

# Looking for a Crack to Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA

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## I. INTRODUCTION

In August 2002, a group of 13 record labels brought a lawsuit against the four major companies that provide the “backbone” infrastructure of the Internet.<sup>1</sup> The record labels sought an injunction under section 512 of the Digital Millennium Copyright Act of 1982<sup>2</sup> (“DMCA”) to compel the defendants to block access to a China-based website, Listen4Ever.com (“Listen4ever”), that offered free downloads of entire albums of copyrighted music from its central server.<sup>3</sup> The labels alleged that Listen4ever located its operations in China specifically to evade U.S. copyright laws.<sup>4</sup> They noted that the site was in English and offered almost exclusively music by popular American artists such as Bruce Springsteen, Christina Aguilera, and The Red Hot Chili Peppers.<sup>5</sup> The site’s operators, meanwhile, took steps to avoid detection, providing questionable contact information in their domain name registration and including no identifying details on the site itself.<sup>6</sup>

Rather than attempting to sue Listen4ever directly or eliciting the aid of Chinese law enforcement officials, the record labels sought the assistance of the Internet’s major infrastructure providers – AT&T Broadband, Sprint, Cable & Wireless, and WorldCom’s UUNet – to voluntarily block access to the site.<sup>7</sup> When the backbone providers refused to do so absent a court order, the record labels brought suit in the Southern District of New York. Notably, however, the record labels failed to allege that the defendant backbone providers had engaged in any direct, vicarious, or contributory copyright infringement. Instead, they asserted merely that the infringement occurring daily on

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1. *Arista Records, Inc. v. AT&T Broadband Corp.*, No. 02-CV-6554 (S.D.N.Y. filed Aug. 16, 2002).

2. 17 U.S.C. § 512 (2000).

3. Complaint ¶¶ 1, 2; *Arista Records, Inc.*, No. 02-CV-6554.

4. *Id.* at ¶ 3.

5. *Id.* at ¶ 2.

6. *Id.* at ¶ 39-40.

7. *Id.* at ¶ 44.

the Listen4ever site would not be possible but for the defendants' provision of routing services.<sup>8</sup> According to the labels, this was exactly the type of situation Congress envisioned when it enacted section 512(j)(1)(B)(ii) of the DMCA, which allows a content owner to obtain an order restraining an Internet Service Provider ("ISP") from providing access to a specific online location hosted by a foreign server.<sup>9</sup>

The Southern District of New York never got the opportunity to consider the merits of the record labels' claim under the DMCA. Indeed, the Listen4ever site went offline less than a week after the labels brought their lawsuit.<sup>10</sup> Consequently, the labels voluntarily dismissed their complaint, reserving the right to bring another lawsuit should Listen4ever reconstitute itself or move to another server.<sup>11</sup>

The record labels' attempt to invoke section 512(j)(1)(B)(ii) absent any allegation of direct or secondary infringement by the backbone providers appears to be without merit in light of the plain language and legislative history of the DMCA. Rather than creating a new and independent cause of action, as the record labels seemed to contend in this case, section 512 instead creates various safe harbors limiting the liability of an ISP where the ISP would otherwise be liable for copyright infringement under existing theories.<sup>12</sup> Thus, to invoke the safe harbor provisions and obtain a blocking order under section 512(j), the labels should have been required to allege that the backbone providers themselves engaged in direct, vicarious, or contributory infringement of the labels' copyrights. Having failed to make any such allegation, the labels' DMCA claim, had they not dismissed it voluntarily, should have been dismissed on a 12(b)(6) motion for failure to state a claim upon which relief can be granted.<sup>13</sup>

The record labels' chance of obtaining a section 512(j) blocking order had they proceeded under traditional copyright law theories of liability is unclear. Under the existing case law, the only viable theory for holding a backbone provider liable appears to be contributory infringement. Recent cases have expanded contributory infringement theory such that knowledge of infringement plus provision of even minimal services appears to constitute

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8. *Id.* at ¶ 46.

9. *Id.* at ¶ 48.

10. Doug Isenberg, *Is This the Way to Fight Copyright Infringement?*, CNET News.com (Sept. 4, 2002), at <http://news.com/2010-1071-956418.htm> (last visited Nov. 20, 2003).

11. See Press Release, Recording Industry Association of America, *Listen4ever To Pirated Music On Chinese Web Site? Not Anymore* (Aug. 21, 2002), at <http://www.riaa.com/news/newsletter/082102.asp> (last visited Nov. 20, 2003) (copy on file with author).

12. § 512 (a)-(d).

13. FED. R. CIV. P. 12(b)(6).

material contribution.<sup>14</sup> Still, there is a viable argument that backbone providers are distinguishable from other entities that courts have deemed contributory infringers – both in terms of their relationship to the direct infringement and the kinds of services they provide. Therefore, it remains uncertain whether a backbone provider may be held liable under a contributory infringement theory.

This result is unsatisfactory because backbone providers have little guidance as to when they may have a legal duty to block access to an allegedly infringing site. Rather than wait for a court order, a backbone provider may block access on the receipt of notice from a content provider, even if the notice does not establish actual infringement. Such action would impose social costs because self-interested parties are likely to fail to consider the full constitutional, statutory, economic, and equitable dimensions of restricting access to online content in a given case. Only courts are positioned to take into account such considerations. Thus, the underlying liability scheme for secondary infringement should be clarified to provide backbone providers with clear guidelines as to when there exists a legal duty to block access to an infringing site.

One way in which courts could clarify backbone provider liability would be to adopt a model of contributory liability based on common law defamation. Under this model, backbone providers would be treated as common carriers, subject to a higher knowledge threshold than other ISPs before being deemed liable for contributory copyright infringement. As part of this standard, courts should require content owners to provide written notice establishing with substantial certainty both the infringement and that the use is not protected under fair use or other exceptions to copyright infringement. The adoption of such a standard would at least establish a clear threshold requirement by which a backbone provider could gauge when it would be deemed a contributory infringer. Together with the DMCA section 512(a) safe harbor provision and the section 512(j) limitation on remedies, such a standard would help reduce the risk that a backbone provider will block access in cases in which a court would likely find that it had no legal duty to do so.

## II. OVERVIEW OF THE INTERNET, THE PIRACY PROBLEM, AND THE MUSIC INDUSTRY RESPONSE

The Internet is a vast network of linked computers that transmits digital information.<sup>15</sup> It allows users to access and disseminate substantial amounts of information quickly, accurately, and conveniently.<sup>16</sup> This advancement

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14. See *infra* notes 158-166 and accompanying text.

15. See *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997) (describing the development and operation of the Internet).

16. See *generally id.* at 850 (describing a variety of ways users can access and distribute information).

has created a tremendous amount of new opportunities for businesses and individuals to engage in the legitimate sharing of information. At the same time, the Internet has created new challenges for the owners of copyrighted materials because now its content may be misappropriated, or “pirated,” cheaply and almost instantaneously on a global scale. This problem is particularly acute and widespread with respect to the unauthorized copying and distribution of copyrighted sound recordings. New technologies allow computer users to copy digital sound files straight from compact discs (“CDs”) of copyrighted music and save the resulting highly compressed, and relatively high-quality, copies onto their computers’ hard drives. These sound files are commonly compressed into a format named “MPEG-3,” or “MP3” files.<sup>17</sup> Within minutes, these MP3 files can be uploaded to and downloaded by other computers anywhere in the world via high-speed Internet connections.<sup>18</sup>

It is difficult to estimate exactly how much the illegal copying and distribution of copyrighted sound recordings on the Internet costs the music industry each year in terms of lost profits. Yet, the International Federation of the Phonographic Industry (“IFPI”) has estimated that there are approximately 500 million files available for copying at any one time on all of the peer-to-peer file-trading services worldwide.<sup>19</sup> In addition, according to the IFPI, “there are approximately 200,000 web and FTP sites hosting or linking to some 100 million unauthorized recorded music files” online.<sup>20</sup> If these figures are accurate, the music industry’s lost revenues from Internet piracy may be staggering.<sup>21</sup> The U.S. recording industry has responded to the threat of copyright infringement by bringing legal action against the operators of infringing websites.<sup>22</sup> For example, in the much-publicized case against Napster, an on-line database of songs, the recording industry obtained an injunction<sup>23</sup> that effectively forced the “granddaddy” of file sharing services out of business.<sup>24</sup> Following its success against file-sharers like Napster, the recording industry has recently begun to wage its battle against infringement

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17. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (describing MP3 and file-sharing technologies).

18. *Id.*

19. *IFPI Music Piracy Report 2002*, available at <http://www.ifpi.org/> (last visited Nov. 20, 2003).

20. *Id.*

21. But see David Grainger, *MP3s Are Big Music’s Savior, Not Slayer*, FORTUNE, Sept. 16, 2002, available at <http://www.fortune.com/> (last visited Nov. 20, 2003) (commenting on Forrester Research report predicting that music downloads will generate \$2.1 billion for record labels by 2007).

22. See *Napster*, 239 F.3d at 1011; see also *Arista Records, Inc. v. MP3Board, Inc.*, No. 00CIV.4660 (SHS), 2002 WL 1997918 (S.D.N.Y. Aug. 29, 2002).

23. See *Napster*, 239 F.3d at 1029.

24. See generally Matt Richtel, *Turmoil at Napster Moves the Service Closer to Bankruptcy*, NEW YORK TIMES, May 14, 2002, available at 2002 WL

on other fronts. For instance, the Recording Industry Association of America ("RIAA") has lobbied hard for legislation that would allow content owners to hack into users' computers to disrupt file sharing.<sup>25</sup> Internet piracy opponents have also begun to put out fake sound files in order to try to discourage downloads.<sup>26</sup> The Listen4ever case represents the industry's first (but probably not its last) attempt to "sue the Internet" by targeting backbone ISPs. That unprecedented lawsuit raised serious questions about the interplay of the DMCA and traditional copyright law, as well as the appropriate standard of liability for backbone providers whose routing services facilitate online infringement.<sup>27</sup>

### III. THE FUNCTION OF THE DEFENDANT BACKBONE ISPs WITH RESPECT TO THE INFRINGING MATERIAL

At the time the record labels brought the Listen4ever suit, the four named defendants, AT&T Broadband, Sprint, Cable & Wireless USA, and WorldCom's UUNet Technologies, comprised the "backbone of the Internet."<sup>28</sup> As the "backbone," these ISPs provide routing connections that direct Internet traffic, such as e-mail messages and requests for access to websites, from the originating computer to the destination computer.<sup>29</sup> In order for these ISPs to work together, they use the same "protocol," or "language." According to the Declaration of David J. Farber ("Farber Declaration"),<sup>30</sup> submitted on behalf of the Listen4ever plaintiffs, backbone ISPs'

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20469018 (last visited Nov. 20, 2003) (outlining the rise and fall of the prominent file-swapping service).

25. See generally *Rosen Applauds Introduction of Rep. Berman's Internet Piracy Bill*, Recording Industry Association of America (July 25, 2002), available at [http://www.riaa.org/News\\_Story.cfm?id=540](http://www.riaa.org/News_Story.cfm?id=540) (last visited Nov. 20, 2003) (expressing support for a bill introduced in 2002 by Representative Howard Berman (D-Cal.) that would allow content owners to use self-help measures to combat peer-to-peer file sharing).
26. See John Borland, *Start-ups Try to Dupe File Swappers*, CNET News.com (July 15, 2002), available at <http://news.com.com/2100-1023-943883.html?tag=RN> (last visited Nov. 20, 2003) (describing the practice of "seeding" file-swapping networks with false versions of songs, hoping that file-swappers will download the fake files and log off in frustration).
27. See generally Isenberg, *supra* note 10 (providing an overview of the Listen4ever case and the issues it raised).
28. *Record Labels Sue ISPs to Block Access to Chinese Web Site*, 9 ANDREWS INTELL. PROP. LITIG. REP. 8 (2002).
29. See Declaration of Professor David J. Farber ¶ 10; *Arista Records, Inc.*, No. 02-CV-6554.
30. David J. Farber is a professor of telecommunications and computer science at the University of Pennsylvania. In his Declaration, Farber also listed himself as a member of the Federal Communications Commission's ("FCC") Techno-

routers utilize a routing protocol known as Border Gateway Protocol (“BGP”)<sup>31</sup> to

exchange information about other known routers, the addresses they can reach, and the best available route between the addresses. [The] routers recognize addresses by reading the Autonomous System Number (“ASN”), or grouping of Internet Protocol (“IP”) blocks, associated with the batch of addresses. The routers then determine the best pathway between the computer requesting a connection with a particular address and that address’s host computer.<sup>32</sup>

In this way, backbone ISPs, such as the Listen4ever defendants, “coordinate and provide the most efficient connection between computers on the Internet.”<sup>33</sup>

According to Farber’s declaration and the record companies’ complaint, the “[d]efendants’ routing services [were] the principal means through which users in the United States [could] reach Listen4ever’s servers in China.”<sup>34</sup> Moreover, according to published news reports, the “four named defendants [had] the most interchange points with other networks” at the time of the lawsuit, “meaning that any technical blocking by them of specific web addresses would affect many Internet users regardless of their service provider.”<sup>35</sup> Consequently, the record labels initially sought the “assistance” of the backbone ISPs in blocking the Listen4ever website.<sup>36</sup> Through the RIAA, the record labels sent a letter (“RIAA Letter”) to each of the four backbone ISPs identifying some of the allegedly infringing works and specifying the Listen4ever website’s IP block.<sup>37</sup> The RIAA letter requested the

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logical Advisory Council. According to Farber’s Declaration, the press has referred to him as “The Man Who Wired the World.” *See* Farber Declaration ¶¶ 2-4.

31. For a through overview of the function of BGP, *see generally* <http://www.cisco.com/univercd/cc/td/doc/cisintwk/ics/icsbgp4.htm> (last visited Nov. 20, 2003).

32. Farber Declaration ¶ 10.

33. For a through overview of the function of BGP, *see generally* <http://www.cisco.com/univercd/cc/td/doc/cisintwk/ics/icsbgp4.htm> (last visited Nov. 20, 2003).

34. *See* Farber Declaration ¶ 10; Complaint ¶ 41.

35. Anick Jesdanun, *Recording Labels Sue to Block Website*, AP, MIAMI HERALD, Aug. 20, 2002, available at 2002 WL 24343525 (last visited Nov. 20, 2003).

36. *See* Complaint ¶ 44.

37. *See* Letter from RIAA to backbone ISPs.

backbone ISPs to voluntarily block access to the website or potentially face a court-ordered injunction requiring them to do so.<sup>38</sup>

According to the Farber Declaration, the processes by which the backbone ISPs could block access to the Listen4ever website were “simple and technically well understood” by the ISPs.<sup>39</sup> “[B]y programming their routers to: (1) direct all traffic addressed to Listen4ever’s ASN to an alternative site notifying them of the block, or (2) direct all traffic addressed to Listen4ever’s IP addresses or IP blocks to an alternative site notifying them of the blocks,” the defendants could effectively shut down the website to U.S. users and restrain the infringement by Listen4ever.<sup>40</sup> Moreover, the defendants could “arrange this blocking to ensure that only direct communications with Listen4ever’s servers [were] blocked, and that communications with all other websites whose traffic flow[ed] through Defendants’ backbone routing network [would] proceed unhindered.”<sup>41</sup> According to Farber’s Declaration, these “simple administrative and technical tasks” would place no “undue burden on [the defendants] or their networks.”<sup>42</sup> When the backbone ISPs refused to take these blocking measures voluntarily, the record labels allege that they had “no choice” but to seek an injunction.<sup>43</sup>

#### IV. THE RECORD LABELS’ COMPLAINT

The record labels brought suit in the United States District Court for the Southern District of New York seeking a court order requiring the backbone ISPs “to block Internet traffic to and from the website <<http://www.listen4ever.com>>, all the pages affiliated with it, and any substantially similar successor websites.”<sup>44</sup> The record labels’ complaint named as defendants only the backbone ISPs, and not the owners of the Listen4ever website.<sup>45</sup> The complaint failed to allege, however, that the backbone ISPs had in any way infringed the plaintiffs’ works.<sup>46</sup> The only infringement alleged in the complaint was that of Listen4ever, which according to the complaint “engage[d] in direct, contributory, and vicarious copyright infringement”<sup>47</sup>

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38. *See id.*

39. *See* Farber Declaration ¶ 13; Complaint ¶ 42.

40. *See* Farber Declaration ¶ 12.

41. *See id.* ¶ 11.

42. *See id.* ¶ 13.

43. *See* Complaint ¶ 44.

44. Complaint, Prayer for Relief ¶ 1.

45. *See* Complaint ¶¶ 18-21.

46. *See id.* ¶¶ 41-42.

47. *See id.* ¶ 48.

by making copyrighted songs and albums available for unauthorized copying and distribution over the Internet.<sup>48</sup>

With respect to the named defendants, the complaint merely asserted that “[t]he unchecked music piracy occurring daily in the United States on the Listen4ever Site would not be possible if Listen4ever were not able to utilize the network routing services Defendants provide.”<sup>49</sup> In legal terms, the RIAA’s argument is one of causation: “but for” the backbone ISPs’ providing Internet access to consumers in the United States via their network routing services, no one in the United States could access the infringing works on the Listen4ever website.<sup>50</sup> The complaint further alleged that the plaintiffs were “irreparably harmed by Listen4ever’s ability to use Defendants’ routing systems to reach the U.S. market.”<sup>51</sup> Consequently, the complaint requested injunctive relief under section 512(j)(1)(B)(ii) of the DMCA, which, according to the plaintiffs, Congress intended as the remedy to address “exactly [this] type of activity” on a foreign website.<sup>52</sup>

The plaintiffs never fully developed their argument under the DMCA. Moreover, they voluntarily dismissed the lawsuit five days after its filing when the Listen4ever website, at least temporarily, went offline.<sup>53</sup> The absence of any allegation of direct, vicarious, or contributory infringement against the backbone ISPs in the plaintiffs’ complaint suggests, however, that the plaintiffs read section 512(j)(1)(B)(ii) as creating a new cause of action, rather than merely limiting a conduit ISP’s potential liability for copyright infringement.<sup>54</sup> Under the plaintiffs’ apparent interpretation, section 512(j)(1)(B)(ii) would allow a domestic copyright holder to obtain an injunction requiring an ISP to block access to allegedly infringing foreign-based websites without any underlying claim of copyright infringement against the ISP.<sup>55</sup> As of the time of this writing, no court has yet had occasion to consider whether a request for an injunction under section 512(j) requires an underlying infringement claim against the ISP. There appears to be little support, however, in either the plain language of the DMCA or the legislative history of the DMCA, for the plaintiffs’ apparent interpretation of section 512(j) as creating a new cause of action. Before considering the merits of the

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48. *See id.* ¶ 38.

49. *Id.* ¶ 46.

50. *See generally id.*

51. *Id.* ¶ 48.

52. *Id.*

53. *See* Press Release, Recording Industry Association of America, *supra* note 11.

54. *See* Complaint ¶¶ 48, 50 (asserting that Congress intended specific injunctive relief to restrain offshore infringement and seeking injunctive relief pursuant to section 512(j)(1)(B)(ii), without alleging that the backbone providers were themselves guilty of direct, vicarious, or contributory infringement).

55. *See id.*



plaintiffs' complaint, however, a brief overview of section 512 of the DMCA should prove useful.

## V. OVERVIEW OF SECTION 512 OF THE DMCA

Congress enacted the DMCA in 1998. Title II of the DMCA, entitled the Online Copyright Infringement Liability Limitation Act ("OCILLA"), was intended to address the problem of copyright infringement suits against ISPs.<sup>56</sup> Conflicting case law prior to the DMCA's enactment created uncertainty as to the liability of ISPs for copyright infringement occurring on their systems or networks.<sup>57</sup> In an attempt to clarify that uncertainty, section 512 of the DMCA limits liability for copyright infringement relating to online material by service providers with respect to four specific activities: "Transitory digital network communications[;] . . . [s]ystem caching[;] . . . [i]nformation residing on systems or networks at [the] direction of users[;] and . . . [i]nformation location tools."<sup>58</sup>

The most relevant provision for purposes of this article is section 512(a), which limits liability for conduit ISPs such as the backbone providers in the Listen4ever suit.<sup>59</sup> Section 512(a) applies to "service providers . . . [that offer] the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material."<sup>60</sup> To avail itself of section 512(a), an ISP must first meet two conditions required of all service providers seeking safe harbors under this section.<sup>61</sup> It must find and reasonably implement a termination policy with respect to users that repeatedly infringe, and it must accommodate and "not

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56. See generally Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1880-82 (2000).

57. Compare, e.g., *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (holding that an online bulletin board service's computer directly infringed Playboy's exclusive copyright rights when it copied, displayed, and distributed Playboy's images even though Frena lacked intent), with *Religious Tech. Ctr. v. Netcom On-line Commun. Servs., Inc.*, 907 F. Supp. 1361, 1369-70 (N.D. Cal. 1995) (holding that an ISP's copying and storing of copyrighted messages on its system does not constitute direct copyright infringement because there was no element of volition on NetCom's part).

58. See § 512 (a)-(d); see also 144 CONG. REC. S11888-01 (1998) (statement of Sen. Kohl).

59. See § 512(a); accord S. REP. NO. 105-190, at 41 (1998) ("[S]ubsections (a)(1) through (5) limit the range of activities that qualify under this subsection to ones in which a service provider plays the role of a 'conduit' for the communications of others.").

60. See § 512(k)(1)(A).

61. See generally § 512(i)(1).

interfere with standard technical measures” used by copyright owners to identify or protect copyrighted works.<sup>62</sup> Additionally, the conduit ISP must satisfy the criteria as enumerated in section 512(a):

- (1) the transmission of the [infringing] material was initiated by or at the direction of someone other than the service provider;
- (2) the transmission, routing, provisions of connections, or storage is carried out through an automatic technical process without selection of material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients and [not]. . .for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5) the material is transmitted through the system or network without modification of its content.<sup>63</sup>

A conduit ISP that satisfies these conditions is shielded from monetary relief “for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for material through [its] system or network[s] . . . or by reason of the intermediate and transient storage of that material.”<sup>64</sup> The ISP is also shielded from injunctive relief for the same activity except as provided in subsection (j), which sets forth rules governing injunctions under section 502.<sup>65</sup> The rules in subsection (j) apply to any ISP that qualifies for any of the section 512 safe harbors but otherwise would be “subject to an injunction under existing principles of law.”<sup>66</sup> For those ISPs qualifying under section 512(a), “the court may only grant injunctive relief in one or both” of two specified forms.<sup>67</sup> The court may grant an order requiring the ISP to terminate the account of a subscriber or account holder that uses the ISP’s service to engage in infringing activity, and/or the court may grant an order requiring the ISP “to block access[,] to a specific, identified, online location outside the United States.”<sup>68</sup> Finally, in granting injunctive relief under section 512(j), a court must consider the following four factors:

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62. *Id.*

63. § 512(a)(1)-(5).

64. § 512(a).

65. § 512 (a), (j).

66. *See* S. REP. NO. 105-190, at 52.

67. § 512(j)(1)(B).

68. *Id.*

whether the injunction would “significantly burden” the ISP or the operation of its system or network; whether the magnitude of harm likely suffered by the copyright owner if an injunction is not granted is great; whether the requested measure is technically feasible, and if so, whether it would interfere with access to non-infringing material at other sites; and whether other less burdensome and comparably effective means of restraining access to the infringing material are available.<sup>69</sup>

#### VI. MERITS OF THE RECORD LABELS’ CLAIM IN LIGHT OF THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE DMCA

The plain language of the DMCA and the legislative history of the Act fail to support the Listen4ever plaintiffs’ contention that section 512(j) creates a new cause of action for copyright holders to obtain injunctions against ISPs.<sup>70</sup> Quite to the contrary, both the language and the legislative history of section 512 evince Congress’s intent to clarify the liability of ISPs for online infringement by limiting the remedies available to copyright owners for certain types of infringing activity.<sup>71</sup>

In their request for injunctive relief, the record labels stated broadly that section 512(j)(1)(B)(ii) gives copyright holders “the ability to seek an injunction requiring Internet service providers (“ISPs”) to block access to specific, identified sites – such as Listen4ever’s – that are located outside the United States.”<sup>72</sup> That statement is only partially correct.<sup>73</sup> Under the plain language of the DMCA, Section 512(j)(1)(B)(ii) allows a court to grant an injunction of the type requested by the plaintiffs only if the ISP qualifies under the section 512(a) safe harbor.<sup>74</sup> Indeed, the legislative history of the Act clarifies that “[t]he limitations on injunctive relief set forth in [section 512(j)(1)(B)] are applicable when the functions at issue fall within the provisions of subsection (a).”<sup>75</sup> Therefore, the ISP *must* fall under *section 512(a)* before a court may grant injunctive relief under section 512(j)(1)(B).

Conspicuously, the plaintiffs’ Complaint and Memorandum fail to make any reference to section 512(a). Arguably, that failure is immaterial because section 512(j)(1)(B) expressly incorporates section 512(a) by reference.<sup>76</sup> The plaintiffs’ omission of any reference to section 512(a) is noteworthy,

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69. § 512(j)(2).

70. Compare § 512(j), and S. REP. NO. 105-190, at 41, 52 (1998), with Complaint ¶ 4.

71. See § 512(a), (j); S. REP. NO. 105-190, at 53.

72. Complaint ¶ 4.

73. See § 512(a), (j); see also S. REP. NO. 105-190 at 52.

74. See § 512(j)(1)(B) (stating that the two forms of relief are available if the ISP qualifies under subsection (a)).

75. S. REP. NO. 105-190, at 41.

76. See § 512(j)(1)(B).

however, because such omission casts serious doubts upon the plaintiffs' apparent interpretation of section 512(j)(1)(B)(ii). Reading sections 512(a) and (j), together with the legislative history of section 512, the inescapable conclusion is that the Listen4ever plaintiffs misconstrued the purpose and function of Section 512(j)(1)(B).<sup>77</sup> First, section 512 limits, not expands, conduit ISP liability.<sup>78</sup> The provision does not create a new and independent cause of action.<sup>79</sup> Second, the remedies in section 512(j) are available only where the defendant ISP would be otherwise liable for infringement under existing copyright law principles.<sup>80</sup>

**A. Section 512 was intended to limit, rather than expand, ISP liability.**

The plain language and legislative history of section 512 suggest that rather than creating a new and independent cause of action against ISPs, section 512 acts merely to limit ISP liability for online infringements.<sup>81</sup> When Congress intends to create a new and independent cause of action, it typically specifies for what conduct the defendant shall be liable.<sup>82</sup> For example, sections 1201 and 1202 of the DMCA, enacted concurrently with section 512, specifically prohibit activities related to the circumvention of certain technical measures intended to protect copyrighted materials in the digital environment.<sup>83</sup> Section 1203 of the DMCA, in turn, specifically authorizes a civil action for "[a]ny person injured by a violation of sections 1201 or 1202."<sup>84</sup> The plain meaning of this language is to create a new cause of action for content owners. Section 512(a), in contrast, states merely that an ISP "*shall not be liable. . . for infringement* of copyright by reason of the provider's transmitting, routing, or providing connections for" allegedly infringing material through its system or network.<sup>85</sup> Section 512(a) does not specify any prohibited conduct, nor does the provision expressly authorize a civil action against a conduit ISP.<sup>86</sup> Instead, by its plain language, section 512(a) serves merely to *limit* the liability of a conduit ISP for some pre-existing or underlying wrong.<sup>87</sup>

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77. Compare Complaint ¶ 4, with § 512(j)(1)(B).

78. § 512(a).

79. *Id.*

80. § 512(j)(1).

81. §§ 512(a), (j)(1).

82. See generally 17 U.S.C. §§ 1201, 1202 (2000).

83. *Id.*

84. § 1203(a).

85. § 512(a) (emphasis added).

86. See *id.*

87. See *id.*

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The legislative history of the Act fully supports this interpretation. For example, the Senate Report to the DMCA states:

Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, *the limitations of liability* apply if the provider is found to be liable *under existing principles of law*.<sup>88</sup>

The Senate Report states elsewhere that section 512(a) “*does not create any new liabilities* for service providers or affect any defense available to a service provider.”<sup>89</sup>

The section 512(a) limitation language is expressly incorporated into section 512(j)(1)(B) by reference.<sup>90</sup> Section 512(j)(1)(B) states that “[i]f the service provider qualifies for the *limitation on remedies* described in subsection (a), the court may *only* grant injunctive relief” in two specified forms.<sup>91</sup> This language suggests not only that section 512(a) was intended as a limitation on conduit ISP liability, but also that section 512(j)(1)(B) was intended only to enumerate the limited remedies available to the copyright owner where the ISP satisfies the section 512(a) criteria.<sup>92</sup> Nothing in the foregoing language or in the legislative history of the Act suggests that section 512(a) or section 512(j), read together or separately, create a new cause of action for an injunction if the ISP was not otherwise liable under existing copyright law principles.

A further reading of section 512 reinforces this conclusion. In addition to incorporating section 512(a), section 512(j) also incorporates by reference section 502 of the Copyright Act.<sup>93</sup> Section 512(j) expressly states that the rules enumerated therein “shall apply in the case of any application for an injunction *under section 502*.”<sup>94</sup> Thus, an application for an injunction under section 512(j) is actually authorized by section 502, which governs injunctions under traditional copyright law.<sup>95</sup> This fact alone would appear to contradict the contention that section 512(j) creates a new and independent cause of action and further undermines the record labels’ argument.

Section 502 gives courts having jurisdiction over copyright infringement actions discretion to “grant temporary and final injunctions on such terms as [they] may deem reasonable to prevent or restrain infringement of a

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88. S. REP. NO. 105-190, at 19 (emphasis added).

89. *Id.* at 55 (emphasis added).

90. *See* 17 U.S.C. § 512(j)(1)(B).

91. *Id.* (emphasis added).

92. *See id.*

93. *See* § 512(j).

94. *Id.* (emphasis added).

95. *See* § 502.

copyright.”<sup>96</sup> Under section 512(j)(1)(B), however, if the service provider qualifies under section 512(a), “the court may *only* grant relief” in one of two specified forms, including blocking the injunction sought by plaintiffs.<sup>97</sup> The use of the term “only” demonstrates that section 512(j)(1)(B) was intended to limit courts’ usual discretion under section 502 when fashioning injunctive relief for infringements involving transitory services such as routing.<sup>98</sup> Moreover, except for the limited remedies provided in subsection (j), courts have *no discretion* to grant injunctive relief against conduit ISPs.<sup>99</sup> Therefore, by its plain terms, section 512(j)(1)(B)(ii), rather than creating a new and independent cause of action against an otherwise innocent ISP, merely limits courts’ typical discretion in awarding injunctive relief with respect to a specified class of copyright infringers.

Once again, the legislative history of the Act fully supports this interpretation. The Senate Report plainly states that section 512(j)(1) “*limits the scope of injunctive relief that may be ordered* against a qualifying provider.”<sup>100</sup> Similarly, the Report elsewhere states that section 512(i)(2) “sets forth mandatory considerations for the court *beyond those that exist under current law*” for granting injunctions.<sup>101</sup> In other words, section 512(j) places additional restrictions on courts’ discretion under section 502. The provision does not authorize courts to grant injunctive relief where a plaintiff would not otherwise be entitled to such relief under pre-existing copyright law theories.

## **B. Section 512 applies only to infringing ISPs.**

The plain language of section 512 demonstrates that its provisions apply only to infringing ISPs. Section 512(a) plainly states that it limits a conduit ISP’s liability “for infringement of copyright” “by reason of” the provider’s activities with respect to allegedly infringing materials.”<sup>102</sup> This language suggests that not only must there be an allegation of copyright infringement for the section 512(a) safe harbor to apply, but also that section 512(a) applies only where the *ISP’s activities themselves would otherwise constitute infringement*.<sup>103</sup> The plaintiffs’ complaint in the Listen4ever case purports to be “an action seeking relief from copyright infringement,”<sup>104</sup> yet the record

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96. § 502(a).

97. § 512(j)(1)(B) (emphasis added).

98. *Id.*

99. *See* § 512(a).

100. S. REP. NO. 105-190 at 52-53 (emphasis added).

101. *Id.* at 53 (emphasis added).

102. *See* 17 U.S.C. § 512(a) (2000).

103. *Id.* (emphasis added).

104. Complaint ¶ 22.

labels failed to allege that the backbone ISPs engaged in any infringement whatsoever.<sup>105</sup> Thus, had the plaintiffs not dropped their suit, their claim under section 512(j)(1)(B)(ii) should have been dismissed on a 12(b)(6) motion for failure to state a claim upon which relief may be granted.<sup>106</sup>

The legislative history of the DMCA provides much support for this textual interpretation. The Senate Report clearly states that the “new section 512 does not create any new liabilities for service providers or affect any defense available to a service provider.”<sup>107</sup> Rather, according to the Senate Report, “[n]ew section 512 simply defines the circumstances under which a service provider, as defined in this Section, may enjoy a limitation on liability for copyright infringement.”<sup>108</sup> Consequently, the liability of an ISP is still “adjudicated based on the doctrines of *direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act* and in the court decisions interpreting and applying that statute, which are unchanged by section 512.”<sup>109</sup> Thus, “[t]he limitations in subsections (a) through (d) protect qualifying service providers from. . . liability for direct, vicarious, and contributory infringement.”<sup>110</sup> Section 512(a) specifically “establishes a limitation on liability for *infringements that may occur in the provision of [conduit] services* falling within the definition of [section 512(j)(1)(A)].”<sup>111</sup>

Meanwhile, section 512(i) “defines the terms and conditions under which an injunction may be issued against a service provider that qualifies for the limitations of liability set forth in subsections (a) through (d), but is *otherwise subject to an injunction under existing principles of law*.”<sup>112</sup> The Senate Report makes clear that an order, such as the one sought by the Listen4ever plaintiffs, “to take reasonable steps to block access to a specific, identified foreign online location,” is only “available in cases in which a *provider is engaging in infringing activity* relating to a foreign online location.”<sup>113</sup> The persuasive weight of the language in the Senate Report to the DMCA is undeniable. Coupled with the plain language of the statute, the legislative history compels the conclusion that an injunction under section 512(j)(1)(B)(ii) is available only where the ISP itself is engaging in infringing activity, whether direct, vicarious, or contributory, and would be subject

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105. *See id.*

106. *See* FED. R. CIV. P. 12(b)(6).

107. S. REP. NO. 105-190, at 55.

108. *Id.* at 49 (emphasis added).

109. *Id.* (emphasis added).

110. *Id.* at 40-41.

111. *Id.* at 41 (emphasis added).

112. *Id.* at 52 (emphasis added).

113. S. REP. NO. 105-190, at 53 (emphasis added).

to an injunction under one or more of those theories without the protections of the section 512 safe harbors.

As previously noted, the Listen4ever plaintiffs' Complaint and Memorandum failed to allege that the backbone providers themselves engaged in any infringing activities whatsoever. Rather, the record labels appear to have conceded [or, rather, attempted to concede] by seeking an injunction under section 512(j)(1)(B)(ii) that the backbone ISPs fell within the section 512(a) safe harbor.<sup>114</sup> Absent a finding or even an allegation of infringement, however, that concession was not the plaintiffs' to make. Instead, section 512(a) applies only where the ISPs would otherwise be liable for infringement under traditional copyright law principles.<sup>115</sup> That underlying liability is a court determination.<sup>116</sup> Thus, the plaintiffs had no ground to seek an injunction under section 512(j) absent an underlying claim of direct, vicarious, or contributory liability against the backbone providers. Consequently, had the plaintiffs actually pursued their claim as alleged in their Complaint, the claim should have been dismissed.

**C. Under the plaintiffs' interpretation, Section 512(j) creates five new causes of action.**

One further consideration of the consequences of applying the plaintiffs' interpretation to section 512(j) undermines their argument: under the plaintiffs' theory, section 512(j) would create not one, but five new causes of action against ISPs—none requiring even an allegation of infringement against the ISP.

In addition to the blocking injunction sought by the Listen4ever plaintiffs under section 512(j)(1)(B)(ii), section 512(j)(1)(B)(i) would allow a copyright holder, in prescribed circumstances, to obtain a court order under specified circumstances, requiring a conduit ISP to terminate the account of a subscriber who uses the system or network to infringe a copyright.<sup>117</sup> In addition, as the plaintiffs would read it, section 512(j)(1)(A) would allow a copyright holder to obtain several other types of injunctions including:

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114. See Memorandum at 2 ("Congress anticipated that infringers might attempt to move offshore to avoid and delay service of process and enforcement of U.S. copyright law. Thus, it enacted section 512(j) of the DMCA, which permits a copyright owner to seek injunctive relief (and solely injunctive relief) to require Internet service providers ('ISPs') to block access. This is exactly the situation here and the limited relief plaintiffs are seeking.").

115. § 512(a).

116. See S. REP. NO. 105-190, at 55 ("Enactment of section 512 does not bear upon whether a service provider is or is not an infringer when its conduct falls within the scope of section 512. Even if the service provider's activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer. . . [.]").

117. See § 512(j)(1)(B)(i)-(ii).



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- (1) an order requiring the ISP to block access to allegedly infringing material residing on the ISP's system or network;<sup>118</sup>
  - (2) an order requiring the ISP to terminate the account of a subscriber who engages in infringing activity on the ISP's system or network;<sup>119</sup> and
  - (3) "such other injunctive relief as the court may consider necessary" to prevent infringement of copyrighted material at a specified online location.<sup>120</sup>

Under the record labels' apparent interpretation of section 512, each of these injunctions would be available without a finding, or even an allegation, that the ISP engaged in any infringing activity.

Bearing in mind that such an interpretation finds no support in the plain language or the legislative history of the Act as shown, it is difficult to see why Congress would create five new independent causes of action to restrain online copyright infringement. Indeed, pursuant to section 502, courts already have broad discretion to grant injunctions to prevent infringement "on such terms as [they] may deem reasonable."<sup>121</sup> Courts effectively exercised that discretion to grant injunctions against ISPs in pre-DMCA cases.<sup>122</sup> Thus, the causes of action available to content owners under existing copyright law remain adequate to restrain online infringement.<sup>123</sup>

Again, the use of the term "only" in both section 512(j)(1)(A) and section 512(j)(1)(B) is telling.<sup>124</sup> By enumerating what specific forms of injunctive relief are available to copyright holders to prevent or restrain certain types of infringing activity, Congress meant to limit, and not to expand the scope of ISP liability. Thus, under section 512(j)(1)(A) courts may exercise, with certain limitations, the rather broad discretion afforded them under sec-

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118. See § 512(j)(1)(B)(i).

119. See § 512(j)(1)(B)(ii).

120. See § 512(j)(1)(A)(iii).

121. See § 502(a).

122. See, e.g., *Sega Enters. Ltd. v. Maphia*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (granting preliminary injunction against BBS operator enjoining facilitation of copying of copyrighted video games where plaintiff showed likelihood of success on direct and contributory infringement claims); cf. *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 907 F. Supp. 1361, 1382-83 (N.D. Cal. 1995) (refusing to issue preliminary injunction because the plaintiffs failed to show a likelihood of success on the merits of its infringement claims against an ISP).

123. See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027-29 (9th Cir. 2000) (upholding preliminary injunction against online file trading service, subject to modification on remand, where plaintiff record companies demonstrated likelihood of success on direct, vicarious, and contributory infringement claims).

124. § 512(j)(1)(A)-(B).

tion 502 “[w]ith respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a).”<sup>125</sup> “If the service provider’s actions qualify for the limitation on remedies described in subsection (a),” however, the discretion of the court and the remedies available to the copyright holder are far more limited.<sup>126</sup> In either case, however, the remedies are only available “against a service provider that is not subject to monetary remedies under [section 512].”<sup>127</sup> In other words, section 512(j) applies only to those ISPs that, but for section 512’s safe harbors, would be liable “for infringement of copyright by reason of” their “conduct.”<sup>128</sup> Thus, contrary to the result under the Listen4ever plaintiffs’ apparent interpretation, none of the remedies enumerated in section 512(j) is available absent an allegation that the ISP has directly, vicariously, or contributorily infringed the plaintiff’s copyright.

## VII. THE RECORD LABELS’ CHANCE OF SUCCESS UNDER TRADITIONAL COPYRIGHT THEORIES OF LIABILITY

Based on its text, structure, and legislative history, section 512 appears to require that to obtain the section 512(j) blocking injunction against the backbone ISPs, the Listen4ever plaintiffs would have had to demonstrate that the ISPs’ conduct constituted direct, vicarious, or contributory infringement.<sup>129</sup> Under the apposite case law, the plaintiffs were unlikely to prevail on theories of direct or vicarious copyright infringement. The plaintiffs’ greatest chance of success would have been under a theory of contributory infringement. Recent cases arguably have expanded the doctrine of contributory infringement, such that an ISP’s knowledge of infringing activity in conjunction with its continued provision of minimal services constitutes material contribution. It is unclear under even the broadest reading of these cases, however, whether the Internet’s backbone providers materially contributed to the direct infringement in a manner that could be deemed contributory infringement. Because the DMCA did not change or clarify this underlying liability scheme, it is uncertain when, if ever, a content owner may obtain a blocking order under section 512(j).

### A. Direct Infringement

Under the apposite case law, the defendant backbone providers would not have been liable for direct infringement.<sup>130</sup> Courts have recognized that

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125. § 512(j)(1)(A)

126. § 512(j)(1)(B).

127. § 512(j).

128. *See* § 512(a)-(d), (j)(1)(A).

129. *See* § 512(j).

130. *See* *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1056 (C.D. Cal. 2002) (finding that “AOL’s role as a passive provider of USENET access to AOL users cannot

the operation of the Internet requires the passive reproduction and distribution of material, and have therefore determined that such activity in and of itself should not constitute direct copyright infringement.<sup>131</sup> Consequently, courts have limited direct infringement theories to defendants who themselves copied or actively distributed copyrighted materials.<sup>132</sup> Indeed, Title II of the DMCA was drafted, in part, to codify this result with respect to liability of ISPs for direct copyright infringement.<sup>133</sup> In the instant case, the backbone providers merely routed requests to the infringing site.<sup>134</sup> Thus, the record labels could not have prevailed on a claim of direct copyright infringement against the backbone ISPs.<sup>135</sup>

## B. Vicarious Infringement

The record labels also would have been unlikely to succeed on a claim of vicarious infringement. To establish vicarious infringement, a plaintiff must show that the defendant: (1) has the right and ability to supervise infringing activity; and (2) has a direct financial interest in that activity.<sup>136</sup>

### 1. Right and Ability to Supervise

One court has held that an ISP's "ability to block infringers' access to a particular environment for any reason whatsoever" constitutes proof of its right and ability to supervise and control the infringing activities.<sup>137</sup> Indeed,

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support direct copyright infringement liability"); *Religious Tech. Ctr. v. Netcom On-Line Commun. Serv., Inc.*, 907 F. Supp. 1361, 1372-73 (N.D. Cal. 1995) (holding that direct infringement liability should be limited to those users who are responsible for the actual copying rather than passive ISPs that merely store or transmit infringing material). *But see* *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1557-59 (M.D. Fla. 1993) (holding that an online bulletin board system operator's automatic copying, storage, and distribution of copyrighted images infringed the copyright owner's exclusive rights).

131. *See, e.g., Netcom*, 907 F. Supp. at 1369-70 ("These parties [ISPs], who are liable under plaintiff's theory, do no more than operate or implement a system that is essential if Usenet messages are to be widely distributed. There is no need to construe the Copyright Act to make all of these parties infringers.").

132. *See Ellison*, 189 F. Supp. 2d at 1057; *Netcom*, 907 F. Supp. at 1372-73.

133. *See Ellison*, 189 F. Supp. 2d at 1070 (citing H.R. REP. NO. 105-551 (1998)).

134. *See* Farber Declaration ¶ 10.

135. *See Ellison*, 189 F. Supp. 2d at 1057; *Netcom*, 907 F. Supp. at 1372-73.

136. *A&M Records, Inc. v. Napster*, 239 F.3d 1004, 1022 (9th Cir. 2000) ("In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'").

137. *Id.* at 1023; *cf. Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996) (swap-meet operator could exclude vendors for any reason).

the Southern District of New York expressly used such language in *Arista Records, Inc. v. MP3Board, Inc.*<sup>138</sup> In that case, the Southern District found that the ability of an MP3 search site's operators to delete links from the site's database and refuse service to certain users constituted evidence of their ability to supervise and control infringing activity by users, and consequently allowed the plaintiffs' vicarious liability claim to survive summary judgment.<sup>139</sup> Under the same reasoning, the Southern District might have found that the backbone providers' ability to block access to specific infringing sites demonstrated their right and ability to control the infringement on the Listen4ever site. However, other recent decisions have interpreted "right and ability to control" to mean the ability to control creation of the infringing material, rather than the mere ability of an ISP to remove or block access to materials posted on the infringer's website.<sup>140</sup> In the *Listen4ever* case, the facts indicate that the backbone ISPs had no ability to control creation of the infringing material, and thus, under this test, the record labels would have been unable to establish the first prong of vicarious infringement.<sup>141</sup>

## 2. Direct Financial Interest

Even assuming that the record labels could have established the "right and ability to control" element, it is highly unlikely that they would have been able to satisfy the "financial interest" prong. The defendant ISPs' financial interest was not directly tied to the infringing activity in the manner necessary for vicarious infringement. Typically, the requisite financial interest is found where, for example, an ISP receives income proportional to the traffic generated by a particular website.<sup>142</sup> Where a defendant rents space or offers services on a fixed fee that does not depend on the nature of the lessee's or user's activity, however, courts usually find no vicarious liability

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138. No. 00CIV.4660(SHS), 2002 WL 1997918 at \*11 (S.D.N.Y. Aug. 29, 2002).

139. *Id.*

140. See e.g., *Ellison*, 189 F. Supp. 2d at 1062 (finding AOL's ability to delete or block access to a user's postings of infringing material after they had already found their way onto AOL's Usenet server insufficient to constitute right and ability to control the infringing activity and limiting right and ability to control analysis to ISP's ability to control infringement at the "root level"); *Hendrickson v. Ebay Inc.*, 165 F. Supp. 2d 1082, 1093-94 (C.D. Cal. 2001) (finding, for purposes of determining applicability of 17 U.S.C. § 512(c) safe harbor, that Ebay did not have the "right and ability to control" merely because it could remove or block access or because it voluntarily monitored its site for infringing material).

141. See *Ellison*, 189 F. Supp. 2d at 1062.

142. See, e.g., *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1172-73 (C.D. Cal. 2002) (finding strong likelihood of success on the direct financial interest element of vicarious liability where the income the defendant ISP received from each website was directly based on the site's initial popularity).

because the defendant does not directly benefit from the infringement.<sup>143</sup> In their Complaint in the *Listen4ever* case, the record labels essentially acknowledged that backbone ISPs provide routing services to all or potentially all Internet users.<sup>144</sup> The backbone providers' service is completely content-neutral and their revenues do not in any way depend on whether or not the users of their routing services engage in infringement.<sup>145</sup> Consequently, the record labels would have been unable to satisfy the second element necessary for a claim of vicarious infringement liability and thus, the backbone providers probably would not have been found liable under such theory.

### C. Contributory Infringement

The defendant ISPs' possible liability under a contributory infringement theory is a more compelling proposition. To establish contributory infringement, a plaintiff must show that the defendant: (1) had actual or constructive knowledge of the infringing activity, and (2) materially contributed to the infringement.<sup>146</sup>

#### 1. Actual or Constructive Knowledge

Accepting as true the facts as alleged in the plaintiffs' Complaint and Memorandum, the record labels gave the defendants "express notice of the infringing activity occurring through their backbone routing services."<sup>147</sup> Specifically, the plaintiffs sent letters, dated August 5 and 6, 2002, to each of the defendant ISPs "to alert them of the infringing activities occurring on the Listen4ever site and seek their assistance in preventing further acts of in-

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143. See, e.g., *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1179 (N.D. Ill. 1997) (denying plaintiff's motion for summary judgment on vicarious liability issue, finding that ISP's collection of flat fee made finding of direct financial interest in infringing activity impossible); *Religious Tech. Center v. Netcom On-line Commun. Servs., Inc.*, 907 F. Supp. 1361, 1377 (N.D. Cal. 1995) (granting summary judgment to defendant ISP on vicarious liability claim where defendant received fixed fee for providing its service and plaintiff was unable to show that infringement enhanced the value of defendant's services or attracted new subscribers).

144. See Complaint ¶ 41 ("Defendants essentially coordinate and provide the most efficient connection between computers on the Internet.").

145. Indeed, unlike host ISPs, which contract directly with users for service, backbone providers offer carriage and routing services to ISPs themselves under one of two primary types of arrangements: "(1) peering, under which the few Tier-1 backbone providers interconnect and exchange traffic on a bill-and-keep basis, and (2) transit arrangements, under which smaller ISPs purchase interconnection with a Tier-1 backbone." See James B. Speta, *A Common Carrier Approach to Internet Connection*, 54 FED. COMM. L.J. 225, 231 (2002).

146. See *Napster*, 239 F.3d at 1019-20, 1022.

147. Memorandum at 8.

fringement.”<sup>148</sup> The letters identified Listen4ever and some of the artists whose works were illegally offered for download on its site.<sup>149</sup> Attached to the letters were screen captures of the Listen4ever site, showing some of these works.<sup>150</sup> In addition, the letters listed the Listen4ever site’s particular block of IP addresses.<sup>151</sup> Under existing standards, this notice was probably sufficient to give the backbone providers the requisite knowledge of “specific” infringing activity to satisfy the first prong for contributory infringement.<sup>152</sup>

Indeed, after receiving the plaintiffs’ rather detailed notice,<sup>153</sup> the

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148. Complaint ¶ 44.

149. *See generally* RIAA Letter.

150. *See id.*

151. *See id.*

152. *See Napster*, 239 F.3d at 1022 (upholding district court’s finding that Napster had actual knowledge of infringement where the RIAA informed Napster in writing of more than 12,000 infringing files).

153. Notably, the plaintiffs’ letter and screen shots appear to comply substantially with the notice provisions of section 512(c)(3) of the DMCA, which limits liability for host ISPs that store or transmit infringing material. *See* § 512(c)(3). Section 512(c) requires the signature of the copyright owner’s agent, specific identification of the work claimed to be infringed, information sufficient to enable the ISP to locate the allegedly infringing material, the complainant’s contact information, and a statement of the complainant’s good faith belief that the material is infringing. *Id.* Although the section 512(c) notice provisions neither apply to nor affect the section 512(a) conduit provider safe harbor, the Southern District of New York has suggested, if only in dicta, that notice substantially compliant with section 512(c) may satisfy the knowledge requirement for contributory infringement. *See* *Arista Records, Inc. v. MP3Board, Inc.*, No. 00CIV.4660, 2002 WL 1997918, at \*8 (S.D.N.Y. Aug. 29, 2002). In *MP3Board*, the Southern District opined that notice virtually identical to that at issue in the Listen4ever case constituted “strong evidence that [the defendant ISP] acquired actual knowledge of infringement.” *Id.* In that case, several major record labels sued MP3Board.com, an ISP that provided users with an automated search engine allowing them to locate sound recording files from publicly available websites. *See id.* at \*1. Many of the files that the defendant’s search engine helped users to locate allegedly were pirated copies of the plaintiffs’ copyrighted works. *See id.* As in *Listen4ever*, the RIAA sent a letter to the defendant ISP specifically identifying the allegedly infringing material along with various screen shots of the ISP’s site identifying user-posted links to that material. *See id.* at \*9. Because the case was decided in the context of a motion for summary judgment, the *MP3Board* court did not address the question of whether such notice would *per se* satisfy the knowledge requirement for contributory infringement. *See id.* at \*10. However, the language of the *MP3Board* opinion suggests that if the Southern District of New York were given the opportunity to consider the issue on its merits, it might find that notice substantially compliant with section 512(c)

defendants certainly “knew or had reason to know” of direct infringement occurring by means of their routing services.<sup>154</sup>

## 2. Material Contribution or Substantial Participation

A more difficult question is whether the backbone providers materially contributed to or substantially participated in Listen4ever's infringement. Merely supplying the “means” to accomplish an infringing activity cannot give rise to the imposition of liability for contributory copyright infringement.<sup>155</sup> Rather, the “assistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer.”<sup>156</sup> However, exactly how much an ISP must contribute to the infringing activity beyond providing the mere facilities used to accomplish the infringement remains unclear. In several recent cases, courts have found material contribution or substantial participation where the defendant merely continues to provide “the site and facilities for direct infringement.”<sup>157</sup>

In *Netcom*, the leading case on ISP liability under a contributory infringement theory, the Northern District of California allowed a content owner's contributory infringement claim to survive summary judgment, finding that the defendant ISP Netcom's “failure to simply cancel [a BBS user's] infringing message and thereby stop an infringing copy from being distributed worldwide constitute[d] substantial participation . . . .”<sup>158</sup> Netcom had refused to investigate whether a user who gained access through a BBS operated by one of Netcom's subscribers was posting infringing messages even after the content owners informed Netcom of the alleged infringement in writing.<sup>159</sup> The court opined that “[p]roviding a service that allows for the automatic distribution of all Usenet postings, infringing and noninfringing, goes well beyond renting a premises to an infringer.”<sup>160</sup> Instead, the court likened Netcom's activity to that of a radio station found liable for rebroad-

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satisfies the knowledge prong of the contributory infringement test *per se*. See *id.*

154. See *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1057 (C.D. Cal. 2002) (holding that “[t]he knowledge requirement means that the contributory infringer must ‘know or have reason to know of direct infringement.’”).

155. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 436 (1984).

156. *MP3Board*, 2002 WL 1997918, at \*5 (quoting *ZVI Livnat v. Shai Bar Lavi*, No. 96Civ.4967, 1998 WL 43221, at \*3 (S.D.N.Y. Feb. 2, 1998)).

157. *Napster*, 239 F.3d at 1022; cf. *Netcom*, 907 F. Supp. at 1375.

158. *Netcom*, 907 F. Supp. at 1374.

159. See *id.* at 1366.

160. *Id.* at 1375.

casting an infringing broadcast.<sup>161</sup> Therefore, it would be fair, reasoned the court, “assuming [the ISP] is able to take simple measures to prevent further damage to plaintiffs’ copyrighted works,” to hold such an ISP liable for contributory infringement where it knows of infringing material on its system yet continues to aid in publicly distributing such material.<sup>162</sup>

The Ninth Circuit reached the same conclusion in a somewhat different, but analogous, context in *Fonovisa, Inc. v. Cherry Auction, Inc.*<sup>163</sup> In that case, the Ninth Circuit held that a swap meet operator’s provisions of “space, utilities, parking, advertising, plumbing, and customers” constituted substantial contribution to an infringing vendor’s activities.<sup>164</sup> In the much-publicized *Napster* case, the Ninth Circuit found that the district court had correctly applied *Fonovisa* in finding a strong likelihood of success on the plaintiff record companies’ contributory infringement claim against the operators of a website that facilitated the trading of unauthorized MP3 files of copyrighted songs.<sup>165</sup> The district court appropriately concluded, held the Ninth Circuit, that “[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts.”<sup>166</sup>

A broad reading of these decisions suggests that the minimal provision of basic services plus actual knowledge of direct infringement constitutes “material contribution” for purposes of contributory infringement.<sup>167</sup> At least one commentator has suggested that such holdings have “shrivel[ed] the ‘substantial participation’ element of the test, rendering it nearly meaningless.”<sup>168</sup> Thus far, courts have neglected to articulate a connection between the kinds of services an ISP offers and its participation in the direct infringe-

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161. *Id.* (citing *Select Theatres Corp. v. Ronzoni Macaroni Corp.*, 59 U.S.P.Q. 288, 291 (S.D.N.Y. 1943)).

162. *Id.*; accord *Napster*, 239 F.3d at 1022 (affirming finding of likelihood of success on contributory infringement claim where Napster had “actual knowledge that specific infringing material [was] available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material.”) (emphases in original).

163. 76 F.3d 259, 264 (9th Cir. 1996).

164. *Id.*

165. See *Napster*, 239 F.3d at 1022.

166. *Id.*

167. See generally Kenneth A. Walton, *Is a Website Like a Flea Market Stall? How Fonovisa v. Cherry Auction Increases the Risk of Third-Party Copyright Infringement Liability for Online Service Providers*, 19 HASTINGS COMM. & ENT. L.J. 921, 942-45 (1997) (discussing *Fonovisa*’s expansion of the contributory infringement doctrine).

168. *Id.* at 943.



ment.<sup>169</sup> There is no question, therefore, that the line of reasoning in *Netcom* and *Fonovisa* places even passive backbone providers potentially at risk for contributory liability once they receive notice of infringing activity taking place by means of their services.

A court might conclude that the backbone ISPs provided the “site and facilities” for the infringing activities of Listen4ever and its users by routing the infringing material through their backbones.<sup>170</sup> Moreover, as in *Napster*, the backbone providers apparently were able to block access to the infringing material through a process that was, at least according to the plaintiffs and Professor Farber, “simple and technically well understood.”<sup>171</sup> A court adopting the *Netcom* standard might find that the backbone ISPs’ failure to take such measures after receiving actual notice of specific infringement “aid[ed] in the accomplishment of [the infringer’s purpose] of publicly distributing” the infringing material<sup>172</sup> and conclude that, by their inaction, the backbone ISPs “encourage[d] or assist[ed] in the infringement” by Listen4ever and its users.<sup>173</sup>

One can argue, however, that not all ISPs are the same with respect to the services they provide, and therefore, should not be treated the same for the purpose of assessing material contribution to copyright infringement. For example, *Napster* involved a file-sharing service that maintained a database of MP3 files available for download over the Internet.<sup>174</sup> This service resulted in many users infringing upon copyrighted material via Napster’s servers.<sup>175</sup> Napster’s role in the infringement of its users was more active, direct, and substantial than that of a “conduit” ISP that provides Internet access, let alone a provider of routing services.<sup>176</sup> Similarly, the court in *Fonovisa* relied on the defendants’ provision of support services to infringing vendors to

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169. *But see Netcom*, 907 F. Supp. at 1370, n.12 (acknowledging a 1995 report of the Information Infrastructure Task Force (“IITF”) which suggested that an ISP that provides only “wires and conduits . . . would have a good argument for an exemption if it was truly in the same position as a common carrier and could not control who or what was on its system”).

170. *See Napster*, 239 F.3d at 1022.

171. *See id.*; *see also* Farber Declaration ¶ 13; Complaint ¶ 42.

172. *See Netcom*, 907 F. Supp. at 1375.

173. *See Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998); *see also* Yen, *supra* note 56, at 1874 (predicting that an ISP’s continued provision of Internet service after receiving actual notice would be sufficient to constitute “material contribution” to the infringing activity).

174. *Napster*, 239 F.3d at 1011.

175. *See id.* at 1014 (stating that downloading and uploading files from the website constituted infringement of at least two exclusive rights of the copyright holders).

176. *Id.* at 1011-13.

find material contribution to copyright infringement.<sup>177</sup> In contrast to *Napster* and *Fonovisa*, the backbone providers of Listen4ever only provided carriage and routing service to the website and its users.<sup>178</sup>

An additional example of the differences in services provided by ISPs may be found in *Netcom*. Netcom offered direct access to the BBS whose subscriber posted materials that allegedly infringed upon the plaintiffs' copyrights.<sup>179</sup> Netcom, therefore, stood in a more direct relationship to the infringement and was in a better position to control the alleged infringement than a backbone ISP that passively and automatically routes Internet traffic, not only upon the request of its subscribers, or its subscribers' subscribers, but rather on the request of all Internet users. Moreover, because the BBS operator gained access solely through Netcom, it is fair to assume that every time the subscriber posted an infringing message to the BBS, he did so by means of Netcom's services.<sup>180</sup> In contrast, any one of the defendant backbone providers or one of several smaller routers, who were not party to the litigation, may have routed the requests of Listen4ever's users.<sup>181</sup> This difference in the relationship between the defendants and the direct infringer might be sufficient to allow a trier of fact to conclude that the backbone providers did not materially contribute to Listen4ever's and its users' direct infringement.<sup>182</sup>

In conclusion, there are several ways the Internet's backbone providers are distinguishable from defendants in previous cases where courts found contributory infringement. Consequently, a court may find that even under the broadest reading of *Netcom* and *Fonovisa*, the backbone providers' role in the infringement relating to Listen4ever was too remote to constitute material contribution.

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177. See *Fonovisa*, 76 F.3d at 264 (finding that providing "space, utilities, parking, advertising, plumbing, and customers" to vendors was sufficient to show material contribution to infringing activity).

178. See Complaint ¶ 41.

179. See *Netcom*, 907 F. Supp. at 1365-66.

180. See *id.*

181. See generally Speta, *supra* note 145, at 232-33 (outlining the current structure of the backbone provider market, which consists not only of the five "Tier-1" providers named as defendants in Listen4ever, but also other "lower-tier" ISPs).

182. See *Ellison*, 189 F. Supp. 2d at 1059 (finding that AOL's lack of any connection with a direct infringer that posted infringing materials on its Usenet server did not eliminate the fact question as to whether there was material contribution, but suggesting that "a trier of fact might consider this difference in reaching the conclusion that AOL did not make a material contribution to [the direct infringer's] underlying infringement").

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### VIII. PROPOSAL FOR A COMMON CARRIER STANDARD OF CONTRIBUTORY INFRINGEMENT FOR BACKBONE PROVIDERS

It remains unclear under existing case law whether the record labels in the *Listen4ever* case would have prevailed against the Internet's backbone providers had they proceeded under one or more traditional theories of copyright liability. This result leaves both content owners and backbone providers uncertain as to when, if ever, a content owner may obtain a blocking order under section 512(j)(1)(B)(ii).<sup>183</sup> This result is unsatisfactory because it provides no real guidance to backbone providers and other conduit ISPs as to when the law would require them to block access to a foreign site that may be participating in copyright infringement.<sup>184</sup> Further, because of the vast quantities of data that flow through their pipelines, backbone providers are not well positioned to efficiently assess the reasonableness of every infringement claim.<sup>185</sup> As compared to a direct infringer, a backbone provider has less incentive to challenge a copyright owner's authority in court.<sup>186</sup> Consequently, there is a legitimate risk that rather than wait for a court order, backbone providers will block access whenever they receive notice of an alleged infringement, potentially resulting in the blockage of both infringing and non-infringing content.<sup>187</sup>

This possibility raises a variety of concerns involving effects on Internet content, freedom of speech, due process, equal access, and the public's interest in maintaining the efficient operation of the Internet's pipelines.<sup>188</sup> It also raises serious issues regarding the extraterritorial application of U.S. intellectual property laws, since a blocking order could affect Internet users around the world.<sup>189</sup> Self-interested parties are unlikely to take such factors into ac-

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183. See § 512(j)(1)(B)(ii).

184. See generally Yen, *supra* note 56, at 1890-92 (discussing the ambiguities in the existing law that encourage ISPs to remove infringing material and the DMCA's failure to clarify the situation).

185. Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 413 (2002).

186. *Id.*

187. See Yen, *supra* note 56, at 1888-89 (arguing that the DMCA's safe harbor scheme creates incentives for ISPs to indiscriminately remove material from the Internet on a content owner's request).

188. See generally *id.* at 1837-39 (discussing First Amendment and due process concerns of indiscriminate blocking by ISPs); Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 70-71 (1992) (discussing First Amendment, due process, and equal access concerns of private enforcement by network service providers).

189. See Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273, 280-85 (2002) (discussing issues raised by extraterritorial application of U.S. copyright laws to restrict access to Internet content).

count when deciding whether to block access to online material.<sup>190</sup> Thus, private bargaining is unlikely to produce a socially efficient outcome.<sup>191</sup> As one commentator stated, “only the courts are in a position to impose constitutional and statutory restrictions on the control of content.”<sup>192</sup>

In addition to the limitations imposed by the Constitution and the Copyright Act, the DMCA imposes mandatory economic and equity considerations that a court must weigh before issuing a blocking order under section 512(j).<sup>193</sup> Together, these constitutional and statutory considerations should be adequate to allow a court to reasonably assess the full social costs and benefits of issuing a blocking order in a given case. Consequently, to reduce the risk of a backbone’s blocking access where the law would not impose such a duty, courts should clarify under which circumstances a backbone provider will be held liable for secondary infringement.

One possibility is to adopt a contributory infringement knowledge standard based on a common law defamation model. Under this standard, a backbone provider would not be held liable for contributory infringement unless it receives written notice establishing with substantial certainty that: (1) the material is infringing; and (2) the use is not protected under doctrines of fair use, parody, or other statutory exceptions to copyright infringement. Accordingly, the provider could only be liable for contributory copyright infringement after having received such notice and refusing to remove access to the content. While such an approach would not eliminate the risk that a backbone provider will block access absent a court order,<sup>194</sup> at least it would provide reasonable and workable guidelines for predicting a backbone provider’s liability for contributory infringement. Together with the subsection (a) safe harbor and the limitation on remedies in section 512, this certainty would help ensure that backbone providers block access absent a court order in only the most egregious and legitimate cases of copyright infringement. Such an approach would also stabilize the treatment of common carrier liability under copyright law and common law defamation.

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190. See Jackson, *supra* note 185, at 414.

191. See Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 244 (2002) (discussing the social costs of allowing self-interested parties to control the content of public discourse).

192. Jackson, *supra* note 185, at 413.

193. See § 512(j)(2).

194. Indeed, there is probably no way to eliminate that risk short of granting complete immunity from secondary copyright infringement to backbone ISPs, a result that would eviscerate the remedy fashioned by Congress in section 512(j)(1)(B)(ii) and potentially leave content owners with no remedy against an egregious infringer based in an offshore copyright haven. See § 512(j)(1)(B)(ii).

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### A. The Common Law Defamation Common Carrier Immunity Standard

Backbone providers acting as routers for Internet traffic function more like the operators of “telephone, telegraph, and microwave communication services” than landlords, swap meet organizers, BBS services, or even host ISPs like Netcom.<sup>195</sup> Unlike swap meet organizers, landlords, or even newsstands, “common carriers” such as these traditionally have been granted broad immunity from liability for torts that occur in the provision of their basic and necessary services.<sup>196</sup> For example, a telephone company will not be held liable for carrying a defamatory message unless it has actual knowledge of its defamatory nature and reason to know that the communicator of the message was not privileged to send it.<sup>197</sup>

One justification for requiring this higher threshold before imposing liability is that common carriers cannot monitor and screen effectively the massive amount of information they handle.<sup>198</sup> Common carriers also exercise little, if any, editorial control over the content of what they carry.<sup>199</sup> Thus, they should bear less liability for tortious content than “publishers” or “distributors” that exercise more editorial control.<sup>200</sup> Perhaps most importantly, the public has a strong interest in having private and efficient communications, which a common carrier could not provide if it were liable every time it transmitted a tortious statement and had to self-regulate accordingly.<sup>201</sup>

In exchange for broad immunity from tort liability in their provision of services, common carriers are required to interconnect and to offer services non-discriminately to consumers.<sup>202</sup> These requirements are justified on the

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195. See generally Bryan J. Davis, Comment, *Untangling the “Publisher” Versus “information Content Provider” Paradox of 47 U.S.C. § 230: Toward A Rational Application of the Communications Decency Act in Defamation Suits Against Internet Service Providers*, 32 N.M. L. REV. 75, 79 (2002) (discussing “common carrier” standard in common law defamation cases).

196. See *id.*

197. See generally Annotation, *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 1015 (1979).

198. Davis, *supra* note 195, at 79.

199. Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 676 (2002).

200. One commentator describes this in terms of a “value added” framework, in which providers of information that supply mere “distribution value” should be exposed to less liability for tortious content than those that provide “value” more closely analogous to content-editing, such as the organizational structure of a newspaper or online index. See Perritt, *supra* note 188, at 69-70.

201. Davis, *supra* note 195, at 79.

202. Speta, *supra* note 145, at 262.

theory that for many users, the services common carriers provide are essential for commerce and communication.<sup>203</sup>

## B. Backbone Providers as Common Carriers

The FCC has thus far declined to treat Internet carriers, including backbone providers, as common carriers for purposes of governmental regulation.<sup>204</sup> Therefore, unlike telecommunications companies, backbone providers may privately negotiate interconnection with other backbone providers and smaller ISPs.<sup>205</sup> Despite the lack of formal regulation, however, the Internet's backbone providers essentially operate as common carriers. As such, the same legal principles should be applied to limit their liability for torts that occur in the provision of their services.<sup>206</sup>

An entity meets the legal test for being a common carrier if it has purported to serve all indiscriminately.<sup>207</sup> Backbone providers, especially in their passive and indiscriminate routing functions, appear to satisfy this test.<sup>208</sup> Indeed, all Internet users utilize backbone routing services. Moreover, as one commentator has noted, the major backbones have published peering policies outlining their criteria for service, thus suggesting their willingness to serve any ISP that meets those criteria.<sup>209</sup> In addition, the backbone providers, much like telephone companies, exercise no control over content.<sup>210</sup> Rather, "they transmit messages without change in the form or content of the information as sent and received."<sup>211</sup>

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203. *Id.* at 269.

204. *See generally id.* at 230-33 (discussing Federal Communications Commission policy of treating Internet carriers as "information services" free from regulation under the Communications Act of 1934).

205. *See Speta, supra* note 145, at 248.

206. Indeed, courts in common law defamation law cases already have extended common carrier status to ISPs other than backbone providers. *See, e.g.,* Lunney v. Prodigy Servs. Co., 683 N.Y.S.2d 557, 561 (1998) (holding that ISP did not "publish" an allegedly defamatory e-mail message and bulletin board postings, and that even if provider could be considered a "publisher," it was protected from liability by qualified privilege historically afforded to telegraph companies that transmit defamatory messages).

207. Speta, *supra* note 145, at 269.

208. *Id.* at 269-70.

209. *Id.*

210. *Id.* at 271.

211. *Id.* (citing definition of "telecommunications" in the Telecommunications Act of 1996).

Another test for common carrier status is whether the entity is performing an important public service in a monopolistic environment.<sup>212</sup> A handful of backbone ISPs provide the great majority of the Internet's carriage and routing services.<sup>213</sup> Thus, they operate in what might be classified as a quasi-monopolistic environment.<sup>214</sup> It is undeniable, moreover, that backbone carriage and routing services have become an essential aspect of commerce and communication for much of the public.<sup>215</sup> Indeed, but for the service provided by these backbone carriers, the Internet would cease to function effectively and efficiently. Society, therefore, has a strong interest in providing incentives for backbone providers to continue to provide these essential services to all Internet users.

As a corollary, society has an equally strong interest in ensuring that neither the backbone providers nor powerful content owners such as the Listen4ever plaintiffs have the right to limit access to the Internet's pipelines absent a legitimate and compelling justification. Indeed, the efficient dissemination of information is one of the goals of copyright law.<sup>216</sup> As one commentator has stated, "if allowing owners to protect their rights unduly hinders access to information, then copyright policy cannot justify such a result."<sup>217</sup> Allowing a small group of self-interested actors to restrict access to the Internet—without a showing that legitimate harm has been done and without a weighing of the full costs and benefits of such restrictions—goes beyond the limited monopoly powers granted to content owners under the Copyright Act.<sup>218</sup> Thus, there is good reason to clarify the standard of back-

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212. Perritt, *supra* note 188, at 83 ("A finding that an entity. . . [is] performing an essential public service in a monopolistic environment—is likely to draw the entity within the definition of common carrier.").

213. See Speta, *supra* note 145, at 232.

214. See *id.* at 233.

215. *Id.* at 271.

216. Cf. *Whelan Assocs. v. Jaslow Dental Lab*, 797 F.2d 1222, 1235 (3d Cir. 1986) (copyright law attempts "to create the most efficient and productive balance between protection [incentive] and dissemination of information, to promote learning, culture, and development"); see also Walton, *supra* note 167, at 945-46.

217. Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 408 (1995); see also John Carmichael, Comment, *In Support of The White Paper: Why Online Service Providers Should Not Receive Immunity From Traditional Notions of Vicarious and Contributory Liability for Copyright Infringement*, 16 LOY. L.A. ENT. L.J. 759, 786 ("Copyright law strikes a balance between providing just enough incentive through a limited monopoly to inspire creation, but not so much that it deprives the public of what is necessary").

218. See Carmichael, *supra* note 217, at 786.

bone provider liability under copyright law to provide extra incentive for backbone providers to refrain from blocking access absent a legal duty to do so. The standard should recognize the common carrier status of backbone providers and set a correspondingly high threshold before imposing secondary liability for the carriage and routing of infringing material.

### C. The Incentive Problem

The safe harbor under section 512(a) and limitation on remedies under section 512(j) provide some incentive for backbone providers to refrain from blocking access on receipt of notice.<sup>219</sup> Unlike the other section 512 safe harbors, a conduit provider does not lose its safe harbor under section 512(a) if it fails to block access to allegedly infringing material on the receipt of statutory notice.<sup>220</sup> Thus, a backbone provider at least knows that if it satisfies the section 512(a) safe harbor, the only relief that a court may issue against it is a section 512(j)(1)(B) blocking order. However, by leaving the uncertain secondary liability scheme of copyright intact and imposing no additional liability on a conduit provider that voluntarily blocks access without a showing of actual infringement, Congress created an incentive for backbone providers to comply with blocking requests rather than wait for a court order.<sup>221</sup> As discussed, this result fails to produce a socially efficient outcome because it fails to take into consideration the full social costs and benefits of blocking access to a given site.<sup>222</sup>

### D. Proposal for a Common Carrier Model

Courts should clarify the uncertainty and provide an additional incentive for backbone providers to refrain from blocking access absent a legal duty to do so by adopting a defamation law-type model for contributory copyright infringement that treats backbone providers as common carriers. Additionally, courts should set a high, clear knowledge threshold by which backbone providers may gauge their potential liability. Under this proposed model, a backbone provider would not be liable for contributory copyright infringement unless it has received written notice that not only establishes infringement with substantial certainty, but also establishes that the use is not "privileged" under the doctrines of fair use, parody, or another exception to copyright liability.

Such a model would offer several advantages over the existing liability scheme. First, by requiring a specific knowledge threshold, this model would add predictability, and thus would be vastly preferable to the existing scheme of contributory infringement. Under the present scheme, both con-

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219. See § 512(a), (j).

220. See § 512(a).

221. See generally Yen, *supra* note 56, at 1892.

222. Schruers, *supra* note 191, at 244.



tent owners and backbone providers are left uncertain as to when, if ever, a backbone provider will be deemed a secondary infringer. Moreover, unlike the existing contributory infringement scheme, a defamation law-type model recognizes that not all ISPs contribute to infringement in the same way. The existing scheme appears to equate knowledge plus the provision of any kind of service as material contribution. The defamation law “value added” model, by contrast, recognizes differences in the kind of service provided by requiring a higher threshold of knowledge where a provider’s participation in the direct infringement is less substantial.<sup>223</sup>

In addition, this model recognizes that content owners are better situated than common carriers such as backbone providers to police infringement and to filter out privileged fair uses.<sup>224</sup> It places a heavy burden on the content owner to establish that legitimate harm is being done. In certain instances, however, a blocking order under section 512(j) may be the most socially efficient remedy.<sup>225</sup> In still others, a section 512(j) order may be the *only* remedy available to a content owner.<sup>226</sup> A court should make this determination on a case-by-case basis, in light of constitutional, equitable, and economic considerations, including those set out in section 512(j)(2). Exempting backbone providers from contributory liability altogether would eviscerate the remedy fashioned by Congress in section 512(j)(1)(B)(ii) and potentially leave the content owner with no remedy against an unreachable offshore infringer.<sup>227</sup> Society has an interest in ensuring remedies for content

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223. See Elkin-Koren, *supra* note 217, at 377 (discussing defamation law standards of tort liability, under which “an on-line service’s accountability increases the more it involves itself in the content it carries”); see also Perritt, *supra* note 188, at 132 (arguing that, under a “value-added framework,” adding value that entails selection of authorship or content review should expose actors to liability under “at least the negligence standard,” while adding “distribution. . . value using network technologies is remote from the underlying content and should not expose the actors to liability”).

224. See Schruers, *supra* note 191, at 236 ( “Because the victim is better positioned to determine whether information about him or her is in fact defamatory, notice-based liability regimes rely on the victim as the better “cost-avoider,” to provide the ISP with notice before liability can attach. After the ISP has been notified, however, it is better suited to avoid the costs that accompany injury by defamation, and thus would be held liable.”).

225. Stacey L. Dogan, *Infringement Once Removed: The Perils of Hyperlinking to Infringing Content*, 87 IOWA L. REV. 829, 896, n.275 (2002) (discussing potential difficulty and cost of obtaining relief against foreign infringers and hosts).

226. See generally Jane C. Ginsburg, *Copyright for the “Digital Millennium*, 23 COLUM.-VLA J.L. & ARTS 137, 165 (1999) (suggesting that blocking orders “against U.S. participants in the communication” may offer the only “meaningful” relief in cases involving egregious offshore infringers).

227. See Dogan, *supra* note 225, at 896; cf. Patel, *supra* note 199, at 691 (noting that the Communications Decency Act’s application of complete immunity to ISPs

owners that suffer harm to preserve incentives for creation.<sup>228</sup> Thus, this proposed model does not eliminate backbone provider liability for contributory infringement entirely. By setting the standard high, however, this proposed model should at least reduce, although admittedly not eliminate, the risk that a backbone provider would voluntarily block access to content where it was not substantially certain that a court would require it to do so.

Finally, this model recognizes that a duty to carry or route all Internet traffic regardless of content necessitates a privilege to transmit some infringing material.<sup>229</sup> As one commentator has written, there is an “irreconcilable conflict between a duty to censor and a duty to carry everything.”<sup>230</sup> Consequently, if society does not want backbone providers or powerful content owners deciding who gets access to the Internet or what content is transmitted, it should create incentives for Internet backbones to “carry everything.” As a corollary, it should create disincentives for them to block access absent a clearly recognizable legal duty. Section 512 of the DMCA already creates limitations on liability aimed at these ends. Courts can help ensure that section 512 operates as intended by further clarifying when a backbone provider may face liability under theories of secondary infringement.

## IX. CONCLUSION

The Listen4ever case represents the music industry’s first attempt to target the Internet’s backbone providers in an effort to control the copyright infringement of an offshore website operator. Obtaining a blocking order under section 512(j) of the DMCA may have been the most efficient or indeed the only way to enjoin the egregious activity of Listen4ever. That is a question likely to be debated for some time. Regardless, the labels’ attempt to invoke section 512 absent an allegation of direct or secondary infringement against the backbone providers was without merit in light of the plain language and legislative history of the DMCA. Whether the labels could have prevailed under traditional copyright theories of liability is uncertain. This uncertainty raises the possibility that backbone providers will block access in cases in which they have no legal duty to do so, which is a socially inefficient result. Consequently, backbone provider liability for contributory

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for third-party defamation leaves some plaintiffs with “no one to sue and no remedy for the harms incurred” and arguing that policy of promoting technology should be balanced against policy of tort compensation).

228. M. David Dobbins, Note, *Computer Bulletin Board Operator Liability for Users’ Infringing Acts*, 94 MICH. L. REV. 217, 239 (1995) (“Society has a substantial interest in maintaining the copyright monopoly. A standard of [secondary liability] that is too low will diminish authors’ incentives to engage in creative endeavors by making unauthorized production and distribution of their works too easy”).

229. Perritt, *supra* note 188, at 95-96.

230. *Id.*

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infringement should be clarified. One possibility is to adopt a defamation law-type model which would treat backbone providers as common carriers and impose a high, clear threshold of knowledge before imposing liability for the carriage and routing of infringing content. Such clarification is necessary to prevent powerful content owners from breaking the backbone of the Internet in their attempt to control online infringement.