DMCA
Digital Millennium Copyright Act
1998 – An S & P Analysis

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ORIGIN AND BACKGROUND

- **1789**: U.S. Constitution: Article I, Section 8, Clause 8
  *"the Congress shall have power . . . to **promote the progress of science and useful arts**, by **securing** for **limited** times to authors and inventors the **exclusive** right to their respective writings and discoveries."*

- **1790**: Copyright Act
  The Copyright Act of 1790, An *Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies* was implemented

- **1841**: Folsom v. Marsh
  Concept of "**fair use**" for first introduced

- **1909, 1976**: Revisions of the U.S. Copyright Act

- **1990**: Circulation of Computer Software
  Congress amended the Copyright Act to prohibit commercial lending of computer software.

- **1996**: World Intellectual Property Organization (WIPO) Treaty
  Delegates from 160 countries considered two treaties on international intellectual property law that would *"permit application of fair use in the digital environment."*

- **1998**: Digital Millennium Copyright Act
  on October 28, 1998 by President Clinton

STAKEHOLDERS

- Authors
- Publishers
- Consumers
- Libraries and educational institutions
- Government
- Researchers
- the public

DMCA TITLES

The **United States Copyright Office** is responsible for administering the DMCA: http://www.copyright.gov/

The DMCA is divided into five titles:

1. **Title I**, the "***WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998***," implements the WIPO treaties.

2. **Title II**, the "***Online Copyright Infringement Liability Limitation Act***," establishes safe harbors for online ISPs

3. **Title III**, the "***Computer Maintenance Competition Assurance Act***," permits temporary copies of programs during computer maintenance

4. **Title IV** makes six miscellaneous amendments to US copyright law – relating to distance education, exceptions for libraries etc.

5. **Title V**, the "***Vessel Hull Design Protection Act,***" creates sui generis protection for boat hull designs

Refer: https://www.copyright.gov/legislation/dmca.pdf

DMCA TITLE I

- WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998

- New chapter to Title 17 of U.S. Code.

- Section §1201 – Circumvention of Copyright Protection Systems.
  - Prohibits unauthorized access through circumvention of copyright protection systems.
  - Anti-Trafficking Provision: prohibits the manufacture and distribution of the circumvention technology.

- Section §1202 – Copyright Management Information
  - Prohibits tampering with copyright management information (CMI).

ANTI-CIRCUMVENTION MEASURES

- Title I: "Circumvention of Technological Protection Measures"
- Includes two technological measures-
  - to prevent unauthorized access to a copyrighted work – no exceptions
  - To prevent unauthorized copying of a copyrighted work – highly specific exceptions to allow "fair use"
- prohibits devices which -
  - are primarily designed or produced to circumvent
  - have only limited commercially significant purpose or use other than to circumvent
  - are marketed for use in circumventing

EXCEPTIONS – UNAUTHORIZED COPYING

- for law enforcement, intelligence and other governmental activities
- Nonprofit library, archive and educational institution exception
- Lawful reverse engineering
- Encryption research
- Protection of minors
- Personal privacy
- Security testing

TITLE I - COURT CASE

Universal City Studios, Inc. v. Reimerdes

- Universal and other movies studios used an encryption system called CSS to prevent DVDs from being copied

- Reimerdes, Johansen, and Corley created and shared a program called DeCSS that would let users copy the data DVDs.

- Universal sued for *copyright infringement*.

- Corley argued that this was a **1st Amendment** *freedom of speech* issue because he didn't think CSS should be legal.

- Universal argued that this was akin to publishing the combination to a bank vault to encourage people to rob the bank.

- The Trial Court looked to the **Digital Millennium Copyright Act** (**DMCA**) (**17 U.S.C. §1201(a)(2)**) and found that DeCSS was a copyright violation because **it's only purpose was to defeat copyright protection**. Therefore offering to transfer and share DeCSS code to a user was not legal.

- The Court held that **§1201(a)(2)** was not a violation of the **1st Amendment** because it was content-neutral and furthered a substantial government interest unrelated to the suppression of free speech.

TITLE I - CRITICISM

- In 2015 Volkswagen was criticized of abusing the DMCA to hide their vehicles emissions cheat.

- It has been suggested that had the DMCA not prevented access to the software an independent "…researcher with legal access to Volkswagen's software could have discovered the code that changed how the cars behave in testing.."

DMCA TITLE II

- ***Online Copyright Infringement Liability Limitation Act***

- creates limitations on the liability of online service providers (OSPs) for copyright infringement when engaging in certain types of activities.

- establishes safe harbors for online ISPs

TITLE II – SAFE HARBORS

Safe harbors based on the following four categories of conduct by a service provider:

1. Transitory communications
2. System caching
3. Storage of information on systems or networks at direction of users
4. Information location tools

Even in case of a failure of a service provider to qualify for any of the limitations, the copyright owner must still demonstrate that the provider has infringed, and the provider may still avail itself of any of the defenses, such as fair use, that are available to copyright defendants generally

TITLE II - PROVISIONS

- A copyright owner can obtain a subpoena from a federal court ordering a service provider to disclose the identity of a subscriber who is allegedly engaging in infringing activities

- Ensures that service providers are not placed in the position of choosing between limitations on liability on the one hand and preserving the privacy of their subscribers, on the other.

LIMITATION FOR TRANSITORY COMMUNICATIONS

- The transmission must be initiated by a person other than the provider.

- The transmission, routing, provision of connections, or copying must be carried out by an automatic technical process without selection of material by the service provider.

- The service provider must not determine the recipients of the material.

- Any intermediate copies must not ordinarily be accessible to anyone other than anticipated recipients, and must not be retained for longer than reasonably necessary.

- The material must be transmitted with no modification to its content.

LIMITATION FOR SYSTEM CACHING

- The content of the retained material must not be modified.

- The provider must comply with rules about "refreshing" material—replacing retained copies of material with material from the original location— when specified in accordance with a generally accepted industry standard data communication protocol.

- The provider must not interfere with technology that returns "hit" information to the person who posted the material, where such technology meets certain requirements.

- The provider must limit users' access to the material in accordance with conditions on access (e.g., password protection) imposed by the person who posted the material.

- Any material that was posted without the copyright owner's authorization must be removed or blocked promptly once the service provider has been notified that it has been removed, blocked, or ordered to be removed or blocked, at the originating site.

LIMITATION FOR INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT THE DIRECTION OF USERS

- The provider must not have the requisite level of knowledge of the infringing activity, as described below.

- If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity.

- Upon receiving proper notification of claimed infringement, the provider must expeditiously **take down** or block access to the material.

LIMITATION FOR INFORMATION LOCATION TOOLS

- The provider must not have the requisite level of knowledge that the material is infringing. The knowledge standard is the same as under the limitation for information residing on systems or networks.

- If the provider has the right and ability to control the infringing activity, the provider must not receive a financial benefit directly attributable to the activity.

- Upon receiving a notification of claimed infringement, the provider must expeditiously **take down** or block access to the material.

DMCA TAKEDOWN NOTICE

The DMCA Takedown Notice provides a mechanism for copyright holders to request an OSP to remove material that is infringing their copyright. The copyright holder must establish that-

- He owns the copyright or has the right to assert infringement of a copyright he licenses.

- The infringement is not covered by an exception such as Fair Use or free speech laws.

- The content is capable of being infringed online. That mean the work must be something in digital form (text, images, audio, video etc.)

TAKEDOWN NOTICE - FILING

- Be in writing (this includes both hardcopy or digital);
- Be signed (whether in writing of via electronic signature) by the copyright owner or agent;
- Identify the original copyrighted work
- Identify the material that is infringing the copyrighted work;
- Include contact information
- Include a statement the complaint is in "good faith"
- Include a statement the information in the notification is accurate
- Include a statement that under penalty of perjury the complaining party is authorized to act for the copyright owner

TITLE II - COURT CASE

A & M Records Inc. v. Napster Inc.

- Napster produced software that allowed its Internet users to search for, request, download, and play music files, free of charge, by exchanging the files with other users.
- A & M Records sued, alleging that Napster's users infringed on their copyrighted music.
- Napster filed a motion for summary judgment, arguing that the safe harbor protected it from liability.
- The court denied Napster's motion because it did not meet the requirements of safe harbor, because it did **not** transmit, route, or provide connections for allegedly infringing material through its system.
- Employees had download files
- Monetary benefits

TITLE II - COURT CASE

Viacom Inc. v. YouTube, Google Inc.

- On March 13, 2007, Viacom filed a lawsuit against YouTube and its corporate parent Google for copyright infringement seeking more than $1 billion in damages.

- Viacom claimed that YouTube was engaging in "massive intentional copyright infringement" for making available a contended 160,000 unauthorized clips of Viacom's entertainment programming.

- Google relied on the "safe harbor" provision to shield them from liability.

- On June 23, 2010, the District Judge granted judgment in favor of YouTube.

- The court held that YouTube is protected by the safe harbor of the DMCA.

DMCA TITLE III

- ***Computer Maintenance Competition Assurance Act –*** *"*creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair."
- allows computer repair technicians to make temporary copies of software while repairing a computer
- The computer must already have a copy of the software in it
- The new copy cannot be used in any other manner
- The new copy must be destroyed immediately after the maintenance or repair is completed.

DMCA: CONCERNS & CRITICISM

- **Chills Free Expression and Scientific Research**

    - "chills the legitimate activities of journalists, publishers, scientists, students, programmers, and members of the public" – Russian researcher threatened

- **Jeopardizes Fair Use**

    - the movie industry's use of encryption on DVDs has curtailed consumers' ability to make legitimate, personal-use copies of movies they have purchased.

- **Impedes Competition and Innovation**

    - Apple has used the DMCA to tie its iPhone and iPod devices to Apple's own software and services.

    - Apple threatened BluWiki reverse-engineering online forums

RESPONSE TO CRITICISM

- On December 29th, 2015, the United States Copyright Office put out a **Notice and Request for Public Comment** on the anti-circumvention provisions of the DMCA.

- Congress asked the public to study the effects of the anti-circumvention rules and the process of granting exemptions, and respond.

- Organizations like **Defective By Design** https://www.defectivebydesign.org and **Electronic Frontier Foundation** https://www.eff.org have been very vocal in calling for change

- The Notice can be accessed here-

- https://s3.amazonaws.com/public-inspection.federalregister.gov/2015-32678.pdf

REFERENCES

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