The liability of online intermediaries for user-posted content in the U.S.

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A. Direct Liability for User-Posted Content

Reproduction: content residing on host's server or platform

Distribution (of digital file): if host allows downloading

Public Performance/Display (statutory definition covers individual receipt of content from source website): "to transmit or otherwise communicate a performance or display of the work . . . 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."

B. Common Law Principles of Secondary Liability

- Contributory Infringement: supplying means to commit infringement with specific knowledge of works infringed
- Inducement: intent to enable copyright infringement; specific knowledge of which works infringed not required if:
- Promoted the service as enabling infringement
- Derived a financial benefit from infringement
- Took no measures to avoid infringement

Common law principles, continued
Vicarious Liability

Derived a direct financial benefit from another's infringing activity

Had the right and ability to control the infringer's activities

Off-line example: music venues liable for infringing performances when the venue hired the performers

Online example: charging higher rates for advertising based on quality of content

Common law principles, continued
Willful blindness

One is willfully blind if one is aware of a high probability that infringement is occurring but consciously avoids confirming that fact; one may not shield oneself from learning of an infringing transaction by looking the other way

C. 17 U.S.C. sec. 512: “safe harbors”: limitations on remedies

- Concerns copyright infringement only
- 512(c): host service providers (including UGC sites)
- Even if host provider liable as direct or secondary infringer, remedies limited to injunctive relief
- Failure to qualify for safe harbor does not automatically mean host is an infringer

Rules generally applicable to all service providers:

Definition of “service provider”: “a provider of online services or network access, or the operator of facilities therefor”

All isps must implement a “repeat infringer” policy and have “designated an agent to receive notifications of claimed infringement”

Isps have no duty of “monitoring its service or affirmatively seeking facts indicating infringing activity”

Repeat infringer policy: Who is a repeat infringer?

EMI Christian Music v MP3 Tunes (2d Cir. 2016) (file-sharing platform)

"all it takes to be a 'repeat infringer' is to repeatedly upload or download copyrighted material for personal use"

The infringer "does not need to know of the infringing nature of its online activities"

Repeat infringer policy: disqualifying acts

- Failure to terminate users whose uploads are the subject of multiple take-down notices
- Terminating repeat infringers but allowing them to reactivate accounts upon request

Relationship between repeat infringer policy and absence of duty to monitor

EMI Christian: “MP3tunes did not even try to connect known infringing activity of which it became aware through takedown notices to users who repeatedly created links to that infringing content in the sideload.com index or who copied files from those links. . . . [Terminating repeat infringers] would not require MP3tunes to "monitor" or "affirmatively seek facts" about infringing activity . . . because it already had adequate information at its disposal in the form of takedown notices provided by EMI as to which links were allegedly infringing.

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

(1) In general.—A [host] service provider shall not be liable for monetary relief, or . . . 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

“by reason of the storage”

Courts have extended to communication, indexation, optimization, user-sharing. Applies to “software functions performed for the purpose of access to user-stored material” *Viacom v. YouTube* (2d Cir. 2012)

Safe Harbor applies 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 ["red flag"]; or

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

"red flag" narrowly defined in *Viacom v. YouTube*

Requires more than general awareness that infringing content is being posted

Knowing that most content is infringing and even welcoming infringing content does not suffice

[But Inducement of infringement may meet red flag standard: *Columbia Pictures v. Fung*]

Knowledge must be sufficiently specific for host to identify, locate and remove infringing content without searching for it

But liability for willful blindness remains possible

But 2d Cir. may be showing more flexibility in *EMI Christian Group*

Evidence that MP3 tunes knew that Beatles songs and pre-2007 sound recordings were not legally available on the internet

"There was evidence at trial that MP3tunes could disable access. Indeed, an expert testified that searching through libraries of MP3 songs was a common function of MP3tunes's business. The jury was therefore permitted to conclude that a time limited, targeted duty—even if encompassing a large number of songs—does not give rise to an 'amorphous' duty to monitor in contravention of the DMCA."

Willful blindness under sec. 512(c): Capitol Records v. Vimeo (2d Cir. 2016)

- Means blindness to specific and identifiable instances of infringement
- Without specific awareness requirement, willful blindness standard would clash with absence of duty to monitor
- Active encouragement of users to post infringing material might suffice to establish willful blindness

Further conditions on availability of safe harbor

(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

Direct financial benefit (*Columbia Pictures v. Fung* (9th Cir. 2013): Bit torrent site)

"direct" financial benefit exists "where there is a causal relationship between the infringing activity and *any* financial benefit"

Is the infringing activity a "draw" for subscribers, "not just an added benefit"?

In advertising-revenue model, advertisement rates depend on audience size, which in turn depends on whether infringements are a "draw"

Right and ability to control

Viacom: Item-specific knowledge not required

But ability to remove infringing content is not an indicium of "right and ability to control" because 512(c)(1)(A) and (C) already require host to remove infringing material

"Something more" required: Intervention in posting content? Inducement?

Fung: Inducement satisfies the "something more"

Implementation - Sec. 512(c)(1)(C): Notice for takedown

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.

Paragraph (3) sets out the “elements of notification” including

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

Counternotification and put-back

512(g)(2)(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

Sanctions for misrepresentation 512(f)

Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

Misrepresentation includes claims that manifestly "fair" uses are infringing

Examples: pretextual invocation of copyright to protect embarrassing business information disclosed in internal email, *Online Policy v Diebold* (N.D. Cal. 2004)

Copyright owner may not rely solely on automated notices generated when search "bot" identifies works on third-party sites; copyright owner has duty to review allegedly infringing postings to form a good faith view as to whether the postings are fair use, *Lenz v. Universal* (9th Cir. 2016)

Remedies (512(j))

the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network.

(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider's system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.