TABLE OF CONTENTS

Dedicati Preface	ion	iii V
	CHAPTER 1	
	Introduction: New Law for New Technology	
§ 1.01 § 1.02	"Cyberspace Law": A Premature Baby? The Digital Millennium Copyright Act:	1-1
3 1.02	A New Departure	1-8
	Addressed by the DMCA	1-13
	[2] The Justification for Focusing on Protective Technologies	1-18
	[3] The Dangers of Focusing on Copy-Control Technology	1-29
	CHAPTER 2	
	gal Reinforcement of Technological Measures cting Copyrighted Works: The Anti-Circumv Rule and the Anti-Trafficking Rules	
§ 2.01	Introduction	2-4
§ 2.02	Implementing the Two WIPO Treaties: Practical and Policy Risks	2-6
§ 2.03	The Millennium Act's Rules: Classification	2-17
§ 2.04	and Terminology	2-17
y 2.04	[1] Strength of the Rule	2-21
	[2] Delayed Effective Date	2-46.3
	xi	

[3]	Regu	ulatory Exemptions of the		
	Li	ibrarian of Congress	2-46.4	
	[a]	The Librarian's Rulemaking		
	F1 3	Power	2-46.16	
	[b]	The Librarian's Year-2000	2.46.24	
		Exemptions	2-46.34	
		[i] Exemption for Lists of		
		WebSites Blocked by Screening Software	2-46.35	
		[ii] Exemption for Literary	2 -4 0.33	
		Works Blocked by		
		Obsolete or		
		Malfunctioning Access-		
		Control Measures	2-47	
		[iii] Denied Exemptions	2-50	
	[c]	The Librarian's Year-2003		
		Exemptions	2-54	
		[i] Modified Exemption for		
		Screening Blacklists	2-55	
		[ii] Exemption for Computer		
		Programs to Which		
		Access Is Blocked by		
		Malfunctioning, Obsolete Dongles	2-56.3	
		[iii] Exemption for Computer	2-30.3	
		Programs and Video		
		Games in Obsolete		
		Formats that Require		
		Original Media or		
		Hardware for Access	2-56.6	
		[iv] Exemption for Literary		
		Works in eBook Format		
		with Both "Read-Aloud"		
		and "Specialized Format"	0.5611	
		Features Blocked	2-56.11	
	r.11	[v] Denied Exemptions	2-56.14	
	[d]	The Librarian's Year-2006 Exemptions	2-56.23	
	[e]	The Librarian's Year-2010	2-30.23	
	[c]	Exemptions	2-56.28	
	[f]	The Librarian's Year-2012	2 30.20	
	r-1	Exemptions	2-56.31	
	[g]	The Unlocking Consumer Choice		
	.01	and Wireless Competition Act		
		of 2014	2-56.37	

			TABLE OF CONTENTS	xiii
		[h]	Author's Comment on	
			Requirements for	
			Rulemaking Exemptions	2-56.39
§ 2.05	The	Anti-7	Trafficking Rules	2-56.48
	[1]	The	Seven Elements of a Civil	
		T	rafficking Offense	2-56.62
		[a]	Summary	2-56.62
		[b]	Trafficking	2-56.63
		[c]	Means for Circumvention	2-56.65
		[d]	Satisfaction of Condition (A),	
			(B) or (C)	2-56.69
		[e]	A Technological Measure for	
			Access or Use Control	2-56.75
		[f]	Effectiveness of Technological	
			Measure	2-56.87
		[g]	A Protected Work	2-56.96
		[h]	Nature of the Protected Work	
	[2]		Distinction Between Access	
			ontrols Under Subsection (a)(2)	
			nd Use Controls Under	
			ubsection (b)	2-56.108
		[a]	The Distinction and	
			Its Consequences	2-56.109
		[b]	Examples: Chasing the Bits	
			and Bytes Versus Economic	
			Substance	2-56.131
		[c]	Decisions that Misapplied	
			the Statute	2-56.163
			[i] The Federal Circuit's	
			Erroneous Alternative	
			Universe	2-56.164
			[ii] The Eighth Circuit's	
			Misconception of	
			Server Technology	
			in Davidson	2-56 178
			[iii] Courts Correctly	_ 00.170
			Recognizing the	
			Statutory Framework	2-56 184
			[iv] Author's Comment:	2 20.101
			A Failed Statute	2-56.187
	[3]	The	Three Conditions, (A), (B)	2 20.107
	[-]		nd (C), Relating to Trafficking	2-56.196
		[a]	The Three Conditions (A), (B)	_ 55.170
		[4]	and (C) and the Librarian's	
			Regulatory Exemptions	2-56 198
			Regulatory Exemptions	2 30.170

CYBERLAW

	[b		Three Conditions (A), (B)	
			d (C) and Their Similarity	
			Conditions for Secondary	
			ability for Copyright	
			fringement	2-56.201
	[4] T		cal Effect of the	
			afficking Rules on Users	
		~ -	righted Works	2-56.213
§ 2.06			Between the	
			ention Rule and	
			cking Rules	2-56.217
§ 2.07	Section	1201 and	l Fair Use	2-56.223
	[1] Se	ection 12	01: Not Copyright Law	2-56.235
	[2] D	oes Secti	on 1201 Incorporate	
		Principle	es of Fair Use?	2-56.243
	[a	.] Fair	Use and Subsection (a)	2-56.244
	[b	_	Use and Subsection (b)	2-56.254
§ 2.08	_	_	Exceptions: An Overview	2-56.261
§ 2.09			ecific Control Technologies	2-61
§ 2.10		_	nalysis	2-67
· ·			tional Overview	2-72
			of the Anti-Circumvention	
	[-]		i-Trafficking Rules on	
			in Copyright Law	2-82
	Га		nce in Copyright Law and	2 02
	Ľ۳		olicy	2-84
	[b		xisting Mechanisms for	201
	Įυ		alance in Copyright Law	2-85
	[c		nce and Section 1201	2-89
	[d	_	ets of the New "Balance":	2-07
	Įч		nintended Consequences?	2-97
	[2] S		11 and the First Amendment	2-102
				2-102
	[a		Reimerdes Decision:	
			nti-Trafficking Liability	2-105
	ΓI.		d the First Amendment	2-103
	[b		First Amendment, Computer	
			ograms, and Internet	2 110
			echnology	2-119
		[i]	Is Binary Executable Code	2 110
		F***3	"Speech"?	2-119
		[ii]	Some Useful Analogies	2-138
		[iii]	Beyond Binary Executable	
			Code	2-142
		[iv]	The Hard Cases:	
			Mixed-Use Technology	
			and Linking	2-151

CHAPTER 3

Exceptions to the Anti-Circumvention	on Rule
and the Anti-Trafficking Rule	es

		and the finti framewing Rules	
§ 3.01 § 3.02		oductionting of the Exceptions	3-1 3-1
§ 3.03	Exce	eptions Addressing Noncopyright Policy	
		oals	3-8
	[1] [2]	Bona Fide Encryption Research Law Enforcement and Intelligence	3-8
		Activities	3-19
	[3]	Security Testing of Computers,	2.21
	[4]	Systems, and Networks	3-21
	[ت]	Individuals' Privacy	3-31
	[5]	Protection of Minors	3-45
§ 3.04		eptions to Preserve Copyright	5
U		xemptions	3-48
	[1]	Introduction	3-48
	[2]	Reverse Engineering for	
		Computer-Program Interoperability	3-48
	[3]	Exemption for Nonprofit Libraries,	
		Archives, and Educational	• • •
		Institutions	3-64.1
		CHAPTER 4	
	Mana	itions Against Providing False Copyright Agement Information and Removing or Ing Copyright Management Information	
§ 4.01	Intro	oduction	4-2
§ 4.02		t Copyright Management Information Is	4-6
	[1]	The Exclusion of Personally	
		Identifying Information	4-11
	[2]	The Association of CMI with	
	F2.7	Copyrighted Works	4-14
	[3]	The Legal Effect of the Use of CMI	
		and Its Association with	A 10
	Γ <i>1</i> 1	Copyrighted Works	4-18
	[4]	Limits on the Scope of CMI	4-23

xvi	CYBERLAW

§ 4.03	The Copyright Management Information	
	Offenses	4-28.1
	[1] Disseminating False Copyright	
	Management Information	4-31
	[2] Removing or Altering Copyright	1.26
	Management Information	4-36
0.404	[3] The Dissemination Offenses	4-42
§ 4.04	State of Mind Requirements	4-46
	[1] The "Disseminating False CMI" Offense	4-49
	[2] The Removing-or-Altering Offense	4-52
	[3] The Dissemination Offenses	4-62
e 4.05	[4] The Additional "It Will" Element	4-64.1
§ 4.05	Exceptions and Limitations	4-73
	[1] The Law Enforcement and Intelligence	4.72
	Exemption	4-73
	[2] Technical Feasibility Exemption [3] The Accepted Standards Exceptions	4-73 4-75
	[3] The Accepted Standards Exceptions	4-73
	CHAPTER 5	
	Civil and Criminal Liability for Violating	
	Anti-Circumvention, Anti-Trafficking, and	
	Copyright Management Information Rules	
	Copyright Management Information Rules	
§ 5.01	Introduction	5-2
§ 5.02	Standing to Claim Relief	5-5
0	[1] Copyright Owners and Exclusive	
	Licensees	5-7
	[2] Beneficial Owners of Copyright	5-9
	[3] Nonexclusive Licensees	5-11
	[4] Practical Problems: Joinder of Parties	
	and Multiple Recoveries	5-15
	[a] Joinder of Parties	5-16
	[b] Multiple Recoveries	5-19
§ 5.03	Monetary Remedies	5-23
	[1] Damages	5-26
	[2] The Violator's Profits	5-29
	[3] Statutory Damages	5-34
	[4] Augmentation, Reduction or	
	Remission of Damages	5-39
	[a] Augmentation of Damages for	
	Repeated Violations	5-40
	[b] Reduction or Remission of	
	Damages	5-42.2

	TABLE OF CONTENTS	xvii
§ 5.04 § 5.05	[5] Discretionary Recovery of Attorneys' Fees and Costs [6] How Courts Should Exercise Their Discretion Nonmonetary Remedies Criminal Sanctions [1] Overview [2] The Requirement for Mens Rea [a] Violation of the Anti-Circumvention Rule [b] Violation of the Anti-Trafficking Rules [c] CMI Offenses [3] Exceptions and Limitations	5-42.4 5-42.11 5-42.18 5-43 5-46 5-47 5-50 5-56 5-58
	CHAPTER 5A	
	The Federal Common Law of Direct and Secondary Liability for Copyright Infringement	
§ 5A.01	Introduction: How the Federal Common Law Lives, and Why It Is Important	5A-2
§ 5A.02	Service Providers' Direct Liability for	311 2
	Infringement on the Internet	5A-6
	[1] The "Volitional Conduct" Approach	5A-9
	[2] The "Server Test" Approach	5A-14
e 5 1 02	Contract" Approach	5A-26
§ 5A.03	Service Providers' Secondary Liability for	5 A 22
	Infringement on the Internet	5A-33
	in Cyberspace	5A-33
	[2] Theories of Secondary Liability	5A-42
	[a] "Inducement" Liability:	
	Purposeful Culpability	5A-50
	[b] Contributory Infringement:	
	Knowledge	5A-56
	[i] The Two-Part	5 A 57
	Common-Law Test [ii] Others' Direct	5A-57
	[ii] Others' Direct Infringement	5A-62.2
	[iii] The Impact of Sony	5A-63
	[m] The impact of bony	511 05

xviii			CYBERLAW	
	[3]	The	Vicarious Liability: Presumed or Inferred Culpability Causal Nexus Between Secondary Defendants' Acts and Others'	5A-65
			nfringement	5A-71
			CHAPTER 6	
	Limita	ations	on Liability for Service Provider	'S
§ 6.01	Intro [1]		on rnet Service Providers as	6-3
	[2]		Conduits" for Others' Content Risk of Federal Common-Law	6-3
	[3]		iability for Others' Infringement Section 512 "Solution":	6-5
		A	Safe Harbor	6-10
	[4]		"End Run" Around Section 512	6-17
	[5]		Policy Basis for the "End Run"	6-20
	[6]	Wha	at Section 512 Does	6-30
		[a]		6-32
		[b] [c]	Conditions of Eligibility for	6-32.1
			"Safe Harbor"	6-34
§ 6.02			What Section 512 Covers	6-38
	[1]	"Seı [a]	rvice Provider"	6-42
		[b]	* *	6-43
			Subsections of Section 512	6-46
	[2]		eral Eligibility Conditions	6-48
		[a]	Subsection (i): Terminating "Repeat Infringers" and Accommodating "Standard	
		[b]	Technical Measures" Designating an Agent to Receive	6-48
		[Մ]	Notification of Infringement	6-69
§ 6.03	Acti	vities	and Operations Covered	6-74.4
y 0.05	[1]		omatic and Transparent Activities	6-81
	[+]	[a]	Transient "Store and Forward"	0 01
		L**J	Services	6-82
		[b]	Caching	6-101
		r - 1	[i] The Basic Conditions of	, -
			Section 512(b)(1)	6-103

		[ii] The Five Additional Conditions of	
		Section 512(b)(2)	6-111
	[2]	Volitional and Visible Activities	6-114.10
	[2]	[a] Posting	6-114.11
		[i] The Three Conditions for	0 11 1111
		the Limitation on	
		Remedies for Posting	6-114.15
		[ii] The Two Separate "Take	
		Down" Requirements	6-114.32
		[iii] Formal Notification of	
		Infringement	6-114.48
		[b] Linking	6-114.74
	[3]	Author's Comment on the "Safe	
		Harbor" Under Section 512	6-114.87
§ 6.04	How	Section 512 Limits Remedies	6-115
	[1]	Monetary Relief	6-115
	[2]	Injunctive Relief	6-117
		[a] "Store and Forward" Services	6-118
		[b] Activities Other Than "Store	
		and Forward" Services	6-122
		[c] Mandatory Considerations	6-125
		[d] Ex Parte Orders	6-127
§ 6.05	Subp	ocenas to Identify Alleged Infringers	6-130
	[1]	Constitutional Issues	6-138.1
		[a] First Amendment	6-138.6
		[b] Article III	6-138.19
		[c] Due Process	6-138.26
	[2]	Statutory Interpretation	6-138.29
		[a] Technological Background	6-138.30
		[b] To What Section 512 Activities	
		Does Section 512(h) Apply?	6-138.34
		[c] Burdens on Service Providers	6-138.51
§ 6.06		ial Rule for Nonprofit Educational	
		stitutions	6-138.57
§ 6.07		r Aspects of Section 512	6-147
	[1]	Misrepresentation Claims	6-147
	[2]	Relationship with Other Laws	6-156
§ 6.08		munications Decency Act: Protections	
		r Internet Service Providers Against	. د د د
	Li	ability Beyond Copyright	6-161

§ 6.09	Cybe	ercrime: The Computer Fraud and	
	\mathbf{A}^{\prime}	buse Act	. 6-205
	[1]	Criminal Law for the New	
		Millennium	. 6-205
	[2]	Historical Background	. 6-217
	[3]	Purpose of the CFAA	. 6-220
	[4]	Application of the CFAA	. 6-222
		[a] Mens Rea	. 6-225
		[b] Actus Reus	. 6-227
		[i] Unauthorized Access	. 6-228
		[c] Damages	. 6-250
§ 6.10	Cybe	ersquatting	. 6-259
	[1]	Elements of a Federal	
		Anticybersquatting Claim	
	[2]	Remedies Under the ACPA	. 6-280
	[3]	Jurisdictional Authority	
	[4]	Applicable Defenses	. 6-285
	[5]	Contributory Liability	. 6-287
	[6]	The Anticybersquatting Consumer	
		Protection Act and the Uniform	
		Domain Name Dispute Resolution	
		Policy	. 6-288
INDEX			. I-1