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Notes and Comments

Making Waves In Statutory Safe Harbors: Reevaluating Internet Service Providers' Liability for Third-Party Content and Copyright Infringement

With the growth of the Internet¹ as a medium of communication, the appropriate standard of liability for access providers has emerged as an international legal debate.² Internet Service Providers (ISPs)³ have faced, and continue to face, potential liability for the acts of individuals using their services to access, post, or download information.⁴ Two areas of law where this potential liability has been discussed extensively are defamation and copyright law.⁵

In the United States, ISP liability for the content of third-party postings has been dramatically limited by the Communications Decency Act of 1996 (CDA).⁶ However, ISPs in America do not face the same degree of immunity for third-party acts of copy-

1. See generally *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849-51 (1997) (describing the development and operation of the Internet).

2. See generally Rosa Julia-Barcelo, *Liability for On-Line Intermediaries: A European Perspective*, 1998 Eur. Intell. Prop. Rev. 20(12) 453-63 (describing the issue of ISP liability and its dimensions).

3. See Mitchell P. Goldstein, *Service Provider Liability for Acts Committed by Users: What You Don't Know Can Hurt You*, 18 J. Marshall J. Computer & Info. L. 591, 592 n.1 (2000) (describing Internet service providers as computer systems providing individuals with modem access to the Internet).

4. See Julia-Barcelo, *supra* note 2, at 453.

5. See *Religious Tech. Ctr. v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1367 n.10 (N.D. Cal. 1995).

6. 47 U.S.C. § 230 (1996).

right infringement.⁷ Under the Online Copyright Infringement Liability Limitation Act (OCILLA), Title II of the Digital Millennium Copyright Act (DMCA),⁸ Internet service providers are protected from strict liability for third-party acts of copyright infringement only if they can prove that their activities fit into one of four general safe harbor categories: transitory network communications, system caching, information stored on networks under user direction, and information location tools.⁹ To retain this safe harbor immunity, OCILLA also requires an ISP to promptly remove any allegedly infringing materials stored on its service once it has been notified of their unauthorized use by a copyright holder.¹⁰

In contrast to the United States, the European Union (EU) is in the process of developing a unified standard for determining the extent of ISP liability for the acts of their third-party users.¹¹ The new EU E-Commerce Directive¹² addresses these issues, and creates safe harbor provisions for ISPs that are, for the most part,¹³ very similar to those enforced in the United States by the DMCA.¹⁴ The E-Commerce Directive and the DMCA differ in the scope of their liability limitations. The Directive is designed to regulate all instances of ISP liability for the acts of its third-party users, and applies one standard horizontally to all areas of law,¹⁵ including defamation and copyright infringement. This is unlike the vertical approach to ISP liability taken in the United States, where liability limitations for Internet providers are defined according to the area of law in which the offense occurs.¹⁶ While the safe harbor

7. See Goldstein, *supra* note 3, at 638.

8. 17 U.S.C. §§ 1201-1332 (Supp. IV 1998). Title II of the DMCA is entitled the Online Copyright Infringement Act. See 17 U.S.C. § 512 (Supp. IV 1998).

9. See 17 U.S.C. § 512(a)-(d), (f), (g), (i).

10. See *id.*

11. See Rosa Julia-Barcelo, *On-Line Intermediary Liability Issues: Comparing E.U. and U.S. Legal Frameworks*, 2000 Eur. Intell. Prop. Rev. 22(3) 105-19.

12. See Proposal for a Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, COM (98) 586 final; Directive on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, Council Directive 00/31, 2000 O.J. (L 178) [hereinafter EU E-Commerce Directive].

13. The EU E-Commerce Directive does not include a safe harbor for information location tools, which is present in the DMCA. See *id.*; see also Julia-Barcelo, *supra* note 11, at 114.

14. See Julia-Barcelo *supra* note 11, at 108.

15. See *id.*

16. See *id.*

provisions limiting ISP liability for user acts of copyright infringement will be similar in the United States and the EU following the adoption of the Directive,¹⁷ the safe harbor provisions limiting ISP liability for third-party content will differ dramatically.¹⁸ By applying the safe harbors of the E-Commerce Directive horizontally, the EU will look to these same provisions in determining when an ISP can face liability as the publisher or distributor of a user's defamatory statement.¹⁹ In the United States, an ISP holds blanket immunity from being considered the publisher of a third-party defamatory statement under the CDA.²⁰

This paper will first discuss the development of the CDA and its requisite safe harbor provision limiting the liability of ISPs for defamatory content on their systems posted by third parties.²¹ It will next discuss the liability of ISPs for third-party copyright infringement under the safe harbor provisions provided by the DMCA in OCILLA.²² It will then compare the liability limitations of the DMCA to those included in the European Union E-Commerce Directive,²³ and outline the implications of applying the same safe harbor limitations horizontally to include ISP liability under defamation law within the same safe harbor parameters. This paper will conclude that the DMCA's safe harbor provisions limiting ISP copyright liability for third-party infringement as outlined should be applied horizontally in defamation cases to determine whether an ISP can be held liable as the publisher or distributor of a third-party defamatory statement posted on its service. Finally, this paper will consider the First Amendment concerns arising from the required removal provisions of the DMCA,²⁴ and how these provisions could be limited in a defamation context so as not to improperly impede these rights.

17. See generally *id.* (comparing the EU E-Commerce Directive to the safe harbor provisions of the DMCA and concluding that they are largely similar).

18. See *id.* at 108.

19. See *id.*

20. See Goldstein, *supra* note 3, at 638.

21. 47 U.S.C. § 230 (1996).

22. 17 U.S.C. §§ 1201-1332 (Supp. IV 1998).

23. See Council Directive 2000/31/EC 2000 O.J. (L 178); see also Julia-Barcelo, *supra* note 2.

24. See generally Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833 (2000) (discussing the First Amendment's under-emphasized implications on copyright law).

I. ISP LIABILITY FOR THIRD-PARTY ACTS OF DEFAMATION

At common law one who "repeats" the statements of another is just as responsible for their defamatory content as the original speaker.²⁵ Thus, the publisher of a defamatory statement is equally liable to the defamed party as is the person originally making the statement. However, newsvendors, bookstores, libraries, and other vendors and distributors of defamatory publications are not liable if they did not know or have reason to know of the defamation.²⁶ Freedom of speech and the press prevent the government from imposing strict liability on distributors for the content of materials they carry.²⁷ Therefore, in the quest to avoid liability for the content placed on the Internet by third-party subscribers, it is advantageous under a common law regime for an ISP to be characterized as a distributor rather than a publisher of an allegedly defamatory statement.

A. *ISP Liability for Third-Party User Defamation Before the CDA*

The first time that the question of liability for an ISP arose in an American defamation case was in *Cubby, Inc. v. CompuServe, Inc.*²⁸ In this case, CompuServe, an Internet service provider, operated a bulletin board that contained a daily newsletter publication catering to the journalistic community entitled "Rumorville."²⁹ Cubby, Inc. began a competing electronic publication entitled "Skuttlebut."³⁰ Following the publication of Skuttlebut, the Rumorville newsletter published statements claiming Skuttlebut was publishing information that it obtained through a "back door" that had first been published by Rumorville, that its principal had been "bounced" from his prior job, and characterizing Skuttlebut as a "start-up scam."³¹ Cubby then sued CompuServe as the publisher of these defamatory statements.

25. See *Cinanci v. New Times Pub. Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980).

26. See *Lerman v. Chuckleberry Publ'g, Inc.*, 521 F. Supp. 228 (S.D.N.Y. 1981).

27. See *Smith v. California*, 361 U.S. 147, 152-53 (1959).

28. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

29. See *id.* at 135.

30. See *id.*

31. See *id.*

The court held that CompuServe acted as a distributor of the Rumorville newsletter rather than its publisher.³² This holding was based on the court's finding that CompuServe did not exercise editorial control over the Journalism Forum bulletin board, but rather had contracted with an independent company, Cameron Communications, Inc., to "manage, review, create, delete, edit and otherwise control [its] contents" in accordance with the editorial and technical standards of CompuServe.³³ Further, the court found that Rumorville was published by Don Fitzpatrick Associates, who accepted total responsibility for its contents.³⁴ CompuServe's only activity in managing the bulletin board was requiring Cameron Communications to limit access to Rumorville to those CompuServe subscribers having a membership arrangement with Don Fitzpatrick.³⁵ Since CompuServe had "no opportunity to review" the content of the newsletter before it was uploaded and made available to subscribers, the court found that CompuServe exercised no more editorial control over Rumorville "than does a public library, bookstore or newsstand" over material it makes available to the public.³⁶ The court went on to hold that the proper standard of liability to be applied to CompuServe in this case was whether it, as a distributor of Rumorville, "knew or had reason to know of the allegedly defamatory Rumorville statements."³⁷ Since Cubby offered no evidence that CompuServe knew or had reason to know of the statements at issue, the court refused to hold CompuServe liable for their content.³⁸

Cubby's holding was not followed by a later case, *Stratton Oakmont, Inc. v. Prodigy Services Co.*³⁹ In this case, an anonymous user of Prodigy's "Money Talk" bulletin board posted statements claiming that Stratton Oakmont, a securities investment banking firm, and Daniel Porush, Stratton's president, committed criminal and fraudulent acts and was a "cult of brokers who either

32. See *id.* at 140.

33. *Id.*

34. See *Cubby*, 776 F. Supp. at 137.

35. See *id.*

36. *Id.*

37. *Id.* at 140-41.

38. See *id.* at 141.

39. See *Stratton Oakmont, Inc. v. Prodigy Servs., Co.*, 1995 WL 323710 at *1 (N.Y. Sup. Ct. May 24, 1995).

lie for a living or get fired.”⁴⁰ Unlike, the decision in *Cubby*, the court in *Stratton Oakmont* held that Prodigy could be held liable for libel as if it were a newspaper or broadcaster because it reserved the right to exercise editorial control over its electronic bulletin boards.⁴¹ The court reasoned that Prodigy held itself out to the public as an ISP exercising editorial control over its bulletin board postings.⁴² Prodigy employed both an automatic screening software program and volunteer bulletin board leaders to supervise the content of board submissions.⁴³ The *Stratton Oakmont* court likened these features to the editorial control exercised by a newspaper, and held that Prodigy was a publisher of the defamatory statements at issue, even though the ISP had no knowledge of these statements.⁴⁴

The court in *Stratton Oakmont* distinguished the *Cubby* decision by describing the different roles performed by CompuServe and Prodigy, the two ISPs and bulletin board operators in question. The court acknowledged that a mere distributor, such as a bookstore or library, may be liable for a defamatory statement made by a third party only if it knew or had reason to know of the defamatory statement at issue.⁴⁵ A distributor, such as CompuServe in *Cubby*, acts as a passive conduit and will not be found liable for libel in absence of fault.⁴⁶ The court reasoned that Prodigy was not such a passive conduit because it exercised editorial control over its bulletin board postings equivalent to that of a newspaper editor.⁴⁷ By exercising this editorial control, the court found that Prodigy exposed itself to greater liability than other computer networks choosing not to monitor the content of their system.⁴⁸

40. *Id.*

41. *See id.* at *5.

42. *See id.* at *2.

43. *See id.* at *4.

44. *See Stratton Oakmont*, 1995 WL 323710 at *3.

45. *See id.* at *3.

46. *See id.*

47. *See id.*

48. *See id.* at *5.

B. *Congressional Reaction to Stratton Oakmont v. Prodigy Services Co.: The CDA*

In response to the decision in *Stratton Oakmont*, Congress passed Section 230 of the Consumer Decency Act of 1996.⁴⁹ In this section, Congress provided that online service providers and web site owners be regarded as distributors rather than publishers of third-party content posted on their systems.⁵⁰ Congress adopted this section with the intention of removing the heightened liability *Stratton Oakmont* placed on ISPs who choose to monitor the content posted on their systems that was generated by other, third-party providers.⁵¹ Section 230 also limits the liability of an online provider for any action taken voluntarily by the ISP in "good faith" to restrict access to material "that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."⁵² These provisions were enacted to facilitate Congress' larger goal of "removing disincentives for the development and utilization of blocking and filtering technologies" which allow parents to "restrict their children's access to objectionable or inappropriate online material."⁵³

Although portions of the CDA prohibiting the transmission of "obscene or indecent" communications were held unconstitutional by the Supreme Court in *Reno v. American Civil Liberties Union*,⁵⁴ the provisions limiting ISP liability for third-party content remain viable.⁵⁵ While the language of Section 230 clearly limits the liability ISPs face as publishers of third-party content, it does not directly address the remaining liability that ISPs could potentially incur as distributors of third-party defamation when the required

49. 47 U.S.C. § 230 (1996).

50. 47 U.S.C. § 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

51. See Joint Explanatory Statement of the Congressional Conference Committee, H.R. Conf. Rep. No. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124.

52. 47 U.S.C. § 230(c)(2)(A) (1996).

53. 47 U.S.C. § 230(b)(4) (1996).

54. 521 U.S. 844 (1997).

55. See *id.*; see also Goldstein, *supra* note 3, at 617-21 (discussing the limitations of the *Reno* case on the CDA and the continuing viability of Section 230 as it limits the content liability of ISPs).

knowledge standard is proven in court.⁵⁶ However, in applying the CDA to online defamation cases, the courts have declined to draw a distinction between distributors and publishers in a way that would give rise to ISP liability for third-party content.⁵⁷ In fact, as this paper will now discuss, courts have interpreted the CDA as providing ISPs a complete safe harbor from tort liability for third-party content posted on their services, even when the provider does not employ any of the self-monitoring activities Congress hoped to promote in enacting the CDA.⁵⁸

C. *Applying the CDA: ISP Immunity from Liability for Third-Party Content*

In *Zeran v. America Online, Inc.*,⁵⁹ an unidentified person posted a message on an America Online bulletin board advertising t-shirts for sale glorifying the April 16, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, and instructing interested parties to call a person named "Ken" at Zeran's home phone number.⁶⁰ After receiving a high volume of calls, Zeran informed America Online of the defamatory posting, and was told that the message would be removed.⁶¹ Zeran later sued AOL for unreasonable delay in removing the message, refusing to post a retraction, and failing to screen for similar postings following the incident.⁶² AOL successfully plead that it was immune from liability under the CDA.⁶³

On appeal, the court construed Section 230 of the CDA broadly, stating that "[b]y it's plain language, Section 230 creates a federal immunity to any cause of action that would make service

56. See Joseph P. Zammit & Felicia Gross, *Web Site Liability: Risks and Costs of Compliance*, 4 P.L.I. Ann. Internet L. Inst., Course Handbook Series, available at 611 PLIPat 815, 895 (2000).

57. See *id.*; see also Douglas B. Luffman, *Defamation Liability for Online Services: The Sky is Not Falling*, 65 Geo. Wash. L. Rev. 1071, 1083-85 (1997); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 Alb. L. Rev. 147, 167-77 (1997).

58. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

59. See *Zeran*, 129 F.3d at 327.

60. See *id.* at 328.

61. See *id.*

62. See *id.*

63. See *id.*

providers liable for information originating with a third-party user of the service.”⁶⁴ The court also noted that the CDA directly precluded an ISP such as America Online being liable as the publisher of third-party content.⁶⁵ The court regarded AOL’s activities in maintaining the bulletin board not as the role of a distributor, but rather as a participant in the publication of third party content—an activity which is protected under Section 230.⁶⁶ The court even went so far as to hold that, upon notice of a defamatory posting, an ISP is “thrust into the role of a traditional publisher,” because the service provider must then determine whether or not to publish, edit, or withdraw the posting.⁶⁷ This rationale effectively prevents an ISP distributing third-party content from ever meeting the knowledge standard required for liability, because once knowledge is proven, the ISP would rise to the federally protected realm of a publisher.⁶⁸ In support of this holding, the court argued that an interpretation of Section 230 imposing liability on ISPs with knowledge of defamatory content would be contrary to Congress’ intent in passing the CDA, as it would deter service providers from monitoring the content of their systems.⁶⁹

One year after *Zeran*, a similar decision was reached in *Blumenthal v. Drudge*⁷⁰ regarding the CDA’s extreme limitation on the liability faced by an ISP for third-party content posted on its services. In *Blumenthal*, Sidney Blumenthal, an assistant to President Clinton, sued Matt Drudge, a gossip columnist, over comments included in Drudge’s publication, “The Drudge Report,” suggesting that Blumenthal had a history of beating his wife.⁷¹ Blumenthal also sued America Online, which had a contract with Drudge to make the Drudge Report available to all AOL members for the period of one year in exchange for a monthly royalty of \$3,000.⁷² In the contract, America Online reserved the right to remove content from the Drudge Report that it reasonably deter-

64. *Id.* at 330.

65. *See Zeran*, 129 F.3d at 330.

66. *See id.* at 332.

67. *See id.*

68. *See Goldstein, supra* note 3.

69. *See Zeran*, 129 F.3d at 333; *see also Goldstein, supra* note 3.

70. 992 F. Supp. 44 (D.D.C. 1998).

71. *See id.*

72. *See Blumenthal v. Drudge*, 992 F. Supp. 44, 47 (D.D.C. 1998).

mined violated AOL's standard terms of provider service.⁷³ AOL had also vigorously promoted its distribution of the Drudge Report, characterizing Matt Drudge as a "Runaway Gossip Success."⁷⁴ After Drudge formally retracted his allegations about Blumenthal, America Online disabled access to the story on its network and removed the edition of the Drudge Report from its online archives.⁷⁵ In *Blumenthal*, the court held that Section 230 of the CDA prevented AOL from being liable in tort as a publisher or distributor of the Drudge Report:

AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires. Because it has the fight [sic] to exercise editorial control over those with whom it contracts and whose words it disseminates, it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others . . . Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.⁷⁶

In reaching this decision, *Blumenthal* embraced *Zeran*'s conclusion that the CDA immunizes ISPs from content-based tort liability whether or not the provider can be shown to have actual or constructive knowledge of improper content.⁷⁷

The blanket immunity the CDA furnishes Internet service providers for third-party content is problematic. Under the holdings of *Zeran* and *Blumenthal*, an ISP can escape liability for third-party content completely, without an evaluation of the provider's knowledge as to the content of the material, or an in-depth analysis of the provider's role in transmitting the material. In *Blumenthal*, America Online had formally contracted with Drudge to

73. See *id.*

74. See *id.* at 51.

75. See *id.* at 47.

76. See *id.* at 51-52 (footnotes omitted).

77. See *id.* at 50 (quoting *Zeran*, 129 F.3d at 330-31).

distribute his Drudge Report and actively promoted the newsletter as a gossip success. Rather than examining this preexisting relationship between Drudge and AOL to determine the extent of the ISP's knowledge as to the content of the Drudge Report, the court awarded complete immunity to America Online due to its status as an Internet service provider. By establishing that an ISP will never be considered a publisher of third-party content, the CDA prevents courts from fully analyzing the nature and extent of the provider's communications to determine liability. As a result, the CDA establishes content immunity for all ISPs who host third-party postings on the Internet, regardless of how this information is transmitted, stored, or accessed by other users.⁷⁸ An analysis of how the ISP maintains the content information on its service is potentially important in determining the extent of the ISP's knowledge.

The importance of these principles is illustrated by another defamation case following the enactment of the CDA. In *Lunney v. Prodigy Services Co.*,⁷⁹ a teenage Boy Scout, Lunney, sued Prodigy claiming that he had been stigmatized and defamed by a third-party user who opened a number of Prodigy accounts under Lunney's name and posted vulgar messages on Prodigy's bulletin boards, attributing them to Lunney.⁸⁰ Prodigy monitored the content of these bulletin boards, and did in fact close down several of the Lunney accounts due to obscene postings and inaccurate user profile information.⁸¹ These events took place prior to Congress' enactment of the CDA, but the decision was rendered after the CDA became law.⁸² Without retroactively applying the immunity provisions of the CDA, the New York Court of Appeals held that Prodigy was not the publisher of the statements at issue, but rather served the function of a conduit, transmitting third-party material without exercising editorial control over its contents.⁸³

78. Although immunity for third-party content is established through Section 230 for ISPs, some courts are extending this statutory immunity to other providers of Internet services, such as online department stores. See *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001) (affirming lower court's holding that Amazon.com was a protected publisher of third-party content under Section 230 as far as its customer book reviews were concerned).

79. 723 N.E.2d 539 (N.Y. 1999), *cert. denied*, 529 U.S. 1098 (2000).

80. See *id.* at 539-40.

81. See *id.* at 540.

82. See *id.* at 543.

83. See *id.*

The court likened Prodigy's role in transmitting e-mail messages to that of a telephone company connecting individual speakers through electronic means, and concluded that it is not expected that either conduit will monitor the content of its subscribers' conversations.⁸⁴ Further, the court held that Prodigy's independent acts of monitoring bulletin board postings did not alter its passive character in providing Internet service.⁸⁵ Thus, the court held that Prodigy, as a mere conduit for transmitting third-party data, was not a publisher or distributor of the material for the purposes of tort law, and found no liability for the ISP.⁸⁶

While *Lunney*'s holding is similar to *Zeran* and *Blumenthal* in that the court found that an ISP was not liable as the publisher or distributor of third-party data, *Lunney* differs in its analysis. Rather than regarding Prodigy's actions in transmitting third-party e-mail messages to its bulletin board as a publication and then resorting to the congressional safe harbor extinguishing ISP liability for third-party content, *Lunney* looked instead to the actual function performed by Prodigy in transmitting these messages. In concluding that Prodigy acted as a mere conduit transmitting the independent content of its third-party users, the *Lunney* court evaluated the function performed by the ISP in that case. It then used this finding to determine both the ISP's role as either a publisher or distributor of the third-party content and the provider's knowledge of the material's content. By regarding the ISP as a medium for transmitting data rather than a form of publishing or distribution, the *Lunney* court came closer to fully evaluating the role of an ISP as a medium for communication.

Lunney's holding suggests that the blanket immunity provisions of the CDA are not necessary for a court to hold that an ISP is not liable as the publisher or distributor of third-party content posted to its Internet service. Rather than resorting to complete immunity under the CDA, a more appropriate scheme for a court determining ISP content liability would constitute making a factual finding as to the role of the ISP in presenting the material to the public and then using this finding to determine the extent of the provider's knowledge and control of the third-party content. This line of analysis would provide a technique for courts to evalu-

84. See *id.* at 541-42.

85. See *Lunney*, 723 N.E.2d at 542.

86. See *id.*

ate the extent of ISP liability in cases like *Blumenthal*, where the role of the ISP more resembles a publisher, without resorting to a blanket foreclosure on provider liability.

There are several different factors that are relevant in determining the role of an ISP in presenting third-party content to the public. A court could examine the actions of the individual provider in light of traditional defamation law, and attempt to determine liability based on whether the provider acts more like a publisher or a distributor of the statement at issue. Another possibility would be to compare an ISP with another form of conduit, like a telephone company.⁸⁷ This comparison is not all-inclusive, however, because it covers only one of several possible ways that an ISP could function to transmit information to the public, some which could arguably involve greater knowledge on the part of the provider than others. The best comparison, as this paper will now suggest, is to the provisions in the DMCA limiting ISP liability for third-party copyright infringements. If these limitations were applied to defamation law in the United States as they are in Europe, ISPs would face uniform liability for third-party acts under OCILLA's transmission-specific safe harbors. These specific provisions would also properly limit immunity to those functions of ISPs that truly serve an innocuous function, in the realms of both copyright and defamation law.

II. ISP LIABILITY FOR THIRD-PARTY ACTS OF COPYRIGHT INFRINGEMENT

Copyright owners hold, among other rights, an exclusive right to control the reproduction, distribution, display, or performance of their protected material.⁸⁸ The U.S. Copyright Act provides that "[a]nyone who violates any of the exclusive rights of the copyright owners . . . is an infringer . . ."⁸⁹ Subject to the recognized fair use exception, any reproduction of a protected work constitutes copyright infringement, and can create liability for the infringer.⁹⁰ Three standards of liability for copyright infringement have devel-

87. See *id.*

88. 17 U.S.C. § 106 (1996), amended by Pub. L. No. 104-39, 109 Stat. 336.

89. 17 U.S.C. § 501(a).

90. See Bruce P. Keller, *Internet and Online Law: Copyright*, 4 P.L.I. Ann. Internet L. Inst., Course Handbook Series, available at 610 PLI/Pat 169, 201 (2000).

oped over the years and have been discussed with regard to ISPs.⁹¹ Direct liability ensues when an individual or entity violates any exclusive right of a copyright holder.⁹² Contributory liability applies to any person who, with knowledge of the infringing activity, "induces, causes or materially contributes to the infringing conduct of another."⁹³ Vicarious liability has been held to exist when the subject of a copyright infringement suit both exercised the right and ability to supervise the primary infringer and had a direct financial interest in the exploitation of copyrighted materials.⁹⁴

Direct and vicarious copyright infringers are subject to strict liability for their offenses, regardless of their intent or knowledge at the time of the violation.⁹⁵ Even innocent copyright infringements are subject to strict liability under these two standards.⁹⁶ Contributory infringement, however, depends on the contributor's actual or constructive knowledge that a copyright violation is taking place.⁹⁷ In assessing the appropriate level of liability facing an ISP in a particular factual situation, one must look at the provider's actions to determine whether the role of the provider is one of direct involvement in the unauthorized use. If the provider's role is not direct, then one must consider whether the provider has sufficient knowledge and involvement to be contributorily liable or, alternatively, whether the provider exerts enough control and derives financial benefit from the infringement so as to be vicariously liable.⁹⁸

A. *Copyright Liability of ISPs Before the DMCA*

The first case in the United States dealing with the subject of online service provider liability for third-party copyright infringement was *Playboy Enterprises v. Frena*.⁹⁹ Here, Playboy sued

91. *See id.*

92. *See id.*

93. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). *See also* Yen, *supra* note 24, at 1843-44.

94. *See Gershwin Publ'g*, 443 F.2d at 1162; *see also* Yen, *supra* note 24, at 1843-44.

95. *See Irina Y. Dmitrieva, I Know It When I See It: Should Internet Providers Recognize Copyright Violation When They See It?*, 16 Santa Clara Computer & High Tech. L.J. 233, 235 (2000).

96. *See id.* at 236.

97. *See id.*

98. *See Keller, supra* note 90, at 241.

99. 839 F. Supp. 1552 (M.D. Fla. 1993).

George Frena, the operator of an online bulletin board service, for copyright infringement, claiming that copyrighted Playboy photographs had been posted on Frena's service without authorization.¹⁰⁰ Frena defended himself by claiming that the copyrighted pictures had been uploaded to his bulletin board by individual subscribers without his knowledge, and that he removed the photographs as soon as he received notification from Playboy.¹⁰¹ The court found that the pictures in question were in fact the copyrighted property of Playboy, and that in some instances these copyrighted photographs had been displayed in an altered form on Frena's service, such that Playboy's trademarks were replaced with Frena's own advertisements.¹⁰² From this promotional alteration, the court concluded that Frena had produced a "product" containing infringing material, and had directly violated both the distribution and display rights that were reserved to Playboy.¹⁰³ Further, the court disregarded Frena's lack of knowledge defense, holding Frena strictly liable for the infringement.¹⁰⁴

Two years after *Frena* was decided, another court evaluated the liability of bulletin board operators and Internet service providers for third-party acts of infringement. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,¹⁰⁵ the Church of Scientology sued Dennis Erlich, a former scientologist minister, for his unauthorized posting of copyrighted church materials on a Usenet bulletin board.¹⁰⁶ Also joined in the suit were Klemesrud, the bulletin board operator managing the board Erlich used to display the messages, and Netcom, Inc., the ISP connecting Klemesrud's bulletin board to the Internet.¹⁰⁷ The Church joined Netcom and Klemesrud after it notified both parties of the infringing activities, and both the ISP and the bulletin board operator refused to remove the postings without a showing of proof that they actually contained infringing material.¹⁰⁸ After reviewing

100. See *id.* at 1554.

101. See *id.*

102. See *id.* at 1556.

103. See *id.*

104. See *Frena*, 839 F. Supp. at 1558.

105. 907 F. Supp. 1361 (N.D. Cal. 1995).

106. See *id.* at 1365.

107. See *id.*

108. See *id.* at 1366.

both the *Frena* decision and other persuasive case law,¹⁰⁹ the court granted summary judgment in favor of Netcom and Klemesrud on the counts of direct and vicarious liability for the alleged copyright infringement, but sustained the contributory liability cause of action against both parties.¹¹⁰

In *Netcom*, the court concluded that *Frena* addressed a different factual situation than the claims advanced by the Church of Scientology. In *Frena*, Playboy focused its case on the unauthorized display and distribution of its protected photographs, and the court found that *Frena* had produced a "product" violating these rights.¹¹¹ The situation was different in *Netcom*, where the Church claimed that Netcom and Klemesrud engaged in illegal reproduction of copyrighted material. Here, the court held that the mere "storage on a defendant's system of infringing copies and retransmission to other services" does not constitute direct infringement by a bulletin board operator when the infringing information was originally uploaded by a third-party user.¹¹² Similarly, the *Netcom* court held that an ISP, like Netcom, could not face direct liability for third-party copyright infringement when it performs only the function of a conduit, and does not hold files in an archive for long periods of time.¹¹³ The court also found that while the Church did allege a genuine issue of fact regarding Netcom's control over the postings placed on its bulletin boards, the Church did not offer significant proof that the ISP incurred a financial benefit from the infringing activities.¹¹⁴ Thus, the court did not sustain the Church's claim against Netcom for vicarious liability.¹¹⁵

The *Netcom* court did, however, refuse to grant the motions against both the ISP and Klemesrud for summary judgment on the count of contributory liability.¹¹⁶ The court concluded that a genuine issue of fact existed as to whether the defendants had actual knowledge of the infringing activity. Since the Church notified Netcom and Klemesrud of the misused material before the posting

109. See *id.* at 1371 (discussing *Sega Enterprises Ltd. v. MAPHIA*, 857 F. Supp. 679 (N.D. Cal. 1994)).

110. See *Netcom*, 907 F. Supp. at 1383.

111. See *Frena*, 839 F. Supp. at 1556.

112. See *Netcom*, 907 F. Supp. at 1371.

113. See *id.* at 1372.

114. See *id.* at 1375, 1376-77.

115. See *id.*

116. See *id.* at 1374-75.

was set to expire, the two defendants' failure to remove the infringing statements could be construed as contributing to a known infringement.¹¹⁷ Thus, the court allowed this claim to proceed to trial.¹¹⁸

Unlike *Frena*, the court in *Netcom* held that an Internet service provider serving only the function of a conduit for third-party information cannot be held liable for direct copyright infringement, because the actual reproduction was made at the hands of the independent third party rather than the ISP. Although *Frena* dealt with the direct copyright liability of a bulletin board operator for alleged third-party postings, an inference can be made that the same liability would attach to an ISP in a similar situation. *Netcom* rejected this notion, likening an ISP to a telephone company or other communications conduit, which exercises no editorial control over third-party submissions, but instead merely transmits them innocuously.¹¹⁹ Thus, *Netcom's* line of reasoning implies that an ISP cannot be held liable for direct copyright infringement when the infringing activity originates with a third-party user. As a result, *Netcom* and *Frena* suggest conflicting standards of copyright liability for Internet service providers.

B. Legislating ISP Copyright Liability: the DMCA

Following the decisions in *Frena* and *Netcom*, scholarly opinion was divided regarding the proper standard of copyright liability that should, as a rule, be imposed on ISPs for their activities as service providers to third parties.¹²⁰ As mentioned previously, holding ISPs either directly or vicariously liable for third party copyright infringement would result in strict liability, while holding them to a contributory liability standard, as the court did in *Netcom*, bases liability of the ISP's awareness of the infringing activity.¹²¹ This debate was also an issue in Congress. In the early 1990s, the Clinton administration had organized a task force on the National Information Infrastructure, whose purpose was reworking copyright laws to make them conform with the new reali-

117. See *id.* at 1375.

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

119. See *id.* at 1370.

120. For an overview of some of the different scholarly approaches to this question see Dmitrieva, *supra* note 95, at 237.

121. See text *supra*; see also Dmitrieva, *supra* note 95, at 237.

ties of the emerging digital society.¹²² This group's report, the White Paper on Intellectual Property and the National Information Infrastructure,¹²³ recommended that ISPs be treated as distributors under copyright law, and that they should be held to a strict liability standard for their users' acts of infringement.¹²⁴ Further, the report did not recommend any modifications in copyright law to limit ISP liability.¹²⁵

The White Paper met with resistance from ISPs, who argued that such a strict liability standard would expose them to unreasonable liability for third-party acts, and would require ISPs to monitor their systems.¹²⁶ ISPs also claimed that it would be impossible to catch all copyright violations through monitoring,¹²⁷ and that extensive monitoring would produce a chilling effect on free speech.¹²⁸ Internet providers preferred an actual knowledge standard, whereby they would face liability for third-party copyright infringement only in cases where a provider knew of the infringement and took no action to remove it promptly.¹²⁹ In contrast, copyright owners argued that a strict liability standard was appropriate for ISPs, and was the only way to adequately protect owners' rights.¹³⁰ Copyright holders directly opposed an actual knowledge standard, arguing that it would remove any incentive for an ISP to monitor its system, rewarding ignorance with limited liability.¹³¹

While the Congressional debate over copyright liability for ISPs continued, the United States became a party to two World

122. Info. Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights (Bruce Lehman ed., 1995).

123. *See id.*

124. *See id.* at 212.

125. *See id.*

126. *See NII Copyright Protection Act of 1995: Hearing on S.1284 Before the Senate Comm. on the Judiciary*, 104th Cong., 38 (1996); *see also* Dmitrieva, *supra* note 95, at 245.

127. *See NII Copyright Protection Act of 1995: Hearings on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 17 (1995).

128. *See id.*

129. *See* Dmitrieva, *supra* note 95, at 235.

130. *See NII Copyright Protection Act of 1995: Hearings on H.R. 2441 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 35 (1995).

131. *See id.* at 20.

Intellectual Property Organization (WIPO)¹³² Treaties, created in Geneva during December, 1996.¹³³ These treaties were international in scope, and were intended to apply the regulatory provisions of the Berne Convention to the new digital environment.¹³⁴ While the WIPO treaties suggested that copyright liability should not apply to a person or entity serving as a conduit, who "provi[des] . . . physical facilities for enabling or making a communication,"¹³⁵ the treaties did not specifically suggest a standard of liability for ISPs, leaving this question for the individual countries to decide.¹³⁶

Following the WIPO treaties, Congressional debate resumed to create a bill that would enact the treaties' provisions and adequately address other copyright concerns, such as the proper standard of liability for ISPs. After several months of Congressional debate, Congress passed the Digital Millennium Copyright Act (DMCA),¹³⁷ which incorporated an industry agreement between ISPs and copyright holders with an earlier bill intended to codify the court's decision in *Netcom* and overturn *Frena*.¹³⁸ In enacting the Online Copyright Infringement Liability Limitation Act (OCILLA),¹³⁹ Title II of the DMCA, Congress intended to balance the actual knowledge standard advocated by ISPs with the strict liability standard advocated by rights holders by adopting an inter-

132. See WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty: Message from the President of the United States, Apr. 12, 1997, S. Treaty Doc. No. 105-17 (1997).

133. See *id.*

134. See Mihály Ficsor, *Towards a Global Solution: The Digital Agenda of the Berne Protocol and the New Instrument*, in *The Future of Copyright in a Digital Environment* 111-37 (P. Bernt Hugenholtz, ed., (1996)).

135. See Agreed Statements Concerning the WIPO Copyright Treaty, WIPO Doc. No. CRNR/DC/96 (Adopted Dec. 20, 1996).

136. See *id.*

137. 17 U.S.C. §§ 1201-1332 (Supp. IV 1998).

138. When Representative Coble introduced House Bill 3209, he included in his introductory remarks that he intended to codify the court's decision in *Netcom*, so far as it established liability standards for ISPs, and wished to overturn the holding of *Frena*, "inasmuch as that case might apply to service providers, suggesting that such acts could constitute direct infringement." See 144 Cong. Rec. E160-01 (daily ed. Feb. 12, 1998) (statement of Rep. Coble); see also *Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding a bulletin board operator strictly liable for third party acts of infringement when he did not have actual or constructive knowledge of the posted infringement and removed the material immediately once notified).

139. 17 U.S.C. § 512 (Supp. IV 1998).

mediate standard of knowledge.¹⁴⁰ This "intermediate" standard of knowledge imposed ISP liability both in instances where the provider had actual knowledge of the third-party infringement, and where constructive knowledge could be inferred from an ISP's awareness of "facts or circumstances from which infringing activity is apparent."¹⁴¹ This is more stringent than the pre-existing knowledge standard for contributory infringement, which imposed liability if the party knew or should have known that the material was infringing.¹⁴²

OCILLA establishes new parameters both defining and limiting the liability that Internet service providers face for third-party acts of copyright infringement on their services. By definition, OCILLA applies to both traditional ISPs and nonprofit institutions of higher education in their capacity as Internet service providers to students and faculty.¹⁴³ The provisions of OCILLA offer ISPs affirmative defenses whereby they can escape liability for third-party acts of copyright infringement, whether facing direct, vicarious, or contributory liability.¹⁴⁴ These safe harbor defenses are briefly described in the sections that follow.

DIRECT LIABILITY

Passive Conduit

OCILLA offers a safe harbor for service providers who perform only the function of a "conduit," merely transmitting, routing, or providing connections for the digital communications of others.¹⁴⁵ This provision recognizes the similarity between ISPs and "passive

140. See *WIPO Copyright Treaties Implementation Act, and Online Copyright Liability Limitation Act: Hearings on H.R. 2280 Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong., 82 (1997).

141. *Id.*

142. The new knowledge standard has been defined as a "red flag" test. According to the House Judiciary Committee, a red flag constitutes "information of any kind that a reasonable person would rely upon" in determining that material is infringing. See *WIPO Copyright Treaties Implementation Act and Online Copyright Infringement Liability Limitation: Report on H.R. 2281 of the House Comm. on the Judiciary*, H.R. Rep. No. 105-551, pt. 1, at 25 (1998). For a discussion of the new knowledge standard and how it should be applied with reverence to the appropriate legislative intent see Dmitrieva, *supra* note 95, at 251, 253-61.

143. 17 U.S.C. § 512.

144. See *id.*

145. See 17 U.S.C. § 512(a)(1-5) (Supp. IV 1998).

carriers" which were originally exempt under the Copyright Act, as they do not exercise control over the contents of their clientele.¹⁴⁶ In order to take advantage of this safe harbor, a provider must not initiate, select, or modify the content of the communication—meaning that providers must not determine the message's recipients or maintain a copy of the transmission on its service in such a manner that it can be accessed by others for a longer period than is reasonably necessary for the transmission to take place.¹⁴⁷

System Caching

OCILLA offers a safe harbor to ISPs for the necessary function of system caching, a technical procedure whereby the ISP makes a temporary copy of information while transmitting it online.¹⁴⁸ To qualify for this defense, an ISP must meet the following conditions: no modification of the material's content; regular updating of the material in accordance with technical standards; no interference with the ability of technology to return certain data to the original site; and no circumvention of password mechanisms.¹⁴⁹ The ISP must also expeditiously remove the material alleged to be infringing upon notification from a copyright owner.¹⁵⁰

VICARIOUS OR CONTRIBUTORY LIABILITY

Information Residing on a System or Network at the Direction of Users

OCILLA limits the liability of an ISP that stores third-party content that is completely under the control of that user.¹⁵¹ This safe harbor is contingent on the intermediate knowledge standard: the ISP must not have actual knowledge that the material or activity is infringing, must not be aware of facts or circumstances from which infringing activity is apparent, and must not financially benefit from the infringing activity.¹⁵² This defense also requires

146. See 17 U.S.C.A. § 111(a)(3) (West Supp. 1999) (stating that activities of passive carriers should be limited to "providing wires, cables, or other communications channels for the use of others").

147. 17 U.S.C. § 512 (a)(1-5).

148. See *id.* § 512 (b)(2).

149. See *id.*

150. See *id.* § 512 (b)(2)(E).

151. See *id.* § 512 (c).

152. 17 U.S.C. at § 512 (c)(1)(ii) and (d)(1)(B).

the ISP to expeditiously remove or disable access to any infringing material either upon notification of a rights holder or upon gaining awareness of the prohibited activity.¹⁵³

Information Location Tools

OCILLA also offers a similar safe harbor for ISPs that provide information location tools, such as search engines, that link users to other web sites indiscriminately.¹⁵⁴ This defense is also limited by the intermediate knowledge standard, and includes the required notice and take down provisions mentioned above.¹⁵⁵

To be eligible for these liability limitations, ISPs are required under OCILLA to designate an agent to receive notifications of copyright violations of their networks¹⁵⁶ and must implement a policy for the termination of subscribers' accounts who repeatedly act in violation of copyright law.¹⁵⁷

The safe harbor provisions limiting ISP copyright liability are directly related to specific functions performed by Internet providers, and protect ISPs from liability only for the innocuous transmission, copying, hosting, or linking of third-party content materials that the provider does not itself create or control. These liability limitations are specific, and better assess the role of the Internet provider in infringing conduct than does the blanket immunity for content provided by the CDA. The limiting provisions listed in OCILLA reflect the careful scrutiny of Congressional debate and lobbying on the part of both copyright owners and Internet service providers.

As a result of this lengthy process, the safe harbors outlined in OCILLA have served as a model for other countries to follow in codifying copyright limitations on ISP liability. OCILLA's limiting provisions have not, however, been restricted to defining the limitations on copyright liability in other countries. This paper will now address the horizontal approach to ISP liability currently being implemented in the European Union. This approach applies safe harbors almost identical to those in OCILLA to all forms of potential ISP liability, creating a uniform, predictable minimum

153. *See id.*

154. *See id.* § 512 (d).

155. *See id.* § 512(b)(2).

156. *See id.* § 512 (c)(2).

157. *See id.* § 512(I)(1)(A).

standard for each of the member states to follow in enacting their own provisions.

III. ISP LIABILITY UNDER THE EU E-COMMERCE DIRECTIVE

The European Union E-Commerce Directive¹⁵⁸ outlines a list of ISP safe harbors almost identical to OCILLA's provisions limiting copyright liability of Internet providers for third-party acts of infringement in the United States.¹⁵⁹ A significant difference in the application of these two "statutory" provisions is the comparative breadth of the safe harbor provisions. Unlike OCILLA's limiting provisions, which provide safe harbors for Internet providers only under copyright law,¹⁶⁰ the EU Directive will apply across the board to all areas of law involving ISPs.¹⁶¹ This creates a unified, "horizontal" approach to determining the extent of Internet provider liability in Europe, and avoids the uncertainty of having different legal standards for determining when ISPs face potential liability.¹⁶²

The E-Commerce Directive will significantly change the laws of countries that have not independently developed statutory provisions limiting ISP liability¹⁶³ or have adopted them, but have, like the United States, made the provisions particular to one area of law.¹⁶⁴ By employing a horizontal approach to the issue of pro-

158. See Council Directive 00/31, 2000 O.J. (L 178).

159. One aspect in which the E-Commerce Directive and OCILLA's limiting provisions differ is the Directive's lack of a comparable safe harbor for ISPs functioning as information location tools. Article 24 of the Directive includes a re-examination procedure whereby the European Commission can re-evaluate the importance of including a liability limitation for ISPs providing these linking services within three years of the Directive's adoption. Some scholars have hypothesized that during this time a separate safe harbor for information location tools will be added to the Directive. See Julia-Barcelo, *supra* note 11, at 115; Claus Köhler & Kai Burmeister, *Copyright Liability on the Internet Today in Europe (Germany, France, Italy and the E.U.)*, 1999 Eur. Intell. Prop. Rev. 21(10) 485-99, 499.

160. See Dmitrieva, *supra* note 95, at 240.

161. See Julia-Barcelo, *supra* note 11, at 108.

162. See *id.*; see also Andre Lucas, *Exploitation and Liability in the Light of Media Coverage*, 2001 Eur. Intell. Prop. Rev. 23(6), 275, 275 (discussing the horizontal approach of the EU E-Commerce Directive and relating some of its advantages and disadvantages).

163. See Köhler & Burmeister, *supra* note 159, at 497-98 (discussing the lack of existing ISP liability limitations in France and Italy).

164. See, e.g., *Godfrey v. Demon Internet Ltd.*, 1999 WL 477647 (Q.B. Mar. 26, 1999) (applying the U.K. Defamation Act of 1996). This Act imposes a variety of

vider liability, the European Commission hopes to ensure predictability for ISPs and promote harmonization between the various member states who must use the Directive as a minimum standard for enacting their own legislation. As Julia-Barcelo¹⁶⁵ argues, this approach also eliminates the need for self-monitoring:

A horizontal approach is appropriate . . . because the information that travels through on-line intermediary facilities such as cables, satellites and servers is just a sequence of bits, a succession of zeros and ones which is not linked to the real meaning of the information itself. Therefore, to apply different legal standards to different material flowing over their systems, on-line intermediaries would actually have to convert all those zeros and ones into text, music and images, and monitor and review each piece of such information. Imposing such an obligation on on-line intermediaries would bring the Internet to a halt and would threaten the privacy of information moving over it.¹⁶⁶

Julia-Barcelo's comments highlight a valid concern with vertically applied ISP liability. For the American dual-standard liability scheme to properly enforce Congress' stated intent in passing both Acts,¹⁶⁷ American Internet service providers must, in some form or fashion, monitor third-party content posted to their systems.¹⁶⁸ It is this self-policing privilege that Congress sought to protect by limiting provider liability for third-party content in the CDA.¹⁶⁹ Congress also advanced this goal by limiting provider liability for removing any third-party material that either the provider or other users found offensive.¹⁷⁰ While this liability limitation does enable ISPs to freely monitor and police their systems, it does not require any such activity on their part.¹⁷¹ As a

limited liabilities for ISPs, provided that they lack knowledge of third party content and exercise reasonable care under the circumstances. The law does not regulate copyright liability of ISPs. *See id.*

165. *See* Julia-Barcelo, *supra* note 11.

166. *Id.* at 108.

167. *See supra*. text; *see also* 144 Cong. Rec. E160-01 (daily ed. Feb. 12, 1998) (statement of Rep. Coble); Joint Explanatory Statement of the Congressional Conference Committee, H.R. Conf. Rep. No. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124.

168. *See id.*

169. *See id.*

170. *See supra*. text; *see also* 47 U.S.C. § 230(c)(2)(A).

171. *See* Joint Explanatory Statement of the Congressional Conference Committee, H.R. Conf. Rep. No. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124.

result, under the current interpretation of the CDA, a provider gains the benefit of complete immunity without upholding any level of requisite responsibility, even when actual or constructive knowledge of the problematic content is arguable.¹⁷²

While still not requiring monitoring,¹⁷³ OCILLA's limiting provisions create liability for an Internet provider where the ISP meets one of three requirements: actual knowledge of a user's infringement,¹⁷⁴ awareness of facts or circumstances from which the infringement is apparent, or receipt of a financial benefit from the user's infringing activity.¹⁷⁵ If any of these provisions are met, an ISP can still avoid liability under OCILLA by promptly removing the questionable material upon notice of the possible infringement.¹⁷⁶ The EU E-Commerce Directive applies similar safe harbor provisions horizontally to define the level of liability ISPs face throughout all areas of law, including defamation.¹⁷⁷ Thus, the E-Commerce Directive avoids content monitoring concerns not by granting wholesale immunity of the kind provided by the CDA, but rather by analyzing the facts of each case to determine whether the ISP gains liability limitation by fitting into the listed safe harbors. Where third-party content is concerned, this evaluation will focus on the amount of editorial control the ISP exercised, the level of knowledge it possessed, and the financial benefit it gained. This method for determining ISP liability seems more in line with the requirement in common defamation law of determining based on

172. See *Zeran*, 129 F.3d at 330-31.

173. See DMCA Report on S. 2037 of the Senate Comm. on the Judiciary, Rept. 105-190, 105th Cong. (1998).

174. See text *supra*. See also *supra* notes 138-52 and accompanying text.

175. See *id.*

176. See *id.*

177. One difference in the respective safe harbors provided by OCILLA and the E-Commerce Directive is the adoption of a "notice and take down" requirement as a prerequisite for obtaining safe harbor immunity. While OCILLA statutorily requires that potentially infringing material be promptly removed by an ISP after notification, the E-Commerce Directive includes no such *per se* requirement. See P. Brent Hugenoltz, *Caching and Copyright: The Right of Temporary Copying*, 2000 Eur. Intell. Prop. Rev. 22(10) 482, 492. However, failure to expeditiously remove infringing material after notification can still result in liability if a court finds, applying underlying general principles of the respective country's law, that the ISP had actual notice of infringement on their system and failed to take reasonable steps to remedy the situation. See *id.*; see, e.g., *Godfrey*, 1999 WL 477647 (discussed at length in text *infra*).

the facts of the case whether or not a person or entity acts as a publisher or distributor of a defamatory statement.

While safe harbor provisions employed by the EU E-Commerce Directive and OCILLA offer a more evaluative look at the activities engaged in by Internet providers for determining provider liability in a defamation context, there remains one aspect of OCILLA that conflicts with another fundamental characteristic of U.S. defamation law. These conflicting provisions are the "notice and take-down" provisions statutorily created through OCILLA and the freedom of speech guarantee of the First Amendment.¹⁷⁸

IV. ISP LIABILITY UNDER OCILLA AND THE FIRST AMENDMENT

To retain OCILLA's safe harbor provision limiting ISP liability for third-party information posted on its service, an Internet provider must promptly remove any allegedly infringing material upon notification by a copyright owner.¹⁷⁹ This feature of OCILLA arguably impedes the First Amendment right to free speech, because the Act in effect requires an ISP to remove or block access to information upon a mere allegation of infringement, without a required showing that an infringement has indeed occurred. As Alfred Yen argued, OCILLA's notice and take-down provisions could have First Amendment implications even in a copyright context:

. . . [T]he ambiguity of copyright law will make it impossible to determine accurately whether many potential infringements are, in fact, infringement . . . even if the subscriber's behavior appears to be infringing, the ISP has no way of reliably knowing whether the subscriber has permission for the use or the copyright holder in question objects.

These problems place ISPs in a quandary. If they monitor their networks, they will undoubtedly stumble across potential infringements, but they also will be forced to decide whether to remove those potential infringements without secure knowledge of whether such removal is appropriate. Like risk averse newspaper publishers, ISPs faced with this dilemma will likely resolve any

178. While freedom of speech is a fundamental concern in Europe as well as in the United States, U.S. defamation law is subject to heightened scrutiny because it must comply with the First Amendment to the Constitution. The First Amendment reads, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. Const. amend. I, cl. 2.

179. *See id.*

such doubts they have in favor of removing the material in question from the Internet because such action minimizes claims of infringement. Such behavior, however, implies resolving doubts about the silencing of speech against speech.¹⁸⁰

While First Amendment concerns exist in a copyright context, they have been explored in greater detail in defamation law, where one of the central issues in creating libel laws has been balancing enforcement with the need to prevent any "chilling effect" on constitutionally protected free speech.¹⁸¹ Arguably, imposing the notice and take-down requirement outlined in OCILLA in defamation cases now covered by the CDA would have an immediate chilling effect on free speech, because such a provision would, in effect, require the immediate removal of information as soon as an allegation as to its defamatory content was made to ensure that the ISP retained its safe harbor for third-party postings.

In Europe, the horizontal approach of the EU E-Commerce Directive addresses these notice and take-down concerns by omitting statutory notice and take-down provisions within the text of the Directive.¹⁸² However, it is arguable that the Directive's silent provisions nonetheless implicitly create a notice and take-down requirement for ISPs to maintain their limited liability status. Because the Directive constitutes only minimum requirements for different member states to adopt into their own respective intellectual property legal schemes, European countries are still free to apply general legal standards to conclude that, once notice of possible infringement is perfected, any failure of an ISP to expeditiously remove the material from the Internet results in a disqualification of the ISP's safe harbor protection.¹⁸³ Due to the horizontal application of the Directive, this possible notice and take-down result would apply across the board in all cases involving Internet service providers, including both copyright and defamation.¹⁸⁴ One case that illustrates the impact of a possible notice and take-down regime on ISP liability is the recent U.K. case, *Godfrey v. Demon Internet Limited*.¹⁸⁵

180. See Yen, *supra* note 24, at 1871.

181. See *New York Times v. Sullivan*, 376 U.S. 254, 279-81 (1964).

182. See Hugenholtz, *supra* note 177, at 492.

183. See *id.* at 492.

184. See Julia-Barcelo, *supra* note 11, at 108.

185. 1999 WL 477647 (Q.B. Mar. 26, 1999).

In *Godfrey*, a British math, physics, and computer science lecturer sued Demon, a prominent Internet service provider in England and Wales, over a defamatory newsgroup posting that the provider carried on its service.¹⁸⁶ While the actual third-party user who originally posted the defamatory statement remains unknown, it was established that the posting originated in the United States with a different ISP.¹⁸⁷ Demon's sole connection with the statement was the fact that it carried the particular newsgroup containing the defamatory content on its service.¹⁸⁸ The statement in question was "squalid, obscene and defamatory of the plaintiff" and purported to come from the plaintiff, although his name was misspelled.¹⁸⁹ When Godfrey discovered the defamatory newsgroup posting, he notified the managing director of Demon that the posting was a forgery and requested that it be removed from Demon's Use-net news server.¹⁹⁰ Although Demon admitted receiving the message, and could have "obliterated the posting," they did not remove the allegedly defamatory material from their server until it naturally expired.¹⁹¹

In deciding *Godfrey*, the court applied the U.K. Defamation Act of 1996,¹⁹² which, like the DMCA, provides safe harbors or "defences" limiting ISP liability as a publisher of third-party content when the provider can show that he was not the "author, editor, or publisher" of the defamatory statement;¹⁹³ that he took "reasonable care" in relation to the statement;¹⁹⁴ and that he "did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement."¹⁹⁵ While the court concluded that Demon was not the actual publisher of the statement in question,¹⁹⁶ it held that the provider was ineligible for the liability limitation provided by the act.¹⁹⁷ Since Demon was notified of the defamatory statement and did nothing,

186. See *id.* at *2.

187. See *id.*

188. See *id.*

189. See *id.*

190. See *id.* at *3.

191. See *Godfrey*, 1999 WL 477647 at *3.

192. See *id.* (quoting from the U.K. Defamation Act of 1996).

193. See *id.*

194. See *id.*

195. See *id.* at *3.

196. See *id.*

197. See *Godfrey*, 1999 WL 477647 at *3.

the court concluded that the ISP had failed to exercise the reasonable care required by the Act.¹⁹⁸ The court also held that Demon, after notification by Godfrey, was in possession of sufficient information to make the ISP aware that its actions were contributing to the publication of a defamatory statement.¹⁹⁹ Because the ISP did not take affirmative action to remove the allegedly defamatory material after Godfrey's notification, it lost the liability limitation that the Defamation Act would have otherwise provided it.²⁰⁰ As a result, the court held Demon liable for the third-party defamatory statements posted on its service.²⁰¹

Although *Godfrey* was not decided under the provisions recited in the E-Commerce Directive, the *Godfrey* case is an example of how strict adherence to a notice and take-down requirement can result in chilling free speech. As *Godfrey* illustrates, an ISP under this regime must remove any problematic material as soon as it receives notice that the information is either defamatory or infringing copyright law to protect itself from liability. Further, both the Directive and OCILLA recognize liability for ISPs when the provider should have been aware of facts or circumstances making infringement apparent.²⁰² If the reasoning applied in *Godfrey* is followed, ISPs could be held liable under these provisions for failing to remove material that appears questionable as regards copyright or defamation law, without any requirement that ISPs affirmatively establish that such information is in fact unprotected. Such broad removal discretion, with or without notice of

198. See *id.*

199. See *id.*

200. See *id.* at *7.

201. See *id.* In deciding *Godfrey*, the court cited the American defamation cases dealing with ISP liability before the CDA, and then distinguished the court's application of the CDA's complete content immunity for ISPs in *Zeran*, noting that the British Defamation Act "did not adopt this approach or have this purpose." See *Godfrey*, 1999 WL 477647 at *8. The *Godfrey* court also distinguished *Lunney*'s common law approach to limiting ISP liability by noting that under English common law Prodigy would have been regarded as the publisher of its user's third party content rather than a passive conduit. See *id.* By this discussion, the *Godfrey* court illustrates the massive liability that British ISPs faced under common law defamation principles, and how this liability has been significantly softened by recent statutory provisions like the Defamation Act, which work to create safe harbors for ISPs.

202. See 17 U.S.C. § 512 (c), (d) (Supp. IV 1998); Council Directive 2000/31/EC, 2000 O.J. (L 178); see also Julia-Barcelo, *supra* note 11, at 110; Köhler & Burmeister, *supra* note 159, at 499.

alleged improper content or infringement, would impede the right of free speech for individual Internet users.

To rectify this problem while still applying the function-specific provisions of OCILLA and the E-Commerce Directive to American defamation law, the notice-and-take-down requirements outlined in OCILLA could be softened in the defamation context. One possibility for softening OCILLA's take-down requirement would be requiring those claiming to be the victim of defamation to approach an ISP not with an allegation of inappropriate content on its system, but rather with a court injunction, specifying that the speech is unprotected and should be removed from the Internet.²⁰³ Since the alleged victim of defamation carries the burden of proving that the other party's speech is in fact false and defamatory in a courtroom setting, such a showing should also be appropriate to restrict the open forum for free speech that exists on the Internet. Requiring such a heightened showing to sanction the removal of material based on its content is consistent with the heightened freedom of speech that is guaranteed by the First Amendment.²⁰⁴ Also, since the heightened removal standard would apply only where content was concerned, it would not impede the privileges of copyright owners under the Berne Convention, which establishes that copyright owners shall not be required to actively enforce their rights of ownership to retain its privileges.²⁰⁵

203. Several scholars discussing the reality of a horizontal application of ISP safe harbors have endorsed the need for a court to weigh the competing interests of the victims of defamation against those of Internet operators before resorting to automatic removal and the resulting imposition on freedom of expression. See Lucas, *supra* note 162, at 278; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-61 (1985) (discussing, among other things, the need to balance the compelling state interest in enforcing defamation law against the First Amendment's interest in allowing the free flow of speech in public debate, and how this balance is altered by the status of the victim as a public or private figure and the subject matter of the speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-48 (1974).

204. See U.S. Const. amend I.

205. See *WIPO Copyright Treaties Implementation Act, and Online Copyright Liability Limitation Act: Hearings on H.R. 2281 and 2280 Before the House Subcomm. On Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 58 (1997).

CONCLUSION

The Internet has continually expanded over the past decade, becoming an invaluable medium for communication on a global level.²⁰⁶ To efficiently enforce defamation and copyright law online, the liability of both individuals and Internet providers must be easily determined and to some degree predictable. It should also be reflective of the roles that individual users and Internet service providers actually play in the digital world. Sometimes ISPs exercise no control over material that they send via the Internet, and act only as a conduit. In other instances, the role of the ISP is much more involved, and its knowledge of the content it produces is arguably greater. The blanket immunity that the CDA offers Internet providers allows ISPs to act as publishers and distributors of online content without facing liability for this role. This provision is outmoded. Defamation law can be better enforced on the Internet by employing a unified set of specific safe harbor provisions for ISPs that relate to the different aspects of their online activities. Such a unified, horizontal approach to ISP liability is being constructed effectively in Europe.²⁰⁷ OCILLA's negotiated provisions limiting ISP liability in the copyright context accurately address the role of an ISP in transmitting information, and can be adequately modified for application in a defamation context without improperly chilling free speech online. Such a unified standard will better meet the needs of users, providers, and defamation law in the United States.

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206. See Jane C. Ginsburg, *Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace*, 95 Colum. L. Rev. 1466, 1466 (1995).

207. See Julia-Barcelo, *supra* note 11.

