Seminario Derecho e Internet
Parte 2
La Propiedad Intelectual

HMJ

UPR-Derecho

22/06/2012

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1- Aspectos Básicos del Derecho de Internet

temas

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2- Intermediarios y Derechos de Autor

temas

1- Aspectos Básicos del Derecho de Internet

2- Intermediarios y Derechos de Autor

3- Derecho de Marcas en el Entorno Digital

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1- Aspectos Básicos del Derecho de Internet

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3- Derecho de Marcas en el Entorno Digital

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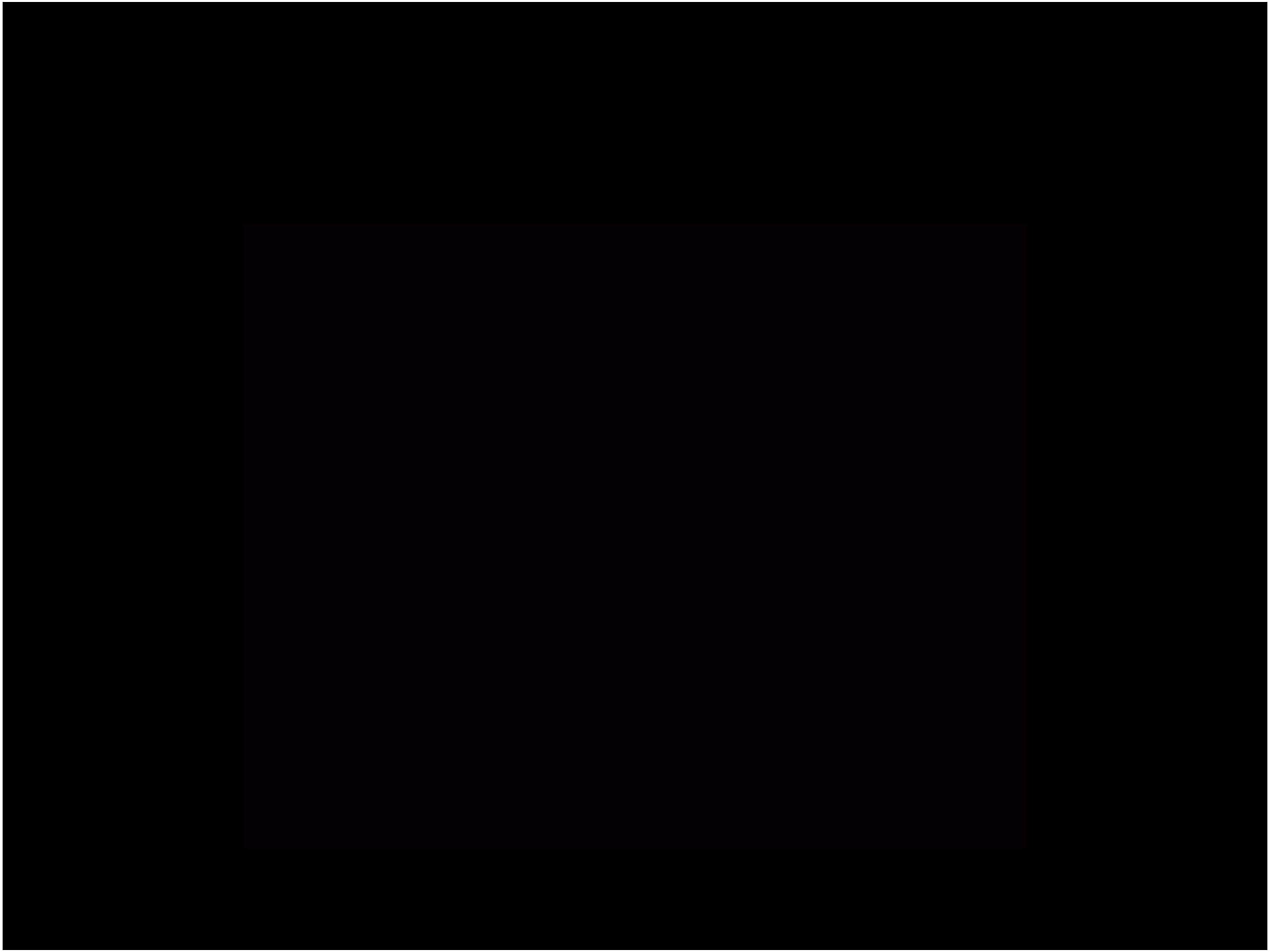
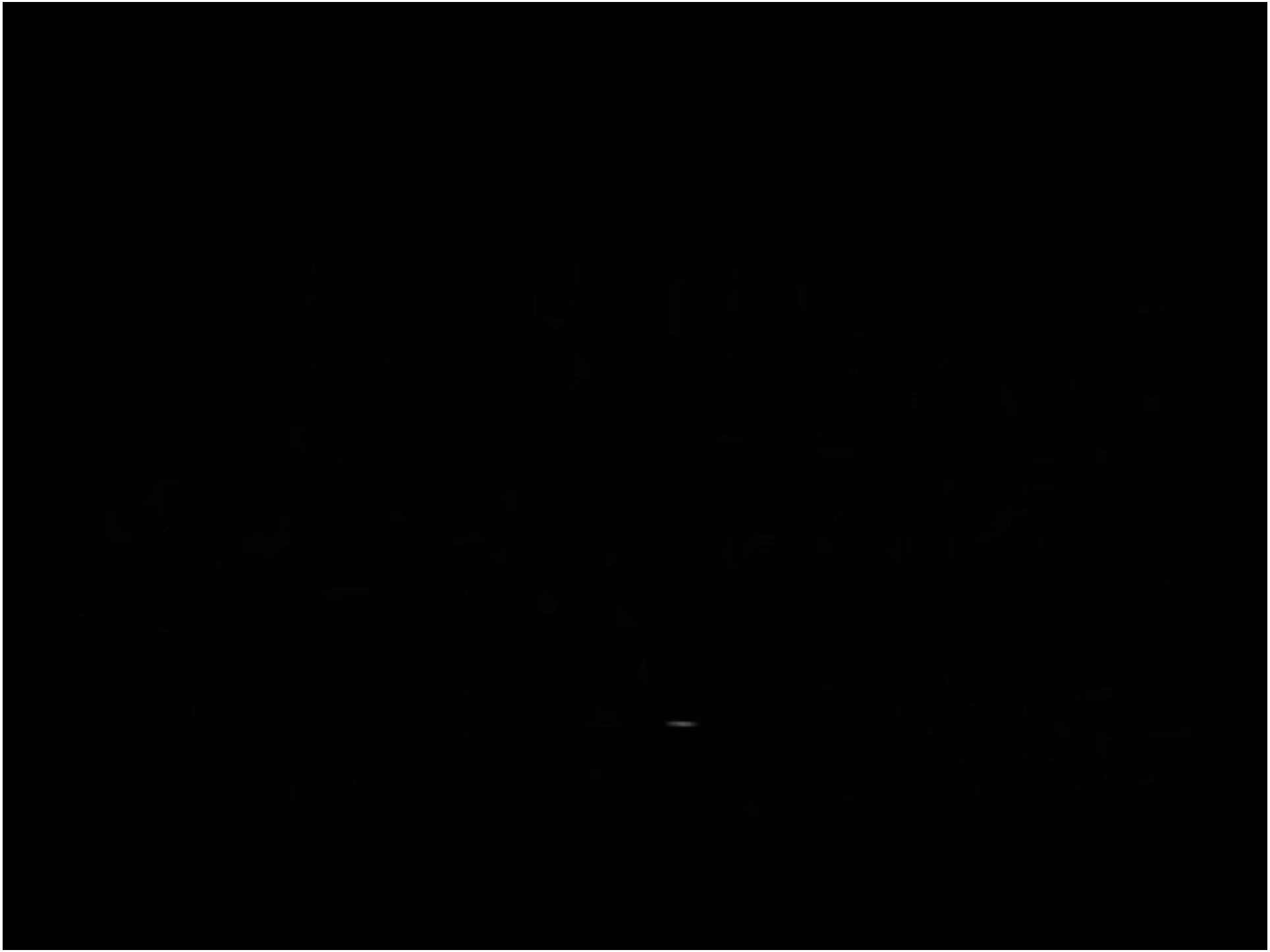
5- Libertad de Expresión e Internet

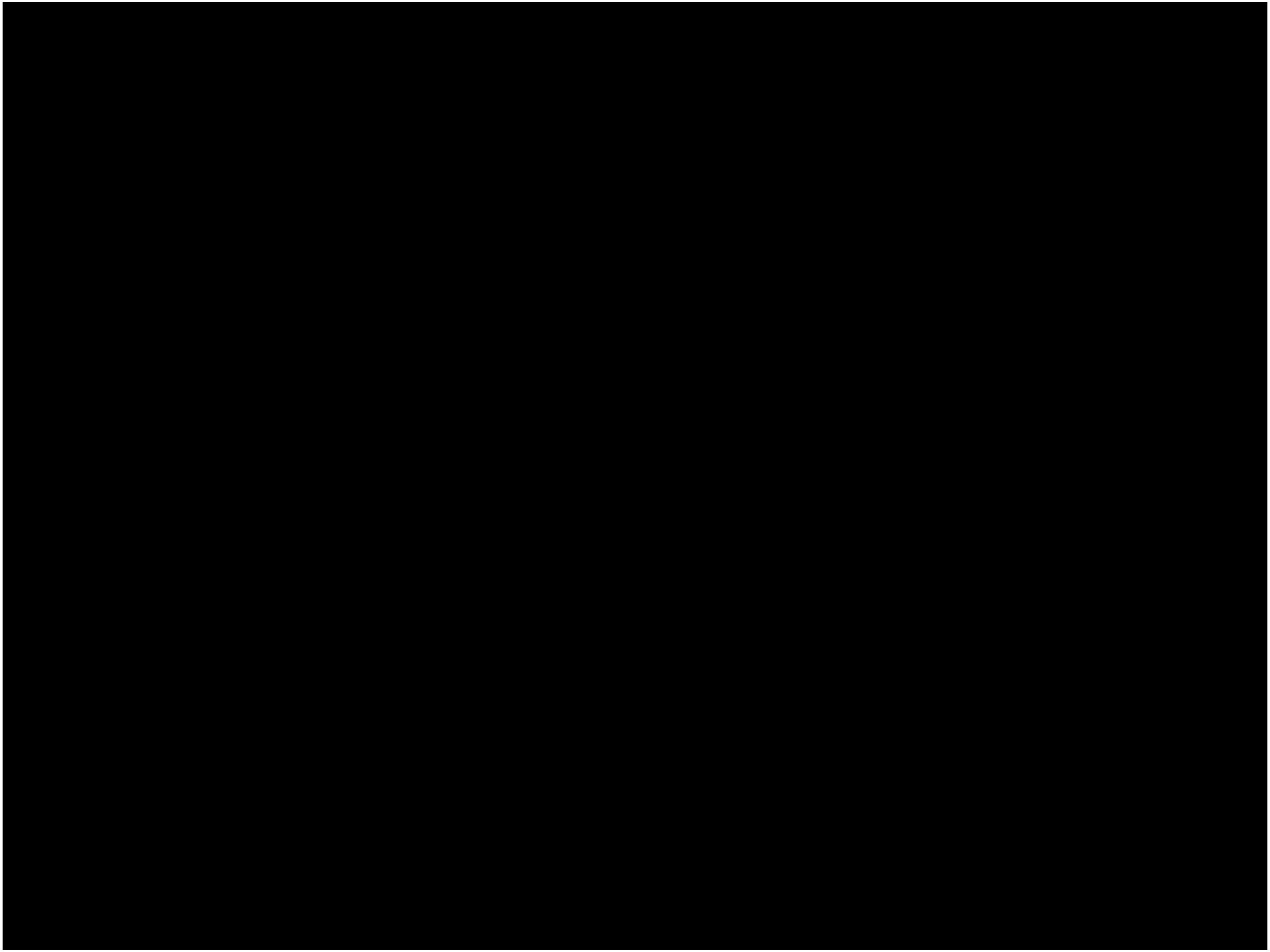
6- Propia Imagen

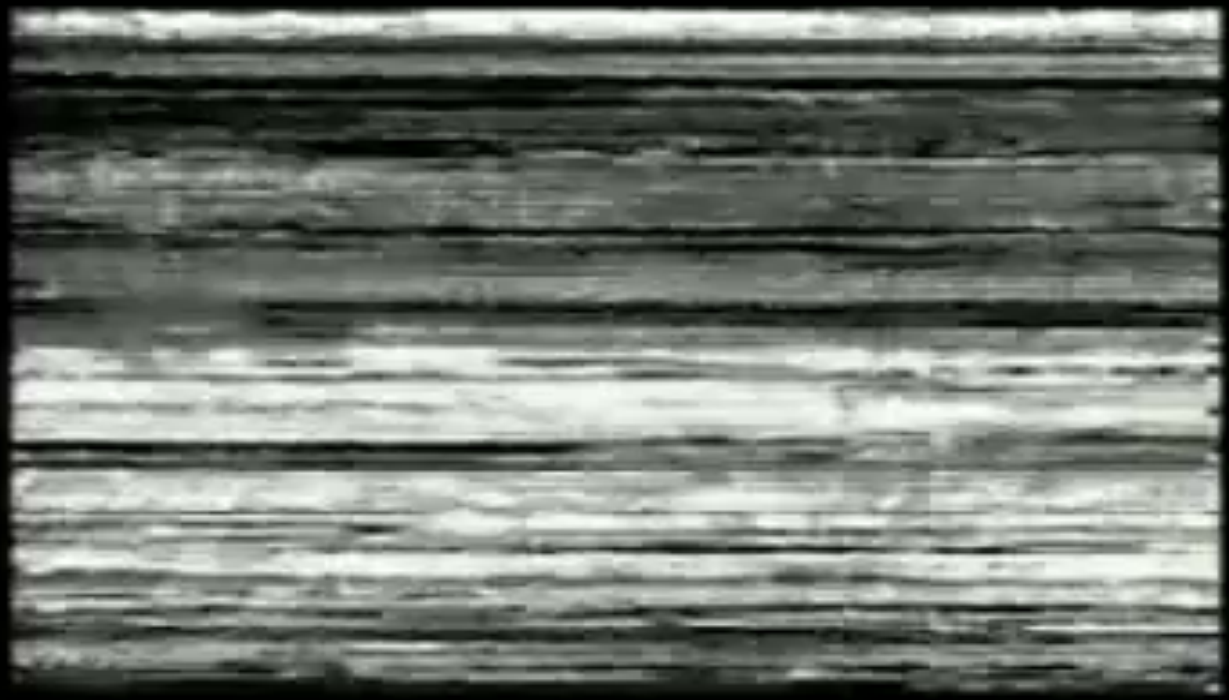
7- Creative Commons

Parte I:
Aspectos Básicos Derecho de Inernet (repaso)









PROTECT ME
WHAT I

WIKIPEDIA

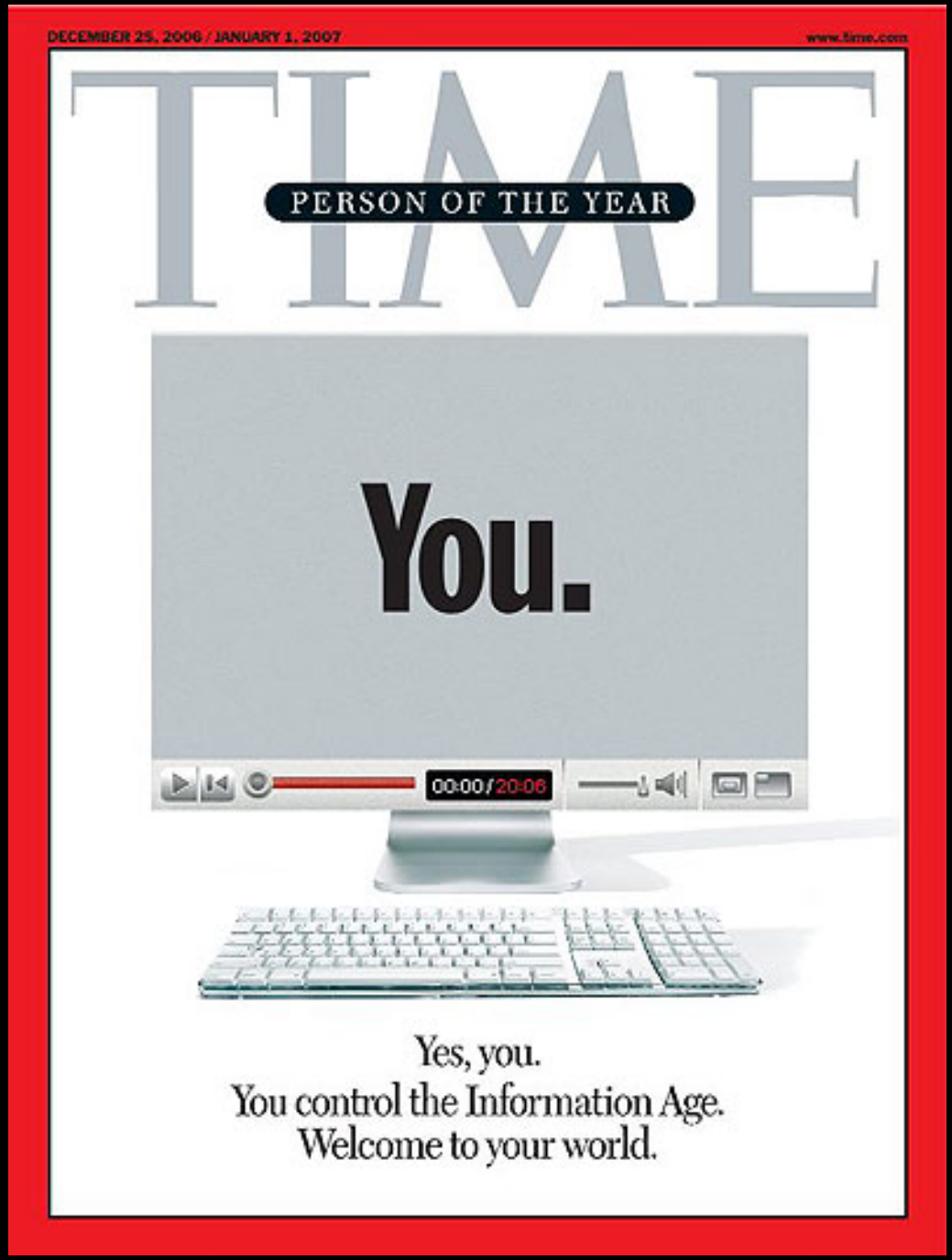
GAMMA
flickr™

YouTube
Broadcast Yourself™

facebook

SETI HOME

2006


DECEMBER 25, 2006 / JANUARY 1, 2007
www.time.com
TIME
PERSON OF THE YEAR
You.
00:00 / 20:06
Yes, you.
You control the Information Age.
Welcome to your world.

2011

PERSON OF THE YEAR
TIME
THE
PROTESTER
FROM THE ARAB SPRING TO ATHENS, FROM OCCUPY WALL STREET TO MOSCOW

- Actividad individual
  - Granular
  - Distribuida
  - Poco costosa
  - Pocos costos de organización
  - Usuarios / no consumidores
  - Social, política, entretenimiento (desde gatos a revoluciones, es la misma tecnología…. Uno depende del otro).

¿Legislable?

"Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather…"

John Perry Barlow

A Declaration of the Independence of Cyberspace (1996)

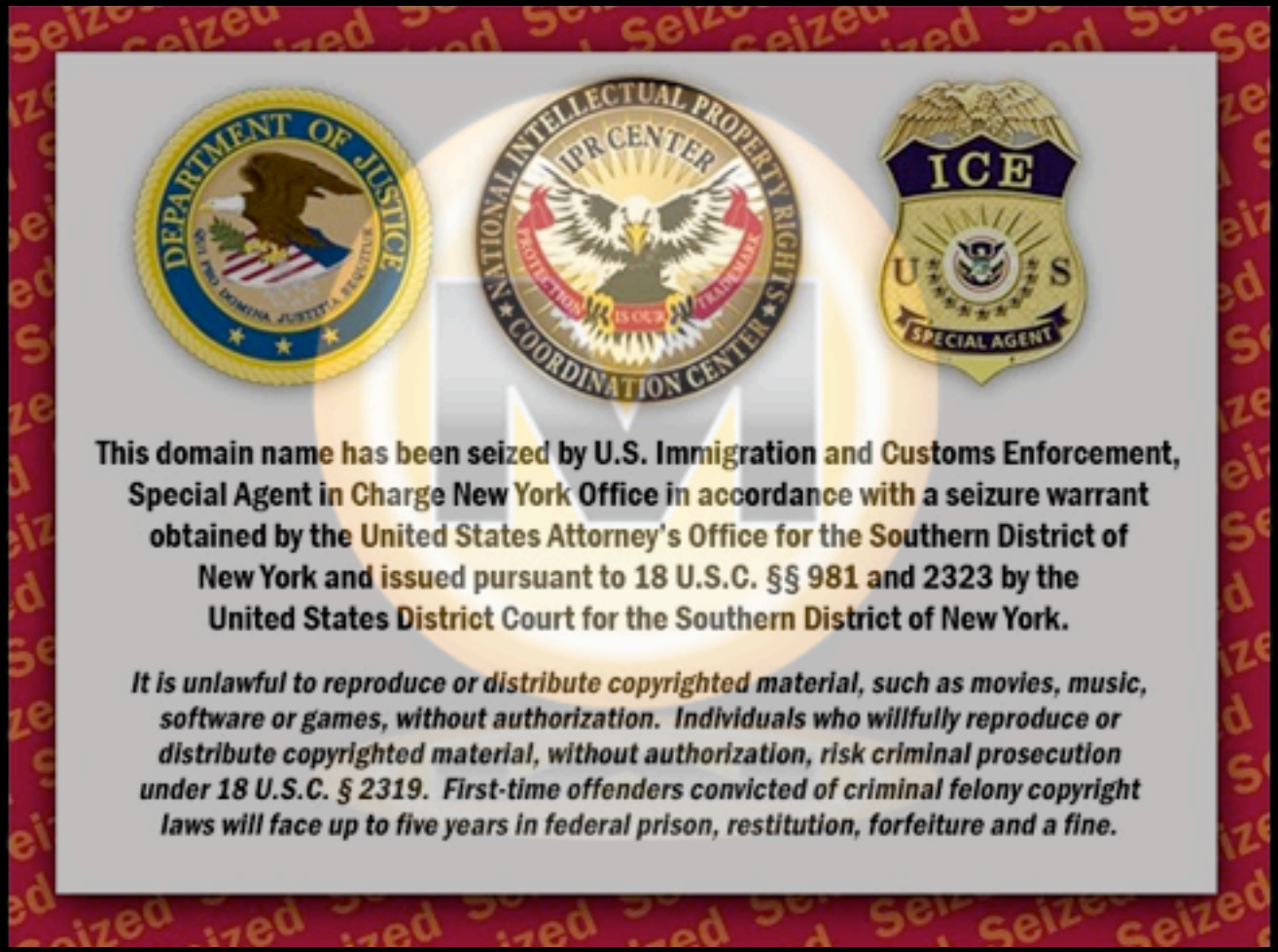
Directa

Excepcional

Desconocimiento

Inmune

Cautela


DEPARTMENT OF JUSTICE
NATIONAL INTELLECTUAL PROPERTY RIGHTS
IPR CENTER
COORDINATION CENTER
ICE
U S
SPECIAL AGENT
This domain name has been seized by U.S. Immigration and Customs Enforcement, Special Agent in Charge New York Office in accordance with a seizure warrant obtained by the United States Attorney's Office for the Southern District of New York and issued pursuant to 18 U.S.C. §§ 981 and 2323 by the United States District Court for the Southern District of New York.
It is unlawful to reproduce or distribute copyrighted material, such as movies, music, software or games, without authorization. Individuals who willfully reproduce or distribute copyrighted material, without authorization, risk criminal prosecution under 18 U.S.C. § 2319. First-time offenders convicted of criminal felony copyright laws will face up to five years in federal prison, restitution, forfeiture and a fine.

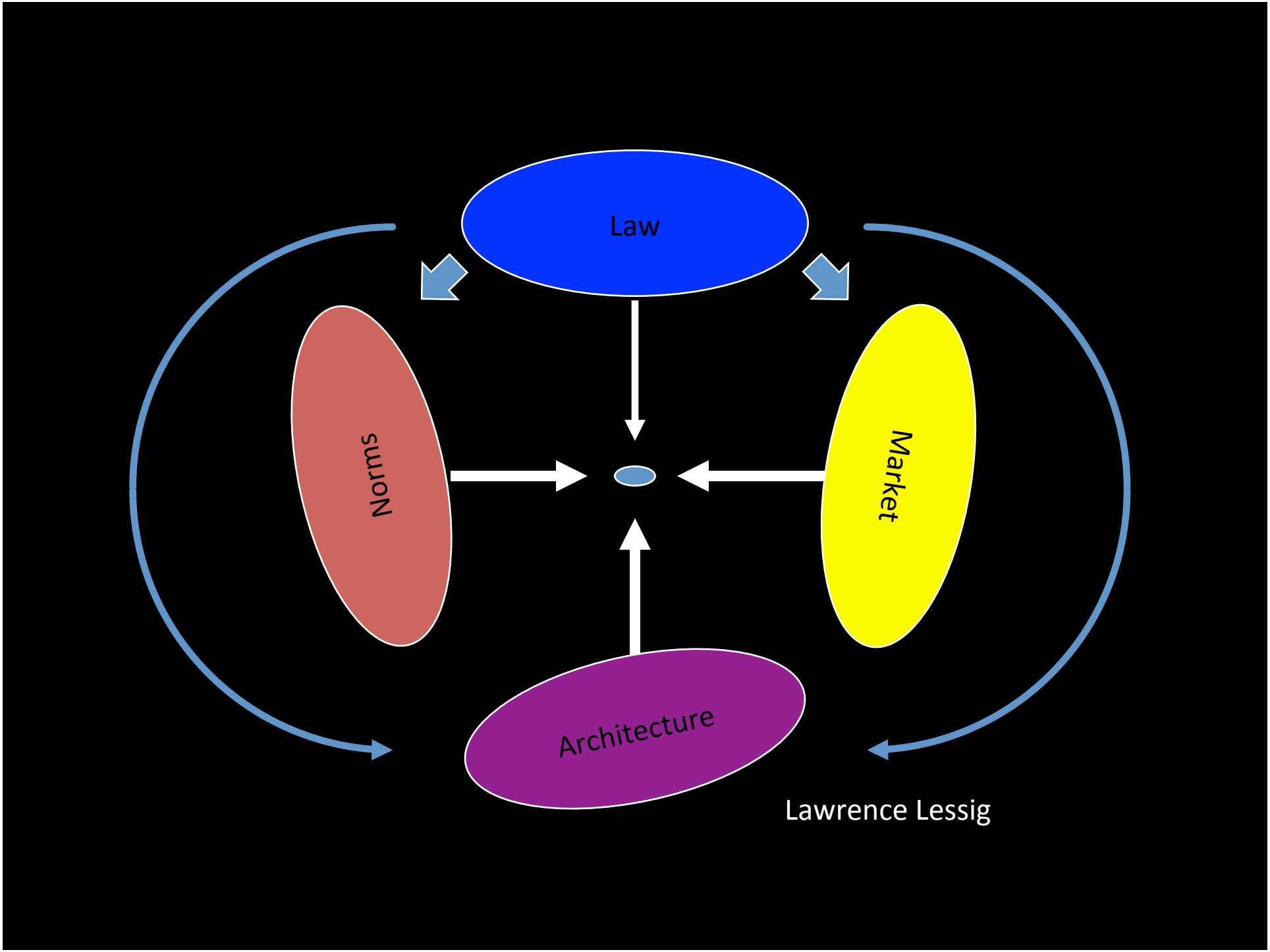
José A. Fusté, 9 Feb., 2011

"Further, the Court hereby ORDERS GoDaddy.com, Inc., Domains by Proxy, Inc., and SiteGround.com Inc. to TAKE DOWN the website www.yonosoydelaclase.com immediately.

Also, on or before February 16,2011, GoDaddy.com, Inc., Domains by Proxy, Inc., and SiteGround.comInc. SHALL provide the Court with the name and address of the individual(s) who contracted their services in relation to the website www.yonosoydelaclase.com."

Juez Kozinski, en Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008)

"The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real- world counterparts, which must comply with laws of general applicability."


Law
Norms
Market
Architecture
Lawrence Lessig

Intermediarios: Porteros y Chaperones

intermediarios de conexión, como los Proveedores de Servicio de Internet, artefactos móviles

intermediarios de información, como los motores de búsqueda, plataformas de redes sociales

intermediarios financieros, como tarjetas de crédito y PayPal, entre otros.

Hiram A. Meléndez Juarbe, *Intermediarios y libertad de expresión: apuntes para una conversación*, Centro de Estudios en Libertad de Expresión y Acceso a Información, Universidad de Palermo, Buenos Aires, 2011 **(ANEJO, pág 3)**

EJEMPLOS
Derecho de Internet

Jurisdicción in Personam

Trans-Oceanic Life Ins. Co. v. Oracle Corp., KLCE200700021, 30 de marzo 2007, 2007 WL 1655784

"mientras el Tribunal Supremo no paute otra cosa, no estamos en posición de resolver que la venta de productos a través del Internet sea suficiente base para establecer contactos mínimos".

Trans-Oceanic Life Ins. Co. v. Oracle Corp., 2012 TSPR 34, 24 de febrero de 2012 ("determinamos que el Tribunal de Apelaciones erró al negarse a resolver la controversia señalada debido a que esta Curia aún no ha pautado la normativa aplicable al asunto particular ")

Ver además, Goodyear Dunlop Tires Operations, S.A. v. Brown, No. 10–76, ___ US __ , Junio 2011) ("A court may assert general jurisdiction over foreign sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are **so "continuous and systematic" as to render them essentially at home in the forum State")**

Anonimato

Protections for anonymous speech are vital to democratic discourse. Allowing dissenters to shield their identities frees them to express critical minority views . . . Anonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

Anonimato

The Court will consider four factors in determining whether the subpoena should issue. These are whether:

(1) the subpoena seeking the information was issued in good faith and not for any improper purpose,

(2) the information sought relates to a core claim or defense,

(3) the identifying information is directly and materially relevant to that claim or defense, and

(4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

Doe v 2themart.com, 140 FSupp2d 1088 (WD Wash 2001)

Manejo de Datos Privados

- Derecho a la Intimidad en Estados Unidos
  - Constitución, Whalen v. Roe, 429 U.S. 589 (1977)
  - Reglamentación fragmentada
  - Tort
    - Apropiación de imagen
    - "False light"
    - Divulgación de hechos privados
    - Intromisión con áreas íntimas, secretas ("intrusion upon seclusion")

Manejo de Datos Privados

- Derecho a la Intimidad en Estados Unidos
  - El Criterio de Expectativa de Intimidad
    - Hiram Meléndez Juarbe, Lo público de lo público: un argumento que no debe estar disponible, http://derechoalderecho.org/2012/04/05/publicodelopublic/, 5 de abril de 2012
    - Opinión Concurrente de la Jueza Sonia Sotomayor en United States v. Jones, 565 U. S.____ (2012)

Manejo de Datos Privados

Reglamentación Administrativa

- Privacy Policy y el Federal Trade Commission

- "We collect information:
  - When you register an account to become a LinkedIn user ("User"), such as your name, e-mail, employer, country, and a password.
  - When you view and interact with LinkedIn pages, features, and functionality, including LinkedIn mobile applications, software (like adding to your profile, participating in Groups, uploading contacts, etc.), and platform technology (like "Share on LinkedIn" buttons or third party applications). We also collect your IP address, browser type, operating system, mobile carrier, and your ISP, and receive the URLs of sites from which you arrive or leave the LinkedIn website, or sites that have embedded LinkedIn platform technology.
  - Through cookies and other technologies that allow us to recognize you, customize your experience, and serve advertisements both on and off LinkedIn."

Manejo de Datos Privados

- Privacy Policy y el Federal Trade Commission

  LinkedIn

  - "LinkedIn takes the privacy of our Users very seriously, and we do not sell, rent, or otherwise provide your personally identifiable information to third parties, except as described in this policy. We will also not share other personal information not published to your profile or generated through engagement with other LinkedIn services (Groups, Answers, Company Pages, etc.) without your explicit consent…
  - We may provide aggregated anonymous data about the usage of the Services to third parties for purposes that we deem, in our sole discretion, to be appropriate, including to prospective advertisers on LinkedIn."

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45)
  - ‘‘unfair or deceptive acts or practices in or affecting commerce.’’
- DACO (3 L.P.R.A. sec. 341e)
  - “Reglamentar y fiscalizar los anuncios y las prácticas engañosas en el comercio, incluyendo la facultad de fiscalizar los reclamos sobre la calidad y demás cualidades de los productos y servicios, realizados a través de los distintos medios de comunicación, así como requerir de los anunciantes evidencia de la veracidad de los reclamos realizados”.

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45) (Acuerdos recientes)
  - In the Matter Facebook, Inc, 092 3184 (FTC 2011)
  - In the Matter of Google, Inc, 102 3136 (FTC 2011) (Google Buzz)
  - In the Matter of Myspace, LLC, 102 3058 (FTC 2012) (Friend Id) (Acuerdo del 8 de mayo de 2012)

Datos Privados y el FTC

- Federal Trade Commission Act (FTC Act) (15 USC 45)

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The New York Times

Business Day

WORLD | U.S. | N.Y. / REGION | BUSINESS | TECHNOLOGY | SCIENCE | HEALTH | SPORTS | OPINION

F.T.C. and White House Push for Online Privacy Laws

By EDWARD WYATT
Published: May 9, 2012

WASHINGTON — The Obama administration and the nation's chief privacy regulator pressed Congress on Wednesday to enact online privacy legislation, saying new laws would level the playing field between companies that already had privacy policies and those that lacked them, and thus escape regulatory oversight.

Enlarge This Image

Jon Leibowitz, chairman of the Federal Trade Commission, which enforces limited Internet privacy laws,

FACEBOOK
TWITTER
GOOGLE+
EMAIL
SHARE
PRINT
REPRINTS

Datos Privados en PR

Protección Constitucional

- Su aplicación contra personas privadas
- Su futuro incierto

– Arroyo v. Rattan, 117 D.P.R. 35 (1986)
– P.R.T.C. v Martínez, 114 D.P.R. 328 (1983)
– U.T.I.E.R. v A.E.E., 99 T.S.P.R. 155

Predomina el paradigma de lo "público de lo público"

Ejemplo: Controversia reciente sobre acceso a listas electorales en primarias

Hiram Meléndez Juarbe, La Constitución en Ceros y Unos: Un Acercamiento Digital al Derecho a la Intimidad y la Seguridad Pública, 77 Rev. Jur. UPR 45 (2008)

Datos Privados en PR

- Vega Rodríguez v. Telefónica de Puerto Rico, 2002 T.S.P.R. 50
  - Incide sobre regulación y supervisión en contexto laboral re: uso de tecnología (y redes sociales) en el empleo (público y privado)
  - Potencial efecto sobre plataformas de redes sociales

Notificación:
"(a) el tipo de vigilancia a utilizarse;
(b) la naturaleza de los datos a obtenerse;
(c) la frecuencia con que habrá de usarse el medio de vigilancia;
(d) sus especificaciones técnicas;
(e) lugar donde se instalará el sistema de vigilancia;
(f) localización del equipo de monitoreo;
(g) el grupo de empleados que ha de ser observado; y
(h) el mecanismo administrativo disponible para canalizar las quejas de los empleados sobre el particular.

Además, la empresa deberá tener una política clara y adecuada sobre el uso, disposición y acceso a la información recopilada, la cual se le informará a los empleados.

Por último, como regla general, no se deberá instalar un sistema de videograbación de empleados en áreas en las cuales por su naturaleza, el empleado tenga una marcada expectativa de intimidad tales como los baños, duchas y vestidores (locker rooms)."

Datos Privados en PR

Protección Constitucional

- Constitucionalización de "Fair Information Practices"
  - Vega Rodríguez v. Telefónica de Puerto Rico, 2002 T.S.P.R. 50
- Pero…
  - Futuro incierto de "factura más ancha"
    - Hiram Melendez Juarbe, Rechazo a tratamiento médico y derecho a la intimidad: ¿suicidio asistido de la factura más ancha?, http://derechoalderecho.org/2010/01/28/tratamiento_medico/, 28 de enero de 2008
    - Lozada Tirado v Tirado Flecha, 2010 TSPR 9, 27 de enero de 2010
- ¿Rol de DACO?

Parte II:
Responsabilidad de Intermediarios por Violación de Derechos de Autor por Terceros

En el Common Law:

1. **Responsabilidad vicaria** se impone cuando el demandado tiene "the right and ability to supervise the infringing activity and also has a direct financial interest in the activity".
Fonovisa v Cherry Auction, 76 F3d 259 (9th Cir 2007) (ANEJO pág. 15)

2. **Responsabilidad secundaria en modalidad de "contributory infringement"**, atiende situaciones en que el demandado "directly contributes to another's infringement". En general, "one who with knowledge of the infringing activity, induces, causes or **materially contributes to** the infringing conduct of another, may be held liable as a 'contributory' infringer". **Gershwin Publishing Corp. v. Columbia**, 443 F.2d 1159 (2d Cir. 1971).

"a computer system operator can be held **contributorily liable** if it ''has actual knowledge that specific infringing material is available using its system,'' and can **''take simple measures to prevent further damage''** to copyrighted works, yet continues to provide access to infringing works." **Perfect 10 v. Amazon, 508 F.3d 1146 (9th Cir 2007)**

Tecnología que facilita la violación de Derechos de Autor:

Sony

"…the contributory infringement doctrine is grounded on the recognition that adequate protection of a monopoly may require the courts to look beyond actual duplication of a device or publication to the products or activities that make such duplication possible. The staple article of commerce doctrine 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. **Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."**

WATCH WHATEVER WHENEVER.
With Sony's Betamax SL-8600 videorecorder, you can see any TV show you want to see anytime you want to see it.
Because Betamax, which plugs into any TV set and is easy to operate, can videotape a show up to three-hours long (with the L-750 videocassette) while you're doing something else—even while you're out of the house, by setting the electronic timer.
It can also videotape something off one channel while you're watching another channel.
And remember, Sony has more experience in videorecorders than anyone (over 20 years!). In fact, we've sold more videorecorders to broadcasters and industry than any other consumer manufacturer. We even make our own tape.
For years you've watched TV shows at the times you've had to. Now you can watch them at the times you want to.
SONY
SONY BETAMAX
THE LEADER IN VIDEO RECORDING

TiVo

Google

Responsabilidad de Intermediarios por actos de terceros

Peer to Peer Filesharing

La distinción entre el artefacto y el servicio

A&M Records v. Napster, 239 F3d. 1004 (9th Cir. 2001) (ANEJO PAG. 21)

"We are compelled to make a clear **distinction** **between the** **architecture** **of the Napster system and** **Napster's conduct** in relation to the operational capacity of the system"
...

"We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement."

Responsabilidad de Intermediarios por actos de terceros

Tecnología que facilita la violación de Derechos de Autor:

Peer to Peer Filesharing

MGM v. Grokster, 125 S.Ct. 2764 (2005) (ANEJO PAG 45)

"where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, Sony's staple-article rule will not preclude liability. …

Evidence of ''active steps taken to encourage direct infringement,''…such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use."

Responsabilidad de Intermediarios por actos de terceros

La Intervención Estatutaria: Sección 512 del Digital MIllennium Copyright Act

(Anejo pág. 66)

Inmunidad Condicionada a Intermediarios

Responsabilidad de Intermediarios por actos de terceros

§512

Distingue entre:

(a) Transitory Digital Network Communications.

(b) System Caching

(c) Information Residing on Systems or Networks at Direction of Users.

(d) Information Location Tools.

Responsabilidad de Intermediarios por actos de terceros

§512(i)
Obligaciones aplicables a todos para ganar la inmunidad

Accommodation of technology.

(A) has adopted and reasonably implemented, and informs 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; and

(B) accommodates and does not interfere with standard technical measures.

Jurisprudencia interpretativa:

- Estas disposiciones no imponen obligaión afirmativa del ISP de investigar

c) Information Residing on Systems or Networks at Direction of Users.—

(1) In general. — A service provider shall not be liable for monetary relief, ... if the service provider

(A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B)

does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and...

c) Information Residing on Systems or Networks at Direction of Users.—

…

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

Notice & Take Down

c) Information Residing on Systems or Networks at Direction of Users.—

(3) Elements of notification. —

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature...

(ii) Identification of the copyrighted work claimed to have been infringed, ...

(iii) Identification of the material that is claimed to be infringing ...

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, ...

(v) A statement that the complaining party has a good faith belief that use of the material ... is not authorized by the copyright owner...

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

c) Information Residing on Systems or Networks at Direction of Users.—

(3) Elements of notification. —

(B)

(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1) (A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A)

c) Information Residing on Systems or Networks at Direction of Users.—

Counter Notification

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification ... promptly provides the person who provided the [original] notification ... with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

c) Information Residing on Systems or Networks at Direction of Users.—

Counter Notification

www.chillingeffects.org

•30% de los requerimientos para retirar contenido son solicitudes basadas en reclamos legales débiles,

•muy pocos usuarios aprovechan el procedimiento de respuesta

Urban, Jennifer, «Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act, en *Santa Clara Comp. & High Tech L. Journal*, 22 (2006), p. 621

c) Information Residing on Systems or Networks at Direction of Users.—

Counter Notification

www.chillingeffects.org

En dos estudios separados, en 2007 y 2008, unos investigadores introdujeron «usuarios» con direcciones IP de la Universidad de Washington, tales como impresoras, en redes Bit-Torrent para monitorear el tráfico. Aun cuando esos «usuarios» no descargaron archivos, más de 400 notificaciones fueron recibidas.

Piatek, Michael, Tadayoshi Kohno y Arvind Krishnamurthy, «Challenges and Directions for Monitoring P2p File Sharing Networks -or- Why My Printer Received a DMCA Takedown Notice Why My Printer Received a DMCA Takedown Notice», en *University of Washington Technical Report, UW-CSE*-08-06-01

c) Information Residing on Systems or Networks at Direction of Users.—

Counter Notification

(f) Misrepresentations. - Any person who knowingly materially misrepresents under this section —

(1) that material or activity is infringing, or
(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

OPG v. Diebold, 337 F. Supp. 2d 1195 (N.D. Cal. 2004),

c) Information Residing on Systems or Networks at Direction of Users.—

Perfect 10 v. CCBill, 481 F.3d 751 (9th Cir. 2007) (Anejo, 74) (hosting & payment solutions)

- "reasonably implemented policy"= "working notification system" + "does not actively prevent copyright owners from collecting information"
- "facts or circumstances" (i.e., "red flag provision")= Service Provider no tiene obligación afirmativa de buscar material ilegalmente distribuido (aun cuando clientes tienen domain names: stolencelebritypics.com, illegal.net)

Perfect 10 v Visa, 494 F.3d 788 (9th Cir. 2007) (Anejo, 86) (secondary liability visa / master card)

- Contributory: No "material contribution… because infringement of Perfect 10's copyright can occur without using Defendant's payment system"
- No inducement
- No vicarious (no "right and ability to control"): "the credit card companies cannot stop any of the third party websites from reproducing, displaying, and distributing unauthorized copies of Perfect 10's images because that infringing conduct takes place on the third party websites"

Perfect 10 v. Amazon, 508 F.3d 1146 (9th Cir 2007) (Anejo, 113) (thumbnails search engines, Google)

- No responsabilidad directa por thumbnails (transformatividad en Fair Use)
- No "right and ability to control" bajo responsabilidad vicaria.

UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011) (Anejo, 135) (diciembre de 2011) (VEOH)

1- Tecnología, DRM Fingerprinting Technology, Audible Magic

2- "at the direction of a user"

- 512 no limitado a web hosts tradicionales.
- 512 aplica aun cuando Veoh formatea el archivo automáticamente al subirse, siempre que no sea pre seleccionado por Veoh.

3- "Actual knowledge" / "aware of facts or circumstances"

- Actual knowledge = specific knowledge of infringing material (no generalizado) + failure to expeditiously remove material (via notice and takedown). Policing burden on CR owner.
- Facts or circumstances = general knowledge n/a red flag.

4- "direct financial benefit and right and ability to control such activity"

- DMCA requiere "Something more" que responsabilidad vicaria en common law
- "a service provider must be aware of specific infringing material to have ability to control that infringing activity… Only then would its failure to exercise its ability to control deny it a safe harbor"
- To "expeditiously remove" implies some "right and ability to control"
- Por tanto, " R & A to C requires control over specific infringing material provider knows about."

Viacom v. Youtube, 10-3342-cv (2nd Cir, 5 de abril de 2012) (Anejo 184)

1- "Actual knowledge" / "aware of facts or circumstances"

- Actual knowledge = specific knowledge of infringing material (no generalizado) + failure to expeditiously remove material (via notice and takedown). Policing burden on CR owner.
- Facts or circumstances: general knowledge n/a red flag. Necesita "specific and identifiable infringement"
- Pero son diferentes:

"The difference between actual and red flag knowledge is thus not between specific and generalized knowledge, but instead between a subjective and an objective standard. In other words, the actual knowledge provision turns on whether the provider actually or "subjectively" knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement "objectively" obvious to a reasonable person. "

(devuelto a instancia para aplicar tests)

Viacom v. Youtube, 10-3342-cv (2nd Cir, 5 de abril de 2012) (Anejo 184)

2- "Willful blindness", nueva teoría disponible para eliminar responsabilidad bajo 512=

"conscious avoidance amounting to knowledge where the person was aware of a high probability of the fact in dispute and consciously avoided confirming that fact"

3- "direct financial benefit and right and ability to control such activity"

- Rechaza Veoh pues duplica "contributory liability" al añadir requisito de conocimiento, (VEOH="a service provider must be aware of specific infringing material to have ability to control that infringing activity… Only then would its failure to exercise its ability to control deny it a safe harbor"), eliminaría la Vicaria del 512.

- Pero DMCA requiere "Something more" que "right and ability to control" en responsabilidad vicaria del common law. Ese "algo más" implica ejercer influencia sustancial sobre la actividad de los usuarios y su contenido (inducir o instruir en la actividad que general la violación)

Problemas emergentes: **Music Lockers y La Nube**:

- Amazon Cloud Drive: https://www.amazon.com/clouddrive/
- Google Music: http://music.google.com/
  - Violación directa del intermediario?
    - **(ANEJO, pág 223)** Cartoon Network v Cablevision, 536 F.3d 121 (2d Cir. 2008) (no responsabilidad directa del intermediario porque "copiar" requiere elemento volitivo, no automático)
  - Responsabilidad secundaria, por violación del usuario?
    - Fair Use? (Sony)
    - Inducement? (Grokster)
    - Vicaria?
    - Sideloading: "Facts or circumstances"? Red Flags?
    - Deduplication?

Parte III:
Derecho de Marcas en el Entorno Digital

Lo Básico:

Lanham Act y la Ley de Marcas de Puerto Rico, Ley Núm. 169 del año 2009, según enmendada.

Ley de Marcas de 2009, enmiendas de 2011, y Reglamento (Anejo, pág. 239-351)

Objetivos del Sistema de Marcas: la protección al consumidor y el flujo de bienes y servicios en el mercado.

Su diferencia con los derechos de autor y otros regímenes de propiedad intelectual.

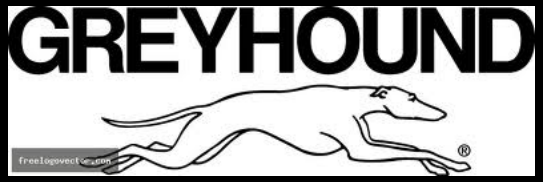
Marcas susceptibles de protección

- El amplio concepto de lo que constituye una "marca"
- La imagen o estilo comercial ("Trade Dress") y el límite de la Funcionalidad
- Trade Dress de una página de internet: el concepto del "look and feel"

(ANEJO 352) Blue Nile, Inc. v. Ice.com, Inc., 478 F. Supp. 2d 1240 (W.D. Wash., 2007)

Lo Básico: … cont.

- Requisitos para la protección
  - Arbitrarias
  - Sugestivas
  - Descriptivas
  - Genéricas



Lo Básico: … cont.

- El concepto del “Secondary Meaning” o “significación secundaria”
- El rol central del consumidor y la Probabilidad de Confusión
- Blurring y Tarnishment
- Fair Use

GROUPON

Destacados | Travel | Todas las ofertas

Ingresar | Registro

San Juan

Suscríbete

Invita a tus amigos y gana USD $10

$23 en vez de $225 por ajuste quiropráctico + evaluación clínica y nutricional en Salud Quiropráctica (90% off)

$23 Comprar

Referencia	Beneficio	Ahorras
$225	90%	$202

Este Groupon expira en
07:32:01

Más de 40 comprados

Groupon activo!

Send | Like 16

Destacados

- El ajuste se realiza desde el cuello hasta el área de la espalda baja.
- Incluye terapia eléctrica ultrasónica para disminuir inflamaciones y mejorar la tolerancia al dolor.
- Todos los procedimientos se realizan en una sola sesión de

Letra chica

- Válido para personas de todas las edades. Menores deben ser acompañados por sus padres o un adulto.
- Aplica solo para pacientes nuevos.
- No requiere plan médico.
- Cancelaciones con mínimo 24 horas

Hoy en Travel

Costa Rica: 7 noches para dos + aventura en la montaña + aéreos
San Juan
$ 1,699
Ver más

Otros Groupones hoy

Masaje sueco + reflexología + piedras calientes a domicilio 68% off
San Juan
$ 32
$ 100
Ver más

Vacunación para perros y gatos a domicilio para toda la isla 65% off
San Juan
$ 35
$ 100

http://www.ofertadeldia.com/puerto-rico-ofertas/oferta/Casa-Azul... — Certificado de $30 para consumir en menú abierto

Google

SIGN UP | MI CUENTA

OFERTA DEL DÍA .COM

¡Descubre como ganar **Créditos de Ofertas!**

OFERTA EN DETALLE | OFERTAS RECIENTES | CÓMO FUNCIONA | CONTACTO

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¡Suscríbete y recibe las mejores ofertas!

$38.00 valor

$18.00 descuento 53%

Papa John's: 1 Pizza Grande + 2 Papa Sides + Padrino de Pepsi por $18
@Papa John's

$270.00 valor

$90.00 descuento 67%

Membresía de 3 Meses + 6 Clases de Spinning @ Be Active Fitness Center by:...
@Be Active Fitness Center by:...

$80.00 valor

$40.00 descuento 50%

Mantenimiento de acondicionador de aire "Mini-Split" en Área Metro con...
@Smart Air Systems

@Casa Azul Cocina Mexicana, San Patricio

Certificado de $30 para consumir en menú abierto

precio $15.00

comprar

Valor	Ahorro	descuento
$30.00	$15.00	50%

03:17:17:46
D H M S

2 Compradas

¡Esta Oferta está activada! ¡Si la compras, es tuya!

Recomendar | Twittear 0 | +1 0 | email

Válido desde 24/04/2012 hasta 30/06/2012

OfertaDelDía.com en Facebook

Acceder Mi Cuenta | ¡Regístrate para Comprar!

Conéctate

GROOPANDA

OFERTAS GROOPERS CONÓCENOS

Hoy en Groopanda... Paga $19 en vez de $40 por un Surtido Marullo (Calamares, Camarones, Buñuelos de Bacalao y Masitas de Pescado) + un Surtido Criollo (Masitas de Pollo, Queso Frito, Sorullos de Maíz y Bolitas de Amarillos) + 4 Medallas ó 2 Sangrías @ Marullo Bar & Tapas (La Placita, Santurce)

$19 COMPRAR!

$21	$40	53%
DESCUENTO	VALOR	AHORROS

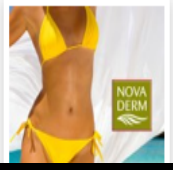
¡Regala esta Oferta!

¡Comparte y Gana $5!

Comparte esta oferta con tus amigos usando el link a continuación o los icons arriba y recibirás $5.00 de crédito a tu cuenta por cada persona que compre la oferta. ¡Compártelas todas y gana! Recuerda estar registrado antes de compartir el link. ¡Woot Woot!

http://groopanda.com

Más Groopandas



3 sesiones de depilación con laser en el bikini line por sólo $99 en vez de $450 @ Nova Derm

Lo Básico: … cont.

El Derecho de marcas y los Intermediarios tecnológicos: responsabilidad por actos de terceros

El criterio de Inwood Labs, 456 US 844 (1982)

"Even if a manufacturer does not directly control others in the chain of distribution, it can be held responsible for their infringing activities under certain circumstances. Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit." **Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 853-54, (1982)**

Marcas en internet

El Derecho de marcas y los Intermediarios tecnológicos: responsabilidad por actos de terceros

(ANEJO, pág 369) Tiffany Inc. v. eBay Inc., 600 F. 3d 93 (2d Cir. 2010), y pág 11 bosquejo.

- Responsabilidad secundaria, Inwood
- Willful blindness

Marcas en internet

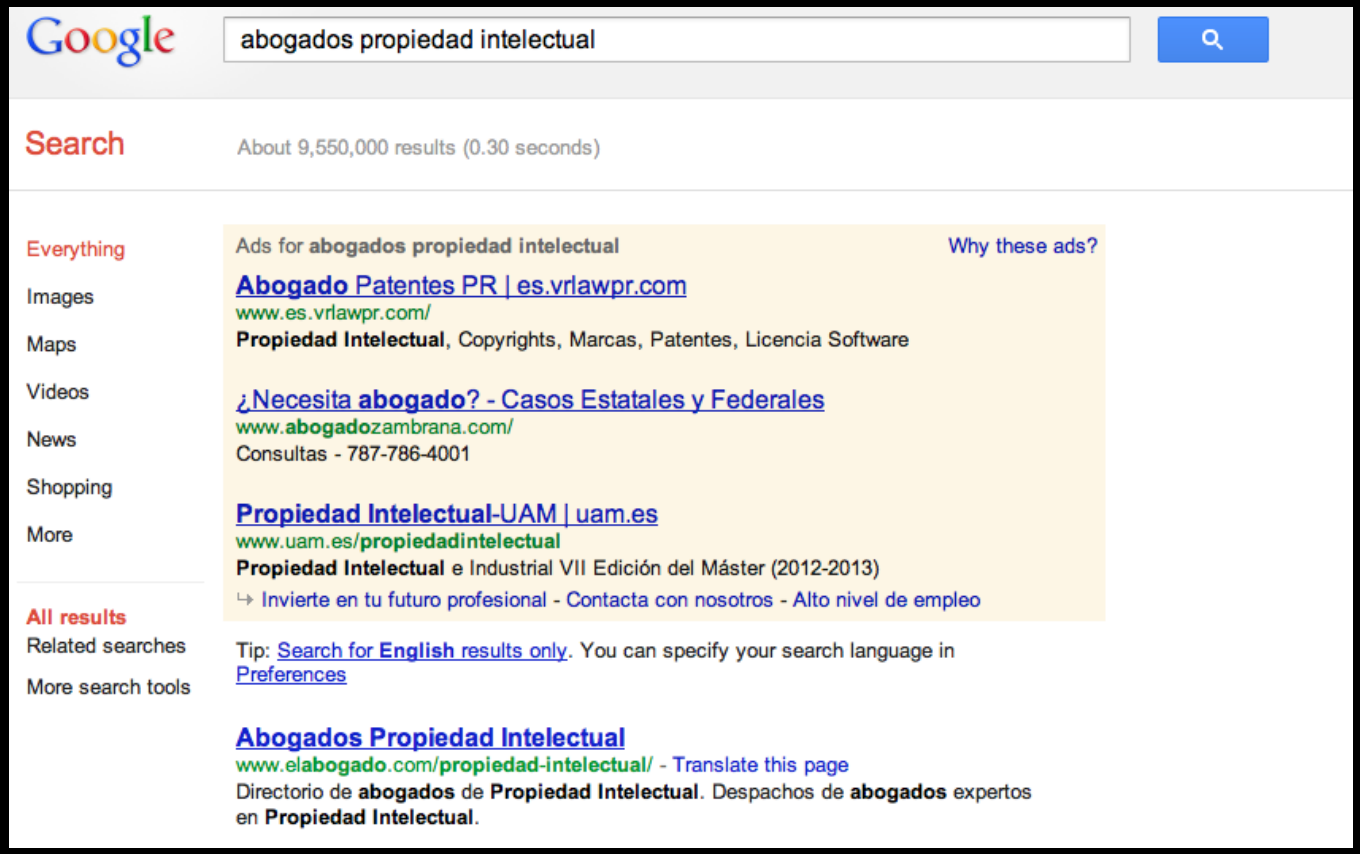
El Derecho de Marcas y la Publicidad Digital

El litigio de Rosetta Stone v Google, Civ No 10-2007, Cuarto Circuito, 9 de abril de 2012

Anejo no enumerado, post pág 416

Marcas en internet

El Derecho de Marcas y la Publicidad Digital



Marcas en internet

El Derecho de Marcas y la Publicidad Digital

Rosetta Stone v Google, Civ No 10-2007, Cuarto Circuito, 9 de abril de 2012
Anejo no enumerado, post pág 416

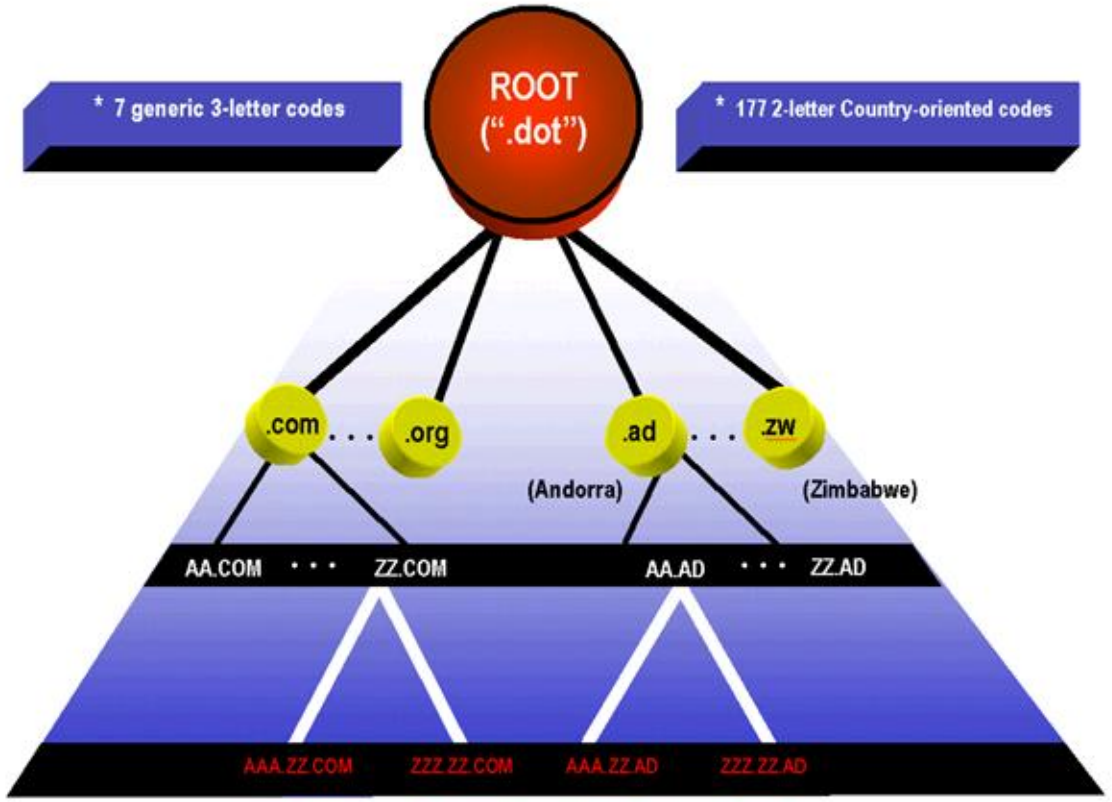
- 2004 Trademarks como "keywords"
- 2009 Trademarks en anuncio en 4 casos (a) reventa, (b) venta de partes, (c) venta de partes compatibles, (d) información o reseñas de productos.
  - Nominative Fair Use
  - Verificado por algoritmo que examina "landing page"
- Probabilidad de Confusión, quaere. Sentencia Sumaria no permite adjudicar.

Parte IV:
Nombres de Dominio

Domain Name System (DNS) Hierarchical Structure

Chart Five

What is DNS? An arbitrary, hierarchical naming convention, primarily based on geographical designations.



NETWORK SOLUTIONS

*TLDs in use Jan. 1997

A. UDRP

a. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.

A. UDRP

b. Evidence of Registration and Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

(i) circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or

(ii) you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or

(iii) you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

c. How to Demonstrate Your Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint. …:

(i) before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or

(ii) you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

(iii) you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

Anticybersquatting Consumer Protection Act, ACPA, Anejo pág 417

Verizon California, Inc. v. Navigation Catalyst Systems, 568 F. Supp. 2d 1088 (2008) (Anejo pág. 420)

Domain Tasting

V3rizon.com, veriz8on.com, ver9izonwireless

Parte V:
Libertad de Expresión

La regulación del material sexualmente explícito, no obsceno:

¿Qué constituye obscenidad?

Miller v. California, 413 U.S. 15 (1973)

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

Material sexualmente explícito, no obsceno

- Ginsburg v New York, 390 US 629 (1968) (harmful to minors)
- FCC v Pacifica Foundation, 438 US 726 (1978) (la regulación en medios de comunicación masiva)
  - **FCC v FOX, US S Ct 21 junio 2012
- Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (zonificación erógena, secondary effects)

La regulación del material sexualmente explícito, no obsceno:

El filtrado del contenido en línea y la Primera Enmienda

- Constitucionalidad del Communications Decency Act (indecent w/ credit card verification)
  - **(ANEJO, pág 429)** Reno v ACLU, 521 US 844 (1997) (problema de vaguedad)

- Constitucionalidad del Children's Internet Protection Act (CIPA) (filtros en bibliotecas w/ fondos federales)
  - **(ANEJO, pág 450)** United States v American Library Ass'n, 539 US 194 (2003)
    - » Condicionar fondos
    - » Discreción librerías selección material
- Constitucionalidad del Child Online Protection Act
  - **(ANEJO, pág. 500)** Aschcroft v ACLU, 542 US 656 (2004)
    - » Prohibió material "harmful to minors", con excepción de sistemas que proveen id por tarjeta de crédito
    - » Prohibición no es medio menos oneroso; disponbibilidad de filtros.

La difamación en línea: responsabilidad del Proveedor de Internet por expresiones de terceros.

El Common Law:

La responsabilidad de publicadores y distribuidores por difamación.

- **(ANEJO, pág 503)** Cubby v. CompuServe, 776 FSupp 135 (1991) (no responsable por falta de "conocimento")

- **(ANEJO, pág 511)** Stratton v Prodigy, 1995 WL 323710 (NY Supreme Court) (control editorial le expuso a responsabilidad)

La difamación en línea: responsabilidad del Proveedor de Internet por expresiones de terceros.

La Intervención Estatutaria

(ANEJO, pág. 518) Sección 230 del Communications Decency Act

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"

***

"The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

La difamación en línea: responsabilidad del Proveedor de Internet por expresiones de terceros.

La Intervención Estatutaria

Sección 230 del Communications Decency Act

(ANEJO, 521) Zeran v. AOL, 129 F3d 327 (1997)

"Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users…The amount of information communicated via interactive computer services is therefore staggering. Congress considered The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."

La difamación en línea: responsabilidad del Proveedor de Internet por expresiones de terceros.

La Intervención Estatutaria

Sección 230 del Communications Decency Act

(ANEJO,pág. 529) Blumenthal v. Drudge, 992 FSupp 44 (1998)

"Any attempt to distinguish between "publisher" liability and notice-based "distributor" liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability. …. While it appears to this Court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended, the statutory language is clear: AOL is immune from suit, and the Court therefore must grant its motion for summary judgment."

La difamación en línea: responsabilidad del Proveedor de Internet por expresiones de terceros.

La Intervención Estatutaria

Sección 230 del Communications Decency Act

(ANEJO, 542) Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F3d 1157 (9th Cir 2008)

- "Here, we must determine whether Roommate has immunity under the CDA because Councils have at least a plausible claim that Roommate violated state and federal law by merely posing the questions. We need not decide whether any of Roommate's questions actually violate the Fair Housing Act or California law, or whether they are protected by the First Amendment or other constitutional guarantees; we leave those issues for the district court on remand. Rather, we examine the scope of plaintiffs' substantive claims only insofar as necessary to determine whether section 230 immunity applies. However, we note that asking questions certainly can violate the Fair Housing Act and analogous laws in the physical world. For example, a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. **If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online.The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet."**

Ver además, FN 15 (p 551 Anejo)

Parte VI:
Propia Imagen

Ley del Derecho sobre la Propia Imagen, Ley Núm. 139 del año 2011 **(ANEJO, pág. 596)**

"Cualquier persona natural o jurídica que utilice la imagen de otra persona con fines o propósitos comerciales, mercantiles o publicitarios, sin el consentimiento previo de ésta, de la persona que posea una licencia sobre tal imagen, de los herederos en caso de haber fallecido o del agente autorizado de uno de éstos, responderá por los daños causados.

En el evento de no obtenerse el consentimiento requerido en esta Ley, la persona afectada podrá presentar una acción para detener la utilización de dicha imagen y para recobrar los daños causados, incluyendo regalías dejadas de devengar o cualquier pérdida económica resultante de la violación del derecho aquí establecido".

Ley del Derecho sobre la Propia Imagen, Ley Núm. 139 del año 2011 **(ANEJO, pág. 596)**

Esta Ley no aplicará bajo las siguientes circunstancias:

(a) Cuando se utilice la imagen de una persona en cualquier medio como parte de un reportaje noticioso, expresión política, transmisión de evento deportivo o artístico, o una presentación que tenga un interés público legítimo, y en donde no sea utilizada con propósitos comerciales o publicitarios.

(b) Cuando se utilice la imagen de una persona como parte de una sátira o parodia, en donde el propósito principal del uso de la imagen no sea uno comercial o publicitario.

(c) Cuando se utilice la imagen con propósitos de crítica o comentario, académicos o investigativos, siempre que dicha utilización no constituya una explotación encubierta de la imagen protegida.

(d) Cuando se utilice la imagen de una persona accesoria.

Ley del Derecho sobre la Propia Imagen, Ley Núm. 139 del año 2011 **(ANEJO, pág. 596)**

Artículo 10. – Inmunidad Limitada

”Los dueños o empleados de cualquier medio, incluyendo pero sin limitarse a, periódicos, revistas, vallas publicitarias, internet y estaciones de radio o televisión, en el que aparezca la imagen de una persona en violación de esta Ley, no será responsable excepto en el caso que se establezca que tenían conocimiento de que el uso de esa imagen se hizo sin la autorización requerida por esta Ley.”

¿Cuál teoría de responsabilidad secundaria?

- Actual knowledge
- Conocimiento generalizado
- Inducir
- Willful blindness
- ¿vicaria?

Ley del Derecho sobre la Propia Imagen, Ley Núm. 139 del año 2011 **(ANEJO, pág. 596)**

Artículo 6. – Extensión

El derecho a la propia imagen se extenderá hasta 25 años después de la muerte de la persona, independientemente de si se utilizó para propósitos comerciales durante su vida.

(ANEJO, 600) Vigoreaux Lorenzana v. Quizno's Sub, Inc 2008 T.S.P.R. 38 ("para los que se quedaron con las ganas")

- relevancia de fines comerciales, figura central, valor comercial de imagen es esencial (vs valor de intimidad)
- Remedios disponibles (a) participación económica + (b) daños morales
- Cf. Bonilla v PNP, 140 DPR 294 (1996) (figura accesoria, en público, fines políticos)

Ley del Derecho sobre la Propia Imagen, Ley Núm. 139 del año 2011 **(ANEJO, pág. 596)**

Artículo 4. – Remedios

- interdicto,
- daños y perjuicios. ” El Tribunal fijará la cuantía de los daños tomando como base los siguientes elementos: el beneficio bruto que hubiera obtenido la parte infractora mediante el uso de la imagen en cuestión; el importe de la ganancia que la persona perjudicada hubiere dejado de percibir como resultado de la actuación de la parte demandada; el valor del menoscabo que la actuación del demandado le hubiera ocasionado al demandante; y cualquier otro factor que a juicio del tribunal cuantifique adecuadamente los daños.”

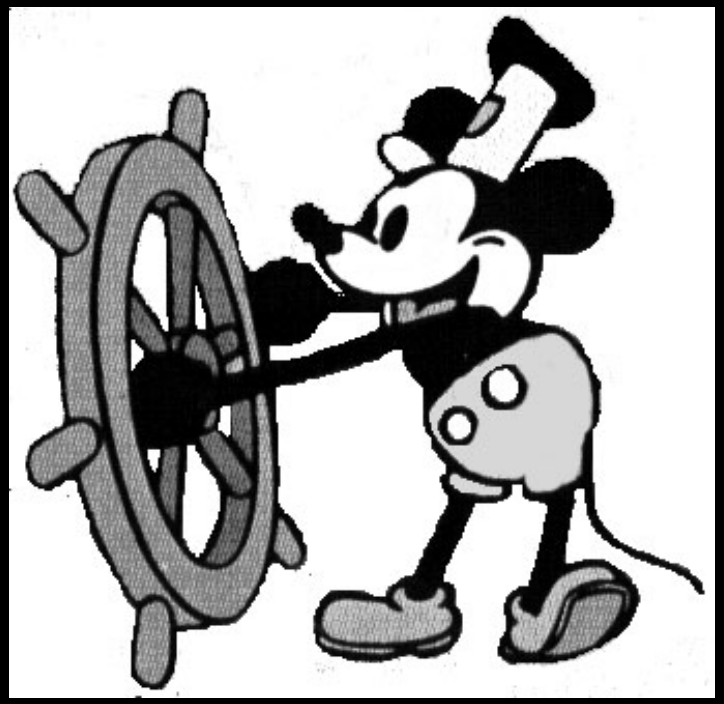
- El tribunal, en su discreción, podrá fijar la cuantía de los daños en una cantidad que no exceda tres (3) veces la ganancia del demandado y/o la pérdida del demandante cuando determine que la violación fue intencional o de mala fe.
- En la alternativa, el demandante podrá optar por solicitarle al tribunal, daños estatutarios. $750 ni - $20,000 por violación
- Si violación intencional o debido a una negligencia crasa, el tribunal, en su discreción, podrá aumentar la cuantía de daños estatutarios a una suma no mayor de $100,000 por violación.
- Cada violación bajo estos daños estatutarios será equivalente al acto de la utilización ilegal de la imagen del reclamante en un trabajo, independiente del número de copias que se hagan del trabajo en cuestión en un momento dado.

Parte VII:
La alternativa abierta a los Derechos de Autor

- (**ANEJO, 633**) Hiram A. Meléndez Juarbe, Creative Copyright for Creative Business, 1 UPR Business L. J. 137 (2010)

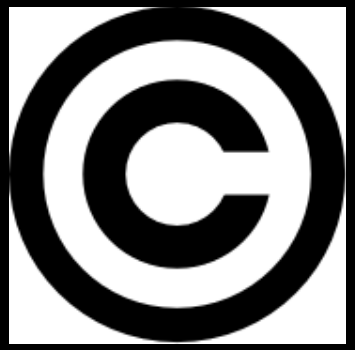
- (**ANEJO, 644**) Hiram A. Meléndez Juarbe, Creative Commons y la Agenda de Contenido Abierto, 69 Rev Jur Col Abog. 151 (2008).

- (**ANEJO, 650**) Creative Commons, Liberando la Creatividad.



Derechos de Autor y Primera Enmienda

- Eldred v Ashcroft, 537 U.S. 186 (2003)
- Golan v Holder, 565 U.S. ___ (2012)

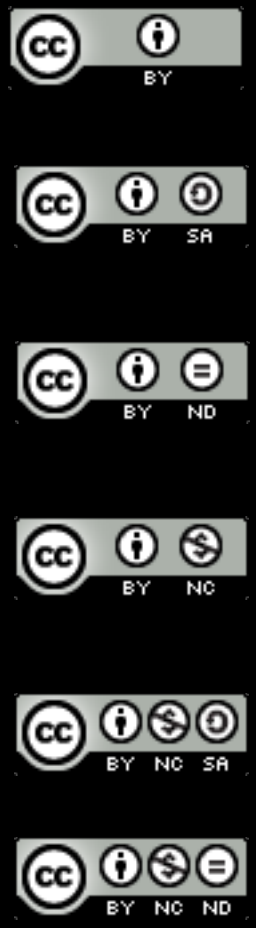
 =

Todos los derechos reservados

=

Algunos derechos reservados

TIPOS DE LICENCIA



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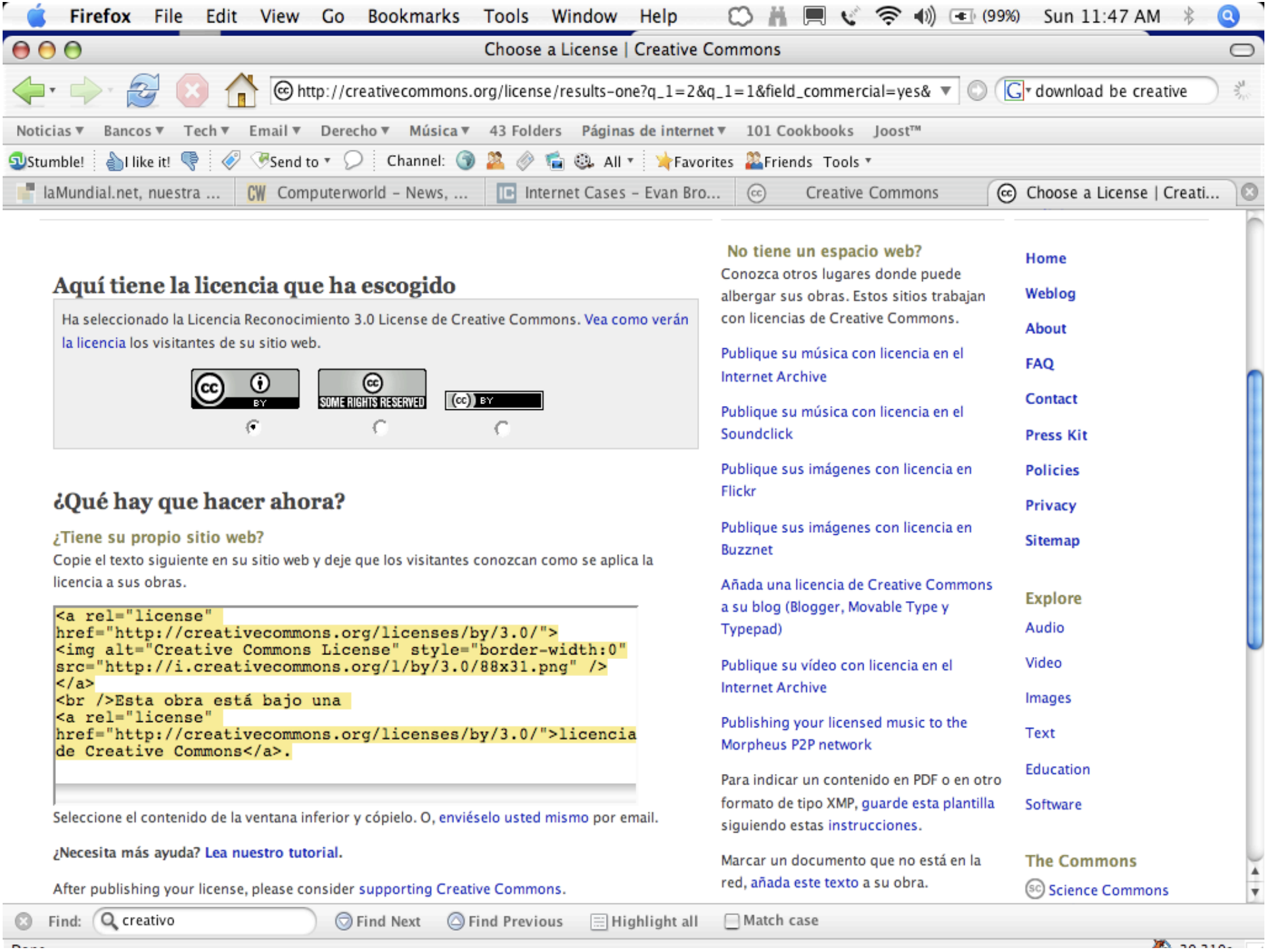
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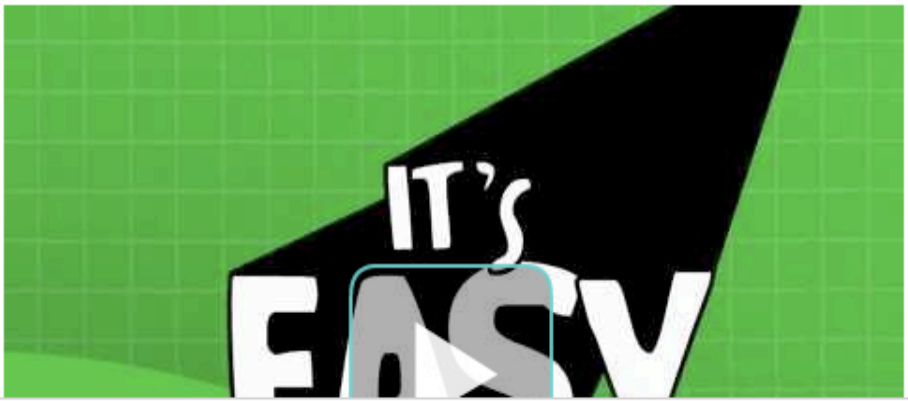

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> Make no mistake, ccMixter is the complete package. No other remix site commands the same level of respect amongst musicians, producers and content creators.
>
> *Dave's Imaginary Sound Spaces*

This is a community music site featuring remixes licensed under **Creative Commons**, where you can listen to, sample, mash-up, or interact with music in whatever way you want.

Remixers If you're into sampling, remixing and mash-ups grab the **sample packs** and **a cappellas** for download and you can upload your version back into ccMixter, for others to enjoy and re-sample. All legal.

Podcasters, directors and music lovers If you're into music, browse this site to hear some of the **great remixes** people have built from sampling music on this site, all licensed for use under Creative Commons license.

DJ Vadim Remix Contest

Creative Commons, **BBE Music** and **DJ Vadim** are pleased to present the DJ Vadim / "Kill Kill Kill" "Talk to Me" Remix Contest. The superstar DJ is offering the audio source files from the songs "Kill Kill Kill" and "Talk to Me" online under a Creative Commons **Attribution-NonCommercial** license, so that producers worldwide can use the sounds in remixes and new compositions.

More information about the DJ Vadim contest...

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