

# NEWSGROUPS FLOAT INTO SAFE HARBOR, AND COPYRIGHT HOLDERS ARE SUNK

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## ABSTRACT

*Usenet newsgroups are swiftly becoming a popular vehicle for pirating digital music, movies, books, and other copyrighted works. Meanwhile, courts ignore Usenet's tremendous potential for copyright infringement. In Ellison v. Robertson, the Ninth Circuit Court of Appeals found that America Online's Usenet service might qualify for safe harbor under the Digital Millennium Copyright Act. According to the district court below, safe harbor would preclude a finding of secondary copyright infringement against America Online. However, the courts misinterpreted the safe harbor provisions. One safe harbor provision was misapplied and another was ignored altogether. This iBrief critiques the Ellison opinions and analyzes the application of the safe harbor provisions to Usenet operators.*

## INTRODUCTION

¶1 After major entertainment companies declared war against popular file-sharing networks, digital pirates were forced to explore other options.<sup>2</sup> Usenet is one of these other options.<sup>3</sup> Conceived by two Duke University graduate students in 1979,<sup>4</sup> Usenet is a distributed discussion network now containing over 100,000 newsgroups.<sup>5</sup> Each newsgroup is a topical discussion board on which

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<sup>2</sup> Michael Desmond, *Sneaky Sharing*, PC WORLD, October 2004, at 26, 26, available at <http://www.peworld.com/resource/printable/article/0.aid.117637.00.asp>.

<sup>3</sup> *Id.*

<sup>4</sup> *Usenet*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Usenet&oldid=75866987> (last visited Sept. 15, 2006).

<sup>5</sup> *Newsgroup*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Newsgroup&oldid=75742602>

users can post messages.<sup>6</sup> When a user posts a message to the news server operated by that user's internet service provider ("ISP"), the message is copied to other ISPs' servers as part of an automatic process called "peering."<sup>7</sup> Because many servers are passing messages between one another, each message eventually exists on all connected servers.<sup>8</sup>

¶2 Usenet newsgroups are swiftly gaining popularity. The volume of data stored on newsgroups doubles every eight to twelve months.<sup>9</sup> Among files existing in newsgroup posts are purportedly illegal copies of episodes of the television shows *Lost* and *Desperate Housewives*, and copies of the movies *Star Wars Episode III*, *Chronicles of Narnia*, and *King Kong*.<sup>10</sup>

¶3 In Usenet's early years, only text files could be distributed over newsgroups.<sup>11</sup> This was initially a major drawback for those wishing to share digital media. However, the text-only restriction led to innovation. There are now tools available to encode digital media into text files before posting them.<sup>12</sup> First, a user encodes a binary media file into text and posts the file on a news server. When another user downloads a file, she simply decodes the text to retrieve the original media.

¶4 In *Ellison v. Robertson*,<sup>13</sup> the Ninth Circuit found that America Online ("AOL") might be shielded from liability for secondary copyright infringement for its operation of Usenet newsgroups.<sup>14</sup> This was not the first time a court refused to find

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(last visited Sept. 15, 2006).

<sup>6</sup> *Usenet*, *supra* note 4.

<sup>7</sup> *Id.*; see generally *Peering*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Peering&oldid=74000083> (last visited Sept. 15, 2006) (defining "peering" in general and in various specific contexts).

<sup>8</sup> *Usenet*, *supra* note 4.

<sup>9</sup> Tom Mainelli, *Newsgroups Get a New Life*, PCWORLD.COM, June 19, 2002, <http://www.pcworld.com/resource/printable/article/0.aid.102081.00.asp>.

<sup>10</sup> Press Release, Motion Picture Ass'n of Am., Studios Move to Thwart Illegal File Swapping on Major Pirate Networks 2 (Feb. 23, 2006), [http://www.mpa.org/press\\_releases/2006\\_02\\_23.pdf](http://www.mpa.org/press_releases/2006_02_23.pdf).

<sup>11</sup> *Usenet*, *supra* note 4.

<sup>12</sup> *Id.*

<sup>13</sup> 357 F.3d 1072 (9th Cir. 2004).

<sup>14</sup> *Id.* at 1081-82 (holding that, while there were triable issues of fact as to whether AOL was contributorily liable for copyright infringement, AOL was not directly or vicariously liable).

infringement despite the tremendous capacity for copyright infringement in newsgroups.<sup>15</sup>

¶5 Ellison sued AOL, alleging contributory and vicarious copyright infringement for AOL's role in operating Usenet on its servers.<sup>16</sup> Although AOL did not operate the server onto which the infringing posts were originally uploaded, it automatically received the posts from other servers through peering.<sup>17</sup> As per its policy to retain posts for fourteen days, AOL stored the infringing material on its servers.<sup>18</sup> To avoid infringement liability, AOL sought safe harbor under the Digital Millennium Copyright Act ("DMCA").<sup>19</sup> The DMCA offers four safe harbors for ISPs whose role in copyright infringement is passive or automatic, and meets certain other parameters.<sup>20</sup> When a certain ISP activity falls under a safe harbor, the ISP may be held liable only for limited equitable relief and cannot be held liable for monetary relief.<sup>21</sup> AOL invoked two of these safe harbors, the "Transitory Communications Safe Harbor"<sup>22</sup> and the "Network Storage Safe Harbor,"<sup>23</sup> but did not assert the remaining two safe harbors.<sup>24</sup>

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<sup>15</sup> See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1381 (N.D. Cal. 1995) (holding that the Usenet operator in question was not liable for direct or vicarious copyright infringement for its automatic copying of infringing material posted by Usenet users, and the Usenet operator could only be contributorily liable if it ignored complaint letters from the copyright-holder).

<sup>16</sup> *Ellison*, 357 F.3d at 1074.

<sup>17</sup> *Id.* at 1075.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1074.

<sup>20</sup> *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 656-57 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003).

<sup>21</sup> 17 U.S.C. § 512(a)-(d), (j) (2000).

<sup>22</sup> *Id.* § 512(a). The given title, "Transitory Communications Safe Harbor," is not an official title of the safe harbor but is merely used by the author for convenience throughout this iBrief.

<sup>23</sup> *Id.* § 512(c). The given title, "Network Storage Safe Harbor," is not an official title of the safe harbor but is merely used by the author for convenience throughout this iBrief.

<sup>24</sup> *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1064 (C.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 357 F.3d at 1074 (9th Cir. 2004). The two assumedly inapplicable safe harbors are the "System Caching Safe Harbor," 17 U.S.C. § 512(b), and the "Information Location Tools Safe Harbor," *id.* § 512(d). As with the first two mentioned safe harbor provisions, the given titles

¶6 The district court granted summary judgment in favor of AOL, allowing AOL a complete shield from liability under the Transitory Communications Safe Harbor.<sup>25</sup> On appeal, the Ninth Circuit remanded for fact-finding on whether AOL met the threshold eligibility requirements for safe harbor protection.<sup>26</sup> However, the Ninth Circuit did not upset the district court's assumption that a single safe harbor precluded all monetary liability.<sup>27</sup> As will be demonstrated in this iBrief, both the district court and the Ninth Circuit misinterpreted the application of the safe harbors.

¶7 The remainder of this iBrief is divided into three sections: The first section examines the position of Usenet-operating ISPs under the Transitory Communications Safe Harbor. The second section examines the courts' failure to consider other safe harbors, particularly the Network Storage Safe Harbor. The final section examines differences between the effects of the Transitory Communications and the Network Storage safe harbors. Throughout these sections, this iBrief will critique the *Ellison* holdings of both the district court and the Ninth Circuit.

#### I. TRANSITORY COMMUNICATIONS SAFE HARBOR

¶8 In *Ellison*, both the Ninth Circuit and the district court determined that AOL satisfied the requirements for a limitation of liability under the Transitory Communications Safe Harbor.<sup>28</sup> These decisions incorrectly applied the Transitory Communications Safe Harbor. No party can take advantage of the Transitory

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of these two are used by the author for convenience and are not official titles of the safe harbors.

<sup>25</sup> *Ellison*, 189 F. Supp. 2d at 1072 (granting summary judgment to AOL without considering the application of any other safe harbor).

<sup>26</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1082 (9th Cir. 2004). Before there can be a limitation on liability under a safe harbor, an alleged copyright infringer must meet threshold eligibility requirements. 17 U.S.C. § 512(i). Under § 512(i), a qualifying services provider must adopt, reasonably implement, and inform subscribers about a policy for terminating the subscription of repeat infringers. § 512(i)(1). Further, a qualifying service provider must accommodate and may not interfere with certain standard technical measures used to prevent copyright infringement. § 512(i). Whether these threshold conditions are met is beyond the scope of this iBrief.

<sup>27</sup> See *Ellison*, 357 F.3d at 1081 n.12 (declining to consider the application of the Network Storage Safe Harbor on the grounds that other matters had yet to be decided).

<sup>28</sup> See *id.* at 1082; see also *Ellison*, 189 F. Supp. 2d at 1072.

Communications Safe Harbor unless it meets the applicable definition of “service provider.”<sup>29</sup> Under the Transitory Communications Safe Harbor, a service provider is protected from monetary liability for copyright infringement

by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, [only] if . . . the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; . . . [and] no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections . . . .<sup>30</sup>

¶9 The district court and the Ninth Circuit made at least five mistakes in their analyses of AOL’s position under this safe harbor. First, the courts assumed that AOL fit the definition of service provider. Second, they found that AOL did not select the transmitted material.<sup>31</sup> Third, they determined that AOL’s retention of posts for fourteen days was intermediate and transient.<sup>32</sup> Fourth, they decided that the fourteen-day holding period was reasonably necessary for transmission, routing, or provision of connections.<sup>33</sup> Fifth, the courts failed to consider the effect of the term “anticipated recipients” in the statute. In this iBrief, the fourth and fifth of these mistakes will be considered together because the issues involved are intertwined.

#### A. Definition of Service Provider

¶10 For the purposes of this safe harbor, a “service provider” is a party that offers “transmission, routing, or provision of connections for digital online communications, *between or among points specified*

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<sup>29</sup> H.R. REP. NO. 105-551, pt. 2, at 63 (1998).

<sup>30</sup> 17 U.S.C. § 512(a), (a)(2), (a)(4).

<sup>31</sup> *Ellison*, 189 F. Supp. 2d at 1071.

<sup>32</sup> *Id.* at 1081.

<sup>33</sup> *Id.*

by a user, of material of the user's choosing.”<sup>34</sup> When considering the totality of its offered services, AOL may qualify as a service provider for purposes of the Transitory Communications Safe Harbor. However, the fact that a provider offers some services that meet this definition does not imply that the provider qualifies for the safe harbor with respect to its other activities.<sup>35</sup> In its capacity as a Usenet operator, AOL fails to qualify as a service provider under the Transitory Communications Safe Harbor.<sup>36</sup>

¶11 AOL’s allegedly infringing conduct is its transmission and temporary storage of Usenet posts. To qualify as a service provider, such transmission must occur only between points specified by a user. However, after Usenet users upload posts, they have no control over where such posts are sent. The path of transmission is always essentially the same. After receiving a post, AOL stores the post’s contents on its servers and transfers the post to other ISPs by way of peering. These actions occur regardless of the desires or directions of posting users. Even if users have knowledge of the locations to which their posts will be transmitted, they have no control over the selection of these locations. Such locations are not *specified by a user* but are predetermined by the peering process. As such, in its capacity as Usenet operator, AOL is not a service provider for the purposes of the Transitory Communications Safe Harbor.

### B. Selection of Material

¶12 An ISP is disqualified from this safe harbor if the transmitted material is selected by the ISP, rather than selected by an automatic process or by the ISP’s users.<sup>37</sup> While AOL does not select individual postings, it does select which newsgroups to host on its servers.<sup>38</sup> The district court in *Ellison* found that “selection” referred

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<sup>34</sup> 17 U.S.C. § 512(k)(1)(A) (emphasis added).

<sup>35</sup> H.R. REP. NO. 105-551, pt. 2, at 64 (1998) (“[T]he fact that a provider performs some functions that fall within the definition of new subparagraph (A) does not imply that its other functions that do not fall within the definition of new subparagraph (A) qualify for the limitation of liability under new subsection (a).”).

<sup>36</sup> However, a broader definition of “service provider” applies to the other three safe harbors. 17 U.S.C. § 512(k)(1)(B). Therefore, parties that fail to qualify as “service provider” under the Transitory Communications Safe Harbor may still qualify as “service provider” under the other safe harbors.

<sup>37</sup> *Id.* § 512(a)(2).

<sup>38</sup> *Ellison*, 189 F. Supp. 2d at 1071.

to selection of the specific infringing material—the allegedly infringing posts. This construction ignores the legislative history and the plain meaning of the statutory text.

¶13 “Selection of material” refers to “the editorial function of determining what material to send, or the specific *sources* of material to place on-line (e.g., a radio station), rather than ‘an automatic technical process’ of responding to a command or request, such as one from a user, an Internet location tool, or another network.”<sup>39</sup> The district court’s construction of “selection” as referring to the specific infringing material ignores Congress’s intent that the term also refer to an ISP’s selection of sources of material. According to a House Commerce Committee Report, selection of a source, such as selecting a particular radio station to broadcast, qualifies as “selection” under the safe harbor.<sup>40</sup> In this case, AOL’s decision to host Usenet is analogous to a decision to broadcast radio stations, and AOL’s selection of certain newsgroups corresponds to selection of specific radio stations. This is the kind of selection that disqualifies an ISP from limitation on liability under the Transitory Communications Safe Harbor.

¶14 Furthermore, the statutory text makes no distinction between selection of infringing material and selection of non-infringing material. The safe harbor applies to ISPs whose transmissions are “carried out through *automatic technical process[es]* without selection of the material by the service provider[s].”<sup>41</sup> The proper distinction is between selection by automatic processes and selection by the ISPs. The *Ellison* court read into the text an additional requirement not intended by Congress.

### C. *Intermediate and Transient*

¶15 In order for an ISP to fall under the Transitory Communications Safe Harbor, and thereby avoid liability for its temporary storage of infringing material, such storage must be both “intermediate and transient.”<sup>42</sup> AOL’s Usenet storage fails this test.

¶16 The Ninth Circuit dispatched this “intermediate and transient” requirement in AOL’s favor by claiming that the safe harbor was

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<sup>39</sup> H.R. REP. NO. 105-551, pt. 2, at 51 (emphasis added).

<sup>40</sup> *Id.*

<sup>41</sup> 17 U.S.C. § 512(a)(2).

<sup>42</sup> *Id.* § 512(a).

meant to codify the result of *Religious Technology Center v. Netcom On-Line Communication Services*.<sup>43</sup> In *Netcom*, the court held that the Usenet operator in question was not liable for direct or vicarious copyright infringement for its automatic copying of infringing material posted by Usenet users.<sup>44</sup> In that case, the Usenet operator maintained each post on its server for eleven days before deletion.<sup>45</sup> In *Ellison*, AOL maintained posts on its system for fourteen days.<sup>46</sup> The district court held that the three-day difference was insufficient to distinguish *Ellison* from *Netcom*,<sup>47</sup> and the Ninth Circuit agreed.<sup>48</sup>

¶17 The courts are correct that *Netcom* had a large influence over the development of the Transitory Communications Safe Harbor. In fact, a House Judiciary Committee Report expressly states that this safe harbor “codifies the result of *Netcom*.”<sup>49</sup> The Ninth Circuit, however, takes this statement out of context. With respect to secondary liability, the “intermediate and transient” requirement of the Transitory Communications Safe Harbor codifies only a very specific element of *Netcom*’s holding. As stated in the House Judiciary Committee Report:

*Netcom* recognizes implicitly that intermediate copies may be retained without liability for only a limited period of time. The requirement that “no copy [be] maintained on the system or network . . . for a longer period than reasonably necessary for the transmission” is drawn from the facts of the *Netcom* case, and is intended to codify this implicit limitation in the *Netcom* holding.<sup>50</sup>

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<sup>43</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1081 (9th Cir. 2004) (citing *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995)).

<sup>44</sup> *Netcom*, 907 F. Supp. at 1381.

<sup>45</sup> *Id.* at 1367.

<sup>46</sup> *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1070 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 357 F.3d at 1074 (9th Cir. 2004).

<sup>47</sup> *Id.*

<sup>48</sup> *Ellison*, 357 F.3d at 1081.

<sup>49</sup> H.R. REP. NO. 105-551, pt. 1, at 24 (1998) (citations omitted).

<sup>50</sup> *Id.* (quoting 17 U.S.C. § 512(a)(4) (2000)) (alteration in original). It should be noted that the Judiciary Committee Report refers to an earlier version of the legislation, which was not ultimately enacted as it existed at that time. *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 554 (4th Cir. 2004). However, the distinction between the earlier bill and the enacted statute is probably not relevant to issues of secondary infringement, *see id.* at 554-55, such as the issues involved in the case of Usenet operators.

¶18 The “intermediate and transient” requirement for safe harbor codifies *Netcom* only in that it allows ISPs to avoid liability for temporary storage during the transmission of material. The safe harbor provision is silent as to exactly how long material may be stored for the purpose of transmission. On this point, *Netcom* is merely a persuasive precedent and is not raised to the level of statute.

¶19 The plain meaning of statutory text is the controlling factor in application of a statute.<sup>51</sup> Plain meaning can be determined based on the common usage of included terms. In common usage, “transient” is defined as “passing away with time; not permanent; temporary; transitory.”<sup>52</sup> “Transitory” means “adapted for passing through.”<sup>53</sup>

¶20 Even AOL admitted that it takes no more than a few hours to complete the peering process.<sup>54</sup> During peering, material passes from AOL’s servers onto the servers of other ISPs. Storage is not transitory after those first few hours. After peering, AOL does nothing with its posts except allow them to sit undisturbed on its networks. At that point, the material is no longer “passing through” AOL’s servers. To the contrary, material remains on the networks only because of AOL’s policy to retain posts for a specified period of time.

¶21 Admittedly, storage for eleven days, fourteen days, one hundred days, or even one million days qualifies as “passing away with time” and “not permanent,” arguably meeting the definition of *transient*. However, this interpretation qualifies all ISPs that plan to eventually delete posts. Because Congress provided for a separate safe harbor to limit liability for certain longer term storage, the Network Storage Safe Harbor, it is doubtful that Congress intended to include all possible storage durations under the Transitory Communications Safe Harbor.

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<sup>51</sup> *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”); *United States v. Aguilar*, 21 F.3d 1475, 1480 (9th Cir. 1994) (“The primary indication of [congressional] intent is the language of the statute.”), *aff’d in part, rev’d in part on other grounds*, 515 US 593 (1995).

<sup>52</sup> WEBSTER’S NEW WORLD DICTIONARY 1420 (3d Coll. ed. 1988).

<sup>53</sup> *Id.* at 1421.

<sup>54</sup> Answering Brief of Appellee America Online, Inc. at 45-46, *Ellison v. Robertson*, 357 F.3d 1072 (9th Cir. 2004) (No. 02-55797), 2002 WL 32303144.

¶22 The district court correctly pointed out that temporary storage of an email message in transit is the typical example of intermediate and transient storage.<sup>55</sup> A House Commerce Committee Report voices its approval of an email service provider as the type of ISP protected by the Transitory Communications Safe Harbor.<sup>56</sup> “‘Intermediate and transient’ refers to such a copy made and/or stored in the course of a transmission, not a copy made or stored at the points where the transmission is initiated or received.”<sup>57</sup> In other words, this particular safe harbor only limits liability with respect to certain temporary copies made for transmission. An email message passes quickly through an ISP’s server from sender to recipient. In contrast, a newsgroup post remains at an intermediate point—on an ISP’s server, ready to be downloaded by any user—for some pre-specified period of time that is unrelated to the time it takes for the post to pass through the server. While the fourteen-day storage is temporary, it is *not* transitory and, therefore, not transient.

¶23 In this case, the plain meaning of the statute conflicts with the *Netcom* decision. The *Ellison* courts should have looked to the meaning of the statute instead of relying solely on *Netcom*.<sup>58</sup> A Usenet operator with a fourteen-day storage policy does not meet the intermediate and transient requirement and, therefore, does not qualify for the Transitory Communications Safe Harbor.

#### *D. Reasonably Necessary Retention Period & Anticipated Recipients*

¶24 An ISP does not qualify for the Transitory Communications Safe Harbor unless its stored material is made accessible to anticipated recipients for no longer than is reasonably necessary for transmission, routing, or provision of connections.<sup>59</sup> Furthermore, posted material is not to be made accessible to unanticipated recipients for any period of time.<sup>60</sup> AOL failed to meet these requirements.

¶25 Once again, the *Ellison* courts relied on the facts of *Netcom* to decide that fourteen days was a reasonable retention period. The

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<sup>55</sup> See *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1068 (C.D. Cal. 2002), *aff’d in part, rev’d in part on other grounds*, 357 F.3d at 1074 (9th Cir. 2004).

<sup>56</sup> H.R. REP. NO. 105-551, pt. 2, at 51 (1998).

<sup>57</sup> *Id.* at 50-51.

<sup>58</sup> See *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543 (1940).

<sup>59</sup> 17 U.S.C. § 512(a)(4) (2000).

<sup>60</sup> *Id.*

Ninth Circuit's only answer to the "reasonably necessary" requirement was that "Congress intended the relevant language of [this safe harbor] to codify the result of *Netcom*."<sup>61</sup> The courts misplaced their loyalties. The language of the statute controls the issue;<sup>62</sup> the facts of *Netcom* are merely persuasive and should not control when contradicting the plain language of the statute.

¶26 The DMCA safe harbor statute gives no guidance as to what retention periods would qualify as reasonably necessary for transmission. To determine an acceptable retention period, one should keep in mind the goal of retention. AOL and other Usenet operators retain posts for two reasons: to transfer material to other ISPs' servers, and to allow users to download posts. For safe harbor, only anticipated users are allowed access to posts on an ISP's Usenet server.<sup>63</sup> Therefore, a qualifying ISP can retain material in a manner accessible to the public for no longer than is reasonably necessary for other servers and for anticipated users to retrieve such material.

¶27 It takes only a few hours for AOL to transfer material to other servers,<sup>64</sup> so fourteen days is longer than is reasonably necessary for the transmission of material to other ISPs. However, the fourteen-day retention period may still be acceptable if it is reasonably necessary to deliver material to anticipated users. Unfortunately for Usenet operators, this is not the case.

¶28 Neither the district court nor the Ninth Circuit considered the effect of the repeated term "anticipated recipients" in the safe harbor provision. It is unlikely that Congress included this term without intent for it to have meaning. "Anticipate" means "to look forward to; expect."<sup>65</sup> "Expect" is defined as "to look for as likely to occur or appear."<sup>66</sup> A qualifying ISP must ensure that material on its system is ordinarily accessible only to those recipients who are likely and expected to acquire such material.<sup>67</sup> The entire public is unlikely to download any one post. Furthermore, an interpretation of "anticipated" to refer to the entire public would eliminate the purpose of including the term in the statute at all. It is unlikely that Congress

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<sup>61</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1081 (9th Cir. 2004).

<sup>62</sup> *Am. Trucking Ass'n*, 310 U.S. at 543.

<sup>63</sup> 17 U.S.C. § 512(a)(4).

<sup>64</sup> Answering Brief of Appellee America Online, Inc., *supra* note 54, at 45-46.

<sup>65</sup> WEBSTER'S NEW WORLD DICTIONARY, *supra* note 52, at 59.

<sup>66</sup> *Id.* at 478.

<sup>67</sup> 17 U.S.C. § 512(a)(4).

meant the word to be ignored,<sup>68</sup> so there must be specific anticipated recipients for each post.

¶29 The previously mentioned House Commerce Committee Report presents two examples of temporary storage that qualify for this safe harbor: storage on a mail server while an email message is in transit, and storage of a web page in the course of transmission to a specific user.<sup>69</sup> Both of these examples involve transmission to *specific users*, and these users are anticipated recipients. In contrast with these examples, Usenet posts are not intended for specific users.

¶30 Furthermore, the definition of “service provider” under this safe harbor supports the proposed construction that there must be specific intended recipients of stored material. Recall that a service provider is an entity that “offer[s] the transmission, routing, or providing of connections for digital online communications, *between or among points specified by a user.*”<sup>70</sup> If an ISP can only transmit material between or among specified points, such points correspond to anticipated recipients. If “anticipated recipients” can be read to refer to the entire public, then necessarily, no user has specified points between or among which material is to be transmitted. Such a broad interpretation would be contrary to the definition of “service provider.”

¶31 The set of anticipated recipients can only be defined by the user posting material on a newsgroup. Any likely and expected recipient has probably had some prior contact with the posting user over a newsgroup or elsewhere, or perhaps the set of likely and expected recipients includes all frequent users of a particular newsgroup. Such recipients do not need fourteen days to find and download a newsgroup post. Furthermore, posts containing only legal material are primarily composed of text, rather than encoded digital pirated works. Text files can be downloaded in seconds over today’s internet connections. If the purpose of a newsgroup is discussion and swapping of legal files, fourteen days is more than is reasonably necessary to accomplish this task. Swapping files with anticipated recipients need not take more than a few days.

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<sup>68</sup> See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”).

<sup>69</sup> H.R. REP. NO. 105-551, pt. 2, at 51 (1998).

<sup>70</sup> 17 U.S.C. § 512(k)(1)(A).

¶32 If there are anticipated recipients, then others are unanticipated. Where Usenet is available, it is generally open to the public.<sup>71</sup> Consequently, even users unlikely and unexpected to receive a particular post have access to that post. To qualify for the Transitory Communications Safe Harbor, an ISP must ensure that material is not available to unanticipated recipients.<sup>72</sup> While material is retained by a Usenet operator, all users have access—including unanticipated users.

¶33 AOL and other Usenet operators make material accessible to anticipated users for longer than is reasonably necessary. Furthermore, they fail to ensure that material is inaccessible to unanticipated users. Therefore, Usenet operators do not meet the requirements for the Transitory Communications Safe Harbor.

## II. FAILURE TO CONSIDER OTHER SAFE HARBORS

¶34 In *Ellison*, neither the district court nor the Ninth Circuit considered the application of any safe harbor other than the Transitory Communications Safe Harbor. In fact, the district court assumed that it was unnecessary to consider the Network Storage Safe Harbor after finding that the Transitory Communications Safe Harbor applied.<sup>73</sup> The Ninth Circuit failed to correct this assumption,<sup>74</sup> which was based on a misinterpretation of the safe harbor provisions.

¶35 Although the district court did not explain the basis for its decision not to consider the Network Storage Safe Harbor, logically, there are two possible reasons for this choice: Either the district court assumed that the Transitory Communications Safe Harbor provides blanket immunity for copyright infringement, or the district court felt that the limitation on liability covered all of AOL's actions in this particular instance. In either case, the district court's reasoning would be incorrect.

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<sup>71</sup> Desmond, *supra* note 2, at 27.

<sup>72</sup> 17 U.S.C. § 512(a)(4).

<sup>73</sup> *Ellison v. Robertson*, 189 F. Supp. 2d 1051, 1072 n.22 (C.D. Cal. 2002), *aff'd in part, rev'd in part on other grounds*, 357 F.3d at 1074 (9th Cir. 2004).

<sup>74</sup> *See Ellison v. Robertson*, 357 F.3d 1072, 1081 n.12 (9th Cir. 2004) (declining to consider the application of the Network Storage Safe Harbor on the grounds that other matters had yet to be decided).

### A. No Blanket Immunity

¶36 The DMCA provides four separate safe harbors, and qualification under one safe harbor has no impact on potential qualification under another.<sup>75</sup> An ISP may need to qualify for multiple safe harbors to be completely shielded from monetary liability. A Senate Judiciary Committee Report provides a useful example of this principle: Consider an ISP that provides a hyperlink to a site containing infringing material. The ISP caches the infringing material on its system to facilitate access by its users. Now suppose a party claims infringement for both the ISP's system caching and its use of location tools. If the ISP wishes to be shielded from monetary liability, it needs the protections of both the System Caching Safe Harbor<sup>76</sup> and the Information Location Tools Safe Harbor.<sup>77</sup>

¶37 If the district court's refusal to consider the Network Storage Safe Harbor was based on a belief that the Transitory Communications Safe Harbor provides blanket immunity, then the court misunderstood the structure of the safe harbor provisions. Such a belief ignores the statutory language as well as the legislative history.

### B. Transitory Communications Safe Harbor is Insufficient in This Case

¶38 While the Transitory Communications Safe Harbor may protect a Usenet operator from copyright infringement for its transferring material to and from other ISPs' servers, it does not protect the operator from continued storage for more than a few days.<sup>78</sup> Where a Usenet operator retains material for fourteen days, the Transitory Communications Safe Harbor is not enough to shield the ISP from all monetary liability. Other safe harbors should be considered.

## III. DIFFERENCES BETWEEN THE SAFE HARBORS

¶39 Aside from limiting liability for different categories of ISP conduct, the effects of Transitory Communications Safe Harbor and the Network Storage Safe Harbor, which the *Ellison* courts failed to

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<sup>75</sup> 17 U.S.C. § 512(n).

<sup>76</sup> *Id.* § 512(b).

<sup>77</sup> *Id.* § 512(d); S. REP. 105-190, at 55-56 (1998).

<sup>78</sup> See discussion *supra* Part I.D.

consider, differ in two significant respects: The Network Storage Safe Harbor includes provisions for “notice and take-down” procedures<sup>79</sup> and for subpoena issuance.<sup>80</sup> Whether the Network Storage Safe Harbor applies to Usenet operators is beyond the scope of this iBrief. Nevertheless, it is important to note that the Transitory Communications Safe Harbor is more lenient on qualifying ISPs in that it does not have the notice and take-down procedures and subpoena provisions.

¶40 To maintain qualification for the Network Storage Safe Harbor, an ISP must comply with notice and take-down procedures by which it expeditiously removes, or disables access to, allegedly infringing material.<sup>81</sup> The notice and take-down procedures were instituted to create a cooperative process by which copyright holders and ISPs could work to minimize the amount of infringing material on ISPs’ systems.<sup>82</sup> The notice and take-down procedures require an ISP to remove allegedly infringing material when the ISP has been formally notified of the existence of such material.<sup>83</sup> Such material must be replaced if the ISP receives formal counter-notification from the allegedly infringing user, *unless* the copyright holder notifies the ISP that he intends to litigate the infringement issue.<sup>84</sup>

¶41 The subpoena provisions allow a party to compel an ISP to disclose the names of subscribers whom such party believes are infringing its copyrights.<sup>85</sup> Subpoenas can be issued to ISPs that qualify under the Network Storage Safe Harbor but cannot be issued to ISPs for activity that qualifies for safe harbor under the Transitory Communications Safe Harbor.<sup>86</sup> For a subpoena to issue, the copyright holder must specify the infringing material to be removed or to which access is to be disabled.<sup>87</sup> In theory, ISPs that qualify only under the latter safe harbor are mere conduits for transferring data.<sup>88</sup> Such ISPs “can neither ‘remove’ nor ‘disable access to’ the

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<sup>79</sup> 17 U.S.C. § 512(g)(2).

<sup>80</sup> *Id.* § 512(h).

<sup>81</sup> *Id.* § 512(g)(2).

<sup>82</sup> H.R. REP. NO. 105-551, pt. 2, at 54 (1998).

<sup>83</sup> 17 U.S.C. § 512(c)(1)(C).

<sup>84</sup> *Id.* § 512(g)(2)(C).

<sup>85</sup> *Recording Indus. Ass’n of Am. v. Verizon Internet Servs.*, 351 F.3d 1229, 1232 (D.C. Cir. 2003) (citing 17 U.S.C. § 512(h)).

<sup>86</sup> *Id.* at 1233.

<sup>87</sup> 17 U.S.C. § 512(h)(4), (c)(3)(A)(iii).

<sup>88</sup> *Recording Indus. Ass’n of Am.*, 351 F.3d at 1237.

infringing material because that material is not stored on the ISP's servers."<sup>89</sup> Given this, no subpoena may issue to compel an ISP to reveal of identities of infringing users, where such ISP's allegedly infringing activity falls under the Transitory Communications Safe Harbor.<sup>90</sup>

¶42 The fact that the Transitory Communications Safe Harbor has no notice and take-down procedures and no subpoena provisions has tremendous implications for Usenet operators. If a court finds that Usenet operators qualify for the Transitory Communications Safe Harbor, these operators will not be required to remove infringing material, and no subpoena may issue to the operators requiring disclosure of subscriber names. In short, it becomes more difficult, if not impossible, to compel Usenet operators to assist in eliminating infringing material from their systems, when courts deem those operators' activities to fall under the Transitory Communications Safe Harbor.

#### CONCLUSION

¶43 In finding that Usenet-operator AOL might be shielded from liability for secondary copyright infringement, the *Ellison* courts ignored the tremendous potential for copyright infringement in newsgroups. *Ellison* misinterpreted the Transitory Communications Safe Harbor to provide blanket immunity for copyright infringement. The courts also disregarded the potential application of the Network Storage Safe Harbor, which might have limited AOL's liability. Furthermore, if the courts had found that the Network Storage Safe Harbor, as opposed to the Transitory Communications Safe Harbor, applied to AOL, copyright holders would have means to protect their copyrighted works by way of the notice and take-down procedures and the subpoena provisions.

¶44 Perhaps courts are concerned that requiring strict standards for qualification under the safe harbors will put too much pressure on ISPs. ISPs like AOL play an indispensable role in providing internet access to the masses. However, courts need not be so concerned that they limit liability without thorough analysis. The safe harbors provide an extra line of defense for ISPs. Even when an ISP fails to qualify for safe harbor, it may still be able to avoid liability for

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<sup>89</sup> *Id.* at 1235.

<sup>90</sup> *Id.* at 1236.

copyright infringement. The safe harbors do not replace the traditional analyses of direct, contributory, and vicarious copyright infringement.<sup>91</sup> Failure to qualify for safe harbor simply means that an ISP will have to litigate the traditional infringement issues.<sup>92</sup> Liability is not implied simply because an ISP does not fall under a safe harbor.

¶45 If courts truly wish to alleviate the problem of piracy on the internet, they need to interpret copyright law more strictly. ISPs need to be aware of the potential for illegal conduct on their networks. A strict interpretation of copyright protection laws will not put ISPs out of business. Finding ISPs liable for secondary copyright infringement encourages ISPs to offer services that have a lesser potential for distributing illegal material. In contrast, shielding secondary infringers only allows pirates the means to illegally reproduce and distribute copyrighted works.

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<sup>91</sup> Perfect 10 v. Cybernet Ventures, 213 F. Supp. 2d 1146, 1174 (C.D. Cal. 2002) (citing H.R. REP. NO. 105-551, pt. 2, at 50 (1998)).

<sup>92</sup> H.R. REP. NO. 105-551, pt. 2, at 50.