

## NOTE

# The Copyright Dilemma Involving Online Service Providers: Problem Solved . . . for Now

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## I. INTRODUCTION

Much has changed in the world of communications in the last several years. A quarter century ago, the suggestion of watching year-old motion pictures at home was almost laughable. The concept of a computer that could be manufactured to fit within a room was still taking shape. Society would not see personal computers become truly prominent until the late 1980s. The notion of an Internet or World Wide Web-sized database was unthinkable.

Times have indeed changed. Year-old movies are watched on videotape, and some computers are manufactured to fit in the palm of a hand. Gone are libraries' card catalogs, as online computer terminals have replaced them. Legal research can actually be done at home. Like it or not, the Information Age is here, and its technology is advancing at a lightning-quick rate.

With the prominence and exponential growth of the World Wide Web over the last six years<sup>1</sup> and the increasing ease of uploading and downloading text, graphics, and software, copyright law had found itself behind the technological times.<sup>2</sup> Should a company that provides Internet access (online service provider or OSP) be held directly liable for the copyright infringing acts of a customer? How would an answer to that question be altered if such a company had no idea that infringing acts were taking place?

In mid-July 1997, a bill was introduced by Representative Howard Coble of North Carolina to combat this problem.<sup>3</sup> Over the next year, this bill was hotly debated in subcommittee hearings, with OSPs on one side and copyright holders on the other. On October 28, 1998, the Digital Millennium Copyright Act (DMCA) was enacted into law.<sup>4</sup> Within it lies the "Online Copyright Infringement Liability Limitation" (Title II of the DMCA<sup>5</sup>), the

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1. Matthew Gray of the Massachusetts Institute of Technology states that although slowing in its rate of growth (in 1993, the doubling period of the World Wide Web was under three months), today's figures indicate that the Web's doubling period is under six months, as measured by the number of hosts. Matthew Gray, *Web Growth Summary* (visited Mar. 15, 1999) <<http://www.mit.edu/people/mkgray/net/web-growth-summary.html>>.

2. Although all of intellectual property has been affected, this Note will focus solely on copyright law.

3. H.R. 2180, 105th Cong. (1997).

4. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (to be codified at scattered sections of 17 U.S.C.).

5. *Id.* secs. 201-203, § 512, 112 Stat. at 2877-86 (to be codified at 17 U.S.C.).

end result of the evolution of the Coble Bill. Title II is not determinant of liability, rather it provides a defense that can be applied “if the provider is found to be liable under existing principles of law.”<sup>6</sup> As the title of the new statute indicates (referring, albeit fifteen months early, to the “Millennium”), it is exactly what the copyright law needed to maintain its relevance in today’s Internet world.

This Note begins (Part II) with a basic introduction to the tort of copyright infringement generally and as applied to OSPs prior to the passage of the DMCA. This Part concludes with an analysis of whether the copyright law, as it stood, presented a problem at all. In Part III, this Note turns to Congress’s solution to the “problem”—the Digital Millennium Copyright Act. It analyzes the evolution of the DMCA from the original Coble Bill through the text of the newly enacted law. It describes the concerns on both sides of the debate and illustrates how Congress kept both viewpoints in mind when composing the final draft of the DMCA. Finally, this Note turns to Title II of the DMCA, discussing specific provisions of the new law. This Note concludes that the DMCA is not “a solution in search of a problem” at all.<sup>7</sup> Rather, it is a necessary amendment to the copyright law, bringing it up to date as the year 2000 draws ever closer.<sup>8</sup>

## II. THE TORT OF COPYRIGHT INFRINGEMENT PRE-DMCA

### A. *Copyright Infringement Generally*

Copyright infringement, briefly defined, is a violation of at least one of the six exclusive rights set out in section 106 of the Copyright Act.<sup>9</sup> Section

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6. 144 CONG. REC. H10,048, H10,067 (daily ed. Oct. 8, 1998) (Conference Report on H.R. 2281, Digital Millennium Copyright Act).

7. Mike Kirk, on behalf of the American Intellectual Property Association, made this comment at the subcommittee hearing for the original Coble Bill. *See WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 222 (1997) [hereinafter *WIPO Hearing*] (statement of Mike Kirk, Executive Director, American Intellectual Property Law Association).

8. *But 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 (1998). Cahoy argues that the then-pending DMCA was “a solution in search of a problem” and that the law should not be changed unless the legislature can show “a defect in the law or the judicial reasoning that has created that law.” *Id.* at 359.

9. These exclusive rights are:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

501(a) provides that should any of these rights be violated (notwithstanding defenses provided in sections 106 through 118<sup>10</sup>), the violating person is deemed “an infringer of the copyright or right of the author, as the case may be.”<sup>11</sup> The policy behind the copyright law is to provide incentive to authors to create and disseminate works to the public without fear that those works will be copied and used to the credit and financial gain of someone else.

Courts divide this relatively broad definition into three categories: direct infringement, vicarious infringement, and contributory infringement. Direct infringement is the affirmative action of violating an author’s exclusive rights under section 106 of the Copyright Act.<sup>12</sup> Contributory infringement generally occurs when one knowingly supervises the infringing acts of another and the observer stands to benefit from the infringement.<sup>13</sup> Vicarious infringement “occurs when the defendant has the right or power to supervise the acts of the direct infringer, and has a financial stake in the infringing acts, even though the defendant *had no knowledge of, or did not directly participate in, the infringing acts.*”<sup>14</sup>

For decades, these torts shaped copyright law. For example, if a book was sold that was a carbon-copy of one written years earlier by someone else (who held a copyright in it), the person who copied the book without permission would be liable for *direct* infringement. If such a person did so within the scope of his or her employment and the employer had a financial stake in the acts, the employer could be held *vicariously* liable. If the company knew that infringing activity was occurring, it could be liable for *contributory* infringement. It is relatively easy to see how these three definitions work together. However, the 1990s brought a means of communication to the forefront of popularity that had never been imagined, other than by academics. This massive database known as the World Wide Web would present an entirely new means for people to advertise their products, communi-

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(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1994 & Supp. III 1997).

10. These defenses are not within the scope of this Note and will not be discussed.

11. 17 U.S.C. § 501(a) (1994).

12. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 9.1, at 285 (2d ed. 1995).

13. *Id.* § 9.20[A], at 314.

14. *Id.* § 9.20[C], at 316 (emphasis added).

cate with one another, and easily download material and place it elsewhere without permission.

*B. Copyright Infringement on the World Wide Web: Application to Service Providers*

The first reaction of scholars and lawmakers upon the growth of this new means of communication was, in essence, to do nothing. Obviously, only holding a subscriber liable for infringement is unlikely to compensate the copyright owner fully. Consequently, the deep pocket of the service provider offers an alluring opportunity for the infringed party to get the damages that person feels he or she deserves.

1. The Early Cases

When such a suit was brought and it became known that the OSP knew of the infringing activity and did nothing to stop it, courts were quick in finding the entity liable for contributory infringement. The policy for this rule was obvious: The whole purpose of copyright law—giving incentive to authors to bring creative works into the public market—would go by the wayside if service providers were permitted to allow their customers to infringe as much or as little as they saw fit. Thus, this part of copyright infringement law did not present any unfairness to service providers. A case involving the trading of unauthorized video games online provides a good illustration.

In *Sega Enterprises Ltd. v. MAPHIA*,<sup>15</sup> Sega, a major manufacturer and distributor of computer video game systems and programs, brought suit against MAPHIA, an electronic bulletin board (BBS)<sup>16</sup> and its system operator, Chad Scherman.<sup>17</sup> Scherman acknowledged that MAPHIA users were permitted to upload and download Sega games with an authorization password.<sup>18</sup> The evidence also indicated that Scherman ran MAPHIA from his home, using his own computer software and hardware.<sup>19</sup> Essentially, he was his own service provider. Because he knowingly allowed users to upload and download unauthorized copies of Sega video games, he was found liable for contributory copyright infringement.<sup>20</sup>

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15. *Sega Enters.*, 948 F. Supp. 923 (N.D. Cal. 1996).

16. A BBS is made up of electronic storage media that are connected by telephone lines through modems and controlled by computers. Users can “upload” information from their own computers to the storage media on the BBS. Likewise, users can “download” information from the storage media to their own computers. *Id.* at 927.

17. *Id.* at 926-27.

18. *Id.* at 928.

19. *Id.* at 927.

20. *Id.* at 933.

While *Sega Enterprises* involved a BBS and not the Internet or World Wide Web, it is not beyond the stretch of imagination that its holding could have been extended to OSPs as well. Admittedly, in the short history of OSP copyright infringement, there have been no cases involving infringement on a Web site where the provider admitted (or was found) to have had knowledge of the unlawful activity.<sup>21</sup> Nevertheless, this seems to be good law. If the OSP knew of infringing activity and did nothing to stop it, the company (or individual) is, basically, sanctioning the activity and should be found liable (and would be so found under the DMCA).

However, when courts in this area could not find knowledge of infringing activity on the part of the OSP (thus being unable to establish *prima facie* contributory infringement), they looked to and found liability under direct infringement. Thus, regardless of knowledge, service providers were forced to pay damages for the infringing activities of their customers. A case involving Playboy Enterprises shows that an online operator, prior to the passage of the DMCA, could be found liable for copyright infringement even when such a person had no knowledge of infringing activity.<sup>22</sup>

In *Playboy Enterprises, Inc. v. Frena*, George Frena, an operator of a BBS, was sued as a result of infringing photographic images that were displayed on his service.<sup>23</sup> For a fee, anyone could log on to his bulletin board service and look at these pictures. Frena did not upload any of Playboy's photographs onto his system and was not aware of any infringing activity on the part of his subscribers.<sup>24</sup> He stated that as soon as he was made aware of the infringing activity, he removed the unlawful photographs and began monitoring his BBS so as to prevent additional infringing photographs from being uploaded.<sup>25</sup> Once he was made aware of the unlawful activity taking place on his BBS, Frena seemed to do everything within his power to remedy the situation and took further steps to ensure that such action did not happen again. However, he was found liable for direct copyright infringement.<sup>26</sup> Quoting the court: "There is no dispute that Defendant Frena supplied a

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21. *But see* Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995). In this case, the court denied Netcom's motion for summary judgment on the claim of contributory copyright infringement on the ground that a material issue of fact existed as to whether Netcom had knowledge of infringing activity. *Id.* at 1374. Netcom claimed it had no knowledge of any infringing activity. *Id.* at 1373.

22. *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

23. *Id.* at 1554.

24. *Id.*

25. *Id.*

26. *Id.* at 1559.

product containing unauthorized copies of a copyrighted work. It does not matter that Defendant Frena claims he did not make the copies itself.”<sup>27</sup>

Although one could argue, probably quite successfully, that due to the small size of his BBS, Frena could have monitored his system from its inception to ensure that infringing activity did not occur, such a rule would be unjust, indeed unreasonable, if applied to an Internet service provider. Doing so would force such a company to monitor the thousands of users to whom it provides Web sites. However, not everyone agreed that such a rule would be unfair.

## 2. The Strict Liability Standard: The Inspiration

Holding service providers to the standards of strict or vicarious liability was an idea of the Clinton-established Working Group on Intellectual Property Rights (Working Group). In September 1995, the Working Group published its final report, entitled *Intellectual Property and the National Information Infrastructure (White Paper)*.<sup>28</sup> It recommended that OSPs be held to the standard of strict liability, finding it “premature to reduce the liability of any type of service provider in the NII environment.”<sup>29</sup> Two years ago, concurrent bills (S. 1284 and H.R. 2441) were brought to amend the Copyright Act to correspond with the recommendations of the Working Group.<sup>30</sup> However, proponents of the bills were not able to overcome objections concerning infringement liability of OSPs.<sup>31</sup> Courts nevertheless adopted a strict liability standard.

The main policy that supported the decision to impose a strict liability standard for OSPs—even when such an entity is unaware of infringing activity—was illustrated by Professor Jane C. Ginsburg of the Columbia University School of Law in 1995. She argued from an economic standpoint: “[T]he party having the ‘right and ability to supervise’ is best situated to pay

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27. *Id.* at 1556. But see *Marobie-Fl, Inc. v. National Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167 (N.D. Ill. 1997), where a court found that a service provider could not be found vicariously liable for copyright infringement, comparing the OSP to the owner of a photocopier machine: “Northwest only provided the means to copy, distribute or display plaintiff’s works, much like the owner of a public copying machine used by a third party to copy protected material. . . . Northwest did not actually engage in any of these activities itself.” *Id.* at 1178.

28. BRUCE A. LEHMAN & RONALD H. BROWN, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS* (1995).

29. *Id.* at 122.

30. *Bill Would Limit Liability for Infringement Occurring On-Line*, 54 Patent, Trademark & Copyright J. (BNA) No. 1336, at 231 (July 24, 1997).

31. *Id.*

for—or better, to prevent—infringement.”<sup>32</sup> She further states that enforcement is not meaningful unless its target is the deep pocket of a commercial network operator or bulletin board.<sup>33</sup>

### 3. So, Was There a Problem with the Copyright Law in This Area?

There is little doubt that a problem existed. Perhaps service providers four years ago had the ability to keep a watchful eye over their customers’ Web pages, but the immense size of the Web today makes such supervision almost impossible. By the calculation of Matthew Gray of the Massachusetts Institute of Technology, the World Wide Web has doubled itself at least six times since the report’s original publication three years ago,<sup>34</sup> and eight times since Professor Ginsburg’s article containing this contention was published.

Even in 1995, some believed that that the Internet was simply too large to be policed. Robert D. Collet, Chairman of the Board and President of Commercial Internet eXchange Association (CIX), a nonprofit trade association that, as of 1995, was comprised of over 70 percent of the nation’s Internet service providers, expressed concern that the Internet was becoming too large to police effectively.<sup>35</sup> He stated that the service providers that belong to CIX “transmit nearly half a billion messages *each day*, and cannot realistically be expected to monitor the content of those transmissions.”<sup>36</sup>

One can understand Collet’s concerns. The added burden of monitoring every message that passes through an OSP would dramatically increase overhead costs. Many smaller service providers would have been forced out of business. It follows that the OSPs that would be able to afford such supervision would still have had to be quite discriminating as to whom they granted access. Regardless, these increased costs would be passed on to the consumer. Fifteen dollars a month for Internet access would become a thing of the past. The Internet is for everyone, not just wealthy people who are able to afford an increase (probably significant) in access costs.

It has also been argued that the legislature should not have acted in the first place, as judges seemed to be creating an exception to the notions of vi-

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32. Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”*: *Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1493 (1995).

33. *Id.* at 1499.

34. See Gray, *supra* note 1.

35. Robert D. Collet, *White Paper: A Brief Analysis of the Role of Internet Access Providers in the Copyright Law Revisions* (visited Mar. 15, 1999) <[http://www.eff.org/pub/Intellectual\\_property/cix\\_ipwg\\_paper.comments](http://www.eff.org/pub/Intellectual_property/cix_ipwg_paper.comments)>.

36. *Id.* (emphasis added).

carious liability before the DMCA was passed into law.<sup>37</sup> However, just because a small handful of district court judges had held unknowing OSPs not liable<sup>38</sup> does not mean that that trend would have continued. It is simply too early to tell. Without any guidance as to how to apply the law (other than nonbinding cases from other jurisdictions), however, copyright would have been at the mercy of judicial decision making. It is possible that judges across the country would have altered the law so as to exempt unknowing OSPs from liability (as Cahoy seems to suggest), but it is equally possible that a decade from now there would have been different precedent for every district. With legislation in place that adequately addresses the issue, the latter is now an impossibility. Without such new law, the possibility would still exist that people such as George Frena<sup>39</sup> would still be held liable, even though unaware of infringing activity on their networks. Relying on judges (as opposed to the legislature) to make these laws would have left OSPs uncertain as to their potential for liability in this area and thereby confused when considering the implementation of precautionary measures. Congress needed to act.

Clearly, then, the law needed to change so as to better balance two viable policies. It needed to adjust so as to facilitate the growth of the Internet as an economic and communications tool, while at the same time not diminish the incentive to create new works. Clearly, requiring service providers to police their networks would have forced such companies to limit access to the Internet and World Wide Web to the number of customers they could viably police and charge more to those who are given access.

### III. THE SOLUTION: TITLE II OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA was the final resolution of a debate that took place in Congress for nearly a year and a half. This Part of the Note looks extensively at the legislative history of the new law from Representative Coble's initial bill<sup>40</sup> to its present form. The first section of this Part looks specifically at H.R. 2180, outlining the concerns on both sides of the debate, as illustrated in the testimony of its subcommittee hearings as well as offering a

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37. "[S]uch action, as with any change in law, should be reserved for a showing of real harm in the alternative. . . . By addressing problems on a case-by-case basis, the courts are able to slowly build a coherent structure for analyzing liability that is fluid and responsive to changes in technology." Cahoy, *supra* note 8, at 354.

38. *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995); Marobie-Fl, Inc. v. National Ass'n of Fire Equip. Distribs., 983 F. Supp. 1167 (N.D. Ill. 1997).

39. *See supra* Part II.B.1.

40. H.R. 2180, 105th Cong. (1997).

critique of the bill in its original form. The second section turns to a newer version of the bill,<sup>41</sup> which strives to answer some of the concerns raised in the prior version's subcommittee hearings. The final section examines the current law (Title II of the DMCA) and concludes that this legislation was necessary to adequately protect copyright owners and companies that provide online access.

A. *H.R. 2180: The Online Copyright Liability Limitation Act*

As a result of there being nothing in the Copyright Act specifically addressing its applicability to service providers, Representative Coble saw the need to introduce this legislation.<sup>42</sup> While there was judicially created doctrine that addressed the question of OSP liability, such companies sought greater assurance through legislation as to how the law—specifically this doctrine—would apply to the Internet.<sup>43</sup>

Representative Coble's rationale behind this bill was to provide "a single exemption, written broadly so as to cover a range of acts" and to devise an exemption based on the service provider's participation in the infringing activity.<sup>44</sup> He stated:

The overall goal is to exempt conduct where liability does not seem appropriate because of a low level of participation, control and knowledge, while at the same time ensuring that adequate incentives remain to assist copyright owners in preventing infringement, . . . without obligating service providers generally to monitor or police communications over the Internet.<sup>45</sup>

To achieve this goal, Representative Coble wrote the bill to exempt an OSP from liability when six circumstances are met.<sup>46</sup> The bill also limits

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41. H.R. 3209, 105th Cong. (1998).

42. Representative Coble notes that this exemption is not limited to "service providers" but can apply to anyone engaging in the covered activity. 143 CONG. REC. E1452, E1452 (daily ed. July 17, 1997) (statement of Rep. Coble).

43. *Id.*

44. *Id.*

45. *Id.*

46. (a) EXEMPTIONS.—A person shall not be liable—

(1) for direct infringement, or vicariously liable for the infringing acts of another, based solely on transmitting or otherwise providing access to material on-line, if the person—

(A) does not initially place the material on-line;

(B) does not generate, select, or alter the content of the material;

(C) does not determine the recipients of the material;

(D) does not receive a financial benefit directly attributable to a particular act of infringement;

(E) does not sponsor, endorse, or advertise the material; and

(F)(i) does not know, and is not aware by notice or other information indicating, that the material is infringing, or

remedies for contributory infringement when such an entity is exempt from direct or vicarious liability and provides legal protection to those who “act responsibly to assist in preventing infringement.”<sup>47</sup>

### 1. The Exemptions of the Coble Bill

The bill provided that should six particulars be met, a person would not be liable for direct infringement nor vicariously liable for the unlawful acts of others. This legislation was not intended to replace current law, rather Representative Coble noted that if an OSP failed to meet each of the exemptions, present doctrine would have governed the outcome.<sup>48</sup>

The first three requirements related strictly to the association of the provider and the infringing material without regard to business practices or state of mind. Basically, the only way these criteria could be met is if the service provider was just that and nothing more. For example, if the OSP had any control over what the content of the Web page was, it would not qualify for the exemption and current doctrine would apply. The third requirement was intended to be read very narrowly; it only required that the entity not be the one to decide whom, specifically, would receive the material.<sup>49</sup> “The fact that the person may have control over the universe of possible recipients . . . would not disqualify him or her, since the choice of all subscribers does not determine which subscriber receives which material.”<sup>50</sup>

The fourth and fifth provisions dealt with the business practice of the service provider, as it related to the infringing material. Between the two, an OSP would not qualify if it benefited financially from the infringement itself or advertised the infringing material.<sup>51</sup> One can see that if either provision was not met, OSP knowledge of the infringing acts can be easily implied. If such an entity benefited financially from or advertised for the information on one of its customers’ Web pages, the bill seems to imply a duty to check for infringing activity.

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(ii) is prohibited by law from accessing the material[.]

H.R. 2180, 105th Cong. § 2(a) (1997).

47. 143 CONG. REC. E1452, E1452 (daily ed. July 17, 1997) (statement of Rep. Coble).

48. *Id.*

49. *Id.*

50. *Id.*

51. In *Sega Enterprises, Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994), MAPHIA would not have qualified for the exemption due in part to these provisions. The court found that Scherman, the system operator of MAPHIA, “specifically solicited this copying and expressed the desire that these video game programs be placed on the MAPHIA bulletin board for downloading purposes.” *Id.* at 683.

The sixth provision was the specific knowledge requirement. The question for Representative Coble, when drafting this legislation, however, was where on the scienter spectrum the knowledge of service providers in these situations should be placed. Actual knowledge would encourage willful blindness, while a negligence standard could be interpreted as creating an affirmative duty on the part of OSPs to investigate—a duty Representative Coble did not want to impose.<sup>52</sup> A standard in between actual knowledge and negligence was adopted: “[I]f a person becomes aware of information that causes suspicion, he or she should have some obligation to check further.”<sup>53</sup> Thus, while there was no affirmative duty to constantly police one’s customers, an OSP, under the provisions of this bill, could not ignore suspicious activity when it became aware of such activity.

## 2. The Debate

Within three months of the bill’s introduction, hearings were conducted before the subcommittee. A debate arose between copyright holders and service providers regarding a knowledge standard. This Part outlines these concerns, using the testimony from these hearings.

### a. *Position One: No Knowledge Standard Should Be Imposed for OSPs.*

Clearly, this was (and likely still is) the position taken by the creators of creative works: motion picture producers, authors, composers, publishers, and the like. Their concern rests on the notion that unless service providers could be held liable regardless of knowledge of infringing activity, online piracy would be rampant, as copyright law would not adequately protect their works. Adoption of legislation such as H.R. 2180 would remove any incentive on the part of service providers to police their customers’ Web sites, placing a huge burden to do so on authors, composers, and other copyright holders.

John Bettis, songwriter, on behalf of the American Society of Composers, Authors, and Publishers, was concerned that if H.R. 2180 became law (thus establishing a knowledge requirement for OSPs to be held liable for infringement), the ability of copyright owners to secure their rights for online uses of their works would be critically handicapped.<sup>54</sup> This would be done in two ways: (1) placing the burden on the copyright owner to prove that the OSP had knowledge would “make it extremely difficult, as a practical mat-

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52. 143 CONG. REC. E1452, E1453 (daily ed. July 17, 1997) (statement of Rep. Coble).

53. *Id.*

54. *WIPO Hearing*, *supra* note 7, at 169 (statement of John Bettis, songwriter).

ter, for a copyright owner whose work was infringed to obtain redress,” and (2) imposing such a knowledge requirement forces the copyright owner to police the Internet for infringing works without assistance.<sup>55</sup> Looking at the policing aspect, he equated a copyrighted work to an automobile:

If someone steals my car, I can call the police and they will assist me—indeed, they will do virtually all the work—in recovering it and catching the criminals. But there is no police force to assist me and the other creators of America’s music when our songs are stolen. Yet these songs are as much our property as our automobiles.<sup>56</sup>

In sum, he was concerned that his rights as a copyright holder would have been severely hindered by the proposed legislation. The burden of policing the Web for infringing activity involving his copyrighted works would be a daunting, almost impossible task, given the immense size of the Internet.

Allee Willis, also a songwriter, on behalf of Broadcast Music, Inc., raised a more practical issue regarding the bill’s affect on the award of damages: “[I]f you want private copyright owners to continue to shoulder the burden of enforcing their copyrights, . . . we need strong civil damages and strong liability laws.”<sup>57</sup> She argued that the livelihood of songwriters depends on the use of their music through the Copyright Act, and by adding a knowledge requirement for the benefit of service providers, Congress would be “depriv[ing] songwriters of an income for that which [they] create.”<sup>58</sup>

This bill would also have presented a significant problem to the producers of software, who, according to Ken Wasch, President of the Software Publishers Association, presently lose \$12 billion per year to piracy.<sup>59</sup> His stance was that the then-current law was best; courts had fairly decided on-line infringement suits that had been brought against network providers.<sup>60</sup> He was unaware of any significant infringement cases involving major service providers, such as America Online, and saw no compelling evidence of a “chilling effect,” which would occur, as proponents of the bill argue,<sup>61</sup> if the then-current law remained unchanged.<sup>62</sup>

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55. *Id.* at 169-70.

56. *Id.* at 170.

57. *Id.* at 161 (statement of Allee Willis, songwriter).

58. *Id.* at 158.

59. *Id.* at 119 (statement of Ken Wasch, President, Software Publishers Association).

60. *Id.* at 120. Recall that this was the same position taken by Daniel R. Cahoy in his comment. See Cahoy, *supra* note 8.

61. See discussion *infra* Part III.A.2.b.

62. *WIPO Hearing*, *supra* note 7, at 120 (statement of Ken Wasch, President, Software Publishers Association).

While one can easily understand why producers of creative works would want the law to remain as it was prior to the DMCA, there was one arguably neutral organization that held the same position. Mike Kirk, representing the American Intellectual Property Law Association, reiterated Wasch's statement that no chilling effect of Internet growth had taken place, nor were they aware of any infringement suits involving online service providers or Internet access providers.<sup>63</sup> Thus, he questioned the need for such legislation altogether—seeing the Coble Bill as “a solution in search of a problem.”<sup>64</sup>

Certainly the arguments made by opponents of H.R. 2180 presented some valid concerns. If the OSP did not police its Web pages for infringing activity, who would? Without question, so the argument goes, these entities are in the best position to do so. Further, by exempting the service provider, would a remedy be available that adequately redresses injuries suffered on the part of the copyright holder? Without the deep pocket of the service provider, conceivably not. If society wants authors, composers, and the like to continue to share their works with the public, copyright rights must be given full protection. Anyone who has the capacity to protect against the violation of these rights must do so.

*b. Position Two: A Knowledge Standard Should Be Applied to OSPs.*

It is also fairly obvious that the types of parties that would favor the Coble Bill would be those involved in the providing of Internet and World Wide Web access. If the law held OSPs vicariously liable for the infringing acts of their customers when the provider is unaware of infringing activity, too great of a burden would be placed on OSPs to police their customers. This would drive small providers out of business and force large providers to increase their access rates. Internet access would be reduced, and it would fail to reach its potential as an electronic, information-based communications medium.

Roy Neel, on behalf of the United States Telephone Association (USTA),<sup>65</sup> argued that by allowing service providers to be found liable for infringement when they are unaware of any infringing activity, the law

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63. *Id.* at 222 (statement of Mike Kirk, Executive Director, American Intellectual Property Law Association).

64. *Id.*

65. The USTA is a coalition of over 1,400 telephone companies, nearly all of which are also service providers. *Id.* at 83 (statement of Roy Neel, President and Chief Executive Officer, USTA).

would be holding “the Internet itself” liable for copyright infringement.<sup>66</sup> He pointed out that the way information travels through the local exchange backbone and network components is in packets of ones and zeros. There should be no liability here, as the content is unidentifiable. Further, when information becomes available to the human eye, a cooperative system should be instituted, wherein the copyright owner is responsible for identifying infringing activity on his intellectual property and alerting the OSP, which would then be under a duty to remove the infringing material.<sup>67</sup> It was his position that the level of knowledge that should be required of service providers is actual knowledge, a standard higher than that in the Coble Bill and the DMCA. Under his scheme, an OSP would only be liable when it was made aware of infringing activity (thus given actual knowledge) and did nothing about it.

While such a rule would lift nearly all responsibility from service providers, it would open the door to willful blindness. An OSP would have an incentive to purposefully ignore the activity of its customers so as to avoid liability. However, not all service providers felt that this should be the standard.

Ronald G. Dunn, President of the Information Industry Association, saw no reason to go as far as Neel’s position. Dunn’s position revolved around the notion that all parties must work together to ensure that piracy is minimized.<sup>68</sup> Although he supported the bill for the most part, he noted that the “financial benefit exemption”<sup>69</sup> needed to be changed so as to encompass nonprofit service providers as well.<sup>70</sup> A simple change in language would have this effect. Overall, he agreed with Neel’s “cooperation” sentiment, but believed that such a system requires some affirmative conduct on the part of the OSP, including making efforts to inform its users about copyright and the penalties for infringement and to educate its employees about copyright law and the consequences of its violation.<sup>71</sup> As to a knowledge requirement, he supported H.R. 2180; he only felt that the bill’s provisions should be rewritten using more detailed language, so as to clarify exactly which service providers would be exempt. He merely called for the imposition of certain

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66. *Id.* at 84.

67. *Id.*

68. *Id.* at 174 (statement of Ronald G. Dunn, President, Information Industry Association).

69. *See* H.R. 2180, 105th Cong. § 2(a) (1997) (citing proposed 17 U.S.C. § 512(a)(1)(D)).

70. *WIPO Hearing, supra* note 7, at 175 (statement of Ronald G. Dunn, President, Information Industry Association).

71. *Id.* at 177.

duties on service providers that, ideally, would increase the likelihood of discovering infringing activity (a “know it when you see it” approach).

The university setting provides a unique perspective on this issue. On one hand, universities seek to advance the creative works of faculty and students. On the other hand, the setting dictates that universities advocate the growth of the Internet and World Wide Web as an educational tool. M.R.C. Greenwood, Chancellor of the University of California, Santa Cruz, believed that a law where “the degree of potential liability varies directly with the degree of control over intellectual property,” such as Representative Coble’s bill, was a good way to balance these two concerns.<sup>72</sup> This allows higher education institutions “to pursue the new education and research opportunities provided by the digital environment while simultaneously preserving critical remedies against infringement for proprietors.”<sup>73</sup>

Along with service providers, which have an enormous personal and business interest in the imposition of a knowledge requirement, H.R. 2180 won the support of entities lacking such an interest. The Register of Copyrights, Marybeth Peters, also supported the “cooperation between copyright holder and service provider” notion,<sup>74</sup> even though one would think upon first glance at her occupation that she would be biased toward strict liability. She stated that in the past, any legislation that sought to exempt OSPs from liability: (1) should be calibrated to particular degrees of involvement and responsibility; (2) should not contain mandatory extra-judicial procedural requirements for copyright owners to be able to enforce their rights; and (3) should not create incentives to avoid knowledge of infringement.<sup>75</sup> She saw this bill as meeting these criteria, finding that it sought “to provide greater certainty while safeguarding the ability of copyright owners to protect their exclusive rights in an on-line environment.”<sup>76</sup>

Clearly, making OSPs strictly liable for the infringing acts of customers regardless of knowledge would present such entities with a daunting task. In order to effectively police the online activities of those to whom they provide access—assuming that an effective method is possible—costs of that access to consumers would probably go up significantly. No one has argued that service providers should be completely excluded from liability in all situations. However, a law that would only punish those providers that know (or should know) of infringing activity and fail to take action seems to be

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72. *Id.* at 67 (statement of M.R.C. Greenwood, Chancellor of the University of California, Santa Cruz).

73. *Id.*

74. *Id.* at 53 (statement of Hon. Marybeth Peters, Register of Copyrights).

75. *Id.*

76. *Id.*

truly just; those that are willing to remove infringing information from their Web sites, but have no way of knowing that such action is taking place, would be exempted from liability.

### 3. The Critique

The initial Coble Bill was a good start, as it showed that a problem in the copyright law did exist and presented a viable solution. The main problem with the bill was that it was simply too broad. If the point of this bill (or, for that matter, any bill) was to not rely on judges and to provide a rule, it must be sufficiently narrow to have that effect. The bill added a knowledge standard to general notions of vicarious liability of OSPs, but it did not look at specific situations where possible infringement could take place. Almost assuredly, questions would have arisen in the courts as to how far to extend its application.

Consider the following hypothetical situation. Suppose a user, through OSP *A* operates a Web page (Page 1) with a link to another page (Page 2), operated by a user through OSP *B*. The latter page contains infringing material. Online service provider *A* then comes to find out about the infringing works on Page 2, although OSP *B* has no knowledge of it. Could OSP *A* be sued under a vicarious liability theory because it provided the page with the link to the page containing the infringing material? Should OSP *A* be under a duty to inform OSP *B* of the infringing acts of OSP *B*'s user? Add OSP *C* to the hypothetical. Online service provider *C* has a link to Page 1 and becomes aware of the infringing activity of a user of one of its competitors (OSP *B*, as it turns out). Should OSP *C* be vicariously liable for providing the page, with the link to the page, with the link to the page containing infringing material? What about search engines, such as Yahoo or Excite, whose business it is to provide links based on a user's search? It is a slippery slope that can be easily avoided through direct legislation. Obviously, with no legislation, judges would have drawn the line somewhere, and it is conceivable, perhaps even likely, that those lines would have been in different places, depending on the jurisdiction. This hypothetical situation illustrates that while a good start, H.R. 2180 was simply so broad that lawyers (and, thereby, courts) would argue (find) ambiguities, and differing judicial viewpoints could result.

On the other hand, it is clear that because computer technology moves at such a quick rate, the legislation will, inevitably over time, lack certain provisions that will seem basic five years from now, thus making it seem outdated. Representative Coble was on the right track when he introduced H.R. 2180; the bill simply left too much room for vastly different interpretations.

### B. *H.R. 3209: An Amended Version of H.R. 2180*

In mid-February 1998, Representatives Coble and Goodlatte of Virginia introduced an altered version of H.R. 2180—H.R. 3209.<sup>77</sup> This modification was somewhat narrower, but not as narrow as what ultimately would become the DMCA.<sup>78</sup> Using more refined language, it exempted an OSP from vicarious liability “based solely on the intermediate storage and transmission of material over that provider’s system or network,”<sup>79</sup> subject to a lack of knowledge standard. If the infringing activity was accomplished in a way other than that provided in paragraph (1), paragraph (3) provided the umbrella, covering any conduct “other than conduct described in paragraph (1).”<sup>80</sup>

One can see that although this is narrower than H.R. 2180, the overarching provision in paragraph (3) presents the same problem of overbreadth. Would caching or linking be included? Conceivably yes, but one could argue (and it is possible that a court could hold) the reverse. The legislation needed to address every conceivable way to transmit data. Without a doubt, new, faster, and more efficient ways will be discovered in the future, but the law can always be amended at that time. H.R. 3209 was outdated from its inception.

In early April 1998, the House Judiciary Committee incorporated H.R. 3209 into H.R. 2281,<sup>81</sup> the then-pending DMCA.<sup>82</sup> On the eve prior to the incorporation, a compromise was reached between copyright owners and OSPs on draft legislation that differed slightly from H.R. 3209.<sup>83</sup> H.R. 2281 was later amended to include this agreement.<sup>84</sup> On October 12, 1998, Congress passed the modified version of the DMCA, clearing it for presidential approval.<sup>85</sup>

### C. *Striking the Balance: Title II of the Digital Millennium Copyright Act*

When the DMCA was signed into law on October 28, 1998, the debate on OSP vicarious liability in the copyright arena finally came to an end. Not

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77. H.R. 3209, 105th Cong. (1998).

78. See discussion *infra* Part III.C.

79. H.R. 3209, § 2(a).

80. *Id.*

81. H.R. 2281, 105th Cong. (1998) (enacted).

82. David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner’s Guide*, 33 U.S.F. L. REV. 1, 50 (1998).

83. *Id.* (citing *Industry Groups Reach Accord on Online Copyright Liability Legislation*, 55 PAT. TRADEMARK COPYRIGHT 557-58, 564-67 (1998)).

84. *Id.*

85. *Id.*

only did it codify a knowledge standard for online service providers, but it did so in a narrow fashion—making it difficult to manipulate. Earlier, this Note argued that having a statute in place would do what judicial doctrine does not: It would provide OSPs with immediate certainty as to what the law is and what precautions to take.<sup>86</sup> Title II of the DMCA not only allows OSPs to be secure as to what exactly the law is, but reaches a fair conclusion as to what that standard should be. The Joint Explanatory Statement of the Committee of Conference states it best:

Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.<sup>87</sup>

This section examines Title II of the DMCA and concludes that this new law complies with the demands of technological innovation. Moreover, it is drafted in such a way (narrowly, as will be illustrated) as to allow OSPs to know what their role in the “policing for infringement” process is.

## 1. Coverage

Four categories of conduct by an OSP are the basis for the new limitations: transitory digital network communications, system caching, storage of information on systems or networks at the direction of users, and information-locating tools or “links.”

### *a. Transitory Digital Network Communications*

This subsection covers actions by a user where the OSP acts as nothing more than a conduit. Nothing is stored for any length of time, as only “intermediate and transient storage” applies here.<sup>88</sup> Thus, the ability of a service provider to gain knowledge of infringing activity is nearly nonexistent. An example here would be e-mail. If a user sends a copyrighted work without permission (as an attachment) to another user, the provider that the infringer used to send the e-mail could be exempted from monetary liability, should the actions of the OSP meet five requirements, each of which sets out a very specific circumstance that must exist for the entity to be able to use this provision.<sup>89</sup>

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86. *See supra* Part II.B.3.

87. 144 CONG. REC. H10,048, H10,067 (daily ed. Oct. 8, 1998) (Conference Report on H.R. 2281, Digital Millennium Copyright Act).

88. Digital Millennium Copyright Act, Pub. L. No. 105-304, sec. 202, § 512(a), 112 Stat. 2860, 2877-78 (1998) (to be codified at 17 U.S.C.).

89. *Id.*

This list of circumstances seems to be a brainstorm of all the ways an OSP could become aware of infringing activity on the part of its users. The material must have been initiated by someone other than the provider,<sup>90</sup> be transmitted without modification,<sup>91</sup> and the service provider may have no part in selecting the recipients of the material (other than as an “automatic response to the request of another person”).<sup>92</sup> Further, the transmission must have been carried out “through an automatic technical process without [the OSP’s] selection of the material”<sup>93</sup> and no copies of the material made in the course of this process are permitted to be retained in the system for any time longer than that which is “reasonably necessary for the transmission.”<sup>94</sup>

*b. System Caching*

“Caching” is defined in this provision as “the intermediate and temporary storage of material on a system or network.”<sup>95</sup> Note the difference between caching and transitory communications, covered in the previous section. In transitory communications, information is stored only as long as it takes for the transmission (e-mail, for example) to reach the other party. Caching is temporary storage as well, but it involves storage for a longer period of time than that of transitory communications. The OSP, therefore, has more of an ability to learn about infringing activity with caching than with transitory communications (although the likelihood of discovering such activity without notice is still very remote).

There are three basic requirements. The material must have been put online by someone other than the OSP,<sup>96</sup> the transmission of the material must have been at the direction of the person who made the material available online,<sup>97</sup> and the storage of the material must have been through “an automatic technical process for the purpose of making the material available to users of the system . . . who . . . request access . . . from [such a person].”<sup>98</sup>

Further, the transmission itself must meet certain conditions. First, the material must be transmitted “without modification to its content from the manner in which the material was transmitted.”<sup>99</sup> Second, the service pro-

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90. *Id.* § 512(a)(1), 112 Stat. at 2878 (to be codified at 17 U.S.C.).

91. *Id.* § 512(a)(5) (to be codified at 17 U.S.C.).

92. *Id.* § 512(a)(3) (to be codified at 17 U.S.C.).

93. *Id.* § 512(a)(2) (to be codified at 17 U.S.C.).

94. *Id.* § 512(a)(4) (to be codified at 17 U.S.C.).

95. *Id.* § 512(b)(1) (to be codified at 17 U.S.C.).

96. *Id.* § 512(b)(1)(A) (to be codified at 17 U.S.C.).

97. *Id.* § 512(b)(1)(B) (to be codified at 17 U.S.C.).

98. *Id.* § 512(b)(1)(C) (to be codified at 17 U.S.C.).

99. *Id.* § 512(b)(2)(A) (to be codified at 17 U.S.C.).

vider must comply with rules concerning updating material when specified by the user “in accordance with a generally accepted industry standard data communications protocol,” although this only applies when such rules are not used by the user “to prevent or unreasonably impair [such] intermediate storage.”<sup>100</sup> The third condition mandates that the OSP did not interfere with the ability of technology to return to the user information that would have been directly available to subsequent users.<sup>101</sup>

Two other conditions are dependent on other circumstances. First, if the user has a condition in effect that a person must meet prior to having access to the material (such as a password, paying a fee, etc.), the service provider must limit access to the stored material to those who have met those conditions.<sup>102</sup> Finally, if the OSP is notified<sup>103</sup> that a user makes material available online without permission from the copyright owner, the OSP must have acted “expeditiously to remove, or disable access to, the material that is claimed to be infringing.”<sup>104</sup>

*c. Information Residing on Systems or Networks at the Direction of Users*

As evidenced by the term “residing,” this limitation covers storage of material for a longer period of time than simple “caching.” This type of storage is nearly permanent—at least as permanent as anything can be online. Although the likelihood of no-notice discovery of infringing activity is

100. *Id.* § 512(b)(2)(B) (to be codified at 17 U.S.C.).

101. *Id.* § 512(b)(2)(C), 112 Stat. at 2879 (to be codified at 17 U.S.C.). Although applicability would apply

only if that technology—(i) does not significantly interfere with the performance of the provider’s system . . . or with the intermediate storage of the material; (ii) is consistent with generally accepted industry standard communications protocols; and (iii) does not extract information from the provider’s system or network other than the information that would have been available to the . . . [user] if the subsequent users had gained access to the material directly from that person.

*Id.*

102. *Id.* § 512(b)(2)(D) (to be codified at 17 U.S.C.).

103. See *id.* § 512(c)(3), 112 Stat. at 2880 (to be codified at 17 U.S.C.), which lists the elements of notification.

104. *Id.* § 512(b)(2)(E), 112 Stat. at 2879 (to be codified at 17 U.S.C.). Note that this subparagraph only applies when

(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and (ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

*Id.* § 512(b)(2)(E)(i)-(ii) (to be codified at 17 U.S.C.).

still very low, it is surely higher if the material is transferred in this way (as opposed to caching or transitory communication). An example is information on a Web page.

Due to this distinction, the requirements that must be met to fall under this exception differ from the previous two means of transferring information. First, the service provider cannot have actual knowledge that the material is infringing,<sup>105</sup> nor can the OSP be “aware of facts or circumstances from which infringing activity is apparent.”<sup>106</sup> Further, if an OSP comes across such knowledge, it must have acted “expeditiously to remove, or disable access to, the material.”<sup>107</sup> Second, the OSP must not have received any “financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”<sup>108</sup> Finally, if the OSP is notified pursuant to the elements of notification<sup>109</sup> of claimed infringement, the provider must have “respond[ed] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”<sup>110</sup>

This subsection also requires OSPs that expect to invoke this limitation to designate an agent to receive notification of claimed infringement: It must provide the Copyright Office with the name, address, phone number, e-mail address of the agent, as well as any other information that the Register of Copyrights “may deem appropriate.”<sup>111</sup>

*d. Information Location Tools or “Links”*

This exception is quite different than that of the first three—no storage (or passage) of information is taking place. Rather, this provision protects those OSPs that provide a Web page that refers or “links” users to another page that contains infringing material. This section covers every form of referral, from the link at the bottom of a personal Web page to a search engine like Yahoo or Excite.

Further, the wording of the requirements that a service provider must meet under this subsection is virtually identical to those covering “Information Residing on Systems or Networks.” Basically, an OSP cannot have ac-

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105. *Id.* § 512(c)(1)(A)(i), 112 Stat. at 2880 (to be codified at 17 U.S.C.).

106. *Id.* § 512(c)(1)(A)(ii) (to be codified at 17 U.S.C.).

107. *Id.* § 512(c)(1)(A)(iii) (to be codified at 17 U.S.C.).

108. *Id.* § 512(c)(1)(B) (to be codified at 17 U.S.C.).

109. *See id.* § 512(c)(3) (to be codified at 17 U.S.C.).

110. *Id.* § 512(c)(1)(C) (to be codified at 17 U.S.C.). Recall the case of *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), discussed *supra* Part II.B.1. Had this case been tried today, Frena would seem to fall within these parameters (assuming he complied with the statutory formalities).

111. § 512(c)(2), 112 Stat. at 2880 (to be codified at 17 U.S.C.).

tual knowledge, constructive knowledge, or receive any financial benefit directly attributable to the infringing material (in such a case when the OSP has “the right and ability to control such activity”).<sup>112</sup> Upon obtaining such knowledge (or receiving notification pursuant to the elements of notification in the subsection (c)(3)), the service provider must have acted swiftly in removing or blocking access to the material.<sup>113</sup>

## 2. Observations

The above establishes, indeed demonstrates, that there was an implicit congressional intent to take the law in this area completely out of the judge’s hands so as to provide uniformity among jurisdictions. By wording the statute as narrowly as it did, Congress did well in showing online service providers exactly what is expected of them in the fight to protect copyrighted works. Title II makes clear throughout that any service provider with actual knowledge (or constructive knowledge, as defined in the statute) is not immune from liability. Moreover, it rewards those OSPs (like George Frena) that, once made aware of infringing activity, act quickly to remove (or block access to) the infringing material.

The main thing it does not do—and rightfully so—is force OSPs to police their networks. Doing so would greatly increase overhead costs, forcing the public to pay significantly increased access fees. It would not make sense, by analogy, to hold the builder of a road liable for a car accident that takes place upon it (assuming no defect in the road exists that in any way contributed to the cause of the accident), and it does not make sense to force service providers to constantly police their “roads” for infringing activity.

Congress’s resolution of the debate between copyright holders and service providers was fair. Both parties now have an incentive to minimize infringement. While the copyright holder’s incentive is obvious, the service provider, once it is made aware of infringing activity either on one of its Web pages or on a page that its Web page links to, will be inclined to remove the material as quickly as possible—doing so will ensure that it will be exempt from possible future liability. Therefore, copyright holders are better protected as well. Tad Crawford, publisher for Allworth Press in New York City, agrees: “[T]he Act provides much-needed protection for the copyright owners of materials that are available and transmitted online.”<sup>114</sup>

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112. *See id.* § 512(d), 112 Stat. at 2881 (to be codified at 17 U.S.C.).

113. *Id.* § 512(d)(3) (to be codified at 17 U.S.C.). *See also* “Limitation on Liability of Nonprofit Educational Institutions,” *id.* § 512(e) (to be codified at 17 U.S.C.).

114. Tad Crawford & Laura Mankin, *The Digital Millennium Copyright Act: Tying Up the Loose Ends of Fair Use and Protected Online Content*, EDITORIAL EYE, Feb. 1999, at 3.

Furthermore, Congress took steps to protect service providers from people “crying wolf.” By implementing the elements of notification<sup>115</sup> and discussing “misrepresentations,”<sup>116</sup> it increased the likelihood that when an OSP receives a warning that material on its network is infringing, such notice will be truthful. It therefore removes anxiety on the part of such entities for another potential for liability—wrongful removal of noninfringing works.

All in all, a fair resolution seems to have been reached that “extend[s] new protections to copyright owners to help them guard against the theft of their works in the digital era. At the same time, . . . the critical balance in the copyright law between the rights of copyright owners and users” was preserved.<sup>117</sup> Without question, there will come a time, probably sooner than later, when this legislation will have to be amended, but today it is exactly what copyright law needs: A knowledge standard applied to online service providers drafted in such a way as to give OSPs a clear idea as to what they need to do to avoid liability.

#### IV. CONCLUSION

There comes a time in the life of any law where it needs to adjust to the changing times. As one publication put it: “The nature of cyberspace itself hinders the traditional development of law simply because it moves so fast; the technology has a tendency to overtake the legal issues.”<sup>118</sup> At the time the Copyright Act of 1976 was drafted, a communications medium such as the Internet and today’s World Wide Web was unimaginable to most, similar to the idea of a horseless carriage traveling a quarter of a mile in less than ten seconds during the Civil War.

Times had changed. Online service providers were confused. Congress had to act. If Congress had simply allowed judges to create doctrine in this area, it would have been years before any definite and controlling rules would have existed. This would have caused copyright law to continue to lag behind the digital times and caused OSPs to protect themselves at the expense of the innocent user. One thing surely is not fair—the law should not

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115. See § 512(c)(3), 112 Stat. at 2880 (to be codified at 17 U.S.C.).

116. See *id.* § 512(f), 112 Stat. at 2882 (to be codified at 17 U.S.C.), which discusses potential liability of any person who knowingly materially misrepresents that material is infringing or was removed by mistake. See also *id.* § 512(g) (to be codified at 17 U.S.C.). This provision protects an OSP from being sued by a copyright holder or an alleged infringer for damages resulting from the wrongful removal of copyrighted works as a result of a false report that the removed work infringed copyright.

117. 144 CONG. REC. E2166, E2166 (daily ed. Oct. 12, 1998) (statement of Rep. Boucher).

118. Carole E. Handler & Craig A. Guthery, *Cyberspace Licensing: Linking, Framing, and Caching*, CYBERSPACE LAW., Dec. 1998, at 2.

punish the entire Internet community for the actions of a few infringing users.

Therefore, the DMCA was and is a necessary amendment to the copyright law, not “an answer in search of a problem.” It allows the Internet to prosper as a communications medium while, at the same time, protecting the rights on which creators depend. Most importantly, it brings the copyright law up to date as the twenty-first century approaches.