

# Copyright Law

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## Topics:

- Special Issues Concerning “Service Providers”
- What is a “Service Provider”?
- How do “Service Providers” Cause Problems for Classic Copyright?

## The "Internet" in 1983



# The Faces of Infringement: What Changes in a Computer Network World?

61 CONTINUED:

PICARD  
[reaches for] B-9  
What are you doing?

SMITHSON (CONT'D)  
I need a sample of your blood. What do your Borg friends say? Resistance is futile.

The doctor takes a quick sample of Picard's blood as Picard glances to the B-7.

SMITHSON (CONT'D)  
Yes... I learned there might be an existing prototype from a Cardassian historian. They went to a great deal of trouble to find it and scatter it about on Rigel 7. I know it would pique your curiosity -- not conveniently make the Borg express the closest ship to Romulus when I contacted Starfleet. The bait you couldn't resist.

The Borg... is...  
The Borg... is...  
The Borg... is...

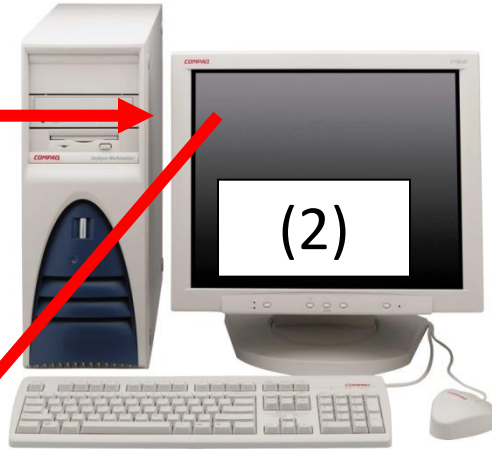
I now know the location of your entire fleet...  
... you may go.  
B-9  
Where?  
SMITHSON  
Out of my sight.  
The B-9 obediently. Leaves the room as:

SMITHSON (CONT'D)  
Maybe I'll train it to do little tricks for me like your robot does.

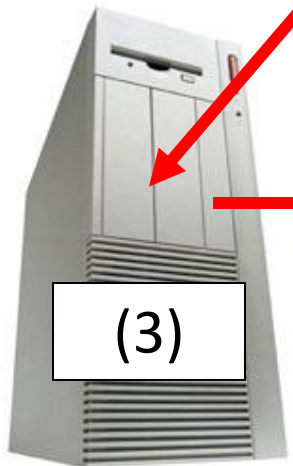
PICARD  
What's this all about?

(CONTINUED)

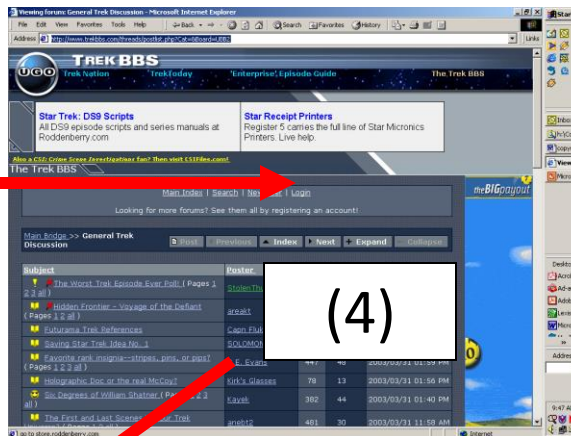
(1)



(2)



(3)



(4)



(4)

## Who commits direct copyright infringement?

- (1) A copyrighted work is uploaded (Uploader may violate §§ 106 (1), (3) (cf §§ 102(b), 107))
- (2) The upload is processed by software supervised by a human BBS operator and is forwarded *automatically* to an ISP (Does the human violate §§ 106 (1), (3)? *No.*)
- (3) The ISP, Netcom, carries the BBS on Usenet (an internet service), by *automatically* forwarding its contents (Does the ISP violate § 106 (1), (3)? *No.*)
- (4) Every human USENET subscriber around the world has access to the work and might download it (Subscriber may violate § 106 (1))

**BUT: Provider may be liable for secondary infringement once it has notice of alleged infringing material.**

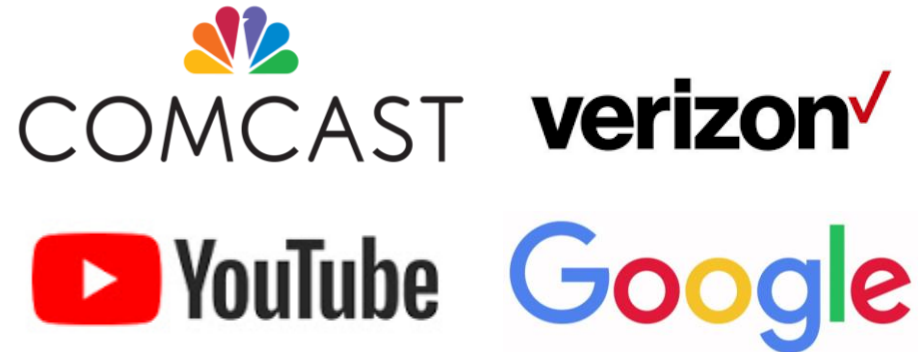
**RTC v. Netcom On-Line Comm.**  
(N.D. Cal. **1995**)

# The Faces of Infringement: the Universe of Service Providers

Service providers in 1998:



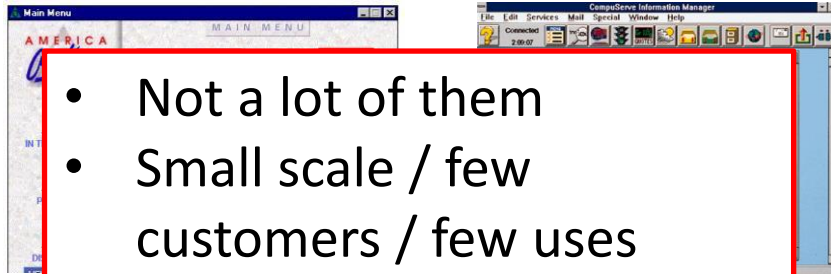
Service providers in 2023:





# The Faces of Infringement: the Universe of Service Providers

## Service providers in 1998:



- Not a lot of them
- Small scale / few customers / few uses
- Slow (copper (POTS), T1)
- Contents and connections largely hand-built and hand-edited
- (Internet protocols operated via software)

GeoCities

 **LYCOS**

  
i n k t o m i

**YAHOO!**

## Service providers in 2023:

- Lots of them
- Enormous scale
- So many customers, so many uses that Internet service is sometimes alleged to be a public utility
- Super fast (fiber, broadband, satellite (coming on fast) ) (but ... the US)
- Contents and connections largely guided by algorithms
- Every digital copy is a potentially infringing 106(1) “copy”

### **Section 512: the “safe harbors” for service providers – *adopted in the DMCA, in 1998***

§ 512(k) Definitions. –

**(1) Service provider.** -

**(A)** As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

**(B)** As used in this section, other than subsection (a), the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).

*In 1998, Congress was aware of services such as AOL and Geocities and search engines such as Excite and Inktomi. Today, it is applied to Google, YouTube, Facebook, and Twitter. How does scale matter?*

# The Faces of Infringement

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*If the defendant is a “service provider,” it may qualify for one or more of the four “safe harbors” under § 512:*

**§ 512(a):** “transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider” (the “passive conduit” safe harbor)

**§ 512(b):** “intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider” (the “system caching” safe harbor)

**§ 512(c):** “the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider” (SP’s “actual knowledge” of infringement defeats the safe harbor; “notice and takedown” provisions apply)

**§ 512(d):** “referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link (SP’s “actual knowledge” of infringement defeats the safe harbor; “notice and takedown” provisions apply)

# The Faces of Infringement

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**§ 512(c): INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—(1) IN GENERAL.**—A [service provider](#) shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the [service provider](#), if the [service provider](#)—

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
  - (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
  - (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the [service provider](#) has the right and ability to control such activity; and
- (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

**(2) DESIGNATED AGENT.**—The limitations on liability established in this subsection apply to a [service provider](#) only if the [service provider](#) has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

- (A) the name, address, phone number, and electronic mail address of the agent.
- (B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, and may require payment of a fee by [service providers](#) to cover the costs of maintaining the directory.

**(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 infringed.

(B) (i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a [service provider](#) has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the [service provider](#)'s designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the [service provider](#) promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the



# The Faces of Infringement

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***If a “safe harbor” applies, the service provider is not liable for monetary relief for copyright infringement so long as***

**§ 512(i):** the service provider accommodates “standard technical measures” used by copyright owners to identify and protect copyrighted works AND publishes a policy for terminating accounts of subscribers who are repeat infringers.

## **Key contemporary problems in applying Section 512:**

- a. Is § 512(c) or (d) a defense to claims of contributory or vicarious infringement? Ninth Circuit holds: yes. *UMG Recordings v. Shelter Capital Partners (Veoh)*.
- b. When does “red flag” knowledge of infringement occurring on a service provider’s system deprive the provider of the § 512 safe harbor?
- c. § 512 was drafted to encourage good behavior by service providers. Does the service provider have any actual incentive under § 512 to monitor its system?
- d. When is it reasonable to unbundle different functions provided by the service provider in order to analyze the applicability of separate subsections of § 512? See § 512(n)
- e. Does § 512(h) (copyright owner may obtain federal subpoena requiring service provider to disclose identity of subscriber who is an infringer) apply even in the absence of a filed Complaint?

# The Faces of Infringement

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## **(Still) open issues under § 512:**

**What possible claims for copyright infringement are (potentially) valid even if the accused defendant invokes and complies with § 512 (c)?**

Viacom Int'l v. YouTube (2d Cir. 2012): service providers may be liable if they have so-called “red flag” knowledge of ongoing copyright infringement ... **which consists of ...?**

**What obligation(s) does a service provider to vet allegations of copyright infringement for possible fair use, when receiving a notice under § 512 (c)? Can (should) a service provider comply with the law by using an automated fair use review system?**

Lenz v. Universal Music (9<sup>th</sup> Cir. 2016)

**Pay attention to automated tools for raising, resolving copyright claims online: implementing and bypassing § 512, with certain (but not necessarily comprehensive) balanced protections for users/content creators:**

- Content ID (Google, for certain owners of large catalogs of copyrights)
- “YouTube is making it much easier for creators to deal with copyright claims” (the Verge, July 9, 2019)
- “YouTube Rolls Out Copyright Checks Tools, Which Analyzes Your Video Prior to Upload, to More Users” (Social Media Today, March 17, 2021)



## "Let's Go Crazy" #1



Stephanie Lenz

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### Up next



Is this the face of copyright infringement?



# The End

