TABLE OF CONTENTS

Dedication .................................................. iii
Preface ..................................................... v

CHAPTER 1

Introduction: New Law for New Technology

§ 1.01 “Cyberspace Law:” A Premature Baby? .......... 1-1
§ 1.02 The Digital Millennium Copyright Act:
  A New Departure .............................................. 1-5
  [1] The Deficiencies in Copyright Enforcement
      Addressed by the Millennium Act . . . . 1-10
      Technologies ........................................... 1-15
  [3] The Dangers of Focusing on
      Copy-Control Technology ....................... 1-28.1

CHAPTER 2

Legal Reinforcement of Technological Measures for
Protecting Copyrighted Works: The Anti-Circumvention
Rule and the Anti-Trafficking Rules

§ 2.01 Introduction .............................................. 2-2.2
§ 2.02 Implementing the Two WIPO Treaties:
  Practical and Policy Risks 2-3
§ 2.03 The Millennium Act’s Rules: Classification
  and Terminology ......................................... 2-11
§ 2.04 The Anti-Circumvention Rule ......................... 2-15
  [1] Strength of the Rule 2-30
  [2] Delayed Effective Date 2-36
     [a] The Librarian’s Rulemaking Power ......................... 2-43
     [b] The Librarian’s Year-2000 Exemptions ................. 2-51
     [i] Exemption for Lists of Web Sites Blocked by Screening Software ...... 2-52
     [ii] Exemption for Literary Works Blocked by Obsolete or Malfunctioning Access-Control Measures .... 2-53
     [iii] Denied Exemptions .......... 2-56
     [c] The Librarian’s Year-2003 Exemptions ................. 2-56.3
     [i] Modified Exemption for Screening Blacklists ...... 2-56.5
     [ii] Exemption for Computer Programs to Which Access is Blocked by Malfunctioning, Obsolete Dongles .... 2-56.8
     [iii] Exemption for Computer Programs and Video Games in Obsolete Formats that Require Original Media or Hardware for Access .... 2-56.10
     [iv] Exemption for Literary Works in eBook Format with Both “Read-Aloud” and “Specialized Format” Features Blocked .... 2-56.15
     [v] Denied Exemptions .......... 2-56.18
     [d] The Librarian’s Year-2006 Exemptions ................. 2-56.26
     [e] The Librarian’s Year-2010 Exemptions ................. 2-56.30
     [f] The Librarian’s Year-2012 Exemptions ................. 2-56.33
     [g] The Unlocking Consumer Choice and Wireless Competition Act of 2014 .................. 2-56.39

xii  CYBERLAW
<table>
<thead>
<tr>
<th>TABLE OF CONTENTS</th>
<th>xiii</th>
</tr>
</thead>
<tbody>
<tr>
<td>[h] Author’s Comment on Requirements for Rulemaking Exemptions</td>
<td>2-56.40</td>
</tr>
<tr>
<td>§ 2.05 The Anti-Trafficking Rules</td>
<td>2-56.49</td>
</tr>
<tr>
<td>[1] The Seven Elements of a Civil Trafficking Offense</td>
<td>2-56.62</td>
</tr>
<tr>
<td>[a] Summary</td>
<td>2-56.62</td>
</tr>
<tr>
<td>[b] Trafficking</td>
<td>2-56.63</td>
</tr>
<tr>
<td>[c] Means for Circumvention</td>
<td>2-56.65</td>
</tr>
<tr>
<td>[d] Satisfaction of Condition (A), (B) or (C)</td>
<td>2-56.69</td>
</tr>
<tr>
<td>[e] A Technological Measure for Access or Use Control</td>
<td>2-56.75</td>
</tr>
<tr>
<td>[f] Effectiveness of Technological Measure</td>
<td>2-56.84</td>
</tr>
<tr>
<td>[g] A Protected Work</td>
<td>2-56.92</td>
</tr>
<tr>
<td>[h] Nature of the Protected Work</td>
<td>2-56.98</td>
</tr>
<tr>
<td>[2] The Distinction Between Access Controls Under Subsection (a)(2) and Use Controls Under Subsection (b)</td>
<td>2-56.101</td>
</tr>
<tr>
<td>[a] The Distinction and Its Consequences</td>
<td>2-56.101</td>
</tr>
<tr>
<td>[b] Examples: Chasing the Bits and Bytes Versus Economic Substance</td>
<td>2-56.122</td>
</tr>
<tr>
<td>[c] Decisions that Misapplied the Statute</td>
<td>2-56.155</td>
</tr>
<tr>
<td>[i] The Federal Circuit’s Erroneous Alternative Universe</td>
<td>2-56.156</td>
</tr>
<tr>
<td>[ii] The Eighth Circuit’s Misconception of Server Technology in Davidson</td>
<td>2-56.169</td>
</tr>
<tr>
<td>[iii] Courts Correctly Recognizing the Statutory Framework</td>
<td>2-56.175</td>
</tr>
<tr>
<td>[iv] Author’s Comment: A Failed Statute</td>
<td>2-56.179</td>
</tr>
<tr>
<td>[3] The Three Conditions, (A), (B) and (C), Relating to Trafficking</td>
<td>2-56.187</td>
</tr>
<tr>
<td>[a] The Three Conditions (A), (B) and (C) and the Librarian’s Regulatory Exemptions</td>
<td>2-56.189</td>
</tr>
</tbody>
</table>
The Three Conditions (A), (B), and (C) and Their Similarity to Conditions for Secondary Liability for Copyright Infringement .......................... 2-56.192

The Practical Effect of the Anti-Trafficking Rules on Users of Copyrighted Works .................. 2-56.204

§ 2.06 The Distinction Between the Anti-Circumvention Rule and the Anti-Trafficking Rules .................. 2-56.207

§ 2.07 Section 1201 and Fair Use .................. 2-56.212

[1] Section 1201: Not Copyright Law .... 2-56.220


[ a] Fair Use and Subsection (a) .... 2-56.229

[ b] Fair Use and Subsection (b) .... 2-56.238

§ 2.08 Limitations and Exceptions: An Overview ........ 2-56.245

§ 2.09 Mandates for Specific Control Technologies .... 2-61

§ 2.10 Constitutional Analysis .......................... 2-67

[1] A Constitutional Overview ............. 2-71


[ a] Balance in Copyright Law and Policy .................. 2-82

[ b] Preexisting Mechanisms for Balance in Copyright Law .... 2-85

[ c] Balance and Section 1201 ........ 2-89


[3] Section 1201 and the First Amendment .... 2-102

[ a] The Reimerdes Decision: Anti-Trafficking Liability and the First Amendment .... 2-105

[ b] The First Amendment, Computer Programs, and Internet Technology .................. 2-119

[ i] Is Binary Executable Code “Speech”? ........ 2-119

[ ii] Some Useful Analogies ........ 2-138

[ iii] Beyond Binary Executable Code ........ 2-142

CHAPTER 3

Exceptions to the Anti-Circumvention Rule and the Anti-Trafficking Rules

§ 3.01 Introduction ..................................................... 3-1
§ 3.02 Drafting of the Exceptions .................... 3-5
§ 3.03 Exceptions Addressing Noncopyright Policy Goals ........................................... 3-8
[1] *Bona Fide* Encryption Research ........ 3-8
[2] Law Enforcement and Intelligence Activities .................. 3-19
[4] Countermeasures Solely to Protect Individuals’ Privacy .......... 3-31
[5] Protection of Minors ........................................... 3-45

§ 3.04 Exceptions to Preserve Copyright Exemptions ........................................... 3-48
[1] Introduction ..................................................... 3-48

CHAPTER 4

Prohibitions Against Providing False Copyright Management Information and Removing or Altering Copyright Management Information

§ 4.01 Introduction ..................................................... 4-2
§ 4.02 What Copyright Management Information Is . . 4-6
[1] The Exclusion of Personally Identifying Information ........ 4-11
[2] The Association of CMI with Copyrighted Works ........ 4-14
[3] The Legal Effect of the Use of CMI and Its Association with Copyrighted Works ........ 4-17
[4] Limits on the Scope of CMI ........ 4-21

(Rel. 38)
## Chapter 4

### § 4.03

The Copyright Management Information Offenses ................................. 4-28

1. Disseminating False Copyright Management Information ............. 4-31
2. Removing or Altering Copyright Management Information .......... 4-35
3. The Dissemination Offenses ............................................. 4-40

### § 4.04

State of Mind Requirements ................................................. 4-43

1. The “Disseminating False CMI” Offense............................. 4-45
2. The Removing-or-Altering Offense................................. 4-48
3. The Dissemination Offenses ............................................. 4-55
4. The Additional “It Will” Element ...................................... 4-58

### § 4.05

Exceptions and Limitations .................................................. 4-66

1. The Law Enforcement and Intelligence Exemption ...................... 4-66
2. Technical Feasibility Exemption ........................................ 4-66
3. The Accepted Standards Exceptions ................................... 4-68

## Chapter 5

### Chapter 5

Civil and Criminal Liability for Violating Anti-Circumvention, Anti-Trafficking, and Copyright Management Information Rules

### § 5.01

Introduction .......................................................... 5-2

### § 5.02

Standing to Claim Relief .................................................. 5-4

1. Copyright Owners and Exclusive Licensees .......................... 5-5
2. Beneficial Owners of Copyright ........................................ 5-7
3. Nonexclusive Licensees .................................................. 5-9
4. Practical Problems: Joinder of Parties and Multiple Recoveries .... 5-14
   a. Joinder of Parties .................................................. 5-14
   b. Multiple Recoveries ............................................. 5-18

### § 5.03

Monetary Remedies .......................................................... 5-22

1. Damages ................................................................. 5-22
2. The Violator’s Profits ..................................................... 5-24
3. Statutory Damages ......................................................... 5-27
4. Augmentation, Reduction or Remission of Damages .................... 5-32
   a. Augmentation of Damages for Repeated Violations .......... 5-32
   b. Reduction or Remission of Damages ............................ 5-36
TABLE OF CONTENTS

[6]  How Courts Should Exercise Their Discretion ......................... 5-42.2
§ 5.04  Nonmonetary Remedies ........................................... 5-42.8
§ 5.05  Criminal Sanctions ............................................. 5-43
[1]  Overview ...................................................... 5-43
   [a]  Violation of the Anti-Circumvention Rule ...... 5-47
   [b]  Violation of the Anti-Trafficking Rules ............ 5-50
   [c]  CMI Offenses ........................................ 5-51

CHAPTER 5A

The Federal Common Law of Direct and Secondary Liability for Copyright Infringement

§ 5A.02  Service Providers’ Direct Liability for Infringement on the Internet ................. 5A-6
§ 5A.03  Service Providers’ Secondary Liability for Infringement on the Internet ........... 5A-33
      [a]  “Inducement” Liability: Purposeful Culpability ...... 5A-50
      [b]  Contributory Infringement: Knowledge .......... 5A-56
         [i]  The Two-Part Common-Law Test .... 5A-57
         [ii]  Others’ Direct Infringement .......... 5A-62.2
         [iii]  The Impact of Sony ........ 5A-63

(Rel. 38)
[c] Vicarious Liability: Presumed or Inferred Culpability .......... 5A-65


CHAPTER 6

Limitations on Liability for Service Providers

§ 6.01 Introduction ............................................. 6-3

[1] Internet Service Providers as “Conduits” for Others’ Content. .. 6-3


[4] An “End Run” Around Section 512 .... 6-16

[5] The Policy Basis for the “End Run” ... 6-19


[a] Covered Activities .................. 6-31

[b] “Take Down” Conditions ........ 6-31

[c] Conditions of Eligibility for “Safe Harbor” ........ 6-34

§ 6.02 Who and What Section 512 Covers ........ 6-38

[1] “Service Provider” .................. 6-42

[a] Definition Applicable to Section 512(a) .................. 6-43

[b] Definition Applicable to Other Subsections of Section 512 .... 6-46


[a] Subsection (i): Terminating “Repeat Infringers” and Accommodating “Standard Technical Measures” ........ 6-48

[b] Designating an Agent to Receive Notification of Infringement ... 6-68

§ 6.03 Activities and Operations Covered ........ 6-74.2

[1] Automatic and Transparent Activities .... 6-81

[a] Transient “Store and Forward” Services .................. 6-82

[b] Caching .................. 6-101

[i] The Basic Conditions of Section 512(b)(1) .......... 6-103
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>[ii]</td>
<td>The Five Additional Conditions of Section 512(b)(2)</td>
<td>6-111</td>
</tr>
<tr>
<td>[2]</td>
<td>Volitional and Visible Activities</td>
<td>6-114.10</td>
</tr>
<tr>
<td>[a]</td>
<td>Posting</td>
<td>6-114.11</td>
</tr>
<tr>
<td>[i]</td>
<td>The Three Conditions for the Limitation on Remedies for Posting</td>
<td>6-114.15</td>
</tr>
<tr>
<td>[ii]</td>
<td>The Two Separate “Take Down” Requirements</td>
<td>6-114.31</td>
</tr>
<tr>
<td>[iii]</td>
<td>Formal Notification of Infringement</td>
<td>6-114.47</td>
</tr>
<tr>
<td>[b]</td>
<td>Linking</td>
<td>6-114.73</td>
</tr>
<tr>
<td>[3]</td>
<td>Author’s Comment on “Safe Harbor” Under Section 512</td>
<td>6-114.86</td>
</tr>
<tr>
<td>§ 6.04</td>
<td>How Section 512 Limits Remedies</td>
<td>6-115</td>
</tr>
<tr>
<td>[1]</td>
<td>Monetary Relief</td>
<td>6-115</td>
</tr>
<tr>
<td>[2]</td>
<td>Injunctive Relief</td>
<td>6-117</td>
</tr>
<tr>
<td>[a]</td>
<td>“Store and Forward” Services</td>
<td>6-118</td>
</tr>
<tr>
<td>[b]</td>
<td>Activities Other Than “Store and Forward” Services</td>
<td>6-122</td>
</tr>
<tr>
<td>[c]</td>
<td>Mandatory Considerations</td>
<td>6-125</td>
</tr>
<tr>
<td>[d]</td>
<td>Ex Parte Orders</td>
<td>6-127</td>
</tr>
<tr>
<td>§ 6.05</td>
<td>Subpoenas to Identify Alleged Infringers</td>
<td>6-130</td>
</tr>
<tr>
<td>[1]</td>
<td>Constitutional Issues</td>
<td>6-138.1</td>
</tr>
<tr>
<td>[a]</td>
<td>First Amendment</td>
<td>6-138.6</td>
</tr>
<tr>
<td>[b]</td>
<td>Article III</td>
<td>6-138.19</td>
</tr>
<tr>
<td>[c]</td>
<td>Due Process</td>
<td>6-138.26</td>
</tr>
<tr>
<td>[2]</td>
<td>Statutory Interpretation</td>
<td>6-138.29</td>
</tr>
<tr>
<td>[a]</td>
<td>Technological Background</td>
<td>6-138.30</td>
</tr>
<tr>
<td>[b]</td>
<td>To What Section 512 Activities Does Section 512(h) Apply?</td>
<td>6-138.34</td>
</tr>
<tr>
<td>[c]</td>
<td>Burdens on Service Providers</td>
<td>6-138.51</td>
</tr>
<tr>
<td>§ 6.06</td>
<td>Special Rule for Nonprofit Educational Institutions</td>
<td>6-138.57</td>
</tr>
<tr>
<td>§ 6.07</td>
<td>Other Aspects of Section 512</td>
<td>6-147</td>
</tr>
<tr>
<td>[1]</td>
<td>Misrepresentation Claims</td>
<td>6-147</td>
</tr>
<tr>
<td>[2]</td>
<td>Relationship with Other Laws</td>
<td>6-155</td>
</tr>
<tr>
<td>§ 6.08</td>
<td>Communications Decency Act: Protections for Internet Service Providers Against Liability Beyond Copyright</td>
<td>6-161</td>
</tr>
</tbody>
</table>
§ 6.09 Cybercrime: The Computer Fraud and Abuse Act


[2] Historical Background

[3] Purpose of the CFAA

[4] Application of the CFAA

[a] Mens Rea

[b] Actus Reus

[i] Unauthorized Access

[c] Damages

§ 6.10 Cybersquatting

[1] Elements of a Federal Anticybersquatting Claim

[2] Remedies Under the ACPA

[3] Jurisdictional Authority


[5] Contributory Liability

[6] The Anticybersquatting Consumer Protection Act and the Uniform Domain Name Dispute Resolution Policy

INDEX

I-1