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Copyright's Trajectory: What to Watch and Why Does Utah Care?



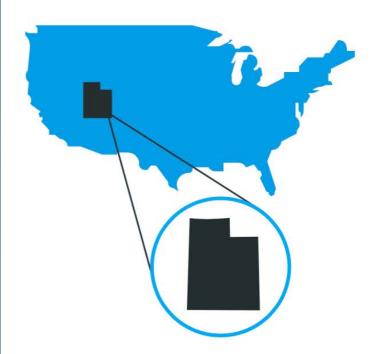


# Utah

Strong intellectual property (IP) protections lead to innovative new discoveries that fuel economic growth and build stronger communities. Workers directly and indirectly connected to these advancements make up a significant percentage of Utah's workforce, are paid higher than their counterparts in non-IP intensive companies, and help increase the state's exports.

UTAH

#### STATE HIGHLIGHTS .....



1. ANNUAL RESEARCH & DEVELOPMENT

\$3.8 BILLION

3. TOTAL IP-RELATED JOBS

590,658

% HIGHER WAGES FOR DIRECT IP WORKERS VS. NON-IP WORKERS

31.0%

2. INNOVATIONS REGISTERED
ANNUALLY TO STATE RESIDENTS

7,178

4. ANNUAL IP EXPORTS

\$12.3 BILLION

## **CORE COPYRIGHT INDUSTRIES ADDED** IN VALUE TO THE **U.S. ECONOMY**

#### **CORE COPYRIGHT INDUSTRIES INCLUDE:**







MUSIC



**PICTURES** 



TV BROADCASTING



COMPUTER SOFTWARE







**VIDEO GAMES** 

PERIODICALS AND JOURNALS

#### **COPYRIGHT INDUSTRIES CREATE HIGH-PAYING JOBS AND EMPLOY MILLIONS**

Copyright industries employed nearly 5% of the total private workforce and paid 38% higher than average U.S. wages.



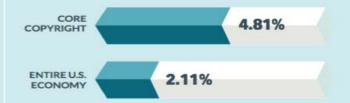
workers hired



average pay of core copyright worker

#### THE COPYRIGHT ECONOMY IS GROWING **FASTER THAN THE NATIONAL ECONOMY**

Since 2012, the core copyright industries have consistently grown faster than the entire U.S. economy.



COMPOUND ANNUAL GROWTH RATES 2012-2015

#### COPYRIGHT INDUSTRY SALES IN FOREIGN MARKETS OUTPACE OTHER INDUSTRIES

\$177 COPYRIGHT

\$135.8 CHEMICALS

\$134.6 **AEROSPACE** 

\$62.9 **AGRICULTURE** 

\$60.3





**ELECTRICAL PHARMACEUTICALS** 













(IN BILLIONS)





## The Economic Impact of Software

#### UTAH

Direct Value-Added GDP:

\$5.9 billion





#### **EMPLOYMENT**

Direct: 42,008 jobs

Total: 98,282 jobs

(includes indirect and induced impacts)

Software creates jobs for a wide variety of professionals in today's workplaces — everything from software developers and web designers to project coordinators, administrative assistants, and accountants. In Utah, the total number of jobs created and supported by the software industry has increased 15.7 percent since 2014.

#### **RESEARCH & DEVELOPMENT**

R&D Investment by Software Companies:

\$548 million

18.6% of All Domestic Business R&D in Utah<sup>8</sup>

Utah's economy and workforce benefit from software's broad investment in new technology. From developing new data analytics to driving breakthrough technologies like cognitive computing, the software industry's commitment to R&D continues to spur innovation at unprecedented rates.

National Science Foundation/National Center for Science and Engineering Statistics and US Census Bureau, Business R&D and Innovation Survey. 2013 Industry breakdown. Where data is not available for 2013, the most recent year is used.

National Science Foundation/National Center for Science and Engineering Statistics.



#### VIDEO GAMES IN THE 21<sup>ST</sup> CENTURY

ECONOMIC CONTRIBUTIONS OF THE US ENTERTAINMENT SOFTWARE INDUSTRY

# **UTAH**

	GAME SOFTWARE LOCATIONS	DIRECT EMPLOYMENT	DIRECT + INDIRECT EMPLOYMENT
PUBLISHER GROUP	2	27	92
DEVELOPER GROUP	25	330	1,121
TOTAL	27	357	1,213
	2015 AVERAGE COMPENSATION PER EMPLOYEE (DIRECT ONLY)	2015 TOTAL DIRECT COMPENSATION (000)	2015 TOTAL DIRECT + INDIRECT COMPENSATION (000)
TOTAL	\$96,779	\$34,550	\$69,605
GAME INDUSTRY		2013	2015
VALUE ADDED (MILLIONS OF CURRE	ENT DOLLARS)	\$56.9	\$68.7
COMPENSATION (MILLIONS OF CURRENT DOLLARS)		\$28.6	\$34.6
REAL VALUE ADDED (MILLIONS OF CHAINED DOLLARS)		\$57.65	\$71.20
REAL ANNUAL GROWTH			7.29%

WHO WE ARE

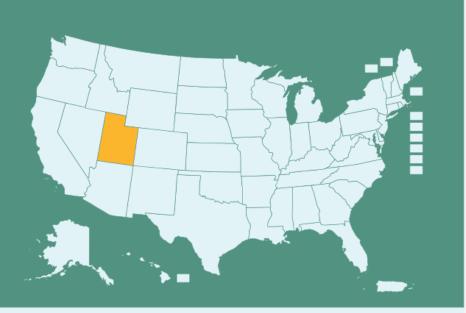
OUR WORK

NEWS

FILM RATINGS

MPAA BLOG





#### **UTAH**

ECONOMIC IMPACT OF THE INDUSTRY

The motion picture and television industry is responsible for:



6,726 DIRECT JOBS



MILLION IN WAGES including both production and distribution-related jobs



PRODUCTION RELATED JOBS

2015-2016





18 MOVIES 10 TV SERIES

# Utah's Competitive Advantage

- Stable Film Production Incentive Program
- Geography/Locations
- Highly Skilled Labor and Support Services
- Infrastructure
- Cost of Living
- Quality of Life
- Film Culture
- Proximity to Los Angeles





### Lone Ranger:

- 25 days of filming in Moab (Dead Horse Point, Professors Valley, Amassa Back) and Monument Valley
- \$8 Million spent in UT
- 574 local cast, crew and extras
- More than \$1 million spent just on hotels
- Over \$600,000 on goods and services

#### John Carter:

- 12 weeks in 6 counties in Southern UT
- \$21 million and 300 jobs
- 2,900 bottles of water consumed per day



# Disney Channel Original Movie: High School Musical Made in UT; 2006 Release Most successful Disney Channel Original Movie ever produced

From this one modest budget movie came:

- High School Musical 2 Produced in UT
- High School Musical 3 Feature Film Produced in UT
- High School Musical Concert Toured in UT
- High School Musical Stage Play Toured in UT
- High School Musical Reality Series Produced in UT
- High School Musical Ice Tour Toured in UT
- High School Musical Video Games Produced in part in UT



# What to Watch

Copyright "must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."

-- Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984)

"[Plaintiffs] and many of the *amici* fault the Court of Appeals' holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off."

-- Metro-Goldwyn-Mayer Studios v. Grokster, 545 U.S. 913, (2005)

### "Transformative" Use

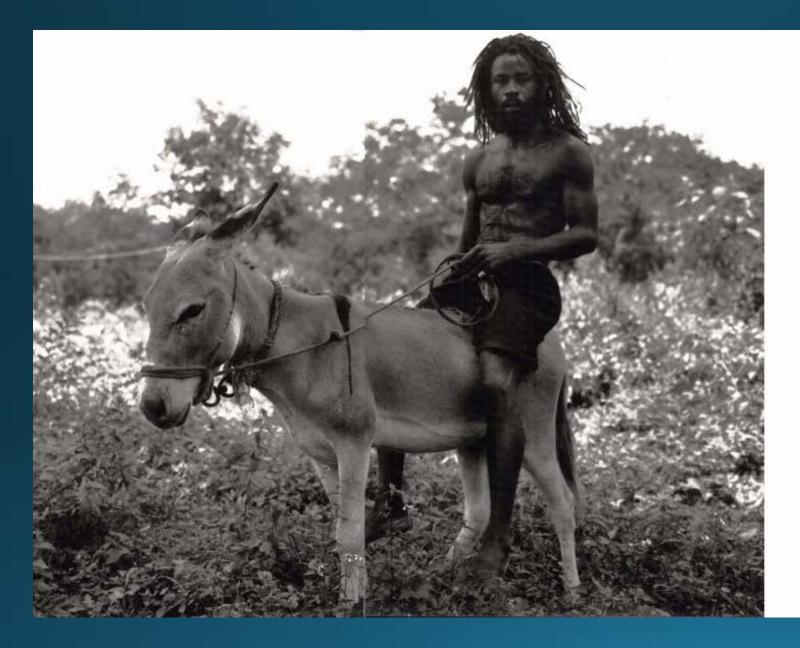
## Campbell v. Acuff-Rose Music (S.Ct. 1994)

"The first factor in a fair use enquiry is 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.' \( \) 107(1). ... The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' ... [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."

# Cariou v. Prince (2d Cir. 2012)

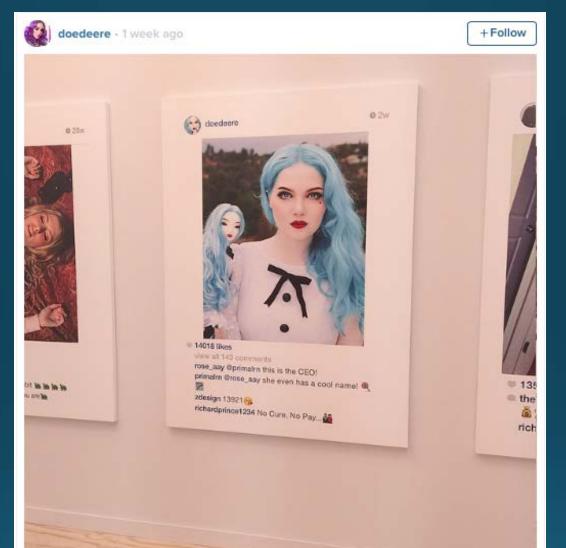


"He's playing the guitar now, it looks like he's playing the guitar, it looks as if he's always played the guitar, that's what my message was." Richard Prince





Charlie Company (2008)



Figured I might as well post this since everyone is texting me. Yes, my portrait is currently displayed at the Frieze Gallery in NYC. Yes, it's just a screenshot (not a painting) of my original post. No, I did not give my permission and yes, the controversial artist Richard Prince put it up anyway. It's already sold (\$90K I've been told) during the VIP preview. No, I'm not gonna go after him. And nope, I have no idea who ended up with it! 69 #lifeisstrange #modernart #wannabuyaninstagrampicture



David Graham: Rastafarian Smoking a Joint (1998)

Richard Prince: Untitled (2014) (Part of "New Portraits" Exhibition)

API





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The CEO needs to know. Our search engine helps you pinpoint the right coverage, instantly. No phone calls, no waiting. Click, and you're done.

LEARN MORE



#### **COMPLETE TV AWARENESS**

We alert you to broadcast coverage within moments of airing - so you can advise clients, head-off issues, correct errors and identify trends earlier.



#### REGIONAL, NATIONAL OR GLOBAL

With three packages to choose from, it's easy to match the capabilities and broadcast market coverage provided by TVEyes to your needs.

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Religious Technology Center v. Netcom (N.D. Cal. 1995)

"although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to use a copy by a third party."

"Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that would lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. ... The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonable be deterred. "



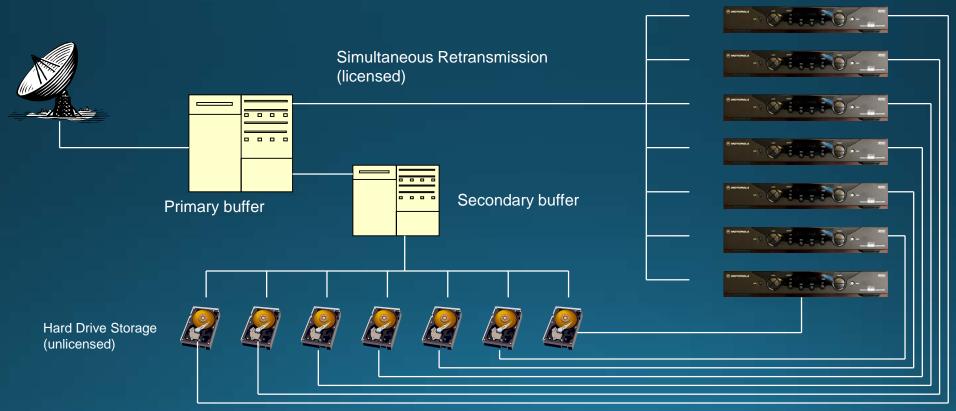
# CoStar Group v. LoopNet (4<sup>th</sup> Cir. 2004)

"[T] o establish *direct* liability under §§ 501 and 106 of the Act, something more must be shown than mere ownership of a machine used by others to make illegal copies. There must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner. The *Netcom* court described this nexus as requiring some aspect of volition or causation."



## Cartoon Network v. CSC Holdings (2<sup>nd</sup> Cir. 2008) ("Cablevision")

CV Set Top Boxes in the Home



On Demand Retransmission (unlicensed)



Cartoon Network v. CSC Holdings (2<sup>nd</sup> Cir. 2008) ("Cablevision")

"In the case of a VCR, it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command."

"In determining who actually "makes" a copy, a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make the copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct."

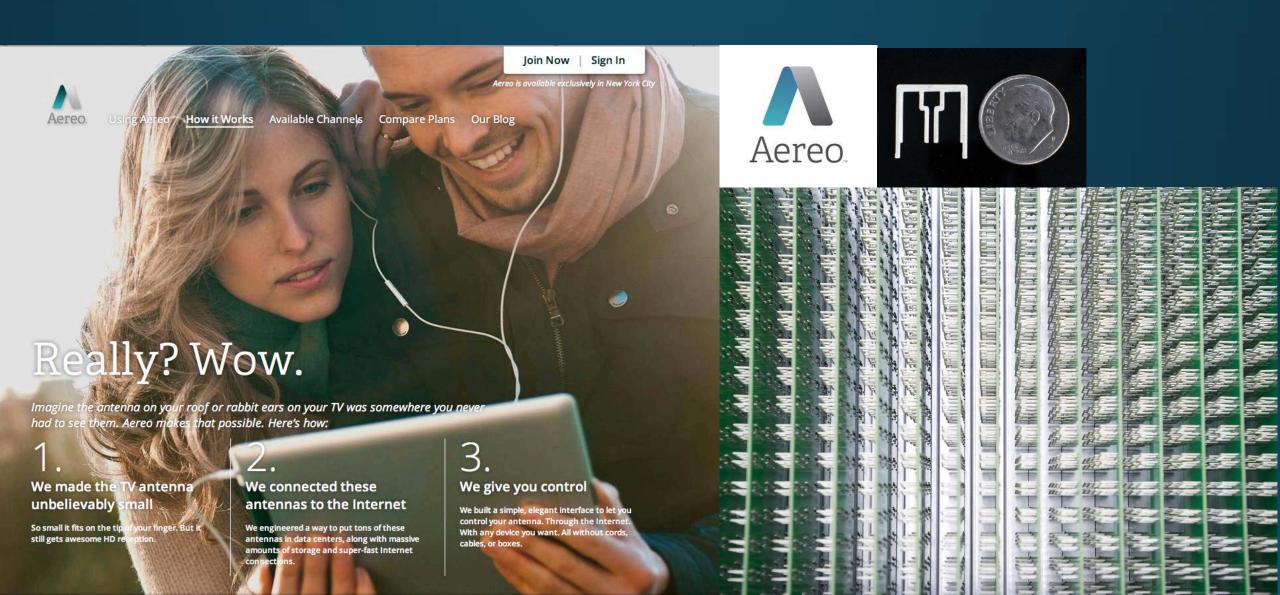




## Fox Broadcasting v Dish Network (9<sup>th</sup> Cir. 2014)

"The [district] court held that the 'user, not Dish, must take the initial step of enabling' PrimeTime Anytime. 'The user, then, and not Dish, is 'the most significant and important cause' of the copy.' (quoting Prosser & Keeton on Torts § 42)."

"Infringement of the reproduction right requires 'copying by the defendant,' which comprises a requirement that the defendant cause the copying. See Cablevision ... [O]perating a system used to make copies at the user's command does not mean that the system operator, rather than the user, caused copies to be made. Here, Dish's program creates the copy only in response to the user's command. Therefore, the district court did not err in concluding that the user, not Dish, makes the copy."







American Broadcasting Company v. Aereo (S.Ct. 2014) (Dissent)

"[T]he Networks must prove that *Aereo* 'perform[s]' ... when its subscribers log in, select a channel, and push the 'watch' button."

"The Networks' claim is governed by a simple but profoundly important rule: A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act. ... Aereo's automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. ... Aereo does not "perform" for the sole and simple reason that it does not make the choice of content."





## American Broadcasting Company v. Aereo (S.Ct. 2014) (Majority Op)

"In Aereo's view, it does not perform. ...Like a home antenna and DVR, Aereo's equipment simply responds to its subscribers' directives. So it is only the subscribers who 'perform' when they use Aereo's equipment to stream television programs to themselves."

Majority says the dissent "makes too much out of too little" in arguing that Aereo lacks volition because "Aereo's system remains inert until a subscriber indicates that she wants to watch a program." "[T]his sole technological difference between Aereo and traditional cable companies does not make a critical difference here. ... [T]his difference means nothing to the subscriber. It means nothing to the broadcaster."

## Perfect 10 v. Giganews (9<sup>th</sup> Cir. 2017)

"[T]he Aereo Court did not expressly address the volitional-conduct requirement for direct liability under the Copyright Act, nor did it directly dispute or comment on Justice Scalia's explanation of the doctrine. Thus, as one court in the Central District of California subsequently opined, because '[t]he volitional conduct doctrine is a significant and long-standing rule, adopted by all Courts of Appeal to have considered it, . . . it would be folly to presume that Aereo categorically jettisoned it by implication."

"[T]he Aereo Court's analysis can be reconciled with the volitional-conduct requirement. Indeed, the Court distinguished between an entity that 'engages in activities like Aereo's,' and one that 'merely supplies equipment that allows others' to perform or transmit. ... Because Aereo did not expressly address the volitional-conduct requirement and the Court's analysis can be reconciled with it, we conclude that the requirement was left intact and that the district court did not err in requiring Perfect 10 to satisfy it."

## Perfect 10 v. Giganews (9<sup>th</sup> Cir. 2017)

"[D]irect infringement requires the plaintiff to show causation (also referred to as 'volitional conduct') by the defendant. See [Fox v. Dish]. We wish to emphasize that the word 'volition' in this context does not really mean an 'act of willing or choosing' or an 'act of deciding,' which is how the dictionary defines the term. ... Rather, as used by the court in [Netcom], it 'simply stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts.' [Nimmer on Copyright]. ... As the district court cogently explained:

[T]he so-called "volition" element of direct infringement is not a judicially-created element of intent or knowledge; it is a basic requirement of causation. As its name suggests, direct liability must be premised on conduct that can reasonably be described as the direct cause of the infringement[.]"

BWP Media v. T&S Software Assocs. (5<sup>th</sup> Cir. 2017)

"We recognize, as other courts have, that "the word 'volition' in this context does not really mean an 'act of willing or choosing' or an 'act of deciding' . . . "Giganews, 847 F.3d at 666. One court decided the word 'stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts.' Id. ... At the very least, the Act 'requires conduct by a person who causes in some meaningful way an infringement.' CoStar, 373 F.3d at 549."

"The facts here are much closer to those in the *Netcom* line of cases than those in *Aereo*. Although Aereo and T&S both provided a service that others could use to infringe, only Aereo played an active role in the infringement. ... True, its users would request the content, but they did not merely utilize Aereo's service to store infringing content they obtained elsewhere. ... Aereo's involvement, in other words, was more than passive. ... The same cannot be said of T&S's conduct. T&S hosts the forum on which infringing content was posted, but its connection to the infringement ends there. ... Like *Netcom* and unlike *Aereo*, T&S and the infringing content are not linked by volitional conduct. It cannot be said that T&S's conduct 'cause[d] in some meaningful way an infringement.' *See CoStar*."

#### Arista Records v. Usenet.com (S.D.N.Y. 2009)

Defendant transformed from passive provider of space to active participants in the process of infringement where Defendants:

- Knew music files were among the most popular articles on their service and took active measures to create servers dedicated to mp3 files and to increase retention times of music groups;
- Took active steps (including automated filtering and human review) to remove access to certain categories of content and to block certain users; and
- Have and exercise control over which newsgroups to accept or to reject.

#### Capitol Records v. ReDigi (S.D.N.Y. 2013)

Fact that Defendant programmed its software to choose only content it knew was copyrighted satisfies the volitional conduct requirement. Absolving ReDigi of direct liability on grounds that the process is automated "would be a distinction without a difference."

#### Capitol Records v. MP3Tunes (S.D.N.Y 2014)

Defendant acted volitionally where defendant "creat[ed] a feature to automatically retrieve [music album] cover art from Amazon.com" and make digital copies of it.

## Fox News v. TV Eyes (Appeal Pending in 2d Cir.)

TV Eyes argues on appeal:

"Under Cablevision, TVEyes cannot be directly liable for any unauthorized copies of clips from the Works made by subscribers' use of the e-mailing, downloading, or date/time-search functions, as those copies would be entirely user- initiated and created through automated tools."

## BWP Mediα v. Polyvore (Appeal Pending in 2<sup>nd</sup> Cir.)

Polyvore argues for affirmance on appeal:

"District Court explained that '[o]utside of the[] narrow circumstances' where a defendant designs a computer program or service for the only or primary purpose of infringement, direct infringement claims should be dismissed 'when plaintiffs can show only that the defendants created and housed automated systems through which plaintiffs' works were copied."

## Spanski v. Telewizja Polska (TVP) (Appeal Pending in D.C. Cir.)

#### TVP Argues on Appeal:

"It is not infringement to establish an automated content delivery system that is not itself infringing, when the user of the system (not the defendant) selects the content to view, actuates the system, and [human] employees of the defendant do not process the request."

"The only volitional acts shown at trial were those of the employees of SEI's own law firm in New York, who sent commands to the VOD system, selected content, and received the resulting signal. The proof cited by the District Court was therefore insufficient to prove volitional copyright infringement."

VHT v. Zillow (W.D. Wa. 2017) (Appeal Pending in 9<sup>th</sup> Cir.)

"VHT is correct that a defendant cannot hide behind the volitional act doctrine by designing software that—although automated—'is designed so that third parties may infringe on copyrighted material.' 4 Nimmer on Copyright § 13.08(C)(3)(a); Aereo, 134 S. Čt. at 2510-11; Smith v. BarnesandNoble.com, LLC, 143 F. Supp. 3d 115, 122 (S.D.N.Y. 2015) ("Courts have looked to the purpose and general use of the service in question, finding 'volitional conduct' where a service or program was designed solely to collect and sell copyrighted material, . . . and where a program collected material that its creators knew to be copyrighted." (internal citations omitted)). However, Zillow's mechanism's—including its evergreen and deciduous classifications— are designed to avoid infringing behavior, not facilitate it. ... This system is no more designed to facilitate infringement than a copy machine."

VHT v. Zillow (W.D. Wa. 2017) (Appeal Pending in 9<sup>th</sup> Cir.)

- 16 Digs-specific copies of each user-selected photo made automatically by Zillow algorithm
- "Implicit Digs" (Digs copies made by Zillow when a user began, but failed to complete, the "dig" process)
- 3,438 images displayed and made searchable through Zillow's moderation, indexing and tagging.
- Image included in a promotional e-mail sent by Zillow, selected based on being among top-ranked images "dug" by users and classified as "great" by Zillow's moderators

# Jurisdiction/Territoriality

## Spanski v. Telewizja Polska (TVP) (Appeal Pending in D.C. Cir.)

Issue Presented: "Whether the District Court erred as a matter of law in holding that SEI's U.S. copyright infringement claim, based on TVP's uploading in Poland of non-geo-blocked content to its automated video-on-demand system located in Poland, was not barred by the extraterritoriality doctrine."

"TVP's 'infringing acts' occurred entirely in Poland, and under the well- settled extraterritoriality doctrine, such foreign acts do not permit a claim for infringement under the U.S. Copyright Act."

"In this case, if TVP performed the 51 Episodes at all, it would have done so entirely in Poland, by uploading non-geo-blocked programs to its VOD system. The only performance of the 51 Episodes in the United States was that of SEI's own law firm, who "turned the knob": its employees opened their Internet browsers, directed them to the TVP Website, chose the content to view on their computers, directed the automated VOD machinery to send the content to their computers, and viewed the content."

HOME

MOVIES

TV SERIES

**NEW EPISODES** 

GENRE

COUNTRY

REQUEST

Searching...

LOGIN

**♦** Filter

← Previous

587

Next →







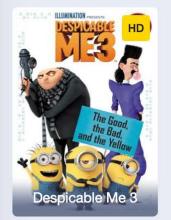






















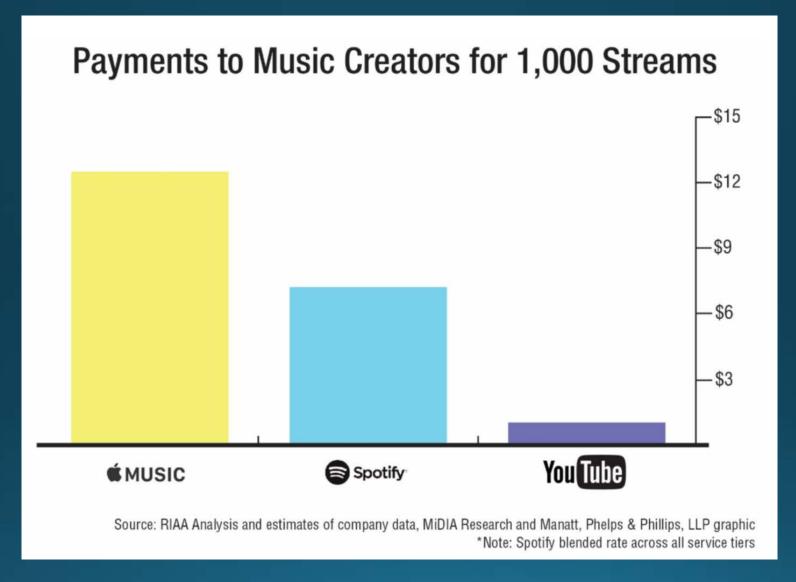
## Section 512

Section 512 "preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities."

S. Rep. 105-190 (1998)

"[DMCA immunity] is not presumptive, but granted only to "innocent" service providers .... The DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe. At that point, the Act shifts responsibility to the service provider to disable the infringing matter, "preserv[ing] the strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." H.R. Conf. Rep. No. 105-796, at 72 (1998)"

ALS Scan v. RemarQ, 4<sup>th</sup> Cir. 2001



Source: A. Abbott, et. al., "Creativity and Innovation Unchained: Why Copyright Law Must be Updated for the Digital Age by Simplifying It", released by the Regulatory Transparency Project of the Federalist Society, October 27, 2017

# Section 512 — Other Cases to Watch

BMG Rights Management v. Cox (Appeal Pending in 4th Cir)

Construing the requirement that an ISP "adopt[] and reasonably implement[], and inform[] subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."

BWP Media v. Clarity Digital (10<sup>th</sup> Cir. 1016)

Mavrix v. Live Journal (9<sup>th</sup> Cir. 2017)

Construing the phrase "storage at the direction of a user"

# Contributory Infringement Liability

BMG Rights Management v. Cox (Appeal Pending in 4th Cir)

Cox Argues on Appeal:

"Grokster limits contributory liability for a service with substantial noninfringing use to cases involving inducement or affirmative acts of contributory infringement."

BWP Media v. Polyvore (Appeal Pending in 2d Cir.)

**District Court:** 

"Here, even assuming that Polyvore had knowledge of the infringing activity and materially contributed to copyright infringement, the *Sony-Betamax* rule shields Polyvore from liability." Features of the Clipper tool that allow clipping of images from anywhere online, copyrighted or not, "make Polyvore's system, at the very least, 'capable of substantial noninfringing use."

#### First Sale

Capitol Records v. ReDigi (Appeal Pending in the 2<sup>nd</sup> Circuit)



# "The Next Great Copyright Act"



#### **COPYRIGHT REVIEW HEARINGS**

March 20, 2013	The Register's Call for Updates to U.S. Copyright Law	
May 16, 2013	A Case Study for Consensus Building: The Copyright Principles Project	
July 25, 2013	Innovation in America: The Role of Copyrights	
August 1, 2013	Innovation in America: The Role of Copyrights	•
September 18, 2013	The Role of Voluntary Agreements in the U.S. Intellectual Property System	•
November 19, 2013	The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age	
January 14, 2014	The Scope of Copyright Protection	
January 28, 2014	The Scope of Fair Use	
March 13, 2014	Section 512 of Title 17	Ĭ
April 2, 2014	Preservation and Reuse of Copyrighted Works	•
May 8, 2014	Compulsory Video Licenses of Title 17	•
June 2, 2014	First Sale Under Title 17	
June 10, 2014	Music Licensing Under Title 17 Part One	
June 25, 2014	Music Licensing Under Title 17 Part Two	
July 15, 2014	Moral Rights, Termination Rights, Resale Royalty, and Copyright Term	
July 24, 2014	Copyright Remedies	
September 17, 2014	Chapter 12 of Title 17	
November 19, 2014	Copyright Issues in Education and for the Visually Impaired	
February 26, 2015	The U.S. Copyright Office: Its Functions and Resources	
April 29, 2015	The Register's Perspective on Copyright Review	

Following these hearings, Chairman Goodlatte and Ranking Member Conyers invited all prior witnesses of the Committee's copyright review hearings and other interested parties to meet directly with Committee staff to provide additional input on these policy issues.