

PEER-TO-PEER TECHNOLOGY: ANALYSIS OF CONTRIBUTORY INFRINGEMENT AND FAIR USE

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The film and music industries (“the Industries”) have a history of prematurely trying to circumscribe new technologies, even though history shows that new technologies help expand their markets.¹ For example, in the early twentieth century, music publishers sought to prevent the distribution of a new sheet music format, the piano roll.² Additionally, they attempted to control the market for phonogram recording equipment and phonograph players.³

Similarly in the early 1980s the music industry lobbied to require manufactures of analog tape recorders and blank audio tapes to pay a royalty fee on each machine and blank tape, and the royalty fee would be added to the price consumers would pay for the product.⁴ The music industry argued

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¹ See e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456, 220 U.S.P.Q. 665, 684 (1984) (refusing to enjoin sale of video tape recorders as violation of Copyright Act); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 411-14, 181 U.S.P.Q. 65, 69-72 (1974) (determining that CATV transmissions are not performances within meaning of Copyright Act); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17-18 (1908) (refusing to restrain production of piano rolls designed to play copyrighted songs); *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081, 51 U.S.P.Q.2d 1115, 1123 (9th Cir. 1999) (denying request to enjoin production of Rio portable music player and holding that it does not fall under Audio Home Recording Act of 1992).

² See *White-Smith*, 209 U.S. 1; see also Jane Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613, 1622 (2001) (explaining that publishers attempted to prevent the distribution of the piano roll and the recording industry planned to obtain a commission on the sale of phonograph machines).

³ See *White-Smith*, 209 U.S. 1; 5 Legislative History of the 1909 Copyright Act, pt. K, 189-193 (E. Fulton Brylawski & Abe Goldman eds., 1976).

⁴ See Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before Subcomm. on Courts, Civil

that these devices were only useful to create illegal copies of copyrighted material, and that people would stop buying music because they would have the technology to make their own copies.⁵ However, home taping increased the Industries' market share because it promoted and helped to distribute music to a wider audience.⁶ As a result, the number of fans increased and more customers purchased tapes.⁷

						
1831	1877	1909	1920	1982	1984	2000
Copyright statutes protected the reproduction of written musical notation, rather than reproduction of actual sound.	Edison invented the phonograph. Musicians boycotted the invention fearing that people would no longer attend live performances.	Congress enacted legislation that granted composers the right to exclusive control of sound recordings of their works.	Radio raised the issue whether music broadcasts infringed composers' performance rights.	The music industry lobbied Congress to require manufacturers of tape recorders and blank audio tapes to pay a royalty on each machine and tape, and the fee would be added to the price consumers would pay for the product.	The film industry sued the makers of Betamax videotape recorders. Supreme Court held the recorders were capable of substantial noninfringing uses and did not constitute copyright infringement.	The Industries sued peer-to-peer Internet providers for contributory copyright infringement.

Additionally, the film industry opposed the sale of home video recording systems in the early eighties claiming that if consumers were able to

Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong. 297-563 (April 14, 1982) (statement of Stanley M. Gortikov, President, Recording Industry Association of America ("RIAA")) (arguing that the music industry should be compensated through a royalty system since it suffers a loss of music sales from the manufacturers and importers of blank tape and taping equipment because consumers are using this equipment to record music on tape cassettes from the radio, from albums, from other cassettes and from 8-track cartridges). The RIAA President further stated, "I'm scared, and so is my industry. Changing technology today is threatening to destroy the value of our copyrights and the vitality of the music industry. Our nemesis is home taping and it is costing our industry about \$1 billion in annual lost sales." *See id.* at 311.

⁵ *See id.*; *see also id.* at 545 (testimony of Jerry Moss, Chairman, A&M Records, Inc.).

⁶ M. William Krasilovsky, Shemel, Sideny, *This Business of Music*, xx-xxi (1995). From 1978-1988 unit sales of records and tapes rose eight percent and continued to rise until 1990 but by 1993 CDs dominated unit sales and record and tapes sales declined. *Id.*

⁷ Michael Plumleigh, *Digital Audio Tape: New Fuel Strokes the Smoldering Home Taping Fire*, 37 UCLA L. Rev. 733, 759 (1990) (explaining that home taping helps generate more sales of copyrighted works).

record movies, the film industry would be crushed.⁸ Interestingly, this new technology opened up one of the film industry's most lucrative markets - home videos.⁹

These examples depict a pattern in the Industries' relationship with new technologies. The pattern depicts that the Industries initially are adverse to new technologies, and the adversity eventually evolves into a mutually beneficial interdependence with the technology.

The Industries are currently opposed to Internet peer-to-peer¹⁰ technologies, e.g. Napster, Scour and Kazaa. If history repeats itself that relationship will evolve, and the Industries will learn to increase their market share by embracing the new technology. Presently, the Industries are in their initial phase of challenging the new technology. They have sued many peer-to-peer services including Napster, Scour and Kazaa for contributory copyright infringement.¹¹ However, Bertelsmann,¹² one of the major labels in

⁸ *Sony*, 464 U.S. at 442, 220 U.S.P.Q. at 678 (holding that noncommercial consumer videotaping of television programs and movies for purposes of later viewing constituted fair use and that, consequently, the sale and distribution of videotape recorders was not contributory infringement because the machines supported a substantial, non-infringing use). The film industry lobbied Congress to impose a royalty on the proceeds derived from the sale of VCRs and blank videocassettes. See Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong. 4-17 (Apr. 12, 1982).

⁹ Nicholas E. Sciorra, *Self-Help & Contributory Infringement: The Law And Legal Thought Behind A Little "Black-Box"*, 11 Cardozo Arts & Ent LJ 905, n18 (1993) (citing Bart Story, Screening Customers, Video Store, Jan. 20, 1992, at 36 ("Despite . . . volume twice that of domestic box-office revenue, the home video industry is still an 'ancillary market' for theatrical motion pictures The estimated \$ 11 billion spent . . . on rental and sale of prerecorded video in 1991 is more than double the estimated \$ 5 billion U.S. box-office gross.")). See also 137 Cong. Rec. 79 (1991)(Representative Howard L. Berman (D-Cal.) (speaking with regard to his introduction of the Motion Picture Anti-Piracy Act of 1991, S. 1096/H.R. 2367, 102d Cong., 1st Sess. (May 16, 1991), stated that "rental and sales of video cassettes have actually surpassed in volume theatrical showings and sales of movies to broadcast TV. The success of the retail video business has benefited consumers, who can rent and buy a wide choice of movies at their convenience and at moderate prices").

¹⁰ Peer-to-peer is a type of network in which each computer is linked together through file sharing software permitting users to share files. Some examples of peer-to-peer technologies are Napster, Scour, Gnutella, Kazaa and America Online's Instant Messenger. See app. I.

¹¹ See *A & M Records. v. Napster, Inc.*, 239 F.3d 1004, 57 U.S.P.Q.2d 1729 (9th Cir. 2001), *aff'g in part, rev'g in part*, 114 F. Supp. 2d 896, 55 U.S.P.Q.2d 1780 (N.D. Cal. 2000); *Leiber v. Napster, Inc.* 2001 WL 789461 (N.D. Cal. Mar. 5 2001); *Leiber v. Consumer Empowerment BV A/K/A FastTrack*, No. 01-09923 (C.D. Cal. 199 filed Nov. 20, 2001) (pending legal filings and trial dates), complaint available at

the music industry announced that it would withdraw its lawsuit and embrace the Napster peer-to-peer technology. Although Bertelsmann dropped out of the lawsuit, the other major labels in the music industry—Warner Music Group, EMI, Sony, and Universal—are pursuing the lawsuit.

The Industries have sued both peer-to-peer providers because many Napster, Scour and Kazaa subscribers download unauthorized media files that infringe the copyrights of the Industries and their clients. When a peer-to-peer subscriber downloads an unauthorized media file, a copyright owner's right to reproduce the copyrighted work is infringed.¹³ Therefore, copyright owners are entitled to relief. Unfortunately, it is likely that they will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy.

The Industries' attempt to seek relief for infringement has deterred investment in peer-to-peer Internet technology.¹⁴ In addition to peer-to-peer technologies, the Industries are suing many other Internet startups for copyright infringement.¹⁵ The large influx in industry lawsuits against startups for copyright infringement has put Internet technology at a legally unstable stance.¹⁶ These lawsuits have inhibited investment from furthering

<http://www.nmpa.org/legal/Musiccity_.pdf>; *Twentieth Century Fox Film Corp. v. Scour, Inc.*, No. 00-5335 (S.D.N.Y. filed June 20, 2000) (pending legal filings and trial dates) complaint available at <<http://www.mpaa.org/Press/ScourComplaint.htm>>.

¹² Bertelsmann's music catalog includes the BMG, Arista and RCA imprints, representing artists such as Whitney Houston, Elvis Presley and Carlos Santana. *See generally*, <<http://www.Bertelsmann.com>> (accessed Feb. 1, 2001).

¹³ 17 U.S.C. § 106(1) (2000).

¹⁴ Alfred C. Yen, *Symposium Article: A preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, And The Possibility of Coasean Bargaining*, 26 U. Dayton L. Rev. 247, 275 (2001); Stefanie Olsen, *Venture Capitalists Wary as Napster Lawsuits Loom*, <<http://news.cnet.com/news/0-1005-200-1724481.html>> (last updated Apr. 21, 2000) (reporting the belief of some that the Napster litigation was brought for the purpose of deterring investment in Napster type file sharing technology).

¹⁵ Examples of suits in the year 2000: *A & M Records v. Napster*, 54 U.S.P.Q.2d 1746 (N.D. Cal. 2000) (suing Internet provider Napster for contributory copyright infringement); *RIAA v. Mp3board.com*, No. 00-4660 (S.D.N.Y. filed June 23, 2000) (suing search engine Mp3board.com for contributory copyright infringement); *Twentieth Century Fox Film Corp. v. Scour, Inc.*, No. 00-5385 (S.D.N.Y. filed June 20, 2000) (pending legal filings and trial dates) (suing Internet provider for copyright infringement); *UMG Recordings, Inc. v. MP3.com*, 92 F. Supp. 2d 349, 54 U.S.P.Q.2d 1668 (S.D.N.Y. 2000) (suing Internet provider MP3.com for copyright infringement).

¹⁶ Olsen, *supra*, n. 14 (discussing the volatile state of the stock market and concern over industry lawsuits backlash).

Internet peer-to-peer and media search engine technologies.¹⁷ Although there are multiple reasons for the recent decline in Internet investment, the recent lawsuits initiated by the Industries have contributed to the decline.¹⁸

The future of peer-to-peer technology and copyright owners' rights to make copies hinge on two fair use defenses to contributory copyright infringement. The peer-to-peer providers either have to prove that they were not liable for the infringing activities of their users because they were immune to infringement under the safe harbors and the fair uses of the Digital Millennium Copyright Act ("DMCA");¹⁹ or they must meet the substantial non-infringing use exception as defined by the Supreme Court in *Sony Corp. v. Universal City Studios, Incorporated*.²⁰

Based on the recent lawsuits initiated by the Industries, this article analyzes the peer-to-peer technology fair use defenses against contributory copyright infringement established by the DMCA and *Sony* decision.²¹

I. DMCA § 512²²

A. Safe Harbor Purpose

To promote the growth of the Internet, Congress implemented a series of safe harbors within the DMCA that shield eligible Internet providers from liability for the infringing activities of their users.²³ The legislative history reveals that Congress intended safe harbors to facilitate a balance between copyright protection and online technological progress.²⁴ Congress sought to protect copyrighted works and encourage Internet innovation by

¹⁷ Lawsuits filed against Scour.com by the Industries have scared off potential investors. Karen Kaplan, "Multimedia Firm Scour Lays off 52 of its 70 Workers," L.A. Times C1 (Sept. 21, 2000).

¹⁸ *Id.*; Olsen, *supra* n. 14.

¹⁹ Enacted in 1998, the DMCA consists of five titles that cover subjects as diverse as copyright protection for boat hull designs, 17 U.S.C. § 1301(a)(2) (2000), circumvention of copyright management systems, 17 U.S.C. § 1201 (2000), and safe harbors for Internet service providers 17 U.S.C. § 512 (2000).

²⁰ The Supreme Court held that a manufacturer is not liable for selling a staple article of commerce that is capable of significant non-infringing uses. *Sony*, 464 U.S. at 442, 220 U.S.P.Q. at 678.

²¹ *Id.*, 220 U.S.P.Q. at 678.

²² 17 U.S.C. § 512 (2000).

²³ See 145 Cong. Rec. S8252, S8254 (daily ed. July 12, 1999).

²⁴ See *id.*

protecting “qualified service providers” from contributory infringement through the creation of safe harbors for four different types of common online activities: (1) transitory communications²⁵; (2) system caching²⁶; (3) user storage²⁷; and (4) information location tools.²⁸

To encourage Internet investment, Congress enacted safe harbors that would allow service providers to “go about their business without fear of facing crippling liability.”²⁹ Congress envisioned that the safe harbors would increase Internet competition and efficiency because qualifying providers would be able to operate with reasonably low transaction costs.³⁰ In theory, costs would be kept low because service providers would be relieved from the duty to police their site and services for infringing material posted by their users.³¹ Unfortunately the safe harbors are not providing the incentives Congress intended. This is evidenced by the fact that only one provider has been able to qualify in court for safe harbor from copyright infringement liability.³² Courts have been reluctant to give safe harbor protection, thereby denying several service providers of protection provided under the DMCA.³³

²⁵ 17 U.S.C. § 512(a) (2000).

²⁶ 17 U.S.C. § 512(b) (2000).

²⁷ 17 U.S.C. § 512(c) (2000).

²⁸ See 17 U.S.C. § 512(d) (2000).

²⁹ 144 Cong. Rec. S 11887, S11888 (1998).

³⁰ 144 Cong. Rec. S 4884, S4899 (1998).

³¹ See *id.*

³² *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094, 60 U.S.P.Q.2d 1335, 1344 (C.D. Cal. 2001) (granting eBay’s motion for summary judgment on the safe harbor defense under 17 U.S.C § 512(c) because eBay did not have actual or constructive knowledge of the alleged infringing activity nor did it have the right and ability to control the infringing activity at issue).

³³ See *A & M Records*, 54 U.S.P.Q.2d at 1753 (denying Napster’s motion for summary adjudication based on safe harbor under 17 U.S.C. § 512); *ALS Scan, Inc. v. RemarQ Cmities., Inc.*, 239 F.3d 619, 626, 57 U.S.P.Q.2d 1996, 2002 (4th Cir. 2001) (reversing summary judgment in favor of defendant because defendant was ineligible for safe harbor since it did not comply with the notice and take down provisions of 17 U.S.C. § 512(c)); *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 702 (D. Md. 2001) (denying motions for summary judgment on the safe harbor defense); *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d. 211, 217, 53 U.S.P.Q.2d 1780, 1785-86 (S.D.N.Y. 2000) (ruling that the defendant’s website that harbored a downloadable program that allowed users to decrypt DVD files failed to qualify as a safe harbor under 17 U.S.C. § 512(c)); *Perry v. Sonic Graphic Systems, Inc.*, 94 F. Supp. 2d 616, 622-23, 54 U.S.P.Q.2d 1491, 1496-97(E.D. Pa. 2000) (ruling that the defendants was liable for copyright infringement even though the defendant could qualify for safe harbor under 17 U.S.C. § 512(c)(1)).

Therefore, the safe harbor defense is not deterring parties from suing Internet providers.

B. Safe Harbor Qualifying Providers

Safe harbor is a statutory liability exemption only available to “qualified” Internet services³⁴ that fit the definition of Internet service provider (“provider”) within the statute.³⁵ Specifically, the definition of a provider applies when the infringing activity is a result of the provider’s actions as a conduit for infringing material (“passive conduit activity”)³⁶ or the infringing activity is a result of both conduit activity and the users’ actions and the users’ content (“user activity”)³⁷ on the provider’s service.

Passive conduit activity applies to transitory communications and is a safe harbor for providers that passively transfer allegedly infringing material via transitory communications.³⁸ Transitory communications occur when a transmission is initiated by a third party; is carried out automatically without selection of the material by the service provider, a copy no longer than is reasonably necessary to perform the transmission, and the material is transmitted unchanged.³⁹

User activity applies to system caching, user storage and information location tools and provides a broader definition of provider than conduit activity.⁴⁰ To qualify for this safe harbor the provider must fit the definition of Internet service provider, comply with the “notice and take down” procedures, remove Internet access to infringing materials, and lack direct benefit or control over the infringing activity.⁴¹

Since only one provider has been held to qualify for safe harbor under the DMCA⁴² the main sources that give meaning to this critical term of

³⁴ See 17 U.S.C. § 512(k)(1) (2000).

³⁵ See 17 U.S.C. § 512(k)(1)(B) (“the term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor”).

³⁶ See 17 U.S.C. § 512(k)(1)(A) (definition applies to § 512(a) “Transitory Digital Network Communications”).

³⁷ See 17 U.S.C. § 512(k)(1)(B) (definition applies to § 512(b), “System Caching,” § 512(c) “Information Residing on Systems or Networks at Direction of Users” and § 512(d) “Information Location Tools”).

³⁸ 17 U.S.C. § 512(a).

³⁹ *Id.*

⁴⁰ See 17 U.S.C. § 512(b)-(d).

⁴¹ See *id.*

⁴² *Hendrickson*, 165 F. Supp. 2d at 1094, 60 U.S.P.Q.2d at 1344.

art are the plain language of the statute, legislative history and recent examples of providers that have attempted to qualify.⁴³ These sources establish a series of requirements to determine whether a provider is eligible.

1. Definition of Service Provider

The initial qualifying requirement is that the provider's services conform to the 17 U.S.C. § 512 definition of Internet service provider.⁴⁴ To be within the scope of the definition an Internet provider faces the initial challenge of ensuring that it serves as a network, information location tool or educational institution as described in section 512(a)-(e), and its services are within the breadth of the section 512(k)(1) service provider definition.⁴⁵

The statutory definition for Internet service provider is broad, but courts, have not applied it broadly. The U.S. District Court for the Northern District of California held that, "Because Napster does not transmit, route, or provide connections [for allegedly infringing music files] through its system, it has failed to demonstrate that it qualifies for the 512(a) safe harbor."⁴⁶ Napster's activity did not qualify as a conduit of transitory communications.⁴⁷ Although Napster's activities did not fit the definition of a transitory communications under section 512(a) other peer-to-peer providers may be eligible.⁴⁸

Congress referenced America Online ("AOL") as an example of a provider that qualifies under the service provider definition in section 512.⁴⁹ Even though AOL provides an Instant Messenger service based on peer-to-peer technology it meets the criteria of a service provider. In contrast, the district court specifically excluded Napster from safe harbor, determining that Napster's peer-to-peer technology was outside the scope of the definition of service provider.⁵⁰

⁴³ *See id.*

⁴⁴ *See* 17 U.S.C. § 512(k)(1)(A)-(B).

⁴⁵ *See* 17 U.S.C. § 512(a)-(e), (k)(1).

⁴⁶ *A & M Records*, 54 U.S.P.Q.2d at 1752.

⁴⁷ *Id.*

⁴⁸ The major Internet service providers include phone companies, as well as companies like America Online. S. Rpt. 105-190, at 8-9 (1998); *see app. II.*

⁴⁹ *See id.*

⁵⁰ *A & M Records*, 54 U.S.P.Q.2d at 1752.

2. Notice and Take Down Procedures

A provider within the scope of the definition can be considered for safe harbor after adopting and implementing a procedure to take down or disable access to infringing material residing on its system.⁵¹ The service provider is required to designate an agent to respond to formal allegations of infringement.⁵² The agent's name and contact information are to be registered with the copyright office.⁵³ To notify the agent of infringing activity, a representative from the aggrieved party shall submit a formal notice to the service provider's agent. The notice format includes: contact information, a description of the infringed material including its location (Internet address or Internet Protocol "IP" address), and a statement asserting that the material was unauthorized by the copyright owner, its agent, or law.⁵⁴ Substantial compliance with the notice requirement is essential. If the notice submission is not complete, a provider may not have a duty to disable access to the allegedly infringing material.⁵⁵

The notice submission satisfies the service providers' "actual knowledge" requirement for the alleged infringement, and thereby obliges the service provider's agent to disable access to the infringing material.⁵⁶ In some cases, a service provider that fails to remove access after notice can still qualify for safe harbor if the removal imposes substantial costs or substantial burdens on their systems or networks.⁵⁷ The notice requirement is designed to ensure that flagrant or repeat infringers have a realistic threat of losing their access.⁵⁸

⁵¹ See 17 U.S.C. § 512 (g); see app. I.

⁵² See 17 U.S.C. § 512 (c)(2).

⁵³ See *id.*

⁵⁴ 17 U.S.C. § 512 (c)(3).

⁵⁵ See *id.*; *Hendrickson*, 165 F. Supp. 2d at 1092-93, 60 U.S.P.Q.2d at 1343 (holding that *Hendrickson's* imperfect attempts to give notice to eBay did not satisfy Section 512(c)(3)'s substantial compliance requirement and therefore eBay did not have a duty to act and was entitled to immunity under the DMCA).

⁵⁶ Sen. Rpt. 105-190 (1990); *Hendrickson*, 165 F. Supp. 2d at 1089, 60 U.S.P.Q.2d at 1340 (C.D. Cal. 2001) (explaining that the DMCA expressly provides that if the copyright holder's attempted notification fails to "comply substantially" with the elements of notification described in subsection (c)(3), that notification "shall not be considered" when evaluating whether the service provider had actual or constructive knowledge of the infringing activity under the first prong set forth in Section 512(c)(1)).

⁵⁷ See 17 U.S.C. § 512 (i)(2)(c).

⁵⁸ H.R. Rep. 105-551(II), at 154.

Although Napster adhered to the section 512 notice and take down procedure (it expeditiously removed materials upon receipt of actual notice) it did not qualify because it did not meet the initial burden of proving itself within the service provider definition codified in section 512(k)(1).⁵⁹ Compliance with section 512 notice and take down procedures in itself is not enough to qualify for safe harbor.

3. Actual Knowledge

In addition to complying with notice and take down procedures, to qualify for safe harbor protection an Internet provider must not have “actual knowledge that the material or activities is infringing.”⁶⁰ A service provider is denied safe harbor if it has actual knowledge of facts or circumstances from which the presence of infringing activities would be apparent, and thereafter had failed to remove expeditiously or disable access to the infringing activity.⁶¹ In section 512(c), it is determined that a provider has actual knowledge if the infringing material would be apparent to a reasonable person operating under the same or similar circumstances.⁶²

Since most of the information online is copyrighted and the majority of the providers are not currently technically capable of performing regular investigations to monitor their users’ activities, Congress did not intend to require service providers to investigate possible infringements, monitor its service or make difficult judgments as to whether conduct is or is not infringing.⁶³ Congress tried to address this problem by allowing a provider that has actual knowledge of infringement to receive safe harbor, providing that the provider expeditiously removes access to the infringing material.⁶⁴

The district court determined that Napster had actual knowledge of the infringement standard.⁶⁵ Congress intended the imputation of the knowledge standard in circumstances for “pirate sites or . . . similarly obvious and conspicuous circumstances.”⁶⁶ The district court explained that the public policies of safe harbor fail when a provider has knowledge of infringement, e.g. the provider users infringe regardless of whether the

⁵⁹ See 17 U.S.C. § 512(k)(1)(2000).

⁶⁰ 17 U.S.C. 512(d)(1)(A).

⁶¹ *Id.* S. Rpt. 105-190 (1998).

⁶² See *id.*; 17 U.S.C. § 512 (c)(1)(A)(i).

⁶³ H.R. Rep. 105-551(II), at 154.

⁶⁴ See 17 U.S.C. § 512(c)(1).

⁶⁵ *A & M Records*, No. 99-5183, slip op. at 24 (N.D. Cal. Aug. 10, 2000).

⁶⁶ *Id.*

provider expeditiously removes infringers and infringing material.⁶⁷ The statute, however, only requires that a provider be ineligible for safe harbor under the actual knowledge standard if the provider fails expeditiously to remove access to the infringing material after notice.⁶⁸

4. Lack of Benefit and Control

The final requirement to qualify for safe harbor compels the provider to have little benefit and control over the infringing activity.⁶⁹ The legislative history reveals circumstances under which a service provider would not qualify for safe harbor by virtue of its benefit from and control over infringing activity: if “financial benefit [is] directly attributable to the infringing activity,” i.e., the value of the service lies in providing access to infringing material, the provider would be denied safe harbor.⁷⁰

In 2000, Napster had over 40,000 subscribers trading music, and allegedly eighty-seven percent is unauthorized copyrighted music.⁷¹ The nature of Napster’s service allows users to download copyrighted musical works. The fact that Napster benefits from and maintains a certain level of control over its subscribers’ activities made it difficult for Napster to qualify for safe harbor protection.

The Napster service has a certain level of control over its subscribers because it maintains a central server database. The Napster software sends client music file information to the Napster central server database making all file information searchable for Napster subscribers. The Napster central server restricts some users’ access to the music by banning their IP addresses from the system. The server’s involvement poses a liability issue because it raises the question whether the Napster server is capable of patrolling its database for links to infringing material.⁷² Controlling its service with a central server gives Napster the opportunity to generate future profits from advertisers, subscribers, and music downloads.

⁶⁷ *Id.* at 63.

⁶⁸ *See* 17 U.S.C. § 512(c)(1)(C).

⁶⁹ *See* 17 U.S.C. 512 (c)(1)(B).

⁷⁰ S. Rpt. 105-190 (1998).

⁷¹ *A & M Records*, No. 99-5183 (N.D. Cal. July 26, 2000).

⁷² *A & M Records*, No. 99-5183, slip op. at 66.

C. *Providers that are Likely to Qualify for Safe Harbor*

Gnutella, a peer-to-peer Internet provider, prevents any entity from potentially profiting from its use because it has no benefit or control over its users. Therefore, Gnutella may qualify for safe harbor.⁷³ Unlike Napster, which networks subscribers to a central computer, Gnutella only operates on its subscribers' machines.⁷⁴ This decentralized approach makes it much more difficult to police or shut down. In fact, its technology dodges most legal issues that Napster could not avoid. First, no entity is responsible for Gnutella. Therefore, if infringing material is transmitted using the Gnutella system no entity can be held liable except the direct infringer herself. In addition, unlike the Napster service that is limited to music files, Gnutella allows users to find and download any type of file.⁷⁵ This emphasizes the fact that Gnutella is purely a file-sharing tool.⁷⁶

Although music piracy is as pervasive on Gnutella as on Napster, the Industries are unlikely to act against Gnutella.⁷⁷ Unlike Napster or Scour, Gnutella provides no deep pocket for the Industries to sue. Rather than using legal means, the Industries should focus on technical means to protect their services by upgrading their archaic approaches to music and film distribution.⁷⁸ The DMCA safe harbor provision was intended to encourage Internet

⁷³ See app. II.

⁷⁴ Gnutella News, "What is Gnutella?" (<http://www.gnutellanews.com/information/what_is_gnutella.shtml> (accessed Jan. 11, 2002) (describing the technical aspects of Gnutella); Aaron M. Bailey, *A Nation Of Felons?: Napster, The Net Act, And The Criminal Prosecution Of File-sharing*, 50 Am. U.L. Rev. 473, 481 (2000).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ For example, Napster has been working with Bertelsmann's Digital World Services to implement a new digital rights management technology that would prevent mass distribution of sound files. Digital World Services, *Napster Announces Key Building Block of New Business Model*, <http://www.dwsco.com/press/mitte_pressus_more.php?press_nr=32> (accessed Feb. 1, 2002) [hereinafter Digital World Services]. Specifically, the new technology enables secure administration of transferred files within a peer-to-peer structure by adding a protection layer to a transferred file that would stop subsequent distribution. *Id.* The recording industry has also been focusing on technical means to protect their services and has collaborated with technology developers to launch the Secure Digital Music Initiative ("SDMI") aimed at developing a copyright encryption standard (watermark) for digital files. See *RIAA/SDMI Overview* <<http://www.riaa.org/Music-SDMI-1.cfm>> (accessed Mar. 12, 2002); *RIAA/SDMI How it will work?* <<http://www.riaa.org/Music-SDMI-2.cfm>> (accessed Mar. 12, 2002).

development by keeping Internet startup's transaction costs down (particularly in legal fees) but only one provider has been held worthy of eligibility.⁷⁹

Congress did not intend for Internet providers like Napster and Scour to receive safe harbor because the providers benefit from their subscriber's trading of unauthorized files.⁸⁰ However, if these companies were to slightly modify their business strategies they could be within the scope of safe harbor. Similar to America Online Instant Messenger, Napster and Scour might be eligible for safe harbor if they adopted stronger policies for policing their services for infringing materials. Napster and Scour would be within the scope of safe harbor if they fully complied with the provisions of the DMCA⁸¹ safe harbor provisions and obtained licenses for the copyrighted works traded on their systems.⁸² Although licensing may seem like an easy solution, it is expensive and challenging to achieve.⁸³ Napster and Scour are in the process of updating their peer-to-peer systems and negotiating license arrangements with the Industries.⁸⁴ Once Napster and Scour finalize their license arrangements and comply with the provisions of the DMCA they will be eligible for safe harbor.⁸⁵

⁷⁹ *Hendrickson*, 165 F. Supp. 2d at 1094, 60 U.S.P.Q.2d at 1344.

⁸⁰ S. Rpt. 105-190 (1998).

⁸¹ 17 U.S.C. § 512.

⁸² Bertelsmann, *Could you explain your alliance with Napster in detail?*, <http://www.bertelsmann.com/news/faq/faq_section.cfm?section=7&a=3506> (accessed Jan. 11 2002) (announcing that Napster has a new business model that guarantees that copyright owners such as artists, songwriters, record labels and music publishers are paid their rightful dues).

⁸³ Music licensing online has not been very profitable for the providers. The American Society of Composers, Authors and Publishers ("ASCAP") formed an alliance with Mp3.com for the legal distribution of more than four million copyrighted works from ASCAP's 85,000 members. Mp3.com pays a licensing fee to ASCAP, and ASCAP members are paid based on the popularity of their songs on the Website. However Mp3.com customers complain that listening to music online is expensive. *Mp3.com Message Board, Topic: RIAA/MP3.com Letters (Part III)* <<http://bboard.mp3.com/mp3/ubb/Forum4/HTML/000513.html>> (posted Feb. 2, 2000).

⁸⁴ CNET, *Napster Sheds Staff as Talks Lag* <<http://investor.cnet.com/investor/news/newsitem/0-9900-1028-9031282-0.html?tag=ats>> (last updated Mar. 8, 2002). Scour has been negotiated licensing agreements with Sony Music. See, ZDNET UK News, *Sony Licenses Song-swapping Site* (accessed March 12) <<http://news.zdnet.co.uk/story/0,,t269-s2105318,00.html>> (last updated Mar. 1, 2002).

⁸⁵ 17 U.S.C. § 512.

II. SONY-BETAMAX DOCTRINE OF SUBSTANTIAL NON-INFRINGEMENT USE

A peer-to-peer provider like Napster or Scour that is denied safe harbor for contributory copyright infringement in court can still raise the substantial non-infringing use defense held by the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.* In *Sony*, the film industry unsuccessfully attempted to control home recording of audiovisual materials.⁸⁶ The Supreme Court found that home television subscribers' use of the new technology was a fair use.⁸⁷ The Supreme Court ruled that Sony was not liable for copyright infringement even though Sony had "sold equipment with constructive knowledge of the fact that [its] customers may use that equipment to make unauthorized copies of copyrighted material."⁸⁸ The Supreme Court was not concerned whether the technology was an infringement in-and-of itself, but whether particular uses of this technology would constitute infringement or be deemed fair use.⁸⁹

Under the Sony-Betamax Doctrine, a manufacture is not liable for selling a "staple article of commerce" that is capable of "significant non-infringing uses."⁹⁰ Modeled after the patent statute the Sony-Betamax non-infringing use doctrine protects staple products against contributory copyright infringement liability.⁹¹ Although the Supreme Court established the Sony-Betamax Doctrine of non-infringing use, Congress never integrated the doctrine into the Copyright Act. However, some of the fundamental fair use principles in the Sony-Betamax doctrine that shield entities from contributory infringement liability have been integrated in the DMCA.⁹² Although Congress did not intend for the DMCA to shield providers like Napster, the Supreme Court may have intended Napster to have some fair use protection as a staple product with significant non-infringing uses.⁹³

Although Napster facilitates piracy, the legislative history reveals that Napster affords an avenue for many struggling musicians and record

⁸⁶ *Sony*, 464 U.S. at 417, 220 U.S.P.Q. at 665.

⁸⁷ *Id.* at 456, 220 U.S.P.Q. at 684.

⁸⁸ *Id.* at 439, 220 U.S.P.Q. at 677.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 440, 220 U.S.P.Q. at 677-78 (explaining that 35 U. S. C. § 271(c) of the Patent Act expressly provides that the sale of a staple article or commodity of commerce suitable for substantial non-infringing use is not contributory infringement).

⁹² S. Rpt. 105-190 (1998).

⁹³ *Sony*, 464 U.S. at 440, 220 U.S.P.Q. at 677-78.

companies (representing the independent music movement) to disseminate their music.⁹⁴ “The Napster community represents a huge . . . demand for the kind of online music services . . . [that] the major record labels have been unable to satisfy.”⁹⁵ The opportunity Napster provides for some of its subscribers represents a substantial non-infringing use of social and commercial importance under the Sony-Betamax Doctrine.⁹⁶

Two days after the district court ordered an injunction against Napster, the Ninth Circuit Court of Appeals emergency panel granted Napster’s motion for stay of the injunction.⁹⁷ However, on February 12, 2001, a three-judge panel from the Ninth Circuit Court of Appeals ruled, “the district court correctly recognized that a preliminary injunction against Napster’s participation in copyright infringement is not only warranted but required.”⁹⁸ Although the three-judge panel affirmed the district court’s injunction, the panel held that the scope of the injunction was “overbroad,” and remanded the case back to the district court.⁹⁹ The legislative history reveals that this “Ninth Circuit decision is a gnawing concern that this legal victory for the record labels may prove . . . short-sighted from a policy perspective.”¹⁰⁰ Napster helps advance the independent music movement, and this authorized use of Napster renders it capable of substantial non-infringing uses.¹⁰¹

Services like Napster that promote independent labels and artists are a threat to the future of the major record labels because they increase competition. The increase in competition among established artists and the unknowns should help to wipe out mediocrity and allow non-mainstream artists to thrive. Furthermore the major labels’ traditional methods of distribution are vulnerable to replacement by a more Internet-friendly distributor of music and film. The major labels are suing services like Napster not only because Napster contributes to the unauthorized use of their copyrights, but Napster also gives opportunities to independent and upcoming competitors that threaten the major labels’ monopolies.¹⁰² If the

⁹⁴ See Cong. Rec. S1376-01 (daily ed. Feb. 14, 2001) (statement of Sen. Hatch).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *A & M Records*, No. 00-16401 (9th Cir. 2000).

⁹⁸ *A & M Records*, 239 F.3d at 1027, 57 U.S.P.Q.2d at 1745.

⁹⁹ *Id.*

¹⁰⁰ See 147 Cong. Rec. S1376-01 (daily ed. Feb. 14, 2001) (statement of Sen. Hatch).

¹⁰¹ *Id.*

¹⁰² Blaine C. Kimrey, *Amateur Guitar Player's Lament II: A Critique of A&M Records, Inc. v. Napster, Inc., and a Clarion Call for Copyright Harmony in Cyberspace*, 20 Rev. Litig. 309, n5 (2001) (citing Todd Spangler et al., *Time to Face the Music, But Who's Got the Right Track?*, *Interactive Week* 1 (May 8, 2000)) (explaining that many

major labels succeed and outlaw services like Napster, the members of the independent music community will be deprived of an opportunity that has helped many succeed.¹⁰³ Depriving the independent music community of these opportunities shields the major record labels from competition and thereby safeguards the major record labels' music monopolies.

III. FINDING A LEGAL BALANCE

Suing peer-to-peer technology services is not the only way the Industries can protect their copyrights. The Industries have other options, for instance they could upgrade their music and film distribution technologies by applying digital rights management (a modern approach that software and online publishing companies have taken to protect copyrights).¹⁰⁴ Additionally, the Industries can inform law enforcement officials about direct infringers¹⁰⁵ under the No Electronic Theft Act ("NET Act").¹⁰⁶ The Net Act sets a threshold of \$1000 in retail value on the amount of permissible copying within a 180-day period, a threshold that most Napster users are unlikely to exceed.¹⁰⁷ There are only a few frequent copyright infringers on

independent and relatively unknown-artists see services like Napster as an excellent promotional vehicle for building an audience).

¹⁰³ Napster's artist program has already enlisted over 17,000 artists who expressly approve of sharing their music through Napster. By contrast, the major labels released a total of only 2,600 albums last year. Napster, *Appellant Napster Inc's Emergency Motion For Stay* <http://dl.napster.com/napster_stay.pdf> (accessed Mar. 13, 2002).

¹⁰⁴ Digital rights management ("DRM") technology provides a way for content creators to make their content more secure before Internet service providers distribute it. This encryption covers the properties of the file as well as the audio content, so that information, such as title, author, and rating, is set and made more secure from modification.

¹⁰⁵ The Department of Justice announced a law enforcement effort aimed at combating the growing challenge of piracy, and the "initiative will also call upon U.S. industry to reaffirm its support for law enforcement efforts in the IP area by referring matters for investigation and prosecution, particularly those which involve threats to public health and safety, offenses believed to be committed by organized criminal syndicates, and other high volume or consequential intellectual property crimes." Department of Justice, *Justice Department, FBI and Customs Service to Combat Intellectual Property Crime: U.S. Law Enforcement Will Target High Tech Corridors to Fight Piracy and Counterfeiting Surge* <<http://www.usdoj.gov/criminal/cybercrime/ipinitia.htm>> (last updated July 26, 1999).

¹⁰⁶ See 17 U.S.C. § 506 (2000); 18 U.S.C. § 2319 (2000).

¹⁰⁷ 17 U.S.C. § 506(a)(2).

Napster that could be considered criminals under the NET Act,¹⁰⁸ and pursuing legal action against these individuals may establish a deterrent against future infringement.¹⁰⁹ Law enforcement officials have pursued criminal prosecution against direct infringers under the NET Act with the help of the Industries.¹¹⁰ However, the Industries assistance in tracking down infringers could create backlash from consumers.¹¹¹ The Industries could consequently lose market share by enraging the public.

The Industries are attempting to put an end to the piracy enabled by peer-to-peer providers. Pursuing options against direct infringers under the NET Act is likely to deter future infringers.¹¹² However, helping peer-to-peer providers that facilitate piracy build new business models would also help solve the piracy problems.¹¹³

¹⁰⁸ Lisa M. Needham, *A Day In The Life Of The Digital Music Wars: The RIAA v. Diamond Multimedia*, 26 Wm. Mitchell L. Rev. 1135, 1161 (2000).

¹⁰⁹ House International Relations Subcommittee on International Economic Policy and Trade, *Testimony of Jeremy Salesin, General Counsel and Director of Business Affairs for LucasArts; Entertainment Company LLC*, available at 1999 WL 27595602. (Oct. 13, 1999) (explaining that it is imperative to provide tougher maximum sentences, because “pirates, particularly small-scale ones, are effectively judgment proof, [so] the threat of imprisonment often provides the only effective deterrent.”).

¹¹⁰ In December of 2001 federal agents executed approximately 100 search warrants worldwide against warez groups engaged in illegal software and movie piracy over the Internet. Department of Justice, *Federal Law Enforcement Targets International Internet Piracy Syndicates: Multiple Enforcement Actions Worldwide Snare Top "Warez" Leadership* <<http://www.usdoj.gov/criminal/cybercrime/warezoperations.htm>> (last updated December 12, 2001). The Department of Justice acknowledged the important assistance provided by various intellectual property trade associations, including the Motion Picture Association. *Id.* In August of 1999 federal agents made their first arrest under the NET Act. The arrest was of, an Oregon University student that possessed unauthorized music and software files. U.S. Dep't of Justice, *First Criminal Copyright Conviction Under the No Electronic Theft Act (NET) for Unlawfully Distribution of Software on the Internet* <<http://www.usdoj.gov/criminal/cybercrime/netconv.htm>> (last updated Dec. 1, 2000). The Department of Justice acknowledged the assistance of the RIAA, MPAA and other intellectual property trade associations. *Id.*

¹¹¹ See Aaron M. Bailey, *A Nation Of Felons?: Napster, the Net Act, and the Criminal Prosecution Of File-Sharing*, 50 Am. U.L. Rev. 473 (2000).

¹¹² See 18 U.S.C. Appx § 2B5.3 (2001). In order to satisfy the NET Act's directive, the sentencing guidelines provide that the applicable guideline range for a crime committed against intellectual property must be stringent enough to deter such a crime. See *id.*

¹¹³ Digital World Services, *supra* n. 78 at <http://www.dwsco.com/press/mitte_pressus_more.php?press_nr=32> (accessed Jan. 11, 2002).

Peer-to-peer technology has substantial non-infringing uses, and rather than attempting to terminate the technology, the Industries should embrace it. History shows that new technologies can help develop the Industries market share in promoting the copyrighted works to larger audiences. Hence, legal actions that seek to circumscribe these technologies are premature because it is likely that these technologies will help benefit the Industries in the future.

APPENDIX I

Definitions

Contributory Infringement

Contributory infringement is a subset of the doctrine of vicarious liability, a third-party liability theory.¹¹⁴ In general, “one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”¹¹⁵ Although no express statutory provision governs contributory infringement, the doctrine is regarded as a valid means of holding a party liable for copyright infringement.¹¹⁶ An example of third party liability is when an Internet service provider is held liable for the actions of other parties.¹¹⁷

Internet Protocol Address

The Internet protocol address is commonly referred to as the “IP address.” The IP address is an identifier for a computer or device on the Internet.¹¹⁸ The Internet organizes and routes websites and email messages based on the IP address of the destination.¹¹⁹ The format of an IP address is a 32-bit address written as four decimal numbers separated by periods.¹²⁰ In decimal, each number ranges from zero to 255.¹²¹ An example of an IP address in decimal format is 1.230.40.240.

¹¹⁴ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435, 220 U.S.P.Q. 665, 675 (1984).

¹¹⁵ *Gershwin Publ’g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162, 170 U.S.P.Q. 182, 184-85 (2d Cir. 1971) (footnote omitted).

¹¹⁶ See *Sony*, 464 U.S. at 435, 220 U.S.P.Q. at 675.

¹¹⁷ See *A & M Records, Inc. v. Napster, Inc.*, 2001 WL 115033 (9th Cir. Feb. 12, 2001) (holding Napster secondarily liable for its users’ infringing activity).

¹¹⁸ See Robert A. Fashler, *The International Internet Address and Domain Name System* <<http://www.davis.ca/topart/domainnam.htm>> (last modified Sept. 10, 1997).

¹¹⁹ See *id.*

¹²⁰ The most common format is 32-bit, however, a 128-bit format has been developed. See Web Management, *IP Address* <http://searchwebmanagement.techtarget.com/sDefinition/0,,sid27_gci212381,00.html> (accessed March 12, 2002).

¹²¹ *Id.*

Notice and Take Down

The notice and take down procedure is described in the Digital Millennium Copyright Act¹²² (“DMCA”) as follows:

(g) Replacement of removed or disabled material and limitation on other liability—

(1) No liability for taking down generally. —Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception. —Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification. — To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

¹²² Pub. L. No. 105-304 (1998).

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.¹²³

Peer-to-peer

Peer-to-peer technology networks computers together and allows users to share files.¹²⁴ Unlike a traditional client-server network, peer-to-peer technology does not require that any files be transferred through a central server.¹²⁵

Qualifying Service Providers

Qualifying providers are described in the DMCA as follows:

(i) Conditions for eligibility—

(1) Accommodation of technology.—The 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

¹²³ 17 U.S.C. § 512(g).

¹²⁴ Clay Shirky, *What Is P2P...And What Isn't?* <<http://www.openp2p.com/pub/a/p2p/2000/11/24/shirky1-whatisp2p.html>> (accessed Jan. 11, 2002).

¹²⁵ *Id.*

holders of the service provider's system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

(2) Definition.—As used in this subsection, the term “standard technical measures” means technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems of networks.¹²⁶

Safe Harbor

As explained in both section 512 of the DMCA and Congressional Committee Reports, a qualifying service provider for a safe harbor receives the benefit of limited liability for certain common activities.¹²⁷

Service Provider

As defined by section 512 of the DMCA the term service provider refers to a provider of online services or network access, or the operator of facilities.¹²⁸ More specifically, it is “an entity offering 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 as sent or received.”¹²⁹

¹²⁶ 17 U.S.C. § 512(i) (2000).

¹²⁷ See 17 U.S.C. § 512; S. Rep. No. 105-190 (1998).

¹²⁸ See 17 U.S.C. § 512(k) (2000).

¹²⁹ *Id.*

APPENDIX II

Associations, Companies and Services

America Online

Based in Dulles, Virginia, America Online provides online services, including its “Instant Messenger” service.¹³⁰ America Online’s Instant Messenger service is based on peer-to-peer technology that allows users to send files to, exchange messages and to chat with other users.¹³¹ America Online has been in existence since 1985.¹³²

Gnutella

Gnutella was an open-source project started by members of Nullsoft, a subsidiary of America Online.¹³³ Justin Frankel and Tom Pepper, some of the founders of Nullsoft and the Winamp MP3 player developed Gnutella, a file-sharing software tool for the Internet that enables users to transmit any type of file over the Internet.¹³⁴ The Gnutella peer-to-peer software was written to make it difficult for network administrators to block.¹³⁵ This Gnutella characteristic was probably implemented in reaction to the fact that many administrators successfully banned the use of Napster on their networks.¹³⁶ Two days after Gnutella’s release on the Internet in June 2000,

¹³⁰ AOL Time Warner, Inc., *America Online* <<http://www.aoltime Warner.com/about/companies/americaonline.html>> (accessed Jan. 11, 2002).

¹³¹ See Margaret Kane, *AOL Puts Its IM Standard to the Test* <<http://www.zdnet.com/zdnn/stories/news/0,4586,2589109,00.html>> (last modified June 16, 2000).

¹³² See America Online, Inc., *Who We Are* <<http://www.corp.aol.com/whoweare.html?>> (accessed Jan. 11, 2001).

¹³³ Nullsoft, *How Did Nullsoft Come to Exist?* <<http://www.nullsoft.com/>> (accessed Jan. 11, 2002).

¹³⁴ *Id.*; Jane Kaufman Winn & James R. Wrathall, *Who Owns the Customer? The Emerging Law of Commercial Transactions in Electronic Customer Data*, 56 Bus. Law. 213, 237 (2000).

¹³⁵ See *id.* at 237.

¹³⁶ Many universities banned use of Napster program due to network congestion. Ariel Bershadsky, *RIAA v. Napster: A Window Onto The Future Of Copyright Law In The Internet Age*, 18 J. Marshall J. Computer & Info. L. 755, 762 (2000).

AOL terminated the project and discontinued public access to the program.¹³⁷ AOL ceased Gnutella operations because it determined the project to be a threat to the record label it recently purchased, Time Warner Music Group.¹³⁸

Kazaa

Incorporated in Amsterdam, The Netherlands, Consumer Empowerment released Kazaa, file trading software, on its website.¹³⁹ Kazaa is a peer-to-peer software program that enables users to share and search for any kind of digital file.¹⁴⁰ Neither search requests nor actual downloads pass through any central server.¹⁴¹

Motion Picture Association of America (“MPAA”)

The MPAA is the trade association for the American film industry.¹⁴² Founded in 1922, it serves as the voice and advocate of the American motion picture, home video and television industries.¹⁴³ It also directs a comprehensive anti-piracy program.¹⁴⁴ The association’s members include: Walt Disney Company, Sony Pictures Entertainment, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corp., Universal Studios, Inc. and Warner Bros.¹⁴⁵

MP3.com

Incorporated in Delaware in March 1999, MP3.com, Inc. distributes software that allows users to copy and store their CD collections online on MP3.com’s server for a fee.¹⁴⁶ The music may then be accessed remotely

¹³⁷ See Winn & Wrathall, *supra* n. 134 at 237, n.129.

¹³⁸ See *id.*

¹³⁹ *Leiber v. Consumer Empowerment BV*, No. 01-09923 (C.D. Cal. 1991 filed Nov. 20 2001) (pending legal filings and trial dates), see complaint, at 5 & 9, available at <http://www.nmpa.org/legal/Musiccity_.pdf>.

¹⁴⁰ Dick Kelsey, *Songwriters Sue P2P Music Services*, Newsbytes New Network, available at 2001 WL 23420400 (Nov. 20, 2001).

¹⁴¹ Kazaa, *What’s Special About Our Technology* <<http://www.kazaa.com/en/technology.htm>> (accessed Jan. 11, 2002).

¹⁴² See *MPA/About MPA, MPAA* <<http://www.mpa.org/about/content.htm>> (accessed Jan. 11, 2002).

¹⁴³ See *id.*

¹⁴⁴ See *MPA/Anti-Piracy* <<http://www.mpa.org/antipiracy/content.htm>> (accessed Jan. 11, 2002).

¹⁴⁵ See *MPA/About MPA, MPAA*, *supra* n. 142.

¹⁴⁶ See *About MP3.com* <<http://mp3.com/aboutus.htm>> (accessed Feb. 20, 2001).

from any computer connected to the Internet.¹⁴⁷ Initially, MP3.com offered the service for free.¹⁴⁸ Subsequently, the Recording Industry of America (“RIAA”) and major record companies successfully sued MP3.com for copyright infringement.¹⁴⁹ MP3.com settled with most of the record companies and implemented a pay-per-use system for its music storing service.¹⁵⁰

Napster

Based in San Mateo, California, Napster, Inc. is an Internet startup founded in May, 1999.¹⁵¹ Napster operates (primarily) on venture capital funding, and employs fifty employees.¹⁵² Napster, Inc. endorses its Napster peer-to-peer software application that enables users to locate and share music files over the Internet.¹⁵³

Recording Industry Association of America (“RIAA”)

RIAA is a trade association whose member companies create, manufacture, and distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States.¹⁵⁴ The association’s 250 members include: Warner Brothers Records, Columbia, Motown, Capitol, as well as many others record labels.¹⁵⁵ Founded in 1952, its stated mission is the promotion of strong intellectual property protection and the prevention of music piracy.¹⁵⁶

¹⁴⁷ *See id.*

¹⁴⁸ *See UMG Recordings, Inc. v. MP3.com, Inc.* 92 F. Supp. 349, 351, 54 U.S.P.Q.2d 1668, 1671 (S.D.N.Y. 2000).

¹⁴⁹ *See id.* at 353, 54 U.S.P.Q.2d at 1672.

¹⁵⁰ Wired News, *Labels Warming to MP3s?*, <<http://www.wired.com/news/business/0,1367,36858,00.html>> (last updated June 7, 2000). The final judgment against MP3.Com was between \$75 million and \$100 million. *Id.*

¹⁵¹ *See Napster Company Profile* <<http://www.akamai.napster.com/company/>> (accessed Feb. 20, 2001).

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ *See RIAA/About Us Mission Statement* <<http://www.riaa.com/about-who.cfm>> (accessed Jan. 11, 2001).

¹⁵⁵ *See RIAA/About Us Membership List* <<http://www.riaa.com/About-members-1.cfm>> (accessed Jan. 11, 2001).

¹⁵⁶ *See RIAA/Gold & Platinum Awards Timeline* <<http://www.riaa.com/Gold-History-4.cfm>> (accessed Jan. 11, 2001); *RIAA/About Us Mission Statement*, *supra* n. 154;

Scour

Originally based in Beverly Hills, California, Scour, Inc. is an Internet start-up that was funded by former Hollywood agent Michael Ovitz and grocery-chain magnate Ron Burkle.¹⁵⁷ The company markets and develops Scour Exchange peer-to-peer software, a multimedia guide and search engine.¹⁵⁸ Scour is a broadband portal on the Internet.¹⁵⁹ It allows users to find images and animations (including music videos, movie trailers, and full-length movies).¹⁶⁰ In July 2000 the RIAA, major motion picture companies and affiliates, and music publishing companies filed a complaint in the U.S. District Court for the Southern District of New York against Scour for copyright infringement.¹⁶¹ Shortly after the lawsuit filing, Scour filed for bankruptcy¹⁶² and was acquired by CenterSpan Communications.¹⁶³

RIAA/Anti-Piracy What We're Doing <<http://www.riaa.com/Protect-Campaign-5.cfm>> (accessed Jan. 11, 2001).

¹⁵⁷ Martin Stone, *Scour Files For Bankruptcy Protection* <http://www.infosec.com/commerce/00/commerce_101300a_j.shtml> (last updated Oct. 2000); William A. Birdthistle, *Article: A Contested Ascendancy: Problems With Personal Managers Acting As Producers*, 20 Loy. L.A. Ent. L.J. 493, n. 299 (2000).

¹⁵⁸ Scour, *What is the new Scour?* <<http://beta.scour.com/help/index.cfm?fuseaction=newscour>> (accessed Jan. 11 2001); Scour, *Join Scour Exchange Beta* <<http://www.scour.com/>> (accessed Jan. 11 2001).

¹⁵⁹ See Scour, *About Scour Home* <http://www.scour.com/General/Company/About/About_Scour.phtml> (accessed Feb. 20, 2001).

¹⁶⁰ See *id.*

¹⁶¹ *Twentieth Century Fox Film Corp. v. Scour, Inc.*, No. 00-5335 (S.D.N.Y. filed June 20, 2000).

¹⁶² Stone, *supra* n. 157.

¹⁶³ See Scour, *supra* n. 158.