Twenty Years Later, DMCA More Broken Than Ever

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Hi, my name is Devlin Hartline, and I work at Antonin Scalia Law School in Arlington, Virginia. Thanks to Hugh Hansen and the Fordham IP team for having me. A longer version of this presentation is available on the conference website for those interested.

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With Section 512 of the DMCA, Congress sought to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements" that take place online.

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The idea was that service providers and copyright owners would work together to help solve the online piracy puzzle. But things haven't gone according to plan—just look at the widespread infringement that's online. Why did things turn out this way? Because courts have misconstrued Section 512's red flag knowledge standards.

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In order to benefit from the safe harbors, Section 512 requires service providers to do several things, such as designate an agent to receive takedown notices and respond expeditiously when they do. But, importantly, service providers also have a duty to take down infringing content even when don't get a notice: If the service provider has either actual or red flag knowledge of infringement, it is obligated to remove it.

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For sites hosting user-uploaded content, actual knowledge is "knowledge that the material or an activity using the material on the system or network is infringing." And red flag knowledge is "aware of facts or circumstances from which infringing activity is apparent." Properly understood, actual knowledge requires knowledge that specific material ("the material") is actually infringing ("is infringing"), while red flag knowledge merely requires general awareness ("aware of facts or circumstances") that activity appears to be infringing ("is apparent"). There are similar provisions for search engines.

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Once the service provider has actual or red flag knowledge, the obligation to remove "the material" kicks in. With actual knowledge, it's easy, and the service provider doesn't have to go looking for "the material" since it already has actual, subjective knowledge of it. But what about with red flag knowledge where the service provider only knows of "infringing activity" generally? How does it know "the material" to take down? The answer is simple: Once the service provider has red flag knowledge, it has to investigate and find "the material" to remove.

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The examples given in the legislative history, which relate only to search engines, give us some idea of what Congress was thinking. It's not a red flag if the service provider views "one or more well known photographs of a celebrity at a site devoted to that person" since they might be licensed or fair use.

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However, sites that are "obviously infringing because they . . . use words such as 'pirate,' 'bootleg,' or slang terms . . . to make their illegal purpose obvious . . . from even a brief and casual viewing" do raise the red flag.

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The legislative history states that a service provider, like a search engine, "that views such a site and then establishes a link to it . . . must do so without the benefit of a safe harbor." Thus red flag knowledge applies once a service provider looks at something that is "obviously pirate"—as the legislative history puts it—even if it's an entire website.

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What's the most "obviously pirate" site? The Pirate Bay! (I stole this image, but I don't think they'll mind.) Like the examples in the legislative history, The Pirate Bay has the word "pirate" right in its title, and a brief viewing of the site reveals its obvious, infringing purpose. So you'd think that search engines can't link to it and maintain their safe harbors, right?

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Wrong! As of today, Google indexes nearly 1.5 million results from The Pirate Bay.

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Popular, current movies like Captain Marvel—which was awesome, by the way—abound.

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And it's not like Google hasn't been told that The Pirate Bay is dedicated to infringement—not that it needs to be told. According to Google's Transparency Report, it has received requests to remove over 4 million URLs from thepiratebay.org domain alone. Other related domains, such as thepiratebay.se, have received millions of requests as well. In a sane world, Google would have red flag knowledge that The Pirate Bay is "obviously pirate." But that's not the world we live in twenty years into the DMCA.

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So how is it that Google can index The Pirate Bay and not be worried about losing its safe harbor? The answer is that the courts, especially the Second and Ninth Circuits, have construed Section 512 in a way that has all but read red flag knowledge out of DMCA.

I briefly go through these four cases in my longer presentation that's on the conference website, but the gist is that these decisions have been the Four Horsemen of the Red Flag Apocalypse. The courts have interpreted red flag knowledge to require specific knowledge of particular infringing activity—something so close to actual knowledge as to render red flag knowledge nearly superfluous—and they've made it so that even the most crimson of flags won't suffice to trigger the removal obligation.

Contrary to Congress's plan, this perversely incentivizes service providers to do as little as possible to prevent infringements. Instead of looking into infringing activity of which they are subjectively aware, they are better off doing nothing lest they gain actual, specific knowledge

that removes their safe harbor protection. And it denigrates Section 512 to a notice-and-takedown regime where copyright owners are burdened with identifying infringements on URL-by-URL basis.

This has enabled service providers to game the system by building business models based on widespread, infringing content—even if they welcome it—so long as they respond to takedown notices. And the end result is that an overwhelming amount of obvious infringements have gone unchecked, and there's essentially none of the cooperation between service providers and copyright owners that Congress intended.

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Thanks again to Hugh Hansen and his team, and thank you all.