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## A Proposal for Rebalancing the Digital Partnership Between Content Providers and Internet Gate-Keepers

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# **A PROPOSAL FOR REBALANCING THE DIGITAL PARTNERSHIP BETWEEN CONTENT PROVIDERS AND INTERNET GATE-KEEPERS.**

## **I. INTRODUCTION**

The Copyright Act of 1976<sup>1</sup> granted copyright owners certain rights, including, *inter alia*, the rights of distribution and reproduction. These rights have historically been exercised through traditional media conduits such as printed books, movies and sound recordings. In the mid-80's authors began to recognize the potential of digital technology as a media form that was cheaper and easier to manipulate than the traditional media forms. In this regard, authors found that through digital technology, they could cheaply mass-produce copies of their material that were of superior quality. During this same time period, authors also began to recognize that the Internet was an economically efficient conduit through which they could reach more consumers. In order for consumers to be able to reach authors' material via the Internet, these consumers had to be provided with a service known as "connectivity." Connectivity was and is provided by Internet Service Providers ("ISPs"). What authors are finding, however, is that not only are digital publishing and the Internet cost efficient and valuable tools for authors, but also they are also popular tools used to infringe these authors' copyrights.

In response to the ensuing copyright infringement that began taking place over the Internet, authors attempted to protect their exclusive rights by filing claims against ISPs. These authors filed suits against the ISPs because they recognized the futility of personally attempting to detect each act of infringement across the Internet. Following standard contributory and vicarious infringement theories, the authors argued that the ISPs controlled subscribers because "but-for" the ISPs the subscriber could not infringe. The authors did meet limited success with these

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1. 17 U.S.C. § 106. The Copyright Act of 1976 (as amended and codified) is current through Pub. L. No. 107-272, approved October, 30, 2002.

arguments, but any ground they gained was lost when Congress enacted the Digital Millennium Copyright Act (“DMCA”) on October 28, 1998. Congress felt ISPs had little defense against an owner claiming copyright infringement, and enacted the DMCA to protect the growth of the Internet.<sup>2</sup>

Current case law indicates that the effect of the DMCA has been to impose on copyright owners the burden of attaching electronic countermeasures to protect the rights that they have been granted under traditional copyright law. Although it is not clear what exactly the first Congress intended when creating traditional copyright law, due to the closed nature of the committee meetings, their ultimate aim, as interpreted by the courts, was to stimulate artistic creativity.<sup>3</sup> Currently however, authors are faced with new obligations, such as the expense of detecting infringing uses on the Internet and the expense of installing electronic countermeasures for initial protection. These new obligations on copyright owners are affirmative responses that developed with the digital revolution.

Assuming copyright owners invoke DMCA provisions to get an ISP to remove infringing material, that owner still has the initial duty to inform the ISP of the infringement. This legal framework leaves certain questions unresolved. More specifically, why can

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2. The Digital Millennium Copyright Act was enacted on October 28, 1998, during the dying days of the 105th Congress. Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.). The DMCA implemented the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty, which were signed by the United States in 1997. See *Clinton Statement on the Digital Millennium Copyright Act*, U.S. Newswire, Oct. 28, 1998, available in 1998 WL 13606936 (“The treaties will grant writers, artists, and other creators of copyrighted material global protection from piracy in the digital age.”).

3. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §1.02 (2002) for a general explanation of the first Congress’ legislative sessions. See e.g., *Mazer v. Stein*, 347 U.S. 201, 219 (1954), *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), *Eldred v. Ashcroft*, 123 S. Ct. 769 (quoting *Mazer* at 219), *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, (1985) (quoting *Mazer* at 219) for the court’s interpretation of the legislative intent.

merely blocking access or removing infringing material suffice as an end to the ISP's responsibilities when an infringer can easily unsubscribe from one ISP and re-subscribe with another? Moreover, the infringer can easily repost the infringing material through the original ISP under a different account. Opponents of the DMCA worry that it grants copyright owners the ability to install fair use defeating electronic countermeasures, giving copyright owners more rights than the Constitution granted. Copyright owners, on the other hand, argue that they have been forced to trade their right to exercise exclusive rights free from costly electronic anti-infringement countermeasures, for broad and unwieldy digital policing obligations.<sup>4</sup>

Recent statutes *appear* to have rectified the balance between copyright owners, Internet service providers, and emerging digital technology. In fact, however, something quite different is occurring. Part II of this article provides background information explaining (a) generally, how the Internet and ISPs work, (b) what rights authors have under traditional copyright law and how pre-DMCA case law applied that law in the face of emerging technology, and (c) how courts now apply traditional copyright law concepts under the DMCA. More specifically, this section explains that pre-DMCA courts, in contrast to post-DMCA courts, were likely to find that an ISP could be liable for contributory infringement if it had some control beyond merely allowing access to the Internet, provided that the infringing material was posted to a discrete portion of the Internet. Part III explains that, despite Congress' and even ISP's best efforts, copyright piracy on the Internet continues to exist as a serious problem. Part IV suggests as a solution that ISPs, rather than copyright owners, bear the costs of implementing pre-screening electronic countermeasures, yet at the same time retain only *limited* liability for infringing material

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4. In fact, both those for the DMCA as well as those worried that the DMCA grants copyright owners the ability to install fair use defeating electronic countermeasures, are unwittingly on the same side – the former resists expensive protective countermeasures, the latter resists tools that inhibit fair use. See David Nimmer, *Article: A Riff On Fair Use In The Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673 (2000).

that manages to pass through their servers. This solution reinforces the partnership between ISPs and copyright owners that Congress had intended.

## II. BACKGROUND

### A. *The Internet and ISPs: An Explanation.*

The Internet is a conglomeration of computers all over the world linked to a common network.<sup>5</sup> This network provides the backbone for which content is stored and transferred to and from computers attached to the Internet.<sup>6</sup> The entry point to the content is generally through ISPs, providing connectivity to the world-wide-web.<sup>7</sup> Usually for a flat monthly fee, users of ISPs receive a software package, which enables the technical linkup with the ISP and, subsequently, the Internet. Once equipped with the technical facilities, the user connects to the ISP through a private log-on name and password known only to the user and the ISP.<sup>8</sup>

One unique ability of ISP/user agreements that is not found in similar agreements is the ease with which users can ISP-hop. ISP

5. See generally *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849-51 (1997) (describing the development and operation of the Internet); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995) (same); PRESTON GRALLA, *HOW THE INTERNET WORKS*, 5-7 (Millenium ed. 1999) (same); DANIEL J. KURLAND, *THE 'NET, THE WEB, AND YOU*, 25-29 (1996) (same); DAVE SPERLING, *DAVE SPERLING'S INTERNET GUIDE*, 2-3 (2d ed. 1998) (same).

6. KEITH W. ROSS AND JIM KUROSE, *WHAT IS THE INTERNET?*, §1.1 (2000), [http://www.postech.ac.kr/cse/hpc/research/webcache/book/overview/What\\_is\\_the\\_Internet.htm](http://www.postech.ac.kr/cse/hpc/research/webcache/book/overview/What_is_the_Internet.htm) (last visited February 27, 2003).

7. ISPs are sometimes referred to as IAPs (Internet Access Providers), the only distinction being that ISPs offer more services than mere access (i.e. connectivity). WEBOPEDIA: ONLINE DICTIONARY FOR COMPUTER AND INTERNET TERMS (2003), at <http://www.webopedia.com/TERM/I/ISP.html> (last modified October 24, 2001).

8. For a more exhaustive list of ISP services see Rob Kolstad, *Becoming an Internet Service Provider*, (Version 0.9.1), <http://docs.rinet.ru:8083/becomeISP/> (last visited February 27, 2003).

hopping occurs when a user cancels their agreement with one ISP and subscribes through another.<sup>9</sup> Because most users access the Internet through a toll-free dial-up number and because there are thousands of ISPs from which to choose,<sup>10</sup> a subscriber can easily unsubscribe and re-subscribe an unlimited number of times. The only real inconvenience to the subscriber would be a change in e-mail address. If an ISP should cancel or block access to a user for conduct that violates the ISP's policies, such as alleged copyright infringement, the user can simply re-subscribe through another ISP. Given that ISPs do not share information, a subscriber is free to ISP-hop even if access was terminated for illegitimate behavior.

Once connected to the Internet, subscribers can, for example, visit web sites, make purchases, browse for news and information, join chat rooms, or track financial information.<sup>11</sup> One particular service millions find useful is Usenet.<sup>12</sup> Used daily by millions of people around the world and containing more than 14,000 forums,<sup>13</sup> called newsgroups, Usenet is a worldwide bulletin board system accessed via ISP connectivity to the Internet.<sup>14</sup> Users communicate by posting messages to Usenet. Totaling hundreds of thousands of pages, messages range from simple text to

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9. Standard industry procedure is to require users to commit to a period, generally six months to a year, before they can discontinue the service. Even this commitment has little persuasive effect because users can typically buy their way out by paying a termination fee.

10. In February of 1996 there were 1,447 ISPs compared to 7,288 as of March of 2001. Todd Judd Erickson, *Introduction to the Directory of Internet Service Providers*, (13<sup>TH</sup> Ed.), <http://www.ispworld.com/IspDirectories/Introduction.htm> (last visited February 27, 2003).

11. For a more exhaustive list of ISP services see Rob Kolstad, *Becoming an Internet Service Provider*, (Version 0.9.1), <http://docs.rinet.ru:8083/becomeISP/> (last visited February 27, 2003).

12. WEBOPEDIA: ONLINE DICTIONARY FOR COMPUTER AND INTERNET TERMS (2003), at <http://www.webopedia.com/TERM/U/USENET.html> (last visited February 27, 2003).

13. *Id.*

14. For a current discussion of Usenet in the courts see *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1053-54 (C.D. Cal. 2002).

extensive graphics.<sup>15</sup> Some go so far as to include complete reproductions of copyrighted music and books. With potentially millions of users world wide accessing the Internet from millions of connection points, tracking infringers is clearly a daunting and expensive task.<sup>16</sup>

### *B. Traditional Copyright Law and Pre-DMCA Case Law*

#### *1. Traditional Copyright Law: An Authors' Exclusive Rights and Limitations On Those Rights.*

All copyright law emanates from the Constitution: "The Congress shall have Power. . . To Promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries."<sup>17</sup> Subsequent acts have, pursuant to this constitutional power, elaborated on copyright ownership definitions.<sup>18</sup> For instance, Congress created the 1976 Copyright Act. Congress intended the 1976 Copyright Act to balance public access to creative works with an artist's right to control his or her work during a specified term.<sup>19</sup> Under the Act, authors are granted five exclusive rights. These rights are: (1) the right of reproduction, (2) the right of adaptation, (3) the right of distribution, (4) the right of performance, and (5) the right to display.<sup>20</sup>

An author claiming infringement of these rights must prove both

15. See Rob Kolstad, *Becoming an Internet Service Provider*, (Version 0.9.1), <http://docs.rinet.ru:8083/becomeISP/> (last visited February 27, 2003).

16. See *Nua Information Surveys, How Many Online?*, at [http://www.nua.ie/surveys/how\\_many\\_online/index.html](http://www.nua.ie/surveys/how_many_online/index.html) (last updated Nov. 2000) (copy on file with The Transnational Lawyer) (measuring Internet use as of Sept. 2000).

17. U.S. Const., Art. I, § 8 cl. 8.

18. Congress enacted the Copyright Act in 1909 and substantially amended it in 1976 to grant the rights we have today.

19. *Steward v. Abend*, 495 U.S. 207 (1990).

20. 17 USCS § 101 (2003).

that he or she owns a valid copyright and that there was a violation of one of the exclusive rights.<sup>21</sup> There are, however, limitations imposed on a copyright owner's right of exclusivity. One such limitation is abandonment. An alleged infringer that invokes abandonment as a defense to a claim of infringement must show that the copyright owner affirmatively did something that let the public know it could freely copy.<sup>22</sup> Another such limitation is fair use. Examples of works that may be considered "fair use," and thus not infringing works, are transformative works or derivative works, such as parodies.<sup>23</sup> Therefore, while an author does have certain rights of exclusivity, these rights are not absolute.

## 2. Pre-DMCA Court Decisions

In *MAI Systems Corp. v. Peak Computer, Inc.*,<sup>24</sup> the Ninth

21. *Id.*

22. *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, (9<sup>th</sup> Cir. 1960), *cert. denied* 365 U.S. 882 (1960) (holding mere lack of action [in affirmatively protecting] is insufficient for a showing that a copyright owner has abandoned any claim to exclusive rights).

23. *See* Copyright Act of 1976, 17 U.S.C. § 107 (2003). *See also*, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, (1985) (noting that "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work'" (citation omitted)); *Stewart v. Abend*, 495 U.S. 207 (1990) (noting that fair use is a balance between creativity which is encouraged by the Copyright Act and the protecting an author's work); *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (holding that a transformative albeit commercial use can be a fair use).

Additionally, the First Amendment guarantees of freedom of speech and expression are also generally recognized as limitations. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* §1.10 (2002) (discussing First Amendment limitations on copyright). The limit is not clearly defined due to a debate centered in part on whether the Copyright Act and First Amendment stand on equal footing or whether the Copyright Act carves its rights out of the First Amendment. *Id.* *See also* David Nimmer, *Article: A Riff On Fair Use In The Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673 (2000) (discussing First Amendment and fair use considerations in the Digital Millennium Copyright Act.)

24. 991 F.2d 511, 518 (9<sup>th</sup> Cir. 1993).



Circuit Court of Appeals held that a computer repair person who was not authorized to use the computer owner's licensed operating system software and who had merely turned on the computer was liable for contributory infringement. At issue was whether an unauthorized but temporary copying and loading of an operating system into a computer's memory just long enough to check an "error log" constituted infringement.<sup>25</sup> The defendant-infringer, Peak, serviced computers that operated on plaintiff-MAI's software.<sup>26</sup> Peak copied the software into the computer's temporary memory to facilitate diagnostic testing.<sup>27</sup> The Ninth Circuit held that although the copy was only temporary, it was enough to infringe MAI's exclusive right to reproduction because, (1) the copy was fixed, and (2) Peak could perceive the copy, i.e. use the copy to diagnose computers.<sup>28</sup> Thus, while the copy was only temporary, the court found for the copyright owner.<sup>29</sup>

In *Religious Technology v. Netcom*,<sup>30</sup> the court found that an ISP was not liable for infringing a copyright owner's rights to reproduction or distribution. The court reasoned that access to the bulletin board system that contained the published and unpublished works of the founder of the Church of Scientology could have been obtained through any Internet linked computer.<sup>31</sup> Defendant-Netcom provided connectivity to the Internet for subscribers who posted messages to a public forum called bulletin boards.<sup>32</sup> One such subscriber, a former employee of Religious

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25. *Id.* at 518.

26. *Id.* at 513.

27. *Id.* at 518-519. The court found that although temporary once copied into a computer's read-only memory ("RAM"), the copy was sufficiently fixed for copyright purposes.

28. *Id.* at 519.

29. *Id.*

30. 907 F. Supp. 1361 (N.D. Cal. 1995). See also, George Smirnoff III, Note: *Copyright on the Internet: A Critique of the White Paper's Recommendation for Updating the Copyright Act and How the Courts Are Already Filling In Its Most Important Shortcoming, On-line Service Provider Liability*, 44 Clev. St. L. Rev. 197 (1996).

31. *Id.* at 1367-68.

32. *Id.*

Technology Center (“RTC”), posted RTC’s copyrighted material to vent about his former employer.<sup>33</sup> Once the subscriber’s messages were posted to the bulletin board, Netcom would automatically copy the messages to Usenet, which is a worldwide forum available through any ISP.<sup>34</sup> The copies were propagated across the world within hours due to Usenet’s functionality.<sup>35</sup> The ISP did not monitor the subscriber’s messages, much less control their content.<sup>36</sup> The court was faced with the issue of whether “the large [ISP] that allows [the subscriber’s messages] to reach the Internet, should be liable for copyright infringement committed by a subscriber.”<sup>37</sup>

The court found that Netcom was not contributorily liable because it had neither knowledge nor control, which are the key elements for finding contributory infringement.<sup>38</sup> RTC alleged that Netcom had control because it was capable of canceling messages from Usenet.<sup>39</sup> The court sided with the ISP and refused to impute control over the infringing material from Netcom’s mere ability to delete messages.<sup>40</sup> However, the court also noted that it would be impractical to require a copyright owner to furnish proof of a valid copyright each time a notice of infringement is sent to an ISP.<sup>41</sup> It went on to add that it would be equally impractical to expect an ISP to decipher infringement from other forms of copyright use such as fair use.<sup>42</sup> The court concluded by finding that Netcom could be liable if an ISP’s inability to assess fair use in light of notice of valid registration was reasonable. The court also rejected Religious Technology’s vicarious liability argument because Netcom was able to show it gained no financial benefit from the

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33. *Id.*

34. *See Ellison*, at 1053-54.

35. *Id.* at 1367-68.

36. *Id.* at 1368.

37. *Id.* at 1367.

38. *Id.* at 1372-73.

39. *Id.* at 1375.

40. *See Ellison*, at 1374.

41. *Id.*

42. *Id.*

subscriber's infringing postings.<sup>43</sup>

Another case challenging traditional copyright law is *Marobie v. National Association of Fire Equipment Distributors* ("NAFED").<sup>44</sup> Defendant-NAFED was a website hosting service that allowed an infringer to post unauthorized copies of Marobie's copyrighted graphics on a website stored on NAFED's servers.<sup>45</sup> Once posted, the unauthorized copies were available on the Internet for distribution.<sup>46</sup> Despite the fact the owner submitted no evidence that the images had been downloaded, the court held that NAFED violated the owner's right of distribution.<sup>47</sup> The court reasoned that it was enough that the images were available on the Internet through a server attached to the Internet, regardless of whether the images were actually downloaded.<sup>48</sup> Although the defendant in *Marobie* was a website operator and not an ISP, the same concept of liability for making available in the digital domain is at issue.<sup>49</sup>

43. *Id.* at 1378.

44. *Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997).

45. *Id.* at 1172.

46. *Id.*

47. *Id.* at 1174.

48. *Id.* at 1173-74.

49. Courts focus not on the type of service through which the public can access the material, but on whether the material is available to the public. Section 106(3) of the Copyright Act grants the exclusive right to "distribute copies. . . to the public by sale or other transfer. . ." 17 U.S.C.A. 106(3) (1996 & Supp. 1998). The test for infringement has three requirements: (a) distribution of a copy; (b) distribution to the public; (c) distribution by some "transfer of ownership." *Id.* Although, the Copyright Act does not define distribution to the public, courts have held merely making copyrighted works available through the Internet is enough. See *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1555-59 (M.D. Fla. 1993) (holding a BBS operator liable for infringement of the public distribution right for the making of photographs available through the BBS.); *Playboy Enterprises, Inc. v. Chuckleberry Publishing Inc.*, 939 F.Supp. 1032, 1039 (S.D.N.Y. 1996) (holding the court ruled that uploading copyrighted pictorial images onto a computer in Italy which could be accessed by users in the United States constituted a public distribution in the United States.); *Playboy Enterprises, Inc. v. Hardenburgh*, 982 F. Supp. 503, 509, 513 (N.D. Ohio 1997)

*MAI*, *RTC*, and *Marobie* demonstrate how the pre-DMCA courts applied traditional copyright law to alleged digital copyright infringements. Under these holdings, ISPs are *not* liable for providing passive connectivity. However, they *are* liable for contributory infringement if they have some control beyond merely allowing access to the Internet, provided that the infringing material was posted to a discrete portion of the Internet, such as Usenet. Moreover, an infringer may be directly liable for merely posting the material to the internet, regardless of whether the material is actually accessed or viewed.

### *C. The Digital Millennium Copyright Act And Courts' Application of It.*

#### *1. The DMCA*

Congress enacted the DMCA in 1998 to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education.”<sup>50</sup> The DMCA grants, *inter alia*, copyright infringement immunity to ISPs if certain conditions are met. In this regard, in order for an ISP to be protected by the DMCA’s safe harbor provision it must (a) not have actual or constructive knowledge of the infringement, (b) not financially benefit from the infringing activity, and (c) act promptly upon notice of infringing material to remove, or prevent access to, the infringing material.<sup>51</sup>

With the explosion of the Internet, the traditional copyright considerations gained a new depth. How would the Internet’s growth be protected without shorting copyright owners’ exclusive rights? Under the traditional tort theory of contributory infringement the two key elements of knowledge and ability to control could be stretched to hold ISPs liable. Congress, however,

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(holding operators of a BBS directly liable for infringement of the public distribution right by virtue of making available photographs.).

50. S. Rep. No. 105-190, at 1, 105<sup>th</sup> Congress, 2d Session 1998.

51. *See generally* 17 U.S.C. § 512.

felt this would have negative consequences, and in particular was concerned that the Internet would not remain an inexpensive medium of expression.<sup>52</sup> Accordingly, the danger might be that ISPs may pass along the cost of infringement, or rather the cost of protecting themselves against subscribers who might infringe, to all subscribers through increased access fees. Recognizing that ISPs faced liability from copyright owners asserting their exclusive rights in digital media, Congress enacted the DMCA.<sup>53</sup>

Congress “recognized that there are different degrees of on-line copyright infringement, from the inadvertent and noncommercial, to the willful and commercial.”<sup>54</sup> However, their intent was also to encourage ISPs to partner with copyright owners “by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing.”<sup>55</sup> To balance this, Congress refused to allow ISPs the ability to claim ignorance of infringing conduct by stating: “However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that

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52. Service providers, as deep pockets, are natural targets for copyright litigation. *Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection*, Serial No. 105-102 (June 5, 1998), at 41 (statement of Business Software Alliance). Presumably the ISP industry is the “party best able to shoulder [the burden of copyright infringement].” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, 495 (4th ed. 1971). See also I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace”*, 55 U. Pitt. L. Rev. 993, 1044 (1994) (arguing that imposing strict liability on ISPs will make them internalize the social costs of wrongdoing and adjust the scope of their activity accordingly).

53. H.R. Conf. Rep. No. 105-796, at 72 (1998). Congress explained that the DMCA “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” while also providing “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” *Id.*

54. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1176 (quoting H.R. Rep. 105-551(II), at 61); S. Rep. 105-190, at 62.

55. *Id.* (quoting H.R. Rep. 105-551(II), at 61; S. Rep. 105-190, at 62 (same)).

access.”<sup>56</sup>

Although congress did not impose an affirmative duty on service providers to hunt out infringers, copyright holders can investigate potentially infringing activities and notify providers under Section 512(i) of the DMCA.<sup>57</sup> Courts have recognized that the DMCA allows for court orders terminating user accounts, but the DMCA also imposes strong incentives to work with copyright owners.<sup>58</sup> The possible loss of safe harbor under the DMCA and subsequent unlimited liability to copyright owners was meant to encourage ISPs to self regulate and in essence work with copyright owners, and together protect the Internet’s intellectual property.<sup>59</sup>

With the advent of the Internet, and ISPs as the entity controlling the gates to the Internet, the legal minds at the time were (and are) faced with how to apply existing law to new technology. Until the late 80’s and early 90’s, plaintiffs were able to have limited success alleging traditional theories of copyright infringement, (i.e. direct infringement, contributory infringement, or vicarious infringement).<sup>60</sup> Under a theory of contributory infringement, the copyright owner had to show that the defendant had knowledge of the infringing activity and materially growth, have had far contributed to or had control over another’s infringing

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56. *Id.* (quoting H.R. Rep. 105-551(II), at 61; S. Rep. 105-190, at 62 (“a service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with new subsection [i]);” H.R. Rep. 105-551(II), at 53.

57. *Id.* at 1177 (applying the DMCA to a website operator).

58. *Id.* at 1178.

59. *See, e.g.*, 17 U.S.C. § 512(i)(2)(A).

60. *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13 (2002). For current applications see *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9<sup>th</sup> Cir. Cal. 1996); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. Cal. 2001); *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Cal. 2002); *CoStar Group, Inc. v. LoopNet, Inc.*, 172 F. Supp. 2d 747 (D. Md. 2001); *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Marobie-Fl., Inc. v. National Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997).

conduct.<sup>61</sup> Contributory infringement was particularly valuable to these plaintiffs, because it allowed a ‘but-for’ analysis where one could be liable for the acts of another if the former had control over the latter’s conduct. Plaintiffs alleged that infringers would not be able to infringe were it not for the ISPs providing the access. The central issues were whether the ISP had knowledge of the infringing acts and whether the ISP could control the infringing acts.

Prior to the DMCA, issues revolved around whether knowledge could be imputed from the act of providing connectivity to the Internet. Against the wishes of copyright owners, Congress chose to accept the ISP’s argument that the Internet is too vast to hold them accountable for merely providing connectivity.<sup>62</sup> Under the DMCA, ISPs must have actual knowledge of the infringement and receive financial benefit.<sup>63</sup> In this regard, an ISP will not be found to have financially benefited merely because it charges the user a flat rate.<sup>64</sup> Upon receiving notice from the copyright owner that the ISP is hosting a subscriber’s infringing material, by hosting the infringer’s website or allowing the infringer to download copyrighted music files, the DMCA requires the ISP to notify the allegedly infringing subscriber that they will be blocked unless the subscriber can justify the infringement.<sup>65</sup> The subscriber then has ten days to respond.<sup>66</sup> Affirmative defenses, such as fair use, can be raised at that time.<sup>67</sup> If the subscriber does not respond, the ISP

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61. *Gershwin Publ’g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

62. *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1059 (C.D. Cal. 2002).

63. *Id.* at 1057-58.

64. *Id.* at 1059.

65. *ALS Scan, Inc. v. Remarq Cmty., Inc.*, 239 F.3d 619, 620 (4th Cir. 2001). See also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §12B.07(B) (2002).

66. *Id.*

67. Presuming the process tracks the statutorily prescribed notices, proper initial notice to the ISP pursuant to 17 U.S.C. § 512(c)(3), subsequent notice to the subscriber pursuant to 17 U.S.C. § 512(g)(2)(A), and finally counter-notification from the subscriber pursuant to 17 U.S.C. § 512(g)(3), both the copyright owner and the alleged infringer have the other’s identity, and the

can remove the infringing material from the Internet, block the web site or newsgroup which contains the material, or completely block the infringing subscriber's access.<sup>68</sup> This assumes, however, that the ISP can identify the subscriber in the first place. Finally, should the user respond to the ISP's notice, the only duty that the ISP has is to notify the copyright owner of the identity of the subscriber. At this point, the ISP removes itself from the controversy. The copyright owner now knows the identity of the infringer and can protect his or her rights by bringing a direct action against the infringer. Under this legal framework, the ISP is free to remain in the background despite the fact that the infringing material has likely been copied or distributed many times over across the Internet.

Once copyright owners know who the infringers are and the material is taken down, an infringer may not be done. The infringer can subscribe with a second ISP. While the infringer's access to the Internet or the infringing material is blocked, the second ISP will have no knowledge of the infringer's past transgressions. The extent of this problem is illustrated by the fact that up to one million full-length movies are currently downloaded every day, and that number is expected to increase dramatically as technology makes motion picture piracy easier.<sup>69</sup> Congressional efforts, which facilitate reaching consequences, such as the

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parties can proceed to court to have their controversy adjudicated. For a general outline of the process see 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, §12B.07(B) (2002).

68. In *Ellison*, AOL blocked all its subscribers from accessing the newsgroup, not just the Ellison. While not within the scope of this article, the concept of security and privacy for subscribers free an ISP's watchful eye should not be a natural consequence of imposition of ISP policing. Andy Harmon, *Worries About Big Brother at America Online*, *The New York Times*, January 31, 1999.

69. See Michael Bartlett, *Pirated Movies Abound on the Web*, *Wash. Post* (Aug. 1, 2001), available at <http://www.newsbytes.com/news/01/168593.html> (copy on file with *The Transnational Lawyer*) (remarking that just one of many forums for Internet movie piracy serves over one million movies a day and logs around 600,000 downloads).



explosion of the piracy market.<sup>70</sup> Furthermore, whereas in the cassette example below the infringing copies had to be imported across physical boundaries, digital transfer is invisible.<sup>71</sup>

By shifting the burden and expense for detecting infringement to copyright owners, Congress intended ISPs and copyright owners to work together. Congress granted ISPs an out, if they cooperate with copyright owners to detect copyright infringements in the digital medium.<sup>72</sup>

Congress anticipated that the next logical step would be copyright owners protecting their works through technical countermeasures. With this in mind, Congress added to the DMCA stiff penalties for circumventing any countermeasure a copyright owner uses to protect access or another exclusive right granted under the Copyright Act.<sup>73</sup> Owners can install devices on their digital works that prevent all infringement, with some exceptions reserved for fair use allowances. Since the practical limitations to unauthorized reproduction or distribution are not available in the digital medium,<sup>74</sup> owners either self-protect their works or track down the infringement and initiate action against the infringer.

## 2. Courts' Application of the DMCA.

In *Perfect 10, Inc. v. Cybernet Ventures, Inc.*,<sup>75</sup> plaintiff-Perfect 10 claimed that the operator of an online age verification service was liable for contributory infringement of its copyright. At issue was Cybernet's contributory infringement for the unauthorized

70. Motion Picture Association of America (MPAA), Anti-Piracy, at <http://www.mpa.org/anti-piracy> (last visited Sept. 16, 2001) (copy on file with The Transnational Lawyer) (Despite launching over 60,000 investigations into pirate activities in 2000 alone, piracy is growing).

71. See *infra* note 104.

72. 144 Cong. Rec. H10,048, H10,067 (daily ed. Oct. 8, 1998) (Conference Report on H.R. 2281, Digital Millennium Copyright Act).

73. See generally 17 USC § 1201.

74. See *infra* note 104.

75. 167 F. Supp. 2d 1114 (C.D. Cal. 2001).

posting of copyrighted photographs on the subscriber's website.<sup>76</sup> A website operator utilized the defendant-Cybernet's age verification service to ensure visitors to its site were of legal age. Cybernet provided the operator a service whereby visitors to the website were first sent to Cybernet and upon approval were allowed to view pornographic images.<sup>77</sup> At some point the operator made unauthorized reproductions of images from Perfect 10's website and posted them as their own.<sup>78</sup> Upon detecting the unauthorized images, Perfect 10 sued the website and Cybernet alleging the age verification service could be held liable for the web site's unauthorized reproduction and distribution of Perfect 10's copyrighted photographs.<sup>79</sup>

As part of Cybernet's service, it would review and verify sites seeking its services.<sup>80</sup> Verification consisted of analyzing the material to ensure the content was proper.<sup>81</sup> Cybernet made a DMCA-like argument, claiming that plaintiff-Perfect 10 had failed to allege a valid claim of copyright infringement, that [Perfect 10] had failed to identify "every copyright relied on, every individual image in the magazines that is being infringed, every image on specific web pages that does infringe, or the dates of any infringement."<sup>82</sup> Although actual knowledge was disputed, the court found that because of Cybernet's review process, it had constructive knowledge.<sup>83</sup> Of particular importance to the court was the fact that copyright owner notified the service of the "potential for copyright infringement" as well as the fact that the service reviewed potential sites seeking the service.<sup>84</sup> Thus

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76. *Id.* at 1117-18.

77. *Id.*

78. *Id.*

79. *Id.* at 1120.

80. *Id.* at 1118-19.

81. 167 F.Supp.2d at 1118-19.

82. *Id.* at 1120. While Perfect 10 is alleging direct copyright infringement, we can note the effect of the Digital Millennium Copyright Act. The DMCA has set out notice requirements for copyright owners that compare to the those in *Cybernet*. See *infra* note 16.

83. *Id.* at 1122.

84. *Id.*

Cybernet could not escape liability for doing little more than verifying the age of subscribers who accesses a web site.<sup>85</sup>

The principle distilled from *Cybernet* is a requirement that defendants must actively engage in one of the prohibited activities recognized in the Copyright Act. In this case we see the court's acceptance of a constructive knowledge argument in relation to a web site service. In the future this could be helpful in holding ISPs to some standard of accountability where circumstances can be shown that the ISP should have known.

*CoStar Group Inc., v. Loopnet Inc.*<sup>86</sup> was also decided under the safe harbor provisions of the DMCA. Plaintiff-CoStar established an Internet presence through its web-based commercial real estate database and national commercial real estate information services. CoStar would publish photographs of properties on its website as part of its service to subscribers.<sup>87</sup> Also a web site operator, Defendant-LoopNet, allowed users to post commercial real estate listings.<sup>88</sup> CoStar sued claiming that many of the photographs on LoopNet's site were infringements of CoStar's copyrighted photographs.<sup>89</sup> At issue was LoopNet's liability alleged to arise from CoStar's notification of the infringing reproduction of copyrighted photographs.<sup>90</sup> The court found that Loopnet was a service provider and that its activities qualified for the hosting safe harbor provision because it did not have the right and ability to control its users commensurate with the standard for vicarious infringement.<sup>91</sup> Again we see the importance courts give the requirement for knowledge.<sup>92</sup>

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85. *Id.*

86. 164 F. Supp. 2d 688 (D. Md. 2001).

87. *Id.* at 691-92.

88. *Id.* at 692.

89. *Id.* at 695.

90. *Id.* at 705.

91. *Id.* at 701-704.

92. Extrapolating, if a website with close control over its content cannot be held to have constructive knowledge of subscriber's activities, it stands to reason that an ISP hosting hundreds or even thousands of such websites, would help and encouragement from courts and Congress, as well as technical means such as digital rights management software.

In *Ellison v. Robertson*,<sup>93</sup> an overzealous fan posted full the full text of several copyrighted books to the popular newsgroup “alt.binaries.e-book.” The fan posted several books through his messages, not as criticism or analysis, but as a tribute to their authors.<sup>94</sup> The messages were subsequently copied throughout Usenet, including an ISP, which maintained Usenet as a service to its subscribers.<sup>95</sup> The ISP established a procedure that both allowed for notification and informed subscribers that their unauthorized messages could be deleted and their access blocked by the ISP.<sup>96</sup> After several failed attempts at notifying the ISP, the owner sued the ISP.<sup>97</sup> At issue was whether the ISP was liable for direct, contributory or vicarious infringement.<sup>98</sup> In addition, at issue was whether the ISP was protected under the ‘safe harbor’ provisions of the DMCA.<sup>99</sup> The court found that the ISP had no knowledge of, control over, or financial benefit from the fan’s messages.<sup>100</sup> Specifically, the court noted that the DMCA was not intended to attach liability merely for the ability to block to establish the element of control.<sup>101</sup> The court also noted that the element of financial benefit was lacking because Usenet occupied a very small percentage of the ISP’s overall package of services.<sup>102</sup> The service at issue requires a significant draw to subscribers, the

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93. 189 F.Supp.2d 1051 (C.D. Cal. 2002).

94. *Id.* at 1053.

95. *Id.*

96. *Id.*

97. *Id.* AOL established a workable notice procedure, which includes a contact in which copyright owners are to submit their notice. *Id.* at 1057. However, because technical glitches AOL did not receive Ellison’s repeated e-mails. *Id.* Thus, there was not actual knowledge. *Id.* The court refused to allow AOL escaping, imputing constructive knowledge. The court noted that AOL has “reason to know” based on the fact that AOL did not correct the technical glitches in its system. *Id.*

98. 189 F.Supp.2d at 1056.

99. *Id.* at 1063.

100. *Id.* at 1064.

101. *Id.* at 1061.

102. *Id.* at 1062.

reason they subscribe, not merely an afterthought service.<sup>103</sup>

III. POST-DMCA COPYRIGHT OWNERS BEAR THE MASSIVE BURDEN  
OF REMOVING INTERNET PIRACY AND CONTINUING INTERNET  
GROWTH.

The Internet is too large and individual user's acts too insignificant in relation to the amount of information passing through an ISP to allow a low standard of liability. ISPs go beyond mere connectivity. When one considers that the content is unavailable to most users without connectivity, ISPs are at the same time a method for which society contracts, expresses, and creates. To that end the means of posting articles, music, movies, or criticisms for example develop the Internet if the ISPs allow it, but their true value is recognized if protected. Copyright law is as old as the Constitution; the Internet is only as old as the 70's. To facilitate Internet growth, Congress essentially removed ISPs from the detection mode.

In 1991, it took twelve counterfeiting operations, employing hundreds of people, to manufacture approximately twenty-eight million counterfeit cassette tapes.<sup>104</sup> Today a single user can accomplish the same on a computer connected to the Internet.<sup>105</sup> Furthermore, in the cassette tape example the effects were not exponential. In other words, it is doubtful that one who acquired the counterfeit cassette tape would go to the same effort, ending the trail of duplication.

The digital model is much different because it is difficult to

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103. *Id.* at 1062, (noting that Usenet accounts for .25% of all services available on AOL). Interestingly, the court failed to note that, whereas prior courts had invalidated notice and take-down procedures (as mandated by the DMCA) for the ease in which subscribers in those cases could unsubscribe and re-subscribe, this court did not address this particular issue. This issue, however, is crucial because a subscriber's ability to re-subscribe and re-post infringing material results in authors receiving a very low degree of copyright protection.

104. See Stephanie Brown, *The No Electronic Theft Act: Stop Internet Piracy!*, 9 J. Art & Ent. Law 147, 154 (1998).

105. *Id.*

detect the source. Due to the ease of digital copying, one copy looks like the next and the next and so on, so that the same copy that starts out posted to a website hosted in California could be posted on a website in China later that same day. One user can duplicate one file with equipment purchased for under \$1000, post the file to a web site or newsgroup, and it is instantly available to literally hundreds of millions of users.<sup>106</sup>

As mentioned above an ISP can block a user, but it does not end there.<sup>107</sup> A copyright owner will be plagued by at least two problems. First, if the blocked user so chooses, he/she can subscribe through another of the thousands of ISPs and continue posting the infringing material. While this creates some inconvenience, it pales in comparison to the time, effort, and expense involved in copying cassette tapes.<sup>108</sup> Second (depending on whether or not the ISP merely blocks the infringing material or identifies the infringer) they can simply create a new website and post the infringing material to that site. Regardless of which reposting method the infringer uses, the copyright owner must now reinitiate the search process and hope to detect the material.

These problems stem equally from copyright law, the emergence of digital technology, and the DMCA. When it enacted the DMCA Congress sought a balance between of equities and prevention of ISPs from liability for mere connectivity.<sup>109</sup>

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106. In fact courts have held merely making available on the Internet is enough to infringe a copyright. *See Marobie-Fl., Inc. v. National Ass'n of Fire Equip. Distribs.*, 2000 U.S. Dist. LEXIS 11022 (N.D. Ill. 2000).

107. This concept can be labeled ISP hopping. It is in essence similar to a recent court decision holding that merely blocking a subscriber was not enough if the subscriber could easily reapply. *A&M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q.2d 1746, 1753 (2000). The ease in which subscribers' could anonymously reapply meant that the on-line file-swapping service had not met the DMCA §512(i)(A) "reasonable" implementation of a notice and takedown policy. *Id.* *See also* Anne Haring, *Copyright Infringement Issues on the Internet*, 617 PLI/PAT 455, 531 (2000).

108. *See supra* text accompanying notes 104-05 (describing an example of a cassette counterfeiting operation).

109. As previously discussed, Congress intent behind the DMCA was the codification of the Netcom and other court holdings recognizing that ISPs

However, through the clearing fog of digital liability, copyright owners emerged with ALP. ALP is a burden born solely by copyright owners requiring the implementation of electronic countermeasures, sometimes referred to Digital Rights Management Systems (“DRMs”), and costly search and detection methods in an attempt to limit digital infringement. Furthermore, whether the ALP itself is constitutional may be a concern until adequately tested in courts.

Whereas prior to the digital revolution practical barriers efficiently barred only the most ardent infringers, the emergence of digital technology in facilitating cheap reproduction and distribution has adversely affected costs of protecting these works. Because the practical barriers were so inhibiting on infringers’ conduct owners could publish in any medium they chose. What infringement existed had little impact on the owner’s market.<sup>110</sup> Today, the picture is less clear. Owners are faced with affirmative liability protection (“ALP”) for both works they digitally publish, as well as works they did not publish.<sup>111</sup>

#### IV. SOLUTION

To maintain Congress’ intended spirit of cooperation, the solution for the foregoing problems must preserve the rights of copyright owners while not discouraging ISPs from acting as passive conduits. This proposed solution does this. To be sure, under the current legal framework an ISP may incur liability for infringement carried on their system. However, the piracy continues unabated, and instead of encouraging cooperation

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needed protection for massive on-line infringement. *See supra* Part II.C.

110. Part of the frustration for on-line publishers, music as well as movie, is the fact that the practical limitations to unauthorized reproduction and distribution in existence prior to the emergence of digital technology have been wiped away by digital technology. *See supra* Part III.

111. *See Ellison* at 1071 (holding that the ISP was not contributorily infringing for merely providing the storage facilities in which its subscribers could access the infringing material).

between ISPs and copyright owners, copyright law has placed ISPs between a place where any action to control could be used to impute knowledge but failing to respond in the face of mounting piracy has left copyright owners chasing millions of acts of infringement one copy at a time.

DRMs are currently gaining acceptance. DRMs are electronic countermeasures installed on an artist's work that notify the public of important rights in the work. Additionally, DRMs can include such information as: 1) the work's title; 2) its author; 3) its copyright owner; 4) the name of a performer whose performance is fixed in a work other than an audiovisual work; 5) the name of a writer, performer, or director who is credited in the audiovisual work; or 6) the duration or extent of use.<sup>112</sup> An author installs a DRM to either restrict access to his or her work or to restrict the work from unauthorized reproduction or distribution or both. An owner can install a DRM that charges the user of a copyrighted work a fee. They take many forms, which are beyond the scope of this article, but understanding that they allow copyright owners to install the same practical barriers that existed in our cassette example above.

Opponents of DRMs argue that traditional copyright law is ineffective with the new technology.<sup>113</sup> The typical analogy goes something like this. In the days before the digital revolution a purchaser could buy a book to read and conceivably read it as many times as possible until the cover falls apart. The argument goes that DRMs will never allow the book to fall apart because the purchaser cannot afford to "pick" the book up that many times if charged for each use. These prognosticators see only the demand side, failing to realize two key developments in the digital world.

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112. *See generally* 17 USCS § 1202. This provision generally allows for the protection of these author-identifying features. *See* National Academy of Sciences, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE*, at 152-71, 282-303 (2000); Electronic Privacy Information Center, *Internet Digital Rights Management and Privacy Act* (Apr. 16, 2001), at <http://www.epic.org/privacy/drm/#developers> (last visited April 28, 2003).

113. Joseph H. Sommer, *Against Cyberlaw*, 15 *Berkeley Tech. L.J.* 1145 (2000).



First, without evidence of demand killing pay-per-use, we won't know whether the effect is to prevent reading. Secondly, it's likely the same purchasers will purchase the real world book, preferring to pay-per-use for limited purposes such as educational or research.

Furthermore, in support of DRMs as a meaningful way to detect and prevent massive infringement, we must re-consider the copyright owner's economics which are inexplicably coupled with the Internet. The copyright owners are by and large fueling the content that drives the Internet. The massive size of the Internet is demanding more and more content. The Copyright Act intended to encourage creativity, but the Internet wants more; it wants content, and it needs badly.

Finally DRMs are supported by the intent of other areas within the DMCA itself. As Congress sought to afford copyright owners new protections, it preserved certain limitation on exclusive rights (e.g. fair) use, while allowing owners statutory protection granted under 17 USC §1202, which provides for the right to not have electronic countermeasures circumvented. Moreover, 17 USC §1201 also prohibits the trafficking in any device that circumvents DRMs.<sup>114</sup>

Thus, copyrights must be protected, and the way to do this is by providing a safe haven. When copyright owners see the Internet as a way to cheaply publish and distribute piracy will be the furthest thing from their mind. DRMs therefore take on the urgent function of driving the engine that promotes the growth of the Internet.

Given that DRMs are effective ISPs can then safely assume the duty of monitoring subscriber's for infringing uses of DRM protected copyrights. Some opponents of making ISPs the Internet police fear the impact of vesting too much power in a private entity. These critics fear that because an ISP has no accountability

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114. *See also* 17 U.S.C. § 1202(b)(1) (prohibiting the deletion of the electronic information that may accompany a computer file containing a copyrightable composition.), 17 U.S.C. § 1202(b)(1) (prohibiting the distribution of copies or phonorecords [or books] from which the pertinent copyright management information has been deleted or changed.).

to any governmental entity the ISP will effectively adjudicate constitutional issues without concern for such issues as Due Process or the First Amendment. In fact, Congress considered this very issue by enacting the DMCA when it added the proviso that allows alleged infringers time to appeal an ISP's notice of takedown. As opposed to making the ISP the arbiter, DRMs actually make it easier for the ISPs to pin-point infringers and send notice without extensive searching by the copyright owner. Furthermore, given that the ISP has the capability to monitor a user's postings (because all subscriber initiated information must pass through the ISP) it is more economically efficient to have the ISP control the infringing acts. In this way the costs of monitoring are spread over a wider audience. Obviously, this spreading of costs would need to be recalculated as piracy decreased.

ISPs will not have to monitor an overwhelming amount of content because this solution only places an affirmative duty to monitor and detect DRM protected works. Copyright owners will actually see a benefit in the expensive DRMs because now instead of futility, they will have assistance. Prior to placing a responsibility on ISPs to detect for infringement, copyright owners most likely viewed DRMs as a futile attempt at eliminating costly Internet inspection. However, once ISPs are given the duty, and freedom, to detect infringement of works that use DRMs, copyright owners will be encouraged to use DRMs. Subsequently, Internet content will improve both in quality and quantity as more copyright owners publish in the digital medium.

*Greg Adams*

