

United States

- (1) Upcoming 20th Anniversary of the DMCA**
- (2) Division of Responsibilities**
- (3) Scope of Remedies**

(1) Upcoming 20th Anniversary of the DMCA

Digital Millennium Copyright Act

Online Copyright Infringement Liability Limitation Act

17 U.S.C. §512

- Regulates ISP liability for copyright infringement**
 - Both direct and secondary liability**
 - Both federal and state law on copyright**
- Provides a safe harbor for ISPs who fulfill §512 requirements**
- Establishes a notice and takedown procedure**

(1) Upcoming 20th Anniversary of the DMCA

Impact of the DMCA since 1998

- **E.g., Google has received takedown notices for almost 3 billion URLs**

Transparency Report, Google, <https://transparencyreport.google.com/copyright/overview>, Oct. 6, 2017

- **Since Jan. 1, 2000, more than 1,000 cases have been filed in U.S. federal district courts involving §512**

Based on a search of LexMachina, <https://law.lexmachina.com/>, Oct. 6, 2017

(1) Upcoming 20th Anniversary of the DMCA

Information about the Functioning of the DMCA

- Since 2002, “Chilling Effects”/“Lumen” database
- Since 2011, Google’s “Transparency Report”
- J. Urban et al., *Notice and Takedown in Everyday Practice*, v. 2, March 2017
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628
- U.S. Copyright Office’s “Section 512 Study”
<https://www.copyright.gov/policy/section512/>

(1) Upcoming 20th Anniversary of the DMCA

Changing Nature of the Internet since 1998

- **1998: 2.4 million websites; 188 million Internet users**
- **2015: 836 million websites; 3 billion Internet users**

(Internet Live Stats, <http://www.internetlivestats.com/total-number-of-websites/>, Oct. 6, 2017)

- **E.g., Google launched in 1998, BitTorrent in 2001, Facebook in 2004, YouTube in 2005, Twitter in 2006, Snapchat in 2011, Periscope in 2015**

(1) Upcoming 20th Anniversary of the DMCA

Changing Perceptions of the DMCA since 1998

- **From “Chilling Effects” to “Lumen”**

“Lumen, the measurement unit for visible light, epitomizes our interest in illuminating the online public sphere and the platforms through which all users of the Internet post, search, speak, and read.”

(Chilling Effects Announces New Name, International Partnerships,
https://www.lumendatabase.org/blog_entries/763, Nov. 2, 2015)

(2) Division of Responsibilities

- **Responsibility for policing (detection of infringements)**
 - Copyright owner v. ISP
- **Responsibility for safeguarding free speech (adequate restraint in enforcement)**
 - User v. copyright owner

(2) Division of Responsibilities

Responsibility for policing

- Congress intended for ISPs and copyright owners to share responsibility for detection of infringements
- ISPs' development of detection tools v. need to avoid actual or red flag knowledge
- The need to create incentives for technological development in detection while maintaining a safe harbor for ISPs
- **Viacom v. YouTube, 676 F.3d 19 (2d Cir. 2012), UMG Recordings v. Shelter Capital, 718 F.3d 1006 (9th Cir. 2013)** (interpreting “right and ability to control”)
- **Capitol Records v. Vimeo, 826 F.3d 78 (2d Cir. 2016), EMI Christian Music Group, Inc. v. MP3Tunes, LLC, 844 F.3d 79 (2d Cir. 2016)** (interpreting “red flag knowledge”)

(2) Division of Responsibilities

Responsibility for safeguarding free speech

- **A shifting role for the fair use defense – from a defense to a right**
- **Lenz v. Universal, 815 F.3d 1145 (9th Cir. 2015, amended 2016)**
- **§512 requirements v. access to the Internet as a free speech issue**
- **BMG Rights Management (US) LLC v. Cox Communications, Inc. (4th Cir. 2017)**

(3) Scope of Remedies

- **No instrument for ISP liability across national borders**
- **Regular conflict-of-laws rules should apply**
- **Google Inc. v. Equustek Solutions Inc., 2017 SCC 34 (Supreme Court of Canada);
Google v. Equustek, N.D.CA Case 5:17-cv-04207-NC, complaint filed on July 24,
2017**

(3) Scope of Remedies

- **The role of geoblocking**
- **Data requests and the “location of the server” theory**
- **The Hague Conference Judgments Project**