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## Will the Bands Play On? How Courts are Allowing ISPs to Float into the Safe Harbor Provisions of the Digital Millennium Copyright Act.<sup>±</sup>

### INTRODUCTION

The Digital Millennium Copyright Act [hereinafter “DMCA”] was intended to give increased copyright protection to copyright holders for unauthorized distribution of their work in the digital age, namely via the Internet.<sup>1</sup> However, many internet service providers [hereinafter “ISPs”] are choosing to either stay willfully blind of such infringing activities, or are doing just enough to qualify under one of the four safe harbor provisions of the DMCA to avoid contributory copyright infringement liability.<sup>2</sup> This lack of bona fide effort on the part of ISPs to prevent infringement now comes at the expense of individual Internet users, each of whom is unable to shoulder the immense burden of copyright liability by himself or herself.<sup>3</sup> Currently they are being asked to shoulder quite a substantial burden. Recently, the Recording Industry Association of America [hereinafter “RIAA”]<sup>4</sup> has brought 261 suits against private individuals,

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<sup>1</sup> S. REP. NO. 105-190, at 8 (1998).

<sup>2</sup> See, e.g., *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002) [hereinafter *In re Aimster*]; *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001); *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Cal. 2002).

<sup>3</sup> Steven Levy et al., *Courthouse Rock*, NEWSWEEK., Sept. 22, 2003, at 38; Johnnie L. Roberts, *Out of Tune; Picking on Little Kids and Old Ladies? What Were the Record Companies Thinking? They Say it's Life or Death*, NEWSWEEK., Sept. 22, 2003, at 42.

<sup>4</sup> The RIAA is the music industry's trade group, representing the industry's five largest music companies – Universal Music, Sony Music Entertainment, Warner Music Group, BMG Entertainment, and EMI. Frank Ahrens, *Music Industry Sues Online Song Swappers; Trade Group Says First Batch of Lawsuits Targets 261 Major Offenders*, WASH. POST, Sept. 9, 2003, at A1.

holding these individuals each liable for \$150,000 per song that they have downloaded.<sup>5</sup> More lawsuits against these individuals are just around the corner.<sup>6</sup>

With more than sixty million file-swappers around the world,<sup>7</sup> the comparatively few ISPs are in the best position to prevent copyright infringement on a large-scale and global level.<sup>8</sup> However, some courts in the Ninth Circuit have been misconstruing congressional intent regarding the four release-from-liability provisions in the DMCA, which may be reducing the incentive for ISPs to stop the rising flood of copyright infringement on the Internet.<sup>9</sup> Congress intended to provide heightened copyright protection by requiring the ISPs to meet the requirements of each and every safe harbor provision that applies to their activity in order to be relieved of liability.<sup>10</sup> However, at odds with this goal, these courts have been releasing the ISPs from contributory copyright liability if some aspect of their activity satisfies the requirements of merely *one* of the four safe harbor provisions, regardless of whether their other actions are subject to the requirements of the remaining three safe harbors.<sup>11</sup>

This note first addresses the recent controversy with the RIAA, and its attempt to find some way to solve the problem of copyright infringement in the technological age. It then discusses contributory copyright infringement with respect to the role of ISPs in file-swapping. Then, it will examine the DMCA safe harbor provisions, and the congressional intent behind

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<sup>5</sup> Levy, *supra* note 4; Roberts, *supra* note 4.

<sup>6</sup> Frank Ahrens, *RIAA's Lawsuits Meet Surprised Targets; Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants*, WASH. POST, Sept. 10, 2003, at E1.

<sup>7</sup> Levy, *supra* note 4.

<sup>8</sup> *See generally* S. REP. NO. 105-190 (1998); H.R. REP. NO. 105-551 (II) (1998).

<sup>9</sup> *E.g.*, *Hendrickson*, 165 F. Supp. 2d at 1088; *Ellison*, 189 F. Supp. 2d at 1067-72.

<sup>10</sup> *See* 17 U.S.C. § 512(n) (2000); S. REP. NO. 105-190, at 8. *See also* H.R. Rep. No. 105-551 (II).

<sup>11</sup> *See Hendrickson*, 165 F. Supp. 2d at 1088; *Ellison*, 189 F. Supp. 2d at 1067-72.

enacting four separate and distinct subsections. From there, this note will illustrate how different courts are applying these separate safe harbors in their analysis of ISP liability. Finally, this note concludes by suggesting that courts must be more proactive in holding ISPs accountable as far as Congress permits, because the ISPs, as digital gatekeepers, have the ability to more effectively prevent unlimited global copyright infringement than do lawsuits against a mere couple hundred individual users out of the sixty million users world-wide, which the RIAA ultimately brings against its own customers.

## I. RECENT CONTROVERSEY

Recently, the RIAA initiated 261 lawsuits against private individuals who used Internet file-sharing services to download music.<sup>12</sup> These suits are making families liable for millions of dollars in penalties for infringing songs in situations where, for example, their young children or grandchildren may have downloaded music to the family computer.<sup>13</sup> RIAA President Cary Sherman claims that the Recording Industry is “doing it to get [its] message out.”<sup>14</sup> There is no doubt that this message is shocking, given that most people do not see downloading a song from an internet service as morally wrong as shoplifting the same CD from a store.<sup>15</sup> But what makes this message more shocking is that families selected at random are being held liable for such devastating amounts of money.<sup>16</sup>

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<sup>12</sup> Levy, *supra* note 4.

<sup>13</sup> Levy, *supra* note 4. *See also* Ahrens, *supra* note 5 (citing an example of one of the individuals that was sued was a 71 year-old grandfather whose grandchildren had been playing with his computer).

<sup>14</sup> Levy, *supra* note 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The RIAA is claiming that these individuals are liable to the music industry for \$150,000 per song downloaded because copyright law allows for up to this amount in damages. *Id.* *See also* Ahrens, *supra* note 5.

At \$150,000 per song, even Senators are becoming concerned, asking whether the punishment really fits the crime.<sup>17</sup> The penalty is even more bizarre given that most of the online service providers that run these file-swapping websites are revenue-generating corporations themselves, and are the ones who are actually *profiting* from facilitating this infringement.<sup>18</sup> Sites like Kazaa bring in revenue from advertising and software distribution.<sup>19</sup> Other services charge their users, such as Aimster, which collects \$4.95 per month from each customer.<sup>20</sup> In exchange for this fee, Aimster users do not even have to search for the most popular songs themselves—Aimster compiles a Top 40 list of songs for its paying customers that are easily downloadable with just one click of the mouse.<sup>21</sup> Yet, the RIAA went after 261 private individuals to seek compensation and create deterrence though commercial ISPs have both the ability to more adequately compensate the music industry and more effectively prevent such copyright infringement in the future.<sup>22</sup>

Besides asking whether the punishment fits the crime, Senators and others should be asking whether suing these individuals is the best means to prevent such copyright infringement on the Internet. The RIAA has already begun accepting individual settlements in the range of \$3,000 to \$5,000.<sup>23</sup> Accounting for court and attorneys' fees and the ill-will that consumers will

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<sup>17</sup> Levy, *supra* note 4 (making reference to a statement by Senator Norm Coleman from Minnesota asking “[d]oes the punishment fit the crime?”).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* These sites also can generate revenue from their spyware.

<sup>20</sup> *In re Aimster*, 252 F. Supp. 2d at 644.

<sup>21</sup> *Id.*

<sup>22</sup> See generally S. REP. NO. 105-190; *In re Aimster*, 252 F. Supp. 2d at 634; *Hendrickson*, 165 F. Supp. 2d at 1082.

<sup>23</sup> Levy, *supra* note 4; Roberts, *supra* note 4.

have towards the Recording Industry, it is possible that the industry will actually walk away with even more financial loss as a result of this litigation.<sup>24</sup> The music industry has already seen decreased revenues of \$700 million since the creation of online file-swapping sites, and risking any more losses through consumer frustration may be unwise.<sup>25</sup>

Besides the relatively insignificant monetary recovery the RIAA is receiving from these private individuals, bringing these suits may not actually deter many people.<sup>26</sup> Given the global impact of file-swapping and its use by more than 60 million people world-wide, it is simply not possible for the RIAA to sue everyone.<sup>27</sup> One student has explained her motivation for continuing to download music:

“Every time I log on to Kazaa it says there are a million users online with me. The odds are in my favor,” says one 19-year-old student at the University of South Carolina. If infringers don’t want to play the odds, they can virtually guarantee the RIAA can’t finger them; simply turn off the “sharing” part of file-sharing software, and you can still download – but the copyright cops can’t find you. If Americans do this, the file sharers overseas will pick up the slack. “Even if every last Kazaa user in the U.S. turned off file sharing, there wouldn’t be a perceptible difference . . . .”<sup>28</sup>

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<sup>24</sup> See generally Ahrens, *supra* note 5.

<sup>25</sup> Roberts, *supra* note 4. The industry used to be “fat with profits.” *Id.* The creation of the CD fueled global sales since 1982, and industry profits were exceeding \$40 billion by the mid-1990’s. *Id.* “But since then, U.S. revenue alone has shrunk by a third. And the rise of file sharing, kicked off by Napster in 1999, is largely to blame. Forrester Research said in a report . . . that downloaders had reduced industry revenues by at least \$700 million.” *Id.* Another article also quotes one of the RIAA victims, saying “I’m furious because I can’t afford this . . . I’ve got two young children.” Levy, *supra* note 4.

<sup>26</sup> Levy, *supra* note 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Given the immense pool of file-swappers and their relatively shallow pockets, it makes sense for ISPs to be held more responsible whenever possible, as the actions of few enable the infringement by many.<sup>29</sup>

However, the RIAA may be discouraged from seeking compensation and deterrence from ISPs because courts do not always require ISPs to act in accordance with the standard that Congress intended to prevent such copyright infringement.<sup>30</sup> The effect is that few ISPs are continuing to provide the technological means to file-swap, and the RIAA is left with no obvious alternative but to turn to consumers for compensation and deterrence.<sup>31</sup> As the above argument suggests, attacking consumers may not be the most effective way for the RIAA, the music industry, and copyright holders in general to seek protection.

## II. CONTRIBUTORY COPYRIGHT INFRINGEMENT

“Liability for contributory copyright infringement attaches when ‘one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.’”<sup>32</sup> Such imposition of contributory liability requires that the secondary infringers, in this case the ISPs, know or have reason to know of the direct infringement.<sup>33</sup> Contributory copyright infringement stems from the idea that one who contributes to another’s

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<sup>29</sup> See, e.g., *In re Aimster*, 252 F. Supp. 2d at 652.

<sup>30</sup> See generally 17 U.S.C. § 512; *Ellison*, 189 F. Supp. 2d at 1067-72; *Hendrickson*, 165 F. Supp. 2d at 1088.

<sup>31</sup> See generally *In re Aimster*, 252 F. Supp. 2d at 634; *Hendrickson*, 165 F. Supp. 2d at 1082; *Ellison*, 189 F. Supp. 2d at 1051.

<sup>32</sup> *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1169 (C.D. Cal. 2002).

<sup>33</sup> *In re Aimster*, 252 F. Supp. 2d at 650.

direct infringing activity should be accountable.<sup>34</sup> If ISPs are aware of infringing activity being conducted on their networks and do not take adequate measures to prevent such infringement, they can and should be held liable, subject to the requirements and restrictions in the DMCA, because they are in the unique position to plug the floodgates of copyright infringement on the Internet.<sup>35</sup>

### **III. THE DMCA SAFE-HARBOR PROVISIONS AND THE RELEASE FROM LIABILITY**

Section 512 of the DMCA creates four limitations on liability for which an ISP can qualify.<sup>36</sup> These safe harbor provisions are intended to “both encourage responsible behavior and protect important intellectual property rights.”<sup>37</sup> Congress recognized that in the growing age of technology and the increased number of individuals on the Internet, it would be hard for ISPs to monitor all of the activity that is conducted on their networks.<sup>38</sup> However, they also wanted to “comply with international copyright treaties and to update domestic copyright law for the online world.”<sup>39</sup> Therefore, Congress attempted to encourage responsible behavior by offering release from liability for ISPs that take responsible and prompt actions to reduce the copyright infringement in which they unknowingly participate.<sup>40</sup> The limitations in the safe harbors (a) through (d) “protect qualifying service providers from liability for all monetary relief

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<sup>34</sup> *Id.* at 648.

<sup>35</sup> *See generally* 17 U.S.C. § 512; S. REP. NO. 105-190; H.R. REP. NO. 105-551 (II).

<sup>36</sup> 17 U.S.C. § 512.

<sup>37</sup> S. REP. NO. 105-190, at 67 (statement of Sen. Patrick Leahy).

<sup>38</sup> *See generally* S. REP. NO. 105-190; H.R. REP. NO. 105-551 (II).

<sup>39</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

<sup>40</sup> 17 U.S.C. §512.

[stemming from] direct, vicarious and contributory infringement.”<sup>41</sup> To qualify for this protection, an ISP must be a “service provider” under the DMCA definition,<sup>42</sup> meet the requirements outlined in subsection (i), and the activities at issue must also involve one of the functions listed in subsections (a), (b), (c), or (d), respectively.<sup>43</sup>

Section 512(n) states that:

[s]ubsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based *solely* on the criteria in that subsection, and *shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.*<sup>44</sup>

Therefore, the language of the statute establishes that each of these safe harbor provisions has its own individual requirements for what an ISP must do to claim the protection of that subsection.

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<sup>41</sup> S. REP. NO. 105-190, at 40. “Monetary relief is defined in subsection (j)(2) as encompassing damages, costs, attorneys [sic] fees, and any other form of monetary payment.” *Id.*

<sup>42</sup> A “service provider” is defined two different ways in the statute. For purposes of the transitory communication safe harbor, a “service provider” is defined as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among parties specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” 17 U.S.C. § 512(k)(1)(A). The definition of a “service provider” under the remaining safe harbors is “a provider of online services or network access, or the operator of facilities therefor . . . .” 17 U.S.C. § 512(k)(1)(B).

<sup>43</sup> S. REP. NO. 105-190, at 40. Subsection (i), entitled ‘Conditions for eligibility’ states that:  
[t]he limitations on liability established by this section shall apply to a service provider only if the service provider--  
(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and  
(B) accommodates and does not interfere with standard technical measures.  
17 U.S.C. § 512(i).

<sup>44</sup> *Id.* § 512(n) (emphasis added).

The statutory language further reinforces that each safe harbor applies to a specific and distinct category of action.<sup>45</sup> Subsection (a), for example, pertains to “[t]ransitory digital network communications.”<sup>46</sup> This section holds that an ISP shall not be liable for “transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . .” provided that the ISP meets the criteria further specified in this subsection.<sup>47</sup> Subsection (b) applies when information is cached on the ISP’s system.<sup>48</sup> It states that an ISP shall not be liable for damages for the “intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider” in certain specified cases.<sup>49</sup> Subsection (c) concerns “[i]nformation residing on systems or networks at direction of users.”<sup>50</sup> It excludes ISPs from liability for damages “by reason of the storage at the direction of a user or material that resides on a system or network controlled or operated by or for the service provider” provided the ISPs

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<sup>45</sup> 17 U.S.C. § 512.

<sup>46</sup> *Id.* § 512(a).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* § 512(b).

<sup>49</sup> *Id.* The specified cases are as such:

(A) the material is made available online by a person other than the service provider;

(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A) . . . .

*Id.*

<sup>50</sup> *Id.* § 512(c).

meet the requirements outlined later in the statute.<sup>51</sup> Finally, subsection (d) applies to “[i]nformation location tools.”<sup>52</sup> It states that an ISP will not be held liable “by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link” provided that the ISP meets the other requirements of the subsection.<sup>53</sup>

The descriptions in each subsection clearly indicate that each applies to and provides immunity for a separate and distinct activity of the ISP.<sup>54</sup> In fact, in its legislative history, Congress provided an instructional example to prevent any confusion as to how these subsections were intended to work in concert:

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<sup>51</sup> *Id.* An ISP is only released from this liability if the ISP:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

*Id.*

<sup>52</sup> *Id.* § 512(d).

<sup>53</sup> *Id.* This is all provided that the service provider:

- (1)(A) does not have actual knowledge that the material or activity is infringing;
- (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity . . . .”

<sup>54</sup> *Id.* § 512.

Section 512's limitations on liability are based on functions, and each limitation is intended to describe a separate and distinct function. Consider, for example, a service provider that provides a hyperlink to a site containing infringing material which it then caches on its system in order to facilitate access to it by its users. This service provider is engaging in at least three functions that may be subject to the limitation on liability: transitory digital network communications under subsection (a), system caching under subsection (b), and information location tools under subsection (d).<sup>55</sup>

This example shows that if the ISP meets the requirements of subsection (i), it is entitled to the limited corresponding relief that the system caching safe harbor provides.<sup>56</sup> “But if the same company is committing an infringement by using information locating tools to link its users to infringing material, then its fulfillment of the requirements to claim the system caching liability limitation does not affect whether it qualifies for the liability limitation for information location tools.”<sup>57</sup> This intended application of the DMCA safe harbor provisions generally accomplishes both overriding goals of the DMCA—to encourage responsible behavior on the part of the ISPs to respond quickly and reduce infringing activity on their servers, and to protect important intellectual property rights.<sup>58</sup> This is accomplished by holding the ISPs accountable for each single action it may be performing, instead of relying more on generalized notions of enforcement.<sup>59</sup>

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<sup>55</sup> H.R. REP. NO. 105-551(II), at 65.

<sup>56</sup> *Id.*

<sup>57</sup> *Ellison*, 189 F. Supp. 2d at 1067 (citing 3 NIMMER ON COPYRIGHT § 12B.06[A], at 12B-53, 54).

<sup>58</sup> S. REP. NO. 105-190, at 67.

<sup>59</sup> 17 U.S.C. § 512(n).

However, despite this clear separation of each safe harbor, some courts are applying the safe harbor provisions interdependently.<sup>60</sup> These courts are saying that as long as an ISP meets the requirements found in *one* of the four safe harbors, it will reap the benefits of *all* of the safe harbors, and will be completely released from liability.<sup>61</sup> Given the legislative history and language of the statute, this is both contrary to the congressional intent, and has the effect of reducing the intended incentive to reduce copyright infringement on the Internet by decreasing the standards that ISPs need to meet in order to avoid liability.<sup>62</sup>

#### **IV. APPLICATION OF THE ‘SAFE-HARBOR’ PROVISIONS IN RECENT CASES**

##### **a. In re Aimster Copyright Litigation**

One instance in which a court applied the DMCA’s safe harbor provisions as Congress had intended is the case of *In re Aimster*.<sup>63</sup> Aimster is a file sharing service that allows users to connect with other users for the purpose of both sending instant messages and transferring files in encrypted form.<sup>64</sup> According to the creator of the service, Aimster performs two main

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<sup>60</sup> See, e.g., *Hendrickson*, 165 F. Supp. 2d at 1088; *Ellison*, 189 F. Supp. 2d at 1067-72.

<sup>61</sup> *Id.*

<sup>62</sup> See *supra* Part III.

<sup>63</sup> 252 F. Supp. 2d at 634.

<sup>64</sup> *Id.* at 638. Instant messages, commonly referred to as ‘IM,’ are a way for people to communicate instantly over the Internet to their ‘buddies.’ *Id.* at 640. To facilitate this service, each individual user must independently download the computer program to his or her own computer so that his or her computer can then connect to the IM network. *Id.* When his or her ‘buddies’ are online, the user is notified and can then send messages to this ‘buddy’ that will pop up on his or her computer screen. *Id.* These people can then ‘chat’ almost instantaneously, which makes it a quicker alternative to email. *Id.*

There are many different IM networks, “including America Online’s Instant Messenger (‘AOL IM’), ICQ, and Yahoo IM.” *Id.*

Additionally, Aimster is an ‘internet service provider’ as defined by §512(k). *Id.* at 657-58. In fact, the court said that “[a] plain reading of both definitions [of a service provider in §512] reveals that ‘service provider’ is defined so broadly that we have trouble imagining the existence of an online service that *would not* fall under the definitions . . . .” *Id.*

functions.<sup>65</sup> First, it creates a “peer-to-peer” network that allows users to send instant messages and transfer files to one another.<sup>66</sup> Second, it allows its users to identify other “buddies” that have “similar interests and who may wish to correspond and exchange files.”<sup>67</sup>

Both of these functions are conducted under Aimster’s encryption technology in this peer-to-peer network.<sup>68</sup> This encryption has two main effects. First, individual users are assured privacy when exchanging instant messages and in their choices of file transfers.<sup>69</sup> Second, Aimster itself benefits from this encryption, because it has no knowledge of what files users may be exchanging or the identity of such users.<sup>70</sup> Because knowledge is a requirement for contributory copyright liability, this encryption technology is significant because it eliminates Aimster’s ability to know when its users are exchanging files, who the users are, and which files they are actually exchanging.<sup>71</sup>

The plaintiffs in *In re Aimster*, who include representatives of various record industries, along with songwriters and music publishers, brought suit to obtain an injunction to prevent the contributory infringement of their copyrighted works on the Aimster network.<sup>72</sup> The plaintiffs

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<sup>65</sup> *Id.* at 641.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Aimster users find “buddies” by “searching the user profiles on the system. The user profile identifies other users by subject matter of interest or ‘by the name of the file or files that user has available on his or her hard drive.’” *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (“Aimster encrypts all the information that is transferred between its users on their private networks.”). *Id.*

<sup>70</sup> *Id.* See also 17 U.S.C. §512.

<sup>71</sup> *In re Aimster*, 252 F. Supp. 2d at 651.

<sup>72</sup> *Id.* at 638.

claimed the Aimster service actually facilitated and contributed to “copyright infringement on a massive scale.”<sup>73</sup>

In its analysis, the court drew attention to two specific features of the Aimster service. First, the court discussed the feature called “Aimster Guardian” in which Aimster demonstrated on its website how to effectively transfer and copy these copyrighted works over the Aimster system; thus facilitating the claimed infringement.<sup>74</sup> The court also drew attention to the feature called “Club Aimster” where Aimster charged its users a \$4.95 monthly fee for a “repackaged version of the basic Aimster service” which made it easier for its users to locate and download all the new hits and releases.<sup>75</sup> Through this service, Aimster created a “Top 40” list of songs, next to which the user could just click the “play” button to automatically transfer the song onto his or her computer without even having to search for it.<sup>76</sup> The remarkable thing about this

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<sup>73</sup> *Id.* Aimster, in its defense, claimed that AOL IM allowed for basically the same file transfer abilities that the plaintiffs were attempting to prohibit on the Aimster network, and therefore if AOL was not being shutdown, Aimster should not be either. *Id.* at 640, 655-56. Aimster provided evidence that AOL users can transfer files between one another via two methods: “by using a file transfer or AOL IM’s ‘get file’ functionality.” *Id.* at 640. When using the file transfer method, a user selects a file from his or her hard drive to send to one of his or her IM buddies, who in turn accepts the transfer on his or her hard drive. *Id.* Through this method, users can transfer files over the AOL networks such as “documents, digital pictures, and MP3 music.” *Id.* The “get file” functionality allows a user to make certain designated files available for other users to look through and take themselves. *Id.* Aimster argues that this essentially allows music to be transferred over the AOL network between users, facilitating copyright infringement on a wide-scale. *Id.* at 640, 655.

However, the court distinguished Aimster and AOL IM by the fact that Aimster expanded the file transferring capabilities of AOL IM by “designating every Aimster user as the ‘buddy’ of every other Aimster user. In this way, every Aimster user has the ability to search and download files contained on the hard drives of any other Aimster user,” and each can do so at the same time. *Id.* at 642-43.

<sup>74</sup> *In re Aimster*, 252 F. Supp. 2d at 643. ‘Aimster’s Guardian’ demonstrated this by using “illustrative on-screen examples, some of the very copyrighted works that Defendants had previously been informed were being infringed on the Aimster system.” *Id.*

<sup>75</sup> *Id.* at 644.

<sup>76</sup> *Id.* at 644-45.

feature was that Aimster was actually profiting itself for facilitating copyright infringement for others.<sup>77</sup> In fact, the court noted that “Aimster is very much a commercial enterprise.”<sup>78</sup>

In this case, the court followed legislative intent and came down hard on this type of contributory copyright infringement by the ISP.<sup>79</sup> The court began by stating that it had no doubt that Aimster either knew or should have known “of the direct infringement occurring on [its network].”<sup>80</sup> The court pointed out that Aimster could not be permitted to remain willfully blind to this activity because they encrypted the information that the users were exchanging so that they would intentionally not know of such activity, and thus prevent themselves from learning about the copyright infringement that was clearly occurring on their system.<sup>81</sup> The court ultimately found that Aimster “materially contributed to the infringing activities,”<sup>82</sup> and proceeded to discuss whether Aimster could be released from its liability under any of the DMCA’s safe harbor provisions.<sup>83</sup>

The court began by stating that “[t]he DMCA was ‘enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the

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<sup>77</sup> *Id.* at 645.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at 654.

<sup>80</sup> *In re Aimster*, 252 F. Supp. 2d at 650. “The imposition of contributory liability requires that the secondary infringer know or have reason to know of the direct infringement.” *Id.* The court also found “Aimster’s Guardian tutorial” to be evidence of their “knowledge of [the] infringing activity” because its purpose was to clearly show “how to infringe [the] Plaintiff’s copyrights.” *Id.* (emphasis added).

<sup>81</sup> *In re Aimster*, 252 F. Supp. 2d at 651.

<sup>82</sup> *Id.* at 654.

<sup>83</sup> *Id.* at 656-62.

service provider.”<sup>84</sup> The court then correctly reaffirmed this purpose of the DMCA by applying each of the safe harbor provisions independently of one another in order to maintain the heightened standard of “copyright enforcement” that Congress intended when creating each of the separate and distinct safe harbor provisions.<sup>85</sup> Though both parties agreed that the third safe harbor provision was not applicable to this case, the court did conduct a thorough analysis of the first, second, and fourth subsections as Congress intended when it created the four separate and distinct safe harbors.<sup>86</sup> None of these subsections were found to apply to Aimster; thus, it was not released from any contributory copyright liability.<sup>87</sup>

This case is a clear example of an ISP crafting methods to avoid liability,<sup>88</sup> and the important role the courts play in enforcing the level of responsibility Congress intended the ISPs to adopt. Though technically Aimster might not have known when each single individual user was downloading and transferring infringing material through its encryption technology, it was still aware that this was the main function of its network.<sup>89</sup> The court was effective in preventing

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<sup>84</sup> *Id.* at 656, quoting *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (citing H.R. CONF. REP. NO. 105-796, at 72 (1998)).

<sup>85</sup> *Id.* at 657-62. Though the court found that Aimster failed to comply with the prerequisite requirements of § 512(i), which thus made them ineligible for any of the safe harbor provisions to begin with, it went on to discuss the applicability of each of the safe harbors in an effort to draft a complete analysis. *Id.* at 659.

<sup>86</sup> *Id.* at 656-62. For the transitory communications safe harbor (subsection (a)), the court found that this subsection was “limited to situations in ‘which an [ISP merely] plays the role of a ‘conduit’ for the ‘communications of others.’” *Id.* at 660. Because Aimster provided for broad searching capabilities, “automatic resumption of interrupted downloads,” and “easy one-click downloading” of the most popular current titles, it was more than a mere conduit for the network users. *Id.* For the system caching safe harbor (subsection (b)), the court held that this safe harbor was inapplicable because Aimster’s liability did not arise from the act of caching itself. *Id.* at 661. Finally, the information location tools safe harbor (subsection (d)) did not apply because Aimster did have actual and constructive knowledge of the infringing activity, and they presented no evidence that they took any steps to remove or disable access to the infringing material. *Id.* at 661.

<sup>87</sup> *Id.* at 657-62.

<sup>88</sup> Here, the court found that Aimster used their encryption technology to stay willfully blind. *Id.* at 641.

<sup>89</sup> *Id.* at 643.

some of this infringement through its correct enforcement of the DMCA standards and requirements through issuance of an injunction against Aimster.<sup>90</sup> Though the safe harbors were ultimately inapplicable because Aimster did not satisfy the prerequisite requirements of Section 512(i), the court set beneficial precedent by evaluating each and every subsection in its analysis, so that other courts would follow this standard.

### **b. Hendrickson v. eBay**

Unfortunately this standard was not applied in *Hendrickson v. eBay*, where the court misapplied the intended use of the four safe harbor provisions.<sup>91</sup> eBay, the Internet website service, provides an online forum for more than twenty-five million buyers and sellers to trade items “through either an auction or fixed-price format.”<sup>92</sup> This “sophisticated online classified service” allows sellers to post descriptive advertisements of items for sale, and prospective buyers can bid for those items that they wish to purchase.<sup>93</sup> Buyers can search for items by typing terms into eBay’s search engine, at which “point links” to these advertised materials are displayed as the search results.<sup>94</sup> This service facilitates trading on a local, national, and international level, where sellers pay for use of virtual space to advertise their items, and goods are sold to the highest bidder.<sup>95</sup>

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<sup>90</sup> *Id.* at 666.

<sup>91</sup> 165 F. Supp. 2d at 1082.

<sup>92</sup> *Id.* at 1084. eBay is an ‘internet service provider’ within the meaning of 17 U.S.C. § 512 (k)(1)(B) which holds that “the term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor.” *Id.* at 1088. *See also infra*, note 41.

<sup>93</sup> *Hendrickson*, 165 F. Supp. 2d at 1084 n.2.

<sup>94</sup> *Id.* at 1084.

<sup>95</sup> *Id.* at 1084 n.2.

Plaintiff Robert Hendrickson dba Tobann International Pictures, is the copyright owner of the documentary *Manson*.<sup>96</sup> Around December 20, 2000, Hendrickson sent a cease and desist letter to eBay advising it that pirated copies of his documentary in DVD form were being advertised for sale on its website.<sup>97</sup> Because eBay claimed that they needed more information about which specific DVDs posted on the website were the infringing copies, as well as more details about Hendrickson's legal interest in the documentary, they allowed the infringing copies remain on their website.<sup>98</sup> Hendrickson subsequently brought suit asserting a claim for copyright infringement.<sup>99</sup>

Hendrickson alleged that eBay was liable for the sale of the pirated and unauthorized copies of his documentary by the eBay users.<sup>100</sup> More specifically, Hendrickson claimed that eBay facilitated the unlawful sale and distribution of *Manson* "by providing an online forum, tools, and services to the third party sellers."<sup>101</sup> Though he asked the court to hold eBay liable for contributory copyright infringement, the court decided to first address the issue of whether the DMCA shielded eBay from liability for the claimed copyright infringement.<sup>102</sup>

In addressing whether eBay was protected by the safe-harbor provisions of the DMCA, the court began by stating that "[the DMCA] preserves strong incentives for service providers

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<sup>96</sup> *Id.* at 1084.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1085. However, eBay did send Hendrickson follow-up emails asking for more details regarding this information. *Id.*

<sup>99</sup> *Id.* at 1086.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1087.

<sup>102</sup> *Id.* at 1087-88.

and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”<sup>103</sup> The court then went on to say that:

To qualify for one of the safe harbor provisions, the service provider’s activities at issue must involve functions described in one of four separate categories set forth in subsections (a) through (d) of Section 512.<sup>104</sup> eBay argues that it qualifies for protection under the third and fourth categories. Because the record establishes that eBay qualifies for protection under Section 512(c), the Court *need not address* the applicability of Section 512(d).<sup>105</sup>

Given the aforementioned congressional intent of the DMCA, it appears that the two statements of the court are contradictory. The first statement that the DMCA “preserves strong incentives for service providers” reinforces the purpose behind the DMCA that it was intended to create a heightened level of copyright protection by providing ISPs strong incentives for complying with the requirements of the DMCA via the safe harbor provisions listed in Section 512.<sup>106</sup> The next paragraph then only interprets these ‘strong incentives’ to require the ISP to meet the requirements of merely one out of four of the safe harbor requirements in order to be *completely* protected from liability.<sup>107</sup> Each of the safe harbor provisions apply to very different activities by the ISPs.<sup>108</sup> By releasing an ISP from any and all liability because it satisfies one safe harbor provision without even considering the applicability of the other safe harbor

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<sup>103</sup> *Hendrickson*, 165 F. Supp. 2d at 1088 (citing S. REP. NO. 105-190, at 40 (1998)).

<sup>104</sup> *Id.* at 1088 (citing 17 U.S.C. § 512(n) (1998)).

<sup>105</sup> *Hendrickson*, 165 F. Supp. 2d at 1088 (emphasis added).

<sup>106</sup> *Id.* at 1088. *See generally* S. REP. NO. 105-190 (1998); H.R. REP. NO. 105-551 (II) (1998).

<sup>107</sup> *Hendrickson*, 165 F. Supp. 2d at 1088.

<sup>108</sup> *See generally*, 17 U.S.C. § 512.

provisions, the court is effectively quashing the “strong incentive for service providers” that it acknowledged at the beginning of its analysis.<sup>109</sup>

This was not a situation where the court was upholding the integrity of congressional intent by making a determination that subsection (c) of Section 512 was the only safe harbor that was applicable to eBay’s potentially infringing activities.<sup>110</sup> There was no discussion of which safe harbor eBay’s activities fell into, and thus no consideration of the totality of eBay’s actions.<sup>111</sup> Further, eBay *itself* argued that it qualified for protection under both Section 512(c) *and* (d).<sup>112</sup> Despite this specific admission of the defendant, the court still only considered one of the four safe harbors where a discussion of more than one was clearly warranted.<sup>113</sup> Because the court did not engage in a discussion of the other safe harbors, it is not clear whether eBay would have been released from liability under each and every applicable section.<sup>114</sup> However, whether eBay would have been released from liability under the other safe harbor provisions is beside the point. By only requiring an ISP to satisfy one of the four requirements instead of each of the applicable requirements independently, the court effectively reduced the strength of enforcement that the DMCA intended to create.<sup>115</sup>

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<sup>109</sup> *Hendrickson*, 165 F. Supp. 2d at 1088.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* at 1088.

<sup>113</sup> *Id.* *See also* 17 U.S.C. §512(d) which addresses the liability for service providers that refer or link users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link. Given that eBay provided a hypertext link to online advertisements that allegedly contained infringing material, a discussion of the other subsection, as eBay themselves alleged, was applicable. *Hendrickson*, 165 F. Supp. 2d at 1092.

<sup>114</sup> *Hendrickson*, 165 F. Supp. 2d at 1088-90. eBay was released from liability in this case under the authority of subsection (c) because *Hendrickson* did not comply with the notice requirements, thus precluding eBay’s ‘right and ability to control’ the infringing activity. *Id.* at 1088-90.

<sup>115</sup> *See* S. REP. NO. 105-190 (1998); H.R. REP. NO. 105-551 (II) (1998).

*c. Ellison v. Robertson*

*Ellison v. Robert* is another example of the same court incorrectly applying the safe harbor provisions of the DMCA.<sup>116</sup> Harlan Ellison, the plaintiff in this case, was the author and copyright holder of various works of science fiction.<sup>117</sup> In mid-2000, defendant Steven Robertson scanned many of Ellison's copyrighted works, which he then converted into digital files and uploaded the files onto the USENET newsgroup "alt.binaries.e-book."<sup>118</sup> This newsgroup "alt.binaries.e-book" was primarily used to transfer pirated and unauthorized copies of text materials.<sup>119</sup> AOL was a USENET peer, and in mid-2000 when the infringing copies of Ellison's work were posted, AOL had a retention policy that allowed USENET messages to remain on their server for fourteen days.<sup>120</sup>

Soon after his works were uploaded and transferred to USENET peers, including AOL, Ellison contacted AOL and notified it of the copyright infringement, as procedurally required by the DMCA.<sup>121</sup> AOL claims to never have received the notification,<sup>122</sup> and Ellison subsequently

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<sup>116</sup> *Ellison*, 189 F. Supp. 2d at 1051.

<sup>117</sup> *Id.* at 1053.

<sup>118</sup> *Id.* at 1053. "USENET" is an abbreviation for "user network", which is "an international collection of organizations and individuals (known as 'peers') whose computers connect to each other and exchange messages posted by USENET users." *Id.*

<sup>119</sup> *Id.* at 1053-54.

<sup>120</sup> *Id.* at 1054.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1057. The Court accepted AOL's claim that they never received the notice from Ellison, which would have given them the 'actual notice' required to find them liable under the DMCA. *Id.* at 1057. However, AOL did not receive an email from Ellison because they gave the Copyright Office an incorrect email address, which copyright holders then detrimentally relied upon to notify AOL of infringing activity. *Id.* at 1057-58. AOL changed its e-mail address from "copyright@aol.com" to "aolcopyright@aol.com" in the fall of 1999, but did not notify the Copyright Office of this change until April of 2000. *Id.* at 1058. Ellison argues that "[i]f AOL could avoid the knowledge

filed suit against AOL.<sup>123</sup> Ellison argues in his complaint that “AOL made copies of his works on its USENET servers after receiving the USENET messages posted by Robertson, and that one binary file containing a copied work remained on AOL’s servers for ten days after [Ellison] sent the company a Notification of Infringement e-mail.”<sup>124</sup> After AOL was served by the plaintiff, they proceeded to block their users’ access to “alt.binaries.e-book.”<sup>125</sup>

Though the court ultimately granted summary judgment to AOL on Ellison’s claim for copyright infringement, the court nevertheless went on to discuss the DMCA’s limitations on liability.<sup>126</sup> Similar to the court in *Hendrickson*, the court in *Ellison* made contradictory statements regarding the safe-harbor provisions throughout its discussion.<sup>127</sup> The court began by stating that “[a] party satisfying the requirements for one of the safe harbors cannot be liable for monetary relief, or, with the exception of the rather narrow relief available under subsection (j), for injunctive or other equitable relief for copyright infringement.”<sup>128</sup> The court then entered

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requirement through this oversight or deliberate action, then it would encourage other ISPs to remain willfully ignorant in order to avoid contributory copyright infringement liability.” *Id.* This may be yet another example of courts being too lenient on ISPs.

<sup>123</sup> *Id.* at 1054. Ellison originally brought suit against many different parties for their parts in the infringement, including Tehama County Online, and his USENET service provided by RemarQ Communities, Inc. *Id.* at 1053. Ellison eventually settled with these other parties, including Robertson, leaving only his dispute with AOL for resolution in this case. *Id.* at 1053-55.

<sup>124</sup> *Id.* at 1056.

<sup>125</sup> *Id.* at 1054.

<sup>126</sup> *Id.* at 1064. The court granted summary judgment after a determination that AOL did not either (1) have the ability to control the infringing activity, or (2) derive a direct financial benefit from the activity. *See id.* at 1061-62.

On appeal, the Ninth Circuit Court of Appeals reversed and remanded the District Court’s decision in part, holding that there was a triable issue of material fact regarding whether AOL was even eligible for the safe-harbor provisions. *Ellison*, 357 F.3d at 1082. The court stated that “[b]ecause a jury has not found AOL liable for copyright infringement and eligible under § 512(i) for the safe harbor limitations of liability, we do not address (nor did the district court) whether AOL could successfully assert the safe harbor under § 512(c).” *Id.* at 1081 n.12. It is unclear whether this brief footnote will, or was even intended to spark application of the incomplete safe-harbor analysis.

<sup>127</sup> *See generally, Ellison*, 189 F. Supp. 2d at 1064-67.

<sup>128</sup> *Id.* at 1064.

into a discussion of the separate requirements of the safe harbor provisions of the DMCA. Specifically, it referred to these four subsections as the “carefully balanced, ‘separate function – separate safe harbor – separate requirements’ architecture of the DMCA.”<sup>129</sup> Correctly reinforcing this ‘separate function view,’ the court continued by stating that “whether a service provider qualifies for the limitation of liability in any one of the subsections shall be based *solely* on the criteria in that subsection, and shall not affect a determination of whether the service provider qualifies for the limitations on liability *under any other such subsection*.”<sup>130</sup> The court supported this view with the legislative history of Section 512(n) which explicitly stated that each of the four safe harbors “describe separate and distinct functions for purposes of applying this section.”<sup>131</sup>

AOL, in its defense, claimed that it was immune from liability under the DMCA because it qualified for both safe harbors (a) and (c).<sup>132</sup> Because each safe harbor has its own “separate function” as stated above, the court should have adhered to its own accurate statement of the law and considered each safe harbor provision separately in releasing AOL from any and all

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<sup>129</sup> *Id.* at 1066 n. 5.

Put into context, the court stated that: “If subsection (i) obligated ISPs to affirmatively seek out information regarding infringement and then investigate, eradicate, and punish infringement on their networks, then most if not all of the notice and takedown requirements of the subsection (c) safe harbor would be indirectly imported and applied to subsections (a) and (b) as well. This would upset the carefully balanced, ‘separate function – separate safe harbor – separate requirements’ architecture of the DMCA.” *Id.* at 1066 n.15.

<sup>130</sup> *Id.* at 1067 (emphasis added).

<sup>131</sup> *Id.* (quoting 17 U.S.C. § 512).

<sup>132</sup> *Id.* (quoting 17 U.S.C. § 512). AOL made this claim because, although it performs many ISP related functions, Ellison’s complaint is only based upon AOL’s storage of USENET messages on its servers. *Id.*

liability.<sup>133</sup> At a bare minimum, because AOL asserted subsections (a) and (c) as affirmative defenses, the court should have fully evaluated the applicability of each of these subsections.<sup>134</sup>

However, the court did not do this. Instead of evaluating each of the subsections independently as single pieces in the larger liability puzzle, it chose to merely evaluate the safe harbor provision in subsection (a) in determining whether AOL was liable to Ellison in any respect.<sup>135</sup> In its analysis, the court found that AOL did not store Ellison's work on its server "for a longer period than is reasonably necessary for the transmission, routing, or provision of connections," thus satisfying the safe harbor requirements of subsection (a).<sup>136</sup>

Following the introductory analysis that the court gave regarding the legislative history and intent of the DMCA's safe harbor provisions, the court should have proceeded at this point to address the remaining subsections dealing with activities other than transitory digital network communications. However, the court surprisingly ended its analysis after determining that AOL satisfied the requirements of subsection (a).<sup>137</sup> Specifically, the court stated "[a]ccordingly, we *need not reach* the arguments presented by the parties regarding AOL's satisfaction of the requirements of subsection 512(c)."<sup>138</sup> This shortened line of analysis contradicted both legislative intent, and the court's own framework of DMCA safe harbor provisions outlined earlier in its decision.<sup>139</sup>

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<sup>133</sup> *Id.* at 1066-67.

<sup>134</sup> *Id.* at 1067.

<sup>135</sup> *See, id.* at 1067-72.

<sup>136</sup> *Id.* at 1070.

<sup>137</sup> *Id.* at 1072.

<sup>138</sup> *Id.* at 1072 n.22 (emphasis added).

<sup>139</sup> *See, id.* at 1064-72.

The court had begun by pointing out that each safe harbor protects a ‘separate function,’ and that courts in general need to be careful not to disrupt this carefully created balance.<sup>140</sup> Then the court examined only one of the four safe harbor specifications, and declared AOL free from any and all liability,<sup>141</sup> because it satisfied the requirements of subsection (a) *alone*.<sup>142</sup> Given the overarching goals of the DMCA to protect copyright material, the courts are obliged to examine each safe harbor provision independently, because the ISPs are in a unique and powerful position to stop continued cases of copyright infringement on a wide-scale level.<sup>143</sup> However, in practical application this court is not doing so.

## V. CONCLUSION

By explicitly stating that “[S]ection 512’s limitations on liability are based on functions, and each limitation is intended to describe a separate and distinction function,” it is clear that Congress intended ISPs to only receive a release from liability for conduct governed by those specific subsections they satisfy.<sup>144</sup> This is further evidenced by the overriding purpose of the safe harbor provisions of the DMCA: to encourage both “responsible behavior and protect important intellectual property rights.”<sup>145</sup> When courts release the ISPs from *all* liability for

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<sup>140</sup> *Id.* at 1066.

<sup>141</sup> *Ellison*, 189 F. Supp. 2d at 1062. It is important to keep in mind that the court already granted AOL’s motion for summary judgment on vicarious copyright infringement because they did not have the “ability to control the infringing activity.” *Id.* However, the court still entered into discussion of the safe harbors because it was obliged by the legislative intent, that the court itself pointed out, to examine all avenues of liability. *Id.* at 1064-72.

<sup>142</sup> *Id.* at 1072.

<sup>143</sup> This power of ISPs, such as AOL, is evident by AOL’s ability to block its users’ access to alt.binaries.e-book as soon as they were served by Ellison. *Id.* at 1054. *See generally* S. REP. NO. 105-190 (1998); H.R. REP. NO. 105-551 (1998).

<sup>144</sup> H.R. REP. NO. 105-551 (II), at 65 (1998).

<sup>145</sup> S. REP. NO. 105-190, at 41 (1998).

satisfaction of merely *one* of the safe harbors, it effectively sends a weak message to the ISPs, because courts are holding them less accountable than Congress intended. And now this lack of an honest effort by the ISPs to take responsibility for the copyright problem on the Internet, combined with the court's lax grants of release from liability is coming at the expense of the consumers themselves.<sup>146</sup>

The RIAA has placed a tremendous burden on the shoulders of their own customers; a weight that these individuals cannot be expected to bear alone.<sup>147</sup> With these sagging shoulders comes resentment towards the music industry as a whole.<sup>148</sup> In the words of an attorney with the Electronic Frontier Foundation, “[r]ather than finding a constructive path towards solving the peer-to-peer dilemma, [the RIAA] chose more lawsuits. Does anyone think suing thousands of Americans is going to put people in the mood to buy more CDs?”<sup>149</sup> The music industry is in crisis, and suing all 60 million file-swappers around the world is not a realistic solution.<sup>150</sup> However, when courts easily grant ISPs immunity from any and all liability, the RIAA may not have any other option.<sup>151</sup>

Unlike the consumers, however, the comparatively few ISPs are in a better position to both plug these copyright infringement flood-gates, and to compensate the music industry for damages that they have incurred.<sup>152</sup> Therefore, for the protection of consumers, musicians,

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<sup>146</sup> *See supra* Part I.

<sup>147</sup> *Id.*

<sup>148</sup> Ahrens, *supra* note 5.

<sup>149</sup> *Id.*

<sup>150</sup> Levy, *supra* note 4.

<sup>151</sup> *See supra* Part I.

<sup>152</sup> *See supra* Part I.

artists and the future of copyright in general, courts need to be more proactive in holding ISPs accountable as far as Congress permits under the DMCA, so that the bands will still play on.