

Section 512 of the DMCA: *A Historical Overview*

Why the DMCA?

- 1998: Congress enacts Digital Millennium Copyright Act to resolve unique copyright enforcement problems caused by widespread use of the Internet.
- *"The "Digital Millennium Copyright Act of 1998" was designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."*
S. REP. 105-190, 2

A Balancing Act

Interest of copyright holders v. interest of end users.



A statute that balances "the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse."

S.Rep. No. 105-190 at 21 (1998)



Notice and Take-Down provisions + **"Safe Harbors"**

Applying Section 512



GENERAL THRESHOLD REQUIREMENTS:

1. “service provider”? Section 512(k) (“material of the user’s choosing, **without modification** to the content of the material as sent or received”)
2. reasonable implementation of repeat infringer policy? Section 512(i)(A)
3. interference with standard technical measures? Section 512(i)(B)

SAFE HARBOR SPECIFIC REQUIREMENTS: (e.g. Section 512(c))

1. **actual knowledge** of the infringement; OR
2. “facts or circumstances” from which infringing activity is apparent (“**red flag**” **knowledge**) + acts expeditiously to remove/disable access to material; OR
3. **right and ability to control** the infringing activity, and
4. removal/disabling access to material upon receiving a **DMCA-compliant notice** of infringement

KEY TERMS

- ① “without modification” / “at the direction of a user”
- ② “actual knowledge”
- ③ “red flag knowledge”
- ④ “DMCA compliant notice”
- ⑤ “right or ability to control”

*How much filtering, moderation and “red flag” knowledge is **too much**?*

Hendrickson v. eBay

165 F. Supp.2d 1082 (C.D. Cal. 2001)

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- **Issue:** whether Section 512(c) shielded eBay from liability for copyright infringement by users selling counterfeit copies of the film “Manson” on eBay.
- **Held:** eBay met all prongs of the Section 512(c) safe harbor:
 1. No **actual** or “**red flag**” knowledge of particular listings being used by particular sellers to sell pirated copies of “Manson”.
 2. Ability to remove/block access to materials posted on its website and “VeRO” program ≠ “**right and ability to control**” infringing activity .
 3. Hendrickson’s notice of infringement ≠ “**comply substantially**” with Section 512(c)(3)(see next slide).

Required Elements for Proper Notification under Section 512(c)(3)



- Notification must include “substantially” the following elements:
 1. Physical or electronic signature of person authorized to act on behalf of copyright owner
 2. Identification of infringed copyrighted work
 3. Identification of infringing material that is reasonably sufficient to permit service provider to locate material
 4. Information reasonably sufficient to permit service provider to contact complaining party
 5. Good faith belief in infringing use
 6. Statement “under penalty of perjury” by complaining party

Corbis v. Amazon.com, 351 F. Supp.2d 109C
(W.D. Wash. 2004)



- **Issue:** Whether Amazon was liable for copyright infringement committed by vendors selling Corbis' copyrighted celebrity images on Amazon.
- **Held:** Amazon met specific requirements for Section 512(c) safe harbor
 1. No **actual** or "**red flag**" knowledge of infringement
 - Awareness that Corbis licensed celebrity photographs ≠ actual knowledge.
 - Notices by third parties ≠ "red flags".
 2. No "**right and ability**" to control infringing activity. Amazon was merely the forum for independent third party sellers to list and sell merchandise.

CoStar Group v. Loopnet,
373 F.3d 544 (4th Cir. 2004)



- **Issue:** Whether Loopnet engaged in “volitional” conduct sufficient to become an infringer (in context of *Netcom* holding that *passive* ownership and management of ISP is not enough for infringement).
- **Held:** Loopnet’s conduct was passive.

CoStar Group v. Loopnet, 373
F.3d 544 (4th Cir. 2004)
(cont'd)

- Although LoopNet engages in volitional conduct to block photographs measured by two grossly defined criteria, this conduct, which takes **only seconds**, does not amount to “copying,” nor does it add volition to LoopNet's involvement in storing the copy. [...] In performing this gatekeeping function, **LoopNet does not attempt to search out or select photographs for duplication**; it merely prevents users from duplicating certain photographs. To invoke again the analogy of the shop with the copy machine, **LoopNet can be compared to an owner of a copy machine who has stationed a guard by the door to turn away customers who are attempting to duplicate clearly copyrighted works**. LoopNet has not by this screening process become engaged as a “copier” of copyrighted works who can be held liable under §§ 501 and 106 of the Copyright Act.
- But see Gregory J's dissent: “LoopNet engages in non-passive, volitional conduct with respect to the photographs on its website such that the Netcom defense does not apply”

Io Group v. Veoh Network,
2008 WL 4065872 (N.D. Cal. 2008)

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- **Issue:** Whether Veoh was precluded from DMCA safe harbor protection by virtue of its automated functions that facilitate access to user-submitted content on its website (e.g. flash files and screencaps).
- **Held:** Veoh was not disqualified from Section 512(c) safe harbor:
 - Service providers seeking safe harbor under Section 512(c) are not limited to merely storing materials → automatic processing of user-submitted content ≠ “**modification**”.
 - No actual or “**red flag**” knowledge.

Viacom International, Inc. v. Youtube, Inc.,
676 F.3d 19 (2d Cir. 2012)

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■ **Issues:**

1. Whether Section 512(c)(1)(A) requires actual knowledge or awareness of **specific and identifiable** infringing activity
1. Whether YouTube's software function fell within Section 512(c) safe harbor – "by reason of the storage **at the direction of a user**"

Viacom International, Inc. v. Youtube, Inc.,
676 F.3d 19 (2d Cir. 2012)
(cont'd)

- **Held (1):** The basic operation of Section 512(c) requires actual knowledge *specific* infringing activity.

*"we are persuaded that the basic operation of § 512(c) requires knowledge or awareness of specific infringing activity. Under § 512(c)(1)(A), knowledge or awareness alone does not disqualify the service provider; rather, the provider that gains knowledge or awareness of infringing activity retains safe-harbor protection if it "acts expeditiously to remove, or disable access to, the material." Thus, **the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material, because expeditious removal is possible only if the service provider knows with particularity which items to remove.**"*

Viacom International, Inc. v. Youtube, Inc.,
676 F.3d 19 (2d Cir. 2012)
(cont'd)



- **Held (1):** The basic operation of Section 512(c) ALSO requires “red flag” knowledge *specific* infringing activity.

“The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead **between a subjective and an objective standard**. [...] The red flag provision, because it incorporates an objective standard, is not swallowed up by the actual knowledge provision under our construction of the § 512(c) safe harbor. Both provisions do independent work, and **both apply only to specific instances of infringement.**”

Viacom International, Inc. v. Youtube, Inc.,
676 F.3d 19 (2d Cir. 2012)
(cont'd)

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- **Held (3):**
 - Three of the challenged YouTube software functions (replication, playback, and the related video functions) occurred by “reason of the storage **at the direction of a user**” within the meaning Section 512(c)(1)
 - The fourth function, the syndication of YouTube videos to third parties, was remanded for further fact-finding