Indirect Liability of ISPs for Peer-to-Peer Copyright Infringement After the *Verizon* Decision

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This Comment seeks to balance the correct application of indirect copyright liability to Internet Service Providers (ISPs) in the wake of the *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.* decision.[1] First, this Comment will provide a background of contributory infringement and vicarious liability by discussing the relevant changes to the theories over time, most notably the *Sony Corp. of America v. Universal City Studios, Inc.* decision in 1984.[2] After this historical and theoretical discussion, there will be a discussion of the increased level of protection granted to ISPs for copyright infringement under the Digital Millennium Copyright Act (DMCA). The Comment will then address peer-to-peer networks and how copyright holders have not yet been able to find ISPs liable for indirect liability in situations where the direct infringers trade files over a decentralized system. Next,

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1. Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

2. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

there will be an analysis of the *Verizon* decision.[3] The conclusion will apply vicarious liability theory to ISPs to determine if the DMCA provides sufficient protection to copyright owners in peer-to-peer infringement cases.

I. COPYRIGHT OWNERSHIP AND ENFORCEMENT

Copyright ownership grants the owner a "bundle of rights" rather than an absolute right of ownership.[4] U.S. law tends to favor the copyright owners in protecting their rights.[5] Furthermore, the Copyright Act grants "copyright owners . . . [the] exclusive right . . . to reproduce, . . . [create] derivative works, distribut[e], . . . publicly display, and publicly perform" their work.[6] Those who violate these rights are direct infringers, while those who contribute to direct infringement can be found liable of contributory or vicarious liability.[7] In the Internet world, "contributory liability will attach if a party knows, or reasonably should know, of infringing activities occurring on the party's website, and the party materially contributes to the infringement."[8] A party will be found vicariously liable if that "party has the right and ability to control the infringing activities."[9]

The Digital Millennium Copyright Act (DMCA) was passed in order to provide ISPs with safe harbor from vicarious copyright liability. In recent attempts to combat online copyright infringement, the Recording Industry Association of America (RIAA) has initiated lawsuits against the direct infringers (the individuals illegally sharing music over the Internet). On January 21, 2003, the RIAA "announced a new round of lawsuits against 532 individuals who allegedly distributed copyrighted music on peer-to-peer networks."[10] This action by the RIAA is the result of a United States Court of Appeals for the District of Columbia Circuit decision which denied the RIAA's subpoena of Verizon, an ISP, to

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3. 351 F.3d 1229 (D.C. Cir. 2003).

4. *See* Kevin Michael Lemley, *Protecting Consumers from Themselves, Alleviating the Market Inequalities Created by Online Copyright Infringement in the Entertainment Industry*, 13 ALB. L.J. SCI. & TECH. 613, 614 (2003) (citing 17 U.S.C. § 106 (2000)).

5. *See id.* at 615.

6. *See id.* (citing 17 U.S.C. § 106).

7. *See id.* (citing 17 U.S.C. § 501; Howard P. Goldberg, *A Proposal or an International Licensing Body to Combat File Sharing and Digital Copyright Infringement*, 8 B.U. J. SCI. & TECH. L. 272, 282 (2002)).

8. *Id.* (citing Goldberg, *supra* note 7, at 282).

9. *Id.*

10. *RIAA Files New Round of Lawsuits Against Alleged Copyright Infringers*, 67 BNA PAT., TRADEMARK & COPYRIGHT J. 242, 242 (2004).

provide the RIAA with the names of the direct infringers.[11] A survey following the lawsuits brought by the RIAA indicates that "[t]he percentage of Americans downloading music files over the Internet has dropped by half since the recording industry began filing lawsuits against those suspected of copyright infringement."[12] Although this survey illustrates that the RIAA's lawsuits are effective in reducing peer-to-peer copyright infringement, this Comment aims to analyze vicarious liability theory in the wake of the DMCA and its application to ISPs after the *Verizon* decision.

II. CONTRIBUTORY INFRINGEMENT AND VICARIOUS LIABILITY

Although the Copyright Act does not explicitly recognize indirect liability, courts have found third parties liable for copyright infringement under the theories of contributory infringement and vicarious liability.[13] Contributory infringement will be found "where one party knowingly induces, causes, or otherwise materially contributes to the infringing conduct of another."[14] The adverb "knowingly" does not simply mean "awareness."[15] To establish knowledge in this context, the copyright holder must show that the third party could prevent or discourage the direct infringer.[16]

Contributory liability for copyright infringement is an attractive solution for copyright holders because there are substantial enforcement savings if the copyright owner is allowed to enforce his right against one third party rather than the individual direct infringers.[17] Furthermore, in some cases, it might be possible for the third party infringer to redesign its product so that it would either eliminate or reduce the level of infringement without significantly injuring the lawful use of the product.[18] An example of such a redesign is seen in the Tivo, which originally had a button that would skip all the commercials of a recorded show. This feature was later replaced with a fast forward button, so that users had to at least watch or time the commercials while fast-

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11. *See id.*
12. *Survey Reveals Dramatic Decrease in Music File Sharing After Lawsuits*, 67 BNA PAT., TRADEMARK & COPYRIGHT J. 208, 208 (2004).
13. *See* Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 396 (2003).
14. *Id.*
15. *See id.*
16. *See id.*
17. *See id.* at 397.
18. *See id.* at 398.

forwarding. In general, contributory liability is considered a more attractive solution than indirect liability:

> (a) the greater the harm from direct copyright infringement; (b) the less the benefit from lawful use of the indirect infringer's product; (c) the lower the costs of modifying the product in ways that cut down infringing activities without substantially interfering with legal ones; and (d) the greater the extent to which indirect liability reduces the costs of copyright enforcement as compared to a system that allows only direct liability.[19]

"Vicarious liability applies" when "one party . . . has control over" the direct infringer and "derives [some] direct financial benefit[s] from the infring[er's] . . . activities."[20] This often occurs in an employment setting.[21] One rationale behind finding liability is that the employer should use caution in hiring, supervising, controlling, and monitoring an employee that could infringe the rights of a copyright holder.[22] Another reason for placing the liability on the employer is that it is more cost efficient for the copyright holder to sue one employer rather than suing numerous employees.[23] Employers have been able to avoid vicarious liability by purchasing blanket licenses from performance rights societies such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music International (BMI).[24]

III. THE HISTORY OF CONTRIBUTORY INFRINGEMENT AND VICARIOUS LIABILITY

Contributory infringement and vicarious liability doctrine have greatly evolved in the last twenty years from both court decisions and Congressional actions.[25] The most significant influence was the 1984 Supreme Court decision in *Sony*.[26] In that case, the plaintiffs, who created television programs, brought an action against videocassette manufacturers claiming that videocassette recorders (VCRs) allowed television viewers to make unlawful copies of copyrighted television broadcasts.[27] Viewers could record the programs and skip the commercials, which greatly diminished the value of the copyrighted

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19. *Id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.* at 399.
25. *See id.* at 400.
26. *See id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).
27. *See id.*

material.[28] Since suing all or many of the viewers directly would have been impossible, the copyright holders sued the VCR manufacturers on the grounds of contributory infringement and vicarious liability.[29]

The Supreme Court rejected the plaintiff's vicarious liability claim on the basis that the VCR manufacturer did not have "meaningful control over their infringing customers."[30] The Court also dismissed the contributory infringement claim on the basis that the VCR is "capable of substantial noninfringing uses."[31]

The *Sony* case has received great scrutiny. In regard to the vicarious liability issue, "the Court took a needlessly restrictive view of what it means for a manufacturer to 'control' its purchasers."[32] The Court did not consider whether changes to the VCR, such as an imprecise fast forward button, which would make it more difficult to skip over the commercials, would have diminished copyright infringement while still maintaining the original legitimate uses of the VCR.[33]

In regard to the contributory infringement claim, the Court should have used a balancing test: "[f]ull analysis requires that the benefits associated with legitimate use be weighed against the harms associated with illegitimate use."[34] Rather, the Court indicated that as long as the VCR had some amount of legitimate uses, other infringing uses would not be sufficient to prove contributory infringement.[35]

Although there are strong criticisms of the Court's decision, it does remain consistent with the policy not to impose indirect liability on a new and still-developing technology. In recognizing this policy, the Court wrote that copyright law must "strike a balance between a copyright holder's legitimate demand for effective . . . protection . . . and the rights of others freely to engage in substantially unrelated areas of commerce."[36] This decision set the stage for the DMCA, which immunizes a broad class of Internet access providers from indirect liability.

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28. *See id.*
29. *See id.*
30. *Id.*
31. *Id.* (citing *Sony*, 464 U.S. at 442).
32. *Id.*
33. *See id.*
34. *Id.* at 400-01.
35. *See id.* at 401.
36. *Sony*, 464 U.S. at 442.

IV. INCREASED PROTECTION FOR ISPS UNDER THE DMCA

An ISP "is a company or corporation that provides users with access to connect to the Internet."[37] In essence, "ISPs serve as gatekeepers" to the Internet,[38] which is expanding so rapidly that "it is estimated that international commerce on the Internet may surpass three trillion dollars by 2006."[39]

In light of this growth, courts have attempted to apply traditional copyright law to the Internet world. However, the Internet makes it difficult to determine if a copyright has been infringed, when the infringement occurred, and who is responsible for the infringement.[40] Since Internet users are relatively anonymous, "detecting individual infringers" is too costly to be practical.[41] Copyright law, which developed for print media, is ill-equipped at tackling the issues confronting digital media.[42] As a result, courts have had difficulties in determining the proper balance between the rights of copyright owners and the limitations of copyright protection.[43]

To set a standard for copyright protection on the Internet, the DMCA was passed in 1998. "The DMCA, a compromise between [ISPs] . . . and copyright owners" promotes the technological advances of ISPs, while at the same time providing "increased protection for copyrighted material transmitted over the Internet."[44] The DMCA provides that ISPs can still be liable for direct infringement; however, the act also provides safe harbors which hold that the ISPs cannot be found liable for contributory or vicarious liability.[45] These safe harbors apply in four circumstances:

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37. Lemley, *supra* note 4, at 619 (citing V.K. Unni, *Internet Service Provider's Liability for Copyright Infringement—How to Clear the Misty Indian Perspective*, 8 RICH. J.L. & TECH. 13, ¶ 5 (2001), *at* http://law.richmond.edu/jolt/v8i2/article1.html).

38. *See id.* (citing Laura Rybka, ALS Scan, Inc. v. Remarq Communities, Inc.*: Notice and ISPs' Liability for Third Party Copyright Infringement*, 11 DEPAUL-LCA J. ART & ENT. L. 479, 483 (2001)).

39. *See id.* (citing Unni, *supra* note 37, ¶ 6).

40. *See id.* (citing Simon Fitzpatrick, *Copyright Imbalance: U.S. and Australian Responses to the WIPO Digital Copyright Treaty*, 22 EUR. INTELL. PROP. REV. 214, 220 (2002)).

41. *See id.* (citing Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 910 (2002)).

42. *See id.* at 619-20 (citing Fitzpatrick, *supra* note 40, at 217).

43. *See id.* at 620 (citing Fitzpatrick, *supra* note 40, at 217).

44. *See id.* (citing David Balaban, Note, *The Battle of the Music Industry: The Distribution of Audio and Video Works via the Internet, Music and More*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. J.L. 235, 258-59 (2001)).

45. *See id.* (citing Joseph A. Sifferd, *The Peer-to-Peer Revolution: A Post-Napster Analysis of the Rapidly Developing File-Sharing Technology*, 4 VAND. J. ENT. L. & PRAC. 92, 97 (2002)).

1. The ISP acts merely as a conduit, unknowingly transferring infringing materials;
2. The ISP temporarily stores infringing materials for the users' convenience;
3. The ISP acts as storage for infringing material, except when "the ISP knows or should know, or financially benefits from, the infringing material;" or
4. The ISP uses information location tools (ILTs), such as hyperlinks, to find infringing materials unless the ISP has actual knowledge or received notice of the infringing materials.[46]

These safe harbor provisions make it difficult to find an ISP liable for contributory or vicarious copyright infringement. The DMCA acts as a limitation on holding ISPs liable for the enormous amount of data which travels over their networks.[47] The theory behind these safe harbors is that the ISPs are simply "middlemen" and therefore do not satisfy the requirements of indirect liability.[48] "While ISPs may provide infringers with access to infringe copyrighted works, the goal of an ISP is not to infringe copyrighted works."[49]

Policy indicates that ISPs supply Internet access but do not seek to infringe the rights of copyright owners.[50] In this sense, "the DMCA does not attempt to pit copyright owners in an ongoing battle against ISPs. Rather, copyright owners work with ISPs to identify infringers and to remove material that is infringing copyrighted works."[51] This places the burden on the copyright owner to identify the materials that are being improperly appropriated and then to notify the ISP of this infringement.[52] This burden placed on the owner by the DMCA is consistent with past copyright law.[53] In the next Part, this Comment will address the difficulty copyright holders have had in satisfying the burden of proving that peer-to-peer networks have been liable for contributory infringement upon the rights of the copyright holders in the era following the passage of the DMCA.

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46. *See id.* (citing Sifferd, *supra* note 45, at 97).

47. John T. Soma & Natalie A. Norman, *International Take-Down Policy: A Proposal for the WTO and WIPO to Establish International Copyright Procedural Guidelines for Internet Service Providers*, 22 HASTINGS COMM. & ENT. J.L. 391, 415 (2000).

48. *See* Lemley, *supra* note 4, at 621.

49. *Id.*

50. *See id.*

51. *Id.* at 621-22 (citing Susan Hong, *The Digital Millennium Copyright Act and Protecting Individual Creative Rights: A Proposal for Online Copyright Arbitration*, 2 CARDOZO J. CONFLICT RESOL. 110, 111-12 (2002), *at* http://www.cardozojcr.com/vol2no1/notes03.html).

52. *See id.* at 622 (citing Hong, *supra* note 51, at 113).

53. *See id.*

V. PEER-TO-PEER

As noted in the *Verizon* case, which will be analyzed below, "P2P software was 'not even a glimmer in anyone's eye when the DMCA was enacted.'"[54] However, the DMCA is being applied in peer-to-peer infringement suits. This Part will discuss peer-to-peer software in order to determine whether vicarious liability should be applied in these infringement cases and whether the DMCA provides sufficient protection for these copyright owners.

Recent policy favors reduced liability for ISPs to make technological advances of their services.[55] However, public policy also favors increased copyright protection against "technologies designed primarily for the purpose of copyright infringement, such as peer-to-peer file sharing systems."[56] To realize these policy goals, contributory liability theory must be expanded against these file sharing technologies.[57]

Now that copyrighted works can be digitized and distributed around the world via the Internet, peer-to-peer networks, or file sharing systems, a "revolutionary" means for copyright infringement presently exists.[58] Computer owners can simply convert hard copies of music (such as CDs) to digital formats which are called MP3s.[59] These MP3s can be uploaded to the Internet, where it can be downloaded by millions of users.[60] This essentially "replaces millions of sales with just one purchase—the initial CD."[61]

In most cases, to distribute the MP3 to others over the Internet, the Internet user must upload the content to a server.[62] When the server stores the MP3 file, Internet users can browse and download the file to their own computer.[63] Under these circumstances, the safe harbor provisions of the DMCA do not apply to the party storing the file on their server and contributory liability will be found. However, peer-to-peer systems permit "one Internet user to directly access another

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54. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1238 (D.C. Cir. 2003) (quoting *In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 38 (D.D.C. 2003)).

55. *See* Hong, *supra* note 51, at 111-12.

56. Lemley, *supra* note 4, at 623.

57. *See id.*

58. *See id.* (citing Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 LOY. L.A. ENT. L. REV. 37, 38 (2001)).

59. *See id.* (citing Balaban, supra note 44, at 244).

60. *See id.* (citing Balaban, *supra* note 44, at 244).

61. *Id.* at 624.

62. *See id.* (citing Tanaka, *supra* note 58, at 40).

63. *See id.* (citing Tanaka, *supra* note 58, at 40-41 & n.32).

individual user's hard drive and download any files that are offered for sharing without relying on a particular central server for storage."[64] In a peer-to-peer network, each individual computer has the capability to both distribute and receive MP3 files.[65]

The most memorable peer-to-peer decision in recent years is *A&M Records, Inc. v. Napster, Inc.*[66] Napster created a peer-to-peer network which would receive requests from individual users and then link them with another computer which was holding the MP3 file that was requested.[67] Once the two computers were linked, the file would be downloaded to the requesting computer.[68] The peer-to-peer system designed by Napster allowed a user to: "(1) make MP3 music files stored on individual computer hard drives available for copying by other Napster users; (2) search for MP3 music files stored on other users' computers; and (3) transfer exact copies of the contents . . . from one computer to another via the Internet."[69]

Copyright holders had a difficult time finding Napster liable for indirect infringement because the copyrighted work was never on the Napster server.[70] The direct copyright infringement occurred on the individual file sharing level and not by Napster because the file sharing did not rely on a central server.[71] Napster provided the individual users the means to make digital duplicates of the MP3s, which are copyrighted material. However, Napster never actually infringed the copyrighted work because it never copied or distributed the copyrighted material.[72]

The United States Court of Appeals for the Ninth Circuit found that Napster was both a contributory and vicarious copyright infringer.[73] Napster was found to be liable for contributory infringement because it had knowledge that users were directly infringing the rights of the copyright holders.[74] The court found that Napster created the "site and

64. *Id.* (citing Tanaka, *supra* note 58, at 41).
65. *See id.* (citing Tanaka, *supra* note 58, at 41).
66. 239 F.3d 1004 (9th Cir. 2001).
67. *See* Sifferd, *supra* note 45, at 93.
68. *See* Lemley, *supra* note 4, at 624 (citing Sifferd, *supra* note 45, at 93).
69. *Id.* at 624-25 (quoting Tanaka, *supra* note 58, at 42).
70. *See id.* (citing Tanaka, *supra* note 58, at 42).
71. *See id.* (citing Tanaka, *supra* note 58, at 38).
72. *See id.* (citing Alfred C. Yen, *A Preliminary Economic Analysis of Napster: Internet Technology, Copyright Liability, and the Possibility of Coasean Bargaining*, 26 U. DAYTON L. REV. 247, 256 (2001)).
73. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001).
74. *See id.* at 1020.

facility" for direct infringement and therefore Napster materially contributed to the direct infringement by the individual users.[75]

Napster was also held to be vicariously liable for infringement because they failed to remove infringing material from its server and terminate the infringing actions of the user after it was notified of the infringing activity.[76] The court issued an injunction against Napster "only to the extent that Napster . . . receives reasonable knowledge of specific infringing files . . .; knows or should know that such files are available on the Napster system; and . . . fails to act to prevent viral distribution of the works."[77] Through its decision, the court recognized that copyright infringement over the Internet was becoming a growing problem and that if it continued, the economic incentives to create copyrighted material would be severely diminished.[78]

While copyright holders have had success finding systems with a central server indirectly liable for copyright infringement, they have had a very difficult time in finding decentralized peer-to-peer networks liable for any form of indirect liability because these networks do not require the use of a central server. While Napster was eventually shut down, decentralized peer-to-peer networks are not affected by the decision.[79] "Decentralized P2Ps only require two users to contact one another using software programs readily available for free on the Internet."[80] The difference between a decentralized peer-to-peer networks (such as Gnutella, LimeWire or Morpheus) and Napster is that Napster had a central server.[81] Napster's central server was not storing infringing material but its presence differentiates Napster from the decentralized peer-to-peer networks. "Without a central server, decentralized P2Ps have absolutely no means to filter or block infringing activities from users."[82]

It will be extremely difficult to hold these decentralized peer-to-peer networks liable for contributory infringement under the Napster decision because "there is usually no way of 'knowing' when infringement occurs . . . and . . . there are doubts as to whether merely

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75. *See id.* at 1022 (citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996)).
76. *See* Lemley, *supra* note 4, at 626 (citing Sifferd, *supra* note 45, at 101).
77. *See id.* (citing Tanaka, *supra* note 58, at 47).
78. *See id.* (citing Yen, *supra* note 72, at 253).
79. *See id.* (citing Tanaka, *supra* note 58, at 57).
80. *Id.* (citing Sifferd, *supra* note 45, at 105).
81. *See id.* (citing Sifferd, *supra* note 45, at 104-05).
82. *See id.* (citing Sifferd, *supra* note 45, at 104).

developing and providing software amounts to 'material contribution.'"[83] Vicarious liability will most likely "not apply [to] . . . decentralized [peer-to-peer] networks" because they do "not charge any fees" and cannot "police" the "activities" of their users.[84] "[E]ven if decentralized peer-to-peer networks are found liable," they will most likely be able to establish the defense created in *Sony* that "even if they are aware of infringing use, they have no means to prevent" it.[85] In the next Part, this Comment will look at the *Verizon* case as analyzed under the DMCA and then discuss if the outcome would be different under an indirect liability theory.

VI. *VERIZON*

The controversy in *Verizon* hinges on the requirements under the DMCA that an ISP provides information about file sharing infringers who use the ISP for Internet access. The peer-to-peer file sharers in this case were decentralized, which allowed the users to search directly for the MP3 file they wished to download without the use of a Web site.[86] At the time of this case, copyright owners had not been able to stop decentralized programs under any form of copyright liability.[87] As a result, the RIAA initiated suits against the direct individual infringers of the peer-to-peer programs.[88] However, to apprehend the direct infringers, the RIAA first had to identify those who are illegally sharing and trading files.[89] While the RIAA can obtain the screen name of a user by their Internet Protocol (IP) address, only the ISP can associate the IP address with the name and address of the user, who is a customer of the ISP.[90]

To obtain this information from the ISP, the RIAA used the subpoena provision in § 512 of the DMCA.[91] The RIAA has filed lawsuits against hundreds of individual direct infringers for illegally downloading in some cases thousands of MP3 files of copyrighted

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83. *Id.* (citing Tanaka, *supra* note 58, at 57).

84. *Id.*

85. *See id.* at 628-29 (citing Tanaka, *supra* note 58, at 57; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984)).

86. 351 F.3d 1229, 1232 (D.C. Cir. 2003).

87. *See id.*; Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

88. *See Verizon*, 351 F.3d at 1232.

89. *See id.*

90. *See id.*

91. *See id.*; 17 U.S.C. § 512(h)(1) (2000) (stating in relevant part that a copyright owner may "request the clerk of any United States district court to issue a subpoena to [an ISP] for identification of an alleged infringer").

recordings.[92] When the RIAA subpoenaed Verizon, Verizon refused to comply and challenged the validity of the subpoena.[93]

There are three items a copyright owner must file along with its request for a subpoena.

> (1) a "notification of claimed infringement" identifying the copyrighted work(s) claimed to have been infringed . . . and providing information reasonably sufficient for the ISP to locate the material . . .; (2) the proposed subpoena directed to the ISP; and (3) a sworn declaration that the purpose of the subpoena is "to obtain the identity of an alleged infringer."[94]

If the copyright holder satisfies "all three items, . . . the ISP [must] . . . disclose to the copyright owner the identity of the alleged infringer."[95]

The RIAA served Verizon on July 24, 2002, on the "'good faith belief' [that] the file sharing activity of Verizon's subscriber constituted infringement of its members' copyrights; and asked for Verizon's 'immediate assistance in stopping this unauthorized activity.'"[96] The district court ultimately ruled in favor of the RIAA, rejecting Verizon's argument that section 512(h) did not apply to ISPs acting merely as a conduit for individual users.[97] Verizon appealed the decision of a subsequent subpoena and contended on appeal that the orders of the district court were based on errors of law regarding section 512(h).[98] The issue in the case of the combined subpoenas was "whether section 512(h) applies to an ISP acting only as a conduit for data transferred between two internet users, such as persons sending and receiving e-mail or, as in this case, sharing P2P files."[99] The United States Court of Appeals for the District of Columbia Circuit agreed with Verizon and held that "a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity."[100]

Verizon started its argument by attacking the first of the three required items that the notification failed.[101] Verizon argued that the subpoenas failed to meet the requirements of section 512(c)(3)(A)(iii) because Verizon did not store any of the infringing material on its server

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92. *See Verizon*, 351 F.3d at 1232.
93. *See id.*
94. *Id.* (quoting 17 U.S.C. § 512(c)(3)(A), (h)(2)(A)-(C)).
95. *Id.*; *see* 17 U.S.C. § 512(h)(3), (5).
96. *Verizon*, 351 F.3d at 1232-33. The RIAA specifically asked that Verizon remove or disable access to the infringing MP3 files. *Id.*
97. *See id.* at 1233.
98. *See id.*
99. *Id.*
100. *Id.*
101. *See id.* at 1234-35.

and therefore could not identify any of the material to be removed.[102] The notification requirement under section 512(c)(3)(A) requires that the notification identify the copyrighted work, identify the material that is infringing the copyrighted work, provide information reasonably sufficient to permit the service provider to contact the complaining party, and ensure the notice is in good faith and accurate.[103]

Verizon asserted that the notice provided was for infringing material obtained via a decentralized peer-to-peer file sharing program.[104] Since the material was located on the individuals' computers, there was no information that the RIAA could have provided which would have enabled the ISP to "remove" or "disable access to," since Verizon did not store the material on its servers.[105]

The RIAA countered Verizon's argument by correctly stating that the ISP can disable the user's access to infringing material by stopping the individual's Internet access.[106] The court rejected this argument by looking towards the DMCA.[107] The court stated:

> Congress considered disabling an individual's access to infringing material and disability access to the internet to be different remedies for the protection of copyright owners, the former blocking access to the infringing material on the offender's computer and the latter more broadly blocking the offender's access to the internet (at least via his chosen ISP).[108]

According to the court, these statutory remedies establish a difference that the remedy of ending service is different from disabling access.[109]

The RIAA countered this statutory reading by illustrating that it is impossible for a copyright owner to satisfy the section 512(c)(3)(A)(iii) requirement, because it cannot identify material to be removed by the ISP.[110] The RIAA pointed out that notification under section 512(c)(3)(A) should be sufficient if it "substantially" includes the required information and that it satisfied that standard because the ISP can identify who the infringer is based upon the information it provided.[111]

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102. *See id.* at 1235.
103. *See* 17 U.S.C. § 512(c)(3)(A) (2000).
104. *See Verizon*, 351 F.3d at 1235.
105. *Id.*
106. *See id.*
107. *See id.*
108. *Id. Compare* 17 U.S.C. § 512(j)(1)(A)(i), which authorizes an injunction restraining the ISP "from providing access to infringing material," *with id.* § 512(j)(1)(A)(ii), which authorizes an injunction restraining the ISP "from providing access to a subscriber . . . who is engaging in infringing activity . . . by terminating the accounts of the subscriber."
109. *See Verizon*, 351 F.3d at 1235.
110. *See id.* at 1235-36.
111. *See id.* at 1236.

The court disagreed and held that the "RIAA's notification identifies absolutely no material Verizon could remove or access to which it could disable, which indicates to us that section 512(c)(3)(A) concerns means of infringement other than P2P file sharing."[112] It is the failure of this notice provision which makes the DMCA ill suited to determine the outcome of these peer-to-peer cases.

VII. ANALYSIS OF *VERIZON*

The court's decision under the rule of the DMCA is correct. However, the question remains whether the case should have been analyzed under an indirect liability theory instead of the DMCA since the DMCA was enacted before peer-to-peer networks and decentralized networks were understood.

The DMCA should not be the guiding statute in determining whether or not the ISP should furnish the personal information of individuals who the RIAA knows to be substantial copyright infringers. However, if the DMCA does not govern, then its subpoena provision will not control. Therefore, the RIAA will have to figure out another way to get this information from the ISP. As it now stands, the DMCA does not assist the RIAA indirect liability suits because it is impossible for the RIAA to satisfy the notification requirement. The DMCA imposes too strict a standard in this instance. If the RIAA can provide not only the IP address but also evidence that the user has illegally infringed upon the copyrights of hundreds, if not thousands of songs, then the ISP should be deemed to have received sufficient notice and the individual user's Internet access should be disconnected. This is not the case under the DMCA.

Another problem with the DMCA is the remedy provision. Congress considered that disabling access to infringing material was different from disabling access to the Internet, which all would agree is an easily recognizable difference.[113] However, the court in *Verizon* said that it could not compel Verizon to disable access to the individual infringer's Internet access because the infringing material was on the individual's server.[114] While copyright policy is furthered by not holding the ISP liable for these violations under the DMCA's safe harbor provision, copyright policy is upset by allowing the infringer to continue to infringe copyrights simply because he stores the material on his own

112. *Id.*
113. *See id.* at 1235.
114. *Id.* at 1236-37.

server. If there is sufficient notice that an individual is infringing, the ISP must disconnect the user's access even if it is not found liable.

VIII. INDIRECT LIABILITY IN THE CONTEXT OF *VERIZON*

In the wake of the DMCA, the indirect liability standard must be reconsidered. If we assume that "there is sufficient social benefit from copyright protection in terms of increased incentives for authors to create and disseminate their work," then legal rules should pressure ISPs to do their part in enforcing the law.[115] It is true that an ISP would have an impossibly expensive time distinguishing legal from illegal copyright activity because they could not tell the difference from an illegal transmission of Aerosmith from a legal transmission of an uncopyrighted classical music piece.[116] However, it is alleged that ninety-seven percent of transactions on peer-to-peer networks are illegal.[117] Therefore, it can be argued that it would be cost efficient to impose liability on these networks.[118] "After all, instead of trying in vain to distinguish lawful from unlawful activity, a firm in this situation would simply increase its price and use that extra revenue to pay any ultimate damages claims."[119] In essence, this would create a type of levy system which is an alternative to indirect liability.[120]

In 1992, Congress passed the Audio Home Recording Act, which received little attention due to the short lifespan of the technology.[121] However, one provision of the Act "imposed a modest royalty on the sale of blank tapes and new digital audio equipment, the proceeds of which were to be shared among copyright holders as an offset against their anticipated piracy losses."[122] Applying this levy system to ISPs would be just one way to compensate the injured copyright holders for the role the ISP plays in infringing the copyright. The levy would only be appropriate if the price increase reduced "the harm caused by illegal behavior more than it would interfere with the social benefits that derive from legal interactions."[123]

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115. Lichtman & Landes, *supra* note 13, at 404.

116. *See id.* at 404-05.

117. *See* Katie Dean, *Techies Blast Induce Act*, July 23, 2004, *at* http://www.wired.com/news/politics/0,1283,64315,00.html.

118. Lichtman & Landes, *supra* note 13, at 405.

119. *Id.*

120. *See id.*

121. *See id.* at 401 (citing Pub. L. No. 102-253, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-1010 (2003))).

122. *Id.*

123. *Id.* at 406.

It is important to recognize that indirect liability is just one of several means by which society can protect those who have the rights of their original work infringed.[124] Ultimately, society should create several means to create incentive for authors while imposing the least social cost.[125] When the interference with legitimate products is too great, society benefits from having alternatives to enforce a copyright holder's rights.[126] "Conversely, . . . sometimes other mechanisms are too costly and indirect liability should therefore be the only option."[127]

In the case of the ISP, the truth falls somewhere in the middle. The ISP should not be found indirectly liable because monitoring the activity over the ISP would be impossible, and most Internet use on the ISP is legitimate or legal. To this end, the DMCA correctly grants the ISP safe harbor for liability. However, the DMCA should make it easier for the copyright holders to disable the access to the Internet of infringers. As it stands now, the DMCA makes the notification requirement too strict to prove successfully that an individual user should lose his Internet rights. The ISP has many of the same interests, and it benefits economically from these decentralized peer-to-peer networks. Therefore, it is in its best interest to comply with the copyright holders when sufficient notice is supplied that an infringer is illegally trading MP3 files over its network. If ISPs fail to recognize that it is the content of the copyright holders that brings many people to use the Internet, they may diminish their own gains by decreasing the incentive to create and distribute copyrighted work.

IX. RECENT DEVELOPMENTS SINCE THE *VERIZON* DECISION: THE INDUCE ACT

In response to the *Verizon* decision and a copyright owner's inability to apply vicarious and contributory negligence theories to peer-to-peer networks, Senators Orrin Hatch and Patrick Leahy have introduced a controversial antipiracy bill known as the Induce Act.[128] In its original form, the bill proposed to "slap technology companies for making any device that could 'induce' or encourage buyers to make illegal copies of songs, movies or computer programs."[129] It is not surprising that the bill

124. *See id.* at 407.
125. *See id.*
126. *See id.*
127. *Id.* at 408.
128. *See* Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004).
129. Dean, *supra* note 117.

has strong support from Hollywood, and the RIAA is opposed by technology companies which claim that the bill would kill innovation.

Due to widespread criticism of the original draft of the Induce Act, alternative language was used to amend the proposal.[130] The new proposal to amend 17 U.S.C. § 501 states in relevant part:

> Whoever intentionally induces another to infringe any of the [copyright owner's rights] . . . shall be liable as an infringer. For the purposes of this subsection, 'induces' means to commit one of more affirmative, overt acts that are reasonably expected to cause or persuade another person or persons to commit any infringement.[131]

The next two sections of the amendment present what would constitute an overt act.

The present version of the amendment is significantly different from the original version in that it codifies the landmark decision in the *Sony* case.[132] Originally the amendment aimed to loosen the requirements of the *Sony* case because courts struggled in applying its holding, that home recordings were legal as long as they were used primarily for legal or noninfringing purposes, to peer-to-peer cases.[133] However, groups opposed to the Induce Act wanted to codify the *Sony* doctrine into law because the decision had become the "'magna carta' for inventors and venture capitalists who have built a thriving technology industry."[134] It appears from the changes to the Induce Act that in order for the bill to pass, the technology industry and those opposed to the original draft had to be appeased.

Section 6 of the Induce Act explicitly states that nothing in the Act shall "enlarge or diminish the doctrines of vicarious and contributory liability for copyright infringement."[135] It is unclear then what effect this Act will have if passed. If the Act codifies the *Sony* decision and leaves contributory and vicarious liability theory as is, then the Act is not addressing the two main theories which could punish ISPs for peer-to-

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130. *See* Xeni Jardin, *Induce Act Draws Support, Venom*, Aug. 26, 2004, *at* http://www.wired.com/news/politics/0,1283,64723,00.html.

131. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong., § 2(g)(1)-(2) (2004).

132. *See id.* Section 2(g)(3) states:

> For the purposes of this subsection, and absent any other overt act, an "overt act" does not include: (A) distributing any dissemination technology capable of substantial noninfringing uses knowing that it can be used for infringing purposes, so long as that technology is not designed to be used for infringing purposes.

133. *See* Dean, *supra* note 117.

134. *Id.*

135. Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong., § 6.

peer violations. However, the passage of the Act may show a change in policy towards these types of infringement. One thing is for certain, the DMCA is not the correct Act to address the ongoing problem of copyright violations over peer-to-peer networks. Maybe under the Induce Act the proper balance between developing technologies and the copyright holders will be met.