

# Digital Transactions: Part Two: Assignment 9

## 17 USC § 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***.
  - Words in blue bold italics have definitions in section 101.
  - The definitions section also describes various types of “works of authorship”

**§101** - A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

### Idea-Expression Dichotomy

|        |  |
|--------|--|
| 102(a) | Copyright protection subsists, in accordance with this title, in original works of authorship . . . <b>[expression]</b>  |
| versus |  |
| 102(b) | In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.<br><b>[idea]</b> |

### Derivative Works; Compilations

- is “based upon one or more preexisting works . . . [and is any] form in which a work may be recast, transformed, or adapted”
- Examples include:
  - translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation
  - a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship
- Why have derivative works protection?
  - Chain of products; new expression from public domain materials; different markets & licensing
- Compilations
  - a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works

## Exclusive Rights in © Works - § 106

- Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
  - **(1)** to reproduce the copyrighted work in copies or phonorecords [material object in which sound is fixated . . .];
  - **(2)** to prepare derivative works based upon the copyrighted work;
  - **(3)** to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
  - **(4)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
  - **(5)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
  - **(6)** in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission

## For digital content, there is copying . . .

- When a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a very brief period, a copy is made.
- When a printed work is "scanned" into a digital file, a copy -- the digital file itself -- is made.
- When other works -- including photographs, motion pictures, or sound recordings -- are digitized, copies are made.
- Whenever a digitized file is "uploaded" from a user's computer to a bulletin board system (BBS) or other server, a copy is made.
- Whenever a digitized file is "downloaded" from a BBS or other server, a copy is made.
- When a file is transferred from one computer network user to another, multiple copies generally are made.
- Under current technology, when an end-user's computer is employed as a "dumb" terminal to access a file resident on another computer such as a BBS or Internet host, a copy of at least the portion viewed is made in the user's computer. Without such copying into the RAM or buffer of the user's computer, no screen display would be possible

### Distribution Right

- § 106(3):
  - “Subject to sections 107 through 121, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: .  
..
  - to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”
- “First sale” doctrine - § 109(a):
  - “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of *that* copy or phonorecord.”
  - But, § 109(a) does not apply to the rental of phonorecords or computer programs for profit. See § 109(b)

### Public Performance and Display Rights

- § 101 - to "**display**" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially
- § 101 - to "**perform**" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible

## Public Performance and Display Rights

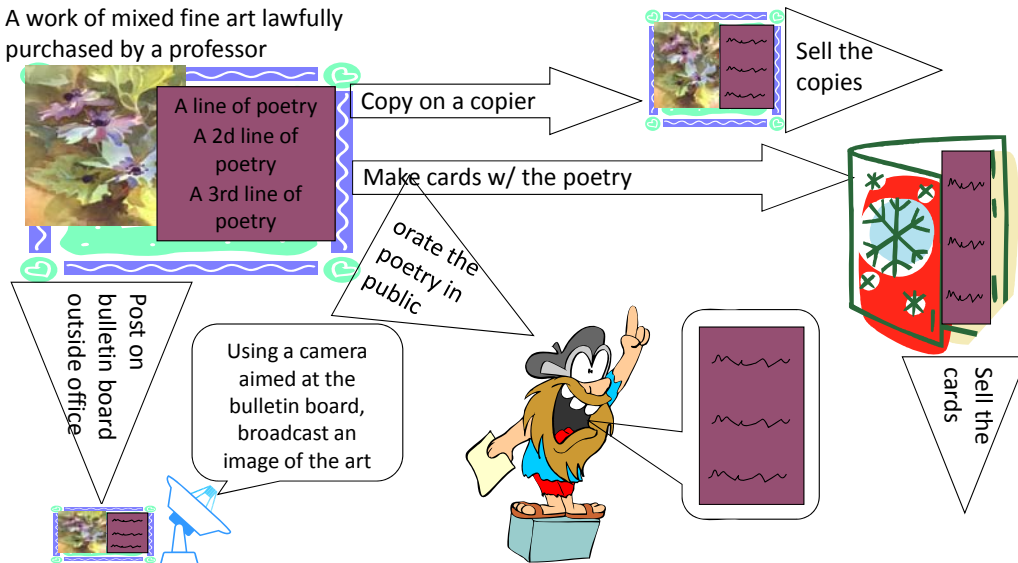
- If it moves, it's a performance; if it stays still, it's a display
- § 101 - to perform or display a work "**publicly**" means –
  - (1) to perform or display it at a place
    - open to the public or
    - at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
  - (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

## § 109(d)

- The privileges prescribed by subsections
  - 109(a) [first sale doctrine] and
  - 109(c) [limitation on the display right]
  - do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

## Public Performance & Display Rights (& others)

A work of mixed fine art lawfully purchased by a professor



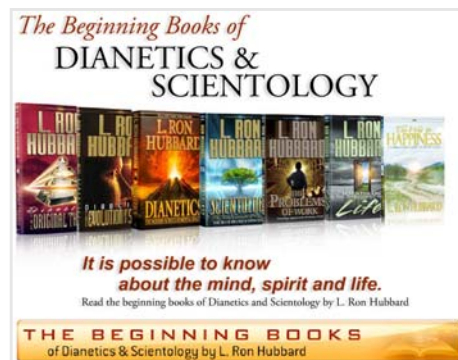
- Considering section 109, but ignoring any other possible exemptions arising from sections 107 through 121, which actions infringe which rights?

## Fair Use

- Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work,
  - including such use by reproduction in copies or phonorecords or by any other means specified by that section,
- for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.
- In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
  - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors

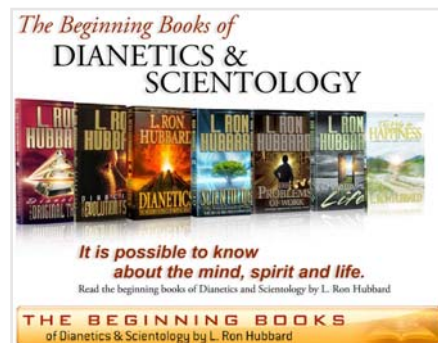
Secondary Liability – ISPs  
Religious Tech. Ctr. v. Netcom (ND.Cal.1995)

- BBS/ISP liable for copyright infringement of BBS subscriber?
- Rights holder is RTC, L. Ron Hubbard works related to Scientology
- Direct
  - Volition or causation by Netcom?
    - Or, are contributing actions “automatic and indiscriminate”
    - Mere conduit?



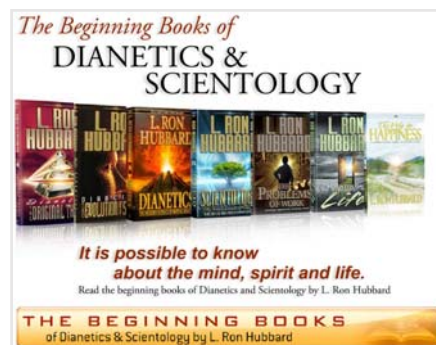
Secondary Liability – ISPs  
Religious Tech. Ctr. v. Netcom (ND.Cal.1995)

- Contributory
  - w/ knowledge = Knew or Should Have Known (KorSHK)
- Situations where knowledge might not be found
  - Colorable claim of fair use
  - No copyright notices
  - Insufficient documentation from P
- Substantial participation
  - Compare to leasing premises?
  - “fair” to impose liability assuming simple preventive measures are available



Secondary Liability – ISPs  
Religious Tech. Ctr. v. Netcom (ND.Cal.1995)

- Vicarious
- Right and ability to control
  - User terms
  - netiquette
  - Suspend accounts?
- Direct financial benefit
  - Proportional or fixed fees
  - Erlich's infringement doesn't enhance value/profit of Netcom's services
- First Amendment / Fair Use



## 17 U.S.C. 512(a)

**(a) Transitory digital network communications.**--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 provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if--

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) the material is transmitted through the system or network without modification of its content.



## 17 U.S.C. 512(b)-(d) in part . . .

### **(b) System caching.--**

(1) Limitation on liability.--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 intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which--

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met. . . .

### **(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-- . . . .

**(d) Information location tools.--**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 provider 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, if the service provider-- . . . .

## 17 U.S.C. 512(c)

### **(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) . . . .

## 17 U.S.C. 512(c)

(c) Information residing on systems or networks at direction of users.—

...

(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 provisions of subparagraph (A).

## 17 U.S.C. 512(d)

(d) Information location tools.--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 provider 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, if the service provider--

(1) (A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) 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

(3) upon notification of claimed infringement as described in subsection (c)(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, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) [identify w/ sufficiently specific information to locate\_] shall be **identification of the reference or link**, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

## 17 U.S.C. 512(g)

(g) Replacement of Removed or Disabled Material and Limitation on Other Liability.—

(1) No liability for taking down generally.— Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception.— Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification.— To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability.— A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

## 17 U.S.C. 512(k)

### (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).

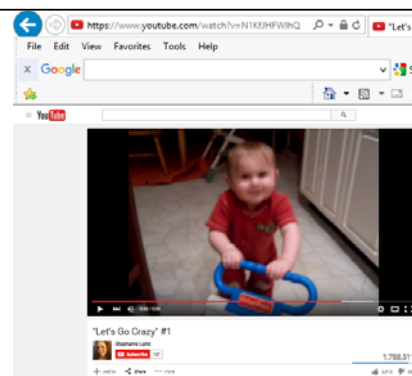
## CoStar Group, Inc. v. LoopNet, Inc. (4th Cir. 2004)

- LoopNet subscribers posting CoStar photos
- LoopNet terms of service obtain subscriber promise not to upload infringing materials
- Contributory / Vicarious liability?
- The *Netcom* opinion remains viable
  - “direct infringement must involve conduct having a volitional or causal aspect.”
- What impact from LoopNet’s gatekeeping practices for uploaded photos?
- Dissent
  - LoopNet is not as passive with a photo posting as compare to a text posting

Because LoopNet, as an Internet service provider, is simply the owner and manager of a system used by others who are violating CoStar's copyrights and is not an actual duplicator itself, it is not *directly* liable for copyright infringement.

## Lenz v. Universal Music (9<sup>th</sup> 2015)

- Under 512(f) . . .
- “the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law”
- Nature of the “subjective good faith belief” to not run afoul of 521(f) . . .
  - Were Universal’s actions sufficient?
  - Computer algorithms (pg. 19)
  - Willful blindness might be applicable



512(f) Misrepresentations.—Any person who knowingly materially misrepresents under this section—  
(1) that material or activity is infringing, or  
(2) that material or activity was removed or disabled by mistake or misidentification,  
shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

## Other items . . .

- Linking and Framing
- Respondeat Superior
  - E-mail
  - Weblogs
  - Chat Rooms
- Securities Law
  - Duty to Update
  - Forward Looking Statements

ISP Safe Harbors - Ellison v. Robertson (9th.2004)

- Robertson scanning Harlan Ellison sci-fi works
- Traveling through Usenet, messages passed through AOL
  - Messages contain non-authorized scanned portions of Ellison's books
  - AOL failure to keep contact email updated
- Can a reasonably implemented policy against repeat infringers contain a faulty notice mechanism?
- If not, impact on the service provider?

512(a-d) safe harbors:

(1) Transitory digital network communications; (2) system caching; (3) information residing on systems or networks at the direction of users; and ( 4) information location tools.

## Assignment Nine Problems

- 9.1 to 9.4
- 9.5
- 9.6 to 9.8