United States

(1) Upcoming 20\textsuperscript{th} Anniversary of the DMCA
(2) Division of Responsibilities
(3) Scope of Remedies
(1) Upcoming 20\textsuperscript{th} Anniversary of the DMCA

Digital Millennium Copyright Act

Online Copyright Infringement Liability Limitation Act

17 U.S.C. §512

\begin{itemize}
  \item Regulates ISP liability for copyright infringement
    \begin{itemize}
      \item Both direct and secondary liability
      \item Both federal and state law on copyright
    \end{itemize}
  \item Provides a safe harbor for ISPs who fulfill §512 requirements
  \item Establishes a notice and takedown procedure
\end{itemize}

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Impact of the DMCA since 1998

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

• 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

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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
• U.S. Copyright Office’s “Section 512 Study”
  https://www.copyright.gov/policy/section512/

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Changing Nature of the Internet since 1998

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


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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.”

(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

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(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”)

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(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)

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(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