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COPYRIGHT INFRINGEMENT ON THE INTERNET: DETERMINING THE LIABILITY OF INTERNET SERVICE PROVIDERS

Jennifer L. Kostyu

A "digital revolution" has enveloped the United States and other countries around the world, bringing with it radical changes to modes of communication and potentially drastic alterations to existing legal principles.1 In less than twenty years, the number of computers linked to form the Internet grew exponentially from less than 300 in 1981 to current estimates of more than 9.4 million host computers.2 One commentator stated in 1997 that an estimated total of 21.3 million people are online users in the one hundred countries that have Internet access and the 154 countries that use electronic mail.3

1. See William J. Cook, Be Wary of Internet Casting Shadows on Copyright Holders, CHI. LAW., Apr. 1996, 60, 60 (quoting Vice President Gore's description of the Internet's enormous and speedy growth as "a revolution—the digital revolution"). "Revolution" is defined as "a complete or radical change of any kind" and "revolutionize" means "to make a complete and basic change in; alter drastically or radically." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1150 (3d ed. 1996).


3. See Vermut, supra note 2, at 275 (noting the pace at which the Internet has been developing since the early 1980s). Electronic mail (e-mail) is correspondence similar to a letter or memorandum sent via the Internet, or within an intra-organization network (an Intranet), between two or more people. See Ian C. Ballon, The Emerging Law of the Internet, in 18TH ANNUAL INSTITUTE ON COMPUTER LAW, at 1163, 1171 (PLI Pats.,
The Internet has become a medium for the worldwide distribution of information, inexpensively expanding the reach of businesses, multimedia, and individuals to global proportions. The distinct roles of printer, publisher, and distributor combine into a single entity due to advances in technology and communications. Authors or other creators of original works benefit from the Internet through the quick distribution of their works to consumers and additional markets, without any loss in the quality of the reproduction.

This informational freedom is not without drawbacks. Creators of original works face a greater risk of violation of their intellectual property rights because of the ease with which their copyrighted material may be used in an unauthorized manner compared to publishing through traditional mediums. Owners of copyrighted material have sought redress

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Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 507, 1998) (defining e-mail and other terms associated with the Internet). Those that are able to use e-mail may not have the ability to access information that is posted on web sites by others on the Internet, even though their correspondence may be sent through the interconnected network of computers that forms the Internet. See infra Part I.B.2 (describing the composition of the Internet).

4. See Levi, supra note 2, at 549-50 (discussing the quick development of, and the benefits reaped from, the wide reach of the Internet). Businesses, individuals, trade associations, government entities, educational institutions, and others use the Internet to disseminate information. See id.; see also Jose I. Rojas, Liability of ISPs, Content Providers and End-Users on the Internet, in 18TH ANNUAL INSTITUTE ON COMPUTER LAW, supra note 3, at 1009, 1011 (listing the types of content that have been made available through the Internet by written word, graphics, and sound).

5. See Joan Gilsdorf, Comment, Copyright Liability of On-Line Service Providers, 66 U. CIN. L. REV. 619, 619 (1998) (discussing the effect technology has had on the ability to disseminate information); see also INFORMATION INFRASTRUCTURE TASK FORCE, DEPT OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 7-8 (1995) [hereinafter WHITE PAPER] (discussing the integration of existing separate communications networks into one system); infra Part II.B (providing an in-depth discussion of the White Paper). Networks consisting of fiber optic cables, wires, switches, routers, microwave frequencies, and satellites link telephones, computers, and fax machines together to send and receive information. See WHITE PAPER, supra, at 7-8.


7. See Levi, supra note 2, at 550 (explaining potential problems copyright owners face by utilizing the Internet). "Unlike the traditional print medium, "high-speed, high-capacity electronic information systems . . . make it possible for an individual to deliver perfect copies of original works of authorship in digital form to scores of other individuals with just a few keystrokes." Patrick J. Glynn, Cyber Copyrights: Internet Provider Liability, 60 TEX. B. J. 634, 635 (1997) (describing the potential impact of copyright infringement through the use of electronic information systems such as the Internet).
for infringing acts occurring through the Internet from various entities. For example, copyright owners have pursued claims against Internet subscribers who misused the material, and the Internet Service Providers ("ISPs") that provided those subscribers with Internet access.

The Copyright Act of 1976 grants authors and creators the ability to copyright their material so that they may benefit economically by holding the exclusive right to sell their work. When the designated material is used by another without the permission of the copyright owner, the copyright owner may seek equitable and statutory remedies, including injunctive relief. Through the efforts of Congress and the courts, copyright law is fairly comprehensive in addressing traditional communica-


9. See Rojas, supra note 4, at 1016-17. There are three general types of ISPs: (1) On-line Service Providers (e.g., America On-Line, Prodigy, and Compuserve), which provide Internet access and their own proprietary or "closed system" on which subscribers can access special content-based data services; (2) Internet Access Providers (e.g., Netcom and UUNet), which provide Internet access only; and (3) Logical Access Providers, or search engines, (e.g., Lycos, Infoseek, Yahoo, and Altavista), which provide search services on the Internet. See id.

10. See Netcom, 907 F. Supp. at 1365; see also Rojas, supra note 4, at 1016 (reasoning that because of the available technology and nature of the Internet, users of infringing material do not have a substantial monetary investment in their actions, encouraging copyright owners to hold others with "deep pockets" accountable for the infringements).


In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429-30 n.10 (1984) (quoting H.R. REP. NO. 60-2222, at 7 (1909)).

13. See 17 U.S.C. §§ 502, 504. Courts have the power to grant temporary and final injunctions against the use of the copyrighted material to prevent or restrain the infringing behavior. See id. § 502(a). In addition, a court may award the copyright owner actual damages or statutory damages. See id. § 504(b), (c) (providing attorney fees and the profits received from the infringement). A copyright infringer also may be criminally prosecuted under 18 U.S.C. § 2319 if he or she willfully violated copyright law with the purpose of receiving commercial advantage or private financial gain. See 17 U.S.C. § 506(a).
The Internet, however, is a non-traditional communication medium only recently scrutinized for infringements of existing copyright law. Courts have attempted to fit the Internet into existing communications categories, often yielding inconsistent results. When addressing the liability of ISPs for infringements by their subscribers, courts have applied different standards of review and altered the traditional elements of liability. The confusion stemming from inconsistent application of theories of liability to infringement on the Internet leaves copyright owners, Internet users, and ISPs with little direction as to what behavior is actionable under existing copyright law.

The parties involved in this controversy desired a resolution in order to conduct their personal and corporate business in the manner that would

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14. See generally White Paper, supra note 5, at 23-45 (discussing the subject matter and scope of protection provided by existing copyright laws). The Copyright Act specifically enumerates eight categories of protected subject matter: "(1) literary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." 17 U.S.C. § 102(a). Congress intended section 102 to be illustrative and not inclusive, "set[ting] out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories." White Paper, supra note 5, at 42 n.123 (quoting H. REP. NO. 94-1476, at 53, reprinted in 1976 U.S.C.C.A.N. 5659, 5666).


16. See Shulman, supra note 6, at 560. See, e.g., Religious Tech. Ctr. v. Netcom Online Communication Servs., Inc., 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995) (explaining that an ISP is not completely analogous to a common carrier because ISPs provide more services to their subscribers than common carriers do to their users; and, ISPs are not natural monopolies required to treat all customers indifferently as common carriers do); Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991) (holding that an ISP was not liable for defamatory statements posted through its network when the ISP did not have knowledge of the content and was merely a distributor of material); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794, 1795, 1797, 1799 (N.Y. Sup. Ct. 1995) (finding that an ISP was a publisher, and therefore liable for defamatory statements posted by third parties on the ISP's network).

17. Compare Netcom, 907 F. Supp. at 1369, 1372-73 (refusing to apply a strict liability standard to an ISP when one of its subscribers was directly liable for copyright infringement), with Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1556, 1559 (M.D. Fla. 1993) (applying a strict liability standard in order to find a bulletin board system operator directly liable for copyright violations of a subscriber).

18. See Netcom, 907 F. Supp. at 1370 (adding the element of volition or causation to the traditional strict liability standard of copyright law).

19. See Shulman, supra note 6, at 560.
best protect their interests. The federal government accepted the challenge of mediating between the two conflicting interests at the heart of this debate: the protection of the exclusive rights of copyright owners under existing copyright law, and the free flow of information that makes the Internet such a valuable tool. Unless these interests are properly balanced, the results could have detrimental consequences on copyright owners and the Internet. For instance, if copyright owners’ material is consistently infringed upon, they could refuse to make original works available on-line. On the other hand, imposing liability on ISPs for the behavior of their subscribers may hinder the full potential of the Internet as a resource.

To date, efforts taken by the three branches of the federal government include: President Clinton’s creation of a task force investigating and recommending a resolution to this conflict; judicial weighing of these competing interests in the course of litigation; and congressional proposals to amend existing copyright law. Congress attempted to clarify an ISP’s copyright liability in each legislative proposal, and eventually passed the Online Copyright Infringement Liability Limitation Act (“OCILLA” or the “Act”).

This Comment examines the developing law governing copyright infringement liability of ISPs. First, Part I explains the current status of

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20. See Levi, supra note 2, at 550 (arguing that the high risk of having copyrighted material used without authorization may inhibit authors from using the Internet, which will inevitably decrease the value and continued growth of the Internet); infra Part II (outlining the actions taken by the judiciary, President Clinton, and the legislature to address ISP liability for copyright infringement).

21. See Levi, supra note 2, at 550; ITAA DOCUMENT, supra note 15, at *1 (reflecting on the possible consequences on the development of the Internet if copyright owners are not given adequate protection for their material).

22. See Levi, supra note 2, at 549-50 (cautioning authors about the risk of copyright infringement liability).

23. See ITAA DOCUMENT, supra note 15, at *1 (stating that “copyright protection measures which result in singling out Internet access providers, and legislative proposals which attach liability unfairly to access providers, will undoubtedly undermine the delivery infrastructure, forcing these companies from the marketplace and making access to the Internet more difficult”).

24. See infra Part II (discussing the government’s actions in the context of copyright infringement on the Internet).

25. See S. 2037, 105th Cong. §§ 201-05 (1998) (proposing the Internet Copyright Infringement Liability Clarification Act of 1998); H.R. 2281, 105th Cong. (1997) (proposing the Digital Millennium Copyright Act and the Online Copyright Infringement Liability Limitation Act); see also infra Parts II.C and IV.B (explaining the provisions and potential effectiveness of the new legislation). Generally, the amendments provide for the exemption of ISPs from the traditional strict liability standard that governs copyright infringement. ISPs are not exempt, however, from all liability which is determined on a case-by-case basis. See generally infra Part II.C (discussing the recently enacted Online Copyright Infringement Liability Limitation Act).
Copyright law and the Internet. Part II then discusses the steps the various governmental entities have taken to resolve the issue of ISP liability. Part III in turn analyzes whether the efforts by the government have been successful. Finally, Part IV critiques the legislative efforts by Congress and concludes that the OCILLA effectively clarifies how copyright laws should apply to ISPs.

I. A GENERAL OVERVIEW OF COPYRIGHT LAW AND THE INTERNET

A. The Current Status of Copyright Law

A comprehensive understanding of ISP liability requires familiarity with some of the complexities of copyright law. In the United States, copyright law began with the Framers of the Constitution, who intended the granting of copyrights to promote free expression. Congress took the power granted by the Constitution, and with the enactment of the first copyright law in 1790, started determining the boundaries of copyright protection. Copyright law, which falls strictly within the province of the federal government, covers “original works of authorship fixed in any tangible medium of expression, now known or later developed, from

26. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 539, 558 (1985) (noting, in a suit regarding the unauthorized publication of quotes by a magazine from President Ford’s memoirs, that the framers provided copyright owners with copyright and the first right of publication to serve as “the engine of free expression”); see also Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (stating that even though economic gain in return for labor is the immediate aim of copyright law, the ultimate goal is to “stimulate artistic creativity for the general public good”). The ability to copyright material creates a right to market individual expression, which in turn creates a private economic motivation to conceive and disseminate new ideas publicly. See id. The ability to copyright original works is also of significant value to the economy. See Glynn, supra note 7, at 635 (discussing the findings of the White Paper). Glynn notes that “the core copyright industries grew twice as fast as the U.S. economy as a whole between 1991 and 1993 and generated an employment growth rate four times that of the economy as a whole between 1988 and 1993.” Id.

27. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

28. See Shulman, supra note 6, at 562 (summarizing the development of intellectual property protection, and copyright law in particular); see also Sony Corp. of Am. v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984) (noting that the Constitution gives Congress the task of defining the scope of copyright protection and balancing it with the interest of public access).

In 1787, the delegates to the Constitutional Convention unanimously agreed to grant to Congress the power enumerated in Article I of the Constitution, and ratified the clause in its present form in 1788. See WHITE PAPER, supra note 5, at 19 n.31 (recounting the legislative history of the enactment of Article I of the U.S. Constitution). Two years later, George Washington signed the first copyright law. See id.
which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.  

Presently, there are three types of liability for copyright infringement: direct liability, vicarious liability, and contributory liability.

1. Direct Copyright Liability

The Copyright Act of 1976 grants copyright owners a limited period of time to exercise five exclusive ownership rights regarding original material. These rights consist of the exclusive right to reproduce, create derivative works, distribute, display, and publicly perform the copyrighted material. Invasion of these rights constitutes direct infringement which may be claimed regardless of the lack of intent or knowledge of the infringing party. This means that innocent or accidental infringement may constitute an actionable offense. Establishing a prima facie case of direct copyright infringement requires proof of (1) ownership by the plaintiff of a valid copyright in the infringed work, and (2) the defen-

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29. 17 U.S.C. § 102(a) (1994). The copyright laws do not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” Id. § 102(b).


32. See id. § 106.

33. See id. § 501; see also Shulman, supra note 6, at 565 (discussing the legal elements of a direct infringement cause of action). Congress provided a description of non-infringing uses of copyrighted material and statutory limitations as listed in 17 U.S.C. §§ 107-18. The provisions limiting a copyright owner’s exclusive rights include general “fair use” of the material. See id. § 107. Specific exemptions include: use of the material by libraries, use of the material before its first commercial sale, use of the material by nonprofit institutions in teaching activities, and the retransmission of the material by cable and satellite operators if a statutory licensing fee is paid. See id. § 107-08.

34. See Shulman, supra note 6, at 565.

35. See id. (citing Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993)). It is implicit in the copyright ownership requirement that the material is eligible for copyright protection. See id. In other words, the material must be original, creative, and fixed in a tangible medium of expression to qualify for protection. See WHITE PAPER, supra note 5, at 24 (examining how courts have derived these requirements from the Copyright Act). Originality arises from the independent creation of a work, and only needs to demonstrate a “modicum” of creativity. See id. at 24-25. Copyright protection attaches when the material is “fixed,” or “when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101 (1994).
2. Vicarious Copyright Liability

The second type of copyright infringement claim exists under the doctrine of vicarious liability: culpability arises from the benefits garnered from infringement and the ability to control the infringing activity, even though a third party actually copied the material. While the Copyright Act specifically prohibits direct infringement, the judicial imposition of vicarious liability has its genesis in the common law theory of respondeat superior. A finding of vicarious liability requires proof that the defendant had the right and ability to control the acts of the primary infringer and received a direct financial benefit from the infringement. Courts

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36. See Shulman, supra note 6, at 565 (citing Playboy, 839 F. Supp. at 1556 (holding that a bulletin board operator was directly liable for the infringing conduct of a subscriber)). If direct proof of copying is not available, the plaintiff may offer indirect proof by showing that the defendant had access to the copyrighted material, and that the defendant's work was materially similar to that of the plaintiff's. See Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1044 n.2 (9th Cir. 1994) (stating that in order to prove copying of a screenplay, the plaintiff had to show that the alleged infringer, the defendant, had access to the screenplay and that the works were substantially similar).

37. See 17 U.S.C. §§ 502-05. Remedies available to the copyright owner include an injunction to prevent further violation, see id. § 502, impoundment and destruction of all infringing works, see id. § 503, statutory damages, actual damages and profits, see id. § 504, and costs and attorneys' fees, see id. § 505.

38. See, e.g., Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 308-09 (2d Cir. 1963) (concluding that a store owner who retained supervision of and received a share of the profits received from the sale of bootleg records was liable for copyright infringement).

39. See Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261-62 (9th Cir. 1996) (explaining the development of vicarious copyright liability in the courts); see also Shapiro, Bernstein & Co., 316 F.2d at 307 (applying the theory of respondeat superior to vicarious copyright infringement); Polygam Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328 (D. Mass. 1994) (citing factors courts rely on in determining whether a defendant satisfies the “control” prong of the test for vicarious liability); Artists Music, Inc. v. Reed Publ'g Inc., 31 U.S.P.Q.2d (BNA) 1623, 1626-27 (S.D.N.Y. 1994) (finding no vicarious liability where the defendant did not financially benefit from the infringement or have control of the actions of the infringer).

The maxim “respondeat superior,” literally defined as “let the master answer,” means that the master, employer, or principal is liable for the actions of his or her servant, employee, or agent done within the scope of employment and authority. See BLACK’S LAW DICTIONARY 1311-12 (6th ed. 1990). For a more in-depth discussion regarding vicarious liability, see JOHN G. FLEMING, THE LAW OF TORTS Ch. 17 (4th ed. 1971).

40. See Frank, supra note 30 at 784 (citing the elements of vicarious liability found in Shapiro, Bernstein & Co.); see, e.g., Shapiro, Bernstein & Co., 316 F.2d at 307-08 (allowing the imposition of vicarious liability on the employer for the acts of the employee after
often consider the ability of the defendant to police the use of infringing material in finding vicarious liability. 41

3. Contributory Copyright Liability

The third type of claim for copyright infringement may be brought under the doctrine of contributory liability. 42 Under contributory liability, a defendant may be held accountable for the infringing behavior of a third party when the defendant did not directly engage in the copying of copyrighted material. 43 Like vicarious liability, the doctrine of contributory liability is not expressly addressed in the Copyright Act, and it originated from common law torts doctrine. 44 Courts have imposed liability for contributory copyright infringement when the defendant "induces, causes or materially contributes to the infringing conduct of another," 45 and knows or should have known of the infringing activity. 46 Participation by the alleged contributory infringer may include personal conduct, providing

41. See Frank, supra note 30, at 785 (noting that ISPs have tried to analogize their situation to the cases concerning landlords, inferring that they too have little control over the users of their facilities). Decisions in many of the cases regarding copyright infringement revolve around landlord/tenant relationships and dance hall owner/performer relationships. See id. at 784-85. Landlords are usually not held liable if the landlord had no notice of the impending infringement, rented the space at a fixed rate (thereby not directly profiting from the infringement), and did not supervise the tenant in any way. See id. Conversely, dance hall operators and other establishments offering entertainment are frequently found vicariously liable because they can police the material to be performed and their profits directly correlate to the performance. See id. at 785. For example, in Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929), the Court of Appeals for the Seventh Circuit upheld a monetary award consisting of damages and attorneys' fees against the owner of a dance hall that did not direct or consent to the selection of music played by the orchestra hired by the dance hall.

42. See Frank, supra note 30, at 783 (listing the theories of liability for copyright infringement).


46. See Sony, 464 U.S. at 435 (explaining that "contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another").
materials, or supplying equipment that aids in infringement.\(^{47}\) In *Sony Corp. of America v. Universal City Studios, Inc.*,\(^{48}\) the Supreme Court held that the scope of contributory liability did not automatically include sellers of copying equipment and like material capable of "substantial noninfringing uses."\(^{49}\) The Court reasoned that holding duplication material and equipment manufacturers contributorily liable for the acts of the users would "block the wheels of commerce."\(^{50}\)

**B. Tracing the Development of the Internet**

1. **The Historical Origins of the Internet**

The Internet was not originally intended to be a commercial communications tool for the general public. It was launched in 1969 under the name ARPANET (Advanced Research Project Agency Network), an international experiment consisting of interconnected computers and networks, designed to share defense-related research and data between the military, defense contractors, and universities.\(^{51}\) After the 1962 Cuban missile crisis, the once remote possibility of a future nuclear attack loomed closer and government officials realized that the centralized U.S. telecommunications system would not withstand such an attack.\(^{52}\) As a result, the government began developing a decentralized and self-maintained network which theoretically could not be destroyed in a nuclear assault;\(^{53}\) consequently, centralized control of the network was...
never implemented.\textsuperscript{54}

At its inception, because ARPANET consisted of only four linked supercomputers, it was too minute of a network to be used effectively for military communications.\textsuperscript{55} To increase the size and use of ARPANET, the government gave researchers and private companies more opportunity to use it, and personal messages became the substance of network traffic.\textsuperscript{56} The arrival of inexpensive personal computers and networking devices in the 1980s brought a flood of new users into the network, effectively halting the use of ARPANET solely for government purposes.\textsuperscript{57} While ARPANET officially dissolved in 1990, what had become the Internet kept expanding, and continues to do so today.\textsuperscript{58}

2. The Internet as It Presently Exists

The Internet expanded from a few supercomputers in 1969 to an estimated forty million Internet users in 1996.\textsuperscript{59} By 1999, that number was expected to grow to 200 million users, sixty percent of whom live in the United States.\textsuperscript{60} Approximately 100,000 new messages are posted on the Internet every day.\textsuperscript{61} Contrary to popular belief, the Internet is not one

\textsuperscript{54} See Gilsdorf, supra note 5, at 624 (stating that one consequence of having no centralized control of the Internet is that any network has the ability to be a part of the Internet).

\textsuperscript{55} See id. at 624 n.45. Even though the Internet had a modest beginning, it has grown to the point that the overall structure and operation of the Internet is not affected by the presence or absence of any one device, material, or entity. See Vermut, supra note 2, at 281 (referring to the lack of dependency on any one computer or network as "one of the most important concepts" of the Internet).

\textsuperscript{56} See Gilsdorf, supra note 5, at 624-25 n.45 (explaining that the private sector's high use of the Internet contributed to the government's discontinuing its use of the Internet).

\textsuperscript{57} See id.

\textsuperscript{58} See id.; see generally ITAA DOCUMENT, supra note 15, (reviewing the evolution and status of the Internet from a historical, legislative, and technical perspective).


\textsuperscript{60} See Reno II, 521 U.S. at 850. Access to the Internet may be achieved in many ways. See Reno I, 929 F. Supp. at 832. One may use a computer that is physically and directly connected to a computer network that is linked to the Internet, or one can use a modem to dial over telephone lines into a network that is linked to the Internet. See id. This physical access is provided by a variety of sources including educational institutions, such as colleges and universities; businesses; "free-nets," which are networks established by individual communities; libraries; Internet cafés; and ISPs. See id. at 832-34.

\textsuperscript{61} See Reno II, 521 U.S. at 851. Once the Internet is accessed, there are six general methods of communication. See Reno I, 929 F. Supp. at 834-36. One method is one-to-one messaging, such as e-mail where a message is sent to the address of another. See id. at
computer system on which all of the available information is kept and accessed universally—it is many individual networks interconnected like a web. In order to access the Internet, a user must travel through one of these networks (via ISP), after which the user can retrieve information stored on other networks connected to the Internet.

The Internet is a very attractive communications and information tool. The Internet's attractiveness flows from four factors: the inexpensiveness of Internet service, the technological ease with which one may locate information on the Internet, the high volume of information and services available on the Internet, and the ability of individuals to post in-

834. A second method is one-to-many messaging, such as "listservs" which is the electronic equivalent of subscribing to a mailing list. See id. A third method consists of distributed message databases, which allow users to access various databases on particular subjects without having to subscribe to a list. See id. at 834-35. A fourth method, termed real time communication, transmits dialog immediately back and forth between users like a normal conversation. See id. at 835. A fifth option is real time remote computer utilization, which gives access to the computer databases at a specific facility, such as a library's on-line card catalog program. See id. Lastly, users can communicate by remote information retrieval, where users search for information on the Internet and then retrieve that material. See id.

62. See Reno II, 521 U.S. at 849 (describing the Internet as an "international network of interconnected computers"). All information posted on the Internet is identified by a unique address, or Uniform Resource Locator (URL). See Levi, supra note 2, at 560 & n.30 (explaining how a subscriber traverses and finds information on the Internet). Each document resides on a specific host computer, whether that computer belongs to an ISP or an individual with the necessary software. See id. at 549-50 & n.1. One well-known Internet service, the World Wide Web (WWW), is not a database of information but a service based on a basic type of language (or a hypertext-based information protocol) that allows Internet users to access the information on the Internet. See Daniel R. Cahoy, Comment, New Legislation Regarding On-Line Service Provider Liability for Copyright Infringement: A Solution in Search of a Problem? 38 IDEA 335, 336 n.4 (1998) (describing the World Wide Web and a Web page as methods of grouping available information on the Internet).

63. See generally Reno II, 521 U.S. at 850-53 (naming many ways an Internet user can access information on the Internet). Access to the Internet may be achieved in many ways, but all involve going through a network that is permanently and directly linked to the Internet, usually an ISP. See id.; see also supra note 9 (listing the types of ISPs).

64. See Anderson, supra note 2, at 9, 12 (discussing the Internet's economic incentives); cf. Cahoy, supra note 62, at 348-49 & n.80 (noting that many ISPs now charge subscribers fixed rates instead of a certain fee calculated by the time spent on the Internet).

65. See Anderson, supra note 2, at 4 (arguing that the continual development of software and equipment makes the Internet increasingly easier to use). Cf. Wendy M. Melone, Note, Contributory Liability for Access Providers: Solving the Conundrum Digitalization Has Placed on Copyright Laws, 49 FED. COMM. L.J. 491, 493 n.9 (1997) (noting that digitalization of data has made the handling of information develop in new and different ways).

66. See Reno II, 521 U.S. at 851 (describing different communication methods on the Internet); see also Shulman, supra note 6, at 558 n.16 (describing how Internet users access and download information from a BBS).
formation on the Internet without significant difficulties.\textsuperscript{67} When amending the Communications Act of 1934, Congress found that the Internet provided diverse educational, informational, cultural, and political benefits to society.\textsuperscript{68} At the same time, these attributes stretch the territorial boundaries of copyright law.\textsuperscript{69}

67. See Shulman, \textit{supra} note 6, at 557 n.10. Web pages, which are single locations on the WWW with given addresses, can be established by anyone with a personal computer, appropriate software, and a modem. \textit{See id.} All types of material, including text, pictures, and audio recordings are easily placed on a web page for minimal production and advertising costs. \textit{See id.}

68. See 47 U.S.C. § 230(a) (1994). The findings by Congress that justify protective action are as follows:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops. (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity. (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

\textit{Id.}

69. See Gilsdorf, \textit{supra} note 5, at 631-36 (comparing the view points of ISPs and copyright owners as to the amount of liability that should be imposed on ISPs for copyright infringement). Because the applicability of existing copyright laws to ISPs is not clear, ISPs have maintained that they may be exempt from liability under section 111(a)(3) of Copyright Act. \textit{See id.} at 632. This passive-carrier exemption states:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if . . . the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others.


Copyright owners argue that ISPs are not passive carriers of information and are in a position to control copyright infringement because ISPs can implement guidelines and warnings about infringement, use tools to monitor their networks, and swiftly stop the infringing activities on their networks. \textit{See Gilsdorf, supra} note 5, at 634-35 (comparing the arguments of copyright owners to those of ISPs).
II. GOVERNMENT APPROACHES TO THE LIABILITY OF INTERNET SERVICE PROVIDERS FOR COPYRIGHT INFRINGEMENT

A. The Courts' Response to Claims of Copyright Infringement

The judiciary faced the challenge of interpreting existing statutory and common law liability in the context of claims of copyright infringement over the Internet. The Supreme Court has not addressed this issue, and thus, the only available precedent is lower court decisions which vary by jurisdiction.

1. Playboy Enterprises, Inc. v. Frena

Playboy Enterprises, Inc. v. Frena is an early decision that offers some direction regarding copyright infringement liability of ISPs. In Playboy, the United States District Court for the Middle District of Florida found a bulletin board system ("BBS") operator directly liable for the copyright infringement of a subscriber. A subscriber to the BBS uploaded (i.e., created copies of) photographs from Playboy magazines and posted these images on the bulletin board. The BBS operator, Frena, only became aware of the use of copyrighted pictures when he received a summons from Playboy. Subsequently, he removed the photographs from the bulletin board and instituted a monitoring process to prevent similar pictures from being uploaded.

The court found that Frena violated Playboy's exclusive right to display, and distribute publicly, its copyrighted material by furnishing the bulletin board where the material was posted. The court held that although Frena did not actually copy or upload the photographs on to the

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70. 839 F. Supp. 1552 (M.D. Fla. 1993).
71. See Marilyn C. Maloney, Intellectual Property in Cyberspace, 53 BUS. LAW. 225, 236 (1997) (identifying Playboy Enterprises, Inc. v. Frena as one of the initial decisions regarding the liability of ISPs for copyright infringement).
72. See Cahoy, supra note 62, at 336 nn.6-7 (describing what constitutes a BBS and how one works). A BBS is an electronic forum for message and file exchange, which may be maintained by an ISP through its own computer system, or an individual that accesses the Internet through the services of an ISP. See id.
73. See Playboy, 839 F. Supp. at 1559.
74. See id. at 1554.
75. See id.
76. See id. The court's decision did not specify whether Frena instituted a technological monitoring process or if he checked the bulletin board himself at various intervals. See id.
77. See id. at 1556 (using strict liability to demonstrate Frena's violation of copyright law).
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bulletin board,\textsuperscript{78} his lack of awareness and intent regarding the posting of
the photographs was irrelevant in a claim for direct copyright infringe-
ment.\textsuperscript{79} Despite \textit{Playboy}, other courts have arrived at different conclu-
sions with regard to an ISP's liability for copyright infringement.

2. Sega Enterprises Ltd. v. Maphia

Shortly after the decision in \textit{Playboy}, the United States District Court
for the Northern District of California faced a similar case in \textit{Sega Enter-
prises Ltd. v. Maphia}.\textsuperscript{80} In this case, a BBS operator solicited BBS sub-
scribers to upload copies of Sega video games, and then allowed other
subscribers to download the games to their personal computers for a
fee.\textsuperscript{81} The case came before the district court in 1994 when Sega learned
of the infringing acts.\textsuperscript{82} In this first proceeding, the court held that Sega
established a prima facie case of direct and contributory copyright in-
fringement, and issued a temporary restraining order and a preliminary
injunction against the BBS operator.\textsuperscript{83} According to the court, the opera-
tor's lack of knowledge of the specific times when the games were up-
loaded and downloaded was irrelevant given the operator's knowledge of
the games and his direct solicitation of subscribers.\textsuperscript{84}

When the case appeared before the district court three years later, al-
though the court did not hold the BBS operator liable for direct copy-
right infringement,\textsuperscript{85} the court granted summary judgment for contribu-
tory infringement and issued a permanent injunction against the

\textsuperscript{78} See id. at 1556.

\textsuperscript{79} See id. at 1559 (supporting a finding of direct copyright infringement). \textit{Playboy}
legally owned the copyrights to the photographs, and they were displayed on Frena's bul-
letin board; innocence would only be relevant to the amount of monetary damages to be
awarded. See id.; see also Rojas, supra note 4, at 1020-21 (analyzing the holding of \textit{Play-
boy} with regard to an ISP's liability for copyright infringement); supra Part I.A (discussing
the elements of copyright infringement).

\textsuperscript{80} 948 F. Supp. 923 (N.D. Cal. 1996) [hereinafter Sega II].

\textsuperscript{81} See id. at 928-29. The BBS operator sold video game copiers to subscribers that
downloaded the Sega video games, which were necessary to operate the games. See id. at
929. The operator also knew that those who offered the games for downloading accepted
"donations" for free downloads. See id.

\textsuperscript{82} See Sega Enters. Ltd. v. Maphia, 857 F. Supp. 679 (N.D. Cal. 1994) [hereinafter
Sega I].

\textsuperscript{83} See id. at 687, 689.

\textsuperscript{84} See id. at 686-87 (finding the BBS operators liable for contributory copyright in-
fringement).

\textsuperscript{85} See Sega II, 948 F. Supp. at 931-32. The court's holding that the operator was not
liable for direct infringement was based on the decision in \textit{Religious Technology Center v. Net-
com On-Line Communication Services, Inc.}, discussed infra at Part II.A.3. See id. at
932.
The court found the operator contributorily liable, primarily because the operator did not deny he had knowledge of the infringing conduct, and had actively participated in it. As a result, the court only examined how substantial the operator's contribution was to the infringement.


The most encompassing case to date covering the potential copyright infringement liability of ISPs is *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* The action arose from a series of postings that Denis Erlich, a former minister of the Church of Scientology, made criticizing the church, and allegedly using materials copyrighted by the church. Representatives of the church, the Religious Technology Center ("RTC"), requested that Erlich, the operator of the BBS, and Netcom, the ISP through which the BBS gained access to the Internet, remove the infringing material. The requests were denied and RTC filed an action against Erlich, the BBS operator, and Netcom for copyright infringement. The United States District Court for the Northern District of California concurrently ruled on Netcom's motion for summary judgment, the BBS operator's motion for judgment on the pleadings, and RTC's motion for a preliminary injunction.

86. See id. at 941 (granting Sega's motion for summary judgement by holding the BBS operator contributorily liable for copyright infringement).

87. See id. at 933.

88. See id. Contributory infringement was established because the BBS subscribers directly infringed on Sega's copyright, and the operator had induced, caused, and materially contributed to the infringing action. Id. at 932-33.


90. See Netcom, 907 F. Supp. at 1365-66.

91. See id. at 1366.

92. See id. The BBS operator asked RTC to prove that the church owned the copyrights for the material in question, and RTC dismissed this as an unreasonable request. See id. Netcom refused to remove the material, claiming it would require termination of all other uses of the BBS service. See id.; see also Maloney, supra note 71, at 236-37 (commenting on the Netcom decision).

93. See Netcom, 907 F. Supp. at 1366. The Church also claimed Erlich was liable for misappropriation of trade secrets, but did not make this claim against the other parties. See id. at 1366 n.5. The district court heard preliminary motions, after which Netcom and RTC settled out of court. See Frank, supra note 30, at 787-88 (describing the events that occurred after the court ruled on preliminary motions).

94. See Netcom, 907 F. Supp. at 1366. The court partially granted and partially denied Netcom's summary judgment motion and a motion by the BBS operator. See id. The
RTC alleged that Netcom and the BBS operator were liable for direct, contributory, and vicarious copyright infringement. The court held that Netcom could not be a direct copyright infringer as a matter of law, and distinguished the holding of the district court in *Playboy*. The court stated that storage and transmission of information is a necessary action for a working network system and the incidental copying that occurs automatically and uniformly in that process does not constitute "copying" as defined by statute. The court also reasoned that the imposition of strict liability on an ISP would have unreasonable consequences, resulting in liability of every server that transmits infringing material when the ISP is no more than a conduit for the information. The court stated that there should be "some element of volition or causation" by the ISP, an element in which Netcom's system lacked because a third party had used the network to create a copy of the church's material.

The court also dismissed RTC's claim that Netcom was vicariously liable for copyright infringement. The court applied the two-prong test advocated in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, questioning whether Netcom had the right and ability to control the conduct of its subscribers, and whether Netcom received direct financial benefit from the infringing activities. The *Netcom* court held that questions of tech-

court denied RTC's motion for a preliminary injunction. See id.

95. See id. at 1367. The distinction between a BBS operator and an ISP is insignificant for the purpose of this paper. Both entities provide a form of Internet service, and a BBS must go through an ISP for access to the Internet. Any discussion of the liability of ISPs therefore includes BBS services and operators, even if not directly mentioned.

96. See Netcom, 907 F. Supp. at 1372-73.

97. See id. at 1370. The court indicated that the *Playboy* court only looked at the liability for infringing on the exclusive right to publicly distribute copies, regardless of whether Frena made the copies of the infringing material. See id.

98. See id. at 1368-69. The court likened the position of an ISP as a copier to that of a copy machine owner who makes the machine available to the public. See id. at 1369. The court did not doubt that copies of the material were created by Netcom. See id. at 1368. The court, deciding whether copies were made, relied on *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993), which held that copying occurs when data is loaded from a storage service into a computer's Random Access Memory (RAM), where it stays long enough for it to be discerned by the computer. See Netcom, 907 F. Supp. at 1368. The court then distinguished *MAI Systems* on the ground that Netcom's copying was incidental instead of being affirmatively initiated by the ISP. See id.


100. Id. at 1370.

101. See id. at 1377.

102. 316 F.2d 304, 307 (2d Cir. 1963) (stating that a defendant is liable if it can control the actions of the infringer and benefits financially from the infringement).

103. See Netcom, 907 F. Supp. at 1375; see also supra note 40 and accompanying text (discussing the two-prong test for vicarious liability for copyright infringement). Knowledge is not an element of vicarious copyright infringement. See Netcom, 907 F. Supp. at
nological and industry protocols created concern about an ISP's right and ability to control a subscriber's conduct. With regard to receiving a direct financial benefit, the court determined that Netcom did not receive extra monies from the infringing activities because Netcom provided service on a fixed fee, unrelated to content accessed or time spent on the Internet.

Although the court held that Netcom was not a direct or vicarious copyright infringer, the court found that it could face liability for contributory infringement. The court asked two questions, the answers to which indicated whether Netcom was contributorily liable. First, did Netcom have knowledge of the infringing activity? The court found that issues of fact existed as to Netcom's knowledge of the infringing conduct because the letter from RTC requesting the removal of the copyrighted work could constitute notice of the infringement. Second, if Netcom knew of the infringement, was its participation substantial? The court reasoned that allowing public distribution of infringing material and not preventing further damage could equate to substantial participation, making Netcom's participation in the infringement a factual issue.

Netcom and RTC entered into a settlement agreement, therefore,

104. See Netcom, 907 F. Supp. at 1376.
105. See id. at 1377.
106. See id. at 1372-73, 1375, 1377. Because the court ruled on a motion for summary judgment, which requires judgment only on matters of law, not material fact, the court did not have to answer conclusively whether Netcom was contributorily negligent. See id. at 1366, 1375.
107. See id. at 1373-75.
108. See id. at 1373.
109. See id. at 1374-75. The court did not address the requisite level of knowledge required for a finding of contributory liability, but did indicate that unlike a landlord-tenant relationship, Netcom retained control over the system, and the relevant time frame of knowledge would be when Netcom provided services to the direct infringer, not the BBS operator. See id. at 1373-74; see also supra note 41 (discussing the use of the landlord-tenant relationship as a comparable situation to that of an ISP).
110. See Netcom, 907 F. Supp. at 1375 (following the rationale in Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971)).
111. See id. The court held that an ISP does not completely relinquish control over its network and can therefore be responsible for its use and for taking measures to protect copyrighted material. See id.
112. See Gilsdorf, supra note 5, at 648 (recounting the August 1996 settlement agreement between Netcom and RTC). Subsequently, Netcom introduced new terms and conditions for subscribers of Netcom: complainants must substantiate infringement claims with some sort of proof of infringement; the subscriber posting the allegedly infringing material may respond; and Netcom will temporarily and possibly permanently deny access to the material pending an internal investigation. See Frank, supra note 30, at 788.
neither an appeals court nor the Supreme Court will review this decision. Courts ruling subsequent to the *Netcom* decision, however, have followed the *Netcom* court's analysis with regard to direct, vicarious, and contributory liability.\textsuperscript{113}

**B. Findings by the Executive Branch: The White Paper**

The judiciary is not the only branch of the government that has debated the applicability of existing copyright laws to this new communications medium, the Internet. In 1993, President Clinton established the Information Infrastructure Task Force ("IITF")\textsuperscript{114} to aid in the development of the National Information Infrastructure ("NII").\textsuperscript{115} The NII is a proposed telecommunications system that would integrate all computers, telephones, radios, and fax machines in the country.\textsuperscript{116} A subcommittee called the Working Group on Intellectual Property Rights (the "Working Group") released a report, the White Paper, examining how the NII would affect the rights of intellectual property owners.\textsuperscript{117}

\textsuperscript{113} See, e.g., Marobie-FL, Inc. v. National Ass'n of Fire Equip. Distrbs., 983 F. Supp. 1167, 1178, 1179 (N.D. Ill. 1997) (holding that an ISP was not liable for direct and vicarious copyright infringement, but may be held contributorily liable when copyrighted clip-art was posted on the Internet through the ISP's service); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 512-13, 515 (N.D. Ohio 1997) (concluding that a BBS operator is liable for direct and contributory copyright infringement when the operator's involvement, engaging in limited screening to avoid pornography, constituted sufficient volitional activity).

\textsuperscript{114} See *White Paper*, supra note 5, at 1 & app. 3. Twenty-six federal agencies and other representatives from the private sector, public interest groups, Congress, and state and local governments were involved in the development and application of information technologies, comprising the IITF. See *id.* at 1. The federal agencies involved included those focused on economics (the National Economic Counsel, the U.S. Department of Commerce, and the U.S. Department of Treasury), humanities (the National Endowment for the Arts and the U.S. Department of Education), research and technology (the National Institute of Standards and Technology, the National Telecommunications and Information Administration, the U.S. Copyright Office and the U.S. Patent and Trademark Office), and others (the Environmental Protection Agency, the Office of Consumer Affairs, and the National Security Agency). See *id.* at app. 3.

\textsuperscript{115} See *id.* at 1 (establishing the reasons for the formation of the IITF and its role in the development of the NII).

\textsuperscript{116} See *id.* at 7-8. According to one report, the NII would increase the amount and variety of information, entertainment, and cultural resources presently available; improve educational and health care systems by linking students, educators, health professionals, and patients together; and increase the ability for individuals to participate in the democratic process of government by making information available on the Internet and fostering public participation. See *id.* at 7-9.

\textsuperscript{117} See *id.* at 2-3. Even though the NII is a developing theory, the intellectual property problems the NII would face are presently occurring in the Internet context. See *id.* at 179 (referring to the Internet as the "prototype" for the NII).
The White Paper concluded that existing laws are adequate and effective, and recommended holding ISPs liable for all types of copyright infringement for any unlawful activities by subscribers.\textsuperscript{118} The Working Group justified its position by arguing that ISPs benefit from unlawful infringement by subscribers because the ability to upload copyrighted material attracts a larger subscriber base.\textsuperscript{119} Additionally, the Working Group argued that ISPs hold a better position than authors or owners of copyrighted material to police and discourage the unlawful activities of their subscribers.\textsuperscript{120} The Working Group found that holding ISPs liable for the unlawful acts of subscribers serves to encourage ISPs in the development of contractual and technological mechanisms that guard against infringement.\textsuperscript{121} Despite the Working Group's recommendation of strict liability, Congress took a different approach to the issue of ISP liability.

C. Legislation Addressing the Difficulties of Copyright Infringement on the Internet

Congress has endeavored to keep pace with the development of the Internet and its ensuing problems by proposing amendments to the Copyright Act of 1976.\textsuperscript{122} The Online Copyright Infringement Liability

\begin{footnotes}
\item \textsuperscript{118} See id. at 117 (stating that despite the integral role ISPs play in the further development of the NII, that position does not exclude ISPs from liability for copyright infringement); see also Levi, supra note 2, at 551-52 (considering the White Paper’s assessment that the most effective way to protect the rights of copyright owners was to hold ISPs liable for subscribers' unlawful activities).
\item \textsuperscript{119} See \textit{WHITE PAPER}, supra note 5, at 117-18 (reporting that if ISPs “reap rewards for infringing activity . . . [then] [i]t is difficult to argue that they should not bear the responsibilities”).
\item \textsuperscript{120} See id. at 123; see also Levi, supra note 2, at 552 (arguing that ISPs can discourage infringing activities by requiring warranty and indemnification agreements, reserving the right to remove infringing material or discontinuing the account of a subscriber acting unlawfully, and purchasing insurance to spread the costs incurred by a subscriber’s infringing behavior).
\item \textsuperscript{121} See \textit{WHITE PAPER}, supra note 5, at 124 (rationalizing the Working Group’s decision to not reduce or remove copyright liability by explaining that it serves as an “incentive” for ISPs to react to and take responsibility for copyright infringement).
\item \textsuperscript{122} See Rojas, supra note 4, at 1032-34 (summarizing recent legislative activity that would impact the Internet). Congress has shown its dedication to aiding the further development of the Internet by stating its policy in this regard as follows:

It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services . . . .
\end{footnotes}
Limitation Act, enacted October 28, 1998,\textsuperscript{123} amends current law by establishing limited liability for ISPs that unknowingly store and transmit copyrighted material on their networks.\textsuperscript{124}

OCILLA limits an ISP's liability for online copyright infringement if it meets certain conditions.\textsuperscript{125} The Act exempts an ISP from liability if it transmits, routes, or provides intermediate and transient storage of material that infringes on a copyright.\textsuperscript{126} The exemption applies if the ISP did not initiate the transmission or routing, the storage and transmission occurred through an automatic technological process, the ISP did not select the recipients of the material, and it did not change the contents of the material.\textsuperscript{127} OCILLA also releases an ISP from liability if it does not have actual knowledge of the infringing behavior.\textsuperscript{128} Alternatively, if the

\begin{itemize}
\item \textsuperscript{123} 47 U.S.C. § 230(b) (1994).
\item \textsuperscript{125} See generally 17 U.S.C.A. § 512 (West Supp. 1999). Note that Congress enacted two section 512s. See id. § 512 n.1. This paper concerns the section 512 entitled "[l]imitations on liability relating to material online" rather than the section 512 entitled "[d]etermination of reasonable license fees for individual proprietors."
\item \textsuperscript{126} See id. § 512(a). This subsection provides:
A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if —
(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
(5) the material is transmitted through the system or network without modification of its content.

\textit{Id.}
\item \textsuperscript{127} See id.; cf. Vermut, supra note 2, at 327-30 (explaining the implications of caching, or the temporary storage of material, on the liability of ISPs).
\item \textsuperscript{128} See 17 U.S.C.A. § 512(c)(1).
ISP does know about the infringement, it is not liable if it removes the material expeditiously.\textsuperscript{129} The Act absolves ISPs of liability for claims based on the disabling of access to, or removal of, allegedly infringing material, regardless of whether the material encroaches on the rights of another.\textsuperscript{130}

In order to have limited liability, ISPs must adopt, implement, and inform subscribers of a policy providing for the termination of the accounts of repeat infringers.\textsuperscript{131} ISPs are also required to accommodate any standard technical measures taken by copyright owners to identify or protect their works.\textsuperscript{132}

If exempted under the Act, ISPs are protected from all monetary damages for direct, vicarious, and contributory infringement.\textsuperscript{133} OCILLA provides for injunctive relief by allowing courts to issue one or more forms of orders to restrain an ISP.\textsuperscript{134} The orders may direct an ISP to terminate the accounts of subscribers that infringe on a copyright, to block access to the infringing material, and any other less burdensome injunctive relief that a court finds necessary to stop the infringing behavior.\textsuperscript{135} However, injunctive relief can be imposed only after the copyright owner notifies the ISP of the alleged infringement, and the ISP has

\begin{itemize}
  \item \textsuperscript{129} See id. § 512(c)(1)(C). These limitations on liability apply only to ISPs with designated company agents who can receive notice of claimed infringements. See id. § 512(c)(2). The ISP must provide such contact information on its website and at the U.S. Copyright Office so that copyright owners can notify the ISP of possible infringing activities. See id.
  \item \textsuperscript{130} See id. § 512(g). The subsection provides in part:
  \begin{itemize}
    \item a service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.
  \end{itemize}
  Id. § 512(g)(1).
  Any person who makes a knowingly false claim of infringement that results in the removal or disabling of access to the material will be held liable for damages. See id. § 512(f).
  \item \textsuperscript{131} See id. § 512(i)(1)(A).
  \item \textsuperscript{132} See id. § 512(i)(1)(B).
  \item \textsuperscript{133} See id. § 512(a)-(d). Monetary relief consists of “damages, costs, attorneys’ fees, and any other form of monetary payment.” Id. § 512(k)(2).
  \item \textsuperscript{134} See id. § 512(j).
  \item \textsuperscript{135} See id. § 512(j)(1). A court deciding whether to impose an injunction against an ISP is required to consider whether the order would significantly burden the ISP or the ISP’s system, how much the copyright owner would be harmed if the infringing action is not restrained, whether it is technically feasible and effective to implement the injunction, and whether there are less burdensome and comparably effective means to prohibit the infringement. See id. § 512(j)(2).
\end{itemize}
the opportunity to appear in court. The parameters of copyright law have been fairly settled by the Constitution, federal statute, and common law. Unfortunately, though, in the development of copyright law, the existence of a communications tool such as the Internet was not considered. Since the dramatic evolution of the Internet, new claims of copyright infringement against ISPs have put law-making bodies in the position of applying already developed copyright law to this new technology.

III. THE NEW TECHNOLOGICAL NATURE OF THE INTERNET DEFIES CURRENT COPYRIGHT LAW

Congress's attempt to "promote the Progress of Science and useful Arts" culminated in the creation of economic rewards for authors and artists who created and disseminated their ideas. As a result, the enforcement of copyright law has become a balancing of the exclusive rights granted to creators of original works with the interest of society to access that information. The difficulty in achieving that balance is no more evident than when a copyright owner claims infringement by ISPs and their subscribers.

Increased dependency on the Internet as a communications tool affects the seriousness of damages incurred by copyright owners from infringement. Estimates of annual monetary loss incurred by copyright owners

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136. See id. § 512(j)(3). The only exception to this occurs when the injunction is necessary to preserve evidence or if it has no significant adverse effect on an ISP's network. See id.

137. See supra Part I.A and II (discussing the complexities of copyright law and its interpretations by the courts, Congress, and the executive branch).

138. See Maloney, supra note 71, at 230 (questioning whether the Copyright Act adequately addresses the Internet environment).

139. See supra Part II (discussing how the various government branches have faced the challenge of applying traditional copyright law to the Internet).


141. See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). In an earlier decision, the Supreme Court recognized that "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . . ." Mazer v. Stein, 347 U.S. 201, 202, 219 (1954) (holding that statuettes of human figures intended to be used as bases for table lamps were "works of art" and valid copyrights).

142. See Levi, supra note 2, at 550 (stating that policy makers and the courts must protect intellectual property rights without adversely affecting the growth of the Internet).

143. See Rojas, supra note 4, at 1013 (contending that as businesses increasingly use the Internet, damage from trespassing on intellectual property rights will become more significant).
stemming from on-line thievery reach into the billions. The judicial and executive branches of the government have responded by applying traditional copyright law that is based on print and broadcast media to this new technology. The awkward and conflicting attempts to address this issue have not reached the level of definitive rulings, leaving the issue of ISP liability one of first impression to many courts.

Traditionally, copyright laws applied to well-recognized communications media such as written publications, audio broadcasts, and visual images. When the copyright laws were drafted, little public interest or knowledge existed about the Internet; therefore, the issues regarding the Internet are not easily pigeon-holed into these existing paradigms.

A. Direct Infringement Liability as Applied to the Internet

Presently, liability for direct infringement is based on a strict liability standard. Any invasion of the rights granted by the Copyright Act constitutes infringement, regardless of the intent or knowledge of the infringer. The Working Group endorsed the traditional strict liability

144. See Cook, supra note 1, at 60 (discussing the international problem of copyright infringement over the Internet). Federal law enforcement officials reported that $10 billion worth of data is stolen by on-line thieves annually. See id. The Business Software Alliance estimated in 1995 that software companies lost more than $15 billion per year in pirated software. See id. Japan and Europe face nearly $6 billion in losses from pirated software per year. See id.

145. See Rojas, supra note 4, at 1013 (identifying the applicability of traditional copyright law to the Internet as the main legal issue in the on-line context).

146. See Melone, supra note 65, at 493-94 (evincing that the Netcom decision did not adequately address the liability of ISPs for the infringing acts of their subscribers). The cases that have addressed the liability of ISPs consist of district court rulings on motions for summary judgment. See supra Part II.A (discussing the relevant court decisions regarding ISP liability). In an effort to resolve confusion surrounding ISP liability, the IITA discouraged changing the severity of liability levied against ISPs. See WHITE PAPER, supra note 5, at 122.

147. See Rojas, supra note 4, at 1016 (stating that claims were traditionally brought against newspapers, magazines, and broadcasters).

148. See Maloney, supra note 71, at 230 (acknowledging that despite the abundant debates regarding liability of ISPs for copyright infringement, it is still unclear if and what Internet activities are proscribed by the Copyright Act).

149. See Rojas, supra note 4, at 1016-17 (examining the various standards employed by courts when applying existing case law to issues arising in the context of the Internet).


151. See 17 U.S.C. § 501(a) (stating that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author").
standard for Internet copyright infringement, believing it would be premature to reduce the liability of ISPs.\textsuperscript{152} It justified its recommendation on the basis that allowing ISPs to refuse to take responsibility for action occurring on their networks would be unfair to Internet users and copyright owners.\textsuperscript{153} According to the Working Group, lifting the responsibility from ISPs would encourage intentional willful ignorance of the unlawful behavior of subscribers.\textsuperscript{154}

Application of the strict liability standard will almost always result in a finding of liability on the part of the ISP because typically the actual copying of the material occurs on the ISP's system.\textsuperscript{155} If ISPs face such a great risk of liability, they may decide not to operate and effectively shut down the Internet.\textsuperscript{156} In the alternative, ISPs could review each document or message transmitted through their systems, significantly increasing operating costs.\textsuperscript{157} Access to the Internet would become more expensive and exclusive, negating the low-cost and expansive benefits society presently receives from use of the Internet.\textsuperscript{158} Holding ISPs to a

\textsuperscript{152} See WHITE PAPER, supra note 5, at 115, 122 (explaining that vicarious and contributory liability have a higher threshold of proof than the strict liability of direct infringement and consequently would not adequately protect the rights of copyright owners).

\textsuperscript{153} See id. at 122 (contending that because ISPs perform many functions, including acting as an electronic publisher and providing the transmission wires like a telephone company, ISPs cannot be considered for total exemption of liability when they maintain some control over their systems).

\textsuperscript{154} See id. This argument rests on the belief that reducing the standard from strict liability would induce ISPs to ignore infringing behavior by providing a disincentive to police their networks. See Cook, supra note 1, at 61 (dubbing this behavior as the "ostrich approach"). The Working Group also theorized that given the chance to avoid responsibility, ISPs would avoid pursuing the development of tools that could lessen the risk of infringement for ISPs and copyright owners. See WHITE PAPER, supra note 5, at 123. Such tools currently include indemnification and warranty agreements, license agreements, education for subscribers regarding unlawful infringement, and technological methods of tracking information. See id.

\textsuperscript{155} See Cook, supra note 1, at 60 (describing the result of applying strict liability to ISPs). Many ISPs practice automatic "caching," where transmitted data is temporarily copied and stored on the ISP's network. See id.; see also Vermut, supra note 2, at 276 (explaining the technical process involved in caching and why ISPs employ this mechanism). ISPs use caching because it is easier for the ISP to supply the data to other requests from its own database without having to request the information from another ISP's network. See id.

\textsuperscript{156} See Kirkwood, supra note 44, at 728 (arguing that subjecting ISPs to a direct liability standard would have devastating effects on the future development of the Internet).

\textsuperscript{157} See id.

\textsuperscript{158} See supra notes 64-67 and accompanying text (explaining the benefits the Internet provides to society as an inexpensive communications tool).
strict liability standard would create an imbalance between the rights of the copyright owner and the rights of the public.159

The court in *Playboy* applied the traditional standard for direct liability in holding a BBS operator directly liable for copyright infringement of Playboy pictures.160 The copyright owner demonstrated the existence of infringement by proving that it legally owned the copyrights to the photographs and inferentially proved that the BBS operator copied the pictures.161 Following the established doctrine of direct liability, the court did not consider lack of intent or knowledge.162

Any possible clarity regarding direct liability is muddied by court decisions that changed the elements of direct liability when analyzing claims of alleged Internet infringement.163 In considering the liability of ISPs for direct copyright infringement, the court in *Netcom* added a component to the traditional two-part test.164 It held that in order to find an ISP directly liable for the reproduction of copyrighted material by a subscriber, an element of volition or causation by the ISP must be present.165 The court reasoned that the copying by Netcom was an incidental action necessary in the running of an Internet access network.166 Therefore, under

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159. See Kirkwood, *supra* note 44, at 728 (arguing that direct liability over-burdens ISPs by placing the interests of the copyright owner above the societal interest in the free flow of information). But cf. Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1368, 1372-74 (N.D. Cal. 1995) (outlining the ability of ISPs to monitor and control on-line infringement). One commentator argues that ISPs possess the ability to control the on-line environment through the use and enforcement of written control policies, the placement and enforcement of warnings on their networks against improper actions, installing software capable of monitoring subscriber activity, recording subscriber activity, and by quickly and effectively handling improper traffic on the network. See Cook, *supra* note 1, at 62. These actions by the ISP would increase its operating costs and would eventually be reflected in the rates charged to subscribers. See Kirkwood, *supra* note 44, at 728 (arguing that imposing direct copyright infringement liability on ISPs may have detrimental effects on the future development of the Internet).

160. See Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1556, 1559 (M.D. Fla. 1993). The court held that there was "irrefutable evidence of direct copyright infringement" by the BBS operator. *Id.* at 1559.

161. See *id.* at 1556. Proof of ownership was satisfied by producing the copyright registrations of the photographs. See *id.* Copying was established by showing the BBS operator had access to the pictures, the infringing photos were substantially similar to the original works, and statutorily guaranteed rights of public distribution and display were implicated by the operator's actions. See *id.* at 1556-57.

162. See *id.* at 1559.

163. Cf. Cook, *supra* note 1, at 60-61 (contending that the court in *Netcom* misapplied current copyright law).

164. See *Netcom*, 907 F. Supp. at 1370.

165. See *id.* at 1370.

166. See *id.* at 1368-69. The court explained that Netcom's system operates without human intervention when it temporarily creates copies of transmitted information, how-
Copyright Infringement on the Internet

Netcom, an ISP is liable only if it deliberately caused the duplication of the copyrighted work.\(^{167}\)

B. Vicarious Infringement Liability as Applied to the Internet

Under the common law tort theory of respondeat superior, an ISP may be found vicariously liable for infringement when it is proven first, that the ISP had the ability to control the infringement, and second, that the ISP received a direct financial benefit from the infringing activity.\(^{168}\) While direct liability favors copyright owners and places a heavy burden on ISPs, vicarious liability tips the scale in the other direction, and favors ISPs.\(^{169}\) This inequity results from the difficulty copyright owners face in proving the elements of vicarious liability.

Whether an ISP has the ability to control a subscriber's conduct depends on the availability of technological resources.\(^{171}\) Theoretically, ISPs already monitor and record subscriber activity\(^{172}\) and possess sophisticated hardware and software that can screen posted information for infringing material.\(^{173}\) Although larger ISPs usually have this sort of capability Netcom does not cause the copying. See id.

167. See id. The court explained the distinction between incidental and deliberate copying by analogizing the role of an ISP to that of a copy machine owner who allows third parties access to the machine. See id. at 1369. A user of the copier may directly infringe on the copyright of another, but the owner of the copier is not held directly liable for the actions of the user because, although the owner provided the means for copying, he did not do the actual reproduction. See id.

168. See supra Part I.A.2 (describing the elements and history of the doctrine of vicarious liability for copyright infringement).

169. See Cahoy, supra note 62, at 348 (stating that courts addressing the vicarious liability of ISPs seem reluctant to find the ISPs liable for copyright infringement).

170. See id. (explaining that copyright owners face a difficult challenge in proving the elements of vicarious liability with regard to whether an ISP directly profits from the infringement).

171. Cf. Netcom, 907 F. Supp. at 1375-76 (deliberating whether Netcom had the technical ability to supervise subscriber activity since the plaintiff, RTC, offered no evidence that the ISP could use software to identify possible copyright infringements).

172. See Cook, supra note 1, at 61 (arguing that ISPs possess the technology to monitor their networks and therefore, are the best suited entities to be "gatekeepers" of the Internet).

173. See id. at 62 (extrapolating from Netcom that large ISPs have software capable of monitoring for infringing material). But see Netcom, 907 F. Supp. at 1372-73 (stating that it is impossible to discern infringing from non-infringing material on the Internet because billions of bits of data are transmitted and stored on network servers).

Members of the Internet communications community have developed various technological tools that would raise the level of protection for copyright owners. See ITAA DOCUMENT, supra note 15, at *18-24. These developments include "digital watermarks" which notify users of the copyright owner, the creator, and payment information; "cryptographic envelopes" which act as a container for encrypted documents; digital headers, originally designed to let parents control what their children access on the Inter-
bility, smaller companies providing Internet access may be unable to secure this type of monitoring for technological or economic reasons. In Netcom, the ISP defendant argued that the speed and volume of information sent through the network made it impossible to screen all messages prior to the time they were posted. The plaintiff, RTC, countered with evidence that Netcom had previously exercised its ability to police subscriber activity by suspending and deleting various postings. The court found that whether the sanctioning of subscribers occurred before or after the information was posted was immaterial to Netcom’s ability to control those actions. The court, however, left this matter unresolved, stating only that there was a genuine issue of fact regarding the ability of the ISP to control the activities of its subscribers.

The second prong of the test for vicarious liability, whether ISPs receive direct financial gain from the infringing activity, may be even harder for a copyright owner to prove. The court in Netcom analogized an ISP's position to that of a landlord renting space. The court justified this comparison on the basis of the fixed fees common to both situations. The importance of drawing this parallel lies in the belief that the

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174. See Netcom, 907 F. Supp. at 1368. The court stated that unlike some of the larger ISPs, Netcom did not control or monitor the content of the information that was transmitted through its network, even though it could reprogram its system to screen out postings containing specific words or coming from certain individuals. See id. at 1368. The court also noted that the plaintiff in this case never produced any evidence that it was possible to design software to detect copyright infringement. See id. at 1376 n.23.

175. See id. at 1376.

176. See id. The plaintiffs provided evidence that Netcom had suspended the accounts of subscribers more than one thousand times for commercial advertising, obscene materials, and off-topic postings. See id.

177. See id.

178. See id.

179. See Cahoy, supra note 62, at 348 (explaining that the difficulty of proving direct financial gain lies in the flat rate that most ISPs charge for a specific amount of access time).

180. See Netcom, 907 F. Supp. at 1376 (affirming that a landlord with the right and ability to supervise the activities of a tenant will be vicariously liable for the tenant’s infringement if the rental amount is proportional to the proceeds of the sales made by the tenant).

181. See id. at 1376. Netcom charged subscribers a flat rate for unlimited connection time. See id. at 1377. In this regard, Netcom conformed to the practices of other ISPs. See Cahoy, supra note 62, at 349 n.80 (noting that fixed subscriber rates prevents finding an ISP vicariously liable if the ISP does not benefit financially from the amount of time the subscriber is connected to the Internet).
fixed charges imposed by a landlord do not depend on the nature of the lessee's activity. The court held that Netcom did not receive a direct financial benefit from the infringing activities of its subscriber because a flat rate was charged irrespective of the subscriber's conduct.

The court's rationale in *Netcom* is now in question because of *Fonovisa, Inc. v. Cherry Auction, Inc.*, a decision by the United States Court of Appeals for the Ninth Circuit. The appellate decision in *Fonovisa* came down two months after the district court in *Netcom* relied on the reasoning of the *Fonovisa* district court. In *Fonovisa*, the Ninth Circuit held that even though vendors paid a fixed rate to participate, a swap meet coordinator received a direct financial benefit from the sale of pirated recordings by a vendor, since customers were "drawn" to the event by the infringing conduct. Under this "draw theory," ISPs may be vicariously liable if the infringing activity "enhance[d] the attractiveness of the venue" by drawing new customers to the ISP's service. Even though the factual circumstances in *Fonovisa* do not address the Internet,


184. 76 F.3d 259 (9th Cir. 1996).

185. *See id.; see also Shulman, supra note 6, at 590-99* (applying the facts of *Netcom* to the appeals court's reasoning in *Fonovisa*). Even though the *Sega* decisions were decided by a different district court than *Fonovisa*, both are within the Ninth Circuit, in which the appeals court had overruled *Fonovisa*. *Compare Sega Enters. Ltd. v. Maphia*, 948 F. Supp. 923, 923 (N.D. Cal. 1996), with *Fonovisa*, 76 F.3d at 259.

186. *See Shulman, supra note 6, at 590 n.285.

187. *See Fonovisa*, 76 F.3d at 263-64. In *Fonovisa*, the defendants operated a swap meet in which individual vendors paid a rental fee for space and customers purchased merchandise from the vendors. *See id. at 261*. The operators knew that vendors were selling counterfeit recordings that violated Fonovisa's copyrights, but failed to exercise their right to exclude any vendor, at any time, for any reason. *See id.* The financial benefit came from the sale of admission fees, parking fees, and concession sales flowing directly from customers that came to the swap meet in order to buy the pirated recordings. *See id. at 263.*

188. Kirkwood, *supra* note 44, at 720, 731-32 (quoting *Fonovisa*, 76 F.3d at 263-64) (advocating that the draw test should be applied by courts to determine if ISPs received a direct financial benefit from infringing conduct). The benefit of the draw test is that it accounts for the number of times the copyrighted material was infringed upon as well as the financial value of the material. *See id.* at 731-32. Theoretically, if a work was only infringed upon a couple of times, the copyright owner would not lose the amount of money he would have lost if the material was infringed upon thousands of times. *See id.* By placing a monitoring requirement on ISPs obligating them to track the Internet sites that constituted a sufficient "draw," the costs of policing the network would be lowered and the rights of the copyright owner would be protected. *See id.*
the *Netcom* court's reliance on what is now an overruled decision brings more confusion to whether an ISP receives a direct financial benefit from a subscriber's infringing actions.\(^{189}\)

**C. Contributory Infringement Liability as Applied to the Internet**

The doctrine of contributory liability holds the most promise for equally balancing the copyright owners' interest in protecting their work and the interest of society in the free flow of information.\(^{190}\) In order to be held contributorily liable, an ISP must have substantially contributed to the infringing behavior of its subscriber and must have known or should have known of the infringement.\(^{191}\) Under this standard, ISPs do not escape liability altogether, but at the same time are not held responsible for all transmissions occurring on their networks.\(^{192}\) The "knowledge" element in contributory liability permits copyright owners to pursue a viable remedy against ISPs if an infringement of their material occurs.\(^{193}\)

The court in *Netcom* devoted little time to discussing whether the ISP substantially participated in the infringing activity of its subscriber.\(^{194}\) Although the court analogized the role of an ISP to that of a landlord with regard to vicarious liability, it distinguished this analogy with regard to contributory liability.\(^{195}\) Unlike a landlord renting space, an ISP may act to prevent further damage to the rights of a copyright owner by blocking

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\(^{189}\) See Shulman, *supra* note 6, at 590-95 (suggesting that the *Fonovisa* analysis is an inappropriate comparison to the facts and circumstances of *Netcom*). Another factor distinguishing the rationale enunciated in the *Fonovisa* decision from the analysis applied in *Netcom* is the court’s finding that the swap meet operator was aware of the sale of the pirated recordings and solicited sales by providing the venue and advertising to attract customers. See *Fonovisa*, 76 F.3d at 264. Even though Netcom received notice of an alleged infringement, Netcom did not actively solicit customers as the swap meet operator did in *Fonovisa*. See *Netcom*, 907 F. Supp. at 1366; *see also supra* notes 90-93 and accompanying text (discussing the notice received by Netcom and its response to RTC's request that access to the allegedly infringing material be blocked).

\(^{190}\) See Melone, *supra* note 65, at 501.

\(^{191}\) See Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d, 1159, 1162 (2d Cir. 1971); *see also supra* Part I.A.3 (explaining the background of contributory liability).

\(^{192}\) But see Melone, *supra* note 65, at 503 (stating that "[t]he only equitable result mandates that liability be imputed solely upon the direct infringer").

\(^{193}\) See *id.* at 503-04 (arguing that the rights of copyright owners are sufficiently protected if they are allowed to bring a claim of vicarious liability against ISPs).

\(^{194}\) See *Netcom*, 907 F. Supp. at 1375.

\(^{195}\) See *id.* (determining that Netcom's automatic distribution of material through its network is more similar to radio stations rebroadcasting infringing works than landlords renting space).
access to information posted on its network.\textsuperscript{196} The court explained that an ISP maintains control over how its system is used in order to provide the means for individuals to access and distribute material on the Internet.\textsuperscript{197} Assuming Netcom possessed the technical measures to prevent the infringement, the court found that this control could amount to aiding the infringing behavior, thus, meeting the "substantial participation" requirement for a claim of contributory liability.\textsuperscript{198}

Under the theory of contributory liability, an ISP must have known or should have known of the infringement.\textsuperscript{199} Proving that notice was given to the ISP would show that it had knowledge of the infringement and that it had a chance to take action to prevent further damage to the value of the copyright.\textsuperscript{200} In \textit{Netcom}, the court held that a genuine issue of fact existed with regard to notice because Netcom received a letter from the copyright owner alleging infringement.\textsuperscript{201} According to the court, even though a "mere unsupported allegation of infringement" may not constitute notice, the lack of evidentiary support provided by the copyright owner does not create the unequivocal assumption that Netcom had no knowledge of the infringing activity.\textsuperscript{202} Therefore, questions of what constitutes notice in the on-line environment is still one of first impression after the \textit{Netcom} decision.\textsuperscript{203}

Some commentators, relying on the Supreme Court's decision in \textit{Sony}, argue that the legitimate purposes for which the Internet is substantially used should be considered when deciding to impose liability on an ISP.\textsuperscript{204} In \textit{Sony}, the Court rejected a claim by owners of copyrighted television programs that manufacturers of video tape recorders ("VCRs") were

\begin{itemize}
\item \textsuperscript{196} See id.
\item \textsuperscript{197} See id.
\item \textsuperscript{198} See id.
\item \textsuperscript{199} See id. at 1373 (relying on Gershwin Publ'g Co. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971)); see also supra note 46 and accompanying text (stating the element of knowledge required for a finding of contributory liability).
\item \textsuperscript{200} Cf. Cook, supra note 1, at 62 (arguing that ISPs are in the best position to receive notices of infringement, and have the technical capability to block access or remove the material from the Internet).
\item \textsuperscript{201} See Netcom, 907 F. Supp. at 1374; see also supra note 92, (describing the responses to the letter by Netcom and the BBS operator).
\item \textsuperscript{202} Netcom, 907 F. Supp. at 1374.
\item \textsuperscript{203} See id.
\item \textsuperscript{204} See Melone, supra note 65, at 502-03 (using Sony as support for the argument that the substantial benefits of the Internet, when it is legitimately used, outweigh any harm from incidents of sporadic infringement); Shulman, supra note 6, at 598 (arguing that an ISP would not be held contributorily liable if it could prove that its service was mostly used for non-infringing purposes).
\end{itemize}
contributorily liable for the taping of television shows by private viewers. \(^{205}\) The Court based its decision on its finding that VCRs were primarily used for substantially non-infringing uses. \(^{206}\) If courts apply this reasoning in Internet copyright cases, ISPs could make a credible claim that the Internet is widely used for legitimate, unobjectionable purposes. \(^{207}\)

In the on-line context, the validity of a claim of contributory liability depends on the ISP's knowledge and participation in the infringement, as well as the Internet's overall purpose. \(^{208}\) The Netcom court found contributory liability yielded a fair remedy as long as an ISP can reduce future harm to the value of a copyright after it becomes aware of the infringement. \(^{209}\) This standard would protect the interests of copyright owners as well as the interests of ISPs and society. \(^{210}\)

The legitimacy of contributory liability also rests on the balancing of rights between the copyright owner and the ISP. The exclusive rights of a copyright owner would not be discarded because ISPs would be held accountable when they learn of an infringement and fail to take action. \(^{211}\) Requiring actual or constructive knowledge would absolve ISPs of the responsibility of looking for the proverbial needle in a haystack by not imposing a duty to police millions of non-infringing transmissions. \(^{212}\) Although contributory liability seems to fairly balance all of the interests involved, the underdeveloped body of case law has left the Internet community with an unclear picture of what actions constitute liability for copyright infringement. \(^{213}\)

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206. See id.

207. See Shulman, supra note 6, at 598-99 (applying the Sony decision to the claim of contributory copyright liability of ISPs). Compare supra text accompanying notes 2-3, 59-61 (quoting the usage rates of the Internet), with supra note 144 and accompanying text (quoting the statistics on the amount of copyright infringement on the Internet).

208. See supra notes 194-207 and accompanying text (discussing the ability to find an ISP liable for contributory infringement on the Internet).


210. See Melone, supra note 65, at 502-03 (maintaining that the courts should adopt the contributory liability standard).

211. See id. at 503.

212. Cf. id. at 503-04 (arguing that the notice required under the contributory liability standard prevents ISPs from being overburdened with the task of searching for potential infringements on their system). The burden on ISPs, on the economic cost of Internet access, and on free expression would be tremendous if ISPs were responsible for screening and judging each claim of infringement. See id.

213. See Rojas, supra note 4, at 1015 (stating that courts must rely on analogous forms of media because of the lack of definitive decisions in the case law regarding copyright in-
IV. OCILLA CLARIFIES HOW COPYRIGHT LAWS APPLY TO INTERNET SERVICE PROVIDERS

Congressional action offers the best mechanism for both adequately protecting the rights of copyright owners and supporting the public’s interest in the freedom to access information. Conflicting court decisions and executive findings do not sufficiently protect the rights of copyright owners, Internet users, and ISPs. The Working Group’s report on intellectual property rights also included a call to Congress to resolve the issue of ISP liability for copyright infringement. Recognizing this need for guidance, Congress passed OCILLA, which tailors traditional copyright laws to the Internet.

A. Why Legislation was Necessary

Thomas Jefferson, the first head of the United States Patent Office, succinctly characterized the relationship between law and new technology. He said:

I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand and hand with the progress of the human mind. As that becomes more developed,
more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy . . . . 219

The unique environment of the Internet requires this type of legislative guidance for a variety of reasons. The courts have not effectively applied existing copyright laws to alleged infringement on the Internet in a way that equitably balances the rights of all interested parties. 220 Netcom showed the most in-depth application of copyright law, but the court ruled only on a motion for summary judgment, after which the parties settled the case. 221 The traditional standards of direct and vicarious liability favor the interests of one party over another, unequally balancing the rights of the copyright owner with society's interest in the free flow of information. 222 In particular, the Netcom court added the elements of volition and causation to its strict liability inquiry because it held it would be unfair to follow the existing standard set out in the Copyright Act. 223 The Netcom court's reliance on a subsequently overruled case creates uncertainty with regard to its holding concerning contributory liability. 224

OCILLA's amendment of the Copyright Act provides a definitive ruling in the wake of conflicting interpretations of copyright laws and the policing capabilities of ISPs in the on-line context. 225 This federal mandate outlines specific guidelines for ISPs to follow, rather than leaving them to interpret conflicting decisions. 226 The quick legislative action

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219. Id. (quoting the inscription at the Jefferson Memorial, Washington, D.C.).

220. See supra Part III (analyzing the confusion of applying traditional copyright law to copyright infringement occurring on the Internet). But see Cahoy, supra note 62, at 353-59 (contending that the courts have demonstrated their ability to interpret copyright law flexibly, precluding the need for legislative action).

221. See Melone, supra note 65, at 502 (stating that the multiple claims of RTC against Netcom were not resolved because of the settlement, leaving the issue of ISP liability undecided).

222. See generally id. at 495-501 (using various court decisions to demonstrate that vicarious liability standards do not equitably balance the interests of copyright owners, the public, and ISPs).


224. See supra notes 184-89 and accompanying text (examining contributory liability and the uncertainty of this standard since the overruling of Fonovisa).


226. See id.; see also Gilsdorf, supra note 5, at 651-52 (espousing the belief that ISPs
also shortens the time in which ISPs, copyright owners, and users of the Internet confront the risk of incurring damage or liability while the courts determine how to consistently apply copyright laws to the Internet. 

The Act creates predictable guidelines enabling ISPs to run their businesses despite the conflicting laws that differ by jurisdiction.

B. OCILLA Sufficiently Protects the Interests of Service Providers, Copyright Owners, and the Public

OCILLA affirms the exclusive rights granted to copyright owners and defines reasonable terms under which ISPs may be held liable for copyright infringement without hindering public access to the Internet. Clarification of liabilities and responsibilities also encourages ISPs to fully invest their own resources and to attract other investors so that the Internet can continue to grow and develop. Congress expects need legislative guidance in order to conduct their businesses effectively).

227. Cf. Gilsdorf, supra note 5, at 651 (discussing the security in having “certainty and predictability through legislation”). But see Cahoy, supra note 62, at 354 (arguing that the courts should have the time to “slowly build a coherent structure for analyzing liability that is fluid and responsive to changes in technology”). The Supreme Court and the lower courts have deferred to Congress when major technological developments change the commercial market. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984). The Supreme Court explained this posture stating that “[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” Id. The Netcom court added, “whether a new exemption should be carved out for online service providers is to be resolved by Congress, not the courts.” Netcom, 907 F. Supp. at 1369 n.12 (refusing to create liability exemptions for ISPs similar to those for common carriers that provide only wire and conduit for the transport of information).

228. See H.R. CONF. REP. NO. 105-796, at 72 (1998) reprinted in 1999 U.S.C.C.A.N. at 655 (declaring that OCILLA “provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities”). See also Gilsdorf, supra note 5, at 651-52 (answering the question, whether legislation is needed to protect the business opportunities of ISPs, in the affirmative).

Absent legislation, ISPs face the possibility of litigating similar issues in different ways, with different outcomes because of the inconsistency between jurisdictions. See id. at 651. Expanding on this possibility, theoretically, because the Internet has reached global proportions, the ISPs’ operating procedures would be difficult to tailor to specific geographic areas. Consequently, ISPs would face the possibility that they will not meet all the requirements in a jurisdiction and would have to incur litigation costs, which would eventually affect the cost charged to subscribers. For more detailed discussion of the issues of jurisdiction and the Internet, see John A. Lowther, IV, Comment, Personal Jurisdiction and the Internet Quagmire: Amputating Jurisdictionally Created Long-Arms, 35 SAN DIEGO L. REV. 619 (1998) (discussing whether activities conducted on the Internet are sufficient to subject a person or business to a civil suit in a foreign state).

229. See generally 144 CONG. REC. S4887, S4889 (daily ed. May 14, 1998) (statement of Sen. Ashcroft) (supporting the amendment to the copyright laws exempting providers of Internet access).

OCILLA to "preserve[] 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."\textsuperscript{231} OCILLA provides a claim against ISPs under the direct liability standard that is still available to copyright owners.\textsuperscript{232} If a copyright owner proves under the traditional direct liability doctrine that the ISP copied material that was copyrighted by the claimant, an ISP would be held directly liable.\textsuperscript{233} OCILLA, however, exempts the ISP from this liability if certain conditions are met.\textsuperscript{234} Congress intended for these limitations on liability to apply only if the ISP is liable under existing principles of law.\textsuperscript{235}

OCILLA's exemptions reasonably limit the ability of copyright owners to pursue claims against ISPs for infringing transmissions that the ISPs did not initiate or transmit through non-automatic means.\textsuperscript{236} These provisions do not require ISPs to independently monitor their networks for infringing material, preventing ISPs from being overly burdened with the responsibility of policing every transmission that occurs on their networks.\textsuperscript{237} The burden of stopping infringing behavior, however, is still shared with copyright owners because ISPs are held responsible for infringements about which they receive notice.\textsuperscript{238} Congress intends to ex-
clude the ISPs that implement a monitoring program from liability. This approach respects the technical operations of an automated ISP network and provides specific guidelines for the ISPs to conduct their business in compliance with the law.

OCILLA, equitably balancing the rights of the copyright owner and the ISP, also preserves the ability for copyright owners to pursue claims against ISPs for vicarious and contributory liability. An ISP may be held vicariously or contributorily liable if the ISP had actual knowledge that copyrighted material was being infringed upon, was aware of circumstances that made the infringing activity apparent, or received a direct financial benefit from the infringing conduct if the ISP had the ability and the right to control the information. The Act mimics existing law in this regard, but OCILLA excludes monetary damages from being levied against the ISP if it meets the Act’s requirements. This provision prevents the payment of potentially large sums of money for infringement of which the ISP was not aware and from which the ISP did not receive any direct profit. If an ISP knew of the infringement or received a direct financial benefit from the infringing activity, a copyright they receive notice of a possible copyright infringement).

239. See H.R. CONF. REP. NO. 105-796, at 73, reprinted in 1999 U.S.C.C.A.N. at 655 (asserting that OCILLA is not meant to discourage ISPs from engaging in monitoring practices of their networks). Congress provided that “[c]ourts should not conclude that the service provider loses eligibility for limitations on liability under section 512 solely because it engaged in a monitoring program.” See id.

240. See OCILLA, 17 U.S.C.A. § 512(a)(2) (West Supp. 1999) (exempting ISPs if “the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider”).

241. See id. § 512(c)(1)(A)(i).
242. See id. § 512(c)(1)(A)(ii).
243. See id. § 512(c)(1)(B).
244. See supra Parts I.A.2 and I.A.3 (explaining the doctrines of vicarious copyright liability and contributory copyright liability).
245. See OCILLA, 17 U.S.C.A. § 512(c)(1); see also infra notes 248-51 and accompanying text (analyzing the incorporation of equitable relief into OCILLA).
246. See Ronald L. Plesser and James J. Halpert, Internet Legislation in the 105th Congress, COMMUNICATIONS, INFORMATION AND INTELLECTUAL PROPERTY UPDATE (Piper & Marbury L.L.P., Washington, D.C.), Nov. 1998, at 5 (theorizing that the limitations on liability will “encourage[e] settlements based largely upon injunctive relief because . . . the plaintiff will often have little possibility of obtaining damages or attorneys’ fees”). The Act fails to suggest what constitutes a direct financial benefit, so it is unclear if fixed rates charged by ISPs would constitute a direct financial benefit. See OCILLA, 17 U.S.C.A. § 512(c)(1)(B). The Netcom court decided that providing services on a fixed fee was unrelated to the content accessed and thus the time spent on the Internet did not constitute a direct financial benefit. See Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1377 (N.D. Cal. 1995).
owner would be entitled to seek monetary damages.\textsuperscript{247} While OCILLA exempts ISPs from monetary damages, the Act clearly provides for injunctive relief for direct, vicarious and contributory liability.\textsuperscript{248} OCILLA sets out the forms of injunctive relief available and limits them to actions "necessary to prevent or restrain infringement of copyrighted material . . . if such relief is the least burdensome to the service provider."\textsuperscript{249} These provisions provide the copyright owner with the means to stop the infringing behavior without unfairly burdening the ISP.\textsuperscript{250} The interests of the copyright owner are protected by providing a feasible remedy, while still allowing the Internet to freely develop as a communications tool.\textsuperscript{251}

OCILLA goes even further to ensure that the interests of copyright owners are protected by making certain that ISPs do not escape all responsibility for the infringing activities occurring on their networks. OCILLA requires an ISP to expeditiously remove or disable access to any allegedly infringing material on its network when it receives written notice from the copyright owner.\textsuperscript{252}

An ISP faces the double-edged sword of potential lawsuits from both the copyright owner and the subscriber once notice of an alleged infringement is received.\textsuperscript{253} Prior to the enactment of OCILLA, when an

\begin{small}
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\item See OCILLA, 17 U.S.C.A. § 512(c).
\item See id. § 512(j).
\item Id. § 512(j)(1)(A)(iii).
\item Cf. Gilsdorf, supra note 5, at 652 (asserting that a legislative mandate providing for the immediate removal of infringing material by ISPs upon receiving notice is in the best interests of ISPs and copyright owners).
\item See supra Part IV.B (discussing the ways in which OCILLA allows the Internet to continue expanding while protecting the rights of copyright owners). The exclusion of monetary damages makes the ability of copyright owners to pursue injunctive relief even more important because parties will be more likely to enter into settlements based on injunctive relief if copyright owners are less likely to recover damages or attorneys' fees. See Plesser & Halpert, supra note 246, at 5 (analyzing the actions taken by Congress regarding the Internet).
\item See OCILLA, 17 U.S.C.A. § 512(g). Notification must include a signature of someone authorized to act on behalf of the copyright owner, identification of the copyrighted work that is allegedly infringed upon, sufficient information to locate and block the infringing material, contact information for the complaining party, a statement of the complaining party's good faith belief that the material was used in an unauthorized manner, and a statement that the notice is accurate and that the complaining party is authorized to act on behalf of the copyright owner. See id. § 512(c)(3)(A).
\item The interests of the subscriber who posted the allegedly infringing material are also protected because ISPs are required to notify the subscriber of the claim of infringement so that the subscriber may respond to the complaint. See id. § 512(g)(3).
\item See Gilsdorf, supra note 5, at 651-52 (discussing the need for legislative guidance to protect ISPs from unnecessary and costly litigation).
\end{enumerate}
\end{small}
ISP received notice of an alleged infringement, the ISP faced possible litigation with all potential courses of action. A claim could have been brought either by the copyright owner against the ISP who refused to remove the material, or by the individual that transmitted the material, claiming the ISP violated his or her rights of privacy and freedom of expression. The Act allows ISPs to remove or block access to allegedly infringing material, regardless of whether it actually infringes on the rights of another, without a potential suit brought by the party that transmitted the information. This further protects the interests of copyright owners because ISPs will be encouraged to investigate any claims of infringement without facing further litigation brought by subscribers whose material was blocked.

If OCILLA had been enacted prior to the *Netcom* decision, the issue of liability would have been analyzed differently. The court held that *Netcom* was not directly or vicariously liable for the infringing acts of one of its subscribers, but found that it may be contributorily liable. Assume, arguendo, that *Netcom* was found contributorily liable. *Netcom* did not initiate the transmission of the infringing material, the transmission and storage of the information was through an automatic process, and *Netcom* did not chose the recipients of the transmission or change the contents thereof; RTC though, gave *Netcom* notice of the alleged infringement. Pursuant to the notice requirements of OCILLA, because *Netcom* received adequate notice of the infringement, it would be re-

254. See id. at 652. William Cook, Chairman of the Computer Law Section of the National Intellectual Property Institute, proposed a legislative solution when he testified before the U.S. House Judiciary Committee about amending the Copyright Act. See id. Cook's proposition entailed a copyright owner notifying the ISP of the location of the alleged infringement, after which the ISP would place the material in a "penalty box" that could not be accessed. See Cook, supra note 1, at 62. While in the box, both sides would have the opportunity to offer proof of copyright ownership and justify the use of the material. See id. The drawback of this approach is that the ISP must judge the validity of the copyright claim and the justification of the subscriber, a role more suited for a judge or jury.

255. See OCILLA, 17 U.S.C.A. § 512(g).

256. But see Cahoy, supra note 62, at 358 (arguing that excluding monetary damages from the remedies against ISPs for removal of alleged infringing material decreases the incentive to investigate infringement claims).

257. Cf Cahoy, supra note 62, at 354 (asserting that legislation addressing ISP liability would force the judiciary to apply the same legal framework to most cases regarding ISP liability).


259. See id. at 1375.

260. See id. at 1368.
quired to block access to that material. Under OCILLA, RTC could have pursued an injunction against Netcom, specifically requesting the removal of the infringing material, but monetary damages would likely not have been awarded.  

OCILLA protects the interests of all affected parties by balancing the remedies available to copyright owners and the responsibilities of ISPs. ISPs that follow the conditions set forth in the Act will be exempt from monetary damages arising from the infringing activities of subscribers. Copyright owners are able to expediently block access to the allegedly infringing material by notifying the ISP of the potential misuse of the copyrighted material. These provisions allow the Internet to keep developing as a communications tool and to increase the amount of information available to the public.

V. CONCLUSION

The Internet has developed into a global communications tool used by millions of people. This resource allows unparalleled amounts of information to be transmitted, without regulation or censorship, for educational, business, and entertainment purposes. With this freedom has come the price of electronic copyright infringement. The government has endeavored to keep up with the technological advances, but courts have inconsistently applied existing copyright laws to claims of liability against ISPs. The Online Copyright Infringement Liability Limitation Act is the best course of action to provide reasonable liability standards that equitably balance the interests of copyright owners in protecting the value of their works, the responsibilities of ISPs in providing such services, and society's interest in the free flow of information.

261. See OCILLA, 17 U.S.C.A. § 512(c)(1)(C) (West Supp. 1999). In order to apply OCILLA's regulations to Netcom, it must also be assumed that Netcom had a designated agent to receive notifications of alleged infringements and that RTC's notice was adequate. See id. § 512(c)(2)-(3).

262. See id. § 512(a) (providing that an ISP "shall not be liable for monetary relief, or except as provided in subsection (j), for injunctive or other equitable relief" if the ISP met the stated requirements); see also id. § 512(j) (providing for injunctive relief with regard to on-line copyright infringement).

263. See supra Part IV.B (discussing why OCILLA adequately protects the interests of ISPs, copyright owners, and the public).


265. See id. § 512(c)(1)(C).

266. Cf. Gilsdorf, supra note 5, at 657 (concluding that legislation clarifying copyright law would support the use and expansion of the Internet).