

# Internet Law: Class 4

Professor Marketa Trimble

## DIGITAL MILLENNIUM COPYRIGHT ACT

17 U.S.C. 512  
Limitations on liability relating to material online

17 U.S.C. Chapter 12  
Copyright Protection and Management Systems

DIGITAL MILLENNIUM COPYRIGHT ACT

17 U.S.C. 1202

- (a) False copyright management information
- (b) Removal or alteration of copyright management information

DIGITAL MILLENNIUM COPYRIGHT ACT

17 U.S.C. 1201 (a)(1)(A)

No person shall circumvent a technological measure that effectively **controls access to a work** protected under this title. ...

**DIGITAL MILLENNIUM COPYRIGHT ACT**

**17 U.S.C. 1201 (a)(2)**

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively **controls access to a work** protected under this title;
- (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively **controls access to a work** protected under this title; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively **controls access to a work** protected under this title.

**DIGITAL MILLENNIUM COPYRIGHT ACT**

**17 U.S.C. 1201 (b)(1)**

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

- (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively **protects a right of a copyright owner** under this title in a work or a portion thereof;
- (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively **protects a right of a copyright owner** under this title in a work or a portion thereof; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively **protects a right of a copyright owner** under this title in a work or a portion thereof.

<b>1201(a)(3)</b>	<b>1201(b)(2)</b>
<b>(B)</b> a technological measure “ <b>effectively controls access to a work</b> ” if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.	<b>(B)</b> a technological measure “ <b>effectively protects a right of a copyright owner under this title</b> ” if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

<b>MDY INDUSTRIES V. BLIZZARD ENTERTAINMENT</b>	
<b>9th Cir. (<i>MDY Ind.</i>)</b>	<b>Fed. Cir. (<i>Chamberlain</i>)</b>
<b>§1201(a) does not require a nexus to copyright infringement</b>	<b>§1201(a) requires a nexus to copyright infringement</b>
<ul style="list-style-type: none"> <li>• <b>statutory language</b> <ul style="list-style-type: none"> <li>- measure protecting access v. §106 rights</li> <li>- §1201(a)(3)(A) examples (descrambling and decrypting)</li> <li>- §1201(b) prohibition of trafficking</li> <li>- §1201(a) rule-making</li> </ul> </li> <li>• <b>legislative history</b> <ul style="list-style-type: none"> <li>- no nexus to infringement under §1201(a)</li> <li>- “on demand,” “pay-per-view” access</li> </ul> </li> </ul>	<ol style="list-style-type: none"> <li>1) Balance the interests of © owners and information users</li> <li>2) Need to permit fair uses</li> <li>3) Cannot facilitate aftermarket monopolies</li> <li>4) Must prevent “absurd and disastrous results”</li> <li>5) Rational exercise of the © Clause authority</li> <li>6) Internal consistency of the © Act</li> </ol>

**1201(a)(3)**

**(A)** to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, **without the authority of the copyright owner;**

**Fed. Cir.:**

“...this definition imposes an additional requirement on a § 1201(a)(2) plaintiff: to show that the defendant’s circumventing device enables third parties to access the copyrighted work without the copyright owner’s authorization”

**2d Cir.:**

“The Second Circuit has adopted a different view, explaining that § 1201(a)(3)(A) plainly exempts from § 1201(a) liability those whom a copyright owner authorizes to circumvent an access control measure, not those whom a copyright owner authorizes to access the work.”

*MDY*, p. 953, fn. 16

**321 Studios v. Metro Goldwyn Mayer Studios, Inc.,**

307 F. Supp. 2d 1085 (N.D. Cal. 2004)

The court rejected the argument that a technological measure cannot be considered effective if its countermeasures are widely available on the Internet. *Id.* at 1095.

The court noted that the argument would be equivalent to a claim that, since it is easy to find skeleton keys on the black market, a deadbolt is not an effective lock to a door. *Id.*

**DIGITAL MILLENNIUM COPYRIGHT ACT****17 U.S.C. 1201 (a)(1)(C)**

... [D]uring each succeeding 3-year period, the Librarian of Congress ... shall make the determination in a **rulemaking proceeding** ... of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. ...

**Class 4 (Wednesday, 21 April 2021)**

1. Private ordering and content moderation
2. Network neutrality, search neutrality, and cloud neutrality
3. Antitrust issues in the ISP ecosystem
4. Future of norms on the internet
5. Conclusions—the current realities of the Internet

## Liability of Internet Intermediaries

- Non-copyright provisions:
  - 470 U.S.C. 230 (Communication Decency Act)
  - 15 U.S.C. § 1114(2)(B)-(C) (Lanham Act - trademarks)
- 17 U.S.C. 512 – Digital Millennium Copyright Act (“DMCA”)

**(B)** Where the infringement or violation complained of is contained in or is part of **paid advertising matter** in a newspaper, magazine, or other similar periodical or in an electronic communication ..., the remedies of the owner of the right infringed or person bringing the action under section 1125(a) of this title as **against the publisher or distributor** of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The limitations of this subparagraph shall apply only to **innocent infringers and innocent violators**.

**(C)** Injunctive relief shall not be available to the owner of the right infringed or person bringing the action under section 1125(a) of this title with respect to an issue of a newspaper, magazine, or other similar periodical or an electronic communication containing infringing matter or violating matter where restraining the dissemination of such infringing matter or violating matter in any particular issue of such periodical or in an electronic communication would **delay the delivery** of such issue or transmission of such electronic communication after the regular time for such delivery or transmission, and such delay would be due to the method by which publication and distribution of such periodical or transmission of such electronic communication is customarily conducted in accordance with sound business practice, and not due to any method or device adopted to evade this section or to prevent or delay the issuance of an injunction or restraining order with respect to such infringing matter or violating matter.

## Prager University v. Google

- 9th Cir., 2020
- YouTube tagged several dozen of PragerU's videos as appropriate for the Restricted Mode and therefore third parties could not advertise on the videos
- PragerU claimed violation of the First Amendment, false advertising, and various state law claims
- YouTube is a private entity not subject to Free Speech obligations
- "YouTube may be a pragmatic public square on the Internet, but it is 'not transformed' into a state actor solely by 'providing s forum for speech'."
- YouTube does not perform a public function – a function that is "both traditionally and exclusively governmental."

## Biden v. Knight First Amendment Institute

- S. Ct., 5 April 2021
- Whether the First Amendment deprives a government official of his right to control his personal Twitter account by blocking third-party accounts if he uses that personal account in part to announce official actions and policies.
- S. Ct. vacated the lower-court judgment and remanded to dismiss the case as moot
- Justice Thomas's concurrence



“Today’s digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors.

Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties.

We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.”

Justice Thomas in his concurring opinion in  
Biden v. Knight First Amendment Institute, 593 U.S. – (2021), 5 April 2021

## Private Ordering

- “Private ordering is the regulation, enforcement and dispute resolution by private actors, as opposed to actors in the public legal order.”
- The role of ISPs in private ordering on the internet

## eBay Dispute Resolution

- eBay first launched in 1995
- In 1999 Professor Ethan Katsh launched a pilot ODR program for eBay
- Later SquareTrade.com provided mediation services to eBay
- Since 2003, eBay's ODR in-house

## eBay Dispute Resolution

- Types of disputes:
  - Payment disputes
  - Quality disputes
  - Feedback (reputation score) disputes
  - Owner (IP) rights disputes
- A “staircase” design:
  - Problem diagnosis
  - Working with the complainant
  - Direct negotiation assisted by technology
  - Evaluation phase

## eBay Dispute Resolution

- Lessons Learned (Schmitz & Rule):
  - Resolutions should be fast and easy
  - Discoverability and easy access are very important
  - Consumers are not motivated by giveaways
  - Satisfaction is not a good way to measure the effectiveness of resolutions programs
  - Sellers have the advantage
  - You have got to set the right tone
  - Do not presume everything is fraud
  - Outcomes have to be consistent and fair
  - Resolution processes do not need to be binding
  - Resolution systems need to be continuously learning

## ISP Liability and Monetization

- YouTube's Content ID as an example
  - Eligibility
  - Subject matter
  - Scope of protection
  - Exceptions and limitations to copyright
  - Misuses of copyright
  - Choice of law
  - Globalization of section 512 notice and takedown

## Network Neutrality

- Professor Tim Wu
- “Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and platforms equally. This allows the network to carry every form of information and support every kind of application.”
- “The principle suggests that information networks are often more valuable when they are *less* specialized – when they are a platform for multiple uses, present and future.”

[http://www.timwu.org/network\\_neutrality.html](http://www.timwu.org/network_neutrality.html)

## Network Neutrality

- De facto monopoly of broadband providers vis-à-vis individual subscribers
  - Multi-homing not widely practiced
  - High switching costs
- A gatekeeper position vis-à-vis edge providers
- Vertical integration in the industry
- Scarcity of broadband connection at peak hours

## Network Neutrality: The 2010 Order

- “Open Internet Order”
- For “broadband”: “Broadband or high-speed Internet access allows users to access the Internet and Internet-related services at significantly higher speeds than those available through ‘dial-up’ services.”
- Bright-line rules
  - No blocking
  - No unreasonable discrimination
- Transparency rules
- Fixed broadband providers classified as an “information service”
- Partly invalidated in Verizon v. FCC (D.C.Cir. 2014)

## Network Neutrality: The 2015 Order

- “Protecting and Promoting the Open Internet”
- Fixed broadband providers classified as a “telecommunications service”
- Bright-line rules
  - No blocking
  - No throttling
  - No paid prioritization
- No unreasonable interference or unreasonable disadvantage to consumers or edge providers
- Enhanced transparency rules

## Network Neutrality: The 2018 Order

- “Restoring Internet Freedom”
- Fixed broadband providers classified as an “information service”
- A “light-touch regulatory scheme”
- Eliminated the bright-line rules of the 2015 Order
  - (no blocking, throttling, and paid prioritization)
- Scaled-back transparency rules
  - No exemption for small providers
- Antitrust law and consumer protection laws better forms of protection

The screenshot shows the FCC's Broadband Data Collection Consumer Information page. The page features a dark navigation bar with the FCC logo, navigation links for 'Browse by CATEGORY' and 'Browse by BUREAUS & OFFICES', and a search bar. Below the navigation bar, there are links for 'About the FCC', 'Proceedings & Actions', 'Licensing & Databases', 'Reports & Research', 'News & Events', and 'For Consumers'. The main content area is titled 'Broadband Data Collection Consumer Information' and includes a sidebar with links for 'Home', 'Resources', 'For Consumers', 'Broadband Data Task Force', and 'Download the FCC Speed Test App'. The main content is divided into three sections: 'Getting Connected to Broadband', 'Share Your Broadband Experience', and a call to action button 'Share Your Broadband Experience'.

fcc.gov/broadbandData/consumers

Federal Communications Commission

Browse by CATEGORY

Browse by BUREAUS & OFFICES

Search

About the FCC Proceedings & Actions Licensing & Databases Reports & Research News & Events For Consumers

Home / About the FCC / FCC Initiatives / Broadband Data Collection /

## Broadband Data Collection Consumer Information

**Broadband Data Collection**

Home

Resources

**For Consumers**

Broadband Data Task Force

Download the FCC Speed Test App

### Getting Connected to Broadband

In today's world, it is critical that families and businesses across the country have access to broadband. As work, education, healthcare, and many other activities have moved online, broadband is no longer nice to have. It's need to have for everyone.

In order to better determine where high speed internet services are currently unavailable, we need precise, accurate, and up-to-date broadband mapping data.

The FCC's Broadband Data Task Force is developing the necessary tools to gather this information. This is a complex, data-driven effort that will involve building new systems, process, and supporting materials.

These new tools will enable the FCC to create maps that display fixed broadband availability for individual locations and mobile broadband availability with more accuracy. The program will also provide a way for consumers, as well as Tribal, state, and local governments, to challenge and improve the accuracy of the maps by sharing data with the FCC. More accurate maps will enable broadband funding programs to target support for broadband services to the areas most in need.

### Share Your Broadband Experience

The Commission is working hard to develop these new tools as quickly as possible. In the meantime, consumers can share their broadband experiences with the Broadband Data Task Force:

[Share Your Broadband Experience](#)

Your experience with the availability and quality of broadband services at your location will help to inform the FCC's efforts to close the digital divide. We may also send you additional information by email in the future as we develop

## Antitrust and Intermediaries

- U.S. antitrust cases against Google as examples
- Monopoly position on the market
  - “General search services”
  - Search advertising

## Antitrust and Intermediaries

- Abuse of the monopoly position
  - Exclusion of competition
    - Payments to Apple for exclusivity
    - Pre-setting Chrome as the default browser, including through Android
    - Anti-forking, pre-installation agreements, and revenue share agreements
    - Default on voice assistant devices, in automobiles
  - Limitation on SA360 interoperability
  - Directing consumers directly to particular destinations

## Antitrust and Intermediaries

- Google's move away from the organic search
- A move to mobile devices
- IoT

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