the “box” or server is on, ensuring power is provided to the server and connecting the client's service or website to the Internet via a data center connection. CCBill allows consumers to use credit cards or checks to pay for subscriptions or memberships to e-commerce venues.

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

- CCBill transmits credit card information and proof of payment, both of which are “digital online communications.” However, we have little information as to how CCBill sends the payment it receives to its account holders. It is unclear whether such payment is a digital communication, transmitted without modification to the content of the material, or transmitted often enough that CCBill is only a transient holder. On the record before us, we cannot conclude that CCBill is a service provider under 512(a). Accordingly, we remand to the district court for further consideration the issue of whether CCBill meets the requirements of 512(a).

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)

- The district court preliminarily enjoined Google from creating and publicly displaying thumbnail versions of Perfect 10's images, *Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828 (C.D.Cal.2006), but did not enjoin Google from linking to third-party websites that display infringing full-size versions of Perfect 10's images.
- Contributory infringement:
 - There is no dispute that Google substantially assists websites to distribute their infringing copies to a worldwide market and assists a worldwide audience of users to access infringing materials. We cannot discount the effect of such a service on copyright owners, even though Google's assistance is available to all websites, not just infringing ones. Applying our test, Google could be held contributorily liable if it had knowledge that infringing Perfect 10 images were available using its search engine, could take simple measures to prevent further damage to Perfect 10's copyrighted works, and failed to take such steps.

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)

- The district court did not resolve the factual disputes over the adequacy of Perfect 10's notices to Google and Google's responses to these notices. Moreover, there are factual disputes over whether there are reasonable and feasible means for Google to refrain from providing access *1173 to infringing images. Therefore, we must remand this claim to the district court for further consideration whether Perfect 10 would likely succeed in establishing that Google was contributorily liable for in-line linking to full-size infringing images under the test enunciated today
- Vicarious:
 - With respect to the “control” element set forth in *Grokster*, Perfect 10 has not demonstrated a likelihood of showing that Google has the legal right to stop or limit the direct infringement of third-party websites.

Perfect 10, Inc. v. Amazon.com, Inc., **508 F.3d 1146 (9th Cir. 2007)**

- DMCA safe harbor:
 - The parties dispute whether Google meets the specified criteria. Perfect 10 claims that it sent qualifying notices to Google and Google did not act expeditiously to remove the infringing material. Google claims that Perfect 10's notices did not comply with the notice provisions of section 512 and were not adequate to inform Google of the location of the infringing images on the Internet or identify the underlying copyrighted work. Google also claims that it responded to all notices it received by investigating the webpages identified by Perfect 10 and suppressing links to any webpages that Google confirmed were infringing.

Perfect 10, Inc. v. Visa Internet Service Ass'n, **494 F.3d 788 (9th Cir. 2007)**

- It sued because Defendants continue to process credit card payments to websites that infringe Perfect 10's intellectual property rights after being notified by Perfect 10 of infringement by those websites
- Contributory Infringement:
 - Material Contribution: “The credit card companies cannot be said to materially contribute to the infringement in this case because they have no direct connection to that infringement. Here, the infringement rests on the reproduction, alteration, display and distribution of Perfect 10's images over the Internet. Perfect 10 has not alleged that any infringing material passes over Defendants' payment networks or through their payment processing systems, or that Defendants' systems are used to alter or display the infringing images.”

***Perfect 10, Inc. v. Visa Internet Service Ass'n,*
494 F.3d 788 (9th Cir. 2007)**

- Inducement: The software systems in *Napster* and *Grokster* were engineered, disseminated, and promoted explicitly for the purpose of facilitating piracy of copyrighted music and reducing legitimate sales of such music to that extent. Most *Napster* and *Grokster* users understood this and primarily used those systems to purloin copyrighted music. Further, the *Grokster* operators explicitly targeted then-current users of the *Napster* program by sending them ads for its OpenNap program.