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WHERE THE *NETCOM* YARDSTICK COMES UP SHORT: COURTS SHOULD NOT APPLY THE FACTS OF *NETCOM* AS AN EXAMPLE OF INTERMEDIATE AND TRANSIENT STORAGE UNDER § 512(a) OF THE DMCA

Sean Croman

Abstract: Internet Service Providers (ISPs) risk substantial liability for passively contributing to subscriber-initiated acts of online copyright infringement. Cognizant of this problem, courts and Congress have taken differing approaches to limiting ISP liability. The *Netcom* court established that ISPs could store infringing material for eleven days without incurring liability for *direct* infringement, but did not similarly rule out liability for other forms of infringement. The Digital Millennium Copyright Act (DMCA) subsequently advanced the law of copyright by strengthening the protections enjoyed by copyright holders whose works face exploitation online, subject to four activity-specific “safe harbor” limitations on liability. For example, § 512(a) of the DMCA offers safe harbor for ISPs that store “intermediate and transient” copies of infringing material “in the course of” digital transmissions. In contrast, § 512(c) offers safe harbor for ISPs that store infringing material at the direction of users, subject to a strict notice-and-takedown requirement. In applying § 512(a), some courts consider the terms “intermediate” and “transient” to be facially ambiguous and look to the DMCA’s legislative history for interpretive guidance. Relying heavily on a legislative committee report discussing a rejected version of the statute, courts in the Ninth Circuit have concluded that § 512(a) codifies the result of *Netcom*. Based on this conclusion, these courts endorse reliance on *Netcom*’s facts as an example of § 512(a) activity. This Comment argues that courts should not consider or apply *Netcom*’s facts as an example of intermediate and transient storage under § 512(a) for three reasons. First, the eleven-day storage of infringing material at issue in *Netcom* would not constitute intermediate and transient storage as subsequently defined by § 512(a). Second, courts that apply *Netcom*’s facts as an example of intermediate and transient storage under § 512(a) obviate § 512(c)’s notice-and-takedown requirement. Third, the DMCA’s text and legislative history confirm that Congress decided against codifying *Netcom* in favor of safe harbors that differ considerably from *Netcom*’s holding. As a result, courts and prospective litigants must either wait for a predictable definition of intermediate and transient storage to develop through judicial interpretation of § 512(a)’s express terms or lobby Congress for a more definitive codified standard. ISP defendants might also seek timely relief under § 512(c) or assert common law defenses not codified within the DMCA’s four corners.

The digital environment poses a significant threat to the interests of copyright holders.¹ The Usenet, a worldwide community of electronic Bulletin Board Services (BBSs),² is no exception.³ Millions of people

1. See H.R. REP. NO. 105-551, pt. 2, at 25 (1998).

2. See *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1365 n.4 (N.D. Cal. 1995).

3. See *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1053–54 (C.D. Cal. 2002) (outlining manner

read and contribute Usenet postings on a daily basis.⁴ Postings frequently contain infringing material supplied by Usenet subscribers.⁵ Internet Service Providers (ISPs) in turn supply the infrastructure necessary for many subscribers to efficiently communicate, store, and access infringing content.⁶ Although ISPs perform a fundamentally passive role, they nevertheless contribute to the unlawful conduct of others by serving as a critical link in the widespread distribution of Usenet postings.⁷ Not surprisingly, ISPs risk liability for their contributory role in acts of online infringement.⁸

Cognizant of the problems faced by ISPs, courts and Congress have taken differing approaches to limiting ISP liability for online copyright infringement. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,⁹ the United States District Court for the Northern District of California held that an ISP could store infringing material for eleven days without liability for *direct* infringement.¹⁰ The court considered theories of liability discretely and did not similarly rule against other forms of infringement.¹¹ Congress subsequently codified four activity-specific limitations on liability under § 512 of the Digital Millennium Copyright Act (DMCA).¹² Unlike the disparate limitations on liability articulated in *Netcom*,¹³ DMCA safe harbors shield ISPs

in which infringing Usenet postings are widely distributed online) [hereinafter *Ellison I*].

4. See *Netcom*, 907 F. Supp. at 1365 n.4 (internal citations omitted).

5. See, e.g., *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004) (recognizing that Usenet discussion group was “used primarily to exchange unauthorized digital copies” of copyrighted works) [hereinafter *Ellison II*].

6. See JAY DRATLER, JR., CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM § 6.01[2], at 6-3 (2004).

7. See *Netcom*, 907 F. Supp. at 1369–70 (recognizing that ISPs perform functions that are “essential if Usenet messages are to be widely distributed”).

8. See, e.g., *Netcom*, 907 F. Supp. at 1373 (recognizing that ISPs can be held liable for materially contributing to infringing conduct of third parties); *Ellison I*, 189 F. Supp. 2d at 1057 (agreeing with *Netcom* court’s analysis of ISP liability).

9. 907 F. Supp. 1361 (N.D. Cal. 1995).

10. See *id.* at 1373 (“Because the court cannot see any meaningful distinction (without regard to knowledge) between what *Netcom* did and what every other Usenet server does, the court finds that *Netcom* cannot be held liable for direct infringement.”).

11. See *id.* at 1372–75, 1377 (ruling against direct and vicarious infringement on different grounds while holding that ISP defendant could be held liable for contributory infringement for independent reasons).

12. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C. (2000)). DMCA limitations on liability, commonly referred to as “safe harbors,” are codified at 17 U.S.C. § 512.

13. See *Netcom*, 907 F. Supp. at 1366–77 (considering theories of liability and related defenses

from all forms of infringement¹⁴ under specific statutorily-defined circumstances.¹⁵ For example, § 512(a) provides a safe harbor for ISPs that create “intermediate and transient” copies of infringing material “in the course of” digital transmissions.¹⁶ To qualify for safe harbor under § 512(a), ISPs may not allow anyone other than “anticipated recipients” of user-directed transmissions to access infringing material and must store infringing material for “reasonably necessary” periods of time.¹⁷ Section 512(c), by contrast, provides a safe harbor for ISPs that store content at the direction of users for longer durations.¹⁸ However, to qualify under § 512(c), ISPs must comply with a strict notice-and-takedown requirement,¹⁹ which § 512(a) lacks.²⁰

While Congress enacted the DMCA to clarify the rules of liability for online infringement,²¹ courts disagree on whether temporary Usenet storage constitutes § 512(a) activity and the extent to which *Netcom* remains a relevant authority after the enactment of the DMCA.²² Courts in the Ninth Circuit have concluded that § 512(a) codifies the result of *Netcom* based on favorable references to *Netcom* in a legislative report describing a proposed limitation on liability that Congress rejected in favor of appreciably different safe harbors.²³ Despite openly recognizing the problematic nature of outdated legislative records, these courts have applied *Netcom*'s facts as an example of intermediate and transient storage under § 512(a).²⁴ In contrast, courts in the Fourth Circuit have concluded that past common law standards should not influence DMCA

discretely).

14. See H.R. REP. NO. 105-551, pt. 2, at 50 (1998) (“The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement.”).

15. See 17 U.S.C. § 512(a)–(d).

16. See *id.* § 512(a).

17. See *id.* § 512(a)(4).

18. See *id.* § 512(c) (affording safe harbor without imposing “in course” storage or “reasonably necessary” period of time requirement).

19. See *id.* § 512(c)(1)(C).

20. See *id.* § 512(a).

21. See H.R. REP. NO. 105-551, pt. 2, at 23–25 (1998) (recognizing need to “more precisely define the relationship between intellectual property and electronic commerce”).

22. See *infra* Part II.

23. See *Ellison II*, 357 F.3d 1072, 1081 (9th Cir. 2004); *Ellison I*, 189 F. Supp. 2d 1051, 1068–70 (C.D. Cal. 2002).

24. See *Ellison II*, 357 F.3d at 1081; *Ellison I*, 189 F. Supp. 2d at 1068–70.

outcomes.²⁵ These courts have evaluated similar durations of temporary Usenet storage under § 512(c) rather than § 512(a).²⁶

This Comment argues that courts should not consider or apply *Netcom*'s facts as an example of intermediate and transient storage under § 512(a) for three reasons. First, the eleven-day storage of infringing material at issue in *Netcom* would not constitute "intermediate and transient" storage as subsequently defined under § 512(a).²⁷ *Netcom* did not exclusively store infringing material "in the course of" digital transmissions,²⁸ did not restrict access to "anticipated recipients" of user-directed transmissions,²⁹ and did not maintain infringing postings for a "reasonably necessary" period of time as required under the statute.³⁰ Second, courts that apply *Netcom*'s facts as an example of intermediate and transient storage under § 512(a) contravene § 512(c)'s notice-and-takedown provision.³¹ Third, the DMCA's text and legislative history confirm that Congress decided against codifying common law standards³² in favor of limitations on liability that differ substantially from the *Netcom* court's treatment of ISP liability.³³

Part I of this Comment reviews the facts and rationale of *Netcom* and discusses § 512's provisions in the context of underlying congressional goals. Part II examines how courts have reached differing conclusions regarding whether temporary Usenet storage constitutes § 512(a) activity and the continued relevance of *Netcom*. Part III explores how the DMCA's legislative history offers mixed guidance on the significance of *Netcom* within the DMCA's four corners. Part IV argues that *Netcom*'s facts are an improper yardstick for measuring intermediate and transient storage under § 512(a) for three reasons: (1) *Netcom*'s eleven-day storage of Usenet content did not constitute § 512(a) activity; (2)

25. See, e.g., *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622 (4th Cir. 2001) (finding that "ultimate conclusion" on liability is controlled by Title II of DMCA).

26. See *infra* Part II.B.

27. See *infra* Part IV.A.

28. See *infra* Part IV.A.1.

29. See *infra* Part IV.A.2.

30. See *infra* Part IV.A.3.

31. See *infra* Part IV.B.

32. See S. REP. NO. 105-190, at 19 (1998) ("[T]he Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers.").

33. Compare *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1366-77 (N.D. Cal. 1995) (considering common law theories of liability and related defenses discretely), with 17 U.S.C. § 512(a)-(d) (2000) (codifying DMCA limitations on liability).

applying *Netcom*'s facts as a § 512(a) yardstick obviates § 512(c)'s notice and takedown provision; and (3) Congress expressly considered and rejected the option of codifying *Netcom*. This Comment concludes that courts and prospective litigants must either wait for predictable standards of intermediate and transient storage to develop through judicial interpretation of § 512(a)'s express terms or lobby Congress for a more definitive standard. ISP-defendants might also seek timely relief under other DMCA safe harbors or assert common law defenses not codified within the DMCA's four corners.

I. SECTION 512 CODIFIES LIMITATIONS ON ISP LIABILITY THAT ARE UNLIKE PRIOR COMMON LAW STANDARDS

The DMCA advanced the law of copyright by clarifying the rules of liability for online infringement.³⁴ Theories of infringement and related limitations developed incrementally at common law.³⁵ For example, the *Netcom* court established that ISPs could temporarily store infringing material without liability for *direct* infringement, but did not similarly rule on other theories of liability.³⁶ Congress subsequently advanced the law of copyright by codifying four activity-specific "safe harbor" limitations on ISP liability.³⁷ While the *Netcom* court addressed theories of infringement and related defenses discretely,³⁸ DMCA safe harbors conditionally shield qualifying ISPs from all forms of infringement.³⁹ Section 512(a) provides a safe harbor for ISPs that store "intermediate and transient" copies of infringing material "in the course of" digital transmissions.⁴⁰ In contrast, § 512(c) provides a safe harbor for ISPs that store content for longer periods of time at the direction of users.⁴¹ To

34. See H.R. REP. NO. 105-551, pt. 2, at 23–25 (1998).

35. See DRATLER, JR., *supra* note 6, § 1.01, at 1-4.

36. See *Netcom*, 907 F. Supp. at 1372–75, 1377 (ruling against direct and vicarious infringement on different grounds while holding that ISP could be held liable for contributory infringement for independent reasons).

37. See 17 U.S.C. § 512(a)–(d); § 512(n) (confirming that each DMCA safe harbor contemplates a "separate and distinct" ISP function); see also H.R. REP. NO. 105-551, pt. 2, at 23–25, 50 (recognizing need to "more precisely define the relationship between intellectual property and electronic commerce," and confirming that "[t]he limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement").

38. See *Netcom*, 907 F. Supp. at 1372–75, 1377.

39. See 17 U.S.C. § 512(a)–(d); H.R. REP. NO. 105-551, pt. 2, at 50.

40. See 17 U.S.C. § 512(a).

41. See *id.* § 512(c).

qualify for safe harbor under § 512(c), ISPs must promptly take down infringing material upon receiving notice of infringing activity.⁴² Because DMCA limitations on liability are not exclusive,⁴³ ISP defendants that fail to qualify for DMCA safe harbors remain free to assert other common law defenses.⁴⁴

A. The Netcom Court Recognized that ISPs May Temporarily Store Infringing Usenet Content Without Incurring Liability for Direct Infringement

In *Netcom*, the U.S. District Court for the Northern District of California considered, as a matter of first impression, whether courts should hold ISPs liable for passively facilitating acts of online infringement.⁴⁵ Plaintiff Religious Technology Center (RTC) held copyrights in the works of L. Ron Hubbard, the late founder of the Church of Scientology.⁴⁶ Defendant Dennis Erlich allegedly infringed RTC's copyrights when he posted Hubbard's works on the Usenet discussion group alt.religion.scientology.⁴⁷ Erlich gained access to the Internet through co-defendant Thomas Klemesrud's BBS.⁴⁸ Klemesrud's BBS in turn obtained its Internet connection through co-defendant Netcom, which at the time was one of the largest providers of Internet access in the United States.⁴⁹

The Usenet, or "User Network," is an international collection of BBSs,⁵⁰ also known as Usenet "peers,"⁵¹ whose computers connect with one another to exchange information online.⁵² Usenet customers read and contribute to particular Usenet sites.⁵³ Usenet sites in turn distribute customer postings among other Usenet servers according to explicit and

42. See *id.* § 512(c)(1)(C).

43. See *id.* § 512(l).

44. See *id.*

45. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995).

46. *Id.*

47. *Id.* at 1365–66.

48. *Id.* at 1366.

49. *Id.*

50. See *id.* at 1365 n.4.

51. See *Ellison I*, 189 F. Supp. 2d 1051, 1053 (C.D. Cal. 2002).

52. See *id.*

53. See *Netcom*, 907 F. Supp. at 1365 n.4 (citations omitted).

implicit configuration settings.⁵⁴ Usenet traffic flows over a wide range of digital networks, including the Internet,⁵⁵ and reaches millions of people on a daily basis.⁵⁶ ISPs play a significant role in the file sharing process by: (1) helping make it possible for information posted online to reach all Usenet servers worldwide in a matter of hours;⁵⁷ and (2) retaining copies of Usenet postings for continued access by customers and other Usenet peers.⁵⁸ For example, Netcom's entire customer base and other Usenet peers could access Erlich's infringing postings while they resided on Netcom's system.⁵⁹

The litigants in *Netcom* did not dispute the processes by which Erlich's postings were distributed online.⁶⁰ Not long after Erlich posted the infringing material, Klemesrud's BBS server copied the material to Netcom's Usenet server.⁶¹ Netcom's Usenet server then made the infringing material available to other Usenet servers, which in turn did the same for numerous other servers, until all Usenet sites worldwide had access to the material.⁶² The entire process took a matter of hours.⁶³ Pursuant to an internal policy, Netcom retained copies of Erlich's postings for eleven days, during which time Netcom's customers and other Usenet peers could obtain copies of the infringing material directly from Netcom's system.⁶⁴ Although RTC informed Netcom when it learned of the infringing activity, Netcom took no action to remove or limit access to the infringing material.⁶⁵

On cross-motions for summary judgment, RTC claimed that Netcom had directly, vicariously, and contributorily infringed its copyright interests.⁶⁶ All three forms of copyright infringement involve the

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at 1367–68.

58. *See id.* (recognizing that so long as infringing material was stored on Netcom's system, Netcom's customers and other Usenet sites could download infringing material).

59. *See id.*

60. *See id.* at 1367.

61. *See id.*

62. *See id.* at 1368.

63. *See id.*

64. *See id.* at 1367–68.

65. *See id.* at 1368.

66. *See id.* at 1367 (“Plaintiffs argue that, although Netcom was not itself the source of any of the infringing materials on its system, it nonetheless should be liable for infringement, either directly, contributorily, or vicariously.”).

unauthorized exercise of one or more of the exclusive rights of copyright holders as defined under the Copyright Act.⁶⁷ Liability for direct infringement typically results from affirmative actions that directly violate a copyright holder's exclusive rights.⁶⁸ Liability for vicarious infringement requires proof that an infringing party had the right and ability to control activities in which that party had a direct financial interest.⁶⁹ Liability for contributory infringement arises where one party knowingly induces, causes, or materially contributes to the infringing conduct of another.⁷⁰

The *Netcom* court addressed theories of liability and related defenses discretely. The court refused to impose liability for direct infringement after concluding that Netcom did not commit a volitional act in passively distributing infringing material.⁷¹ Consistent with this view, the court suggested that ISPs should generally be able to retain infringing material at the direction of subscribers for reasonably limited periods of time without giving rise to liability for *direct* infringement.⁷² In contrast, the court refused to impose liability for vicarious infringement because RTC

67. 17 U.S.C. § 106 (2000 & Supp. II 2002). In describing the exclusive rights of copyright holders, the Act states:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.

68. See *Netcom*, 907 F. Supp. at 1368–72.

69. See *id.* at 1382.

70. See, e.g., *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (describing how “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory infringer’”) (footnote omitted).

71. See *Netcom*, 907 F. Supp. at 1368–72 (recognizing in relevant part that “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party,” and “the mere fact that Netcom’s system incidentally makes temporary copies of plaintiffs’ works does not mean Netcom has caused the copying”).

72. See *id.* at 1368–72 (stating general unwillingness to hold ISPs directly liable for copies of infringing material made and stored on ISP’s system where infringing subscriber is clearly directly liable for same act).

failed to produce evidence that Netcom received a direct financial benefit from Erlich's postings.⁷³

The *Netcom* court did not discuss similar limitations on liability in the context of contributory infringement.⁷⁴ Instead, the court explicitly recognized that courts may hold ISPs contributorily liable for storing infringing material at the direction of users and then failing to take "simple" measures to prevent damage to copyright interests after receiving notice of the infringing activity.⁷⁵ Summary judgment on contributory infringement was ultimately precluded by questions of fact regarding whether Netcom knew, or should have known, that it substantially contributed to Erlich's actions and whether Netcom could, upon receiving notice, have limited RTC's injury.⁷⁶

In short, the *Netcom* court advanced but did not conclusively define the contours of ISP liability at common law. The court's decision established that: (1) ISPs could temporarily store infringing Usenet content for eleven days without incurring liability for direct infringement; (2) courts should not hold ISPs liable for vicarious infringement unless the ISP derived a direct financial benefit from the infringing activity; and (3) temporary storage of infringing material could give rise to liability for contributory infringement where an ISP fails to reasonably limit damage to copyright interests after receiving notice of infringing activity. Continued uncertainty over the landscape of liability prompted Congress to enact the DMCA.⁷⁷

B. The DMCA Promotes E-Commerce by Strengthening Copyright Protections Subject to Four Activity-Specific Limitations on ISP Liability

Congress enacted the DMCA to promote e-commerce by enhancing the protection of copyright interests and clarifying the rules of liability for online infringement.⁷⁸ The DMCA's legislative history confirms that

73. *Id.* at 1377.

74. *See id.* at 1373–75 (discussing risk of liability for contributory infringement without reference to limitations on liability discussed in context of direct and vicarious infringement).

75. *Id.* at 1375.

76. *See id.* at 1374–75.

77. *See* H.R. REP. NO. 105-551, pt. 2, at 23 (1998) ("The Committee on Commerce believes it is important to more precisely define the relationship between intellectual property and electronic commerce . . ."); *see also* DRATLER, JR., *supra* note 6, § 1.01, at 1-4 (discussing concerns that prompted Congress to enact DMCA).

78. *See* H.R. REP. NO. 105-551, pt. 2, at 23.

Congress viewed the promotion of economic growth and the protection of intellectual property rights as complementary, rather than competing, goals.⁷⁹ Legislative action was ultimately prompted by concerns that: (1) new technologies were creating new threats to copyrighted works at such a rate that copyright holders could not wait for common law protections to catch up,⁸⁰ and (2) unclear common law standards placed ISPs in an undesirably tenuous position with regard to potential liability.⁸¹

The DMCA's most important titles, Titles I and II, focus squarely on issues related to the Internet.⁸² Title I strengthens the protections enjoyed by copyright owners whose works face exploitation online.⁸³ Title II, codified at 17 U.S.C. § 512, defines four independent circumstances in which qualifying ISPs are shielded from liability for direct, vicarious, and contributory infringement.⁸⁴ Section 512(a) provides a safe harbor for ISPs that passively transmit digital content and create "intermediate and transient" copies of infringing material "in the course of" digital network communications.⁸⁵ Section 512(b) limits ISP liability for temporarily cached data.⁸⁶ Section 512(c) limits ISP liability for storing material at the direction of customers, subject to a strict notice-and-takedown requirement.⁸⁷ Section 512(d) limits ISP liability for referring or linking users to infringing material.⁸⁸ Section 512(n) confirms that each DMCA safe harbor contemplates a "separate and distinct" activity-specific limitation on ISP liability.⁸⁹

79. *See id.*

80. *See* DRATLER, JR., *supra* note 6, § 1.01, at 1-4.

81. *See id.* § 6.01[2], at 6-19 to 6-20.

82. *See id.* § 1.02, at 1-5 to 1-6.

83. *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[C][1], at 12B-22 (2004).

84. *See* 17 U.S.C. § 512(a)-(d), (n) (2000).

85. *See id.* § 512(a).

86. *See id.* § 512(b).

87. *See id.* § 512(c).

88. *See id.* § 512(d).

89. *See id.* § 512(n). The Act's legislative history verifies the activity-specific nature of DMCA safe harbors:

Consider, for example, a service provider that provides a hyperlink to a site containing infringing material which it then caches on its system in order to facilitate access to it by its users. This service provider is engaging in at least three functions that may be subject to the limitation on liability: transitory digital network communications under subsection (a), system caching under subsection (b), and information location tools under subsection (d).

H.R. REP. NO. 105-551, pt. 2, at 65 (1998).

C. *Section 512(a) Provides a Safe Harbor for ISPs that Store Infringing Material in the Course of Digital Transmissions*

Section 512(a) limits the liability of ISPs that store “intermediate and transient” copies of infringing material “in the course of” digital transmissions.⁹⁰ As a threshold matter, § 512(a)’s limitations apply solely to “transitory digital network communications” and related storage activities.⁹¹ An ISP may seek relief from liability under § 512(a) only where the ISP: (1) passively transmits material as directed by a third party through the ISP’s system; and (2) stores “intermediate and transient” copies of infringing material “in the course of” digital network communications.⁹² Intermediate and transient copies subsist exclusively while material is *en route* to intended destinations, and not under any other circumstances.⁹³ Consequently, ISPs that store content at points where transmissions are initiated or received for any length of time cannot qualify for safe harbor under § 512(a) as a threshold matter.⁹⁴ For example, ISPs that provide temporary storage space for online chatroom content, which may not reside on an ISP’s system for longer than chatroom messages appear onscreen,⁹⁵ must seek relief from liability under § 512(c) rather than § 512(a).⁹⁶

After meeting the aforementioned threshold criterion, transmission and storage activities must conform to five additional requirements in order for an ISP to qualify for safe harbor under § 512(a).⁹⁷ First, a person other than the ISP must initiate or direct the transmission of infringing material.⁹⁸ Second, the ISP must carry out the transmission, routing, and “in course” storage of infringing material through an automatic technical process.⁹⁹ Third, the ISP may not select recipients of infringing material except as an automatic response to the request of

90. See 17 U.S.C. § 512(a).

91. See *id.*

92. See *id.*

93. See H.R. REP. NO. 105-551, pt. 2, at 51.

94. See *id.* at 50–51 (recognizing that “intermediate and transient” copies as contemplated under § 512(a) are created as automatic consequence of transmission process).

95. See *United States v. Johnson*, No. 97-CR-0206, 98-CR-160, 2005 WL 22680, at *9 n.9 (N.D.N.Y. Jan. 5, 2005) (describing fleeting nature of chatroom content).

96. See H.R. REP. NO. 105-551, pt. 2, at 53.

97. See 17 U.S.C. § 512(a)(1)–(5).

98. *Id.* § 512(a)(1).

99. *Id.* § 512(a)(2).

another person.¹⁰⁰ Fourth, the ISP may not maintain copies of infringing material in a manner: (1) “ordinarily accessible” to anyone other than “anticipated recipients”; or (2) for longer than is “reasonably necessary” for the transmission, routing, or provision of connections.¹⁰¹ Fifth, the ISP may not modify infringing material.¹⁰²

The DMCA’s legislative history confirms the narrowing influence of subsections (a)(1) through (5).¹⁰³ For example, a committee report that tracks the express language of each enacted provision specifies that ISPs must serve as passive “conduits” for the communications of others in order to qualify for safe harbor under § 512(a).¹⁰⁴ To this end, subsection (a)(4)’s “reasonably necessary” requirement ensures that eligible copies of infringing material are made exclusively while infringing material is en route to its intended destination.¹⁰⁵ In similar fashion, subsection (a)(4)’s “anticipated recipient” requirement prevents ISPs from qualifying for safe harbor under § 512(a) if they make stored content available to unintended third parties.¹⁰⁶

D. Section 512(c) Provides a Safe Harbor for ISPs that Store Copies of Infringing Material at the Direction of Customers, Subject to a Strict Notice-and-Takedown Provision

Section 512(c) limits the liability of ISPs that store copies of infringing material on their systems or networks at the direction of users.¹⁰⁷ As a threshold matter, § 512(c) defines qualifying storage as “storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.”¹⁰⁸ ISPs need not store infringing material “in the course of” digital transmissions or retain infringing material for a “reasonably necessary” period of time to limit their liability under § 512(c).¹⁰⁹ Section 512(c) therefore

100. *Id.* § 512(a)(3).

101. *Id.* § 512(a)(4).

102. *Id.* § 512(a)(5).

103. See H.R. REP. NO. 105-551, pt. 2, at 51 (1998).

104. See *id.*

105. See *id.*

106. *Id.*

107. See 17 U.S.C. § 512(c).

108. *Id.* § 512(c)(1).

109. See *id.* § 512(c) (lacking “in course” and “reasonably necessary” storage requirements).

contemplates longer periods of storage than § 512(a).¹¹⁰ That said, § 512(c) imposes a number of activity-specific constraints on safe harbor qualification.¹¹¹ For example, an ISP may *not* possess knowledge of infringing material stored on its system,¹¹² nor may it obtain direct financial benefits from infringing activity and still qualify for safe harbor under § 512(c).¹¹³ Additionally, an ISP must, upon receiving notification of claimed infringement, “respond expeditiously” to remove or disable access to related infringing material stored on its system.¹¹⁴

E. The DMCA Operates Independently from Preexisting Common Law Rights, Remedies, and Defenses

The DMCA does not abolish common law rights, remedies, or defenses.¹¹⁵ Section 512’s provisions operate as independent statutory defenses to liability, and therefore apply only after circumstances demonstrate that an ISP is otherwise subject to liability under existing principles of law.¹¹⁶ To this end, § 1330 explicitly provides that the DMCA does not annul or limit common law rights or remedies otherwise available to potential litigants.¹¹⁷ Section 512(l) guarantees ISP defendants similar rights, providing that an ISP’s failure to qualify for DMCA limitations on liability “shall not bear adversely” on the consideration of other common law defenses.¹¹⁸

In sum, the *Netcom* court recognized that ISPs may temporarily store infringing material without liability for *direct* infringement, but did not conclusively define the contours of ISP liability or related defenses. Congress subsequently codified four activity-specific limitations on ISP liability applicable to all forms of copyright infringement under § 512 of the DMCA. Section 512(a) specifically limits the liability of ISPs that create “intermediate and transient” copies of infringing material in the course of transitory digital communications. To qualify for safe harbor under § 512(a), an ISP must: (1) create copies of infringing material “in

110. See *supra* notes 91–96 and accompanying text.

111. See 17 U.S.C. § 512(c).

112. See *id.* § 512(c)(1)(A)(i)–(ii).

113. See *id.* § 512(c)(1)(B).

114. See *id.* § 512(c)(1)(C).

115. See *id.* § 1330.

116. See H.R. REP. NO. 105-551, pt. 2, at 50 (1998).

117. See 17 U.S.C. § 1330.

118. *Id.* § 512(l).

the course of” digital network communications;¹¹⁹ (2) not make infringing material available to anyone other than “anticipated recipients”;¹²⁰ and (3) not store infringing material for longer than “reasonably necessary” for the transmission, routing, or provision of connections.¹²¹ Section 512(c), by contrast, allows ISPs to retain infringing material for longer periods of time, subject to a strict notice-and-takedown requirement.¹²²

II. COURTS DISAGREE ON THE CIRCUMSTANCES IN WHICH TEMPORARY STORAGE CONSTITUTES § 512(a) ACTIVITY AND THE CONTINUED RELEVANCE OF *NETCOM*

Federal courts have reached differing results when applying § 512 in the context of temporary Usenet storage. Courts in the Ninth Circuit have concluded that § 512(a) codifies the result of *Netcom* and endorse reliance on Netcom’s eleven-day storage of infringing Usenet content as an example of “intermediate and transient” storage under § 512(a).¹²³ In contrast, courts in the Fourth Circuit have concluded that § 512’s statutory provisions operate independently of *Netcom*¹²⁴ and assess similar durations of storage under § 512(c).¹²⁵

A. *Courts in the Ninth Circuit Have Relied on the Facts of Netcom as an Example of § 512(a) Activity*

Although case law applying § 512(a) is limited, courts in the Ninth Circuit endorse reliance on the facts of *Netcom* as an example of intermediate and transient storage under § 512(a).¹²⁶ In *Ellison v. Robertson*,¹²⁷ the U.S. District Court for the Central District of

119. *See id.* § 512(a).

120. *See id.* § 512(a)(2)–(4).

121. *See id.* § 512(a)(4).

122. *See id.* § 512(c).

123. *See infra* Part II.A.

124. *See, e.g.,* CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004) (“The DMCA has merely added a second step to assessing infringement liability for Internet service providers, after it is determined whether they are infringers in the first place under the preexisting Copyright Act.”).

125. *See infra* Part II.B.

126. *See* Ellison II, 357 F.3d 1072, 1081 (9th Cir. 2004); Ellison I, 189 F. Supp. 2d 1051, 1070 (C.D. Cal. 2002).

127. 189 F. Supp. 2d 1051 (C.D. Cal. 2002).

California held that defendant America Online (AOL) could store infringing Usenet content for fourteen days and still qualify for safe harbor under § 512(a).¹²⁸ Plaintiff Harlan Ellison owned copyrights to a number of works of science fiction.¹²⁹ Co-defendant Stephen Robertson posted Ellison's works to a Usenet newsgroup, which in turn transmitted Robertson's posting to AOL's system.¹³⁰ Pursuant to an AOL policy, AOL stored copies of the unlawful postings on its system for fourteen days,¹³¹ during which time AOL's thirty million customers¹³² and other Usenet peers worldwide could access the infringing material.¹³³ AOL moved for summary judgment¹³⁴ and asserted numerous defenses to Ellison's claims, including that AOL qualified for safe harbor under § 512 subsections (a) and (c).¹³⁵

In deciding whether AOL's storage of infringing material constituted "intermediate and transient" storage as contemplated under § 512(a), the *Ellison* court relied heavily on references to *Netcom* contained in a legislative committee report discussing a version of § 512(a) that Congress considered and rejected.¹³⁶ The court first deemed the terms "intermediate" and "transient" to be "rather ambiguous."¹³⁷ The court then looked to the aforementioned committee report for guidance.¹³⁸ The report indicated in relevant part that the "reasonably necessary" requirement associated with the rejected version of § 512(a) was "drawn from the facts of the *Netcom* case" and intended to codify *Netcom*'s "implicit" limitation on liability for temporary storage.¹³⁹

The court ultimately concluded that Congress intended to codify *Netcom*'s facts as a limitation on liability for all forms of infringement based on similarities between a single subsection of the rejected proposal

128. *Id.* at 1070.

129. *Id.* at 1053.

130. *Id.* at 1053–54.

131. *Id.* at 1054.

132. See America Online, *Who We Are*, at <http://www.corp.aol.com/whoweare> (last visited Mar. 19, 2005) ("Today, about 30 million people around the world count themselves as AOL members.").

133. See *Ellison I*, 189 F. Supp. 2d at 1053–54.

134. *Id.* at 1055.

135. *Id.* at 1067.

136. See *id.* at 1069–70.

137. *Id.* at 1068.

138. See *id.* at 1068–70.

139. *Id.* at 1069–70.

and a related subsection of the enacted law.¹⁴⁰ Despite these similarities, the court recognized two distinct problems with its approach.¹⁴¹ First, the outdated legislative report contemplated a version of § 512 that differed “in a number of ways” from the subsequently enacted statute.¹⁴² Second, even if certain terms associated with the rejected proposal appear in the law enacted, the meaning of those terms might be quite different in the context of a law that contained “vastly more provisions” than the earlier version.¹⁴³

Nevertheless, the court applied *Netcom*'s facts as an example of intermediate and transient storage under § 512(a).¹⁴⁴ In doing so, the court reasoned that if eleven days constituted a reasonably limited period of time in *Netcom*, then AOL's fourteen-day retention of infringing Usenet content met § 512(a)'s purportedly *Netcom*-derived standard.¹⁴⁵ The court discounted the three-day difference between AOL's fourteen-day storage of infringing material and the eleven-day storage at issue in *Netcom* as “insufficient to distinguish the two cases.”¹⁴⁶ However, the court never discussed whether AOL limited distribution of the infringing material to “anticipated recipients”¹⁴⁷ as expressly required by § 512(a)(4).¹⁴⁸ Moreover, the court never addressed whether § 512(c) applied to the undisputed facts.¹⁴⁹

On appeal, the U.S. Court of Appeals for the Ninth Circuit agreed with the district court's construction of § 512(a), holding that if AOL met certain general threshold requirements for asserting safe harbor protection, then AOL would qualify for § 512(a)'s limitation on liability as a matter of law.¹⁵⁰ The Ninth Circuit reasoned that the court below properly applied *Netcom*'s facts as an example of intermediate and

140. *See id.* at 1070 n.20.

141. *See id.* at 1069–70.

142. *Id.* at 1069.

143. *Id.*

144. *See id.* at 1070.

145. *See id.*

146. *Id.*

147. *See id.* at 1067–72 (discussing § 512 limitations on liability without reference to the requirements of § 512(a)(4)).

148. 17 U.S.C. § 512(a)(4) (2000).

149. *See Ellison I*, 189 F. Supp. 2d at 1067–72 (discussing § 512 limitations on liability without addressing whether § 512(c) afforded a relevant safe harbor).

150. *See Ellison II*, 357 F.3d 1072, 1074, 1081 (9th Cir. 2004).

transient storage under § 512(a).¹⁵¹ Like the court below, the Ninth Circuit never discussed whether AOL made infringing content available to unanticipated recipients,¹⁵² and it also never addressed whether § 512(c) applied to temporary Usenet storage.

B. Courts in the Fourth Circuit Do Not Consider Netcom's Facts Relevant to DMCA Defenses and Find that Temporary Usenet Storage Constitutes § 512(c) Activity

Courts in the Fourth Circuit have concluded that § 512(c) governs limitations on liability for temporary Usenet storage and do not consider or apply *Netcom's* facts when deciding the merits of related defenses.¹⁵³ In *ALS Scan, Inc., v. RemarQ Communities, Inc.*,¹⁵⁴ the U.S. Court of Appeals for the Fourth Circuit recognized that § 512(c) conditionally limits ISP liability for temporary storage activities.¹⁵⁵ Plaintiff ALS Scan claimed that defendant ISP RemarQ had infringed its copyright interests by storing infringing material for at least eight days on newsgroups that RemarQ hosted.¹⁵⁶ RemarQ did not monitor, regulate, or censor the newsgroup content posted by subscribing members.¹⁵⁷ The district court relied on *Netcom* in concluding that RemarQ could not be held directly liable for passive acts.¹⁵⁸

On appeal, the Fourth Circuit concluded that § 512(c), rather than the principles articulated by the *Netcom* court, afforded RemarQ's only defense.¹⁵⁹ The court explained that, while it found the *Netcom* court's

151. *See id.* at 1081.

152. *See id.* at 1080–82.

153. *See, e.g., ALS Scan, Inc., v. RemarQ Cmty., Inc.*, 239 F.3d 619, 622–26 (4th Cir. 2001) (finding that “ultimate conclusion” on liability for temporary Usenet storage is controlled by Title II of DMCA and recognizing that § 512(c) “gives Internet service providers a safe harbor from liability for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”).

154. 239 F.3d 619 (4th Cir. 2001).

155. *See id.* at 623–26. When discussing the relevance of DMCA safe harbors, the *RemarQ* court concluded as follows:

The liability-limiting provision applicable here, 17 U.S.C. § 512(c), gives Internet service providers a safe harbor from liability for “infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”

Id. at 623 (quoting 17 U.S.C. § 512(c)(1)).

156. *See id.* at 620–21.

157. *Id.* at 620.

158. *See id.* at 621–22.

159. *See id.* at 622–23.

reasoning persuasive, the DMCA's express terms controlled the "ultimate conclusion" on ISP liability.¹⁶⁰ In the Fourth Circuit's view, *Netcom* remained relevant only to the limited extent that § 512's actual provisions specifically reflected the *Netcom* court's approach to limiting ISP liability.¹⁶¹ In ruling on RemarQ's eligibility for safe harbor, the court held: (1) that the court below failed to adequately consider RemarQ's claims under § 512(c);¹⁶² and (2) that RemarQ was not entitled to the DMCA safe harbor because ALS Scan had "substantially complied" with § 512(c)'s notice requirement, while RemarQ had not met its corresponding obligations.¹⁶³

The Fourth Circuit subsequently clarified its position on the continued relevance of *Netcom* in *CoStar Group, Inc. v. LoopNet, Inc.*,¹⁶⁴ where the court held that *Netcom* remains influential as common law precedent, but only outside the DMCA's four corners.¹⁶⁵ Like RemarQ, defendant ISP LoopNet passively hosted infringing material.¹⁶⁶ LoopNet customers were responsible for posting the infringing material, which LoopNet removed after receiving notice of the unlawful activity from plaintiff CoStar.¹⁶⁷ The district court below relied on *Netcom* in granting LoopNet "conclusive immunity" from direct infringement as a "passive provider of Internet services."¹⁶⁸

On appeal, CoStar argued that *Netcom* did not survive the DMCA's enactment.¹⁶⁹ The Fourth Circuit disagreed, holding that while DMCA safe harbors are distinguishable from common law standards,¹⁷⁰ *Netcom* remains influential on the threshold question of whether courts should hold passive actors strictly liable as *direct* infringers at common law.¹⁷¹

160. *See id.* at 622.

161. *See id.* ("Although we find the *Netcom* court reasoning more persuasive, the ultimate conclusion on this point is controlled by Congress' codification of the *Netcom* principles in Title II of the DMCA.").

162. *See id.* at 623–26.

163. *See id.* at 625–26.

164. 373 F.3d 544 (4th Cir. 2004).

165. *See id.* at 552 ("[I]n enacting the DMCA, Congress did not preempt the decision in *Netcom* nor foreclose the continuing development of liability through court decisions interpreting §§ 106 and 501 of the Copyright Act.").

166. *See id.* at 547.

167. *Id.*

168. *Id.* at 548 (internal quotation marks omitted).

169. *See id.* at 552.

170. *See id.* at 555.

171. *See id.*

The court recognized that DMCA limitations on liability are not exclusive and that ISPs accordingly remain “entitled to all other arguments” under the law, “whether by way of an affirmative defense or through an argument that conduct simply does not constitute a prima facie case of infringement under the Copyright Act.”¹⁷² The court also noted that while a rejected prior version of § 512 may have closely tracked the *Netcom* court’s reasoning, the enacted law differs in significant ways from the purportedly *Netcom*-derived version.¹⁷³

In discounting the relevance of *Netcom* within the DMCA’s four corners, the Fourth Circuit identified three significant differences between the rejected proposal and the enacted legislation.¹⁷⁴ First, the enacted legislation, unlike the rejected proposal, draws no distinction between direct and indirect liability.¹⁷⁵ Second, the rejected proposal did not afford a distinct safe harbor for ISPs that store infringing material at the direction of users, as expressly contemplated under § 512(c).¹⁷⁶ Third, the rejected proposal unconditionally shielded ISPs from direct liability for automatic processes, while the enacted law includes an entire layer of threshold conditions for safe harbor eligibility related to passive acts.¹⁷⁷ The court ultimately considered these differences sufficient to conclude that the *Netcom* court’s approach to ISP liability did not govern the meaning of § 512’s terms.¹⁷⁸ ISPs seeking relief under § 512 must therefore fulfill the conditions imposed by the statute once a prima facie case of infringement has been established.¹⁷⁹

III. THE DMCA’S LEGISLATIVE HISTORY PROVIDES MIXED GUIDANCE ON THE RELEVANCE OF *NETCOM*

The DMCA’s legislative history confirms that § 512’s terms changed significantly during the legislative process.¹⁸⁰ In fact, Congress

172. *See id.* at 552.

173. *See id.* at 554–55 (discussing at length substantial differences between proposed limitations on liability premised on *Netcom* and enacted limitations on liability).

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.* (concluding that Congress “intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection” and, as such, that DMCA “merely added a second step to assessing infringement liability” after ISP is found otherwise subject to liability).

179. *See id.* at 555.

180. Compare H.R. REP. NO. 105-551, pt. 1, at 7–8 (1998) (describing limitations on liability

considered and rejected a version of § 512 that, like the standards articulated in *Netcom*, would grant ISPs immunity from liability for direct infringement without foreclosing liability for vicarious or contributory infringement under similar factual circumstances.¹⁸¹ Not surprisingly, congressional intent to codify *Netcom* appears in references to the rejected prior version of § 512.¹⁸² However, legislative reports associated with the limitations on liability that Congress enacted evince no congressional intent to codify common law standards.¹⁸³ Rather, these records indicate that Congress decided to codify discrete new limitations on liability while leaving the common law, including the standards articulated in *Netcom*, in an “evolving state.”¹⁸⁴

A. *Legislative History Discussing a Rejected Version of § 512(a) Suggests that Congress Previously Considered Codifying the “Essence” of Netcom*

A committee report associated with a rejected version of § 512 indicates that Congress considered codifying the *Netcom* court’s approach to limiting ISP liability.¹⁸⁵ One passage provides that § 512

premised on *Netcom* that Congress considered and rejected), with 17 U.S.C. § 512(a)–(d) (2000) (codifying DMCA limitations on liability).

181. See S. REP. NO. 105-190, at 19 (1998) (“[T]he Committee decided to leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers.”); Eric Evans, Note, *From the Cluetrain to the Panopticon: ISP Activity Characterization and Control of Internet Communications*, 10 MICH. TELECOMM. & TECH. L. REV. 445, 475 (2004). Compare Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1366–77 (N.D. Cal. 1995) (considering common law theories of liability and related defenses discretely), and H.R. REP. NO. 105-551, pt. 1, at 7–8 (describing limitations on liability premised on *Netcom* that Congress considered and rejected), with 17 U.S.C. § 512(a)–(d) (codifying DMCA limitations on liability).

182. See H.R. REP. NO. 105-551, pt. 1, at 11, 24–25 (discussing *Netcom* in reference to proposed and subsequently rejected legislation).

183. See H.R. REP. NO. 105-551, pt. 2, at 49–66; S. REP. NO. 105-190, at 19–21 (discussing enacted DMCA limitations on liability without suggesting intent to codify *Netcom* or other common law principles).

184. A pertinent committee report states, in relevant part:

There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of “safe harbors,” for certain common activities of service providers.

S. REP. NO. 105-190, at 19.

185. See H.R. REP. NO. 105-551, pt. 1, at 11, 24–25 (discussing *Netcom* in reference to proposed and subsequently rejected legislation).

was previously intended to codify the “core of current case law” dealing with ISP liability and that the rejected legislation, unlike the law enacted, distinguished “between direct infringement and secondary liability, treating each separately.”¹⁸⁶ Another passage indicates that § 512 was intended to codify *Netcom* in referencing language considered but not included in the DMCA.¹⁸⁷ A frequently cited passage, which provides in relevant part that § 512(a) “essentially codifies the result” of *Netcom* insofar as *Netcom* ruled out direct liability for “passive, automatic acts,”¹⁸⁸ appears in a similarly outdated discussion of proposed limitations on liability that differ in many respects from the limitations on liability that Congress enacted.¹⁸⁹

At least one commentator reconciles the substantial differences between § 512’s enacted text and prior legislative intent to codify the essence of *Netcom* by concluding that § 512 does indeed reflect the essence of decisions like *Netcom*: namely, a desire to avoid applying the usual rules of strict liability to ISPs acting as passive conduits for infringing material.¹⁹⁰ In this commentator’s view, § 512’s complex terms confirm that, in the final analysis, “Congress neither ‘codified’ the *Netcom* decision nor gave the courts general instructions to satisfy that desire, however legitimate it may be.”¹⁹¹ As such, § 512’s limitations stand alone, and the common law applies only when § 512 “in all its detail and complexity” does not.¹⁹²

B. *Legislative History Discussing the Version of § 512 that Congress Enacted Suggests that Congress Rejected the Option of Codifying the Netcom Court’s Approach to Limiting ISP Liability*

Legislative history discussing the enacted version of § 512(a) evinces a strong congressional desire to leave the common law, including the principles articulated in *Netcom*, “in its evolving state” and to codify

186. *See id.* at 11.

187. *See id.* at 11, 24–26 (referring to proposed limitations on liability that closely followed *Netcom* court’s approach to liability as outlined at pp. 7–8 of same legislative committee report); *see also* Evans, *supra* note 181, at 475 (“Congress considered and rejected the option of simply adopting the *Netcom* rule shielding ISPs from direct liability for passive or automatic transmission of messages but leaving open the possibility of contributor or vicarious liability.”).

188. H.R. REP. NO. 105-551, pt. 1, at 11.

189. *See* Ellison I, 189 F. Supp. 2d 1051, 1069 (C.D. Cal. 2002).

190. *See* DRATLER, JR., *supra* note 6, § 6.01[3], at 6-40.1.

191. *See id.*

192. *See id.*

discrete statutory limitations on liability.¹⁹³ Relevant passages discuss the types of intermediate and transient storage that constitute § 512(a) activity in specific terms.¹⁹⁴ One such passage stipulates that § 512(a) applies only where: (1) transmissions are initiated by or at the direction of persons other than an ISP; (2) communications are carried out through an automatic technical process; (3) an ISP does not select the recipients of infringing material except as an automatic response to the request of another; (4) no copy of infringing material is maintained on the ISP's system in a manner ordinarily accessible to unanticipated recipients or for any longer than reasonably necessary; and (5) the content of infringing material is not modified by the ISP in the course of transmission.¹⁹⁵ Another passage confirms that "intermediate and transient" copies are copies "made and/or stored *in the course of a transmission*," not copies made or stored at points where transmissions are initiated or received.¹⁹⁶ Unlike the law enacted, the rejected proposal contained nothing comparable to § 512(a)'s "in course" storage requirement.¹⁹⁷ In short, Congress seemingly decided to codify discrete new limitations on liability while leaving the common law, including the principles articulated in *Netcom*, in an "evolving state."¹⁹⁸

IV. COURTS SHOULD NOT CONSIDER OR APPLY *NETCOM'S* FACTS AS AN EXAMPLE OF § 512(a) ACTIVITY

Courts should not consider or apply *Netcom's* facts as an example of "intermediate and transient" storage under § 512(a) for three reasons. First, *Netcom's* eleven-day storage of infringing material did not constitute intermediate and transient storage as subsequently defined by

193. See S. REP. NO. 105-190, at 19 (1998).

194. See H.R. REP. NO. 105-551, pt. 2, at 50-51 (1998).

195. See *id.* at 51.

196. See *id.* at 50-51 (emphasis added).

197. Compare H.R. REP. NO. 105-551, pt. 1, at 7-8 (describing limitations on liability premised on *Netcom* that Congress considered and rejected), with 17 U.S.C. § 512(a) (2000) (codifying DMCA limitation on liability for intermediate and transient storage).

198. A pertinent committee report states, in relevant part:

There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of "safe harbors," for certain common activities of service providers.

S. REP. NO. 105-190, at 19.

§ 512(a).¹⁹⁹ Second, courts that apply *Netcom*'s facts as an example of § 512(a) activity obviate § 512(c)'s notice-and-takedown provision.²⁰⁰ Third, the DMCA's text and legislative history confirm that Congress decided to create new limitations on liability that differ in significant respects from the *Netcom* court's treatment of ISP liability,²⁰¹ while leaving the common law in an evolving state.²⁰² ISPs that fail to qualify for safe harbor under § 512(a) may still assert other DMCA safe harbors and common law defenses.²⁰³

A. Storing Usenet Content for Subscriber Access Does Not Constitute Intermediate and Transient Storage as Defined Under § 512(a)

Courts should not apply *Netcom*'s facts as an example of intermediate and transient storage under § 512(a) because *Netcom*'s eleven-day storage of infringing material would not constitute § 512(a) activity. In fact, *Netcom* would fail to qualify for safe harbor under § 512(a) for three reasons. First, *Netcom* did not store infringing material "in the course of" transmission.²⁰⁴ Rather, *Netcom* stored infringing material for longer than necessary to facilitate transmission.²⁰⁵ Second, *Netcom* did not limit access to "anticipated recipients" of infringing material.²⁰⁶ Third, *Netcom* did not store infringing material for a "reasonably necessary" period of time.²⁰⁷

1. Netcom's Eleven-Day Retention of Infringing Usenet Content Would Fail § 512(a)'s "in the Course of" Requirement

Netcom's eleven-day storage of infringing material did not take place "in the course of" transmission as required by § 512(a). Section 512(a)

199. See *infra* Part IV.A.

200. See *infra* Part IV.B.

201. Compare *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1366–77 (N.D. Cal. 1995) (considering common law theories of liability and related defenses discretely), with 17 U.S.C. § 512(a)–(d) (enacting limitations on liability).

202. See S. REP. NO. 105-190, at 19 (1998) ("[T]he Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers.").

203. See 17 U.S.C. § 512.

204. See *infra* Part IV.A.1.

205. See *infra* Part IV.A.1.

206. See *infra* Part IV.A.2.

207. See *infra* Part IV.A.3.

applies solely to “intermediate and transient” storage that occurs “in the course of” transmitting, routing, or providing connections.²⁰⁸ As a threshold matter, ISPs that store content at points where transmissions are initiated or received for any length of time cannot qualify for safe harbor under § 512(a).²⁰⁹ Erlich’s infringing posting reached all Usenet servers worldwide in a matter of hours.²¹⁰ Netcom stored the infringing material for eleven days.²¹¹ For the bulk of that time, the infringing material was not en route to a particular destination.²¹² Rather, the material lingered on Netcom’s system where all of Netcom’s subscribers and other Usenet peers could access it.²¹³ As a result, the infringing content was not stored “in the course of” transmitting, routing, or providing connections as required by § 512(a).²¹⁴

2. *Netcom’s Eleven-Day Retention of Infringing Usenet Content Would Fail § 512(a)’s “Anticipated Recipients” Requirement*

Netcom would also fail to qualify for safe harbor under § 512(a) because Netcom did not limit access to “anticipated recipients” of infringing material temporarily stored on its system. Section 512(a) denies safe harbor protection to ISPs that make infringing material “accessible to anyone other than anticipated recipients.”²¹⁵ After Ehrlich’s local BBS server posted infringing material on Netcom’s Usenet server, Netcom’s entire customer base and all other Usenet peers, whether intended recipients of the posting or not, could access the infringing material.²¹⁶ Netcom’s eleven-day retention of infringing material²¹⁷ would therefore fail § 512(a)’s “anticipated recipients” requirement,²¹⁸ unless every member of Netcom’s subscriber base, in addition to all members of the Usenet community worldwide,²¹⁹ could be

208. See 17 U.S.C. § 512(a).

209. See H.R. REP. NO. 105-551, pt. 2, at 50–51 (1998).

210. See *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1367–68 (N.D. Cal. 1995).

211. *Id.* at 1367.

212. See *id.* at 1367–68.

213. See *id.*

214. See 17 U.S.C. § 512(a) (2000).

215. *Id.* § 512(a)(4).

216. See *Netcom*, 907 F. Supp. at 1367–68.

217. See *id.* at 1367.

218. See 17 U.S.C. § 512(a)(4).

219. See *Netcom*, 907 F. Supp. at 1367–68.

reasonably classified as intended recipients of infringing postings. This interpretation would contravene § 512(a)'s plain meaning by rendering the "anticipated recipients" requirement meaningless.

3. *Netcom's Eleven-Day Retention of Infringing Usenet Content Would Fail § 512(a)'s "Reasonably Necessary" Requirement*

Section 512(a) also denies safe harbor protection to ISPs that store copies of infringing material for longer than "reasonably necessary for the transmission, routing, or provision of connections."²²⁰ Netcom stored infringing material for eleven days.²²¹ Information posted by a Usenet subscriber reaches all Usenet servers worldwide in a matter of hours.²²² While some period of storage is presumably necessary for the passive transmission of material between Usenet servers, storing infringing postings for eleven days cannot be reasonably necessary when transmission time is measured in hours, not days.²²³ As such, Netcom stored infringing material for longer than "reasonably necessary," as contemplated under § 512(a).

B. *Courts that Consider and Apply Netcom's Eleven-Day Storage of Infringing Usenet Content as a Yardstick Under § 512(a) Obviate § 512(c)'s Notice-and-Takedown Provision*

Courts that apply *Netcom's* facts as an example of "intermediate and transient" storage under § 512(a)²²⁴ contravene § 512(c)'s notice-and-takedown provision.²²⁵ Congress did not include a notice-and-takedown requirement under § 512(a),²²⁶ presumably because ISPs that engage in properly classified § 512(a) activities do not retain infringing material long enough to make notice-and-takedown a practical solution.²²⁷ If *Netcom's* eleven-day storage of infringing content truly constituted

220. See 17 U.S.C. § 512(a)(4).

221. *Netcom*, 907 F. Supp. at 1367.

222. See *id.* at 1368.

223. See *id.* at 1367–68.

224. See *Ellison II*, 357 F.3d 1072, 1081 (9th Cir. 2004); *Ellison I*, 189 F. Supp. 2d 1051, 1070 (C.D. Cal. 2002).

225. See 17 U.S.C. § 512(c)(1)(C).

226. See *id.* § 512(a).

227. See H.R. REP. NO. 105-551, pt. 2, at 51 (1998) (confirming that intermediate and transient copies must be "made of material while it is *en route* to its destination" and not under any other circumstances) (emphasis added).

§ 512(a) activity, as suggested by courts in the Ninth Circuit,²²⁸ then every service provider that stores infringing Usenet content for eleven days, and possibly longer, could ignore § 512(c)'s notice-and-takedown provision.²²⁹ For example, if a copyright holder informed an ISP two days after a subscriber posted infringing content, the ISP could take no action for nine additional days without incurring any liability.²³⁰ Even the *Netcom* court recognized that failure to prevent damage to copyright interests upon notice of infringing activity could give rise to ISP liability for contributory infringement.²³¹ Although mindful of ISPs' exposure to liability, Congress was principally interested in promoting e-commerce by further safeguarding the rights of copyright holders,²³² and therefore could not have intended a contrary result.

A narrow reading of § 512(a) does not prevent ISPs from asserting other DMCA safe harbors or common law defenses.²³³ For example, ISPs may still argue that their temporary storage activities fall within the express provisions of § 512(c).²³⁴ The Fourth Circuit looked precisely to this safe harbor in assessing limitations on liability relevant to an ISP that stored infringing Usenet content for at least eight days.²³⁵ In doing so, the Fourth Circuit properly recognized that ISPs may store Usenet content at the direction of subscribers in compliance with § 512(c)'s strict notice-and-takedown provision without giving rise to liability.²³⁶ Consistent with the Fourth Circuit's position on common law rights,²³⁷

228. See *Ellison II*, 357 F.3d at 1081; *Ellison I*, 189 F. Supp. 2d at 1070.

229. See *Ellison I*, 189 F. Supp. 2d at 1070 (obviating need for ISP that stored infringing material for fourteen days to remove or limit access to infringing material by holding that ISP's activity constituted intermediate and transient storage under § 512(a), which does not contain notice-and-takedown provision); *Ellison II*, 357 F.3d at 1081 (agreeing with the *Ellison I* court's construction and application of § 512(a)).

230. See *Ellison I*, 189 F. Supp. 2d at 1070; *Ellison II*, 357 F.3d at 1081.

231. See *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1373–74 (N.D. Cal. 1995).

232. See H.R. REP. NO. 105-551, pt. 2, at 23 (recognizing two priorities underlying DMCA: "promoting the continued growth and development of electronic commerce; and protecting intellectual property rights").

233. See *supra* Part I.E.

234. See 17 U.S.C. § 512(c) (2000).

235. See *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 620, 622–26 (4th Cir. 2001).

236. See 17 U.S.C. § 512(c)(1)(A)(iii), (c)(1)(C); *ALS Scan*, 239 F.3d at 623 (recognizing § 512(c) "gives Internet service providers a safe harbor from liability for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider").

237. See *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004) ("We conclude

ISP defendants might also argue that their actions do not constitute a prima facie case of infringement as a threshold matter before ever reaching DMCA limitations on liability.²³⁸

C. Section 512's Text and Legislative History Confirm that Congress Rejected the Netcom Court's Approach to Limiting ISP Liability

Courts that apply *Netcom's* facts as an example of intermediate and transient storage under § 512(a)²³⁹ erroneously rely on outdated legislative records and ignore § 512(a)'s express terms. These courts characterize *Netcom's* influence on § 512(a) according to a proposed limitation on liability that maintained *Netcom's* distinction between direct, contributory, and vicarious infringement.²⁴⁰ The legislative report associated with that proposal provides in relevant part that § 512(a)'s "reasonably necessary" requirement was drawn from the facts of *Netcom* and intended to codify *Netcom's* "implicit" holding by limiting liability for temporary storage.²⁴¹ However, Congress rejected that proposal in favor of safe harbors that differ in significant respects from the *Netcom* court's holding.²⁴² Despite recognizing the problematic nature of their reliance on outdated legislative records,²⁴³ these courts have still erroneously concluded that § 512(a) codifies *Netcom's* facts.²⁴⁴

More directly relevant legislative reports confirm that Congress decided to leave the common law, including the principles articulated in

that in enacting the DMCA, Congress did not preempt the decision in *Netcom* nor foreclose the continuing development of liability through court decisions interpreting §§ 106 and 501 of the Copyright Act.").

238. *See id.* (recognizing that DMCA limitations on liability are not exclusive and that ISPs accordingly remain "entitled to all other arguments under the law—whether by way of an affirmative defense or through an argument that conduct simply does not constitute a prima facie case of infringement under the Copyright Act").

239. 17 U.S.C. § 512(a); *see* *Ellison II*, 357 F.3d 1072, 1081 (9th Cir. 2004); *Ellison I*, 189 F. Supp. 2d 1051, 1068–70 (C.D. Cal. 2002).

240. *See supra* notes 136–51 and accompanying text. *Compare* *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1366–77 (N.D. Cal. 1995) (considering common law theories of liability and related defenses discretely), *and* H.R. REP. NO. 105-551, pt. 1, at 7–8 (1998) (describing limitations on liability premised on *Netcom* that Congress considered and rejected, *with* 17 U.S.C. § 512(a)–(d) (enacting limitations on liability).

241. *See Ellison I*, 189 F. Supp. 2d at 1069; H.R. REP. NO. 105-551, pt. 1, at 24.

242. S. REP. NO. 105-190, at 19 (1998) ("[T]he Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers."); *see Ellison I*, 189 F. Supp. 2d at 1069.

243. *See Ellison I*, 189 F. Supp. 2d at 1069.

244. *See supra* Part II.A.

Netcom, in an “evolving state,” and that § 512 was designed to create discrete statutory limitations on liability for specific ISP activities.²⁴⁵ Not surprisingly, legislative records associated with § 512’s enacted terms evince no intent to codify the *Netcom* court’s approach to liability or other common law principles.²⁴⁶ While Congress may have indeed codified the “essence” of cases like *Netcom* by limiting ISP liability in certain contexts,²⁴⁷ Congress expressly considered and rejected the option of codifying common law standards²⁴⁸ in favor of appreciably different statutory limitations on liability.²⁴⁹

In sum, courts should not consider or apply *Netcom*’s facts as an example of intermediate and transient storage under § 512(a) for three reasons. First, *Netcom*’s eleven-day storage of infringing Usenet content would not constitute intermediate and transient storage as subsequently defined under § 512(a). Second, courts that apply *Netcom*’s facts as an example of § 512(a) activity obviate § 512(c)’s notice-and-takedown requirement. Third, Congress openly considered and rejected a proposal to codify the *Netcom* court’s approach to ISP liability. While *Netcom* may remain relevant as common law precedent outside of the DMCA’s four corners, *Netcom*’s facts are an improper yardstick for measuring intermediate and transient storage under § 512(a).

V. CONCLUSION

The DMCA’s text and legislative history preclude reliance on the facts of *Netcom* as an example of intermediate and transient storage under § 512(a). Congress considered and rejected proposed legislation that would have essentially codified the *Netcom* court’s approach to limiting ISP liability in favor of appreciably different safe harbors. Courts that apply *Netcom*’s eleven-day storage of infringing Usenet content as an example of § 512(a) activity erroneously rely on outdated

245. See S. REP. NO. 105-190, at 19 (1998).

246. See H.R. REP. NO. 105-551, pt. 2, at 49–66 (1998); S. REP. NO. 105-190, at 19–21 (discussing enacted limitations on liability without evincing any congressional intent to codify *Netcom*’s approach to ISP liability or other common law principles).

247. See DRATLER, JR., *supra* note 6, § 6.01[3], at 6-40.1.

248. S. REP. NO. 105-190, at 19.

249. Compare *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1366–77 (N.D. Cal. 1995) (considering common law theories of liability and related defenses discretely), and H.R. REP. NO. 105-551, pt. 1, at 7–8 (1998) (describing limitations on liability premised on *Netcom* that Congress considered and rejected), with 17 U.S.C. § 512(a)–(d) (2000) (enacting limitations on liability under § 512).

depictions of the rejected legislative proposal in defiance of § 512(a)'s plain meaning. Consequently, courts and litigants seeking predictable outcomes under § 512(a) must wait for a consistent standard of intermediate and transient storage to develop through interpretation of § 512(a)'s express terms, or petition Congress for a more definitive codified standard. ISP defendants might also seek timely relief under other DMCA safe harbors, such as § 512(c), or resort to common law defenses not codified within the DMCA's four corners.

