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Joshua Alan Daub

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A Premature Solution: Legislative Reaction to the Debate Over Internet Service Provider Liability for Copyright Infringement*

I. Introduction

Copyright law seeks to "promote the Progress of Science and useful Arts" by granting to authors limited control over the use and dissemination of their works.1 When a person engages in an unauthorized use of a copyrighted work, that person is said to have infringed on the copyright, and may face both civil and criminal liability.2 Furthermore, a person who facilitates or contributes to the infringing activity of others may be liable as well.3

The Internet provides unprecedented access to intellectual property by making the widespread distribution of information easy and inexpensive.4 When this information consists of copyrighted material, the distribution may implicate the rights granted by copyright law.5 Thus, the complex system of rights and responsibilities created by copyright law is forced to adapt to the Internet's rapid growth, enormous scale, and unique nature.6

* Author's note: Shortly before this Comment was published, President Clinton signed a different bill limiting Internet service provider liability for copyright infringement. See Digital Millennium Copyright Act, P.L. No. 105-304, 112 Stat. 2860 (adding § 512 to the Copyright Act). The new law is more coherent than the bills analyzed in this Comment. Nevertheless, this Comment's analysis of Internet copyright infringement legislation is still valid to the issues of service provider knowledge, overly burdensome notice, multiple exemptions, and the policy of enforcing copyrights on the Internet.

1. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress power in the field of copyright).
5. See id.
6. The Internet poses new issues in a variety of legal areas. See generally Howard L. Steele, Jr., Comment, The Web That Binds Us All: The Future Legal Environment of the Internet, 19 Hous. J. INT'L L. 495, 498-503 (1997) (discussing the criminal law issues raised...
An important copyright issue raised by the growth of the Internet is the liability of Internet service providers for the infringements of those who use their services.\(^7\) Although the case law is sparse, courts confronted with this issue have not hesitated to impose liability on a service provider under appropriate circumstances.\(^8\) These decisions have sparked a debate between copyright industries and service providers.\(^9\) The copyright industries argue that they already lose billions of dollars each year to copyright infringement\(^10\) and the growth of the Internet threatens to exacerbate the problem: once on the Internet, digital versions of copyrighted works may be endlessly duplicated with little effort.\(^11\) Whereas piracy once required extensive machinery, materials, and methods of distribution, today, a single copy on a single computer on the Internet allows worldwide access and unlimited duplication of the copyrighted work.\(^12\)

On the other hand, Internet service providers believe that it is unfair to hold them liable for the infringements of persons who use their services because it is impossible for them to monitor all the information that is transmitted by the provider.\(^13\) They argue that such liability would stifle the growth of the Internet and foil the

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10. See NII Hearings, supra note 7 (testimony of Kenneth R. Kay, Executive Director, Creative Incentive Coalition) (available in 1996 WL 241769). Copyright infringement is often referred to as piracy. See id. Global piracy costs the United States’ industries an estimated $18-20 billion per year. See id.

11. See S. 1146 Hearings, supra note 4 (statement of Cary H. Sherman, Senior Executive Vice-President and General Counsel, Recording Industry Association of America) (available in 1997 WL 545714).

12. See id.

purpose of copyright law: to encourage access to information and discourse.14

This debate spilled over into Congress in 1995 when the 104th Congress sought to amend the Copyright Act15 to recognize its applicability in a digital age16 and found itself a referee between powerful industries.17 Because these industries failed to reach a consensus on the issue of service provider liability, Congress was forced to put the legislation on the back-burner.18 The 105th Congress has recently turned to the issue once more by drafting bills that would limit a service provider's liability for infringing activity on its system: the On-line Copyright Liability Limitation Act19 and the Digital Copyright Clarification and Technology Education Act of 1997.20

This Comment examines how this new legislation will affect service provider liability. Part II of this Comment provides an overview of basic copyright law, the pertinent character of the Internet, the recent case law concerning service provider liability, and Congress' previous attempts to address the issue. Part III discusses the changes the bills would make in the existing law, both in theory and in application. Finally, this Comment asserts that the courts have been flexible in dealing with copyright law in the changing medium of the Internet. The courts have not imposed excessive liability on Internet service providers, nor is there any indication that such liability is likely to occur (insert a footnote here). Accordingly, the bills should not be enacted without further study of their potential chilling effects on the growth of the Internet.

14. Senator Orin Hatch has framed the issue as "a battle over whether the advance of the Internet would be retarded because of adverse court rulings or the reluctance of content owners to make full use of the medium." Lutzker, supra note 9, at 18.
18. See Gibeaut, supra note 13, at 62. H.R. 2441 and S. 1284 were never enacted because of a lack of compromise between service providers and the copyright industries. See id.
II. Background

A. Copyright Law

1. Policy of Copyright—Copyright law is a complicated subject made more difficult when applied to the Internet. The purpose of copyright law is to ensure the public's access to knowledge by encouraging the production of creative works. In practice, there is a tension between this purpose and the rights granted to accomplish this purpose. Thus, a short summary of basic copyright law is necessary to understand the issues raised by both sides in the liability debate.

2. Exclusive Rights—Copyright is a limited property interest granted to the author of a work that gives the author certain exclusive rights. These rights give the copyright holder limited control over the use and dissemination of the copyrighted work as well as control over reproduction, distribution, and performance. Congress has continually amended the Copyright Act so that these rights extended into new mediums, including the digital environment of the Internet.

3. Direct Infringement—Copyright infringement occurs when a person violates any of the copyright owner's exclusive rights. Thus, a claim for direct infringement must establish, first, the ownership of a valid copyright, and, second, copying of constituent elements of the work that are original. The ownership element

21. Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 305 (2d Cir. 1963) (acknowledging the typical copyright infringement suit to involve: "[A] legal problem vexing in its difficulty, a dearth of squarely applicable precedents, a business setting so common that the dearth of precedents seems inexplicable, and an almost complete absence of guidance from the terms of the Copyright Act.")

22. See Shulman, supra note 8, at 562.


27. See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). In this context, copying covers not only reproduction but also a violation of any of the exclusive
is usually satisfied by the production of certificates of copyright showing that the plaintiff is the owner of the copyright.\(^{28}\) The copying element requires that the plaintiff produce direct evidence of copying or create an inference that copying occurred.\(^{29}\) This inference can be created by showing that the defendant had access to the copyrighted work and that the two works are substantially similar.\(^30\) Direct infringement does not require an intent to infringe or knowledge of the infringement;\(^31\) thus, the Copyright Act imposes strict liability.\(^32\)

4. **Contributory Infringement**—Courts have further developed the law of copyright infringement by introducing the concepts of contributory and vicarious copyright infringement.\(^33\) Contributory infringement requires that the defendant, first, have knowledge of the infringing activity, and, second, that the defendant induced, caused, or materially contributed to the infringing activity.\(^34\) The knowledge element is satisfied when the defendant knows or has reason to know of the infringing material.\(^35\) The participation element is satisfied if the defendant provided the "site and facilities" for the infringing activity.\(^36\)

5. **Vicarious Infringement**—The other judicial extension of liability for copyright infringement is the law of vicarious infringement, which focuses on the relationship between the defendant and
the direct infringer.\textsuperscript{37} Vicarious liability requires that the defendant, first, had the right and the ability to supervise the infringing activity and, second, that the defendant had a direct financial interest in such activities.\textsuperscript{38} The control element is satisfied when the defendant had a contractual ability to control the direct infringer,\textsuperscript{39} when the defendant had the ability to impose rules and regulations on the direct infringer,\textsuperscript{40} or when the defendant promoted the direct infringer.\textsuperscript{41} The direct financial benefit element is satisfied when the infringing activities provide a direct benefit to the defendant; however, the defendant is not required to have an actual stake in the direct infringing activities.\textsuperscript{42}

\section*{B. The Internet}

The severity of copyright infringement on the Internet is due, in part, to the attitude of Internet users toward intellectual property and piracy, and the origin of this attitude can be found in the Internet's unique character. Furthermore, the Internet presents special obstacles to the enforcement of copyright law in a digital age. Therefore, in order to understand the debate over service provider liability, a discussion of the unique history, culture, and nature of the Internet is necessary.

\subsection*{1. The History of the Internet—The Internet began in the 1960's with the development of the ARPAnet by the United States Military.\textsuperscript{43} Originally, the ARPAnet connected computers

\textsuperscript{37} See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963). The origins of vicarious liability are in cases of landlord-tenant or employer-employee relationships. See, e.g., id.; Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d at 1159.

\textsuperscript{38} See Gershwin, 443 F.2d at 1161-62.

\textsuperscript{39} See Shapiro, 316 F.2d at 308 (finding control sufficient when the defendant had contractual power to regulate the direct infringer's business, discharge infringer's employees, and handle infringer's accounting).

\textsuperscript{40} See Fonovisa, 76 F.3d at 263 (finding control sufficient when defendant had the ability to make rules regarding the operation of the premises which the infringer used to sell bootleg records).

\textsuperscript{41} See Gershwin, 443 F.2d at 1162-63 (finding control sufficient when the defendant helped to book and promote local community concerts at which copyrighted music was performed).

\textsuperscript{42} See Fonovisa, 76 F.3d at 263-64 (finding a direct financial benefit when the defendant received fees from admission, parking, and concessions at swap meet that sold bootleg records).

\textsuperscript{43} See Steele, supra note 6, at 497. The name ARPAnet comes from the Advanced Research Project Agency of the Department of Defense that developed the network. See
operated by the military, defense contractors, and universities conducting defense-related research and was used primarily by researchers and scientists. The network grew steadily until the 1990's when it exploded into what it is today: a globe-spanning civilian network connecting individual users, businesses, organizations, and governments.

2. The Nature of the Internet—The Internet has many component parts including electronic mail ("e-mail"), newsgroups, chat rooms, and the World Wide Web ("the Web"). These components allow documents to be copied from computer to computer over the Internet. Each Internet site has its own "address" that is used to navigate the myriad computers and documents that make up the Internet.

Access to the Internet has never been easier: persons can gain access through educational institutions, employment, community organizations, or through commercial Internet service providers. Such providers vary. Some give their users access to the Internet by transmitting data through the provider's system with little creation or policing of content. Other providers supply additional services beyond Internet access, such as chat-rooms, mailing lists,
and on-line catalogues. These providers are more likely to police existing content and create their own new content.

3. The Culture of the Internet—Because the Internet developed without planning, it has largely been self-regulated. This unique history is reflected in the lax attitudes of many Internet users toward intellectual property issues: that everything on the Internet is “free” or at least should be “free.” While business and industry now embrace the technology as a new frontier in which to reach consumers, much of the information on the Internet remains accessible at little or no cost to the user. Thus, persons who might hesitate to pirate copyrighted material by conventional means do not think twice about downloading a new song or piece of software from an Internet site.

4. Problems of Enforcement—Copyright owners seeking to enforce their rights must deal with many problems posed by the Internet’s unique character. First, the Internet’s enormous size and international character make detecting infringements difficult. The infringers themselves are also difficult to find because they have no fixed address and their crimes occur over a communication system rather than in a concrete locale. Therefore, simply bringing a suit can be difficult because copyright owners often “don’t know who to sue.”

Even after the infringement and infringer are discovered, the problems do not end; the Internet compounds existing legal difficulties and creates new ones. First, the Internet poses jurisdictional problems that a court must resolve before examining

52. See Reno, 117 S. Ct. at 2334.
54. See Steele, supra note 6, at 503 (discussing new solutions for regulating crime on the Internet).
55. See Gibeaut, supra note 13, at 63.
56. See S. 1146 Hearings, supra note 4 (testimony of Daniel Burton, Vice-President, Novell Corporation, discussing the present and future of commerce on the Internet) (available in 1997 WL 545715).
57. See Reno, 117 S.Ct. at 2335.
58. See Gibeaut, supra note 13, at 63.
60. See Lutzker, supra note 9, at 18.
61. See id.
62. Bencivenga, supra note 59, at 5.
the merits of the underlying claim. Second, case law is sparse because the widespread use of the Internet is a relatively recent phenomenon. Third, the Internet is "a unique and wholly new medium of worldwide human communication" and, thus, presents difficulties in applying legal concepts that were not developed with the Internet in mind. Finally, even if an infringer is located and brought to trial, the infringer may not have the resources to pay damages.

C. Recent Case Law

Recent case law has addressed the issue of service provider liability. Much of the debate is a reaction and overreaction to these decisions. A discussion of the current state of the law is necessary to fully understand the arguments on both sides of the debate.

1. Direct Infringement—A service provider's potential liability for direct infringement depends on the acts undertaken by the provider in supplying its services. In Religious Technology Center v. Netcom On-line Communication Services, Inc., the first case to squarely address the issue of service provider liability, the court held that when a provider's only act is to maintain a system which automatically transfers data sent by subscribers, the provider will not be liable for direct infringement. The Netcom court noted that "[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."

64. The first case to address the issue of copyright online was Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).
67. See Bencivenga, supra note 59.
68. See infra notes 69-102 and accompanying text.
70. See Id. at 1370-71.
71. Id. In doing so, the Netcom court modified the strict liability nature of copyright infringement and declined to follow the decision in Frena which held that a bulletin board
Other courts have followed *Netcom* by refusing to impose liability unless there is some evidence of volitional conduct.\(^7\) Furthermore, some courts have found no element of volition when the provider's acts went beyond mere automatic transmission.\(^7\) For example, in *Sega Enterprises Ltd. v. Maphia*, the court held that a bulletin board operator was not liable for direct infringement even though it knew of the infringements and solicited subscribers to upload the infringing material.\(^7\)

However, in *Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc.*,\(^7\) the court held that a bulletin board operator was liable for direct infringement even though the operator's acts were similar to the defendant's acts in *Sega*.\(^7\) The *Hardenburgh* court agreed with the *Sega* and *Netcom* decisions, but found that the defendant's additional act of using a screening procedure\(^7\) satisfied the volitional element.\(^7\) Thus, while the simple act of transmission is not a sufficient volitional act, it is uncertain what additional conduct is sufficient to constitute a volitional act.

2. **Contributory Infringement**—Although a service provider's actions may not be sufficient to subject it to direct liability, the

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\(^7\) See *Sega Enters. Ltd.*, 948 F. Supp. at 932. The provider in *Sega* was the operator of a bulletin-board service where subscribers could obtain bootleg video games. See id. at 927. Although the defendant was not an Internet service provider, the court followed the *Netcom* reasoning and treated the two situations as analogous. See id. at 932.

\(^7\) See id.

\(^7\) 982 F. Supp. at 503 (N.D. Ohio 1997).

\(^7\) See id. at 503; *Sega Enters. Ltd.*, 948 F. Supp. at 932.

\(^7\) During this procedure, the bulletin board employees selected the files to be made available for downloading from the files uploaded by subscribers. See *Russ Hardenburgh*, 982 F. Supp. at 513. The employees then moved the selected files into the area from which subscribers could download. See id.

\(^7\) See id. In doing so, the court followed *Netcom* and distinguished *Frena* in which the provider's bulletin-board allowed users to directly upload files into the available download area and, thus, had no such screening process. See *Russ Hardenburgh*, 982 F. Supp. at 513 (finding that the facts "transform[ed the defendants] from passive providers of a space in which infringing activities happened to occur to active participants in the process of copyright infringement").
provider may still be liable for contributory infringement.⁷⁹ A claim for contributory infringement requires that the provider knew of the infringing activity, and that the provider induced, caused, or materially contributed to the infringing activity.⁸⁰

a. Knowledge of the Infringement—The knowledge element is satisfied if the provider has actual or constructive knowledge.⁸¹ In Netcom, the court denied the provider’s motion for summary judgment on the contributory infringement claim because the copyright owner raised a genuine issue of fact as to the provider’s knowledge by notifying the provider of the infringing activity. Moreover, in Sega, the court held that the provider had knowledge of the infringing activity due to the fact that the provider monitored or had the ability to monitor the downloading and uploading that occurred on its system.⁸³

b. Substantial Participation—While courts have been reluctant to impose direct liability without substantial action by the provider, less substantial action may suffice to impose liability for contributory infringement.⁸⁴ The Netcom court held that once the knowledge element is satisfied, merely providing the automatic service of transmission satisfies the participation element.⁸⁵ Furthermore, in Fonovisa, Inc. v. Cherry Auction, Inc., the court held that providing the facilities for known infringing activity is sufficient to show substantial participation.⁸⁶ In that case, the defendant’s

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⁸⁰. See Gershwin Publ’g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).
⁸¹. See id.
⁸². See Netcom, 907 F. Supp. at 1381. Netcom had actual knowledge upon receipt of the notice from the copyright owner. See id. at 1374. However, there was still a question of fact as to whether Netcom had knowledge of the infringing activity occurring after receiving notice. See id.
⁸⁴. Compare Netcom, 907 F. Supp. at 1373 (holding that the act of automatic transmission is insufficient to subject the provider to direct liability), with id. at 1375 (holding that automatic transmission is sufficient to subject the provider to contributory liability).
⁸⁵. See id.
⁸⁶. 76 F.3d 259 (9th Cir. 1996).
⁸⁷. See id. at 264. Fonovisa concerned the liability of a swap meet operator for the infringing activity of the swap meet vendors. See id. Although not an Internet service provider case, Fonovisa has been cited by several courts in their analysis of service provider liability. See, e.g., Sega Enters. Ltd., 948 F. Supp. at 932-33; Playboy Enters., Inc. v. Russ Hardenburgh, 982 F. Supp. 503, 514 (N.D. Ohio 1997). Commentators have also recognized the situations as roughly analogous. See Shulman, supra note 8, at 585.
supplying of support services to the direct infringers was enough to show a material contribution to the infringing activity.88

Thus, courts will find that a provider participated in the infringing activity when the provider supplied a central depository site for the infringing material, allowed users to download the infringing material, or actively solicited users to upload infringing materials.89 In addition, courts are even more likely to find substantial participation when the provider has organized the infringing material on its system to facilitate easier downloading.90

3. Vicarious Infringement—No court has found a service provider liable for vicarious infringement, but copyright owners and commentators believe that such a claim is viable.91 Vicarious liability requires that the provider have the right and ability to control the infringing activity and that the provider receives a direct financial benefit from the activity.92 Thus, analysis of vicarious liability focuses on the alleged infringing persons rather than the infringing act itself.93

a. Right and Ability to Control—The control element requires an examination of the provider’s relationship with the infringer.94 In Netcom, the court held that the provider’s contractual right to take remedial action against its subscribers was sufficient to satisfy the control element.95 The court also cited the provider’s prohibition against infringement and its requirement that subscribers indemnify it for any damage to third parties as examples of control.96 Moreover, the evidence showed that the provider had exercised this right numerous times.97

88. See Fonovisa, 76 F.3d at 264 (stating that “it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the [defendant]”).
89. See Sega Enters. Ltd., 948 F. Supp. at 933.
90. See id.
91. See Shulman, supra note 8, at 585.
92. See Gershwin Publ’g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1161-62 (2d Cir. 1971).
93. See id.
95. See id. at 1375-76. This right was contained in Netcom’s terms and conditions to which subscribers must agree. See id. at 1375.
96. See id.
97. See id. at 1376.
b. *Direct Financial Interest*—Although the *Netcom* court found the control element satisfied, it refused to impose vicarious liability because the fixed fees received by the provider did not satisfy the direct financial interest element.\(^9\) The court held that there was no evidence that the infringements enhanced the value of the provider's services or attracted new subscribers.\(^9\) Thus, under this rationale, it is unlikely that a service provider would be held liable for vicarious infringement.

However, the *Netcom* decision was based in part on the district court decision in *Fonovisa, Inc. v. Cherry Auction, Inc.*,\(^10\) which has since been reversed.\(^11\) In *Fonovisa*, the Ninth Circuit Court of Appeals held that a swap meet owner received a direct financial benefit from the fixed fee paid by vendors, the concession sales, and parking fees.\(^12\) Thus, following the reversal of the district court decision, the liability of a service provider for vicarious infringement is somewhat in question.\(^13\)

D. *Previous Attempts at Legislation*

Service providers feared that they would face extreme liability for copyright infringement in the wake of the *Netcom* and *Sega* decisions.\(^14\) Moreover, the courts were not alone in provoking this fear; Congress was attempting to clarify the application of the copyright law to digital media.\(^15\) In September of 1995, the Working Group on Intellectual Property Rights issued its final report entitled "Intellectual Property and the National Information Infrastructure," popularly known as the "White Paper."\(^16\) The

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98. *See id.* at 1376-77.
100. 947 F. Supp. 1492 (E.D. Cal. 1994).
101. *See Fonovisa Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).
102. *See id.* at 263.
103. As of the date of this Comment, no court has used *Fonovisa* for the proposition that a service provider receives a direct financial benefit from its fixed fees. However, articles that discuss *Fonovisa's* impact on service provider liability suggest that the *Fonovisa* decision may be used to impose vicarious liability. *See, e.g.*, Shulman, *supra* note 8, at 585.
106. The Working Group on Intellectual Property Rights was a part of the Information Infrastructure Task Force established by President Clinton to make recommendations on
main thrust of the White Paper was that current copyright law should be applied to the Internet and that only minor changes were needed to facilitate this application.\textsuperscript{107}

Congress used the White Paper’s recommendations as the basis for the NII Copyright Protection Act of 1995 ("NII Act"),\textsuperscript{108} which proposed several minor amendments to the Copyright Act.\textsuperscript{109} The NII Act was to amend the right of distribution\textsuperscript{10} to include an express recognition that public distribution may occur by transmission.\textsuperscript{111} Furthermore, the NII Act was to amend the definition of "publication" to include publication by transmission.\textsuperscript{112} Finally, the NII Act was to amend the definition of "transmit" to include any copy "fixed beyond the place from which it was sent."\textsuperscript{113} These changes would have recognized that copies made by digital communication systems implicate the exclusive rights of the copyright owner and, thus, would have ensured the application of copyright law to these systems.\textsuperscript{114}

The introduction of the NII Act caused an outcry of opposition from service providers who believed the NII Act would subject them to unlimited liability for their subscribers’ infringements.\textsuperscript{115} Service providers argued that the NII Act would unfairly impose liability for the mere transmission of infringing material because it is impossible for them to monitor all the information moving through their systems.\textsuperscript{116} In contrast, the content providers viewed the NII Act as merely "confirming the current status of the law."\textsuperscript{117}

\begin{footnotesize}
\footnote{107. See Legislation: Panel Sees Examples of On-line Copyright Infringement, Asks Who Should Be Liable, 52 PAT. TRADEMARK & COPYRIGHT J. 36 (1996).}
\footnote{108. See H.R. 2441, 104th Cong. § 1 (1995).}
\footnote{109. This legislation “nearly mirrored” the recommendations made in the White Paper. See Gibeaut, supra note 13, at 62.}
\footnote{110. See 17 U.S.C. § 106(3)(1994).}
\footnote{111. See H.R. 2441, 104th Cong. § 2(a).}
\footnote{112. See id. § 2(b)(1) (amending 17 U.S.C. § 101).}
\footnote{113. See id. § 2(b)(2) (amending 17 U.S.C. § 101).}
\footnote{115. See Gibeaut, supra note 13, at 62.}
\footnote{116. See id.}
\footnote{117. NII Hearings, supra note 7, at 10 (testimony of Daniel Burton, Vice-President of Governmental Relations, Novell, Inc.) (available in WL 238585).}
\end{footnotesize}
Accordingly, the service providers sought an amendment to the proposed NII Act limiting their infringement liability, and a formal negotiation process commenced between the service providers and the content providers. The parties, however, were unable to reach a consensus concerning proposals to limit service provider liability. As a result, the bills were never enacted and the debate among lawmakers, commentators, service providers, and copyright industries intensified.

III. Analysis

The first session of the 105th Congress has attempted to address the issue of service provider liability by introducing two separate bills: the On-line Copyright Liability Limitation Act and the Digital Copyright Clarification and Technology Education Act of 1997. Each bill proposes to add a new section to the Copyright Act that would exempt a service provider from liability for direct, contributory, and vicarious infringements. These exemptions seek to clarify copyright law, foster the growth of the Internet, and protect the rights of copyright owners. This Comment, however, asserts that the bills do not effectively address the issue of service provider liability because they fail to fulfill these purposes.

A. Provisions of the On-line Copyright Liability Limitation Act

1. General Exemption from Liability—The House Bill would exempt a service provider from liability for direct, vicarious, or contributory infringement “based solely on transmitting or
otherwise providing access to material on-line . . .”126 The exemption for contributory liability does not extend to injunctive relief.127 Rather, injunctive relief is available only when it is technically feasible and economically reasonable for a provider to carry out.128

2. Disqualifying a Provider from Exemption—The exemption does not cover all service providers; the exemption would be removed if a service provider engaged in certain activities129 and had knowledge that the material was infringing.130 When a service provider has had its exemption removed, the normal law of infringement liability would apply.

a. Activities Required for Removal of the Exemption—The bill requires that the service provider engage in certain activities before the exemption would be removed; for example, when the provider placed,131 generated, selected, altered,132 or advertised133 the infringing material.134 Additional activities include when a service provider determined the recipients of the material135 or received a direct financial benefit from a particular act of infringement.136

b. Provider’s Knowledge of the Infringing Material—In addition, removal of the exemption requires that the provider had knowledge that the material is infringing.137 A service provider has knowledge that the material is infringing if the service provider had notice or other information indicating that the material was infringing.138 The bill expressly states, however, that providers have no duty to acquire such knowledge.139 Moreover, a service provider who had knowledge, but is prohibited by law from

126. See H.R. 2180, 105th Cong. sec. 2, § 512 (a)(1).
127. See id. § 512(a)(2).
128. See id.
129. See id. § 512(a)(1)(A)-(E).
130. See id. § 512(a)(1)(F)(i).
132. See id. § 512(a)(1)(B).
133. See id. § 512(a)(1)(E).
134. Engaging in any one of these activities would deny the provider the benefit of the exemption. See id. § 512(a).
135. See id. § 512(a)(1)(C).
137. See id. § 512(a)(F)(i).
138. See id.
139. See id. § 512(a)(2).
accessing the infringing material, would still enjoy the exemption.\textsuperscript{140}

3. \textit{Further Liabilities}—The House Bill also addresses liabilities for removal of access to materials and misrepresentation of infringing material.\textsuperscript{141} A service provider is not liable for any claim based on its removal of material if the removal is in response to information or notice indicating that the material is infringing.\textsuperscript{142} Furthermore, "any person who knowingly materially misrepresents that material on-line is infringing" is liable to any person who relies on the misrepresentation and removes the material.\textsuperscript{143} The person who relies on the misrepresentation may recover costs and attorney's fees.\textsuperscript{144}

\textbf{B. Provisions of the Digital Copyright Clarification and Technology Education Act}

The Senate Bill, like its House counterpart, would exempt a service provider from direct, vicarious, or contributory liability for the infringing acts of its users.\textsuperscript{145} The Senate Bill, however, is more comprehensive because it provides two exemptions, one for supplying services and the other for infringing materials.\textsuperscript{146} The Senate Bill also establishes a procedure for notifying service providers of infringing materials so that the materials can be removed.\textsuperscript{147}

\textit{1. Exemption for Supplying Services}—First, the Senate Bill would exempt a service provider from liability for supplying certain services or facilities to an infringing user.\textsuperscript{148} A service provider would incur no liability for supplying transmission services to an infringing user unless such transmission involved the "generation or material alteration" of content by the provider.\textsuperscript{149} Nor would a provider incur liability for supplying private and real-time commu-

\textsuperscript{140} See id. § 512(a)(1)(F)(ii). This covers situations in which privacy laws may prohibit a provider from accessing a users e-mail. See id.
\textsuperscript{141} See H.R. 2180, 105th Cong. sec. 2(a), § 512(b), (d).
\textsuperscript{142} See id. § 512(b).
\textsuperscript{143} See id. § 512(d).
\textsuperscript{144} See id.
\textsuperscript{145} See S. 1146, 105th Cong. sec. 102(a), § 512(a)(1)-(3) (1997).
\textsuperscript{146} See id. § 512(a)-(b).
\textsuperscript{147} See id. § 512(b)(1)-(3).
\textsuperscript{148} See id. § 512(a)(1)-(3).
\textsuperscript{149} Id. § 512(a)(1)(B).
2. Exemption for Material Residing on a Network

a. General Exemption—Second, the Senate Bill would exempt a service provider from liability for infringing materials residing on a system controlled by the service provider. This exemption would be removed when the service provider placed the material, determined the content of the material, or contracted for the placement of the material to be offered as part of the provider's service.

b. Notice and Takedown—A service provider will remain exempt from liability unless it had notice that the material is infringing and failed to remove, disable, or block access to the material. Under this procedure for notice and takedown, a service provider is presumed to lack notice that the materials were infringing unless the provider has received valid notification. To be valid, the notice must pertain only to material that resides on a system controlled and operated by or for the service provider. Furthermore, the notice must be submitted to the place designated for notification, must be signed by the copyright owner, must provide the telephone number and address.
of the complaining party, must describe the allegedly infringing material, and must provide reasonable proof of a valid copyright. Finally, the notice must contain a sworn statement that the information contained in the notice is accurate and that the party has a good faith belief that the use of the material constitutes infringement.

3. Other Liabilities—The Senate Bill also addresses liability for removal of access to materials and misrepresentation of infringing material. A provider is not liable for any claim based on the person's removal of material if the removal is in response to official notice complying with the Act. Furthermore, any person who materially misrepresents in an official notice that material on-line is infringing is liable for statutory damages and any actual damages including costs and attorney's fees. That person is liable to the actual copyright owner or alleged infringer for the removal and to any person who relied on the misrepresentation and removes the material.

C. Application

In order to understand the changes the bills would make to the existing law, an application of the bills to the facts in Netcom is helpful. This application will focus on the provisions of the Senate Bill due to its more comprehensive nature.

1. Direct Infringement—In order to prevail on its claim of direct infringement, the copyright owner must first show that Netcom is not entitled to the exemptions contained in the Senate Bill. Netcom's only act of copying occurred solely as a result

163. See id. § 512(b)(3)(A)(iv).
164. See S. 1146, 105th Cong. sec. 102(a), § 512(b)(3)(A)(v). The description must be "sufficient to permit [the provider] expeditiously to identify and locate the material." Id.
165. See id. § 512(b)(3)(A)(vi). Reasonable proof includes a certificate of copyright registration, a filed application for such registration, or a court order stating that the material is not authorized by the copyright owner. See id.
166. See id. § 512(b)(3)(A)(vii). The bill also permits the Register of Copyrights to require a payment at the time of notification in order to deter frivolous or de minimus notices. See id. sec. 102(a), § 512(b)(3)(A)(viii).
167. See id. § 512(b)(4) and (5).
168. See id. § 512(b)(5).
169. See S. 1146, 10th Cong. sec. 102(a), § 512(b)(4).
170. See id. § 512(b)(4)(A).
171. See id. § 512(b)(4)(B).
172. See id. § 512(a), (b).
of the automatic mechanisms of its system. Moreover, the automatic transmission did not involve any generation or alteration of the content. Therefore, Netcom is entitled to the exemption for supplying transmission services and the copyright owner will not prevail on its claim of direct infringement.

In practice, the Senate Bill may not affect the outcome of a plaintiff's claim for direct infringement because a service provider is unlikely to be directly liable under recent case law. In Netcom, the court required that the provider engage in some volitional act beyond mere transmission. Thus, a service provider that only transmits the infringing material is not liable and the exemption has little effect on the outcome.

Application of the exemption becomes a closer issue when a service provider engages in additional acts such as the soliciting and screening of material. At some point these additional acts will shift a service provider from a passive transmitter to an active infringer. Existing case law is uncertain as to what additional acts are sufficient for direct infringement. Likewise, there is a range of conduct that falls short of "generation or material alteration of content," but may still be considered direct infringement. In these situations, the bill may exempt the party that is most responsible for infringements.

174. See Netcom, 907 F. Supp. at 1361. Liability for transmission will only result when a provider generates or materially alters the content. See supra Part III.B.1.
175. See S. 1146, sec. 102(a), § 512(a).
176. See Netcom, 907 F. Supp. at 1370.
177. See id.
178. Such situations are more likely to occur in the context of bulletin board operator than a large Internet service provider. See Sega Enters. Ltd. v. Maphia, 948 F. Supp. 923, 932 (N.D. Cal. 1996).
180. In light of the Sega and Hardenburgh decisions, the additional acts sufficient to impose liability are uncertain. The Sega court held that the additional act of soliciting the material was insufficient for liability. See Sega Enters. Ltd., 948 F. Supp. at 932. Although the Hardenburgh court found the defendant liable for direct infringement, it put great emphasis on the defendant's act of employing a screening process. See Russ Hardenburgh, 982 F. Supp. at 513.
182. In its finding that the service provider was not directly liable, the Netcom court emphasized the fact that there was another party that was more responsible for the infringements. See Netcom, 907 F. Supp. at 1372. Thus, when a service provider's acts are
2. Contributory Liability—To prove contributory infringement, the copyright owner must show that Netcom had knowledge of the infringing activity and substantially participated in the activity. However, the copyright owner must first show that Netcom is not entitled to the exemption. Again, Netcom’s only act of copying occurred solely as a result of the automatic mechanisms of its system. Thus, Netcom will receive the benefit of the transmission exemption because it did not generate or alter the content of the transmission.

In Netcom, however, the copyright owner previously contacted Netcom and requested that the provider block the infringing subscriber’s access. While this contact was sufficient to raise the issue of knowledge to defeat Netcom's summary judgment motion on the contributory infringement claim, this contact would be insufficient to satisfy the notice requirement of the Senate Bill. Therefore, under the Senate Bill, Netcom would be entitled to the exemption and not liable for contributory infringement.

Alternatively, assuming that the copyright owner had complied with the notice requirement, Netcom would be in possession of substantial, such as soliciting and screening the content, the service provider may become the primary infringer. See Russ Hardenburgh, 982 F. Supp. at 513.

183. See Netcom, 907 F. Supp. at 1373.
184. See S. 1146, 105th Cong. sec. 102, § 512(a) and (b) (1997).
185. See Netcom, 907 F. Supp. at 1368.
186. The exemption from contributory liability granted in the House Bill does not extend to injunctive relief. See H.R. 2180, 105th Cong. sec. 2(a), § 512(a)(2). Thus, although barred from damages, the copyright owner could still bring a claim to force Netcom to block access to the infringing material. See id. The bill, however, requires that the injunctive relief be "technically feasible and economically reasonable" and the service provider still has no duty to seek knowledge of the infringing materials. Id. Therefore, prevailing on such a claim may be difficult.
188. See id. at 1375.
189. Currently, either actual or constructive knowledge of the infringing material will satisfy the knowledge element of contributory infringement. See Sega Enters. Ltd. v. Maphia, 948 F. Supp. 923, 933 (N. D. Cal. 1996). Under the House Bill, the exemption contains "an intermediate standard" between actual and constructive knowledge under which a person who "becomes aware of information that causes suspicion" has "some obligation" to investigate. 143 CONG. REC. E1452-01, E1453 (daily ed. July 17, 1997) (statement of Rep. Coble). See H.R. 2180, 105th Cong. sec. 2(a), § 512(a)(1)(F)(i). Although an admirable attempt at compromise, the standard is trying to cut too thin a line and is wrought with ambiguity. First, there is no guidance as to how strong the suspicion needs to be in order to trigger the provider's obligation to investigate. See id. Second, there is no guidance as to what level of investigation will suffice to relieve the provider's obligation. See id.
valid notice. Netcom also failed to block access to the material and, thus, would not be entitled to the exemption for the materials residing on its network. This raises the issue of the interaction between the transmission exemption and the materials exemption. The transmission exemption applies to not only the act of transmission, but to also "intermediate and transient storage." There is no guidance as to when the exemption for such storage ends and the exemption for more permanent storage begins. Moreover, there is no indication that failure to qualify for one exemption removes the possibility of qualifying for the other exemption.

3. Vicarious Infringement—To prove vicarious infringement, the copyright owner must show that Netcom had the right and ability to control the infringer's acts and that Netcom received a direct financial benefit from the infringement. Again, however, the copyright owner must first show that Netcom is not entitled to an exemption.

Vicarious infringement raises the same problems as contributory infringement when interpreting the interaction of the exemptions. Netcom can receive the benefit of the transmission exemption because it did not generate or alter the content of the transmission. Assuming that the copyright owner complied with the notice requirement, however, Netcom has valid notice. Therefore, Netcom is not entitled to the exemption for infringing material because it had notice and failed to block access to the material. Whether this notice would remove the transmission exemption is not clear from the bill's language.

Even without the exemption, liability under the Senate Bill is not inevitable; the *Netcom* court refused to find that Netcom

190. See S. 1146, 105th Cong. sec. 102(a), § 512(b)(3) (1997).
191. See id. § 512(b).
192. See id. § 512(a)-(b).
193. Id. § 512(a)(1).
194. See id. § 512(a)-(b).
195. See S. 1146, 105th Cong. sec. 102(a), § 512(a)-(b).
197. See S. 1146, 105th Cong. sec. 102(a), § 512(a)(1)(B).
198. See id. § 512(b)(3).
199. See id. § 512(b).
received a direct financial benefit from the fixed fee it charged.\textsuperscript{200} Whether the \textit{Netcom} court would still refuse to find a direct financial benefit from the fixed fee is uncertain due to the recent decision in \textit{Fonovisa}. As previously indicated, the \textit{Fonovisa} court found that a swap meet owner received a direct financial benefit from the fixed fees it charged.\textsuperscript{201}

In practice, the bills will most affect situations in which a provider meets the elements of vicarious liability, but has no knowledge of the infringements.\textsuperscript{202} In these situations, the procedure for notice and takedown would allow a provider to avoid liability until it receives valid notice.\textsuperscript{203}

\section*{D. Policy Debate: Do the Bills Fulfill Their Purposes?}

The bills seek to clarify copyright law, foster the growth of the Internet, and protect the rights of copyright owners. Yet, if enacted, the bills may have the opposite effect.\textsuperscript{204} Copyright owners who cannot enforce their rights will be reluctant to distribute their works on the Internet, thus resulting in less available content.\textsuperscript{205} In addition, recent case law may allow greater flexibility in application to the rapidly changing Internet. Therefore, Congress should avoid granting the exemptions contained in these bills without further study of their possible chilling effects.

\subsection*{1. Clarification of Copyright Law on the Internet—The bills seek to clarify the application of copyright law to the Internet by defining the rights and liabilities of copyright owners and service providers.\textsuperscript{206} The ambiguous language and provisions, however, may diminish rather than enhance the clarity of copyright law.

\begin{itemize}
  \item \textsuperscript{200} See \textit{Netcom}, 907 F. Supp. at 1377 (holding that the provider was not liable for vicarious infringement); see \textit{also} \textit{Marobie-FL, Inc. v. National Ass’n of Fire Equip. Distrbs.}, 983 F. Supp. 1167 (N.D. Ill. 1997) (granting summary judgment to the defendant on the issue of vicarious liability, although the plaintiff had not alleged the issue). The plaintiffs in \textit{Sega} and \textit{Hardenburgh} probably could have alleged vicarious infringement, but did not. See \textit{Playboy Enters., Inc. v. Russ Hardenburgh, Inc.}, 982 F. Supp. 503 (N.D. Ohio 1997); \textit{Sega Enters. Ltd. v. Maphia}, 948 F. Supp. 923 (N.D. Cal. 1996).
  \item \textsuperscript{201} See \textit{ supra} note 85 and accompanying text.
  \item \textsuperscript{202} See, \textit{e.g.}, \textit{Shapiro, Bernstein & Co., v. H.L. Green Co.}, 316 F.2d 304, 308 (2d Cir. 1963) (discussing the lack of any knowledge element in vicarious infringement).
  \item \textsuperscript{203} See \textit{S. 1146}, 105th Cong. sec. 102, § 512(b).
  \item \textsuperscript{204} See \textit{id.} sec. 101.
  \item \textsuperscript{205} See \textit{141 CONG. REC. S14,547-05, S14,552} (daily ed. Sept. 28, 1995) (statement of Sen. Leahy) (\textit{available in 1995 WL 570637}).
  \item \textsuperscript{206} See \textit{S. 1146}, 105th Cong. sec. 101(1)-(6) (describing the bill’s purposes).
\end{itemize}
First, the knowledge standard of the House Bill is so ambiguous that it raises more questions than it settles. The bill does not indicate what constitutes "suspicion," making the trigger for the provider's obligation to investigate uncertain. Nor does the bill indicate the extent of the obligation to investigate. This is likely due to the bill being intended to be "a new starting point for discussion," rather than a fully crafted piece of legislation.

Second, the Senate Bill suffers from poor drafting that makes unclear the application and integration of the exemptions. A provider's system may make copies of infringing materials as part of the transmission process. Once notified that these copies are infringing, failure to comply with the notice and takedown procedure removes the exemption contained in that procedure. However, the service provider may argue that these copies constitute "intermediate or transient storage" and, thus, cannot be the basis for an infringement claim under the transmission exemption. This would allow a service provider that had official notice to avoid liability thereby frustrating the purpose of a cooperative procedure for notice and takedown.

Finally, the bills frustrate the clarity of copyright law by adding elements of knowledge to direct and vicarious infringement when previously there were none. This may eliminate the practical differences between the three theories of infringement, causing confusion for judges, lawyers, service providers, and copyright owners.

209. See id.
210. Id.
211. See Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc., 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (stating that there is "no question" that copies are created by the provider's system).
212. See S. 1146, 105th Cong. sec. 102(a), § 512(b)(1) (1997).
213. Id. § 512(a)(1).
214. See id. sec. 101(5)-(6). This problem could be eliminated by applying the requirements of the notice and takedown procedure to the transmission exemption, or by stating that failure to qualify for the notice and takedown exemption disqualifies the provider from exemption under the transmission provision.
215. See discussion supra Parts II.A.3, II.A.5.
216. See Cunard and Wells, supra note 102, at 369.
2. Protect the Rights of Copyright Owners—Although the bills seek to protect the rights of copyright owners, the bills may reduce such protection in a medium that presents great potential for abuse of these rights.\textsuperscript{217} Copyright owners already have difficulty in enforcing their rights on the Internet.\textsuperscript{218} The owner must discover the infringement, find the infringer, and successfully bring the infringement claim.\textsuperscript{219} The exemptions make these tasks more difficult by allowing service providers to sit back and ignore known infringing activity until a copyright owner discovers it. This gives service providers little incentive to work with copyright holders to stop infringements.\textsuperscript{220}

Furthermore, the requirement of valid notice in the Senate Bill is onerous in light of the transient nature of the Internet. The Netcom court recognized that requiring overly burdensome notice "would be impractical and would perhaps take too long to verify, making it impossible for a copyright holder to protect his or her works ... ."\textsuperscript{221} By the time a copyright owner discovers the infringing material and gathers the documents necessary for notice, the notice may no longer be valid.\textsuperscript{222} Copyright owners could even face liability for such invalid notice that further diminishes the owner's ability to protect its works.\textsuperscript{223} Finally, the fact that the Internet is still a rapidly developing medium means that any broad exemption for service providers is premature at best. Therefore, if the bills are to be enacted, they must be rewritten to provide greater balance between the rights of copyright owners and service providers.

3. Foster the Growth of the Internet—Because the bills do not provide a greater level of clarity and balance than the existing law,

\textsuperscript{217} See S. 1146 Hearings, supra note 4 (statement of Cary H. Sherman, Senior Vice-President and General Counsel, Recording Industry Association of America) (\textit{available in 1997 WL 545714}).

\textsuperscript{218} One lawyer described the current state of enforcement as "a finger in the dike." Bencivenga,\textit{ supra} note 59, at 5.

\textsuperscript{219} See discussion\textit{ supra} Part II.B.4. (addressing the difficulty of enforcing copyrights on the Internet).

\textsuperscript{220} See S. 1146 Hearings, supra note 4 (statement of Cary H. Sherman, Senior Executive Vice-President and General Counsel, Recording Industry Association of America) (\textit{available in 1997 WL 545714}).


\textsuperscript{222} Notice is valid only if it describes the specific infringing materials. See S. 1146, 105th Cong. sec. 102, § 512(b)(3)(v) (1997).

\textsuperscript{223} See id. § 512(b)(4).
they may stifle the growth of the Internet. The Internet has the potential to open up new avenues in communication, education, and commerce.\(^2\) It brings people closer to each other and the government closer to the people.\(^2\) It provides students and educators with a wealth of information,\(^2\) and it offers substantial commercial opportunities and access to a global marketplace.\(^2\)

In order to fulfill this potential, the Internet needs access to the content provided by the copyright industries.\(^2\) Without content, the Internet may end up providing great access to little valuable information.\(^2\) The presumption underlying this push for a legislative exemption is that service providers will face excessive liability under the existing law of infringement.\(^2\) Service providers argue that they may be held liable each time they transmit infringing materials.\(^2\) Such extreme liability would stifle the growth of the Internet and foil the purpose of copyright by discouraging access to knowledge.\(^2\)

However, this basic presumption is flawed because the judicial interpretation of copyright law does not subject service providers to excessive liability.\(^2\) Courts have protected service providers by reserving liability for particular facts that show direct contribution in the face of knowledge of the infringing activities.\(^2\) There has been no deluge of cases imposing liability on service providers for merely supplying their basic services to a subscriber and there is no evidence that this is likely.\(^2\) Therefore, any broad exemption for service providers is premature at best and could stifle the growth of the Internet.


\(^{225}\) See id.

\(^{226}\) See id.

\(^{227}\) See id.


\(^{229}\) See id.

\(^{230}\) See Lutzker, supra note 9, at 18.

\(^{231}\) See id.


\(^{233}\) See Cunard & Wells, supra note 102, at 393.


\(^{235}\) See Cunard & Wells, supra note 102, at 393.
IV. Conclusion

There are a number of possible solutions to the problem of copyright infringement short of an exemption for Internet service providers. One possibility is to regulate copyright on the Internet through the use of collective licensing. Users of copyrighted material could license this material by paying a fee to an agency which collects royalties for its members. This solution encourages cooperation between legitimate content users and owners, but is unlikely to have much affect on truly illicit copyright infringers.

Another possibility is a technological fix that enhances the ability to prevent and detect infringements on the Internet. Such a technological solution includes programs that search the Internet for unlicensed and infringing copyrighted materials. Other technological solutions may be to utilize digital watermarks or encryption to prevent the illicit copying of copyrighted information. However, technological measures are unlikely to solve the issue because such protections have "only a limited shelf life."

The most effective solution to the issue is to encourage cooperation between Internet service providers and copyright owners. This may be accomplished by combining the previously mentioned solutions with legal intervention. However, the most obvious solution to the issue of service provider liability is to make no changes to the copyright law. Courts have been remarkably flexible by only imposing liability in situations in which the provider had knowledge and engaged in some volitional acts. The courts will also be better able to adapt to further changes in the

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236. See Jane C. Ginsberg, Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace, 95 COLUM. L. REV. 1466, 1489 (1995).
237. See Bencivenga, supra note 59, at 5.
238. See Ginsberg, supra note 234, at 1492.
239. See NII Hearings, supra note 7 (testimony of Kenneth R. Kay, Executive Director, Creative Incentive Coalition) (available in 1996 WL 241769).
240. See Sue Zeidler, BMI Sends a Bot for Music Pirates, PITTSBURG POST-GAZETTE, Oct. 18, 1997, at A2 (describing the use of such a program by Broadcast Music, Inc., a performance rights licensing group). These programs reduce the manpower necessary for enforcement of copyright owner's rights. See id.
241. See Bencivenga, supra note 59, at 5.
242. Id. (stating that "[e]very time you try to put some kind of protection on [copyright] there's always someone out there trying to figure out a way to get around it.")
paradigm of the Internet. Therefore, Congress should not enact the bills unless, and until such time as, the case law proves unable to cope with the issue of service provider liability.

Joshua Alan Daub