

## THE DMCA'S BALANCED FRAMEWORK

The DMCA establishes a clear, fair and equitable framework for determining when companies operating over the internet should be immune from damages liability for copyright infringement. It strikes a balance between “promoting the continued growth and development of electronic commerce, and protecting intellectual property rights.” H.R. Rep. No. 105-551(II), at 23 (1998). It strikes that balance in two key ways.

*First*, the DMCA established safe harbors limited to companies providing the basic building block functions of the internet: transmission, routing, or providing connections, 17 U.S.C. § 512(a); system caching, *id.* § 512(b); storage of data, *id.* § 512(c); and directories, indexes, and linking, *id.* § 512(d). Such companies are protected from damages when they are sued for infringement that arises from performing these specified functions. § 512(n). But Section 512 does not extend further and protect a consumer media company that is displaying, distributing or performing video content online. Such an entity is fully subject to the copyright laws, just like anyone else.

*Second*, the DMCA draws the line at “innocence.” See *ALS Scan, Inc. v RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001); *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1086 (C.D. Cal. 2004). If a service provider knows it is storing infringing material, or “becomes aware of a ‘red flag’ from which infringing activity is apparent,” it “lose[s] the limitation of liability if it takes no action” to remove the infringing material expeditiously -- ***and that is true whether or not the copyright owner has asked that infringing works be removed.*** H.R. Rep. No. 105-551(II) at 53 (1998). A service provider also loses its immunity if it “receive[s] 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.” § 512(c)(1)(B). Service providers also must respond promptly to any “take down” notices they receive, § 512(c)(1)(C), and must enforce a policy that terminates repeat infringers. § 512(i).

This balanced approach is fair. It protects those who provide basic services (transmission, caching, storage and linking) from liability when they innocently copy works in the course of providing their services (services that will necessarily involve some copying). But it does not protect companies that actively trade in the distribution and performance of copyrighted works. Such companies should be expected to respect copyright as part of their normal business activities. And it does not protect any company that is aware of infringement on its service and fails to stop it, or that builds a business in part on trafficking in infringing content. Such companies are not innocent and do not deserve protection.

This balanced approach also makes economic sense. A rule that challenges YouTube to minimize infringement has the lowest cost of compliance and encourages YouTube to negotiate for rights. In contrast, a rule that rails to do so encourages YouTube to infringe, maximizes compliance costs, and maximizes harm.