Section 512

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Internet Law
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Class 23

Where we are

- Part I: Public Law
- Part II: Private Law
  - Control over Computers
  - Domain Names
  - Copyright
  - Innovation
  - Case Studies

In today's class

- *Netcom* as another perspective on online service provider liability
- Section 512
- YouTube: grand copyright review

Religious Technology Center v. Netcom

Netcom: the context

- By what more familiar name do we know the Religious Technology Center?
- Erlich is a vocal critic who uses Usenet to make his arguments
- The RTC launches an all-out legal assault
  - Is this an appropriate use of copyright?
  - Why sue Netcom?

Netcom: the technology

- Ehrlich uploads messages to Netcom by way of Klemsrud's server
  - Netcom distributes them to the world and also archives them for a few days
- How hard would it be for Netcom to:
  - Cut Ehrlich off?
  - Block all infringing messages?
  - Remove infringing messages on notice?

Netcom and copyright infringement

- What is this new "volitional act" test for direct infringement?
  - Some other courts have adopted it
- What facts would make Netcom a contributory infringer? Not one?
- Why does Netcom not have the sort of financial interest that would make it a vicarious infringer?

Section 512

The high-level overview

- Think of § 512 as being a kind of § 230 for copyright infringement, with two twists:
  - Notice-and-takedown
  - Subpoenas to identify infringers
- If you're the right kind of online intermediary, and you play by the rules, you are off the hook for certain kinds of copyright infringement liability

The four immunities

- § 512(a): Transitory Digital Network Communications (e.g. backbone routers)
- § 512(b): System Caching (extraordinarily technical; we won't discuss the details)
- § 512(c): Information Residing on Systems or Networks At Direction of Users (e.g. LiveJournal, Yahoo! GeoCities)
- § 512(d) Information Location Tools (e.g. Google)

Close study case study: § 512(c)

- Only applies to "service providers" as defined in § 512(k)
- Can't have actual knowledge of infringement, § 512(c)(1)(A)(i)
- Can't turn a blind eye to "red flags" of potential infringement, § 512(c)(1)(A)(ii)
- Can't vicariously infringe, § 512(c)(1)(B)
- Need repeat infringer policy, § 512(i)

Notice and takedown

- *If* you get a proper notice of infringement (§ 512(c)(3)(A)) and don't remove the material, you lose your immunity (§ 512(c)(1)(A)(iii)
- NB: you might still not be an infringer
- But really, what are your incentives?

Counter-notice and putback

- § 512(g) allows the user to claim the material wasn't infringing
  - To be immune from suit, you need to put it back online (. . . but suit for what?)
- The counter-notification system is designed to get the service provider out of the complainant-user crossfire
  - Which side does it favor?

YouTube

Is there infringement?

- Direct infringement by YouTube?
- Direct infringement by users?
  - Contributory infringement by YouTube?
  - Vicarious infringement by YouTube?
  - Inducement infringement by YouTube?
- DMCA § 1201 circumvention?
- Fair use?

Does a § 512 safe harbor apply?

- § 512(c) is relevant; anything else?
- Assuming it follows its stated policies, is it okay under § 512(c)(1)(c) & (c)(2) ?
- Does it pass the knowledge tests in § 512 (c)(1)(A) (actual and "red flag")?
- Does it pass the vicarious infringement test in § 512(c)(1)(B)?
- Anything else?

My conclusion

- YouTube could have a gigantic direct infringement problem
  - But *Netcom*, *Sony/Napster*, fair use, or § 512 could give it a defense
  - All of these point roughly the same way
- *If* the compromise embodied in notice-and-takedown holds, YouTube wins
  - If not, it loses

Next time

Turning copyright inside-out