

# Internet Service Providers' Liability: Copyright enforcement and Free Speech Issues

El Derecho de Autor: Nuevos Temas en el  
Entorno Digital

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# Internet Service Provider Immunity

- U.S. Copyright Act §512
- Problems with U.S. provisions
- Similar ISP provisions in Free Trade Agreements
- Alternative International Approaches

# Questions

- Would ISPs be liable under national law?
  - Direct infringement
  - indirect/secondary liability
- “Safe harbors” only needed where there is liability.
- What type of provision is appropriate?
  - Blanket immunity or conditional safe harbor?

ISP Business  
Risk

Internet  
Architecture

Freedom  
of Speech

Copyright  
Protection

# Background to U.S. Provisions:

- ISPs sought safe harbors for 2 reasons:
  - Conflicting U.S. secondary and direct infringement cases.
  - Interpretation of temporary reproduction in computer memory.
- Background unique to U.S.
- No international agreement
  - Secondary liability.
  - OMPI WCT rejection of temporary reproduction.
- Sound policy reasons for ISP immunity but U.S. provisions not a good model to follow

# U.S. ISP Provision - 17 USC §512

- Safe Harbors - Limited immunity for 4 activities:
  - Transitory communication of information (ss. 512(a))
  - Intermediate and temporary caching (s.512(b))
  - Innocent hosting of end-user's material on ISP network (s.512(c))
  - Providing location tools- hyperlinks (s.512(d))
- Administrative expedited subpoena requires ISP to disclose identity of subscriber.

# Safe Harbors - Conditions;

## General:

- ISP adopted and reasonably implemented, and informs subscribers, of policy to terminate “repeat infringers”; and
- Accommodate and non-interference with standard technical measures.

## Conduit Safe Harbor (s.512(a)):

- ISP does not initiate chain of transmission
- ISP does not select material and transmission done through an automatic process
- ISP does not select recipients
- No copy retained longer than necessary
- Material transmitted without modification.

# Notice and Takedown Procedure

- Webhosting and Location Tools safe harbors:
  - - upon receipt of valid takedown notice from rightholder or agent, good faith belief of infringement, ISP must remove or block access to identified material and notify subscriber.
  - Subscriber may countersue - good faith belief that mistake or misidentification
  - ISP must notify complainer and reinstate material in 10-14 business days unless lawsuit filed.



# U.S. ISP Provision - Issues:

- Takedown notices misused:
  - No due process & private censorship.
- Create incentives for ISP to takedown material or terminate user on unproven allegation of infringement.
- Anti-competitive misuse - Walmart v. Fat Wallet.
- Safe harbors too narrow to be useful:
  - Doesn't cover all internet service providers, or activities (Google caching).
- Doesn't accommodate P2P - Termination of subscribers where no legal obligation as "repeat infringer".

# U.S. ISP Provisions - Issues:

Expedited administrative subpoena process:

- Lack of due process and procedural safeguards;
- Privacy concerns;
- Inconsistent with many countries' discovery procedures - issued by court clerk on allegation of infringement;
- Not available where allegedly infringing material resides on users' computer (RIAA v Verizon (2003); RIAA v Charter Communications (2004)).

# Alternative Approaches

- Blanket immunity.
- Alternative to private notice and takedown.
  - Notice-notice (new Canadian C-60 Bill)
  - Court order to remove or disable access
- Variations on U.S. safe harbor provisions:
  - Immunize broader type of ISP activities;
- Limit liability basis through temporary reproduction.
- Judicial subpoena power.

# Draft Access to Knowledge Treaty - Option 1:

1. The exclusive rights of copyright owners shall be subject to exceptions and limitations of liability sufficient to ensure there is no impairment of the provision of Internet services that provide access to knowledge, including, but not limited to, Internet access and transmission, broadband services, hosting, caching, linking and the provision of online directories.
2. Should the laws of a Member State recognize theories of secondary liability under its national law, any authority able to impose such secondary liability or grant remedies, therefore, must consider, before imposing any such liability or remedy, whether the imposition of such liability or remedy will negatively effect access to knowledge, and must seek to avoid such negative affect.
3. The exclusive rights of copyright owners shall be subject to appropriate opportunities and processes to facilitate access by service providers to content that has entered the stream of commerce.

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