



1 See Fed. R. Civ. P. 78, Local Rule 7-15. For the following reasons,  
2 the Court **DENIES** the Motion in its entirety.

3  
4 **I. BACKGROUND**

5 This Order assumes familiarity with the prior Orders issued in  
6 this case, in particular with the Order granting in part and denying  
7 in part Defendants' Motion to Dismiss Complaint. See March 8, 2013  
8 Order (J. Matz) (docket no. 97) ("March 8 Order").

9 In summary, Plaintiff owns the copyrights to thousands of adult  
10 images and several trademarks derivative of its name. Giganews is a  
11 Usenet service provider. The Usenet is a global network of servers  
12 that host online bulletin boards or newsgroups to which users can post  
13 "messages." As a service provider, Giganews operates servers that  
14 store this user-generated content. Livewire claims it does not store  
15 infringing materials, but instead resells access to Giganews's  
16 servers. Yokubaitis Decl. ¶¶ 12-16. Plaintiff alleges that Usenet  
17 users have posted messages containing thousands of Plaintiff's  
18 copyrighted images, and, broadly speaking, Plaintiff seeks to hold  
19 Defendants liable for hosting those images on their servers and/or  
20 providing access to those images.

21 Following motions to dismiss, the claims remaining in the case  
22 are: for direct, contributory, and vicarious copyright infringement  
23 against Giganews; and for direct copyright infringement against  
24 Livewire. Plaintiff now seeks summary adjudication of issues relating  
25 to Defendants' affirmative defenses, in particular, relating to  
26 Defendants' assertions that they are eligible for certain safe harbors  
27 established by the Digital Millenium Copyright Act ("DMCA"), 17 U.S.C.  
28 § 512. A party that satisfies the conditions of the safe harbor

1 provisions is protected from liability for copyright infringement.

2 Although Plaintiff has not organized its Motion in the most  
3 logical way and fails to distinguish between Giganews and Livewire,  
4 Defendants have helpfully parsed the Motion, and summarize it as  
5 seeking adjudication of the following issues as to Giganews: (1)  
6 whether five notices Plaintiff sent to Giganews meet the requirements  
7 of 17 U.S.C. § 512(c)(3)(A); (2) whether Giganews has reasonably  
8 implemented a repeat infringer termination policy as required by §  
9 512(i); and (3) whether Giganews is eligible for the safe harbor  
10 protections of §§ 512(a)-(d). As to Livewire, Plaintiff appears to  
11 make only one argument: that Livewire "purchases infringing materials  
12 from Giganews and resells those infringing materials to third  
13 parties," conduct that Plaintiff claims excludes Livewire from any  
14 safe harbor. See Motion at 24:3-8.

15 Giganews argues that Plaintiff's five sample notices do not  
16 comply with 17 U.S.C. § 512(c)(3)(A); that it has reasonably  
17 implemented a repeat infringer termination policy; and that it is  
18 eligible for safe harbor protection under §§ 512(a), (c), and (d).  
19 Livewire also contends that it is eligible for safe harbor protection  
20 under §§ 512(a), (c), and (d).

21  
22 **II. LEGAL STANDARD**

23 "The court shall grant summary judgment if the movant shows that  
24 there is no genuine dispute as to any material fact and the movant is  
25 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The  
26 moving party has the burden of demonstrating the absence of a genuine  
27 issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S.  
28 242, 256 (1986).

1           Once the moving party satisfies its initial burden, the adverse  
2 party must set forth specific facts showing that there is a genuine  
3 issue for trial. S. Cal. Gas Co., 336 F.3d at 888 (“[The non-moving  
4 party] can defeat summary judgment by demonstrating the evidence,  
5 taken as a whole, could lead a rational trier of fact to find in its  
6 favor.”) (citations omitted).

7           Both the moving party and the adverse party must support their  
8 factual positions by “citing to particular parts of materials in the  
9 record . . . or . . . showing that the materials cited do not  
10 establish the absence or presence of a genuine dispute, or that an  
11 adverse party cannot produce admissible evidence to support the fact.”  
12 Fed. R. Civ. P. 56(c)(1)(A), (B).

13           An issue of fact is genuine if it reasonably can be resolved in  
14 favor of either party. Anderson, 477 U.S. at 250-51. “[A] district  
15 court is not entitled to weigh the evidence and resolve disputed  
16 underlying factual issues.” Chevron Corp. v. Pennzoil Co., 974 F.2d  
17 1156, 1161 (9th Cir. 1992). Rather, “the inferences to be drawn from  
18 the underlying facts . . . must be viewed in the light most favorable  
19 to the party opposing the motion.” United States v. Diebold, Inc.,  
20 369 U.S. 654, 655 (1962). However, the court must view the evidence  
21 presented “through the prism of the substantive evidentiary burden.”  
22 S. Cal. Gas Co., 336 F.3d at 254. Yet “mere disagreement or the bald  
23 assertion that a genuine issue of material fact exists” does not  
24 preclude summary judgment. Harper v. Wallingford, 877 F.2d 728, 731  
25 (9th Cir. 1989). The “existence of some alleged factual dispute  
26 between the parties will not defeat an otherwise properly supported  
27 summary judgment motion; the requirement is that there be no genuine  
28 issue of material fact.” Anderson, 477 U.S. at 247-48. The “opponent

1 must do more than simply show there is some metaphysical doubt as to  
2 the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith  
3 Radio Corp., 475 U.S. 574, 586 (1986).

4  
5 **III. ANALYSIS**

6 **A. Preliminary Evidentiary Issues**

7 The Court has reviewed the parties' voluminous evidentiary  
8 objections. Plaintiff's objections to the Declarations of Ronald  
9 Yokubaitis (docket no. 149-6) and Philip Molter (docket no. 149-11)  
10 are substantially meritless. By contrast, Defendants do raise serious  
11 questions about whether the Declarations of Norman Zada (docket nos.  
12 142-3, 150-1) are admissible. Of particular concern is whether some  
13 of Zada's statements are tantamount to expert testimony that Zada is  
14 not qualified to give. However, the Court will not rule on these  
15 objections because even if Zada's testimony is admitted, Plaintiff's  
16 Motion still fails.

17 The Court overrules Plaintiff's objections to the Declarations of  
18 William Rosenblatt (docket no. 149-2) and John Levine (docket no. 149-  
19 4). Plaintiff argues that Defendants failed to disclose Rosenblatt  
20 and Levine in their Rule 26 initial disclosures and therefore should  
21 not be permitted to rely on their declarations to oppose the Motion.  
22 However, Rosenblatt and Levine are offered as experts, and as such  
23 Defendants were not required to disclose them in their Rule 26 initial  
24 disclosures. Rather, the deadline for disclosing experts is June 2,  
25 2014. See Scheduling Order (docket no. 139). As such, Defendants  
26 have not run afoul of the deadline for disclosing Rosenblatt and  
27 Levine. The Court also overrules Plaintiff's objection that the  
28 Yokubaitis Declaration should not be considered because Defendants did

1 not produce him for deposition. It appears that Yokubaitis was ill  
2 and the parties were working to find a convenient deposition date when  
3 Plaintiff decided to file its Motion. Notably, Plaintiff filed the  
4 Motion very early, as the discovery cut-off date is June 30, 2014.  
5 Id. In the meantime, Yokubaitis was able to provide a declaration to  
6 support Defendants' Opposition. Nothing about this suggests  
7 Defendants failed to honor discovery obligations.

8 Plaintiff's position in the event the Court denies its objections  
9 is that the Court should continue the Motion to allow it to conduct  
10 discovery on Rosenblatt, Levine, and/or Yokubaitis, and then file  
11 supplemental briefing. See Reply at 5, fn.1. As noted, and as  
12 Plaintiff should have known, this Motion is very premature. If  
13 Plaintiff decided in retrospect that filing the Motion so early was a  
14 mistake, then it should have withdrawn it. The interests of judicial  
15 economy are ill-served when the Court makes piecemeal evidentiary  
16 rulings and allows the parties to submit supplemental briefing that  
17 the Court then has to reconcile with the existing flawed papers, all  
18 to allow a party to attempt to salvage a Motion that it chose to file  
19 months before the discovery cut-off. The Court therefore declines to  
20 stay the Motion on the terms Plaintiff proposes and will instead rule  
21 on it.

#### 22 **B. The Digital Millenium Copyright Act's Legal Framework**

23 The DMCA establishes safe harbors that protect service providers  
24 from liability for (1) transitory digital network communications; (2)  
25 system caching; (3) information residing on systems or networks at the  
26 direction of users; and (4) information location tools. 17 U.S.C. §§  
27 512(a)-(d) (footnotes omitted). A service provider must satisfy  
28 certain conditions to be eligible for any particular safe harbor. To

1 be eligible for any of the § 512 safe harbors, a service provider must  
2 have "adopted and reasonably implemented" a policy that provides for  
3 the termination of repeat infringers. 17 U.S.C. § 512(i).

4 At issue here is whether either Defendant is eligible for safe  
5 harbor under § 512(c), and whether Giganews has adopted and reasonably  
6 implemented a repeat infringer termination policy under § 512(i).

7 **C. Plaintiff Has Not Shown that Giganews' Repeat Infringer**  
8 **Termination Policy Falls Short of § 512(i).**

9 To be eligible for any of the four safe harbors stated in §  
10 512(a)-(d), a service provider must first meet the threshold  
11 conditions set out in § 512(i), including the requirement that it:

12 has adopted and reasonably implemented, and informs  
13 subscribers and account holders of the service  
14 provider's system or network of, a policy that  
15 provides for the termination in appropriate  
16 circumstances of subscribers and account holders of  
17 the service provider's system or network who are  
18 repeat infringers.

19 17 U.S.C. § 512(i)(1)(A).

20 The statute does not define "reasonably implemented." However,  
21 the Ninth Circuit treats this concepts as consisting of two  
22 components: first, whether a service provider implements a policy, and  
23 second, whether that implementation is reasonable. See Perfect 10,  
24 Inc. v. CCBill LLC, 488 F.3d 1102, 1109-10 (9th Cir. 2007) (" CCBill  
25 LLC"). Under this rubric, a service provider "implements" a policy if  
26 "it has a working notification system, a procedure for dealing with  
27 DMCA-compliant notifications, and [] does not actively prevent  
28 copyright owners from collecting information needed to issue such

1 notifications." CCBill LLC, 488 F.3d at 1109. Second, that  
2 implementation is "reasonable" if, under "'appropriate circumstances,'  
3 the service provider terminates users who repeatedly or blatantly  
4 infringe copyright." Id.

5 Plaintiff's opening brief does not dispute that Giganews has a  
6 working notification system, a procedure for dealing with DMCA-  
7 compliant notifications, and that it does not actively prevent  
8 copyright owners from collecting information needed to issue such  
9 notices. Despite its opening brief's silence on these issues,  
10 Plaintiff's Reply appears to assert that the policy is inadequate. As  
11 such, the Court will briefly address whether Giganews's policy, on its  
12 face, satisfies the first component set forth in CCBill.

13 The parties refer to Giganews's policy as a "two-strike" policy:  
14 upon learning that a user has posted an infringing message, Giganews  
15 freezes the user's account and provides the user with a warning that  
16 another infringement will result in the termination of the account.  
17 If the user responds that he/she will not post any additional  
18 infringing material, the account is "unfrozen." If Giganews is  
19 informed that the user has posted any additional infringing material,  
20 that user's account is terminated. See, e.g., Molter Decl. ¶¶ 27-35  
21 (describing Giganews's repeat infringer termination policy). There is  
22 no serious dispute that Giganews has a system in place to receive and  
23 deal with DMCA-compliant notifications, and Plaintiff has not  
24 suggested that Giganews prevents copyright owners from collecting data  
25 they need to send such notices. Having reviewed Giganews's policy,  
26 the evidence explaining it, and the relevant law, Plaintiff has not  
27 shown that Giganews's policy is inadequate such that Giganews does not  
28 "implement" a policy. Thus, the Motion is denied insofar as it argues



1 Giganews's policy is inadequate.

2 The gravamen of Plaintiff's challenge is to the "reasonableness"  
3 of Giganews's implementation of its policy, that is, whether Giganews  
4 actually terminates users as its policy states. Again, Plaintiff has  
5 not carried its burden on this issue. The Court will address each  
6 subissue briefly in turn.

7 Plaintiff argues that Giganews has not terminated all of the  
8 repeat infringers who posted messages it identified by Message-ID in  
9 its DMCA notices. Having reviewed all of the evidence, the Court  
10 finds that it precludes summary adjudication of this issue in  
11 Plaintiff's favor.

12 Plaintiff also argues that Giganews must remove all of a repeat  
13 infringer's content, not just the content a copyright holder has  
14 specifically identified as infringing. Giganews acknowledges that it  
15 removes only the specifically-identified infringing messages posted by  
16 a repeat infringer, and not all of the messages ever posted by a  
17 repeat infringer. The Court is not persuaded that § 512(i)(1)(A)  
18 requires a service provider to disable or delete all messages a repeat  
19 infringer has ever posted. By its terms, the section requires  
20 "termination . . . of subscribers and account holders," not the  
21 deletion of messages. In addition, by Plaintiff's reading, §  
22 512(i)(1)(A) would require a service provider to take down all of a  
23 user's messages, not just the infringing ones. Because deleting non-  
24 infringing messages does not serve any infringement-preventing  
25 purpose, there is no justification for reading such a requirement into  
26 the statute. In short, the Court will not read into the statute a  
27 requirement that its plain language does not support and that goes far  
28 beyond stopping and deterring copyright infringement.

1 Plaintiff argues that the fact that Giganews has terminated only  
2 46 repeat infringers since 2008 despite removing more than 531 million  
3 infringing messages over the past year, see Molter Decl. ¶¶ 22, 28,  
4 demonstrates that Giganews does not properly implement its policy.  
5 The conclusion that Plaintiff urges is an inference that *may* be drawn  
6 from the bare facts its cites, but that conclusion is *not compelled* by  
7 the evidence. As such, the Court cannot summarily adjudicate this  
8 issue.

9 Plaintiff argues that the fact that Giganews does not know the  
10 identity of all users whose messages reside on its servers  
11 demonstrates that Giganews's policy is inadequate, because if Giganews  
12 cannot identify a user, it cannot "reasonably implement" a repeat  
13 infringer termination policy. However, that a Usenet service provider  
14 cannot identify all users whose messages reside on its servers appears  
15 to be a function of how the entire Usenet works. According to  
16 Giganews, all Usenet service providers encrypt the data that  
17 identifies the user who posted a message; this encrypted data is  
18 reflected in a part of the message header called the X-trace field.  
19 Only the Usenet service provider with whom an account is registered  
20 can decrypt the X-trace field it has attached to a message posted by  
21 that user. Many of the messages hosted on Giganews servers are posted  
22 through accounts registered with other Usenet providers. Because  
23 Giganews cannot decrypt the X-trace field on such messages, it cannot  
24 link such messages to any specific users, and thus cannot apply its  
25 repeat infringer termination policy to such users. See, e.g., Molter  
26 Decl. ¶¶ 18, 29-31; Rosenblatt Decl. ¶¶ 66-72. The foregoing evidence  
27 precludes summary adjudication of whether Giganews "reasonably  
28 implements" its repeat infringer termination policy.

1 This evidence also raises an issue neither party addressed. The  
2 Court questions whether Giganews *could* "terminate" repeat infringers  
3 who are registered with a different provider because, by definition,  
4 those users's accounts reside with a different provider. If Giganews  
5 can not terminate accounts registered with other Usenet providers,  
6 then Giganews would not be able to apply its repeat infringer policy  
7 to such accounts even if it could identify them as repeat infringers.  
8 At a minimum, in light of this unresolved threshold issue, the Court  
9 cannot find that Giganews's repeat infringer termination policy is  
10 inherently infirm merely because Giganews cannot identify accounts  
11 through which infringing messages are posted when such accounts are  
12 registered with a different provider.

13 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion  
14 insofar as it seeks a determination that Giganews's repeat infringer  
15 termination policy does not comply with § 512(i)(1)(A)

16 **D. Plaintiff Has Not Established that its Notices Comply with**  
17 **§ 512(c)(3)(A).**

18 To claim the protection of § 512(c) for storing material on  
19 systems or networks at the direction of users, a service provider  
20 must, "upon notification of claimed infringement as described in  
21 paragraph (3), respond[] expeditiously to remove, or disable access  
22 to, the material that is claimed to be infringing or to be the subject  
23 of infringing activity." 17 U.S.C.A. § 512(c). A service provider's  
24 obligation to remove infringing material is not triggered unless the  
25 copyright holder provides a notice that complies with § 512(c)(3)(A).  
26 Section 512(c)(3)(A) states:

27 (A) To be effective under this subsection, a  
28 notification of claimed infringement must be a

1 written communication provided to the  
2 designated agent of a service provider that  
3 includes substantially the following:

4 (i) A physical or electronic signature of a  
5 person authorized to act on behalf of the  
6 owner of an exclusive right that is  
7 allegedly infringed.

8 (ii) Identification of the copyrighted work  
9 claimed to have been infringed, or, if  
10 multiple copyrighted works at a single  
11 online site are covered by a single  
12 notification, a representative list of  
13 such works at that site.

14 (iii) Identification of the material that is  
15 claimed to be infringing or to be the  
16 subject of infringing activity and that  
17 is to be removed or access to which is to  
18 be disabled, and information reasonably  
19 sufficient to permit the service provider  
20 to locate the material.

21 (iv) Information reasonably sufficient to  
22 permit the service provider to contact  
23 the complaining party, such as an  
24 address, telephone number, and, if  
25 available, an electronic mail address at  
26 which the complaining party may be  
27 contacted.

28 (v) A statement that the complaining party

1 has a good faith belief that use of the  
2 material in the manner complained of is  
3 not authorized by the copyright owner,  
4 its agent, or the law.

5 (vi) A statement that the information in the  
6 notification is accurate, and under  
7 penalty of perjury, that the complaining  
8 party is authorized to act on behalf of  
9 the owner of an exclusive right that is  
10 allegedly infringed.

11 17 U.S.C. § 512(c)(3).

12 Plaintiff seeks a ruling that five of the Notices it sent to  
13 Giganews comply with § 512(c)(3)(A). See Notices (Zada Decl. Exhs. 9-  
14 13).<sup>1</sup>

15 The parties' disagreement focuses on one element, §  
16 512(c)(3)(A)(iii), which has two components: identification of the  
17 infringing material, and information reasonably sufficient to permit  
18 the service provider to locate the material.

19 At this point, a description of Plaintiff's Notices is in order.  
20 Plaintiff's Notices instruct Giganews to use certain newsreaders to  
21 conduct searches of specific names within certain newsgroups, and then  
22 tell Giganews that all of the messages yielded by those searches on a  
23 certain date contained infringing material. Along with (verbose)  
24 written instructions for performing these searches, Plaintiff's

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25  
26 <sup>1</sup> Plaintiff sent more than these five notices to Giganews.  
27 However, Plaintiff appears to believe that these notices are  
28 representative of the body of notices it sent to Giganews, such that  
any adjudication of this issue with respect to any of the five notices  
will apply to other notices at issue in the case.

1 Notices include pages of thumbnail images of the infringing materials  
2 and/or screen shots of the newsreader interface reflecting the search  
3 results. Plaintiff contends that this satisfies § 512(c)(3)(A)(iii)  
4 because the search results and thumbnails both "identify" the  
5 infringing messages and also provide sufficient information to permit  
6 Giganews to "locate" those messages.

7 Giganews contends that these Notices are inadequate insofar as  
8 they fail to include Message-IDs for each infringing message.  
9 According to Giganews, a Message-ID is a string of letters and  
10 numbers; every Usenet message is assigned a unique Message-ID that any  
11 Usenet user can view on a message's message header. Giganews contends  
12 that a Message-ID is the only unique identifier associated with any  
13 message, and is therefore the only way it can "locate," and,  
14 accordingly, disable, infringing messages. See, e.g., Rosenblatt  
15 Decl. ¶¶ 29-39. Indeed, insofar as Plaintiff's Notices included  
16 Message-IDs for infringing messages, Giganews disabled those  
17 messages.<sup>2</sup> Yokubaitis Decl. ¶ 30. Thus, the controversy is whether  
18 Plaintiff's Notices lacking Message-IDs satisfy § 512(c)(3)(A)(iii).

19 Stated in terms of the statute, the issue is whether, as  
20 Plaintiff contends, its search instructions and the attached thumbnail  
21 images and screen shots "identif[y]" the infringing material and  
22 constitute "information reasonably sufficient to permit the service  
23 provider to locate the material." 17 U.S.C. § 512(c)(3)(A)(iii).

24 Caselaw explains that the "DMCA notification procedures place the  
25 burden of policing copyright infringement - identifying the

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27  
28 <sup>2</sup> Plaintiff's Notices indicated a Message-ID (seemingly  
inadvertently) for only a small minority of the infringing messages.

1 potentially infringing material and adequately documenting  
2 infringement - squarely on the owners of the copyright." CCBill, 448  
3 F.3d at 1113. "The goal of [Subsection (c)(3)(A)(iii)] is to provide  
4 the service provider with adequate information to find and address the  
5 allegedly infringing material *expeditiously*." Viacom Intern Inc. v.  
6 YouTube, Inc., 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013) (emphasis  
7 added). Congress cited as "an example of such sufficient information"  
8 "a copy or description of the allegedly infringing material and the  
9 URL address of the location (web page) which is alleged to contain the  
10 infringing material." Id.

11 The Court has reviewed the cases and all of the evidence bearing  
12 on this issue and finds that Plaintiff has not met its burden of  
13 showing that, as a matter of law, its Notices comply with §  
14 512(c)(3)(A)(iii).

15 As to the identification component of § 512(c)(3)(A)(iii), it is  
16 not clear that Plaintiff's approach of pointing to the results of a  
17 search performed on a specific date at a specific time on a specific  
18 newsreader, and attaching thumbnail images and screen shots, amounts  
19 to "identification of the infringing material. . ." First, this  
20 method points to a list of search results, not to any material in  
21 particular. Second, it is judicially noticeable that the material  
22 accessible through the Usenet is in a constant state of flux. As  
23 such, there is no certainty that any particular search will yield the  
24 exact same results at different times. Searches moments apart could  
25 yield different results. Plaintiff argues that the searches it  
26 specified in fact yielded the same results when performed months  
27 apart. See Reply at 6:4-11. However, even accepting the assertion  
28 that searches performed at different times yielded the same results,

1 verifying this requires a Usenet provider to compare its search  
2 results to Plaintiff's search results in an onerous side-by-side,  
3 line-by-line manner. See Zada Reply Decl. ¶ 7 (3:20-4:1) (describing  
4 his process for comparing search results). Furthermore, a close  
5 reading of the Zada Reply Declaration reveals that, for at least one  
6 of the Notices, the search Plaintiff instructed Giganews to perform  
7 yielded some messages that were non-infringing. See Zada Reply Decl.  
8 ¶ 7 (3:13-20). As such, Plaintiff's "identification" method enlists  
9 Giganews to compare its search results to Plaintiff's search results  
10 to see if they are the same, *and* to distinguish between material that  
11 infringes Plaintiff's copyrights and material that doesn't. The more  
12 Giganews must sort through these search results to determine what the  
13 infringing material is, the less it seems that Plaintiff has provided  
14 Giganews with "identification of" the infringing material. In light  
15 of all of the foregoing, this issue cannot be resolved summarily in  
16 Plaintiff's favor.

17 As to whether Plaintiff's Notices provide "information reasonably  
18 sufficient to permit the service provider to locate the material,"  
19 again, Plaintiff has not met its burden. This provision, by its  
20 terms, is slippery: it requires the copyright holder to provide  
21 "information *reasonably* sufficient . . ." Every first year law  
22 student learns that the term "reasonably" is amorphous, but it almost  
23 always involves the weighing of alternatives, burdens, and costs. As  
24 noted above, the burden of "identifying the potentially infringing  
25 material and adequately documenting infringement [falls] squarely on  
26 the owners of the copyright." CCBill, 448 F.3d at 1113. Furthermore,  
27 the notification should enable the service provider to remove the  
28 offending material *expeditiously*. See YouTube, 940 F. Supp. 2d at



1 115. “[A] copy or description of the allegedly infringing material  
2 and the URL address of the location (web page) which is alleged to  
3 contain the infringing material” is an example of sufficient  
4 information. Id. (emphasis added).

5 Giganews analogizes a Usenet message’s Message-ID to a webpage’s  
6 URL, as, like a URL, the Message-ID is the only unique identifier that  
7 a Usenet service provider can use to locate a Usenet message. Indeed,  
8 according to Giganews, the Message-ID is the data Giganews enters into  
9 its disabling program to disable a message. See Molter Decl. ¶ 20.  
10 In an attempt to downplay the singular utility of a Message-ID for  
11 identifying and locating a message, Plaintiff points to several other  
12 variables in message headers that could be used *in combination* to  
13 “locate” a message. But, a Message-ID suffices to locate a message,  
14 and adding more variables to the location process does not solve any  
15 problem, it only complicates them. In short, Plaintiff’s Rube  
16 Goldberg method of locating messages doesn’t aid Plaintiff, because  
17 that method would just compound the problems noted below for both  
18 sides.

19 Based on Giganews’s evidence, the searches Plaintiff instructed  
20 it to perform appear to be analogous to a web search using a search  
21 engine, such as the kind of search one would perform using Google.  
22 Such searches yield a list of results that may or may not include the  
23 content the user wants to find. See, e.g., Rosenblatt Decl. ¶¶ 25-28,  
24 Levine Decl. ¶¶ 32-39. Giganews has presented evidence that such  
25 searches simply do not function effectively within Usenet’s  
26 architecture. See Rosenblatt Decl. ¶¶ 29-39, Levine Decl. ¶¶ 34-39.  
27 The Court also notes that while a web search may “find” a number of  
28 results, the search itself does not actually locate the items found;

1 the search engine just presents its search results in a list, and any  
2 item in that list is not "located" until its URL is extracted.

3 Similarly, Giganews argues that in order to "locate" a message  
4 that appears in one of Plaintiff's searches, one must extract the  
5 Message-ID from that message's message header. See Rosenblatt Decl.  
6 ¶¶ 29-39. Both sides describe several ways to extract the Message-ID.  
7 The most onerous approach is a manual, message-by-message process  
8 requiring a person to download each message, open each message's  
9 message header, and extract the Message-ID by cutting-and-pasting the  
10 Message-ID from the message header into another document or program.  
11 A more efficient approach involves using a computer program to extract  
12 Message-IDs automatically from a number of pre-selected messages,  
13 without the need for a person to undertake the above-described manual  
14 cut-and-paste steps for each message individually. There is evidence  
15 that both Plaintiff and Giganews can perform these manual Message-ID  
16 extractions, and both could also easily write computer programs to  
17 execute such extractions. Giganews also points out that many holders  
18 of large portfolios of copyrighted material enlist the service of  
19 third-party companies who prepare DMCA notices with Message-IDs.

20 Thus, the crux of the parties' dispute is who must bear the  
21 burden of extracting the Message-IDs associated with the infringing  
22 messages, copyright holders or Usenet service providers. According to  
23 Giganews, if it had to extract Message-IDs for the hundreds of  
24 millions of messages identified in DMCA notices it has received, it  
25 would not be able to function. See Opp'n 5:24-26; 21:21-25. All of  
26 the declarations Giganews submitted substantiate this claim. That  
27 Plaintiff also expects Giganews to run searches and compare its search  
28 results to Plaintiff's search results to isolate infringing messages

1 makes this burden even greater. Giganews also points out that because  
2 Plaintiff already knows which messages are infringing, it would be  
3 much easier for Plaintiff to extract the Message-IDs, whether by a  
4 manual cut-and-paste method, by using a computer program, or by using  
5 a third-party service. For its part, Plaintiff notes that Giganews  
6 did extract Message-IDs for infringing messages reflected in Notices 1  
7 and 2, and argues that this demonstrates that all Notices lacking  
8 Message-IDs were sufficient to allow Giganews to locate the messages.

9 Based on the foregoing, triable issues preclude summary  
10 adjudication of this issue in Plaintiff's favor. Giganews has  
11 presented substantial evidence of the untenable burden it would face  
12 if every DMCA notice it received required it to undertake the Message-  
13 ID extraction process Plaintiff expects of it. That Giganews  
14 evidently chose to undertake this process for two of Plaintiff's  
15 Notices does not necessarily mean that those Notices satisfy §  
16 512(c)(3)(A); it may mean that Giganews went beyond its duty.

17 In short, Plaintiff has not met its burden to show that its  
18 Notices comply with 17 U.S.C. § 512(c)(3)(A)(iii). This aspect of the  
19 Motion is therefore **DENIED**.

20 **E. Plaintiff Has Not Shown that the Defendants Are Ineligible for**  
21 **Safe Harbor Protection Under § 512(c).**

22 Plaintiff contends that Defendants are not eligible for any of  
23 the four safe harbors set forth in §§ 512(a)-(d), but really only  
24 addresses § 512(c) in relation to Giganews. Plaintiff devotes only  
25 one page and six lines of its opening brief to this argument. See  
26 Mot. 23:21-24:26. Plaintiff's argument as to Livewire is somewhat  
27 hard to discern and is stated entirely as follows: that Livewire  
28 "purchases infringing materials from Giganews and resells those

1 infringing materials to third parties," conduct that Plaintiff claims  
2 excludes Livewire from any safe harbor. See Motion at 24:3-8. In  
3 response, both Defendants contend that they are eligible for  
4 protection under §§ 512(a), (c), and/or (d). Because Plaintiff did  
5 not specifically address §§ 512(a) or (d), those safe harbors are not  
6 in issue so the Court will not reach them. The Court will therefore  
7 only reach Defendants' eligibility for § 512(c).

8 Section 512(c) provides immunity "for infringement of copyright  
9 by reason of the storage at the direction of a user of material that  
10 resides on a system or network controlled or operated by or for the  
11 service provider." Thus, a provider may be immune if it stores  
12 infringing material at the direction of a user. Plaintiff contends  
13 that Giganews is not eligible for this safe harbor because it copies  
14 infringing messages to its servers without the intervention of third-  
15 party users, and because it stores these images on its servers for as  
16 long it wants to. However, according to Giganews, that messages are  
17 copied to Usenet servers in this way is simply a function of the  
18 Usenet, which provides for the *continuous and automatic propagation or*  
19 *copying* of messages across all Usenet servers. See Rosenblatt Decl. ¶  
20 29. Because these messages are propagated automatically once they are  
21 posted by the third-party user, that propagation itself is arguably  
22 "at the direction of" a user. Insofar as Plaintiff's arguments as to  
23 Livewire turns on its statement that Livewire "purchases infringing  
24 materials from Giganews and resells those infringing materials to  
25 third parties," that is a disputed issue of fact. As such, whether  
26 Defendants are eligible for protection under § 512(c) cannot be  
27 summarily adjudicated in Plaintiff's favor, so this aspect of the  
28 Motion is **DENIED**.

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**IV. CONCLUSION**

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **DENIED** in its entirety.

**IT IS SO ORDERED.**



**DATED: January 29, 2014**

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**AUDREY B. COLLINS  
UNITED STATES DISTRICT JUDGE**