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ALS SCAN, INC. V. REMARQ COMMUNITIES, INC.:¹ NOTICE AND ISPS' LIABILITY FOR THIRD PARTY COPYRIGHT INFRINGEMENT

I. INTRODUCTION

As the Internet grows, courts are struggling to apply traditional copyright law to the digital world. The nature of the Internet makes copying extremely easy, and often, copyright owners find their works posted on websites or in newsgroups² by unauthorized users.³ The ease with which copyrighted material is distributed through the Internet poses many difficulties for all involved parties. Individuals and entities, in particular Internet Service Providers⁴ (“ISPs”), are faced with the uncertainty of knowing when they may be held liable for copyright infringement. For example, an ISP user may upload copyright infringing information onto the Internet often by storing this information on the ISP’s computers for access to others who are “surfing” the Internet.⁵ Thus, the copyright owner’s material is easily disseminated through the ISP typically without the ISP’s knowledge that any infringing activity has occurred. If the copyright owners cannot

¹ ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d 619 (4th Cir. Feb. 6, 2001).

² Steven E. Halpern, *New Protections for Internet Service Providers: An Analysis of “The Online Copyright Infringement Liability Limitation Act”*, 23 SETON HALL LEGIS. J. 359, 361 (1999) (“A newsgroup is an online collection of open exchanges and discussions on a particular topic.” (citing American Civil Liberties Union v. Reno, 929 F.Supp. 824, 834 (E.D. Penn. 1996))).

³ Daniel R. Cahoy, *New Legislation Regarding On-Line Service Provider Liability For Copyright Infringement: A Solution In Search Of A Problem?*, 38 IDEA 335, 336 (1998).

⁴ Mitchell P. Goldstein, *Service Provider Liability for Acts Committed ByUsers: What You Don’t Know Can Hurt You*, 18 J. MARSHALL J. COMPUTER & INFO. L. 591, 592 (2000) (Internet service providers “provide direct access to the Internet and usually have content provided in a central location, often a Web site, that anyone can access”).

⁵ *Id.* at 336.

discover the identity of the infringer, ISPs are often specifically targeted by copyright owners for liability for infringing materials posted by these third parties because the individual who posted the infringing material cannot be located.

Unfortunately, case law does not help the ISPs or copyright owners because it does not lead in any one clear direction. Therefore, Congress began to search for a way to clarify how copyright law interacts with Internet issues. In October 1998, Congress answered this dilemma with the implementation of the Online Copyright Infringement Liability Limitation Act ("OCILLA")⁶ as part of the Digital Millennium Copyright Act ("DMCA").⁷ The DMCA was drafted to help provide guidance for ISPs faced with copyright infringing material posted by third parties.⁸ The Background of this Note will examine the current case law and analyze the protections the DMCA has provided ISPs. The Analysis will examine the various situations courts have found in which ISPs do not qualify for protection under the DMCA.

II. BACKGROUND

Copyright law provides authors the "exclusive rights of reproduction, distribution, display and performance, and the right to prepare derivative works."⁹ Any encroachment on these exclusive rights is an infringement, unless the alleged infringer can show that the act was authorized or constituted an affirmative defense.¹⁰ Certain affirmative defenses, such as fair use, allow a person to use the copyrighted material for purposes such as criticism or news reporting without being found liable for

⁶ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, §512 (1998).

⁷ *Id.*

⁸ 17 U.S.C.A. § 512 (West Group 2001).

⁹ Irina Y. Dmitrieva, *I Know It When I See It: Should Internet Service Providers Recognize Copyright Violation When They See It?*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 233, 235 (May 2000) citing 17 U.S.C. §106 (1994).

¹⁰ Halpern, *supra* note 2, at 366.

copyright infringement.¹¹ Copyright law allows authors to sue alleged infringers on the theory of direct liability,¹² but the Copyright Act of 1976¹³ does not clearly state that non-infringers can be held liable for allowing third parties to infringe.¹⁴ Instead, the theory of secondary liability allows copyright owners to sue parties who are not direct infringers under the theories of vicarious and contributory liability.¹⁵ Direct infringement occurs when the alleged infringer violates a specific right of a copyright owner such as reproducing a copyrighted work without the author's permission.¹⁶ A court can find a defendant guilty of direct infringement even if the defendant had no knowledge of the copying.¹⁷ Vicarious liability is found when an individual or entity has a direct financial interest from a copyright violation and has the right and ability to supervise it although that individual or entity does not directly commit the copyright violation.¹⁸ Both direct and vicarious liability are examples of strict liability that does not require that the alleged infringer have knowledge of the infringement.¹⁹ On the other hand, contributory liability does

¹¹ Copyright Act of 1976, 17 U.S.C.A. §107 (West Group 2001).

¹² Dmitrieva, *supra* note 9, at 236.

¹³ 17 U.S.C.A. §101-803 (West Group 2001).

¹⁴ Bruce G. Joseph & Dineen P. Wasylik, *Copyright Issues On the Internet and the DMCA*, PLI Order No. G0-00N5, 653 PRACTISING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 245, 254 (2001).

¹⁵ *Id.* at 254.

¹⁶ Dmitrieva, *supra* note 12, at 236.

¹⁷ Halpern, *supra* note 10, at 368; *See also* Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc., 907 F.Supp. 1361, 1372 (N.D. Cal. 1995) (Party not found liable for direct infringement “[w]here the infringing [third party] is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet”).

¹⁸ Marobie-Fl, Inc. v. Nat'l Ass'n of Fire and Equip. Distrib. and Northwest Nexus, Inc., 983 F.Supp. 1167, 1179 (N.D. Ill. 1997) (quoting Hard Rock Café Licensing Corp. v. Concession Serv., Inc. 955 F.2d 1143, 1150 (7th Cir. 1992) (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc. 443 F.2d 1159, 1162 (2nd Cir. 1971))).

¹⁹ Dmitrieva, *supra* note 16, at 235.

require knowledge of the infringing activity and the defendant must have induced, caused, or materially contributed to the infringing activity.²⁰

As the Internet developed and copyright issues arose, the courts began to determine which theory of liability infringers could be held accountable. The initial case law fell on all ends of the spectrum, some finding that ISPs may be held directly liable for infringing material posted by third parties even if they were unaware of the infringing material,²¹ while later courts found that while an ISP is not directly liable, they may be liable under the theory of contributory infringement which requires the defendant have knowledge about the infringing material.²² The case law at the time led only to uncertainty of when ISPs would be held accountable for infringing material posted by third parties until Congress stepped in and passed the DMCA, to give ISPs guidance regarding their liability.²³ The members of the House and Senate prepared a conference report on the DMCA stressing the importance of the new legislation.²⁴ The report states that “[OCILLA] provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”²⁵

²⁰ *Marobie-Fl, Inc.*, 983 F.Supp. at 1178; *See also Religious Tech.*, 907 F.Supp. at 1382 (“To state a claim for contributory infringement, plaintiffs must allege that [defendant] knew or should have known of [the third party’s] infringing actions at the time they occurred and yet substantially participated by “induc[ing], caus[ing] or materially contribut[ing] to the infringing conduct” of [the third party].” (quoting *Gershwin Publ’g*, 443 F.2d at 1162)).

²¹ *See Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (stating that defendant need not have knowledge of infringement for finding of direct copyright infringement).

²² *Religious Technology Center v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1375 (1995) (fair to hold defendant liable for contributory infringement when defendant has knowledge of infringing activity but continues to aid in the infringing activity such as continuing to post copyright infringing material on a bulletin board).

²³ Dmitrieva, *supra* note 19, at 239.

²⁴ H.R. CONF. REP. NO. 105-796 (1998).

²⁵ *Id.* at 72.

A. Summary of Title II Provisions of the DMCA

The OCILLA amended Chapter 5 of the DMCA by adding a new section titled “Limitations on Liability Relating to Material Online.”²⁶ It provides protections for ISPs who “unknowingly transmit or store copyrighted material”²⁷ as long as those ISPs follow the specific actions required in the DMCA.²⁸ In order to qualify for the DMCA’s protections, an ISP must meet the definition of a “service provider” which is defined by the statute in two ways. For subsection (a) of OCILLA, a “service provider” is defined as “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.”²⁹ For all other subsections, a “service provider” is defined as “a provider of online services or network access, or the operator of facilities therefor.”³⁰ ISPs must also employ and notify users of their policy that terminates privileges of any users who repeatedly infringe copyrights.³¹

If the ISP satisfies the service provider definition and notification requirements, the ISP may qualify for protections such as affirmative defenses and “safe harbors” against liability for copyright infringement by third parties. There are four categories of activity protected by the “safe harbors:” 1) transitory digital network communications, 2) system caching, 3) information residing on systems or networks at the direction of users, and 4) information location tools.³² ISPs are protected by these “safe harbors” from monetary relief for direct, vicarious, and

²⁶ 17 U.S.C.A. § 512 (West Group 2001).

²⁷ John F. Delaney & M. Lorrane Ford, *The Law of the Internet: A Summary of U.S. Internet Case Law and Legal Developments*, PLI Order No. B0-0100, 1244 PRACTISING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 103, 138-139 (2001).

²⁸ *Id.* at 138-139.

²⁹ 17 U.S.C.A. § 512 (k)(1)(A).

³⁰ 17 U.S.C.A. § 512 (k)(1)(B).

³¹ Delaney, *supra* note 27, at 139-142.

³² Dmitrieva, *supra* note 23, at 239.

contributory infringement and limited protection is given against injunctions.³³

B. Transitory Digital Network Communications

Subsection (a) of OCILLA limits liability of ISPs who perform only as a “passive conduit” for actions such as transmitting, routing, or providing connections for digital network communications.³⁴ Some examples of “passive conduit” activity include email services and newsgroups.³⁵ Several conditions are required for an ISP to qualify for this limitation: the transmission of the material must be initiated by a third party; the ISP must not select or modify the content of the transmission; it must not select the recipients of the material; and it must not maintain a copy of the message on a system or network in a manner ordinarily accessible to such anticipated recipients for a period longer than is reasonably necessary for the transmissions.³⁶

C. System Caching

Subsection (b) of OCILLA limits liability of ISPs for “storage of material in the process of system caching.”³⁷ System caching is the temporary storage of Internet material locally on the ISP’s server so that material can be accessed more readily.³⁸ An ISP may enjoy this limitation if it meets several conditions: the material was made available online by a third party; the ISP cannot have modified the material; refreshing or updating of the material was done in accordance with accepted industry standards; there is no interference with the ability of the technology to return data to the content provider; and the ISP shall permit only those who have permission from the content provider, either through use of a fee

³³ *Id.* at 240.

³⁴ *Id.* at 241.

³⁵ *Id.*

³⁶ See 17 U.S.C.A. 512(a)(1-5).

³⁷ Dmitrieva, *supra* note 35, at 241.

³⁸ See Delaney, *supra* note 31, at 139-140.

or a password, access to the material.³⁹

D. Information Residing on Systems or Networks at Direction of Users

Subsection (c) and (d) of OCILLA contain conditions that “combine the elements of contributory and vicarious liability.”⁴⁰ Subsection (c) limits liability of ISPs for information residing on systems or networks at the direction of users.⁴¹ An example of this is a web page. In order to qualify for this “safe harbor” the ISP must not have actual knowledge about the infringing material, must not directly benefit financially from such infringing activity, and upon gaining knowledge of the infringing material, the ISP must remove or disable access to the material.⁴² OCILLA provides that in order to qualify for the limitations on liability described in subsection (c), the ISP must designate an agent to receive notifications of alleged infringement.⁴³

In addition, there are specific elements of notification that the complaining party must meet in order to satisfy the notification requirement.⁴⁴ These written notices must be provided to the ISP’s designated agent and must contain the following elements:⁴⁵ a physical or electronic signature of a person authorized to act on behalf of the copyright owner for the allegedly infringed exclusive right;⁴⁶ identification of the copyrighted work claimed to have been infringed, or if multiple copyrighted works are claimed to be infringed at a single online site, a representative list of such works at that site;⁴⁷ identification of the infringing material to be removed or access disabled by the ISP and sufficient information

³⁹ 17 U.S.C.A. § 512 (b)(1-2).

⁴⁰ Dmitrieva, *supra* note 37, at 242.

⁴¹ 17 U.S.C.A. § 512 (c).

⁴² 17 U.S.C.A. § 512 (c)(1) (West Group 2001).

⁴³ *See* § 512 (c)(2).

⁴⁴ *See* § 512 (c)(3).

⁴⁵ *See* § 512 (c)(3)(A).

⁴⁶ *See* § 512 (c)(3)(A)(i).

⁴⁷ *See* § 512 (c)(3)(A)(ii).

for the ISP to locate that material;⁴⁸ contact information of the complaining party;⁴⁹ a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner;⁵⁰ and a statement by the complaining party that the information in the notice is accurate and that, under the penalty of perjury, the party is authorized to act on behalf of the copyright owner of the allegedly infringed exclusive right.⁵¹ Upon receiving notification that substantially complies with the above requirements, the ISP must remove or disable access to the allegedly infringing material in order to find protection under this “safe harbor.”⁵²

E. Information Location Tools

Subsection (d) of OCILLA limits liability for ISPs who provide information location tools such as hypertext links, directories or indexes to infringing material on the ISP’s system.⁵³ The ISP must meet the following conditions in order to qualify for this “safe harbor”: the ISP must not have actual knowledge of the infringing material,⁵⁴ must not be aware of circumstances from which the infringing activity is apparent,⁵⁵ and must not directly benefit financially from the infringing activity “in a case where the ISP has the right and ability to control such activity.”⁵⁶ When the ISP receives notice of the alleged infringement, the ISP must remove or block access to the allegedly infringing material.⁵⁷

OCILLA does distinguish between direct infringement and

⁴⁸ See § 512 (c)(3)(A)(iii).

⁴⁹ See § 512 (c)(3)(A)(iv).

⁵⁰ See § 512 (c)(3)(A)(v).

⁵¹ See § 512 (c)(3)(A)(vi).

⁵² Delaney, *supra* note 38, at 140-141.

⁵³ 17 U.S.C.A. § 512 (d) (West Group 2001).

⁵⁴ See § 512 (d)(1)(A).

⁵⁵ See § 512 (d)(1)(B).

⁵⁶ See § 512 (d)(2).

⁵⁷ See § 512 (d)(3).

secondary infringement,⁵⁸ but “it does not define contributory or vicarious infringement or limit the other defenses available to a service provider.”⁵⁹ The complaining party must still prove that the ISP is liable under direct, vicarious, or contributory infringement, but the DMCA provides ISPs with defenses against such infringement claims.⁶⁰

III. SUBJECT OPINION

On February 6, 2001, the United States Court of Appeals for the Fourth Circuit decided *ALS Scan, Inc. v. RemarQ Communities Inc.*,⁶¹ a case that may have a substantial impact on how copyright law is applied to the Internet.⁶² By reversing the summary judgment ruling against ALS Scan, Inc. (“ALS Scan”), the court denied an ISP protection under the “safe harbor” defense provided by the DMCA and remanded the case to determine if ALS Scan’s allegations of third party copyright infringement claims would prevail against the defendant.⁶³

A. The Parties

ALS Scan is a creator and marketer of “adult” photographs.⁶⁴ ALS Scan distributes these pictures on the Internet to paying subscribers and sells the pictures on CD ROMs and videotapes.⁶⁵ ALS Scan is the copyright owner of all of these photographs.⁶⁶ Defendant RemarQ Communities, Inc. (“RemarQ”) is an ISP

⁵⁸ *ALS Scan, Inc. v. RemarQ Cmtys. Inc.*, 239 F.3d 619, 622 (4th Cir. Feb. 6, 2001).

⁵⁹ Joseph, *supra* note 14, at 261.

⁶⁰ Michelle A. Ravn, *Navigating Terra Incognita: Why the Digital Millennium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement*, 60 OHIO ST. L.J. 755, 788 (1999).

⁶¹ *ALS Scan*, 239 F.3d at 622.

⁶² *Id.* at 620.

⁶³ *Id.* at 626.

⁶⁴ *Id.* at 620.

⁶⁵ *Id.*

⁶⁶ *ALS Scan*, 239 F.3d at 620.

allowing its subscribers access to various newsgroups,⁶⁷ which are sites where users can post messages for others to read.⁶⁸ RemarQ does not monitor, regulate, or censor the content of the articles posted on any of the newsgroups by its subscribers, but it does have the ability to filter information in the newsgroups and can screen members from logging onto certain newsgroups.⁶⁹

B. History of the Case

Two of the newsgroups to which RemarQ provided access for its subscribers contained ALS Scan's name in their titles, "alt.als" and "alt.binaries.pictures.erotica.als," both of which contained hundreds of postings by RemarQ's subscribers that infringed ALS Scan's copyrights.⁷⁰ ALS Scan sent RemarQ a cease and desist letter dated August 2, 1999 requesting RemarQ to cease carrying the two newsgroups containing ALS Scan's name in the titles and provided RemarQ with links to ALS Scan's websites that contained ALS Scan's models and copyright information.⁷¹ ALS Scan claimed in the letter that both of those newsgroups were created solely for the purpose of violating their federally filed copyrights and tradename and that RemarQ's servers provided access to these illegally posted images and enabled transmission of these images across state lines.⁷² RemarQ refused to comply with ALS Scan's request unless ALS Scan identified the infringing materials with "sufficient specificity" according the DMCA requirements.⁷³ ALS Scan responded that over 10,000 copyrighted images were in the newsgroups, but did not identify which specific images were infringing.⁷⁴

ALS Scan then filed suit against RemarQ, alleging violations of

⁶⁷ *Id.*

⁶⁸ Delaney, *supra* note 52, at 125.

⁶⁹ *ALS Scan*, 239 F.3d at 620.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *ALS Scan*, 239 F.3d at 621.

⁷⁴ *Id.*

the Copyright Act, Title II of the DMCA, and unfair competition.⁷⁵ In response, RemarQ filed a motion to dismiss the complaint, or in the alternative, a motion for summary judgment and also filed affidavits stating that RemarQ would remove any infringing articles posted on the newsgroups if these articles were specifically identified.⁷⁶ RemarQ's response included a "safe harbor" defense under the DMCA alleging that ALS Scan did not meet the notice requirements stated in the DMCA and therefore, because RemarQ is an ISP, it is not liable for any infringing material posted by third parties.⁷⁷

The district court, treating RemarQ's motion to dismiss and its motion for summary judgment as one, granted the motion to dismiss stating that: (1) RemarQ could not be held liable for direct copyright infringement simply because it provided access to newsgroups that contained infringing material; and (2) RemarQ could not be held liable for contributory infringement because ALS Scan did not comply with the DMCA notice requirements.⁷⁸ The district court's ruling followed the decision of *Religious Technology Ctr. v. Netcom On-Line Communication Services, Inc.*,⁷⁹ which determined an ISP that serves as a passive conduit for copyrighted material, meaning without human intervention, cannot be held liable as a direct infringer.⁸⁰ ALS Scan appealed the district court's ruling.⁸¹

C. Court's Analysis and Decision

In its analysis, the Fourth Circuit found that the DMCA and not the *Netcom* case, controls the decision in this case.⁸² The court reasoned that although ALS Scan did not comply perfectly with

⁷⁵ *ALS Scan*, 239 F.3d at 621.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 621-622 (citing *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1368-73 (N.D. Cal. 1995)).

⁸⁰ See *ALS Scan*, 239 F.3d at 621.

⁸¹ *Id.* at 622.

⁸² *Id.* at 625.

the DMCA's notification requirements because it did not provide a list of the infringing works to RemarQ, that ALS Scan's "substantial" compliance was sufficient to put RemarQ on notice.⁸³ The Court held that a representative list of the allegedly infringing materials provided by the complaining party was sufficient to meet the notification requirements and substantially comply with the DMCA.⁸⁴ The Court stated that because ALS Scan's notice was not defective, RemarQ could not use the protection offered by the "safe harbor" provisions.⁸⁵

IV. ANALYSIS

The DMCA was enacted to create a balance between the protections of the exclusive rights of copyright owners and the growth of the Internet.⁸⁶ Congress noted with specificity the requirements a complaining party must substantially fulfill in order to provide adequate notice to an ISP listing six elements that should be included in the written notification.⁸⁷ One of those elements is the identification of the material that is claimed to have been infringed, or if there are multiple copyrighted works at a single online site, then the complaining party should provide a representative list of those works to the ISP.⁸⁸ "Courts may not consider notification that is not in substantial compliance when ascertaining the service provider's awareness or knowledge of infringing materials or activity."⁸⁹

The *ALS Scan* Court noted that the DMCA requires the complaining party to put the ISP on notice by "comport[ing] with the prescribed format only 'substantially,' rather than perfectly"⁹⁰ and that according to the statute, only a representative list was

⁸³ *ALS Scan*, 239 F.3d at 625.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Costar Group Inc. v. LoopNet, Inc.*, 2001 WL 1153544 *7 (D.Md. 2001).

⁸⁷ 17 U.S.C.A. § 512 (c)(3) (West Group 2001).

⁸⁸ *See id.* § 512 (c)(3)(ii).

⁸⁹ Halpern, *supra* note 17, at 400.

⁹⁰ *ALS Scan*, 239 F.3d at 625.

necessary with respect to allegedly infringed multiple works.⁹¹ The Court denied RemarQ protection under the “safe harbors” of OCILLA because the Court believed ALS Scan had “substantially” complied with the notification requirement⁹² found in subsection (c) of the Act.⁹³ The Court found that ALS Scan complied with the identification requirement of multiple works merely by providing a link to ALS Scan’s websites where their models could be identified⁹⁴ and the Court did not require that ALS Scan provide an actual representative list of the allegedly infringing works.⁹⁵

The *ALS Scan* Court seemed persuaded that the newsgroups ALS Scan were complaining about included ALS Scan’s name in the title, which ALS Scan insisted were created solely for the purpose of illegally posting ALS Scan’s copyrighted photographs.⁹⁶ However, the Court did note that not every image in the two newsgroups were copyrighted photographs owned by ALS Scan, but they stated that RemarQ had remedies⁹⁷ for any injuries incurred as a result of removing noninfringing material.⁹⁸ ALS Scan’s argument is persuasive that the two newsgroups were created only for the purpose of posting their copyrighted images and therefore, does not require them to provide the ISP with an actual representative list.

However, in situations unlike ALS Scan where the alleged infringing materials do not fully encompass the copyright owner’s materials, courts should find that the complaining party must specifically enumerate the allegedly infringing materials or risk the possibility of defective notification. In *Hendrickson v. Ebay, Inc.*,⁹⁹ the court found that the copyright owner gave deficient notice to the defendant, an online auction site, regarding the

⁹¹ *ALS Scan*, 239 F.3d at 625.

⁹² *Id.*

⁹³ 17 U.S.C.A. § 512 (c)(3) (West Group 2001).

⁹⁴ *ALS Scan*, 239 F.3d at 621.

⁹⁵ *Id.* at 625.

⁹⁶ *Id.* at 621.

⁹⁷ 17 U.S.C.A. § 512 (f)(g) (West Group 2001).

⁹⁸ *ALS Scan*, 239 F.3d at 625.

⁹⁹ *Hendrickson v. Ebay, Inc.*, 2001 WL 1078981 (C.D. Cal., 2001).

allegedly infringing DVD copies of his movie, Manson. The court noted that proper identification of the materials was required, including the specific item numbers of the listings of allegedly infringing materials, and plaintiff's failure to provide with specificity allowed the defendant to claim protection under the "safe harbor" provisions.¹⁰⁰

Adequate notification is significant because the DMCA's "safe harbor" protections disappear the moment the ISP has knowledge, either actual or constructive, of the infringing material.¹⁰¹ Although the actual notice itself does not remove the ISP's protections, giving adequate notification of infringing materials shifts the burden to the ISP to remove or disable the infringing material.¹⁰² If an ISP fails to remove or disable the infringing material, they lose the protections offered by the DMCA.¹⁰³ However, if the notification is defective, then that defective notice cannot be considered in determining if an ISP has actual knowledge or is aware of circumstances from which an infringing activity is apparent.¹⁰⁴

Courts should be cautious when allowing complaining parties to prevail when they do not necessarily comply with the notification provisions of the DMCA. Congress used specificity when describing the elements required in order to achieve adequate notification. By loosening these requirements, courts must be careful that they do not overlook Congress' intention. As a result of the inconsistent standards implemented by courts as satisfying the notification requirement, ISPs may end up being overly cautious when deciding to remove allegedly infringing materials. This goes against Congress' intention to allow the growth of the Internet while protecting copyright owners' rights. As Senator Orrin G. Hatch stated, "In addition to securing copyright in the global, digital environment, the DMCA also clarifies the liability

¹⁰⁰ *Hendrickson* at *8.

¹⁰¹ *ALS Scan*, 239 F.3d at 625.

¹⁰² *Costar Group Inc. v. LoopNet, Inc.*, 2001 WL 1153544 *11 (D.Md., 2001) (quoting *ALS Scan, Inc. v. RemarQ Cmty., Inc.*, 239 F.3d 619, 625 (2001)).

¹⁰³ See 17 U.S.C.A. §512 (West Group 2001); See *ALS Scan*, 239 F.3d at 625.

¹⁰⁴ 17 U.S.C.A. § 512 (c)(3)(B)(i) (West Group 2001).

of on-line and Internet service providers – OSPs¹⁰⁵ and ISPs – for copyright infringement liability. The OSPs and ISPs needed more certainty in this area in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet.”¹⁰⁶

V. CONCLUSION

Congress passed the DMCA to help clarify how copyright law interacts with the Internet. Individuals and entities rely on the DMCA to give guidance as to when they may be liable for copyright infringement. In drafting the DMCA, Congress specifically noted the requirements copyright owners must meet to put an ISP on notice of any infringing material posted by a third party. The courts that have already interpreted the statute have altered these requirements and parties continue to be unsure of when the DMCA will protect them.

Proponents of the *ALS Scan* court’s ruling may argue that there are remedies for ISPs who are forced to take down material that is later determined to not be infringing. However, forcing an ISP to remove allegedly infringing material without meeting the specificity requirements of the DMCA potentially leads to the same dilemmas the DMCA was originally created to solve. The balance between copyright protection and the growth of the Internet continues to be imbalanced as the courts alter the requirements set out by Congress in the DMCA.

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¹⁰⁵ Goldstein, *supra* note 4, at 592 (Online service providers “provide content through proprietary networks in addition to Internet access, which is provided through the same networks”).

¹⁰⁶ 144 CONG. REC. S11,889 (1998), available at <http://thomas.loc.gov>.

