

# 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 .....	1-8
[1]	The Deficiencies in Copyright Enforcement 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

### **Legal Reinforcement of Technological Measures for Protecting Copyrighted Works: The Anti-Circumvention 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 and Terminology .....	2-17
§ 2.04	The Anti-Circumvention Rule .....	2-21
[1]	Strength of the Rule .....	2-40
[2]	Delayed Effective Date .....	2-46.3

[3]	Regulatory Exemptions of the Librarian of Congress . . . . .	2-46.4
[a]	The Librarian’s Rulemaking Power . . . . .	2-46.16
[b]	The Librarian’s Year-2000 Exemptions . . . . .	2-46.34
[i]	Exemption for Lists of WebSites Blocked by Screening Software . . . . .	2-46.35
[ii]	Exemption for Literary 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 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” Features Blocked . . . . .	2-56.11
[v]	Denied Exemptions . . . . .	2-56.14
[d]	The Librarian’s Year-2006 Exemptions . . . . .	2-56.23
[e]	The Librarian’s Year-2010 Exemptions . . . . .	2-56.28
[f]	The Librarian’s Year-2012 Exemptions . . . . .	2-56.31
[g]	The Unlocking Consumer Choice 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-Trafficking Rules . . . . .	2-56.48
	[1]	The Seven Elements of a Civil Trafficking 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 . . . . .	2-56.105
	[2]	The Distinction Between Access Controls Under Subsection (a)(2) and Use Controls Under Subsection (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 Recognizing the Statutory Framework . . . . .	2-56.184
		[iv] Author’s Comment: A Failed Statute . . . . .	2-56.187
	[3]	The Three Conditions, (A), (B) and (C), Relating to Trafficking . . . . .	2-56.196
		[a] The Three Conditions (A), (B) and (C) and the Librarian’s Regulatory Exemptions . . . . .	2-56.198

	[b]	The Three Conditions (A), (B) and (C) and Their Similarity to Conditions for Secondary Liability for Copyright Infringement . . . . .	2-56.201
	[4]	The Practical Effect of the Anti-Trafficking Rules on Users of Copyrighted Works . . . . .	2-56.213
§ 2.06		The Distinction Between the Anti-Circumvention Rule and the Anti-Trafficking Rules . . . . .	2-56.217
§ 2.07		Section 1201 and Fair Use . . . . .	2-56.223
	[1]	Section 1201: <i>Not</i> Copyright Law . . . . .	2-56.236
	[2]	Does Section 1201 Incorporate Principles of Fair Use? . . . . .	2-56.244
	[a]	Fair Use and Subsection (a) . . . . .	2-56.245
	[b]	Fair Use and Subsection (b) . . . . .	2-56.255
§ 2.08		Limitations and Exceptions: An Overview . . . . .	2-56.261
§ 2.09		Mandates for Specific Control Technologies . . . . .	2-61
§ 2.10		Constitutional Analysis . . . . .	2-67
	[1]	A Constitutional Overview . . . . .	2-72
	[2]	The Effect of the Anti-Circumvention and Anti-Trafficking Rules on Balance in Copyright Law . . . . .	2-82
	[a]	Balance in Copyright Law and Policy . . . . .	2-84
	[b]	Preexisting Mechanisms for Balance in Copyright Law . . . . .	2-85
	[c]	Balance and Section 1201 . . . . .	2-89
	[d]	Effects of the New “Balance”: Unintended Consequences? . . . . .	2-97
	[3]	Section 1201 and the First Amendment . . . . .	2-102
	[a]	The <i>Reimerdes</i> 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
	[iv]	The Hard Cases: Mixed-Use Technology and Linking . . . . .	2-151

**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] <i>Bona Fide</i> Encryption Research . . . . .	3-8
	[2] Law Enforcement and Intelligence Activities . . . . .	3-19
	[3] Security Testing of Computers, Systems, and Networks . . . . .	3-21
	[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
	[2] Reverse Engineering for Computer-Program Interoperability . . . . .	3-48
	[3] Exemption for Nonprofit Libraries, Archives, and Educational Institutions . . . . .	3-64.1

**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 . . . . .	4-18
	[4] Limits on the Scope of CMI . . . . .	4-23

§ 4.03	The Copyright Management Information Offenses . . . . .	4-28.1
	[1] Disseminating False Copyright Management Information . . . . .	4-31
	[2] Removing or Altering Copyright Management Information . . . . .	4-36
	[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
	[4] The Additional “It Will” Element . . . . .	4-65
§ 4.05	Exceptions and Limitations . . . . .	4-73
	[1] The Law Enforcement and Intelligence Exemption . . . . .	4-73
	[2] Technical Feasibility Exemption . . . . .	4-73
	[3] The Accepted Standards Exceptions . . . . .	4-75

## 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 . . . . .	5-5
	[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 . . . . .	5-20
§ 5.03	Monetary Remedies . . . . .	5-23
	[1] Damages . . . . .	5-26
	[2] The Violator’s Profits . . . . .	5-30
	[3] Statutory Damages . . . . .	5-34
	[4] Augmentation, Reduction or Remission of Damages . . . . .	5-40
	[a] Augmentation of Damages for Repeated Violations . . . . .	5-41
	[b] Reduction or Remission of Damages . . . . .	5-42.3

## TABLE OF CONTENTS

xvii

	[5] Discretionary Recovery of Attorneys’ Fees and Costs . . . . .	5-42.6
	[6] How Courts Should Exercise Their Discretion . . . . .	5-42.12
§ 5.04	Nonmonetary Remedies . . . . .	5-42.20
§ 5.05	Criminal Sanctions . . . . .	5-43
	[1] Overview . . . . .	5-43
	[2] The Requirement for <i>Mens Rea</i> . . . . .	5-46
	[a] Violation of the Anti-Circumvention Rule . . . . .	5-47
	[b] Violation of the Anti-Trafficking Rules . . . . .	5-50
	[c] CMI Offenses . . . . .	5-56
	[3] Exceptions and Limitations . . . . .	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 Infringement on the Internet . . . . .	5A-6
	[1] The “Volitional Conduct” Approach . . . . .	5A-9
	[2] The “Server Test” Approach . . . . .	5A-14
	[3] The “Implied License” or “Social Contract” Approach . . . . .	5A-26
§ 5A.03	Service Providers’ Secondary Liability for Infringement on the Internet . . . . .	5A-33
	[1] The Importance of Secondary Liability 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 Common-Law Test . . . . .	5A-57
	[ii] Others’ Direct Infringement . . . . .	5A-62.2
	[iii] The Impact of <i>Sony</i> . . . . .	5A-63

[c]	Vicarious Liability: Presumed or Inferred Culpability . . . . .	5A-65
[3]	The Causal Nexus Between Secondary Defendants' Acts and Others' Infringement . . . . .	5A-71

## CHAPTER 6

### Limitations on Liability for Service Providers

§ 6.01	Introduction . . . . .	6-3
	[1] Internet Service Providers as "Conduits" for Others' Content . . . . .	6-3
	[2] The Risk of Federal Common-Law Liability for Others' Infringement . . . . .	6-5
	[3] The Section 512 "Solution": A Safe Harbor . . . . .	6-10
	[4] An "End Run" Around Section 512 . . . . .	6-17
	[5] The Policy Basis for the "End Run" . . . . .	6-20.1
	[6] What Section 512 Does . . . . .	6-30
	[a] Covered Activities . . . . .	6-32
	[b] "Take Down" Conditions . . . . .	6-32.1
	[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
	[2] General Eligibility Conditions . . . . .	6-48
	[a] Subsection (i): Terminating "Repeat Infringers" and Accommodating "Standard Technical Measures" . . . . .	6-48
	[b] Designating an Agent to Receive Notification of Infringement . . . . .	6-69
§ 6.03	Activities and Operations Covered . . . . .	6-74.4
	[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 OF CONTENTS

[ii] The Five Additional  
Conditions of  
Section 512(b)(2) . . . . . 6-111

[2] Volitional and Visible Activities . . . . . 6-114.10

[a] Posting . . . . . 6-114.11

[i] The Three Conditions for  
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 Subpoenas to Identify Alleged Infringers . . . . . 6-130

[1] Constitutional Issues . . . . . 6-138.1

[a] First Amendment . . . . . 6-138.6

[b] Article III . . . . . 6-138.18

[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 Special Rule for Nonprofit Educational  
Institutions . . . . . 6-138.57

§ 6.07 Other Aspects of Section 512 . . . . . 6-147

[1] Misrepresentation Claims . . . . . 6-147

[2] Relationship with Other Laws . . . . . 6-156

§ 6.08 Communications Decency Act: Protections  
for Internet Service Providers Against  
Liability Beyond Copyright . . . . . 6-161

§ 6.09	Cybercrime: The Computer Fraud and Abuse 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] <i>Mens Rea</i> . . . . .	6-225
	[b] <i>Actus Reus</i> . . . . .	6-227
	[i] Unauthorized Access . . . . .	6-228
	[c] Damages . . . . .	6-251
§ 6.10	Cybersquatting . . . . .	6-261
	[1] Elements of a Federal Anticybersquatting Claim . . . . .	6-268
	[2] Remedies Under the ACPA . . . . .	6-282
	[3] Jurisdictional Authority . . . . .	6-286
	[4] Applicable Defenses . . . . .	6-288
	[5] Contributory Liability . . . . .	6-289
	[6] The Anticybersquatting Consumer Protection Act and the Uniform Domain Name Dispute Resolution Policy . . . . .	6-290
	<b>INDEX</b> . . . . .	<b>I-1</b>