

Copyright & the Digital Millennium Copyright Act (“DMCA”)

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What is a Copyright?

- Copyright protection in the United States is based in Article I, Section 8, of the U.S. Constitution
 - *“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;”*
- Copyright Act of 1976
 - The federal statute governing copyright protection in the US, codified in [Title 17 of the US Code](#). Subject to limited exceptions, the Copyright Act preempts state law.



What is a Copyright?

- 17 U.S.C.A. § 102
- *(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:*
 - *literary works;*
 - *musical works, including any accompanying words;*
 - *dramatic works, including any accompanying music;*
 - *pantomimes and choreographic works;*
 - *pictorial, graphic, and sculptural works;*
 - *motion pictures and other audiovisual works;*
 - *sound recordings; and*
 - *architectural works.*

What is protected under copyright?

- Literary



- Dramatic



- Musical



- Artistic



- Architectural



What is not protected under copyright?

- Ideas
- Facts
- Data
- Concepts
- Systems
- Methods
- Principles
- Discoveries
- Names, Titles, Short Phrases



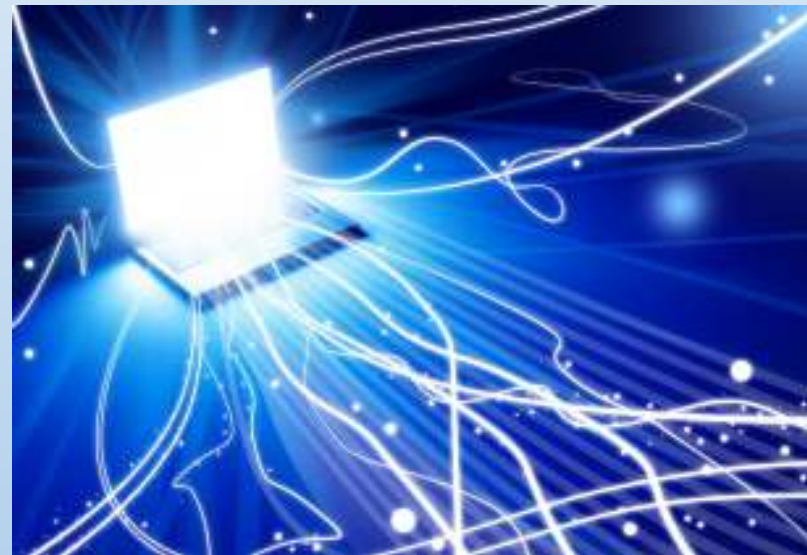
Copyright Infringement Example

- Shepard Fairey, et al. Plaintiffs, v. The Associated Press. Defendant (09 Civ. 1123 (AKH) (S.D.N.Y. Aug. 2, 2010))
- Famous street artist, Shepard Fairey, created the Hope poster during President Obama's first run for presidential election in 2008.
 - The design rapidly became a symbol for Obama's campaign, technically independent of the campaign but with its approval.
- In January 2009, the photograph on which Fairey allegedly based the design was revealed by the Associated Press as one shot by AP freelancer Mannie Garcia — with the AP demanding compensation for its use in Fairey's work.
 - Fairey responded with the defense of fair use, claiming his work didn't reduce the value of the original photograph.
- The Shepard Fairey and the AP came to a private settlement in January 2011, part of which included a split in the profits for the work.



The Internet Goes Mainstream

- The World Wide Web became publicly available on August 6, 1991 – Copyright protection law would need to be updated



Copyright Law squares with Technology

- Religious Technology Center v. Netcom On-Line Comm. (907 F. Supp. 1361 (N.D. Cal. 1995)).
- Dennis Erlich ("Erlich") was a former minister of Scientology ("RTC") who turned vocal critic of the Church via an on-line forum for discussion and criticism of Scientology.
- RTC maintained that Erlich infringed their copyrights when he posted portions of their works through the facilities of defendant Netcom On-Line Communications, Inc. ("Netcom").



Digital Millennium Copyright Act

- In 1998, Congress passed the Digital Millennium Copyright Act (“DMCA”) to adapt various aspects of the copyright law to address some of the unique issues presented by advances in digital information technology.
- Among other things, the DMCA provides mechanisms for limiting liability for digital platforms (e.g. YouTube) in connection with the unauthorized use of copyrighted material by users, including the unauthorized posting and transmission of protected material.

Digital Millennium Copyright Act

- Under the DMCA, four “safe harbor” categories are established through which a platform can qualify for immunity from secondary liability in connection with copyright infringement.
 - a) Transitory digital network communications;
 - b) System caching;
 - c) Information residing on systems or networks at direction of users; and
 - d) Information location tools.
- Where a platform’s service activity fits within one of the Act’s four safe harbors, it will qualify for safe harbor immunity provided that:
 - (i) it has adopted and informed its subscribers of a policy prohibiting the use of its service for copyright infringement activities, and
 - (ii) its policy includes appropriate mechanisms for dealing with “repeat infringers”. *See* Subsection 512(i)2

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- With regard to the safe harbor immunity available to platform under Sub-section 512(c), the Act further provides that where infringement activity has occurred, the safe harbor immunity will attach only if the platform
 - (i) lacked knowledge of the infringing conduct, and
 - (ii) upon receiving notice thereof, “responds expeditiously to remove” the infringing material. *See e.g. ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001); *In re subpoena to University of North Carolina at Chapel Hill*, 367 F. Supp. 2d 945, 948 (M.D.N.C. 2005).
- It should be noted, however, that *currently* the DMCA expressly provides that platforms have no responsibility to monitor the internet for infringing conduct by their users.
 - *See* Sub-section 512(m); *see also Perfect 10, Inc., v. CCBill, LLC.*, 2007 U.S. App. LEXIS 7238 at *9-10, *16 (9th Cir.) (“The DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement - squarely on the owners of the copyright.”)

Potential Changes to the Digital Millennium Copyright Act

- On May 21, 2020, the U.S. Copyright Office released a 200-page [report](#) suggesting changes to the DMCA
 - Analysis of if the DMCA's safe harbor provisions are still a proper balance of the needs of online service providers to that of copyright holders
 - Technology has advanced significantly since the DMCA was put into place 22 years ago.
- Suggested 10 potential items for Congress to consider legislating