

SEEKING SHELTER FROM THE MP3 STORM: HOW FAR DOES THE DIGITAL MILLENNIUM COPYRIGHT ACT ONLINE SERVICE PROVIDER LIABILITY LIMITATION REACH?

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"In a case . . . in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests."¹

INTRODUCTION

Copyright infringement in cyberspace is not a primary concern for most internet users.² Photos, music, software and video images are freely swapped online with seemingly little thought given to the proprietary rights attached to them. This explosion of information dissemination on the internet, coupled with an ever-increasing audience literate in its use, has wreaked havoc on the underlying principles of copyright enforcement. Arguably, the invention of Gutenberg's printing press pales in comparison to the conse-

quences of the internet's ubiquitous reach. Unlike publishers of printed material, it is extremely difficult, if not impossible, to find Internet copyright infringers, let alone prosecute them.

Copyright infringement judgments have the potential to be prodigious.³ Thus, for copyright owners seeking to enforce their rights in cyberspace, the most logical choice of defendants has been the online companies which provide the service that facilitates the copyright infringement because of their "deep pockets." This is a logical assumption considering that historically, the party disseminating the copyrighted works, whether knowingly or not, has been held liable.⁴ Booksellers, theater owners, and storeowners traditionally have all been held liable under copyright law.⁵

Cyberspace, however, raises new questions.

¹ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

² See *ACLU v. Reno*, 929 F. Supp. 824, 830-38 (E.D. Pa. 1996) (discussing cyberspace, the Internet and access methods). The Internet is the vast collection of interconnected networks that all use TCP/IP protocols and that evolved from the Defense Department's Advanced Research Projects Agency Network (ARPANET) of the late 1960's and early 1970's. See *id.* at 831. Over 16 million host computers existed on the Internet as of January 1997, representing access to more than 175 countries and 40 million users. See KEVIN WERBACH, OPP WORKING PAPER NO. 29, DIGITAL TORNADO: THE INTERNET AND TELECOMMUNICATIONS POLICY, 21-22. (1997). With the estimated number of users doubling every 200 days, the number of users is expected to have reached well over 100 million by 1998. See Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMM'LAW CON-SPECTUS 37, 46 (1999) [hereinafter Esbin].

³ See generally 17 U.S.C. §504. A copyright owner may choose to recover either actual damages plus any additional profits of the infringer or statutory damages not less than \$500 or more than \$20,000 for each act of infringement, though the court may in its discretion increase the award of damages to not more than \$100,000 per each willful infringing act. See 17 U.S.C. §504(c)(1)-(2). Due to the nature of

the Internet, actual damages to a copyright owner likely would be indeterminable.

⁴ See *Religious Tech. Ctr. v. Netcom Online Communications Services*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995) (stating that "direct infringement does not require intent or any particular state of mind, although willfulness is relevant to the award of statutory damages"); *Playboy Enterprises v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993). See also Mary Ann Shulman, *Internet Copyright Infringement Liability: Is An Online Access Provider More Like a Landlord or a Dancehall Operator?* 27 GOLDEN GATE U. L. REV. 555, 568 (1997) [hereinafter Shulman]; Andrea Sloan Pink, *Copyright Infringement Post Isoquantic Shift: Should Bulletin Board Operators Be Liable?* 43 UCLA. L. REV. 587, 618 (1995).

⁵ See *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1162, 1163 (1971) (holding a concert provider liable for contributorily causing the infringing performance of a copyright holder's songs when performed by its artists at local community concerts); *Shapiro Bernstein & Co. v. H.L. Green*, 316 F.2d 304, 307 (2nd Cir. 1963) (holding that since the infringing party had a concession to operate a record store in defendant's department stores, the storeowner was vicariously liable for sale of bootleg records); *Dreamland Ball Room v. Shapiro Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929) (holding a dance hall operator lia-

Regulation on the Internet in and of itself is a complicated and controversial subject, and conventional legal principles, including those of copyright analysis, are simply incompatible with the function of the network.⁶

Congress in 1996, seeking to limit online service providers' liabilities, enacted the Communications Decency Act ("CDA") which exempted Internet Service Providers ("ISPs") from slander and libel caused by third parties.⁷ The CDA was the first statute to recognize the incongruity between laws firmly ensconced in society and those suitable for the virtual world of cyberspace.⁸

In 1998, Congress again sought to limit ISP liability through the Online Copyright Infringement Liability Limitation Act ("Title II")⁹ incorporated in the larger Digital Millennium Copyright Act ("DMCA").¹⁰ Importantly, Title II does not alter

ble for infringing performance of copyrighted songs played by the orchestra it hired because the dancehall stood to make a profit from the performance).

⁶ See generally Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (discussing fundamental difficulties regulating cyberspace using traditional tools of the law, including jurisdiction, law enforcement, liability and the challenges in creating a regulated structure).

⁷ See 47 U.S.C. §230.

⁸ See *id.* A "Good Samaritan" provision of the Communications Decency Act of 1996 stated that ISPs should not be "treated as the publisher or speaker" of third party content and cannot be held liable for slanderous or libelous material posted on their services. See, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (granting tort immunity for Internet Service Providers by Congress because of the impossibility of screening millions of electronic postings for problems). That provision, however, does not apply to intellectual property issues. See 47 U.S.C. §230(e)(2) (stating that tort immunity does not limit or expand any law pertaining to intellectual property). Therefore, the Digital Millennium Copyright Act "fills a legal gap left by the passage of the Communications Decency Act in 1996." John Borland, *Law Enlists ISPs In Piracy Fight*, CNET News.com (visited Nov. 4, 1998) <<http://www.news.com/News/Item/0,4,28357,00.html>>.

⁹ See Title II (Online Copyright Infringement Liability Limitation Act) of the Digital Millennium Copyright Act, Pub. L. No. 105-304, §§201-03, 112 Stat. 2877 (1998) (to be codified at 17 U.S.C. §512).

¹⁰ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2861 (1998). While the DMCA encompasses a great deal more than the service provider liability limitations found in Title II of the Online Copyright Infringement Act, for the purposes of this Comment they are referred to as one and the same. The DMCA also implements the World Intellectual Property Organization's Copyright Treaty, a computer maintenance repair or copyright exemption, the Collections of Information Antipiracy Act, protection of certain original designs, and other miscellaneous intellectual property provisions.

¹¹ See HOWARD COBLE, THE DIGITAL MILLENNIUM COPYRIGHT ACT, H.R. CONF. REP. NO. 105-796, at 72 (1998) [here-

inafter REPORT].

the elements required to prove a copyright infringement claim. It was intended to adjust the basic principles of U.S. copyright law *liability* with regard to ISPs.¹¹

The DMCA's exemptions only apply to ISPs when they perform certain functions,¹² discussed in this Comment, including merely providing access to the internet and temporarily storing various forms of material on their equipment.¹³

Because both defending copyright infringement lawsuits and paying damages for copyright infringement is extremely expensive,¹⁴ attaining service provider status under Title II is particularly desirable. Further, distinguishing the various service provider functions protected by Title II is equally important.¹⁵ The difficulty with Title II is that Congress may have failed to adequately delin-

inafter REPORT].

Title II 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.

Id. See also 17 U.S.C. §512 (a)-(d), (g).

¹² See REPORT, *supra* note 11, at 72.

¹³ See Perkins Coie, *Law Now Limits Liability for Certain Online Activities* (visited Feb. 8, 1999) <<http://www.Coiecoie.com>> [hereinafter Coie].

¹⁴ See *Playboy Enterprises, Inc. v. Sanfilippo*, 97-0670-IEG, 1998 U.S. Dist. LEXIS 5125 (S.D. Cal. 1998) (finding defendant liable for \$3,737,500 in statutory damages for uploading 7,475 copyright infringing images onto his web site without permission). *Id.* at 9. Additionally, *Sanfilippo* clarifies §504(c)(1) which defines "acts" of infringement. *Id.* at 19. Under §504(c)(1), statutory damages may be awarded "for all infringements involved in the action and that with respect to any one work . . . for purposes of this subsection, all the parts of a compilation or derivative work constitute one work." *Id.* See also 17 U.S.C. §504(c)(1). The question existed as to whether each copied picture was an act of infringement or whether each copied file containing numerous pictures was an act of infringement. See *Sanfilippo*, 1998 U.S. Dist. LEXIS 5125, at *13 n.2. The court held that "each [picture uploaded by the defendant] had an 'independent economic value' and is viable on its own. . . . Furthermore, each image represents a singular and copyrightable effort concerning a particular model, photographer and location." *Id.* at 18. Simply because many of the images appeared together should not lessen the protection conveyed to each separate effort. *Id.* See also *Sega v. MAPHIA*, 948 F. Supp. 923, 940 (N.D. Cal. 1996) (awarding costs per infringed work for video games); *Nintendo of America v. Dragon Pacific International*, 40 F.3d 1007 (9th Cir. 1994) (awarding large statutory damages in addition to attorneys' fees against copyright infringer).

¹⁵ See 17 U.S.C. §512 (a)-(d), (g).

eat between what constitutes a "service provider," and what "functions" are protected.

A case in point involves the popular web site operator and search engine, Lycos.¹⁶ Lycos claims that it is immune from copyright liability under Title II for providing access to what are in reality unauthorized transfers of copyrighted songs.¹⁷ These songs are digitally transferred using a technology commonly known as MP3 (Motion Picture Experts Group, Audio Layer 3), that allows music files to be saved using very little computer storage space while preserving nearly impeccable sound.¹⁸ Next to searches for topics concerning sex, MP3 files have become one of the most popular topics on the internet.¹⁹

Specifically, Lycos argues that because it does not physically store the MP3 files on its servers, but merely provides the internet location of the files, it does not violate the conditions of the Title II.²⁰ A closer examination of the statute's language, however, raises questions as to (1) whether Lycos qualifies as a service provider under Title II and, if it does, (2) whether its function in facilitating MP3 file retrieval and exchange disqualify it from protection.

Section I of this Comment briefly outlines the recent history of copyright law focusing on the different theories of liability and the parties implicated by online copyright lawsuits. Specifically, this section discusses ISPs and various internet

services they provide. Section II discusses the case law that defined online service provider copyright liability standards prior to the passage of the Title II. Section III sets out the relevant portions of Title II, specifically concentrating on the definition of "service providers" and the "functions" that they perform. Section IV outlines the copyright liability issues that have survived the legislation and that will most likely continue to plague both courts and the legislature as demonstrated by the controversy over MP3. Section V concludes that service providers specifically engaging in MP3 activity are acting outside the scope of both caselaw and Title II's limited liability provisions. As a result, they do not qualify for protection. Lastly, this comment recommends a test for evaluating whether a service provider is eligible for protection under Title II.

I. HISTORICAL OVERVIEW OF COPYRIGHT PROTECTIONS AND PURPOSES

To understand the scope of copyright law, it is necessary to understand its mission: to balance societal interest in access to information against the rights of the authors.²¹ Copyright law provides incentives to ensure authors' continued creative progress without fostering temporary monopolies on those creations.²²

Beginning in England in 1476, the need to con-

minute of music. *See id.*

¹⁹ See L.A. Lorek, *A Note of Interest: MP3 Technology Changes Music on Web*, SUN-SENTINEL (Fort Lauderdale), Feb. 28, 1999, at 4F (noting that over 600 IRC chat channels and hundreds of websites are devoted to MP3 files).

²⁰ See Chris Nelson, *Lycos' Search Engine: Half-Million Links, Lots of Kinks*, SONICNET MUSIC NEWS OF THE WORLD, (visited Feb. 16, 1999) <<http://www.sonicnet.com/news/article1.jhtml?index=7>>. A Lycos representative said it is not the responsibility of the search engine to "vouch for the legality" of the music it directs users to by proving the music files are copyrighted. *See id.*

²¹ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The *Aiken* Court described the Copyright Act as a balancing mechanism. *See id.* The limited monopoly given to reward copyright owners for their creations is carefully weighted against the public interest to have access to such works. *See id.* The Court concluded that ultimate motivation for copyright protected works ought to be the public interest derived from the fruits of artistic creativity. *See id.*

²² See *Whelan Associates v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1235 (3d Cir. 1986). "The purpose of the copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development." *Id.*

¹⁶ See Lycos Reports 2nd Quarter Revenues Up 142% Over Last Year and 24% Over Last Quarter, BUSINESS WIRE, Feb. 25, 1999 [hereinafter Lycos Revenues]. Lycos, Inc., an international company headquartered in Waltham, Massachusetts, owns the Lycos Network. *See id.* The company was founded in 1995 and now operates as the second most popular hub on the internet. *See id.* On February 8, 1999, the company entered into agreements with USA Networks, Inc. and Ticketmaster Online-City Search, Inc. and, pending stockholder approval, the merged companies will be called USA/Lycos Interactive Networks, Inc. *See id.*

¹⁷ But see Richard P. Klau, Recording Industry Sings the Blues As Consumers Gain More Means To Make Their Own Kind of Music, STUDENT LAWYER, Mar. 1999, at 17. The MP3 format itself is perfectly legal and is not only used by music "pirates." *Id.* Many unsigned bands have started using the format to distribute their music, easily and inexpensively. *See id.* In fact, the operators of a website called "MP3.com" provide small bands the opportunity to sell their music to website visitors by allowing them to add their music to its archives. *See id.*

¹⁸ See *MP3 for Beginners* (visited Feb. 5, 1999) <<http://www.mp3.com/faq/general.html>> [hereinafter *Beginners*]. MP3 (short for Motion Picture Experts Group, Audio Layer 3) files are typically identifiable because they will end in ".mp3." *See id.* The size of an MP3 file is typically 1 MB per

trol unauthorized reproductions was triggered by the invention of the printing press.²³ Subsequently, the Framers recognized the importance of this need in drafting the United States Constitution which granted Congress the power to protect copyright owners.²⁴ The most recent codification of this power is the Copyright Act of 1976 ("Copyright Act").²⁵

Under the Copyright Act, copyright owners are granted five exclusive rights, the violation of any one of them constitutes infringement.²⁶ An infringing party under the Copyright Act may be held directly liable.²⁷ To establish copyright infringement, a plaintiff must prove two elements: "(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original."²⁸ Copying constitutes infringement if it conflicts with one of the specific exclusive rights conferred by the Copyright Act.²⁹

Technology has proven to be a continuous challenge for legislators attempting to preserve the ba-

sic premise of the Copyright Act.³⁰ Prior to the recent amendments to the Copyright Act by Title II, case law clumsily attempted to apply old standards to new problems.³¹ Courts have struggled to discover a nexus between copyright theories that were intended to endure modern technology and the situations that exist online.³²

Courts were confronted with determining the Copyright Act's reach into the context of cyberspace and applying it to the novel technology and disparate parties responsible for disseminating information over the internet. As a result, in specific factual situations, parties who did not physically complete the infringing activities but were in some way "related" to the direct infringers were held indirectly liable for the infringement.³³ Under the theories of contributory and vicarious liability, courts imposed liability on internet service providers for the copyright infringement by their users.³⁴

²³ See ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT FOR THE NINETIES: CASES & MATERIALS*, 1-4 (1993) [hereinafter GORMAN] (outlining the historical development of intellectual property from the Reformation to the United States colonial era).

²⁴ See U.S. Const. art. I, § 8, cl. 8. (stating "to promote the Progress of Science and Useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). See also David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F.L. REV. 1, 10 n.38 (1998) [hereinafter Weiskopf] (asserting that "in enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public?" *Id.* citing, H.R. Rep. No. 60-2222, at 7 (1909)).

²⁵ See Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§500). The first Copyright Act was passed by the U.S. Congress in 1909. See Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075 (1909). See also GORMAN, *supra* note 23, at 2.

²⁶ See 17 U.S.C. §106(a).

²⁷ See MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 9.1 (2d ed. 1995) (discussing what constitutes a prima facie case for copyright infringement) [hereinafter LEAFFER].

²⁸ *Feist Publ'g Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

²⁹ See *Sony*, 464 U.S. at 432-33. In *Sony*, the court discussed the sale of "copy equipment" ever violated the holder's rights. See *id.* at 420. Congress granted to copyright owners five exclusive rights which they may exercise or license: (1) reproduction of the copyrighted work in copies or phonorecords; (2) preparation of derivative works; (3) distribution of copies or phonorecords of the copyrighted work to the public by sale or transfer of ownership, or by rental, lease or lending; (4) performance of the work publicly; and (5) display of the copyrighted work publicly. See 17 U.S.C. §106.

³⁰ See Weiskopf, *supra* note 24, at 11. Since the passage of the first copyright act in 1790, Congress has repeatedly amended copyright laws to reflect technological innovation and progress. See *id.* See also Brian A. Carlson, *Balancing the Digital Scales of Copyright Law*, 50 S.M.U. L. REV. 825, 828-45 (1997) (tracing the changes in copyright law resulting from technological advancements as disparate as the printing press, piano rolls and digital technology).

³¹ See INFORMATION INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE*, at 211 (1995) [hereinafter WHITE PAPER]. The Task Force found in some cases, only an explanation of the law was required while in others, the rights constitute the spirit of the copyright law but not the letter. See *id.* at 211-12. In other cases, the need for new solutions was clear. See *id.* "Even though the 1976 Copyright Act was carefully drafted to be flexible enough to be applied to future innovations, technology has a habit of outstripping even the most flexible statutes." *Id.* at 211.

³² See Timothy L. Skelton, Comment, *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, 35 SAN DIEGO L. REV. 219, 313 (1998) [hereinafter Skelton]. Courts analyze the law's underlying purpose when technology creates ambiguities in the law. See *id.* But when technology advances faster than the development of the law, adapting the statutes to comply with the law's principles becomes difficult and awkward at best, triggering a need for change. See *id.*

³³ See Weiskopf, *supra* note 24, at 15. The burden is significant for plaintiffs attempting to establish direct infringement because the plaintiff must prove the required copying for each alleged direct infringer and each claimed direct infringement. See *id.* at 14. Attempting to hold large numbers of alleged online infringers liable is nearly impossible and highly impractical because copying occurs on a mass scale. See *id.*

³⁴ See LEAFFER, *supra* note 27, at §9:20 (discussing contributory and vicarious infringement liability).

A. The Three Theories of Copyright Infringement Liability

1. Direct Liability

Successfully trying a case of direct copyright infringement requires the owner to prove: (1) valid copyright ownership of a work; (2) the work was, in fact, copied; and (3) the copying of work was illegal under copyright laws.³⁵ A defendant's intent or knowledge is not an element of direct infringement.³⁶

In *Mai Systems Corp. v. Peak Computer, Inc.*,³⁷ the court held that works viewed and transmitted on the internet are "copies" for the purposes of the Copyright Act.³⁸ While the absence of an intent or knowledge requirement may lessen the burden on copyright owners seeking to impose liability, direct evidence of copying is often elusive.³⁹ This is especially apparent in the realm of cyberspace where often the parties responsible for the infringement are impossible to find.⁴⁰ For this reason, imposing direct copyright liability in cyberspace generally yields to alternative theories of contributory and vicarious liability.⁴¹

2. Contributory Liability & Vicarious Liability

While the Copyright Act does not expressly impose liability on anyone other than direct infringers, courts have long recognized that, in certain circumstances, liability for contributory infringement may be imposed.⁴² After establishing that direct infringement occurred, the plaintiff must

demonstrate that the defendant had knowledge of the users' infringing activity and induced, caused, or materially contributed to the infringing activity.⁴³ For example, in *Playboy Enterprises, Inc. v. Russ Hardenbaugh*,⁴⁴ a defendant electronic bulletin board service ("BBS") operator was found liable for contributory infringement because he encouraged subscribers to upload information including copyrighted adult-oriented files.⁴⁵ When Playboy sued the BBS operator for infringement of hundreds of its images stored on his system, the district court held that because Playboy is one of the most famous and widely distributed adult-oriented publications, the defendant should have been aware of infringing photos.⁴⁶

If the plaintiffs cannot prove defendants are contributorily liable for their participation in the infringing activity, they may still seek to prove vicarious liability, which focuses on the relationship of the third party with the direct infringer.⁴⁷ Courts have found vicarious liability for the actions of a primary infringer where the defendant: (1) has the right and ability to control the infringer's actions; and (2) receives a direct financial benefit.⁴⁸ While several courts have endeavored to interpret the language, substantive definitions for "control" and "financial benefit" have not been provided in the online context.⁴⁹

B. Distinguishing Between ISPs and ISP Services

Determining who may be liable for copyright

rially contributes to the infringing conduct of another." *Id.* (quoting *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1162 (1971)).

⁴³ See *Sega Enterprises v. MAPHIA*, 857 F. Supp. 679, 686 (N.D. Cal. 1994).

⁴⁴ 982 F. Supp. 503 (N.D. Ohio 1997).

⁴⁵ See *id.* at 514.

⁴⁶ See *id.* at 515.

⁴⁷ See *Netcom*, 907 F. Supp. at 1375 (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.* 316 F.2d 304, 306 (2d Cir. 1963) and 3 NIMMER ON COPYRIGHT §12.04[A][1], at 12-70.).

⁴⁸ See *id.* at 1368.

⁴⁹ See *Fonovisa*, 76 F.3d at 264. The Court in *Fonovisa* found those leasing flea market space where pirated works were sold financially benefited from the infringement because they received money from entrance fees and concession sales at the market. See *id.* Since the sale of infringing material drew people to the flea market, a direct benefit was derived from the activity. See *id.* The court expanded the meaning of a direct financial benefit, which prior to this standard required a tangential relationship between the infringing activity and the financial benefit. See *id.* at 263.

³⁵ See *id.* at §9.2.

³⁶ See *Frena*, 839 F. Supp. at 1559. The *Frena* court stated that intent and knowledge are not required to prove direct infringement and innocence is insignificant to determine statutory damages. See *id.*

³⁷ 991 F.2d 511 (9th Cir. 1993).

³⁸ See *id.* at 518.

³⁹ Evidence of direct copying is nearly impossible to collect because defendants rarely admit copying a work. See LEAFFER, *supra* note 27, at §9.3. Also, providing witnesses who physically saw defendants copying the works is unlikely since most copying is achieved privately through non-physical means. See *id.* Extended to an online environment, this is especially true because computer use is an individual activity and most people using the Internet are acting individually. See *id.*

⁴⁰ See Weiskopf, *supra* note 24, at 16.

⁴¹ See *id.* at 26.

⁴² See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996) (citing *Sony* 464 U.S. at 435). "Contributory copyright stems from the notion that one who directly contributes to the infringing activity induces, causes or mate-

infringement as a service provider requires an understanding of the underlying internet technology and how pirated content is traded.⁵⁰ Courts have delineated three categories of ISPs on which they have imposed copyright liability: BBSs, ISPs, and Usenet operators.⁵¹ However, there are numerous additional categories of internet services in existence that raise copyright liability questions that are not addressed in either Title II or existing case law.⁵²

The ISP category encompasses a wide variety of participants in the industry. "Access providers" and "content providers" are both grouped under the ISP heading.⁵³ Most internet services will fall under one of these two headings. While all have the capability of transferring MP3 files and are thus able to facilitate infringement, as discussed below, the problems each poses for enforcing copyright rights differ because infringing activity is more detectable on some services than others.

1. "Access Providers"

An access provider is a company that leases the use of its computer facilities to connect a subscriber to a regional network linked to the internet.⁵⁴ Typically, access providers only provide an entry through their servers to the internet network.⁵⁵ That is, they do not provide any content whatsoever, but merely act as a conduit between the user and the internet.

2. "Content Providers"

Content providers are generally commercial services, such as America Online, that provide both content-based services and internet access through private computer networks.⁵⁶ Most con-

tent services include news, commentary, feature articles, sports and weather information automatically updated from a wire service.⁵⁷ Other such services described below may also include operating bulletin/message boards, hosting chat groups, or establishing interactive discussion forums.⁵⁸

a. *Electronic Bulletin Board Systems ("BBS")*

BBSs are online services that allow subscribers to exchange electronic messages (e-mail), text, computer programs, photographs, music and other forms of information.⁵⁹ The electronic bulletin board is one of the most popular services available through the internet and other computer services. More than 70,000 bulletin board systems are estimated to be in operation worldwide.⁶⁰ A user uploads material from her computer to make it available onto the bulletin board.⁶¹ All subscribers have access to all bulletin board messages, and any subscriber may download the material to her computer.⁶² The largest bulletin board systems are operated by commercial online services such as America Online, CompuServe, Microsoft, and Prodigy.⁶³

Distinguishing between online services and large electronic bulletin board services (BBS) is not always easy. Most existing BBSs have a limited number of users and function on small, single phone-line personal computers operated by a systems operator ("Sysop") as a pastime with no charge to users.⁶⁴

b. *Usenet*

The Usenet is a decentralized worldwide system of over 50,000 discussion groups⁶⁵ arranged by topic,⁶⁶ in which individual comments are passed

⁵⁰ See Skelton, *supra* note 32, at 231-32.

⁵¹ See Weiskopf, *supra* note 24, at 7. (discussing which parties should be responsible for copyright violations).

⁵² See Skelton, *supra* note 32, at 242-43. (noting that most of the cases and commentaries regarding ISP liability fail to clearly distinguish the differing roles that ISPs play in the provision of the different internet services).

⁵³ See Shulman, *supra* note 4, at 559.

⁵⁴ See *id.* at 559 n.26.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See Giorgio Bovenzi, *Liabilities of System Operators on the Internet*, 11 BERKELY TECH. L.J. 93, 98-99 (1996).

⁵⁹ See Niva Elkin-Koren, *Copyright Law and Social Dialogue On the Information Superhighway: The Case Against*

Copyright Liability for Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 345, 346 n.5 (1995) [hereinafter Elkin-Koren].

⁶⁰ See Shulman, *supra* note 4, at 558 n.16.

⁶¹ See Elkin-Koren, *supra* note 59, at 372 (discussing uploading and downloading as copying under *Sega*).

⁶² See *id.*

⁶³ See Shulman, *supra* note 4, at 559 n.26.

⁶⁴ See Weiskopf, *supra* note 24, at 8 n.30 (citing A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW* (1994)).

⁶⁵ See Michelle U. Rafter, *Taming Newsgroups*, INTERNET WORLD, (Mar. 2, 1998). This is three times the number in existence in 1995. See *id.*

⁶⁶ See Kim Komando, *Countless Topics of Discussion Captured in Usenet*, ARIZONA BUSINESS GAZETTE, at 9 (Mar. 30,

among hundreds of thousands of computers.⁶⁷ A message posted on one Usenet server is automatically and rapidly propagated to every other news server in the Usenet worldwide system.⁶⁸ Only an estimated one half of all Usenet computers are actually on the internet.⁶⁹ Any computer file may be converted into a text equivalent. Therefore, many Usenet "messages" are actually encoded computer programs, images, sound recordings, and other types of computer files.⁷⁰

c. Other Online Services

Electronic mail ("e-mail"),⁷¹ File Transfer Protocol ("FTP"),⁷² the World Wide Web ("WWW"),⁷³ Search Engines⁷⁴ and Internet Relay Chat ("IRC")⁷⁵ are services available by accessing

1995).

⁶⁷ See Matisse Enzer, *Glossary of Internet Terms* (visited Feb. 8, 1999) <<http://www.matisse.net/files/glossary.html>> [hereinafter *Internet Glossary*].

⁶⁸ See Skelton, *supra* note 32, at 236. The daily volume on Usenet has doubled every year and exceeded half a million messages by February 1998. *See id.* at 237.

⁶⁹ See *Internet Glossary*, *supra* note 67.

⁷⁰ See Skelton, *supra* note 32, at 237.

⁷¹ *See id.* Potential for copyright abuse is limited in e-mail because it is one-to-one communication. *See id.* Because it is relatively simple to trace the copyright abuser, return addresses are usually attached to sent-message. *See id.*

⁷² *See generally id.* at 234. FTP is a file transfer service that uses remote servers as a storage medium and usually maintains controlled access which requires a user name and password. *See id.* Some servers allow users to log on anonymously. *See id.* Anonymous users are sometimes not allowed the ability to upload files. *See id.* Once connected, users may select and download files using a server directory. *See id.* Copyright abuse via FTP is common since the service is designed to anonymously transfer large files. *See id.* at 234-35. Despite a Sysop's efforts to detect pirated works by watching for suspicious filenames, the sheer amount of files transferred through the system prevents any effective blocking. *See id.*

⁷³ See Skelton, *supra* note 32, at 240-41. The WWW is a collection of documents stored on computers located worldwide. *Id.* The opportunity for web page copyright abuse is immense due to linking capabilities. *See id.* For example, the pages can directly link to FTP servers, supply tools to defeat copy protection systems, or provide detailed instructions on how to locate and download pirated works from other internet services. *See id.* On the other hand, like e-mail, web pages are not difficult to trace and for that reason are not uncontrollable. *See id.* Additionally, because web pages may only be modified by their author who is solely responsible for its content, subscribers may be deterred from posting illegal material. *See id.*

⁷⁴ See Esbin, *supra* note 2, at 52. Search engines allow users of the World Wide Web to search for specific information among all public sites that comprise the Web with a simple keystroke or click of the computer "mouse." *Id.* Popular search engines include "Yahoo," "Lycos" and "Magellan." *Id.*

traditional ISP servers.⁷⁶ With the exception of e-mail and the WWW, each service provides a means by which users may transfer files easily, and in most cases anonymously, over the internet.⁷⁷ Among these, however, the most threatening service for copyright owners seems to be the IRC.⁷⁸

Danger exists in IRC for copyright owners for several reasons, most significantly the service's anonymity and speed.⁷⁹ Material may be quickly posted, downloaded and removed before any trace of the transaction is detected.⁸⁰

II. CASE LAW PRIOR TO TITLE II

Attempts by the courts to import direct, contributory and vicarious copyright liability theories in cyberspace have been imprecise.⁸¹ Early deci-

⁷⁵ See "IRC FAQ" (visited Mar. 5, 1999) <<http://www.mirc.com/ircintro.html>>. IRC stands for Internet Relay Chat ("IRC"). It is a multi-user chat system, where people meet on "channels," usually with a certain topic of conversation, to talk in groups or privately. *See id.* The largest one, referred to as Efnets (Eris Free net), usually serves over 15,000 users at any given moment operating over 2,000 channels. *Id.* Smaller IRCs exist such as Undernet with 10,000 users and Dalnet with 5,000 users. *See id.* "Although the IRC protocol does not directly support file transfers, IRC is frequently used to facilitate intellectual property theft using other internet services." *See Skelton*, *supra* note 32, at 235.

⁷⁶ *See id.* at 242.

⁷⁷ *See id.*

⁷⁸ *See id.* at 236 n.57. Transfers are normally conducted with the use of IRC robots ("bots"), or programs that automatically enable a user's computer, using the IRC channels, to carry out various assignments. *See id.* Private connections are created allowing a by-pass of safeguards against normally unauthorized file transfers. *See id.* Essentially, the "bot" creates an illusion by tricking the systems into believe they are functioning as an FTP host where files may be transferred. *See id.* *See also* John C. Dvorak, *MP3 Spells Disaster*, PC MAGAZINE, at 87, Mar. 9, 1999 (discussing Internet Relay Chat ["IRC"] as the "tip of the iceberg for potential bootlegging") [hereinafter Dvorak].

⁷⁹ See Skelton, *supra* note 32, at 231 n.41. Most users are identifiable through an Internet Protocol ("IP") address. *See id.* This address is usually assigned by the ISP to users each time they log on. *See id.* However, this is not an effective means of blocking access to infringers because ISPs purchase blocks of "IP" addresses and recycle them to maintain the efficiency of their networks. *See id.* Each time a user logs on, he is randomly assigned an IP address that differs from the last log-on. *See id.*

⁸⁰ See Dvorak, *supra* note 78, at 87.

⁸¹ See Weiskopf, *supra* note 24, at 31-32, 36 (asserting that courts have taken three different views of ISP contributory infringement post-*Fonovisa* and that the current case law lacks clarity with regard to determining whether a direct financial benefit has been received by an ISP under vicarious liability analysis).

sions have reflected an attempt to force-fit old copyright law to cyberspace, but increasingly courts are quick to recognize the traditional methods of analysis are not appropriate. Clearly, the shift from direct liability for online service providers to theories of indirect liability was the initial major step to modernizing copyright law.

The first notable case to consider liability for direct copyright infringement on the internet was *Playboy Enterprises, Inc. v. Frena*.⁸² A small BBS, operated by Frena, was accused of automatically displaying and distributing to its subscribers hundreds of *Playboy* magazine photographs.⁸³ Subscribers of Frena's BBS had uploaded files containing digitized copies of the photographs onto the BBS for other subscribers to access and download.⁸⁴ Despite the fact that Frena had absolutely no participation in the uploading or downloading of the photos, he was found directly liable because he facilitated the exchange.⁸⁵ The fact that Frena removed the photos following notification that they were unlawfully posted did not alter the court's finding of guilt.⁸⁶ Specifically, the court stated: "[I]t does not matter that Defendant Frena may have been unaware of the copyright infringement. . . . Intent or knowledge is not an element of infringement, and thus even an innocent infringer is liable for infringement."⁸⁷

After *Frena*, however, courts have tended to avoid punishing service providers for activity occurring on their services without their knowledge. Focus of the courts has shifted to the defendant's *participation* for a finding of infringement due to the nature of cyberspace.⁸⁸ That is, unlike traditional notions of infringement that applied to the

actual act of copying by a person or his affiliates, the technology operating the internet "automatically operates to copy."⁸⁹

Less than two years after *Frena*, a California district court held in *Religious Technology Center v. Netcom Online Communications Services, Inc.*⁹⁰ that internet access providers and BBS operators were not directly liable for copyright infringement if they merely served as conduits for unaltered information, regardless of any infringing materials stored on their computers.⁹¹ In *Netcom*, a user posted his infringing materials to a BBS computer, where they were temporarily stored and automatically copied to Netcom Online servers for distribution to the Usenet.⁹² Netcom Online asserted that it only provided internet access and provided neither content nor exercised control over material posted.⁹³ The BBS operator also asserted he had no control over the contents of materials posted.⁹⁴

The *Netcom* court declined to hold either the ISP or the BBS liable for direct infringement.⁹⁵ This pivotal decision, which has served as the foundation for both online copyright liability case law and Title II, analogized the ISP's functions to those of a copy machine. The *Netcom* court compared the function of an ISP such as Netcom Online to "the owner of a copying machine who lets the public make copies with it."⁹⁶ While noting that the Copyright Act is a strict liability statute, the court concluded there is an implicit element of "volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."⁹⁷ The court recognized that maintaining a strict liability standard would hold the entire internet liable simply because of the

⁸² 839 F. Supp. 1552 (M.D. Fla. 1993).

⁸³ See *id.* at 1554. Ultimately Frena was found liable. See *id.* at 1559-63. Note that the court moved directly to evaluate the violation of plaintiff's right to distribute the copyrighted works where copyright liability exists after concluding the defendant made the copies. See *id.* at 1555. The court did not consider the plaintiff's right of reproduction. See *id.* See also *Netcom*, 907 F. Supp. at 1370 (discussing criticisms of the *Frena* decision).

⁸⁴ *Frena*, 839 F. Supp. at 1554.

⁸⁵ See *id.* at 1559-63. While the court's ultimate decision did not rely on the defendant's knowledge of infringing activity, it clearly held him strictly liable. See *id.* Knowledge was not an element. See *id.* It has been suggested that perhaps the Court was influenced by evidence that the defendants did know of the infringing activity. See *Netcom*, 907 F. Supp. 1361, 1371 n.16.

⁸⁶ See *Frena*, 839 F. Supp. at 1554.

⁸⁷ See *id.* at 1559.

⁸⁸ See *Netcom*, 907 F. Supp. at 1361.

⁸⁹ Weiskopf, *supra* note 24, at 23. (citations omitted).

⁹⁰ 907 F. Supp. 1361 (N.D. Cal. 1995).

⁹¹ See *id.* at 1366-73, 1381-82.

⁹² See *id.* at 1367-68. Usenet servers maintained the postings from newsgroups for a short period of time—eleven days for Netcom's system and three days for the BBS. See *id.* Once on Netcom's computers, messages were available to Netcom's customers and Usenet neighbors, who could then download the messages to their own computers. See *id.*

⁹³ See *id.* at 1368.

⁹⁴ See *id.* at 1381.

⁹⁵ See *id.* at 1372.

⁹⁶ See *Netcom*, 907 F. Supp. at 1369 (footnote omitted).

⁹⁷ See *id.* at 1370.

way it operates.⁹⁸ That is, the equipment used to operate the internet automatically copies user material onto its equipment and distributes it to other users.

Following *Netcom*, courts continued to view passive automated functions by ISPs as lacking the necessary volition required to establish direct liability.⁹⁹ The participation standard heavily relies on "automatic functions" analysis.¹⁰⁰ For example, web site operators generally have not been placed in the same category as ISPs and BBSs because they have been found to possess a greater degree of participation in the content provided on their sites.¹⁰¹

In two consolidated cases involving Playboy and several web site operators, the United States District Court for the Northern District Court of Texas held web site operators liable for direct infringement where they developed software that actively collected infringing material from the internet and posted it to their web site.¹⁰² The web site operators argued that they lacked necessary volition under *Netcom* to be held liable because

their software automatically searched and posted material, as opposed to searching by specific command.¹⁰³ The *Webbworld* court disagreed, contrasting the *Netcom* defendants from *Webbworld*, who took "affirmative steps to cause the copies to be made."¹⁰⁴

Direct liability infringement for ISPs may have been weakened due to the strict evidentiary standards set under *Netcom*. But plaintiffs subsequently have not hesitated to attempt to apply alternative theories, such as contributory and vicarious liability.¹⁰⁵ As discussed above, these alternatives are not specifically enumerated within the Copyright Act, but instead have evolved from courts interpreting Section 106 of the Copyright Act.¹⁰⁶ Section 106 grants copyright owners the exclusive right to authorize others to exploit the exclusive rights of others.¹⁰⁷ The concept of "related defendants" is derived from this Section, that is, where one can be held liable for the acts of others.¹⁰⁸ Since the internet enables innumerable direct infringers, both theories make it easier for the copyright owner to find some party who

⁹⁸ See Weiskopf, *supra* note 24, at 23 (explaining the potential implications strict liability standards would have for Usenet servers which, by their function, carry infringing material to other servers without human intervention). Conceivably, every single Usenet server in the worldwide link of computers exchanging materials could be found liable for copyright infringement. See *Netcom*, 907 F. Supp. 1361 at 1369-70.

⁹⁹ The *Netcom* volition requirement was adopted in a series of cases considering the direct liability for copyright infringement claims. See *Sega v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996) (holding that the defendant may have known of the infringing activity occurring on his BBS, but since he did not directly cause the copying he could not be held liable for direct infringement). The finding of against direct liability in *Sega* did not preclude the court from finding contributory or vicarious liability. See *id.* at 932; *Playboy Enterprises, Inc. v. Hardenburgh*, 982 F. Supp. 503, 512-13 (N.D. Ohio 1997) (holding a BBS operator directly and contributorily liable for copyright infringement where images from Playboy magazine were knowingly posted for access by paying subscribers thus meeting the volition requirement). But see *Playboy Enterprises, Inc. v. Sanfilippo*, 97-0670-IEG, 1998 U.S. Dist. LEXIS 5125, 7-8 (S.D. Cal. 1998) (holding defendant directly liable for uploading plaintiff's images onto defendant's hard-drive via File Transfer Protocol exchange simply by attacking the Copyright Act's exclusive grant of authorization power rather than "copy power"). The claim in *Sanfilippo* was brought under 17 U.S.C. §106, which gives copyright owners the exclusive right to copy their works and authorize copies to be made. See *id.* at 6, 18-20. The court stated the defendant did not have the authority to allow the third party to upload the infringing photos. See *id.*

¹⁰⁰ See Shulman, *supra* note 4, at 556 n.5. Automated functions are those which the servers are programmed to complete without human intervention. See *id.*

¹⁰¹ See *Playboy Enterprises v. Chuckleberry Publ'g*, 939 F. Supp. 1032 (S.D.N.Y. 1996) (holding web site operator liable for direct copyright infringement when defendant operator personally provided the content for the web site). *Chuckleberry* is distinguishable from *Netcom* because the defendant provided more than simple access to the world wide web. See also *Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distributors*, 983 F.Supp. 1167 (N.D. Ill. 1997) (denying web site operator cross motion for summary judgment and finding possible contributory infringement of copyright where his agent copied protected "clip art" onto defendant's web site available for users to download onto their own computers). While the ISP hosting the web page was not found directly liable because it did not engage in the infringing activity, the court in *Marobie* indicated the ISP could be found liable for contributory infringement depending on the extent of knowledge it had. See *id.* See also *Electronic Information Policy & Law Report*, Vol. 2, No. 47 1088-1565 at 1275 (Dec. 12, 1997).

¹⁰² *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171 (N.D. Tex. 1997); *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997) [hereinafter *Webbworld I*], aff'd *Playboy Enterprises v. Webbworld*, 168 F.3d 486 (5th Cir. 1999) [hereinafter *Webbworld II*]. See also Weiskopf, *supra* note 24, at 25.

¹⁰³ See *Webbworld I*, 991 F. Supp. at 549-50.

¹⁰⁴ *Id.* at 552.

¹⁰⁵ See Weiskopf, *supra* note 24, at 15. Courts have struggled to tailor statutory intent and existing case law to the internet and computer technology. *Id.* at 19.

¹⁰⁶ See Leaffer, *supra* note 27, at §9.20 (citing H.R. REP. NO. 94-1476, 94TH CONG., 2ND SESS. 159 (1976)). See also 17 U.S.C. §106.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

can be held liable.¹⁰⁹ In fact, every court to date considering cyberspace copyright infringement claims has held vicarious and contributory liability theories as acceptable for the jury to consider.¹¹⁰

Netcom and *Webbworld* paved the way for contributory liability claims where only knowledge and participation¹¹¹ in the infringing acts exist (as opposed to the actual "act" of copying necessary for direct liability).¹¹² However, exactly what level of knowledge is satisfactory to successfully prove contributory infringement remains open for interpretation. In *Netcom*, both the ISP and BBS operator were notified by plaintiff of the infringing material posted.¹¹³ No question arose as to whether either had knowledge of the activity.¹¹⁴ Notably, one court suggested that the sole operation of a BBS could serve as constructive knowledge to defendant BBSs that infringing activity has occurred—enough so to impose liability.¹¹⁵

Following *Netcom*, a potentially troublesome expansion of the participation requirement for contributory infringement liability was decided in *Fonovisa v. Cherry Auction, Inc.*¹¹⁶ In *Fonovisa*, the Ninth Circuit held that the participation in infringing activity need not be "substantial."¹¹⁷ Swap meet operators were held contributorily liable for the acts of individual vendors who were selling copyrighted music recordings without per-

mission.¹¹⁸ Since there was no question the operators had knowledge of the infringing activity, the court was left to determine whether the operators' participation level was enough to warrant contributory infringement.¹¹⁹ According to the court, providing the site and facilities where the provider actually knew infringing activity was occurring constituted ample participation to create contributory liability.¹²⁰ While this case did not involve online service providers, its effects will undoubtedly affect future courts analyses of contributory liability.

The success of contributory infringement liability has essentially eliminated the need for vicarious infringement liability online.¹²¹ However, vicarious liability should not be discounted as a possible liability theory for service providers. Predicting what will satisfy the required control and direct financial benefit elements necessary to support a vicarious liability infringement claim in the online environment became a lot more difficult thanks to *Fonovisa*. In addition to lowering the participation standard for contributory liability, the *Fonovisa* court's interpretation of "direct financial" benefit also lessened the threshold for what could be considered sufficient to make a vicarious liability claim.¹²² In the online context, charging a fee for downloading infringing materi-

¹⁰⁹ See Weiskopf, *supra* note 24, at 12.

¹¹⁰ See *id.* at 27.

¹¹¹ *Gershwin*, 443 F.2d at 1162 (describing the second element of a contributory liability claim which requires that the defendant "induces, causes or materially contributes" to the infringing activity).

¹¹² The *Netcom* court held the standard for "participation" to be "substantial." *Netcom*, 907 F. Supp. at 1375. However, following that decision, the Ninth Circuit in *Fonovisa* decreased the level of participation necessary for contributory infringement liability to less than substantial. 76 F.3d at 264. In that case, the Ninth Circuit held that providing site and facilities known by consumers to be a location for "infringing activity is sufficient to establish contributory liability." See *id.* See also *Marobie-FL*, 983 F. Supp. at 1179 (finding issues of material fact existed regarding contributory liability claim against an ISP who stored an infringing web page on its server); *MAPHIA*, 948 F. Supp. at 932-33 (holding BBS operator that had undisputed knowledge contributorily liable for soliciting its subscribers to upload and download copyrighted video games).

¹¹³ See *Netcom*, 907 F. Supp. at 1374.

¹¹⁴ See *id.* at 1382.

¹¹⁵ See *Playboy Enterprises, Inc. v. Russ Hardenbaugh, Inc.*, 982 F. Supp. 503, 514 (N.D. Ohio 1997) (holding defendant BBS liable for contributory infringement, the court stated: "Defendants had at least constructive knowledge that infringing activity was likely to be occurring on their BBS [because they encouraged subscribers to upload information in-

cluding adult files]. . . . *Playboy* magazine is one of the most famous and widely distributed adult publications in the world. It seems disingenuous for defendants to assert that they were unaware that copies of photographs from *Playboy* magazine were likely to find their way onto the BBS."). See also Weiskopf, *supra* note 24, at 30. Copyright notices on posted or to-be-posted works have been found to be one such form of knowledge since most copyrighted works on the Internet already have notices. See *id.* An issue, raised by such a standard that has not been fully examined by the courts is the removal of copyright notices by parties posting the infringing material. See *id.*

¹¹⁶ *Fonovisa*, 76 F.3d at 259.

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 261.

¹¹⁹ See *id.* at 264.

¹²⁰ See *id.* By providing an environment and market for illegal copies of recordings to "thrive," the swap meet operators participation could not be considered "passive." *Id.*

¹²¹ See Weiskopf, *supra* note 24, at 32.

¹²² See *Fonovisa*, 76 F.3d at 263. The swap meet promoters were found to directly benefit from the infringing activity because they leased the areas where infringing activity occurred, sold tickets to enter the activity and operated concession stands that also generated a profit. See *id.* This was considered adequate promotion and control leading to a financial benefit. See *id.* at 263-64. "In this case, the sale of pirated recordings at the Cherry Auction swap meet is a 'draw' for customers" *Id.*

als is obviously a financial benefit.¹²³ However, it remains uncertain when a service provider receives a "direct" financial benefit from activities occurring on its systems as opposed to a tangential benefit. Theories alleging that infringing activity enhances the value of an ISP's service, thus attracting more subscribers, have been dismissed by the courts.¹²⁴ It has yet to be determined whether increased advertising revenues as a result of increased "traffic" to a particular internet site constitute a direct financial benefit.¹²⁵

Fonovisa's impact extends to the right and ability to control element of vicarious liability. While courts have failed to define "ability" to control with respect to online service providers, it has been held that the relevant issue is not whether service providers exercise control over individuals uploading and downloading infringing material, but whether they had the right and ability to control what happens on their websites.¹²⁶

III. COPYRIGHT LIABILITY LIMITATIONS FOR ISPS CONTAINED IN THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. Legislative History

The Online Copyright Infringement Liability

¹²³ See *Webbworld*, 968 F. Supp. at 1171; *Webbworld I*, 991 F. Supp. at 560 (selling adult pictures was the sole purpose of the website).

¹²⁴ See *Netcom*, 907 F. Supp. at 1377. See also *Marobie-FL*, 983 F. Supp. at 1167.

¹²⁵ See *Weiskopf*, *supra* note 24, at 36.

¹²⁶ See *Webbworld*, 968 F. Supp. at 1177.

¹²⁷ Pub. L. No. 105-304, §§ 201-03, 112 Stat. 2861 (1998) (to be codified at 17 U.S.C. §512).

¹²⁸ See House Delay in Passage of the Digital Millennium Copyright Act H.R. 2281, 144 CONG. REC. S12730, (Oct. 20, 1998).

The 1998 report of the International Intellectual Property Alliance confirms the importance of copyright based industries to our American economy and our economic future. The report demonstrates for the seventh straight year that the U.S. copyright industries continue to be one of the largest and fastest growing segments of the U.S. economy. These industries are leading the country into the digital age and the 21st century.

Id.

¹²⁹ See *Hardenburgh*, 982 F. Supp. at 513-14 (finding BBS operator directly and contributorily liable for copyright infringement where images from Playboy magazine were knowingly posted for access by paying subscribers); *Marobie-FL*, 983 F. Supp. at 1179. (denying defendants motion for summary judgment on contributory infringement of "clip art" by ISP and web site operator. since factual determination regarding service providers' knowledge about alleged infringement was necessary). *Webbworld*, 968 F. Supp. at 1173, 1177

Act was enacted by Congress as Title II of DMCA.¹²⁷ The new legislation, amending the Copyright Act of 1976, set out to codify technologically-sound guidelines for liability based on the new medium for publishing and distributing information.¹²⁸ Title II limits liability for providers of "network access" and "online services" and substantially alters prior case law holding service providers liable for copyright infringement.¹²⁹

Notably, Title II differed substantially from the recommendation of a Presidential National Intellectual Property Information Task Force ("IITF") formed in February 1993 to "articulate and implement the Administration's vision for the National Information Infrastructure."¹³⁰ In September 1995, the group's final report, "The White Paper,"¹³¹ stated that "altering the standards of liability for infringement would be a significant departure from current copyright principles and law and would result in a substantial derogation of

(issuing summary judgment for copyright infringement against web site operator uploading "adult images" including copyrighted photographs from Playboy). See also *Sega Enters. v. Sabella*, 1996 U.S. Dist. LEXIS 20470 1,6, 19-20, 25 (N.D. Cal. 1996) (holding BBS operator liable for contributory, not direct, copyright infringement by maintaining server file that she had knowledge was used by her subscribers to upload and download unauthorized copies of Sega games); *MAPHIA*, 948 F. Supp. at 933 (holding BBS operator contributorily liable for customers' uploading of Sega video game software to sell or trade for copies of other games); *Netcom*, 907 F. Supp. at 1368, 1373 (stating that while ISP and BBS operators cannot be held directly liable for infringement for posting copyrighted material due to lack of "volition," they may be vicariously or contributorily liable); *Frena*, 839 F. Supp. 1559 (holding that uploading *Playboy* images without permission creates contributory liability for copyright infringement for operator where subscribers actually uploaded the material).

¹³⁰ White Paper, *supra* note 31, at 1. Chaired by the late Secretary of Commerce Ronald H. Brown, the IITF was comprised of Federal agency representatives. See *id.* Stated goals of the group were "to develop comprehensive telecommunications and information policies and programs that will promote the development of the NII and best meet the country's needs." *Id.*

¹³¹ See *id.* at 2. The authors of the White Paper analyzed most areas of intellectual property law with an emphasis on copyright law. See *id.* The NII is described in the White Paper as "encompassing digital, interactive services now available,

the rights of copyright owners."¹³² In short, the Clinton administration strongly supported strict liability for ISPs who transmit infringing material through their computers in any way.¹³³ But the White Paper generated more controversy than support, and sparked quite a reaction from courts who disagreed with it and a legislature which ignored it.¹³⁴

The *Digital Millennium Copyright Act*, which was the result of a compromise between copyright owners and online industry representatives, added a new Section 512 to the Copyright Act of 1976.¹³⁵ The provisions enacted were specifically intended to codify the *Netcom* decision (and thus overrule *Frena*) by, *inter alia*, requiring volition on the part of ISPs for a finding of direct infringement.¹³⁶ The law has received mixed reviews from industry representatives—it's been called "a Washington approach to a simple kind of problem" because of its broad language and complicated requirements.¹³⁷

B. Title II's Purpose: Limited Copyright Liability for ISPs

The statute seeks to limit copyright liability for those who qualify as service providers.¹³⁸ While

such as the internet, as well as those contemplated for the future." *Id.* Input was received from electronic industries, service providers, academic, research, library and legal users, as well as the computer software, motion picture, music, broadcasting, publishing and other information and entertainment industries. *See id.* at 5.

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See Skelton, supra* note 32, at 265-68 (discussing various reactions to the White Paper).

¹³⁵ *See* 17 U.S.C. §512.

¹³⁶ *See Weiskopf, supra* note 24, at 50.

¹³⁷ *See* John Borland, *Law Entists ISPs in Piracy Fight*, (visited Nov. 9, 1998) <<http://www.news.com/News/Item/0,4,28357,00.html>> (quoting Dave McClure, executive director of the Association of Online Professionals, a trade group that represents ISPs as stating "This isn't what we would have wanted. It's a Washington approach to a simple kind of problem").

¹³⁸ *See id.*

¹³⁹ *See Skelton, supra* note 32, at 246.

¹⁴⁰ *See id.* at 247.

¹⁴¹ *See id.* at 246.

¹⁴² *See* Bruce G. Joseph, member, Wiley, Rein & Fielding, memorandum, "Summary of the Online Copyright Infringement Act," at 4, 1998 [hereinafter Joseph]. Mr. Joseph was a principal negotiator representing service provider interests during the Senate negotiations that finally resulted in Title II of the Digital Millennium Copyright Act. *Id.*

¹⁴³ *See* 17 U.S.C. §504.

Title II benefits could protect service providers' purses by guarding against mammoth monetary penalties associated with copyright infringements, a number of hurdles must be overcome before the protections take effect.¹³⁹ The first hurdle is determining who the service providers are.¹⁴⁰ What would seem to be a bright-line test is actually unclear because tracing information transfers back to individuals or service providers is not always easy or possible.¹⁴¹ The second hurdle is defining and compartmentalizing each function of the ISP. As noted above, liability limitations hinge on both service provider status and the performance of a certain function.

C. The Stakes

The provisions calling for injunctive relief as opposed to monetary damages were a major victory for online service providers in the creation of Title II.¹⁴² Copyright cases have the possibility of yielding enormous cash awards to copyright owners whose rights have been infringed.¹⁴³ ISPs under Title II that are *prima facie* guilty for either direct, contributory or vicarious infringement are not liable for such monetary damages.¹⁴⁴

Without the protection provided by Title II, as

A copyright owner may choose to recover either: (a) the copyright owner's actual damages plus any additional profits of the infringer; or (b) statutory damages ("in a sum not less than \$500 or more than \$20,000" for each act of infringement. . . "The court may in its discretion increase the award of statutory damages to a sum of not more than \$100,000 [per each infringing act] where the act is "willful"). 17 U.S.C. §504(c)(1)-(2). Due to the nature of the internet, actual damages to a copyright owner would be indeterminable because there is no way to calculate exactly how many copies were made and distributed. The statutory damage provision therefore becomes extremely important to the recovery of damages in cyberspace.

¹⁴⁴ *See* 17 U.S.C. §512. *See also* Lilli Hsieh et. al., *Intellectual Property Crimes*, 35 AM. CRIM. L. REV. 899, 918 (1998) (discussing traditional copyright defenses including "fair use," "parody," "scenes a faire," and "first sale"). In the event that a service provider does not qualify for the limitation on liability, it still may claim all of the defenses available to it under current law. *See* Joseph, *supra* note 131, at 2. The Act does not create any new liabilities. *See id.* In other words, the act does not determine whether a service provider is or is not an infringer. *See id.* If its conduct falls within the scope of functions protected, it is protected. *See id.* Even if an ISP's activity falls outside the limitations on liability specified in the bill, the ISP is not necessarily an infringer. *See id.* Liability under these circumstances would be adjudicated based on direct, vicarious or contributory liability as articulated in the Copyright Act and case law unchanged by §512. *See id.*

the internet grows, large online service providers with deep pockets would become increasingly susceptible to considerable financial distress if forced to defend against copyright infringement claims.¹⁴⁵ For example, a California District Court awarded nearly \$4 million to a copyright owner whose pictures were unlawfully copied onto defendant web site operator's site.¹⁴⁶ While this case applied a relatively straightforward copyright infringement analysis because it clearly involved the active participation of the web site operator in uploading the images, it does serve as a good example of potentially high damage awards.¹⁴⁷

The protected functions of a service provider listed in Title II are qualified with an exemption from monetary liability even if under prior case law infringements could be found.¹⁴⁸ This limitation is the heart of Title II. It does not change existing definitions and requirements for copyright infringement, but rather accommodates a new technology and protects parties that, in reality, are not truly responsible for the infringements.¹⁴⁹

¹⁴⁵ *But see*, Mark C. Morrill & Sarah E. Eaton, *Protecting Copyrights On-Line: Copyright Liability for Online Service Providers*, 8 No. 4 J. PROPRIETARY RTS. 2, 3 (Apr. 1996) (discussing "innocent copyright infringer doctrine" which limits fine to \$200 for infringers who were not aware or had no reason to believe their actions constituted copyright infringements).

¹⁴⁶ *See* Weiskopf, *supra* note 24, at 5 n.21 (citing *Sanfilippo*, 97-0670-IEG, 1998 U.S. Dist. LEXIS 5125).

¹⁴⁷ *See* Skelton, *supra* note 32, at 307. "Recently, an access-only provider in Northern Virginia was sued by a copyright owner under a theory of copyright infringement. Although the service provider settled before trial, just a few months of litigation preparation represented a large chunk of its annual revenue. This is a burden that most providers are unable to undertake, particularly if they can do nothing to minimize their liability." *Id.*

¹⁴⁸ *See* 17 U.S.C. §512(a)-(d). "A service provider shall not be liable for monetary relief or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's . . . [transmitting/routing, caching, third-party postings, or information location tools]." *Id.* Section (g), the notice and takedown provision, is also considered a protected function. *See* 17 U.S.C. §512(g). However, it does not mention a specific exemption from monetary liability. In (g)(4), it states that a service provider shall not be liable for copyright infringement if it complies with the "notice and take-down" requirements outlined. Therefore, if a copyright owner's claim for copyright infringement is later found to be valid, a service provider may not be held liable for complying with this section of the Act which requires the service provider to control content. This is the *only* portion of the Act that permits service providers to control content and escape liability. *See* 17 U.S.C. §512 (g).

Injunctive relief, however, is available.¹⁵⁰ When a successful infringement claim is brought, courts may grant relief by ordering the suspension or termination of access to an infringing subscriber, blocking access to a particular site, or taking action "necessary" to stop copyright infringement.¹⁵¹ When considering which type of injunctive relief to order, the court is bound to weigh the financial burden of the service provider against the harm suffered by the copyright owner if no action is taken to remove the infringing material.¹⁵²

D. Ambiguous Service Provider Definitions

There are two definitions for service provider in Title II.¹⁵³ The first definition, transmitting online communications, is relatively straightforward in its meaning and applies to "conduit" activity.¹⁵⁴ That is, a service that provides plain old access to the internet—no bells, whistles, or content.¹⁵⁵ The second definition is much broader and appears to be a catchall, applying to "providers of online services or network access."¹⁵⁶ The second

¹⁴⁹ *See* 17 U.S.C. §512 (j) (stating that "[t]he following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section. . . .").

¹⁵⁰ *See id.*

¹⁵¹ *See* 17 U.S.C. §512 (j) (1) (A) (i)-(iii).

¹⁵² *See* 17 U.S.C. §512 (j) (2) (A)-(D).

The court . . . shall consider (A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network; (B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement; (C) whether implementation . . . [is] technically feasible and would not interfere with access to noninfringing material at other online locations; and (D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

Id.

¹⁵³ 17 U.S.C. §512 (k) (1) (A)-(B).

¹⁵⁴ *See* 17 U.S.C. §512 (k) (1) (A). "As used in subsection (a), the term 'service provider' means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user of material as sent or received." *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ 17 U.S.C. §512(k)(1)(B). "As used in this subsection, other than subsection (a), the term 'service provider' means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A)." *Id.*

definition poses the most significant questions and, unfortunately, the statute does little to provide answers.¹⁵⁷ The section-by-section analysis provided by the House Judiciary Committee specifically included "services such as providing internet access, e-mail, chat room and web page hosting services."¹⁵⁸ In addition to traditional online service providers, this definition appears to include any business that may operate a web site or other internet services or facilities, including private networks "intranets."¹⁵⁹

Most businesses operating web sites or networking their employees' computers likely would not consider themselves "service providers" that are vulnerable to any sort of copyright liability. The law, however, does not define what a "provider of online services" is, nor does it define "network access."¹⁶⁰ The linchpin to ISP status appears to be the facilitation of access to the internet and its various resources. That is, anyone providing any sort of online service or network access could be considered an ISP, but the issue relating to its function still exists for those desiring Title II protection.

For example, large ISPs not only provide access to the internet, but in some cases they also provide content such as encyclopedia-like

databases.¹⁶¹ Clearly, they are not exempt from copyright infringement liability when the material they post is infringing. However, a question exists as to whether they can still be found liable for material posted by users in an area where they do not provide content, but provide guided access.

E. Liability Limitation Compliance Requirements

Service providers are required to comply with certain criteria (such as appointing an agent to handle copyright owner complaints and filing the information with the U.S. Copyright Office) depending on their function.¹⁶² Section 512 provides limited liability for the four functions discussed below.¹⁶³

1. *Transitory Digital Network Communications*

As long as several criteria are satisfied, the liability exemption provided by Section 512 shields service providers from third party infringing material that merely passes through its system.¹⁶⁴ It codifies the *Netcom* decision and replaces the *Frena* court's strict liability standards for service providers acting in their capacity as "conduits."¹⁶⁵

¹⁵⁷ Committee On The Judiciary, 105th Cong., Section By Section Analysis Of H.R. 2281 As Passed By The United States House of Representatives On August 4, 1998, 39 (1998) [hereinafter Analysis]. Although slightly more specific than the statutory language in §512 (k)(1)(B) (the second definition of service provider), neither the statute nor the analysis concretely defines the elements that comprise any of these services.

¹⁵⁸ *Id.*

¹⁵⁹ See Coie, *supra* note 13 at 1. "Intranet" is defined as "a private network inside a company or organization that uses the same kinds of software that you would find on the public internet, but that is for internal use. As the internet has become more popular, many of the tools used on the internet are being used in private networks, for example, many companies have web servers that are available only to employees." *Internet Glossary*, *supra* note 67.

¹⁶⁰ See 17 U.S.C. §512(k).

¹⁶¹ See Shulman, *supra* note 4, at 555.

¹⁶² See 17 U.S.C. §512 (i)(1)(A)-(B). See also 17 U.S.C. §512(i)(2)(A)-(C).

The limitations on liability established by Section 512 (i)(1)(A)-(B) shall apply to a service provider only if the service provider (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 stan-

dard technical measures. "Standard Technical measures" is defined as "technical measures that are used by copyright owners to identify or protect copyrighted works and: (A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

¹⁶³ See 17 U.S.C. §512(a)-(d). The limited liability only attaches if service providers perform one of the listed functions. See Coie, *supra* note 13, at 127. Generally, however, the functions to which liability limitations apply are passive activities where the service provider fails to exercise any control over, or interact with, the content of the infringing material. See *id.*

¹⁶⁴ See 17 U.S.C. §512(a). "[T]ransmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections. . . ." *Id.*

¹⁶⁵ The elements of each function differ, and they are evaluated individually for determining whether the particular action of a service provider is protected or not. See *id.* In other words, a service provider's activities may qualify for protection under one category, but not the other. See *id.* If an activity does not fall under one of the liability limitation activities, then the service provider will be evaluated under tradi-

Specifically, eligibility requires that service providers not alter content, initiate the transmission, make or keep copies for longer than the time it takes to transmit or route, or select recipients for the transmission.¹⁶⁶ The conduit protection is intended to extend to activities such as: (1) sending and receiving e-mail; (2) web site information retrieval; (3) posting material by users to and from chat rooms and bulletin boards; and (4) providing internet access in general.¹⁶⁷

2. System Caching¹⁶⁸

Service providers may, subject to several conditions, store material on their servers from outside web sites in order to provide quick and easy access by their users.¹⁶⁹ Conditions for the system caching liability qualification include the service provider's transmission of materials to a third party without modification and compliance with generally accepted industry standard data communications protocols that concern refreshing, reloading or updating cached material.¹⁷⁰ Additionally, with certain exceptions, the service provider may not interfere with the technology used by the originating person to return information back to

that person.¹⁷¹ Service providers must also subject their users to the same visitation conditions (e.g., fees and passwords) for cached material as the originating site.¹⁷² Finally, if the material was made available without permission from the copyright owner, the service provider must remove the material upon notice as long as the material has also been removed from the originating site.¹⁷³

3. Information Residing On Systems or Networks at the Direction of Users

Of the four protections for service providers, the umbrella provided to service providers for infringing material posted by third parties is probably the most wide-reaching in terms of the functions it seems likely to protect. Arguably, the most elaborate requirements service providers must adhere to in Title II are also contained in this section: designating an agent to receive notifications of infringement claims, notice and takedown provisions.¹⁷⁴ In other words, any entity defined as a service provider is required to appoint a person to receive complaints regarding alleged infringing material and register with the U.S. Copyright Office.¹⁷⁵ If no agent exists, there is no limited lia-

tional copyright liability standards. *See id.*

¹⁶⁶ See 17 U.S.C. §512(a)(1)-(5). Service providers meeting the "conduit" definition must meet all five stipulations before qualifying for the limited liability. *See id.* The statute protects them if:

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content.

Id.

¹⁶⁷ See Joseph, *supra* note 142, at 4.

¹⁶⁸ Caching is defined as "a different form of intermediate and temporary storage . . . used to increase network performance and to reduce network congestion generally, as well as to reduce congestion and delays to popular sites. This storage is intermediate . . . between the originating site and ultimate user. The material in question is stored on the service provider's system or network for some period of time to

facilitate access by users subsequent to the one who previously sought access to it." ANALYSIS, *supra* note 157 at 27.

¹⁶⁹ 17 U.S.C. §512(b)(1)(A)-(C). The statute defines circumstances under which caching is protected as the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which the material is made available online by a person other than the service provider. *See id.* Second, the person (not the service provider) transmitting the material via the service provider's system or network must be sending it to someone other than himself. *See id.* Finally, an automatic technical process must be operating to store the material for the purpose of making the material available to users of the system or network. *See id.*

¹⁷⁰ See 17 U.S.C. §512(b)(2)(B).

¹⁷¹ See 17 U.S.C. §512(b)(2)(C)(i)-(iii) (outlining the exceptions which basically exclude unreasonable technological protections that would interfere with normal ISP functions).

¹⁷² See 17 U.S.C. §512(b)(2)(D).

¹⁷³ See 17 U.S.C. §512(b)(2)(E).

¹⁷⁴ See 17 U.S.C. §512(c)(2). To receive liability limitations, service providers must do two things. *See id.* First, they must designate an agent to receive notification of claimed infringements and provide the public with contact information on the agent (proper notification guidelines are located in §512(c)(3)). *See id.* Second, service providers must register the name, address, phone number and e-mail address of the agent with the Copyright Office, as well as any other contact information which the Register finds necessary. *See id.*

¹⁷⁵ What constitutes proper notification is clearly stated in §512(c)(3)(A)(i)-(vi). The notice must be (1) a written

bility protection.¹⁷⁶

When a third party stores infringing material on a service provider's system or network,¹⁷⁷ the service provider is not liable for monetary damages if it does not have actual knowledge that the material is infringing;¹⁷⁸ it does not receive a financial benefit directly attributable to the infringing activity;¹⁷⁹ and upon receiving notice of the infringing activity, responds "expeditiously" to remove or disable access to the material claimed to be infringing.¹⁸⁰

The knowledge element of this section is important to highlight. The second part of the test providing for "apparent" notice was a central element to the legislative compromise reached between the online service industry and copyright owner representatives.¹⁸¹ Since the determination of a service provider's knowledge could also make the difference between a finding of contributory and vicarious liability, it is critical to create a standard to which a service provider can reasonably be held.¹⁸²

Title II's section dealing with information residing on systems or networks specifically states that a service provider has *no duty* to monitor its service or seek out infringing material.¹⁸³ Presumably, since there is no affirmative obligation to investigate the material, a service provider will thus

communication with a physical or electronic signature of either the owner or a person authorized to act on behalf of the owner of an exclusive right that has allegedly been infringed, as well as contact information of the complaining party; (2) a clear description of the alleged copyrighted works and a description of their alleged infringing location; (3) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner; and (4) a statement that the information in the notification is authorized and accurate, under penalty of perjury. See 17 U.S.C. §512(c)(3)(A)(i)-(vi) (1998).

¹⁷⁶ See *id.*

¹⁷⁷ See 17 U.S.C. §512(c)

¹⁷⁸ See 17 U.S.C. §512(c)(1)(A)(i)-(iii). The actual knowledge stipulation includes "apparent knowledge." *Id.* Apparent knowledge occurs when a service provider is not aware of facts or circumstances from which the infringing activity is clear, such as uploaded files using a large amount of hard drive memory, or URLs containing words like "pirate" or "copy." See ANALYSIS, *supra* note 157, at 32.

¹⁷⁹ See 17 U.S.C. §512(c)(1)(B).

¹⁸⁰ See 17 U.S.C. §512(c)(1)(C).

¹⁸¹ See Joseph, *supra* note 142, at 5. "The awareness of facts and circumstances is a subjective standard. The plaintiff must prove that the service provider had actual, subjective awareness of the facts and circumstances on which plaintiff relies. However, the question of whether infringement is "apparent" is an objective standard evaluated on the basis of

not lose the liability protection if it becomes aware of material that may be "suspect," but not "obvious" or "apparent."¹⁸⁴

The Congressional Analysis suggests a "red flag" test exists within the language of the statute itself.¹⁸⁵ No ISP is required to monitor its service or affirmatively seek facts indicating infringing activity.¹⁸⁶ However, the liability limitation will be lost if the ISP becomes aware of a "red flag" that suggests infringing activity and it takes no action to remove or stop the infringements.¹⁸⁷

The section-by-section analysis provided by the House of Representatives also addressed the meaning of "financial benefit" in relation to this portion of Title II¹⁸⁸ suggesting a "common sense, fact-based approach, not a formalistic one."¹⁸⁹ It distinguished receiving a one-time set-up fee and flat periodic payment from a "financial benefit directly attributable to the infringing activity."¹⁹⁰ Any financial gain that is received from providing the access to the infringements is considered part of that meaning.¹⁹¹

4. *Linking to Infringing Material Via Information Location Tools*¹⁹²

Section 512(d) exempts service providers who provide "short cuts" to other internet locations

a reasonable person. The legislative history uses the words 'obvious' and 'clearly' as synonyms of 'apparent' to describe infringement." *Id.*

¹⁸² See 17 U.S.C. §512(m).

¹⁸³ See 17 U.S.C. §512(m) (emphasis added).

¹⁸⁴ See 17 U.S.C. §512(m).

¹⁸⁵ See ANALYSIS, *supra* note 157, at 29. Determining whether the facts or circumstances constitute a "red flag" would be based on an objective "reasonable person" standard. See *id.* That is, would the infringing activity have been apparent to a reasonable person operating the same or similar circumstances. See *id.* Determining whether the service provider was actually aware of the "red flag" would be subjectively evaluated based on individual facts and circumstances. See *id.*

¹⁸⁶ See *id.* at 29.

¹⁸⁷ See *id.* Action to be taken requires the expeditious removal of infringing material or the disabling of access to that material. See *id.* Due to factual circumstances and technological limitations varying from case to case, it is impossible to identify a uniform time limit for expeditious action. See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² An "information location tool" is a directory or index of online sites or material such as a search engine that identifies pages by specified criteria, a reference to other online

that may contain infringing material on their sites from monetary liability.¹⁹³ To qualify for the liability limitation, upon notification, service providers are required to remove infringing material as described in the other functions.¹⁹⁴ They also must not have knowledge of the infringing activity on the other sites and they must not receive a direct financial benefit from linking to the infringing sites.¹⁹⁵

Commentators have raised concerns regarding what constitutes knowledge of an infringing site.¹⁹⁶ They argue that the statute is unclear as to whether online directories prepared by human editors and reviewers who view and classify various internet sites would be denied the safe harbor if they view the infringing site.¹⁹⁷ The knowledge provision is the same as that is found in Section 512(c) (information residing on a system or network).¹⁹⁸ An ISP has no obligation to seek out copyright infringement, but it would not qualify for the liability limitation if it ignored "red flags" of blatant infringement.¹⁹⁹

Another "red flag" test has been suggested as the criteria for judging whether knowledge is present.²⁰⁰ For example, site or file Titles containing words that indicate illegality, such as "pirate.com," "bootleg.com" or other slang terms for intellectual property theft in their uniform resource locator ("URL") and header information may be considered enough of a notice, or a "red flag," to render knowledge present.²⁰¹

The copyright owner could also attempt to prove the location was "clearly, at the time the di-

rectory provider viewed it, a "pirate" site where unauthorized materials are available for download.²⁰² The *Section-by-Section Analysis of Title II*, as provided by the House of Representatives, says the red flag test "strikes the right balance" because the "apparent" knowledge required would catch illegitimate service providers preparing infringing sites.²⁰³ However, recent technological developments have created circumstances where apparent knowledge could seemingly be found without such blatant triggers, e.g. a trade organization's warning to a company that their activity is illegal.

IV. INTRODUCING MP3: A COPYRIGHT PIRATE'S RECIPE FOR INFRINGEMENT

A. How Does MP3 Work?

The development of MP3 technology has drawn increased attention to the capability of online services to facilitate copyright infringement. MP3 is a standard, not an organization or brand name.²⁰⁴ Its compression technology, which is legal,²⁰⁵ has been likened to that of the "Zip" file format commonly used by PC users which condenses files in order to accelerate transfers.²⁰⁶ The files are read either on computers by software available to be downloaded free on the internet or anywhere by purchasing walkman-like players.²⁰⁷ Fearing the negative impact these devices could have on the music industry, the Recording Industry of America ("RIAA") unsuccessfully sued

material such as a list of recommended sites, a pointer that stands for an Internet location or address, or a hypertext link which allows users to access material without entering its address. See ANALYSIS, *supra* note 157, at 32.

¹⁹³ 17 U.S.C. §512(d).

¹⁹⁴ See 17 U.S.C. §512(c)(3), discussed *supra* note 175.

¹⁹⁵ 17 U.S.C. §512(d)(2).

¹⁹⁶ See Weiskopf, *supra* note 24, at 43.

¹⁹⁷ See ANALYSIS, *supra* note 157, at 32.

¹⁹⁸ See 17 U.S.C. §512(c)(3), discussed *supra* note 175.

¹⁹⁹ See ANALYSIS, *supra* note 157, at 33.

²⁰⁰ See *id.* at 32.

²⁰¹ See *id.*

²⁰² See *id.* at 33.

²⁰³ *Id.*

²⁰⁴ Michael Robertson, *Top Ten Things Everyone Should Know About MP3*, (visited Feb. 5, 1999) <<http://www.mp3.com/new/070.html>>.

²⁰⁵ MP3 is simply a format used to store files. Michael Robertson, *MP3 for Beginners* (visited Feb. 5, 1999) <<http://www.mp3.com/faq/general.html>>. It can be used legally or illegally. See *id.* Using an MP3 is legal if the song's copyright

holder has granted permission to download and play the song. See *id.* It is also used legally to make copies from purchased CDs for personal use. See *id.* However, it is illegal to encode MP3s from CDs and trade them with others without permission from the copyright holder. See *id.*

²⁰⁶ See *id.*

²⁰⁷ See Klau, *supra* note 17, at 17. There are a number of different ways to "play" MP3 files. See *id.* For example, Windows 98 which contains "Media Player;" or MusicMatch Jukebox (<http://www.musicmatch.com>) shareware can be downloaded for free with the option to purchase the complete version. See *id.* The software has the capability to covert songs from C.D.s to MP3 format where they may be stored on a hard drive. See *id.* It is also possible to transfer them to a writeable C.D. and play them back on any MP3-enabled CD players. See *id.* Diamond Multi-media Services produced one of the first hand-held portable devices onto which MP3 files may be transferred and replayed. See *id.* The "Rio" is a 32-megabyte hard-drive which runs on a single double AA battery available for \$199. *Id.* See also <<http://www.diamondmm.com/products/current/rio.ctm>>.

the manufacturers of the portable players, which are not designed to "copy protect" audio files to prevent the illegal sale of copyrighted material.²⁰⁸ While the music industry currently has the capability to include advanced technology in music files to prevent its illegal use, most copyrighted songs presently available are not safeguarded.²⁰⁹

More than 600 Internet Relay Chat ("IRC") channels and hundreds of web sites provide files furnishing free music in the compressed format.²¹⁰ While record companies actively shut down many illegal MP3 sites, IRC systems make it nearly impossible to control illegal use of MP3 files.²¹¹ "The top IRC system, Efnets, can handle 40,000 to 50,000 simultaneous online users; ICQ can have 500,000. AOL can have a million."²¹² Additionally, many MP3 users send files from fake or hacked internet addresses that are usually impossible to trace back to the sender.²¹³

B. Providing Links to Infringing Material: Enter Lycos, Inc.

Internet company Lycos, Inc. launched a search engine,²¹⁴ Fast MP3 Search, which reportedly posted over a half million links to MP3 song files

on February 1, 1999.²¹⁵ The computer equipment powering the search engine had to be upgraded within 48 hours because the demand was four to five times higher than anticipated.²¹⁶ Lycos officials claim the Fast MP3 search engine avoids copyright infringement problems because it merely provides lists of sites containing the MP3 files rather than storing the content on their servers.²¹⁷ While Lycos poses a clever argument, the question remains whether Lycos can escape liability under Title II.

1. Analyzing Lycos' Copyright Liability as a Service Provider Under Title II

Evaluating whether a service provider is liable for copyright infringement under Title II requires two determinations. First, does the ISP satisfy the technical definition of service provider outlined in Title II?²¹⁸ Second, is it engaged in one of the four protected functions.²¹⁹

The two types of service providers defined in Title II include those strictly acting as conduits to the internet and those "providers of online services or network access, or the operator of facilities

²⁰⁸ See Recording Industry Association of America, Inc. v. Diamond Multimedia Systems, Inc., 29 F. Supp. 2d 624 (1998). The RIAA was denied a preliminary injunction to prevent the release of the "Rio" after a district court ruled the device did not violate the Audio Home Recording Act of 1992 ("AHRA") (17 U.S.C. §§1001). *Id.* at 27. The Act implemented the "Serial Copy Management System" ("SCMS") around the time of the first digital audio tape players and was intended to impede consumers ability to hurt the record industry by making unauthorized copies by allowing copyright holders to encode copy protection in their original recordings, which recording devices were required to recognize. See Klau, *supra* note 17, at 18. The court determined that because the Rio is not capable of "serially copying" digital works it did not fall within the purview of the AHRA. See *id.* See also Margaret Quan & Yoshiko Hara, *Sony, Toshiba and Others Propose Security Technologies and Prep Products—Music Group Gets First Take on Web Standard*, ELECTRONIC ENGINEERING TIMES, Mar. 1, 1999. Analysts estimate 12 portable digital audio players will be on the market by the end of 1999 with one to two million units expected to be sold by Christmas. See *id.* Several other MP3 players are currently being planned for release, including car players and hybrid stereo components. See *id.* For a general discussion of upcoming technology, See *The Next Stage for MP3*, WIRED NEWS REPORTS, (visited Mar. 18, 1999) <http://www.wired.com/news/print_ve...chnology/story/18547.html?wnpg_l>.

²⁰⁹ See Melissa Ruggieri, *Digging New Sounds; MP3 Music is Gold to Internet Pirates, Chaos to Industry*, RICHMOND TIMES DISPATCH, Feb. 25, 1999, at E1. Industry-wide safeguards against copyright infringement are being developed such as digital watermarking, preventing digital broadcasts from being

saved and restricting the playback of an audio file to one computer. See *id.* Worldwide recording industry leaders launched the "Secure Digital Music Initiative" (SDMI) in December 1998 to provide a forum where technology companies can cooperatively develop digital music security. See *Worldwide Recording Industry and Technology Companies Kick-Off Work of SDMI*, BUSINESS WIRE (Los Angeles), Feb. 26, 1999. For a general discussion of security methods available see James Oliver Cury, *Remote Control; Get a Download of This: Record Labels are Finally Tackling the MP3 Cult With a High-Tech, High-Security System*, ENTERTAINMENT WEEKLY, Mar. 5, 1999, at 72. See also Jay Sherman, *Net Music Security Forces Huddle*, THE HOLLYWOOD REPORTER, Mar. 1, 1999.

²¹⁰ See Lorek, *supra* note 19.

²¹¹ See Dvorak, *supra* note 78, at 87.

²¹² *Id.*

²¹³ See *id.*

²¹⁴ The URL for the Lycos MP3 search engine is <<http://www.mp3.lycos.com>>. The MP3 search engine allows users to type the name of a song or artist into a search bar and the search engine retrieves a list of links where the music may be downloaded. See Lorek, *supra* note 19.

²¹⁵ See Chris Nelson, *Lycos' Search Engine: Half Million Links, Lots of Kinks*, SONICET MUSIC NEWS OF THE WORLD [hereinafter Nelson] (visited Feb. 16, 1999) <<http://www.sonicnet.com/news/article1.jhtml?index+7>>.

²¹⁶ See *id.*

²¹⁷ See Sharon Nash, *Tracking Web Music; Industry Trend or Event*, PC MAGAZINE, Mar. 9, 1999, at 29 [hereinafter Nash].

²¹⁸ See 17 U.S.C. §512(k)(1)(A)-(B).

²¹⁹ See 17 U.S.C. §512(a)-(d). See also discussion, *supra* Section III.

therefore."²²⁰ No definition is provided within Title II to clarify the meaning of "provider of online services or network access." However, the section-by-section analysis provided by the House Judiciary Committee specifically includes services such as: providing internet access, e-mail, chat room and web page hosting services.²²¹ Presumably, the second definition was intended to encompass other services including IRC.²²²

Notwithstanding its status as a service provider, Lycos and other ISPs providing links to copyright infringing material can be evaluated under the described Information Location Tools function.²²³

While Title II covers functions related to search engines in the "Information Location Tools" section, the exemption states that: (1) service providers may not store information; and (2) the information must be specifically requested by a user.²²⁴ By stopping short of technically storing the infringing MP3 files on its servers, Lycos argues it eliminates itself from the portion of Title II concerning information storage. Instead, Lycos asserts, it merely provides information to users on where to find the MP3 files.²²⁵ Because Lycos directs a search engine to automatically hunt for all MP3 songs it can find on the internet, indexes them and places links to them on its servers for users to query arguably disqualifies Lycos from the liability limitation.²²⁶ Lycos is thus searching for files before users are requesting them.

The "information location tools" functional prohibitions could prove to be the most damaging for Lycos as the restrictions it places on service provider activity involve knowledge and direct financial benefit as prohibited conduct.²²⁷ Although the statute defines the level of knowledge as "actual," it expands this knowledge re-

quirement to allow that: "in the absence of such actual knowledge or awareness, is not aware of facts or circumstances from which the infringing activity is apparent."²²⁸

Statistics provided by the RIAA could serve as apparent knowledge that the majority of MP3 songs are illegally posted to the internet. The organization represents 90 percent of the music industry.²²⁹ It is responsible for the licensing and sale of materials.²³⁰ If the RIAA is not supportive of MP3 files, the majority song files are most likely not authorized by them. Additionally, the direct financial benefit received by Lycos could be construed as increased value of advertising space as a result of the popularity of the MP3 search files.

A straightforward standard for applying the elements specifically to linking services such as the MP3 search engine is simply not present in Title II. While the legislative history provides some assistance in interpreting the extent of internet services covered by Title II, the statute's actual language is ambiguous. It remains unclear whether Lycos qualifies as a service provider or whether its MP3 search engine qualifies as a protected function.

2. *Recording Industry Claims Majority of MP3 Song Files Illegal*

The RIAA, which represents creators, manufacturers and distributors of more than 90 percent of all sound recordings,²³¹ expanded its staff in 1997 to include a team of specialists to monitor the internet, and additionally implemented an automated web crawler to scan the internet.²³² Thousands of internet sites were sent letters informing them that they were infringing on RIAA company rights.²³³ Estimates provided by the

²²⁰ 17 U.S.C. §512(k)(1)(B).

²²¹ See ANALYSIS, *supra* note 157, at 39.

²²² Very little guidance is provided by Title II or in the legislative history suggesting how to define providers of online services or "network access." In fact, the ANALYSIS only briefly mentions a few examples to differentiate between the two different service provider definitions. See ANALYSIS, *supra* note 157, at 38-39. The ANALYSIS specifically mentions "chat room" services as included in the second definition. See *id.* at 39. Chat rooms are operated using IRC. See discussion, *supra* Section I.

²²³ See 17 U.S.C. §512(d). See also discussion, *supra* Section III.

²²⁴ See 17 U.S.C. §512(c)(1)(A)(i)-(iii).

²²⁵ See Nash, *supra* note 217, at 29.

²²⁶ See *id.*

²²⁷ See 17 U.S.C. §512(d)(1)(B)-(2).

²²⁸ 17 U.S.C. §512(d)(1)(B).

²²⁹ See discussion, *supra* n.178 and accompanying text.

²³⁰ See *id.*

²³¹ See Klau, *supra* note 17, at 18.

²³² See RIAA Releases Year-end Anti-piracy Statistics, [hereinafter Antipiracy] (visited Sept. 22, 1998) <<http://www.riaa.com/antipir/releases/apyr97.htm>>.

²³³ See *id.* The majority of the sites were promptly shut down. See *id.* In June 1997, however, the RIAA filed civil actions against three Music Archive Sites for the unauthorized reproduction and distribution of sound recordings. See *id.* In each of these cases, federal courts issued decisions and consent judgments in the RIAA's favor. See *id.* Each of the site operators, as part of the judgments, agreed to refrain from any further infringements and to destroy any unauthor-

RIAA indicated there are over 91 million computers in the world connected to the internet today, causing the organization to direct 80% of its 1997 anti-piracy resources to internet investigations to protect copyrighted sound recordings in cyberspace.²³⁴

Despite the RIAA's desire to work with MP3 providers to prevent copyright infringement, it has disapproved of "the format's ease of use and lack of copy protection [which] encourages piracy on the internet."²³⁵ Although no comprehensive statistics exist that estimate the number of posted MP3 files without permission from copyright owners, it is generally conceded that illegal MP3s far outnumber legal ones.²³⁶ In fact, many of the links to the unlicensed songs are removed within hours of their postings because the bootleggers do not want to get caught.²³⁷

Lycos maintains that the search engine simply directs users to song files and the company does not vouch for the legality of the song files posted at the locations.²³⁸ Yet the company proudly boasts "if we don't have it, nobody does" and provides detailed instructions on how to "join the revolution."²³⁹ Focusing on case law preceding Title II and the language of Title II itself, Lycos is clearly testing the limits of online copyright infringement.

3. *Evaluating Lycos' MP3 Search Engine: A Case for Contributory & Vicarious Liability*

Prior to Title II, service providers facilitating ac-

ized sound recordings in their possession. *See id.* Additionally, each defendant agreed to pay \$100,000 in damages for each infringed sound recording—totaling more than \$1 million against each defendant if further infringements took place. *See id.*

²³⁴ *See Antipiracy*, *supra* note 232. In late 1997, the RIAA charted a "growing trend of unauthorized pre-released recordings offered for download on the Internet" available through MP3 sites which can contain hundreds of different, unauthorized copyrighted sound recordings that can be downloaded in a matter of minutes. *Id.* The MP3 technology is an advanced compression technology that allows users to download and, in some cases, upload hundreds of full-length, near CD-quality sound recordings without the permission of the copyright holder. *See id.*

²³⁵ Alexandra Walsh, *RIAA Statement on the Lycos MP3 Search Engine* (visited Feb. 1, 1999) <<http://www.riaa.com>>.

We have communicated with Lycos about their new MP3 search engine, and they have committed to work with us to develop procedures to eliminate infringing sites from their directory. They also indicated their intent to fulfill their obligations under the newly enacted Digital Millennium Copyright Act, which requires them to take action

cess to illegal MP3 files through their services (such as IRC, FTP, BBSs and Usenet) would likely have been evaluated under the *Netcom* "volition" or intent standard for contributory infringement.²⁴⁰ It is likely courts would consider the degree of participation the service providers exert in the exchange of files. Under a volition standard, if the ISP simply provides access to infringing material on the internet without knowledge of its content, the necessary intent is missing.²⁴¹ Therefore, under the *Netcom* standard, ISPs simply exchanging MP3 files via ISP services would not be directly liable.²⁴² Contributory or vicarious liability claims are still viable if knowledge and substantial participation (contributory) or control and direct financial benefit (vicarious) can be proven.

Thus far, courts have failed to provide a succinct standard for determining the elements of contributory and vicarious liability in the online environment. Differences in decisions concerning the level of conduct necessary to constitute "inducing, causing or materially contributing"²⁴³ to the directly infringing activity have rendered great incertitude in the law regarding service provider infringement liability.²⁴⁴ To date, no U.S. court has handled a copyright infringement case questioning the liability of a service provider for linking to copyright infringing material, as the MP3 search engine.²⁴⁵ Lycos' MP3 Search Engine, however, may prove to be the impetus for such action.

whenever they become aware of an infringing musical recording.

Id.

²³⁶ *See Nelson*, *supra* note 215, at 2.

²³⁷ *See Lorek*, *supra* note 19.

²³⁸ *See Nelson*, *supra* note 215, at 2. "We are not expected to legitimize text and prove that's copyrighted. We're not expected to legitimize pictures that are out there and prove that [they're] copyrighted." *See id.* at 2. (quoting Lycos Product Manager Brian Kalinowski).

²³⁹ Lorek, *supra* note 19.

²⁴⁰ *See Netcom*, 907 F. Supp. 1361.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *See discussion*, *supra* Section I (defining contributory infringement).

²⁴⁴ *See supra* n.103 (providing online copyright infringement case synopsis discussing various liability holdings).

²⁴⁵ The RIAA has only threatened suing Lycos for its MP3 search engine, however, the International Federation of the Phonographic Industries (IFPI) filed a complaint against the Lycos search engine in Oslo, Norway on March 25, 1999. *See Chris Nelson*, *Record Industry Files Criminal Action Against*

4. *Establishing Lycos' Knowledge of Copyright Infringing Song Files*

Proving actual knowledge in the MP3 context would be difficult because the nature of the services that most commonly facilitate file transfers, such as IRC, are "real time." IRC does not provide the opportunity to discover the infringement or notify the proper authorities before the infringement has been removed or can be stopped. Proving constructive knowledge and substantial participation, however, would likely be a less daunting task. Importantly, the initial decisions prior to Title II did not require the knowledge element to be "actual" knowledge, only "constructive."²⁴⁶ Depending on the facts of the case, the court determined whether the knowledge possessed by the ISP was sufficient to warrant liability.²⁴⁷

For example, in the *Webbworld* and *Hardenbaugh* cases, the courts found the defendant service providers liable for subscribers' infringements because adult images were likely to include copyrighted *Playboy* images.²⁴⁸ In fact, the court determined in both cases due to *Playboy's* prominence in promulgating adult images, the ISP could be considered to have had constructive knowledge that the images were *Playboy* copyrighted, therefore, actual knowledge was not necessary.²⁴⁹ The same constructive knowledge could be held against providers of MP3 files. Lycos advertises over 500,000 links to MP3 files.²⁵⁰

Given the strong, publicized disapproval of MP3 technology by the RIAA (which represents the major labels controlling most mainstream mu-

sic), Lycos may be deemed to have "constructive knowledge" that illegal links to copyrighted songs exist on their system.²⁵¹

5. *Lycos' Participation and Control in Infringing Activity*

Following the *Fonovisa* court's reasoning that providing sites or facilitates widely known by consumers to be a location where infringing activity occurs,²⁵² it appears MP3 facilitating services are at risk to be considered participating in copyright violations.

Lycos boasts that it employs a "team of people looking for MP3 files all over the internet," implying that it is not passive in its information location function.²⁵³ The seeking out of these files should be considered a form of active participation in infringing activity which has been found to be grounds for liability.²⁵⁴ Additionally, the site actually "rates" the files it lists in its database for ease of accessibility.²⁵⁵ If this is the case, Lycos could face liability directly under *Netcom* for the "volition" it displays in seeking out files.²⁵⁶

6. *Finding Lycos' Direct Financial Benefit*

Finally, applying the financial benefit and control elements of vicarious liability presents an equally damaging case against Lycos. An argument could be posed that advertising revenues that logically increase with the popularity of the service create significant profit for the ISP.²⁵⁷ As do all ISPs, Lycos generally posts advertisements

MP3 Search Engine, SONICNET NEWS OF THE WORLD, (visited Mar. 26, 1999) <<http://www.sonicnet.com/news/article1.jhtml?index=4>>. The IFPI was quoted as saying "MP3.Lycos.com infringes copyrights on a mass scale." *Id.* The IFPI is based in Switzerland where it represents 1,300 record companies in 39 countries. *Id.*

²⁴⁶ The "actual" knowledge requirement versus "constructive" knowledge requirement was a major victory for ISPs lobbying Title II. See discussion, *supra* n.181, and accompanying text.

²⁴⁷ See Weiskopf, *supra* note 24, at 28-30.

²⁴⁸ See *Hardenbaugh*, 982 F. Supp. 503 at 512-13; *Webbworld I*, 991 F. Supp. at 543.

²⁴⁹ See *id.*

²⁵⁰ See Nelson, *supra* note 215.

²⁵¹ See Michael Robertson, *Lycos Gets Into MP3 Hotwater* (visited Feb. 5, 1999) <<http://www.mp3.com/news/164.html>>.

²⁵² See *Fonovisa*, 76 F.3d at 264. "Indeed it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided." *Id.*

²⁵³ See *id.*

²⁵⁴ See *Hardenbaugh*, 982 F. Supp. 503 at 514; *Webbworld I*, 991 F. Supp. at 543.

²⁵⁵ Song Titles are rated using a "star" system. See Nelson, *supra* note 20. Lycos ranks the links according to ease of access. See *id.* Because only a limited number of users may link and download a file at one time, Lycos designed its search engine to keep track of the most popular links and notify users of the ones that will be most time-consuming and difficult to download due to their popularity. See Lycos homepage at <<http://www.lycos.com>>.

²⁵⁶ See *Netcom*, 907 F. Supp. 1361, at 1370. To prove a direct infringement online, there must be an element of volition present to be held liable. See *id.*

²⁵⁷ See Leslie Walker, *Sites Find New Ways to Profit*, [hereinafter *Lycos Revenues*] WASHINGTON POST, Feb. 25, 1999, at E1. Seventy percent of the 1998 projected \$2 billion web advertising revenue went to the internet's top 10 sites. See *id.* Microsoft's "Money Central" site draws nearly four million visitors a month and collects "sizable advertising fees" in large part because its content remains free. See *id.* Advertis-

on every screen a consumer views. When a consumer searches for MP3 files on Lycos, this generates advertising revenue through multiple screens to benefit Lycos.²⁵⁸ Regarding the control element, as stated by the *Webbworld* court, the relevant issue is not whether Lycos controls individuals uploading and downloading infringing material, but rather, their ability to control what happens on their website.²⁵⁹

CONCLUSION: CREATING AN APPLICABLE STANDARD

Although Title II was passed less than a year ago, recent technological capabilities such as MP3 have created another insurrection for copyright law. Service providers seeking to take advantage of the Title II haze ought not to receive liability protection for engaging in activity that was not contemplated in writing the law. A separate, more thorough standard should be devised to cover ISPs furnishing services that knowingly facilitate the exchange of infringing material. As the law is written today, identifying those services or the level of knowledge necessary for accountability is much too imprecise and, as demonstrated by Lycos, subject to abuse.

In order to respect the intent of Title II, as well as the efforts of the courts to devise standards that accommodate ISPs who unknowingly disseminate infringing material, any new standard developed for analyzing services provided must avoid altering the flexibility given to ISPs when applying copyright infringement analysis. The standard should only affect ISPs who knowingly attempt to circumvent the otherwise effective Title II. By combining portions of Title II that resemble the knowledge and substantial participation elements of contributory infringement with the direct financial benefit and control elements of vicarious infringement, ISPs subject to all four restrictions could not find shelter under the liability limitations of Title II.

Under this standard, it is likely Lycos' MP3 search engine would not qualify for a Title II liability limitation. With respect to the knowledge

element, the fact that the majority of MP3 files available on the internet are illegal according to the RIAA places Lycos on notice that many of their files are copyright infringements. "Apparent" knowledge should be clarified and expanded beyond the obvious. An expansion of the "red flag" tests suggested in Title II legislative history would allow for the consideration of the RIAA's statistics and warnings as "red flags" and impart knowledge on the ISPs providing links.

Substantial participation and control are likely to be found where Lycos employs people to actively seek MP3 files on the internet and create links to the sites that host them. This is exactly the "volitional" element the *Netcom* court referred to when it pioneered the first set of ISP copyright infringement liability standards. As the court wisely noted, there is a difference between an ISP automatically allowing information to be passed through its system and an ISP picking and choosing what information it will store on its system. While Lycos claims it is not technically storing illegal files, Lycos users are only a click of the mouse away from thousands of illegal files it clearly "picks and chooses." The distinction between storing and linking is non-existent to the average user. The use of employees to actively seek, categorize and rate MP3 files would meet the average person's standard for both participation and control.

Finally, the increased traffic the MP3 search engine has generated due to its ease in locating MP3 song files arguably makes its advertising space more valuable, thus creating a direct financial benefit. While courts typically require the financial benefit be directly derived from the infringing activity, it must be recognized that, at least presently, advertising is perhaps the most lucrative source of revenue for ISPs. The more people that visit a site increases that site's value to prospective advertisers. Because proving all four portions of the test would be extremely difficult, only those ISPs grossly abusing liability limitations set forth in Title II would be in danger of losing the exemption.

Under this hybrid contributory-vicarious liabil-

ing revenues are projected to comprise 14 percent of the 2002 \$55.6 billion internet consumer economy. *See id.*

²⁵⁸ *See Lycos Reports Second Quarter Revenues Up 142%*, BUSINESS WIRE, Feb. 25, 1999. Lycos experienced a 142 percent increase in revenues during the second quarter of the 1999 fiscal year from the same time period last year. *See id.*

The company reported 39 percent growth in traffic to 50 million page views daily. *See id.* Lycos CEO Edward N. Philip commented "The ability to monetize our traffic growth through value-added advertising and commerce platforms is evidenced by our strong revenue growth." *Id.*

²⁵⁹ *See Webbworld*, 968 F. Supp. at 1177.

ity standard, services linking to infringing material such as Lycos' MP3 search engine would not be able to escape liability on a statutory technicality. Proving all four requirements would be ardu-

ous enough to preserve the ISP functions Congress intended to protect, while shutting the door on the others.

