I KNOW IT WHEN I SEE IT: SHOULD INTERNET PROVIDERS RECOGNIZE COPYRIGHT VIOLATION WHEN THEY SEE IT?

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TABLE OF CONTENTS
I. Introduction ................................................................. 233
A. Liability of ISPs for Copyright Violations of Their Users Before the OCILLA ....................................................... 235
B. Summary of Key Statutory Provisions .............................. 239
C. Legislative History of OCILLA: Evolution of the Knowledge Standard ............................................................... 244
   1. The White Paper on Intellectual Property and the National Information Infrastructure and 104th Congress .......... 244
   2. WIPO Treaties and 105th Congress ............................. 246
D. Suggestions for Court Interpretation of the New Knowledge Requirement ......................................................... 253
   1. New Knowledge Standard Should be Construed in Comparison With the Language Rejected or Modified by Congress .... 253
   2. Structural Analysis: Congress Intended Courts to Narrowly Construe the Statutory Provisions that Impose Burdens on ISPs 255
   3. The Purpose of the New Statute is to Encourage ISPs to Invest in the Internet Development by Limiting Their Vulnerability to Copyright Litigation .................................................. 258
   4. By Limiting ISPs' Liability, Congress Intended to Place Primary Responsibility in Detecting Copyright Violations on Copyright Owners ............................................................... 259
II. Conclusion .................................................................. 261

I. INTRODUCTION

Internet service providers (ISPs) are gateways to the world of cyberspace. They provide on-line access to individuals, educational institutions, corporations, and government agencies. At the same time, they can easily “pull the plug” on cyber-speech by taking down

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233
questionable material and terminating the accounts of specific users. In this sense, ISPs have become on-line guardians of free speech. ISPs, however, should not become Internet censors or decision makers on what constitutes copyright violations on the Internet.

For example, fans of Homer J. Simpson may put his images on their personal web sites. Likewise, those who enjoy novels of Iris Murdoch may quote her extensively on their web pages. Most Internet users also hope that on-line services will notice their sites and list them in their Internet directories, so that more people could visit them. Fans believe that the fair use provision of copyright law protects their use of copyrighted images or excerpts from the novels. However, the owners of copyrights for the famous cartoon series or Iris Murdoch's novels may think otherwise. In this situation, when compilers of Internet directories come across such fan sites, should they decide whether the sites violate copyright law? And if a compiler decides that a violation occurred, should it immediately block access to the site?

The Online Copyright Infringement Liability Limitation Act (OCILLA) signed into law in October 1998, provides that ISPs are required to expeditiously take down on-line material when they become "aware of facts or circumstances from which infringing activity is apparent." The issue is: Just how "apparent" a copyright infringement should be for a service provider to take restrictive actions against it? In other words, should ISPs be expected to know a copyright violation when they see it?

This article argues that in light of the OCILLA's legislative history, courts should narrowly construe the new "awareness" standard. If courts broadly interpret this requirement, ISPs may have incentive to restrict more on-line material than necessary without fear of being punished, because the same law shields them from liability for taking down, in good faith, allegedly infringing content. Part I of this paper provides an overview of the ISPs' liability in copyright infringement suits before the passage of the statute. Part II


2. Iris Murdoch is a famous 20th century British novelist.


5. See id. § 512(g)(1).
summarizes the main provisions of the OCILLA. Part III describes the legislative history of the statute, with particular focus on drafting the new knowledge and awareness requirement. Finally, Part IV argues for the narrow judicial interpretation of the new awareness standard in light of the statute’s language, structure, and legislative history.

A. Liability of ISPs for Copyright Violations of Their Users

Before the OCILLA

Copyright law provides economic incentives for authors to engage in creative activities by granting them a temporary monopoly over their works. Exclusive rights of copyright owners include the rights to reproduction, distribution, display and performance, and the right to prepare derivative works. To better ensure financial remuneration of authors, copyright law imposes strict liability for copyright violations. This means that an individual’s intentions and knowledge are irrelevant in determining whether a copyright violation occurred. Courts find individuals strictly liable even for innocent copyright violations.

Strict liability principles of copyright law differ dramatically from the liability principles in defamation and obscenity law, where courts take into consideration the element of knowledge (scienter) on the part of a defendant. Defamation and obscenity laws distinguish between primary publishers and distributors, with the latter subject to a more lenient standard of liability. On the contrary, under copyright law, distributors such as bookstores may be found strictly

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8. The concept of liability is defined as “every kind of legal obligation, responsibility, or duty;” “condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden.” BLACK’S LAW DICTIONARY 914 (6th ed. 1990).
9. However, courts may consider the innocent character of a violation in assessing punitive damages.
10. See for example Smith v. California, 361 U.S. 147, 149-50 (1959), where the Supreme Court invalidated on First Amendment grounds a Los Angeles city ordinance which imposed strict criminal liability on a retail bookseller for possession of an obscene book. The Court held that the ordinance, which did not consider the element of scienter (distributor’s knowledge of the contents of a book), inhibited freedom of expression by forcing booksellers to inspect the contents of all reading materials they carry.
11. See for example Cubby, Inc. v. Compuserve, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991), where the New York federal district court found a service provider not liable for allegedly defamatory statements posted by its independent contractor, because, the court said, Compuserve performed the role of a traditional news vendor.
liable for unauthorized distribution of infringing materials.\textsuperscript{12}

Courts base responsibility for copyright violations on three theories of liability: Direct, vicarious, and contributory. Direct and vicarious liability are examples of strict liability, which do not take into consideration the element of knowledge. Direct infringement occurs when an individual violates one of the exclusive rights of a copyright owner. For example, direct violation occurs when a vendor distributes bootleg recordings, or when a person reproduces a copyrighted work without the author's permission.

Vicarious liability is imposed on an individual or entity that does not commit a copyright violation, but directly benefits from it and has the right and ability to control it. Vicarious liability is an outgrowth of the doctrine of \textit{respondeat superior}, according to which a master is responsible in certain cases for the wrongful acts of his servants. For example, a dance hall owner may be found vicariously liable for leasing his premises to a band that performs copyrighted songs without permission.\textsuperscript{13}

The only theory of liability that considers the element of knowledge on the part of an infringer is contributory liability. Contributory liability is an outgrowth of a common law principle that those who knowingly participate in the act of direct infringement should be held accountable for their wrongful actions. To be found contributorily liable, a person "must have acted with the direct infringer and must have known of the infringing activity."\textsuperscript{14} For example, an operator of a retail copy service may be found contributorily liable for helping his customers copy protected audio-tapes by using his cassette recorder.\textsuperscript{15}

With the development of the Internet, the question arose as to which standard of liability should apply to ISPs. Two federal district court decisions framed the debate on this issue. In the 1993 case, \textit{Playboy Enterprises, Inc. v. Frena},\textsuperscript{16} a Florida federal court ruled that

\textsuperscript{12} 17 U.S.C. § 106(3) (1994) grants copyright owners the exclusive right to distribute copies of their works to the public. The distribution right applies to all copies of copyrighted works, whether or not they were lawfully made. \textit{See Nimmer on Copyright} § 8.11. The distribution right is limited by the "first sale" doctrine. Under 17 U.S.C. § 109 (1994), a lawful owner of a particular copy of a copyrighted work can sell or otherwise dispose of that copy without the copyright owner's permission.

\textsuperscript{13} \textit{See Dreamland Ball Room v. Shapiro, Bernstein & Co.,} 36 F.2d. 354, 355 (7th Cir. 1929).

\textsuperscript{14} \textit{Paul Goldstein, Copyright} § 6:1 at 6.6 (2d ed. 1999).


\textsuperscript{16} 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).
a computer bulletin board (BBS) operator was directly liable for illegal materials posted to his system by subscribers. The court ignored the fact that the BBS operator claimed he did not know about copyright violations on his system, and, as soon as he learned about them, he took down the infringing materials. This decision alarmed the ISP community which said that imposition of strict liability on service providers would compel them to monitor private transmissions of their users in effort to detect potential copyright violations.\textsuperscript{17} By monitoring transmissions of their subscribers, ISPs risk violating another federal law, the Electronic Communications Privacy Act, which prohibits interference with private digital communications, such as electronic mail.\textsuperscript{18}

In the 1995 case, \textit{Religious Technology Center v. Netcom Online Communications},\textsuperscript{19} a federal court in California refused to follow Florida’s precedent in holding an ISP strictly liable for copyright violations of its users. Instead, the court ruled that liability of ISPs should be based on the theory of contributory infringement. Under this theory, liability for participation in illegal activity is established when the defendant, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”\textsuperscript{20} The California court’s decision received fire from the community of copyright owners who argued that, by introducing the element of knowledge into the liability scheme, the court encouraged ISPs to turn a blind eye on copyright violations on their networks.\textsuperscript{21}

The debate over the proper copyright liability standard for ISPs unfolded in academic circles. Most of the research on this issue appeared in law reviews. For example, Jane Ginsburg of Columbia University School of Law argued that ISPs should be subject to the strict liability standard because they facilitate transmissions of

\begin{itemize}
\item \textsuperscript{17} "Absent clear lines of liability, service providers may have no practical defense to crippling damages but the invasive monitoring and supervision of their subscribers’ private communications." \textit{H.R. REP. No. 105-551, Pt. 1, at 26 (1998) (stressing that the new statute does not require ISPs to access, remove or disable access to material if in violation of the Electronic Communications Privacy Act).}
\item \textsuperscript{18} \textit{Gershwin Publ’g Corp. v. Columbia Artists Management Corp., 443 F.2d 1159, 1162 (2d Cir. 1971), quoted in Religious Tech. Ctr., 907 F. Supp. at 1382.}
\item \textsuperscript{19} \textit{907 F. Supp. 1361 (N.D. Cal. 1995).}
\item \textsuperscript{20} \textit{907 F. Supp. 1361 (N.D. Cal. 1995).}
\end{itemize}
infringing messages.\textsuperscript{22} Ginsburg also wrote that copyright owners may choose to sue a bulletin board or commercial network operator as a “profitable intermediary" to recover some of their losses from copyright violations.\textsuperscript{23}

Others stressed that if ISPs are exposed to strict liability, they would start monitoring transmissions on their networks, thus turning into on-line censors. Law professor Niva Elkin-Koren wrote that imposition of strict liability on ISPs is not a sound policy choice because it would turn ISPs into inspectors, or supervisors of the on-line information flow.\textsuperscript{24} Pamela Samuelson of the University of California at Berkeley also warned against ISPs becoming “centralized control centers to enforce copyright law.”\textsuperscript{25}

Some scholars noted that under existing case law, ISPs can be held vicariously and contributorily liable for activities of their users. For example, Mary Ann Shulman wrote that ISPs who reap advertisement revenue when users hit their web sites might be found liable if the content includes infringing material.\textsuperscript{26}

Several scholars came to the conclusion that courts should hold ISPs accountable for acts of their users only if copyright owners can demonstrate that ISPs had actual knowledge of copyright violations. For example, Giorgio Bovenzi wrote that the appropriate standard of liability for ISPs is negligence under the actual knowledge requirement.\textsuperscript{27} According to Bovenzi, the actual knowledge requirement would ensure the freedom of on-line communications because ISPs would not have the incentive to monitor transmissions of their users for potentially infringing content.\textsuperscript{28} Bovenzi suggested that upon receipt of a complaint from a copyright owner, ISPs should be required to remove an allegedly illegal message.\textsuperscript{29}

\begin{thebibliography}{99}
\bibitem{22} See Jane C. Ginsburg, Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace, 95 COLUM. L. REV. 1466, 1492-94 (1995).
\bibitem{23} See id. at 1499.
\bibitem{25} Pamela Samuelson, The Copyright Grab, WIRED, Jan. 1996, at 190.
\bibitem{26} See Mary Ann Shulman, Comment, Internet Copyright Infringement Liability: Is an Online Access Provider More Like a Landlord or a Dance Hall Operator?, 27 GOLDEN GATE U.L. REV. 555, 599 (1997).
\bibitem{28} See id. at 139.
\bibitem{29} See id. at 140; see also Wendy Melone, Note, Contributory Liability for Access
Unfortunately, neither case law nor academic commentary provided a consistent solution to the problems of ISPs' liability for copyright violations of their users. The answers to some of those questions came in October 1998, when Congress enacted limitations on copyright liability for ISPs as part of the Digital Millennium Copyright Act.

B. Summary of Key Statutory Provisions

Congress passed the Online Copyright Infringement Liability Limitation Act (OCILLA)\textsuperscript{30} as Title II of the Digital Millennium Copyright Act,\textsuperscript{31} signed into law by President Clinton on October 28, 1998. OCILLA, which took effect on the same date, amended Chapter 5 of the Digital Millennium Copyright Act by adding a new section called “Limitations on liability relating to material online.”\textsuperscript{32}

OCILLA applies to ISPs and nonprofit institutions of higher education in their capacity as service providers.\textsuperscript{33} It creates a number of “safe harbors” for service providers against liability for copyright violations of their users, based on the functions performed by service providers. The liability limitations apply to four general categories of activity: Transitory digital network communications,\textsuperscript{34} system caching,\textsuperscript{35} storage of information residing on systems or networks at

\begin{itemize}
\item Providers: Solving the Conundrum Digitalization Has Placed on Copyright Laws, 49 Fed. COMM. L.J. 491, 506 (1997) (suggesting that copyright owners should be required to notify ISPs of copyright violations on their networks).
\item 33. The term “service provider” is generally defined as “a provider of online services or network access, or the operator of facilities thereof.” \textit{Id.} § 512(k)(1)(B). For example, this broad definition would include providers of Internet access, commercial on-line services, and operators of individual computer bulletin boards (BBS).
\item OCILLA also provides an additional, more narrow definition of a service provider which applies only to the subsection covering transitory digital network communications. For the purposes of this subsection, a service provider is defined as “an entity offering the transmission, routing, or providing of connections for digital on-line communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” \textit{Id.} § 512(k)(1)(A). In order to qualify for this definition, a service provider must perform a passive role of a conduit—for instance, to provide e-mail service, or mailing lists (Listserv).
\item 34. The concept of “transitory digital network communications” describes the process of “moving packets of information across digital online networks,” such as forwarding e-mail traffic or routing messages to a mailing list agent (Listserv). COMM. ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 105th Cong., 2d Sess., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998 26 (Comm. Print Serial No.6 1998).
\item 35. System caching is a technique employed by ISPs to speed up public access to popular
the direction of users, and information location tools. These "safe harbors" protect service providers from all monetary relief for direct, contributory, and vicarious infringement, and substantially limit injunctive relief against qualifying service providers.

To be eligible for liability limitations, service providers shall designate an agent to receive notifications of copyright violations on their networks and shall implement a policy for the termination of accounts of those subscribers who repeatedly violate copyright. In addition, service providers should not interfere with "standard technical measures" used by copyright owners to identify and protect their works. This provision reflects the belief of members of Congress that, in the future, technology may provide solutions to many issues facing copyright owners.

The statute specifies that "standard technical measures" should be developed by both copyright owners and ISPs in "an open, fair, voluntary, multi-industry standards process." For example, members of the House Committee on Commerce anticipated that organizations such as the World Wide Web Consortium, the Internet Engineering Task Force, or ad hoc web sites. When a user requests access to a certain web site, a local Internet server automatically makes a temporary copy of the requested file. This is done in case other users from the same area would want to visit this particular site. In this case, they will access it from the local server instead of re-calling the site from possibly thousands of miles away. See Information Resource Caching FAQ (visited Feb. 5, 2000) <http://www.ircache.net/Cache/FAQ>.

36. "Examples of such storage include providing server space for a user's web page, for a chatroom, or other forums in which material may be posted at the direction of users." COMM. ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 105th Cong., 2d Sess., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998 26 (Comm. Print Serial No.6 1998).

37. The term "information location tools" refers to directories of on-line sites, search engines, lists of recommended sites, hyperlinks. See id. at 32.


39. See id. § 512(i)(1)(A). Members of the House Committee on Commerce described the goals of a copyright policy in the following way: "[T]hose who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." See also Digital Millennium Copyright Act of 1998, Report on H.R. 2281 of the House Comm. on Commerce, Rept. 105-551, Pt. 2, 105th Cong., 2d Sess., at 61 (1998).


industry groups, could take an active part in this process.\textsuperscript{43}

OCILLA essentially creates a series of affirmative defenses for service providers who are found liable for copyright violations under existing principles of law.\textsuperscript{44} At the same time, if service providers fail to qualify for liability limitations under OCILLA, they still can assert other defenses available under copyright law, such as the fair use defense.\textsuperscript{45}

Subsection (a) of OCILLA limits liability of service providers who perform only a passive "conduit" function in the process of transmitting, routing, or providing connections for digital communications of others. This provision resembles the "passive carrier" exemption of the Copyright Act.\textsuperscript{46} Under section 111(a)(3) of the Copyright Act, certain "passive carriers" are exempt from copyright liability as long as they do not directly or indirectly control the content of their transmissions and clientele.\textsuperscript{47} Traditionally, the passive carrier exemption has applied to communications common carriers regulated by the Federal Communications Commission. Examples of "passive" functions performed by ISPs include provision of e-mail services, newsgroups, and listserv services.

For a service provider to qualify for the "conduit" limitation, several conditions must be met: A service provider must not initiate, select or modify the content of the communication; it must not determine the recipients of the message, or maintain a copy of the message on a system or network in a manner ordinarily accessible to other people for a longer period than is reasonably necessary for the transmission.\textsuperscript{48}

Subsection (b) of OCILLA limits liability of service providers for intermediate storage of material in the process of system caching,


\textsuperscript{44} See Report on H.R. 2281 of the House Comm. on the Judiciary, Rept. 105-551, Pt. 1, 105th Cong. 2d Sess., at 26 (1998) ("[T]he exemption and limitations provided in this subsection are affirmative defenses, like the exceptions and limitations established elsewhere in title 17.").


\textsuperscript{46} See Report on H.R. 2281 of the House Comm. on Commerce, Rept. 105-551, Pt. 2, 105th Cong. 2d Sess., at 63 (1998) (stressing that the definition of a service provider for purposes of subsection (a) reflected the fact that the "functions covered by new subsection (a) are essentially conduit-only functions").

\textsuperscript{47} 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").

\textsuperscript{48} See id. § 512(a)(1-5).
under certain conditions. These conditions include: no modification of the material’s content by a service provider; regular updating of the material in accordance with accepted technical standards; no interference with the ability of technology to return certain data to the original site; and no circumvention of password mechanisms.\textsuperscript{49} In addition, a service provider shall expeditiously remove the material claimed to be infringing upon notification from a copyright owner.\textsuperscript{50}

The other two functions protected by the liability limitations—information residing on a system or network at the direction of users and information location tools—contain conditions that combine the elements of contributory and vicarious liability. Subsection (c) applies to activities such as provision of server space for users’ web pages or chat forums.\textsuperscript{51} Subsection (d) applies to the on-line navigational tools, such as search engines, hypertext links, Internet directories, and lists.\textsuperscript{52}

Both subsections establish a new knowledge standard for finding the service providers’ liability. They provide that ISPs shall not be liable for third-party copyright violations if ISPs do not have actual knowledge that the material or activity on their networks is infringing, or, in the absence of such knowledge, are not “aware of facts or circumstances from which infringing activity is apparent.”\textsuperscript{53} The statute requires that, upon obtaining such knowledge or awareness, a service provider must act expeditiously in removing the allegedly infringing material off-line. In addition, to avoid liability, a service provider shall not receive a financial benefit directly attributable to the infringing activity.

OCILLA establishes a somewhat different standard of knowledge for nonprofit educational institutions in their capacity as service providers. Subsection (e), inserted by the House and Senate conference committee, provides that when a faculty member or graduate student performs a teaching or research function, such faculty or student’s knowledge of infringing activities, generally, shall not be imputed to an institution.\textsuperscript{54} Exceptions to this rule include situations when infringing materials were officially required or recommended for a class taught at an institution for the preceding

\textsuperscript{49} See id. § 512(b)(2).
\textsuperscript{50} See id. § 512(b)(2)(E).
\textsuperscript{51} See id. § 512(c).
\textsuperscript{52} See id. § 512(d).
\textsuperscript{53} 17 U.S.C.A. § 512(e)(1)(ii) and (d)(1)(B) (West Supp. 1999).
\textsuperscript{54} See id. § 512(e).
three years; and when the institution received more than two notifications of copyright violations within three years but failed to act on them. In addition, institutions are required to implement a copyright policy and to promote compliance with it.

OCILLA sets forth the rules for the “notice and take-down” procedure, which provides that copyright owners may notify an ISP of alleged copyright violations on the ISP’s networks. Upon receipt of such notification, an ISP is expected to “take down” or disable access to the allegedly infringing material. The statute requires that effective notification shall identify allegedly infringing works, and provide information that would permit service providers to locate an infringing site and to contact a copyright owner. In addition, the notification shall include a good-faith statement from the complaining party that the material in question violates copyright law.

To balance the rights of copyright owners and users in the digital environment, the statute also provides for the process of counter notification. Under this provision, a user whose material was taken off-line at the request of a copyright owner, has the right to argue (under the penalty of perjury) that the material was removed as a result of mistake or misidentification. Upon receipt of a counter notification, a service provider shall restore access to the allegedly infringing material within 10 to 14 business days unless a copyright owner files an action seeking a restraining court order. The statute provides that a service provider is not liable for disabling access to an allegedly infringing material, even if such material ultimately proves to be non-infringing.

Under OCILLA, copyright owners may request a federal district court to issue a subpoena to a service provider for identification of an alleged infringer. In this case, a service provider is required to disclose to a copyright owner any identifying information it has in its possession. However, a service provider is not expected to contact other systems or networks for information they may have about a potential infringer.

55. See id. § 512(c)(3).
56. See id. § 512(c)(2)(i, iv).
57. See id. § 512(c)(3)(v).
58. See id. § 512(g)(3).
60. See id. § 512(g)(1).
61. See id. § 512(h).
OCILLA provides that copyright owners cannot seek monetary relief for activities of service providers that fall within the "safe harbors." However, copyright owners still can seek limited injunctive relief against a service provider.\textsuperscript{63} The statute limits injunctive relief to either blocking access to a particular on-line site, or terminating an account of a subscriber who engages in infringing activities.\textsuperscript{64} In issuing injunctions, courts shall balance the "magnitude of harm" to a copyright owner against the burden on a service provider and the technical feasibility and efficiency of an injunction. Courts also shall consider the availability of less burdensome and comparably effective means of blocking access to allegedly infringing material.\textsuperscript{65}

Finally, the statute provides that nothing in its language shall condone invasion of users' privacy by service providers in the process of monitoring for potential copyright violations.\textsuperscript{66}

C. \textit{Legislative History of OCILLA: Evolution of the Knowledge Standard}


In 1993, the Clinton administration organized a task force on the National Information Infrastructure to "fine tune" the copyright laws to the realities of the digital world. The task force was headed by then-Commissioner of Patents and Trademarks, Bruce Lehman. After numerous public hearings and consultations with 22 federal agencies, the task force came up with a 250-page report, the \textit{White Paper on Intellectual Property and the National Information Infrastructure} (the "White Paper").\textsuperscript{67} Addressing the issue of ISPs liability, the report concluded that ISPs should be treated like other distributors under copyright law and that they should be held strictly liable for copyright violations of their users.\textsuperscript{68} The report did not recommend any changes

\textsuperscript{64} See id. § 512(j)(1)(A)(iii). Courts are also allowed to order other types of injunctive relief as long as they are "the least burdensome to the service provider among the forms of relief comparably effective for that purpose [restraining infringement of copyrighted material]." \textit{Id.}
\textsuperscript{65} See id. § 512(j)(2).
\textsuperscript{66} See id. § 512(m).
\textsuperscript{68} "With respect to the allowance of uploading of material by their subscribers, they
to copyright law in regard to ISPs’ liability, claiming that existing copyright law could be applied effectively to the Internet.\textsuperscript{69}

However, when Senator Orrin Hatch and Representative Carlos Moorehead introduced bills based on the White Paper’s recommendations, ISPs and telephone companies immediately criticized them for not addressing the issue of ISP liability.\textsuperscript{70} The bills would have extended the copyright owner’s exclusive distribution right to include the right of transmission.\textsuperscript{71} ISPs argued that, under the proposed legislation, they would be exposed to strict copyright liability each time their users send infringing materials via their networks.\textsuperscript{72}

Representative Rick Boucher, a member of both the House Committee on the Judiciary and the House Committee on Commerce, argued during the hearings that Congress should provide ISPs with an incentive to invest in the development of computer networks without fear of litigation. Boucher stressed the importance of balancing the interests of copyright owners on the one hand with the ability of ISPs to thrive on the other.\textsuperscript{73}

During the House hearings, representatives of ISPs, such as America Online, Compuserve, and Prodigy, also argued that exposure to strict liability would make them monitor transmissions of subscribers in an attempt to detect infringing content.\textsuperscript{74} This could violate First Amendment rights and invade the privacy of Internet users. In addition, they argued, it would be impossible to detect all copyright violations on their networks.\textsuperscript{75}

\textsuperscript{69} According to the report, the Copyright Act of 1976 was “fundamentally adequate and effective” in addressing the new realities of the digital age. \textit{Id.} at 212.

\textsuperscript{70} H.R. 2441 and S. 1284, 104th Cong. (1995).

\textsuperscript{71} \textit{Id.} § 2(a).

\textsuperscript{72} “The main problem... is a pressure to shift the enforcement responsibility and burden away from copyright owners... and toward service providers by deeming them violators of the copyright laws essentially, simply by virtue of their presence in the digital infrastructure.” \textit{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.}, at 234 (1995) (statement of Stephen Heaton, general counsel for Compuserve, Inc.).


\textsuperscript{74} “Service providers must not be required to ‘police’ or ‘monitor’ transmissions.” \textit{NII Act of 1995: Hearing on S.1284 Before the Senate Comm. on the Judiciary, 104th Cong.}, at 38 (1996) (statement of William Burrington, American Online, Inc.).

\textsuperscript{75} The argument of ISPs was well summarized by Rep. Boucher, who said, “[w]ith transmissions literally numbering in the tens of thousands on a daily basis for a given service,
ISPs also argued that Congress should either immunize them from liability altogether, or hold them responsible for copyright violations of their users only when they have actual knowledge of these violations. This actual knowledge standard could be fulfilled by requiring a copyright owner to notify an ISP of copyright infringements taking place on its network.

Copyright owners, on the other hand, argued that exempting ISPs from strict copyright liability would encourage them to turn a blind eye to on-line violations and would discourage them from cooperating with copyright owners in detecting infringing conduct. For instance, Edward Murphy, president of the National Music Publishers' Association, said: "If an 'actual knowledge' standard advocated by others is allowed to establish a safe haven from the liability for infringements, we fear the creation of an on-line environment in which ignorance is bliss."77

Because of the sharp disagreements among copyright owners and ISPs, neither Senate nor House subcommittees took any action on the NII Copyright Protection Act. However, Congress decided to engage the disputing parties in the negotiation process under the supervision of Representative Bob Goodlatte. Goodlatte called for industry negotiations at one of the hearings saying, "[t]his subcommittee [on Courts and Intellectual Property] has a history of preferring that commercial disputes be resolved between the parties rather than through the legislative process, which may favor one interest group over another."78

2. WIPO Treaties and 105th Congress

In the period between the 104th and 105th Congresses, the United States became a party to two international copyright treaties negotiated in Geneva at the diplomatic conference held by the World Intellectual Property Organization (WIPO) in December 1996.79 The

76. "[B]ecause providers do not know the contents of the message they are transmitting or distributing on a real-time basis, they are unable to use content as a basis for limiting users' access to their systems unless they have actual knowledge that the material is indeed infringing...." 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., at 17 (1995).

77. Id. at 35.

78. See id. at 20.

79. WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty: Message
treaties did not specifically address the issues of ISP liability for copyright violations of their users.80 However, the delegates to the conference adopted a statement concerning Article 8 of the WIPO Copyright Treaty, according to which “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.”81 Thus, WIPO let individual countries establish their own national standards for ISP liability under copyright law.

During the first session of the 105th Congress, several members of Congress introduced bills to implement the WIPO treaties in the United States. Two bills, introduced by Senator John Ashcroft and Representative Howard Coble, addressed the issue of ISP copyright liability.

Senate Bill 1146, the Digital Copyright Clarification and Technology Education Act, sought to shield ISPs from direct, vicarious, and contributory liability when they performed two types of functions: Transmission82 and temporary storage of material placed by third parties on a system or network.83 The bill would have covered services such as e-mail, real-time chat,84 on-line navigational aids,85 and provision of server space for personal web pages.86 The bill would have imposed liability on ISPs for copyright violation of their users only if they received a notification from a copyright owner about illegal acts on their networks and failed to remove the allegedly infringing material. The bill was the first to introduce the standard of actual knowledge for ISPs.

However, during the hearings Senator Orrin Hatch, chairman of the Judiciary Committee, stressed that the actual knowledge requirement may not provide an incentive for ISPs to cooperate with

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80. For a full discussion of the WIPO conference and treaties, see Pamela Samuelson, The Digital Agenda of the WIPO: The US Agenda at WIPO, 37 VA. J. INT’L L. 369 (1997). Samuelson writes that there is no international consensus on the issue of whether intermediate copying in computer’s memory violates exclusive reproduction rights of copyright owners.
82. Transmission included three types of services: Transmission of electronic communications (e-mail), provision of real-time services (real-time chat), and supply of information navigational tools (on-line directories and indexes). S. 1146, 105th Cong. § 512(a) (1997).
83. Id. § 512(b).
84. See id. § 512(a)(2).
85. Id. § 512(a)(3).
86. Id. § 512(b).
content providers in taking down the pirated sites.\textsuperscript{87}

Another bill addressing the issues of ISP liability, House Bill 2180, would have added additional criteria for determining direct and vicarious liability of ISPs, including the knowledge requirement.\textsuperscript{88} The knowledge requirement proposed in the bill would have shielded an ISP from copyright liability if it "did not know, and was not aware by notice or other information indicating, that the material was infringing."\textsuperscript{89} Representative Howard Coble, sponsor of the bill, explained that this provision introduced an intermediate knowledge standard—something between the actual knowledge and a general standard of negligence.\textsuperscript{90} According to Coble, this intermediate knowledge standard was based on the concept of "red flags"—facts, which, even in the absence of notification from a copyright owner, indicate existence of copyright violations.\textsuperscript{91}

However, during the hearings held by the House Judiciary Committee, representatives of ISPs and telephone companies criticized this intermediate standard of knowledge as imposing "horrendous liability on carriers, on telephone companies and ISPs."\textsuperscript{92} Representative Boucher once again spoke in favor of the actual knowledge requirement and mandatory notice and take-down procedure.\textsuperscript{93} However, the Register of Copyrights, Marybeth Peters,

\textsuperscript{87} Senator Hatch stated:

\begin{quote}
It seems to me that the content providers make a valid point when they ask what incentives the service providers will have to continue cooperating with them to take down pirated sites. It seems realistic to assume that not all service providers are as ethical or as upright as you folks represented here today . . .
\end{quote}

\textsuperscript{88} H.R. 2180, 105th Cong. (1997).

\textsuperscript{89} Id. § 512(a)(F)(i).


\textsuperscript{91} Id.


\textsuperscript{93} Rep. Boucher stated:

\begin{quote}
If the content provider knows that an infringement is taking place, the avenue for obtaining relief should be to provide notice and a reasonable opportunity for the OSP to take that information down. . . . Under the bill as drafted, OSP would be liable for third-party infringement in instances where they have less than actual knowledge of the infringement. . . . It should be replaced by the actual knowledge standard.
\end{quote}
said that such a requirement would violate the provisions of the Berne Convention and the TRIPS agreement against imposition of formalities on copyright owners. Representative Howard Berman best summarized the gist of the dispute about the knowledge standard for ISPs. Berman suggested that a compromise be found in establishing an intermediate knowledge standard. He stated that: "The answer is somewhere between the conduit, who everybody agrees should not be liable, and . . . something less than actual knowledge." In February 1997, after several months of negotiations between ISPs and copyright owners, Representative Coble re-introduced the Online Copyright Infringement Liability Limitation Act as House Bill 3209, which replaced his earlier House Bill 2180. The new bill sought to shield ISPs from direct liability for copyright violations occurring in the process of intermediate storage and transmission over their networks. In addition, the bill provided that an ISP should not be liable for monetary damages for contributory or vicarious infringement, when (among other conditions), an ISP "does not know and is not aware of information indicating that the material is infringing." As Coble noted in his introductory remarks, the knowledge requirement in House Bill 3209 was "nearly identical" to that used in House Bill 2180.

Coble explained that "information indicating that the material is infringing" would include "a notice or any other 'red flag'—information of any kind that a reasonable person would rely upon." Such information, he wrote, would include the absence of digital watermarks or other copyright management information. Coble stressed that the bill would not impose on ISPs any affirmative duty to seek out copyright violations on-line.

In his introductory remarks, Coble wrote that he intended to

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Id. at 29 (statement of Rep. Boucher).
94. The agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a part of the General Agreement on Tariffs and Trade (GATT).
96. Id. at 187.
98. Id. § 512(a)(1).
99. Id. § 512(a)(3)(A).
101. Id.
102. See id.
codify the court's decision in RTC v. Netcom\textsuperscript{103} which established liability standards for ISPs.\textsuperscript{104} Coble also stressed that the bill intended to overturn the court's holding in Playboy Enterprises v. Frena,\textsuperscript{105} "inasmuch as that case might apply to service providers, suggesting that such acts could constitute direct infringement."\textsuperscript{106}

The debate surrounding the issue of ISP liability culminated on March 31, 1998, with an agreement between copyright owners and ISPs.\textsuperscript{107} The next day, the House incorporated this agreement into House bill 2281 (which included House bill 3209).\textsuperscript{108} A month later, the Senate adopted the same language in the companion Bill 2037, introduced by Senator Orrin Hatch.\textsuperscript{109}

The industry agreement shielded ISPs, under certain conditions, from all types of liability and monetary damages for digital network communications and system caching.\textsuperscript{110} It also defined a new standard of knowledge in regard to two other types of functions: Temporary storage of information on networks and information location tools. The new knowledge requirement provided that an ISP shall not be held liable for certain activities if it "does not have actual knowledge that the material or activity is infringing or, in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent."\textsuperscript{111} According to the agreement, ISPs that become aware of such facts or circumstances, have an obligation to take down allegedly infringing material—otherwise, they lose protection of the "safe harbors."\textsuperscript{112} Both the House and Senate accepted this standard of knowledge and awareness without modifications, and it became effective in October 1998, when President Clinton signed into law the Digital Millennium Copyright

\begin{footnotes}
\footnotetext{103}{907 F. Supp. 1361 (N.D. Cal. 1995).}
\footnotetext{104}{See supra note 100.}
\footnotetext{105}{839 F. Supp. 1552 (M.D. Fla. 1993).}
\footnotetext{106}{144 CONG. REC. E160 (daily ed. Feb. 12, 1998) (statement of Hon. Howard Coble). In Frena, the Florida district court held a BBS operator liable for illegal acts of his users even in the absence of knowledge on the part of the operator, who took infringing material off-line immediately after notification. See 839 F. Supp. 1552 (M.D. Fla. 1993).}
\footnotetext{107}{Industry Groups Reach Accord on Online Copyright Liability Legislation, 55 PAT., TRADEMARK & COPYRIGHT J. 557 (1998).}
\footnotetext{108}{Digital Millennium Copyright Act of 1998, H.R. 2281, 105th Cong. (1998), Tit. II.}
\footnotetext{109}{Digital Millennium Copyright Act of 1998, S. 2037, 105th Cong. (1998), Tit. II.}
\footnotetext{110}{Agreement on Digital Copyright Liability, 55 PAT., TRADEMARK & COPYRIGHT J. 564 (1998).}
\footnotetext{111}{Id. § (c), (d).}
\footnotetext{112}{Id.}
\end{footnotes}
In the House Judiciary Committee report issued in May 1998, House members explained that the new knowledge and awareness standard created a so-called "red-flag" test. The report defined a "red flag" as "information of any kind that a reasonable person would rely upon." According to the report, examples of "red flags" would include the absence of digital watermarks or other copyright management information. Members of the House Judiciary Committee stressed that the newly created knowledge requirement differed from existing law, "under which a defendant may be liable for contributory infringement if it knows or should have known that material was infringing."

Two months later, the House Committee on Commerce issued its own report on the Digital Millennium Copyright Act. The section of the report explaining the "red flag" test reiterated the key points from the report prepared by the House Judiciary Committee. The members of the House Commerce Committee defined the "red flag" test in the following way: "Whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances." In addition, it explained that the "red flag" test combined two elements—objective and subjective. The report advised that, in determining whether an ISP was aware of a "red flag," courts should look into the "subjective awareness of the service provider of the facts or circumstances in question." However, the report also stated that in deciding whether facts or circumstances constitute a "red flag," courts should apply an objective standard. Members of the House Commerce Committee did not clarify the distinction between the objective and subjective tests that courts should apply in determining whether an ISP was aware of a copyright violation.

115. See id.
116. Id.
118. Id. at 53.
119. See id.
120. Id.
121. See id.
The report prepared by the Senate Judiciary Committee in May 1998, described the “red flag” test in terms similar to those used by the House Commerce Committee. Senate members clarified that the new test did not create an affirmative obligation on part of an ISP to monitor its networks or to seek out copyright violations. However, if a provider became aware of a “red flag,” it would lose the “safe harbor” protection unless it took steps to remove infringing content off-line.

In October 1998, members of the House and Senate met in a conference committee and prepared a conference report on the Digital Millennium Act. Members of the conference committee stressed that the new liability standard for ISPs was designed to preserve “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” The only disagreement between the two houses on the limitation of liability provisions concerned the standards of liability for non-profit educational institutions in their capacity as service providers. The House version of the bill would have relieved institutions from certain types of liability when they passively transmit communications initiated by a student or a faculty member. The Senate version of the bill would have required the Register of Copyrights to consult with representatives of copyright owners and educational institutions and to submit to Congress recommendations regarding the liability of institutions for third-party copyright violations.

In the process of negotiating the bill’s provisions, the two houses agreed on a different knowledge standard for educational institutions. Members of Congress made it very difficult to sue institutions for on-line copyright violations committed by their faculty and graduate students. The bill provided that educational institutions

123. See id. at 44.
125. Id. at 72.
would be presumed to know about third-party violations only if infringing materials were a part of the required course list for the class taught at an institution for the past three years; and if the institution received more than two notifications of copyright violations and failed to act on them.129

D. Suggestions for Court Interpretation of the New Knowledge Requirement

The new definition of the knowledge standard is at best vague. The phrase, "facts and circumstances, from which copyright infringement is apparent," gives courts the discretion to decide what they consider "apparent" violations of copyright on Internet networks.

For example, when compilers of Internet directories come across a fan site with a large picture of the Star Trek starship, should they consider it an "apparent" copyright infringement and block access to the site? This violation would probably be "apparent" to Viacom and Paramount Pictures, which produce the Star Trek series. However, should an ISP be expected to know a copyright violation, when it sees it?

When the language of the statute is not plain on its face, courts often turn to the statute's legislative history to determine the purposes of its enactment and particular activities targeted by the legislation.130 The following section argues for narrow judicial construction of the new knowledge and awareness standard set by Congress for ISPs in copyright infringement suits. The key tools of statutory construction are, in the order of their importance: Language, structure, and legislative history of the statute.131 The argument follows this order by: (a) analyzing the "plain language" of the new knowledge provision; (b) comparing it to other parts of the same statute; and (c) considering the purposes with which Congress enacted the legislation.

1. New Knowledge Standard Should be Construed in Comparison With the Language Rejected or Modified by Congress

The new "knowledge and awareness" standard should be construed in comparison with other language considered and rejected by Congress in the process of drafting the statute. For example,

131. See id. at 414.
Congress did not endorse the language of House Bills 2180 and 3209 which defined the knowledge requirement as "information indicating that the material is infringing."\textsuperscript{132} During the House hearings, witnesses testified that this language is too broad and unspecified and, as a result, could expose ISPs to a "horrendous liability."\textsuperscript{133}

In addition, the enacted awareness standard falls short of the actual knowledge requirement introduced in Senate Bill 1146. The latter provided that ISPs should be required to take down certain materials only when they are notified of an alleged violation by a copyright owner.\textsuperscript{134} This proposal was rejected because copyright owners were concerned that it would encourage ISPs to turn a blind eye to copyright violations on their networks.\textsuperscript{135}

Members of the House and Senate also distinguished the new awareness standard from the knowledge standard applied previously by the courts. In cases of contributory infringement, courts applied the test of constructive knowledge: Whether a person knows or should have known about illegal activities.\textsuperscript{136} Thus, the constructive knowledge test involves the element of inference—"a process of reasoning by which a fact or proposition . . . is deduced as a logical consequence from other facts."\textsuperscript{137} In other words, the constructive knowledge standard does not necessarily require direct evidence of a copyright violation.

On the contrary, the term "apparent" used in the new statute means "manifest," "open to view," or "plain."\textsuperscript{138} Therefore, it can be argued that, unlike the test of constructive knowledge, the requirement to be aware of "apparent" copyright violations does not involve the element of logical deduction or inference by an ISP. Under the new law, to imply knowledge or awareness on the part of a

\textsuperscript{134} S. 1146, 105th Cong, Tit. I, Sec. 102, § 512(b).
\textsuperscript{135} "Removing the possibility of liability would eliminate the incentive for Internet access providers to help deter infringements. It would discourage them from working with the creative community to combat on-line piracy. We need cooperation, not immunity." Hearing on S.1146 Before the Senate Comm. on the Judiciary, 105th Cong., at 15 (statement of Cary Sherman, general counsel to Recording Industry Association of America).
\textsuperscript{137} BLACK'S LAW DICTIONARY 778 (6th ed. 1990).
\textsuperscript{138} Id. at 96.
service provider, infringement should be "plain" and "manifest" to a reasonable person.

In fact, a congressional committee provided examples of when application of the new awareness standard would be appropriate. The section-by-section analysis of the statute performed by the House Committee on the Judiciary states that copyright violations would be apparent from the use of words such as "pirate," "bootleg," or similar slang terms in the Internet addresses of certain web sites.\(^{139}\)

The analysis of the statutory language, thus, demonstrates that the new knowledge and awareness standard is less stringent than the standard of actual knowledge. However, it is more difficult to prove than the standard of constructive knowledge, applied previously by the courts. Congress intended the new knowledge standard to be applied only under very specific circumstances, where there could be no reasonable doubt as to the illegal character of the activities.

2. Structural Analysis: Congress Intended Courts to Narrowly Construe the Statutory Provisions that Impose Burdens on ISPs

When the language of the statute leaves doubts about the way a certain provision should be interpreted, courts often turn to the statute's overall structure. It can be argued that the new knowledge and awareness standard calls for narrow interpretation because Congress intended courts to interpret narrowly other provisions of the same statute. Examples of such narrow construction include the knowledge standard for nonprofit educational institutions,\(^{140}\) the concept of "direct financial benefit" attributable to infringing activities,\(^{141}\) imposition of injunctions on ISPs,\(^{142}\) and the requirement that ISPs must release to copyright owners information about their


\(^{140}\) The statutes defines the principles of copyright liability for nonprofit educational institutions in section (e). See 17 U.S.C.A. § 512(e) (West Supp. 1999).

\(^{141}\) The concept of a financial benefit directly attributable to infringing activities originates in the theory of vicarious liability. According to this theory, a person may be found responsible for illegal acts of others if he or she derives financial benefit from illegal activities and has the right and ability to control them. The new statute incorporates the element of direct financial benefit in sections (c) and (d). See id. § 512(c)(1)(B), (d)(2).

\(^{142}\) Title II of the Digital Millennium Copyright Act provides that copyright owners may seek a limited injunctive relief against ISPs. See id. § 512(j). An injunction is a court order prohibiting someone from doing certain specified acts. See BLACK'S LAW DICTIONARY 784 (6th ed. 1990).
subscribers when issued a subpoena.\(^{143}\)

During the conference proceedings, members of Congress designed a provision addressing the liability of nonprofit educational institutions, in their capacity as service providers, for copyright violations committed by their faculty and graduate students. The statute provides that an institution would be held liable for third-party violations only a) if the infringing materials were required or recommended for a course taught at a university during the preceding three years, b) if the institution during these three years has received more than two notifications of a copyright violation and failed to act on them.\(^{144}\)

This provision makes it very hard to sue a nonprofit educational institution for a copyright infringement by one of its employees. First, it takes more than two valid notifications from a copyright owner informing the institution of alleged copyright violations. Second, the course for which infringing materials were used must be taught for at least three years. Third, in the conference report Congress defined "required or recommended" materials very narrowly, as "instructional materials that have been formally and specifically identified in a list of course materials that is provided to all students enrolled in the course for credits."\(^{145}\) For example, this definition would not include materials distributed by a professor or a graduate student once an academic semester has started, or posted on a class web site without being formally included on a list of required readings.

Therefore, for an institution to become liable for third-party violations, it has to blatantly ignore the facts of copyright infringement identified at least twice, in good faith, by copyright owners.

Another concept that requires a narrow judicial construction is that of "a financial benefit directly attributable to the infringing activity."\(^{146}\) Some legal scholars interpreted the California federal district court's decision in *Fonovisa Inc. v. Cherry Auction, Inc.*\(^{147}\) as

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\(^{143}\) OCILLA provides that copyright owners can request a federal district court to issue an ISP a subpoena, requesting the release of information identifying an alleged infringer. See 17 U.S.C.A. § 512(h) (West Supp. 1999).

\(^{144}\) See id. § 512(e).


\(^{147}\) 76 F.3d 259 (9th Cir. 1996). In *Fonovisa*, the Ninth Circuit Court of Appeals held a
exposing ISPs to vicarious liability for illegal activities of their users, because they derive financial benefit from the monthly subscription fees.\textsuperscript{148} In addition, infringing activities arguably may attract new subscribers to ISPs.

Addressing these concerns, the report of the House Committee on Commerce advised courts to take a "common-sense, fact-based" approach to the requirement of direct financial benefit from infringing activities.\textsuperscript{149} The report stressed that a "direct benefit" concept would not include one-time set-up fees and flat periodic payment, or fees based on the length of a message. According to the report, courts should apply the concept of direct financial benefit only in the circumstances where, "the value of the service lies in providing access to infringing materials."

Therefore, the concept of a direct financial benefit, as explained by Congress, would apply only to pirate directories which make their revenue by providing access to unauthorized materials on-line. At the same time, the concept of direct financial benefit would not apply to an ISP that has at least some subscribers who engage in legal activities.

Another example of the statute’s provision that calls for narrow judicial construction is the disclosure of information about an alleged infringer by a service provider, who received a subpoena.\textsuperscript{151} The report of the House Commerce Committee explained that such disclosure should be interpreted as “requiring disclosure of information in the possession of the service provider, rather than obliging the service provider to conduct searches for information that is available from other systems or networks.”\textsuperscript{152} In other words, Congress instructed courts to construe the disclosure provision narrowly, without imposing additional burdens on ISPs.

The provision establishing standards for injunctions against ISPs is yet another example of the legislative intent to interpret narrowly...
some of the statute's provisions. The statute instructs courts to consider several criteria before issuing injunctions against ISPs. In particular, courts shall consider if an injunction balances the "magnitude of harm" to a copyright owner against considerations of burden on an ISP, technological feasibility, and effectiveness of injunctions and availability of other, less burdensome and effective means of preventing access to infringing materials. By imposing specific restrictions on issuance of injunctions against ISPs by courts, Congress demonstrated that injunctive relief should be used very sparingly, as the last recourse.

3. The Purpose of the New Statute is to Encourage ISPs to Invest in the Internet Development by Limiting Their Vulnerability to Copyright Litigation

One of the main purposes in limiting ISPs liability for third-party infringements was to encourage economic growth and technological development of the Internet. Members of Congress realized that ISPs should not fear creating new services and continuing to invest in the development of digital networks. For example, the House Committee on Commerce stressed in its report the importance of balancing the interests of copyright owners, Internet providers and Internet users to "foster the continued development of electronic commerce and the growth of the Internet."

Senator Hatch expressed the same idea speaking on the Senate floor before the passage of the conference report, saying "[t]he OSPs [on-line service providers] and ISPs need more certainty in this area in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet."

One of the ways to encourage activities of ISPs is to limit their exposure to strict liability under copyright law. On numerous occasions, members of the House and Senate stressed that the new statute is designed to clarify provisions of copyright law and to provide greater certainty for service providers as to their duties and rights in the digital environment.

154. See id.
157. See Conference Report: "Title II provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their
The report of the House Committee on Commerce specifically addressed the issue of potential exposure to copyright liability of information location tools including Internet directories such as Yahoo!. The report stressed that further development of navigational tools is "essential to the development of the Internet; without them [information location tools], users would not be able to find the information they need."

Members of Congress wrote that on-line catalogers should not be penalized for exercising "human judgment and editorial discretion" by being subject to copyright liability whenever they come across a site that might be infringing. According to the report, liability should not attach to a directory provider for simply seeing, during a brief cataloguing visit, several "well known photographs of a celebrity at a site devoted to that person." The report stated that ISPs cannot be expected to know whether the image is still copyrighted or in the public domain, or whether it is licensed or used under the fair use doctrine.

Members of Congress realized that if the knowledge of copyright infringements is imputed to an on-line cataloguer every time he or she comes across questionable content, ISPs would have little incentive to use man-made on-line directories or would extensively censor on-line speech. For example, the House Commerce Committee report stated: "The knowledge or awareness standard should not be applied in a manner which would create a disincentive to the development of directories which involve human intervention."

Therefore, one of the key purposes in enacting the ISP liability limitation statute was to encourage development of the on-line services by shielding them from extensive litigation.

4. By Limiting ISPs' Liability, Congress Intended to Place Primary Responsibility in Detecting Copyright Violations on Copyright Owners

Members of Congress wanted to make certain that the responsibility of fighting on-line copyright violations would be distributed fairly among copyright owners and ISPs. Many
congressional discussions stressed that service and content providers have a common interest in developing the full potential of the Internet, and thus should share responsibility for detecting copyright abuses. For example, the conference report describes the purpose of the liability provisions as preserving "incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."163

However, Congress decided that it should be the primary responsibility of copyright owners to police the net for potential copyright violations because they are in the best position to make well-informed judgments whether a certain use constitutes a copyright violation. The report of the House Commerce Committee states that ISPs cannot be expected to know whether a certain use is licensed or allowed under the fair use doctrine.164

In fact, Congress went to great lengths to make clear that only "obvious" violations would imply "awareness" on the part of an ISP. For instance, the House Judiciary Committee explained that under the new knowledge requirement, an ISP "would not qualify for the safe harbor if it turned a blind eye to 'red flags' of obvious infringement."165 Examples of "obvious" violations would include pirate directories containing links to big volumes of unauthorized materials, such as copyrighted audio and video clips.166

Congress carefully designed the statute to make sure that the key responsibility in resolving copyright disputes lies with copyright owners and Internet users. The statute provides for the notification procedure when a copyright owner lets an ISP know about potential copyright violations on its network.167 In order to be actionable, a notification must contain a copyright owner's good-faith statement that a violation occurred.

In addition, the statute provides for the procedure of a counter notification, allowing an Internet user to disagree with the copyright

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166. "Location was clearly, at the time the directory provider viewed it, a 'pirate site' of the type described below, where sound recordings, software, movies, or books were available for unauthorized downloading, public performance, or public display." H.R. REP. NO. 105-551, Pt. 2, at 57 (1998).
owner’s claims.\textsuperscript{168} Both notification and counter notification procedures were designed to make certain that the primary responsibility in resolving difficult issues of copyright law lies with the parties best suited to address them—copyright owners and alleged infringers.

The role of ISPs, on the contrary, is to educate their subscribers by implementing a copyright policy.\textsuperscript{169} Such policy would warn Internet users that if they violate copyright laws, ISPs will take down their materials.

\section*{II. CONCLUSION}

The language, structure, and purpose of the Online Copyright Infringement Liability Limitation Act indicate that Congress recognized the important role ISPs play in the development of the on-line infrastructure and tried to ensure that measures restricting their operation would be used sparingly.

In particular, courts should construe narrowly the new knowledge and awareness standard articulated in OCILLA. Otherwise, ISPs would have an incentive to restrict more on-line speech than necessary to enforce copyright law on the Internet. For example, on-line catalogers should not be expected to detect copyright violation simply by visiting web sites with the posted celebrity photos or images of famous cartoon characters. As long as there is a reasonable element of doubt whether a certain use is licensed or excused under the fair use doctrine, ISPs should not take the material down.

The legislative history of the statute shows that Congress intended the new awareness requirement to apply under very narrow, specific circumstances. For example, when web sites contain words such as “pirate” and “bootleg.” The language and structure of the statute also indicate that the primary responsibility in detecting copyright violations on-line lies with copyright owners.

\textsuperscript{168} See \textit{id.} § 512(g)(3).

\textsuperscript{169} See \textit{id.} § 512(i)(1)(A).