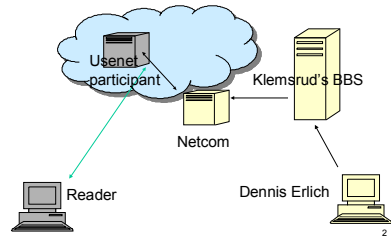


## Safe Harbors and Chilling Effects

Secondary Liability after the  
Digital Millennium Copyright Act

1

## RTC v. Netcom



2

## 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?*

3

## 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

4

## 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*)

5

## Takedown mechanics, §512(c)

- OSP lists designated agent for notice of claimed infringement: <http://www.copyright.gov/onlineosp/olist/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

6

- (3) **Elements of notification.**— (A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
  - (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.
  - (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
  - (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
  - (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly 7 infringed.

## Hendrickson

- Hendrickson to eBay:
  - “All Manson DVDs”
  - No listing of specific item numbers
  - No statement of authorization under penalty of perjury

8

## ALS Scan:

- ALS Scan to RemarQ:
  - “The newsgroup alt.binaries.pictures.erotica.als”
  - Identification of models with copyright notices

9

## 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*

10

## 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*

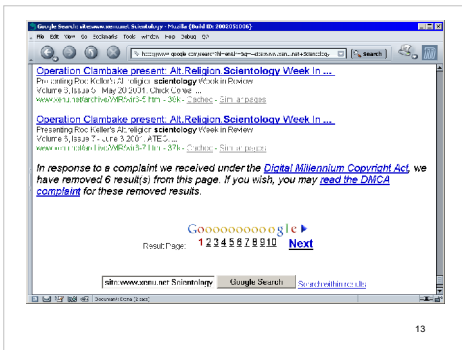
- Direct:
  - Copying, Fixation (MAI)?
  - Any element of volition or causation?
- Contributory:
  - Knowledge?
  - Substantial participation?
- Vicarious:
  - Right and ability to control?
  - Direct financial benefit?
- Fair use? *First Amendment?*

11

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

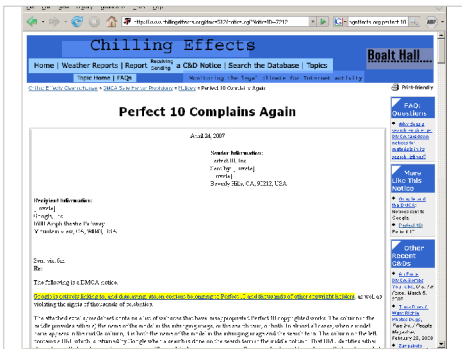
- Hendrickson to eBay:
  - “All Manson DVDs”
  - No listing of specific item numbers
  - No statement of authorization under penalty of perjury
  - **Notice does not substantially comply**
  - **->eBay gets safe harbor**
- ALS Scan to RemarQ:
  - “The newsgroup alt.binaries.pictures.erotica.als”
  - Identification of models with copyright notices
  - **Notice substantially complies**
  - **->RemarQ does not get safe harbor**
  - **->Analyze 2dary liability**

12



Find Deleted Notices: DMCA Safe Harbor Provisions

Subject	Sender	Recipient	Date	Topic Area	Link
Libertarianism.com	libertarian.com	Search Engine	May 8, 2008	DMCA Safe Harbor Provisions	
DMCA Bank	U.S. Air Force	Search Engine	May 15, 2008	DMCA Safe Harbor Provisions	
World War II Books	Time Inc. / People Magazine	Google.com	February 28, 2009	DMCA Safe Harbor Provisions	
100 Computers of Durocopy	247books.com	Google	February 27, 2009	DMCA Safe Harbor Provisions	
Chickens.com	chickens.com	Google	February 18, 2009	DMCA Safe Harbor Provisions	
MySpace.com	MySpace.com	Google, etc	January 25, 2009	DMCA Safe Harbor Provisions	
U.S. Department of Justice	U.S. Department of Justice	Recipient	January 24, 2008	DMCA Safe Harbor Provisions	
Search Engine	Search Engine	Google.com	January 24, 2008	DMCA Safe Harbor Provisions	
Search Engine	Search Engine	Google	January 9, 2008	DMCA Safe Harbor Provisions	
Search Engine	Search Engine	Google, etc	December 11, 2007	DMCA Safe Harbor Provisions	



### 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.

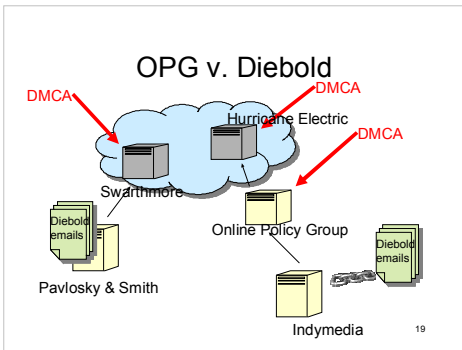
### OPG v. Diebold

- # 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 Slash of Diebold Memos... of amc

http://www.jindybay.org/news/2003/06/16/4919\_comment.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.

20

### 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.

21