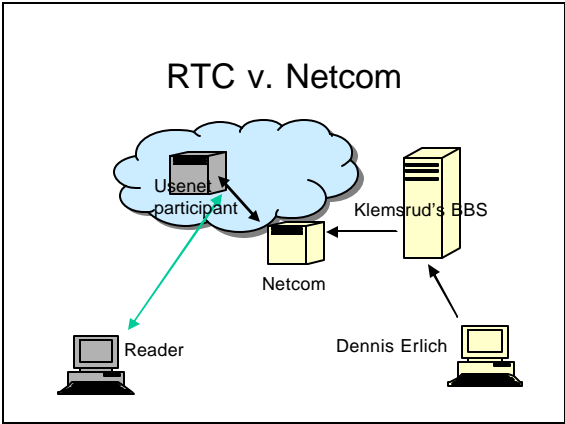


## Safe Harbors and Chilling Effects

### Secondary Liability after the Digital Millennium Copyright Act



- ### How do we analyze Netcom's copyright liability (1995)?
- Direct:
    - Assume Erlich is directly infringing. Is Netcom?
    - Copying, Fixation (MAI)?
    - No "element of volition or causation"
  - Contributory:
    - Knowledge?
    - Substantial participation?
  - Vicarious:
    - Right and ability to control?
    - Direct financial benefit?
  - Fair use? First Amendment?

### Digital Millennium Copyright Act (DMCA) of 1998

- Technical Protection Measures (Anticircumvention)
- Online Copyright Infringement Liability Limitation (OCILLA)
- Webcasting rules

- ### Safe Harbor
- Post-Netcom and -MAI, entertainment companies convince ISPs that they might face copyright liability for users' activity
  - As a compromise, they propose Section 512's safe harbor:
    - If you follow DMCA's procedures, you won't be liable for money damages

- ### Section 512 Safe Harbor
- Limitation on ISP liability for user infringements
    - (a): Transitory Digital Network Communications (*connectivity providers*)
    - (b): System Caching (*ISPs or services like Akamai*)
    - (c): Information Residing on Systems or Networks At Direction of Users (*web and file hosts*)
    - (d): Information Location Tools (*search engines*)

## Takedown mechanics, §512(c)

- OSP lists designated agent for notice of claimed infringement: <http://www.copyright.gov/onlineosp/ist/index.html>
- Copyright owner serves compliant notice
  - OSP “responds expeditiously to remove, or disable access to” material claimed to be infringing;
  - OSP notifies user
- If user gives counter-notification
  - OSP replaces material 10-14 days after receipt, unless notified of a pending court action

## Pre- and Post- DMCA

- 512(k) Definitions. (1) Service provider. -
  - (A) As used in subsection (a), the term “service provider” means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.
  - (B) As used in this section, other than subsection (a), the term “service provider” means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).
- Is Webworld an online service provider?
- Is Netcom?
- Is Napster?

## How do we analyze eBay’s or RemarQ’s copyright liability (2001)?

- Is provider an OSP?
- Does it meet the safe-harbor requirements?
  - No actual or “red-flag” knowledge of infringement?
  - No financial benefit if right and ability to control?
  - Responded expeditiously to notification of claimed infringement under 512(c)(3)?
    - Was the notification compliant?
    - If not, no response required
- If safe-harbor fits, STOP the inquiry, **no liability**
- If no safe-harbor, GOTO ordinary secondary liability test of *RTC v. Netcom*

## Post-DMCA Secondary Liability

- Is provider an OSP?
- Does it meet the safe-harbor requirements?
  - No actual or “red-flag” knowledge of infringement?
  - No financial benefit if right and ability to control?
  - Responded expeditiously to notification of claimed infringement under 512(c)(3)?
    - Was the notification compliant?
- If safe-harbor fits, STOP the inquiry
- If no safe-harbor, GOTO ordinary secondary liability test of *RTC v. Netcom*
- Direct:
  - Copying, Fixation (MAI)?
  - Any “element of volition or causation”
- Contributory:
  - Knowledge?
  - Substantial participation?
- Vicarious:
  - Right and ability to control?
  - Direct financial benefit?
- Fair use? First Amendment?

## Hendrickson / ALS Scan: who gets safe harbor?

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• Hendrickson to eBay: “All Manson DVDs”</li> <li>• No listing of specific item numbers</li> <li>• No statement of authorization under penalty of perjury</li> <li>• <b>Notice does not substantially comply</b></li> <li>• <b>-&gt;eBay gets safe harbor</b></li> </ul> | <ul style="list-style-type: none"> <li>• ALS Scan to RemarQ: “The newsgroup alt.binaries.pictures.erotica.als”</li> <li>• Identification of models with copyright notices</li> <li>• <b>Notice substantially complies</b></li> <li>• <b>-&gt;RemarQ does not get safe harbor</b></li> <li>• <b>-&gt;Analyze 2dary liability</b></li> </ul> |
|---|--|




## Chilling Effects

- Are we indirect infringers?
- <http://www.chillingeffects.org/>

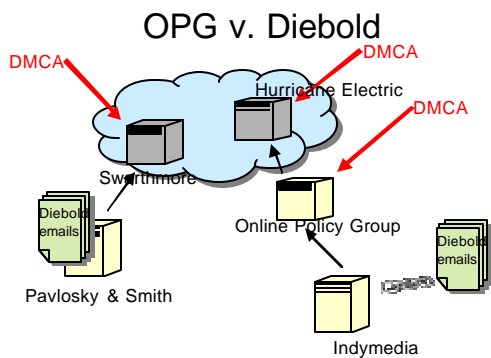
## DMCA Misrepresentation, §512(f)

- (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.

## OPG v. Diebold

- 
  - # To: <support@gesn.com>
  - # Subject: RE: GEMS Versions
  - # From: "Ken Clark" <ken@gesn.com>
  - # Date: Mon, 5 Jun 2000 18:00:49 -0500
  - ...Testing releases go out to customers when they shouldn't, and new features get added to stable branches when they shouldn't. It is not entirely undisciplined either though. Obviously you need to keep an eye on the support and bugtrack lists. Sometimes a bug slips into a stable branch, in which case its better to ship a version you trust, or wait for it to get corrected.

Link To The Full Stack of Diebold Screens... of die http://www.indymedia.org/2003/06/04/019\_01comment.php



### Diebold Election Systems to Online Policy Group (and dozens of other ISPs)

We represent Diebold, Incorporated and its wholly owned subsidiaries Diebold Election Systems, Inc., and Diebold Election Systems ULC (collectively "Diebold").

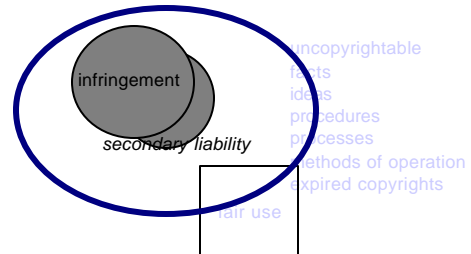
Diebold is the owner of copyrights in certain correspondence and other material relating to its electronic voting machines, which were stolen from a Diebold computer ("Diebold Property").

It has recently come to our clients' attention that you appear to be hosting a web site that contains Diebold Property. The web site you are hosting infringes Diebold's copyrights because the Diebold Property was reproduced, placed on public display, and is being distributed from this web site without Diebold's consent.

## OPG v. Diebold

- No reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright, and there is no genuine issue of fact that Diebold knew—and indeed that it specifically intended—that its letters to OPG and Swarthmore would result in prevention of publication of that content.
- ... The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA's safe harbor provisions—which were designed to protect ISPs, not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.

## Section 512 Safe Harbor



Copyrightable Work	Rightsholder	Service Provider	Date	DMCA Safe Harbor Provision
Artists' and Composers of 50 Popular Songs	Artists' and Composers	Google, Inc.	July 28, 2005	DMCA Safe Harbor Provision
Providing photographs	Argentin Posters	Blogger (Google, Inc.)	July 28, 2005	DMCA Safe Harbor Provision
Photographer's work	[redacted]	Blogger (Google, Inc.)	July 27, 2005	DMCA Safe Harbor Provision
Search engines' collection of information	Cable Complete Property	Google, Inc.	July 27, 2005	DMCA Safe Harbor Provision
Perfect 10's Copyright	Perfect 10, Inc.	Google, Inc.	July 28, 2005	DMCA Safe Harbor Provision
Hotels' Google Photos	Hobson Australia Hobson's Choice	Google, Inc. (Blogger)	July 25, 2005	DMCA Safe Harbor Provision
Interactive Internet Websites	Interactive Internet Websites, Inc.	Google, Inc.	July 25, 2005	DMCA Safe Harbor Provision
Temple of The	Temple of The	Google, Inc.	July 25, 2005	DMCA Safe Harbor Provision
DMCA Safe Harbor Provision			July 25, 2005	DMCA Safe Harbor Provision

## Notice and Takedown Hypos

- Gaggle, Inc. runs a multi-purpose portal at gaggle.com.
  - Allows users to post comments on message boards
  - Offers Usenet access and archives news postings
  - Runs an automated search engine that returns hyperlinks to responsive websites; caches web pages and offers them in search results
- You have just been hired as General Counsel

## Notice and Takedown...1

- Science fiction author sends Gaggle a notice claiming a user has posted one of his copyrighted stories to Gaggle bulletin board.
  - Fails to sign the notice or allege that he is the copyright owner.
  - Corrects that, and sends the URL to the allegedly infringing story, as well as a pointer to the authorized copy available for download on his website.

## Notice and Takedown...2

- After the copies of his fiction are removed, Author claims that bulletin board users have replaced them with false "news stories" calling him a thief, scoundrel, and spouse-abuser, and specifically identifies the URLs of those stories.

### Recall CDA § 230

(c)(1) Treatment of publisher or speaker.  
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

### Notice and Takedown...3

- Adult-oriented website claims that "somewhere on Usenet", and in the archives Gaggle maintains, its images have been copied and posted
  - identifies the "alt.binaries.perfect11" newsgroup as the location of most of these images

### Notice and Takedown...4

- Church of Deontology complains that Gaggle's search engine returns links to websites hosting infringing copies of Church scriptures and infringing DEONTOLOGY trademarks.
  - critic is in the Netherlands and does not want to agree to U.S. jurisdiction

### Notice and Takedown...5

- Web hosting company demands that Gaggle remove links to litigation papers (complaint for copyright infringement) that reproduce its copyrighted homepage as an exhibit.
- Plaintiff who had posted the papers files a counter-notification alleging that the exhibit is fair use.

### Notice and Takedown...6

- You, the newly burnt-out General Counsel, demand that Gaggle, Inc. hire several additional lawyers and paralegals to handle the slew of DMCA notices.