

Application of the DMCA Safe Harbor Provisions to Search Engines

CRAIG W. WALKER[†]

ABSTRACT

The Digital Millennium Copyright Act (“DMCA”) established procedures that Internet service providers can implement to gain protection from liability for copyright infringement by their users. Under DMCA “notice and takedown” provisions, service providers notified by copyright owners about allegedly infringing content must remove or disable access to that content in order to remain immune from claims for contributory liability. In response to such notifications, search engines have begun to remove links to allegedly infringing content from their search results.

Unfortunately, applying the DMCA safe harbor provisions to search engines is problematic. Key portions of the statute refer to “subscribers” and “account holders,” making their application to search engines unclear because search engines typically do not have subscribers or account holders. The lack of a subscription relationship also seems to make search engines more likely than other types of service providers to remove content overzealously after notification. Finally, the combination of the unique importance of search engines for most Internet users and the availability of other means for copyright owners to protect their interests suggests that the burden of complying with the safe harbor procedures should not be placed on search engines. A better alternative would be for Congress to grant search engines complete immunity from contributory liability for infringing activities by third parties.

© 2004 Virginia Journal of Law & Technology Association, at <http://www.vjolt.net>. Use paragraph numbers for pinpoint citations.

[†] J.D. candidate, University of Virginia School of Law, May 2004; A.B., Political Science, Duke University, May 2000, *cum laude*. The author currently serves on the Article Review Board of the *Virginia Journal of Law & Technology* and as Production Editor and Technology Editor for the *Virginia Tax Review*. He thanks Professor Robert M. O’Neil, as well as David Cohen, Dan Mazanec, Julie Ann Perschbacher, Berin Szoka, Christian Walker, Paul Yanosy, and his father, James R. Walker, for their advice and support during the preparation of this Note. He also thanks the editorial staff of the *Virginia Journal of Law & Technology* for its efforts in preparing this Note for publication.

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Service Providers and Search Engines.....	4
	A. Service Providers	4
	B. Search Engines.....	5
III.	Copyright Law	6
	A. Introduction to Copyright.....	6
	B. Copyright and the First Amendment.....	7
	C. Copyright in Cyberspace.....	7
	D. Potential Liability of Service Providers for Copyright Infringement	8
IV.	The DMCA Safe Harbor Provisions	8
	A. Introduction.....	8
	B. Initial Eligibility Requirements.....	9
	C. Additional Requirements for “Information Location Tools”.....	10
	D. Counter-Notification Procedures	10
	E. Other Relevant Provisions	11
V.	Section 230 of the Communications Decency Act	12
VI.	Review of Commentary on the DMCA Safe Harbor Provisions	13
	A. Congress Failed by Not Clarifying the Underlying Liability of Service Providers	14
	B. The Safe Harbors Prevent Future Judicial Clarification	14
	C. Service Providers Will Overzealously Remove or Disable Access to Content	14
	D. The Details of the Counter-Notification Procedures Are Unacceptable.....	16
VII.	Application of the DMCA Safe Harbor Provisions to Search Engines	16
	A. Problems with the Plain Language of the Statute as Applied to Search Engines.....	17
	1. Initial Eligibility Requirements.....	17
	2. Additional Requirements for “Information Location Tools”	18
	3. Counter-Notification Procedures	18
	4. Summary and Conclusions.....	18
	B. Problems Inherent in the Procedures as Applied to Search Engines	19
	C. Policy Considerations	21
	D. How Search Engines Should Respond.....	22
VIII.	Conclusion	22



I. INTRODUCTION

¶1 On August 11, 2003, the owner of KaZaa, a popular file-sharing program, began sending a series of complaints to Google, a popular search engine, claiming that Google

was providing links to sites offering unauthorized and infringing versions of its software.¹ Without any determination by a court that the materials actually infringed on the owner's copyright, Google swiftly responded to these complaints by removing the specified links from its search results. Google replaced the links with a disclaimer at the bottom of each relevant search page stating that some results were removed and providing a link to the complaint.²

¶2 This scenario may be surprising to many Internet users, but it is becoming increasingly common.³ Copyright owners are beginning to use the "notice and takedown" procedures provided by the Digital Millennium Copyright Act ("DMCA") "safe harbor" provisions against search engines.⁴ For example, in addition to complaints regarding versions of software, copyright owners have submitted complaints to search engines regarding a variety of other materials, including literary works, photographs, motion pictures, marketing plans, product keys for activating software, and PowerPoint presentations, to name a few.⁵ In response to such complaints, search engines are removing links to allegedly infringing materials from their indices. These actions could have a dramatic impact on the Internet. In the future, disclaimers announcing removed search results could become commonplace. Alternatively, it may become typical for search results to be removed without any disclaimers warning users of their absence.

¶3 The DMCA safe harbor provisions represent an attempt by Congress to balance carefully the goal of preventing the increase in copyright infringement that has accompanied the proliferation of the Internet against technical and non-copyright legal concerns, including the First Amendment. There has been significant commentary addressing the general application of the DMCA safe harbor provisions. However, little attention has been paid to the application of these provisions to search engines specifically. This Note attempts to fill this gap.

¶4 Part II provides a very brief introduction to service providers and search engines. Part III introduces copyright law, addresses the basic problem of copyright infringement in cyberspace, and considers potential liability for search engines and other service

1. For the initial complaint, see http://www.chillingeffects.org/dmca512/notice.cgi?action=image_342 (last visited Jan. 25, 2004).

2. To see the response, search for "kazaa" on Google, at <http://www.google.com>. At the bottom of the page, there is a disclaimer stating: "In response to a complaint we received under the Digital Millennium Copyright Act [hyperlink removed], we have removed [X] result(s) from this page. If you wish, you may read the DMCA complaint [hyperlink removed] for these removed results." It is an interesting side note that the complaint linked to in the disclaimer contains a list of the allegedly infringing websites. Therefore, a user still has all of the information necessary to access the allegedly infringing material, although it will now take a multi-step process as opposed to the one-step process of clicking on a link. It would be interesting to see how a court would address Google's response.

3. This particular scenario also may seem ironic to more experienced Internet users. KaZaa is one of the most popular peer-to-peer ("P2P") file-sharing programs available and is regularly used for unauthorized distribution of copyrighted material such as music and movies. For the DCMA safe harbor provisions, see 17 U.S.C. §§ 512(c)(1) and (3) (2000).

4. For a regularly updated list including such complaints, see <http://www.chillingeffects.org/dmca512/notice.cgi> (last visited Jan. 25, 2004).

5. *Id.*

providers. Part IV summarizes the DMCA safe harbor provisions. Part V compares the DMCA safe harbor provisions to section 230 of the Communications Decency Act, another statutory provision addressing the liability of service providers for content provided by third parties. Part VI reviews the commentary on the DMCA safe harbor provisions in general. Finally, Part VII analyzes the application of the DMCA safe harbor provisions to search engines, concluding that their application in this context is problematic due to inconsistencies in the statutory language, potential First Amendment concerns, and general policy considerations.

II. SERVICE PROVIDERS AND SEARCH ENGINES⁶

A. Service Providers

¶5 The legal meaning of the term “service provider” is extremely broad. The DMCA safe harbor provisions define “service provider” as “a provider of online services or network access, or the operator of facilities therefor,” including “an entity offering the transmission, routing, or providing of connections for digital online 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.”⁷ As one pair of commentators has noted, this definition “would seem to encompass virtually every Internet or intranet provider or intermediary, including portal sites, search engines, universities, and intranet providers.”⁸ Within this broad definition, the DMCA safe harbor provisions distinguish among different types of service providers based on the function they are performing.⁹ Understanding the role and function of every possible entity that could be classified as a service provider is not necessary for this Note. However, it is important to recognize that the DMCA safe harbor provisions cover a wide range of entities that have different relationships with alleged copyright infringers. For example, service providers responsible for hosting Web sites generally will have a direct subscription relationship with alleged infringers. Search engines, however, often will

6. This Note will bypass the formality of providing a generic definition of the Internet, primarily because such a definition is not very helpful. The Internet is so pervasive that most readers are already very familiar with it and do not need it to be defined. For those readers not familiar with the Internet, no definition will do it justice; any definition would most likely fail to convey the Internet to someone who has not experienced it for himself.

7. 17 U.S.C. § 512(k)(1). The DMCA’s definition of “service provider” can be compared to the definition of “interactive computer service” in section 230 of the Communications Decency Act: “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2). The term “access software provider” used within this definition is defined as “a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” *Id.* § 230(f)(4).

8. Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 303–04 (2002).

9. 17 U.S.C. § 512(a)-(d). These functional categories are discussed further in Part IV.

have no direct relationship with parties responsible for posting allegedly infringing materials. Recognizing this distinction is essential to analyzing properly the application of the DMCA safe harbor provisions.

B. Search Engines

¶6 Search engines — a type of service provider — are the primary focus of this Note. In common usage, the term “search engine” often refers to two distinct entities: directories and search engines. The primary distinction between directories and search engines is the manner in which their indices of Web-content are created. Directories are compiled and organized by humans. Search engines use automated programs, commonly referred to as “spiders,” “robots,” “bots,” or “crawlers,” to compile their indices and sort through information. Although this distinction does have some potential practical and legal implications,¹⁰ it is relatively unimportant for this analysis. Additionally, the rise of “hybrids” offering a combination of features of both directories and search engines has further blurred the distinction. For example, Google began as a pure search engine but now also includes a directory, and Yahoo began as a pure directory but now offers a search engine as well.¹¹ For these reasons, “search engine” will be used to refer to both types of entities.

¶7 It would be difficult to overstate the importance of search engines. Two of the most useful metaphors that describe the role of search engines in the Internet are “roadmaps” and “library catalogues.” Both of these metaphors break down after careful analysis, but the main point is that search engines are essential tools for most people trying to find their way around the World Wide Web, a significant portion of the Internet. Without the assistance of search engines, Internet users would be severely limited in the amount of information they would be able to locate and access.¹² Search engines help by allowing users to locate material either by browsing through categories of related Web sites or by using keywords to search for relevant Web pages.¹³ Search engines typically respond to categorical or keyword searches with a list of links to relevant Web sites or Web pages, thus allowing users to access the material. For the majority of Internet users, the use of search engines is the primary means for locating and accessing information contained on the World Wide Web. If Web-content cannot be reached at least indirectly via a search engine, then it likely will be inaccessible to most Internet users.

10. For example, trademark infringement cases arising from the use of meta tags and other “spamdexing” techniques designed to manipulate the automated programs used by search engines would not implicate directories. For a more detailed discussion of such cases, see Ira S. Nathenson, *Internet Infoglut and Invisible Ink: Spamdexing Search Engines with Meta Tags*, 12 HARV. J.L. & TECH. 43 (1998) and F. Gregory Lastowka, Note, *Search Engines, HTML, and Trademarks: What’s the Meta For?*, 86 VA. L. REV. 835 (2000).

11. Currently, Yahoo uses Google to power its search engine function, but there are reports that it will switch to its own technology within the next several months. Mylene Mangalindan, *Yahoo Gets Set To Give Google Run for Money*, WALL ST. J., Jan. 6, 2004, at B1.

12. Even with the aid of search engines, Internet users are not able to access all of the material available. Each search engine indexes only a small portion of all of the Web sites found on the Internet.

13. The term “Web page” refers to a particular document on the World Wide Web, and the term “Web site” refers to a set of interconnected webpages.

¶8 The central role of search engines in locating and accessing Web-content makes search engines obvious targets of attempts to restrict the flow of content across the Internet. Mechanisms designed to prevent access to particular materials via search engines can serve as powerful weapons in the fight against copyright infringement.¹⁴ However, the same mechanisms may also pose a serious threat to free expression in cyberspace.

III. COPYRIGHT LAW

A. Introduction to Copyright

¶9 Copyright law is a segment of intellectual property law. The foundation of American copyright law is found in Article I, Section 8, Clause 8 of the United States Constitution, and the contours are developed further by statute and judicial decision. Copyright protection extends to “original works of authorship” that have been “fixed in any tangible medium of expression.”¹⁵ Examples of copyrightable works include the following: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.¹⁶ Copyright owners are granted five exclusive rights in their works: (1) reproduction, (2) distribution, (3) adaptation, (4) performance, and (5) public display.¹⁷ Copyright infringement occurs when someone “violates any of the exclusive rights of the copyright owner.”¹⁸ The remedies available for copyright infringement include injunctions, impoundment and disposition of infringing articles, actual damages and profits, statutory damages, and costs and attorney’s fees.¹⁹

¶10 The constitutionally-stated purpose of copyright protection is “[t]o promote the Progress of Science,”²⁰ with “Science” meaning knowledge in general.²¹ Given this

14. Although mechanisms directed at search engines are powerful weapons, they certainly could not be the only weapons due to the continual development of new technologies. For example, the rise of P2P programs, such as KaZaa, has provided another forum for both free expression and widespread copyright infringement in cyberspace.

15. 17 U.S.C. § 102(a).

16. *Id.*

17. *Id.* § 106.

18. *Id.* § 501(a).

19. *Id.* §§ 502–505.

20. U.S. CONST. art. I, § 8, cl. 8. Although it is often stated that the purpose of copyright is “[t]o promote the Progress of Science and useful Arts,” *id.* (emphasis added), this broader formulation ignores the dual structure and function of the relevant clause of the Constitution. In full, Article I, Section 8, Clause 8 grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* This clause is the source of Congress’ power to establish both a copyright system and a patent system, and the language of the clause must be distributed between these two powers accordingly. Using this distributive approach, the grant of power regarding copyright is “[t]o promote the Progress of Science ... by securing for limited Times to *Authors* ... the exclusive Right to their ... *Writings*,” and the grant of power

purpose, there are a number of important doctrines, such as the “originality” requirement, the “idea/expression dichotomy,” and the “fair use” exception, that place internal limitations on copyright. These internal limitations work to define the boundaries between what is and what is not copyrightable and between infringing and acceptable uses of copyrighted material.

B. Copyright and the First Amendment

¶ 11 Application of copyright law may implicate the First Amendment because it involves restriction of speech. For First Amendment purposes, speech that infringes on copyright is deemed to be unprotected. However, enforcement of copyright can raise First Amendment concerns if it overreaches and restricts or chills protected speech. The doctrines providing internal limitations on copyright discussed in the preceding section draw the boundary between protected and unprotected speech with respect to copyright. Proper application of these doctrines and imposition of liability for copyright infringement are thus essential to maintaining the balance between copyright law and the First Amendment.

C. Copyright in Cyberspace

¶ 12 The Internet has created both new opportunities and new threats for copyright owners. The ease with which copyrighted materials can be converted into digital format and transmitted across the Internet offers copyright owners greater options for distributing their works. It also dramatically increases the likelihood of widespread copyright infringement. This effect is already very apparent from the highly-publicized battle over music piracy. The problem is not limited to music, however. It already has begun to spread to movies and almost certainly will encompass books with the eventual rise of e-books. It seems that virtually all forms of copyrighted material are vulnerable to the threat posed by the Internet.

¶ 13 Copyright owners are fighting back on both technological and legal fronts. Technological responses, such as copyright-protected music discs, digital watermarking, and other forms of digital rights management (“DRM”), are gaining some ground and will certainly play a key role in controlling the problem in the future.²² However, it seems obvious at this point that technological responses will not succeed on their own. Most technological responses are quickly overcome by persistent crackers. Many

regarding patent is “[t]o promote the Progress of ... *useful Arts*, by securing for limited Times to ... *Inventors* the exclusive Right to their ... *Discoveries*.” *Id.* (emphasis added). Although this more accurate formulation may seem to be an inconsequential parsing of the clause, it has some important practical consequences, such as to limit the scope of patent protection to applied technology. See, e.g., *In re Bergy*, 596 F.2d 952, 958-59 (C.C.P.A. 1979), *aff’d sub nom.* *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); Rebecca S. Eisenberg, *Proprietary Rights and the Norms of Science in Biotechnology Research*, 97 *YALE L.J.* 177, 185-86 (1987).

21. Eisenberg, *supra* note 20, at 186.

22. For more information on such technologies, see DRM Watch, at <http://www.drmwatch.com> (last visited Jan. 25, 2004).

technological responses also have practical drawbacks, ranging from minor inconveniences to significant impediments to the appropriate use of copyrighted material. Given the shortcomings of technological responses, copyright owners have turned to courts and Congress for assistance. The DMCA represents part of the attempt to establish the strong legal framework that is necessary for curtailing copyright infringement in cyberspace.

D. Potential Liability of Service Providers for Copyright Infringement

¶ 14 Before addressing the role of the DMCA in this legal framework, it is necessary to examine the potential liability of service providers in the absence of the DMCA safe harbors. There are three forms of liability for copyright infringement: direct liability, vicarious liability, and contributory liability. Direct liability arises when a party exercises a copyright owner's exclusive right without authorization.²³ Vicarious liability is a form of derivative liability that can be applied to a party that does not engage in direct copyright infringement but does have "the right and ability to supervise" the infringing activity and "an obvious and direct financial interest" in the infringing activity.²⁴ Contributory liability is another form of derivative liability that can be imposed when a party knows of and "induces, causes, or materially contributes" to copyright infringement.²⁵

¶ 15 Application of these forms of liability to service providers is a complex and largely undecided area of law. A detailed examination of such application is beyond the scope of this Note. Based on the developments so far, however, two important points are evident. First, in the absence of the protection of the DMCA safe harbors, service providers are potentially liable for copyright infringement by third parties, and search engines are particularly vulnerable to claims for contributory liability.²⁶ Second, the extent of such liability is still very unclear. The DMCA safe harbor provisions do not clarify the underlying liability of service providers. Instead, they simply provide a set of procedures that will permit service providers to avoid most liability if followed. Given the significant uncertainty in this area of law, it is not surprising that service providers have embraced the opportunity to take advantage of these provisions.

IV. THE DMCA SAFE HARBOR PROVISIONS

A. Introduction

¶ 16 Congress enacted the DMCA in October 1998²⁷ in an attempt to address some of the copyright issues presented by the rise of the Internet and digital media. Two distinct

23. See 17 U.S.C. § 501.

24. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

25. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

26. The non-typical search engine that deals primarily with copyright-infringing material would also be vulnerable to claims for vicarious liability.

27. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

components of the DMCA have received considerable attention from commentators. The first such component, found in Title I of the DMCA, is the section dealing with anti-circumvention measures that was designed to prohibit attempts to thwart copyright protection technologies. These provisions are codified at section 1201 of the Copyright Act.²⁸ This Note will not address the legal quagmire created by these anti-circumvention provisions.²⁹ The second such component is found in Title II of the DMCA, the Online Copyright Infringement Liability Limitation Act. This part of the DMCA contains provisions governing the imposition of liability on service providers for copyright infringement by third parties. These “safe harbors,” codified at section 512 of the Copyright Act,³⁰ are the focus of this Note.

¶ 17 The DMCA safe harbor provisions provide a set of statutory procedures offering service providers the opportunity to avoid monetary liability for copyright-infringing activities by third parties. The DMCA safe harbor provisions divide the functions of service providers into four categories, coinciding with the first four subsections of section 512: (a) “transitory digital network communications,” (b) “system caching,” (c) “information residing on systems or networks at direction of users,” and (d) “information location tools.”³¹ Although search engines may engage in a number of these functions, the final category of “information location tools” is the most applicable. The activities encompassed by the category of “information location tools” include “referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.”³² “[L]inking users to an online location” is the primary service provided by search engines, and thus the specifics of the provisions for “information location tools” will be the focus of this discussion.

B. Initial Eligibility Requirements

¶ 18 All service providers wishing to benefit from the safe harbors must meet three initial eligibility requirements, set forth in section 512(i). First, the service provider must have “adopted and reasonably implemented ... a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”³³ Second, the service provider must have informed “subscribers and account holders of the service provider’s system or network” of such policy.³⁴ Third, such policy must accommodate and not interfere with “standard technical measures.”³⁵ Once these initial eligibility requirements are fulfilled, service

28. 17 U.S.C. § 1201.

29. See Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999), for an obviously critical introduction to the anti-circumvention provisions.

30. 17 U.S.C. § 512.

31. *Id.* § 512(a)–(d).

32. *Id.* § 512(d).

33. *Id.* § 512(i)(1)(A).

34. *Id.*

35. *Id.* § 512(i)(1)(B).

providers must then look to the subsections applicable to their particular functions for additional requirements.

C. Additional Requirements for “Information Location Tools”

¶19 Service providers offering “information location tools” must fulfill three additional requirements, set forth in section 512(d), in order to claim protection from liability for copyright infringement by third parties. First, the service provider must “not have actual knowledge that the material or activity is infringing” or, “in the absence of such actual knowledge,” must not be “aware of facts or circumstances from which infringing activity is apparent” or, “upon obtaining such knowledge or awareness,” must act “expeditiously to remove, or disable access to, the material.”³⁶ Second, the service provider must “not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity.”³⁷ This requirement essentially means that service providers are still subject to vicarious liability. Finally, the service provider, “upon notification of claimed infringement,”³⁸ must respond “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”³⁹ This final requirement establishes the “notice and takedown” procedures that copyright owners are using against search engines and other service providers.

D. Counter-Notification Procedures

¶20 The DMCA safe harbor provisions also contain a detailed set of counter-notification procedures. Section 512(g)(1) provides service providers with a limitation on liability to any party based on the service providers’ “good faith” removal of “material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.”⁴⁰ Section 512(g)(2) provides an exception to this general limitation by requiring service providers to follow counter-notification procedures in order to benefit from the limitation on liability resulting from removal of materials. This section provides that a service provider can still be held liable for removal of “material

36. *Id.* § 512(d)(1).

37. *Id.* § 512(d)(2).

38. The elements necessary for sufficient notification are set forth in section 512(c)(3)(A) and modified for “information location tools” by section 512(d)(3). Briefly, they include the following: (1) physical or electronic signature of a person authorized to act on behalf of the owner of an allegedly infringed exclusive right; (2) identification of the allegedly infringed copyrighted work or, in the case of multiple works, a representative list of such works; (3) identification of the reference or link to allegedly infringing material or activity, and information reasonably sufficient to permit the service provider to locate such reference or link; (4) complainant’s contact information; (5) statement of a good faith belief that use of the material in the manner complained of is not authorized; and (6) statement that the information in the notification is accurate and that the complaining party is authorized to act on behalf of the owner of the allegedly infringed exclusive right. *Id.* § 512(c)(3)(A), (d)(3).

39. *Id.* § 512(d)(3).

40. *Id.* § 512(g)(1).

residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider” unless the service provider fulfills three requirements.⁴¹ First, the service provider must take “reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material.”⁴² Second, upon receipt of a counter-notification from the subscriber,⁴³ the service provider must provide the original complainant with a copy of the counter-notification and a warning that it will replace the material in ten business days.⁴⁴ Finally, the service provider must replace the material, within ten to fourteen days after receipt of the counter-notification, unless the original complainant notifies the service provider that it has filed “an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.”⁴⁵

E. Other Relevant Provisions

¶21 In order to discourage unmeritorious notifications by copyright owners and counter-notifications by alleged infringers, section 512(f) provides liability for “any person who knowingly materially misrepresents ... that material or activity is infringing, or ... that material or activity was removed or disabled by mistake or misidentification.”⁴⁶ Liability for such misrepresentations covers any damages, including costs and attorney’s fees, incurred by the copyright owner, the alleged infringer, or the service provider.⁴⁷

¶22 Another provision places an affirmative duty on service providers to make inquiries into notifications that fail to substantially comply with all of the specific statutory requirements.⁴⁸ If a service provider receives a complaint that substantially identifies the allegedly infringed copyrighted work, identifies the reference or link to the allegedly infringing material or activity, and provides the complainant’s contact information, then it must promptly attempt to contact the complainant or take “other reasonable steps” in order to assist in receiving a notification that substantially complies with all of the requirements.⁴⁹ Failure to make such attempt will result in the incomplete notification being considered as a factor supporting a determination that the service provider “has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent,” thus potentially removing the protection of safe harbors.⁵⁰

41. *Id.* § 512(g)(2).

42. *Id.* § 512(g)(2)(A).

43. The elements necessary for sufficient counter-notification are set forth in section 512(g)(3). Briefly, they include the following: (1) physical or electronic signature of the subscriber; (2) identification of the removed material and location of material prior to its removal; (3) statement of good faith belief that material was removed as result of mistake or misidentification; (4) subscriber’s contact information; and (5) statement that consents to jurisdiction of the Federal District Court either for where subscriber is located or, if subscriber is located outside of the United States, where service provider is located. *Id.* § 512(g)(3).

44. *Id.* § 512(g)(2)(B).

45. *Id.* § 512(g)(2)(C).

46. *Id.* § 512(f).

47. *Id.*

48. *Id.* § 512(c)(3)(B)(ii).

49. *Id.*

50. *Id.* § 512(c)(3)(B)(i)-(ii).

V. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

¶ 23 Section 230 of the Communications Decency Act (“CDA”)⁵¹ is another statutory provision addressing the liability of service providers for the activities of their users and thus provides a good comparison to the DMCA safe harbor provisions.⁵² This statute was enacted in 1996, prior to the DMCA, and specifically excludes intellectual property law from its coverage.⁵³ Its application is remarkably different from application of the DMCA safe harbor provisions.

¶ 24 The primary functional language of section 230 of the CDA is that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁵⁴ This language originally was intended to shield service providers from liability for defamation on the part of their users. It has since been extended to grant service providers blanket immunity from virtually all claims (with the exception of claims regarding intellectual property rights) for civil liability resulting from content provided by a third party. Unlike the DMCA safe harbor provisions, there are no procedural requirements that must be followed by a service provider in order to be protected from liability by the CDA. Instead, to avoid liability, the service provider simply must show that it fits within the definition of “interactive computer service,”⁵⁵ that it is not the “information content provider”⁵⁶ of the allegedly harmful content, and that the plaintiff seeks to hold the service provider liable for content originating from a third party.

¶ 25 Although section 230 of the CDA explicitly recognizes the Internet’s capability to “offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,”⁵⁷ it is not designed to discourage service providers from taking active measures to regulate the materials posted by third parties. Section 230(c)(2) provides that service providers will not be held liable for any voluntary good faith action taken “to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.” This language is significant because, prior to the enactment of the CDA, the ruling in *Stratton Oakmont, Inc. v. Prodigy Services Co.*⁵⁸ produced the perverse result that service providers that did not attempt to regulate materials provided by third parties could not be found liable for the content of those materials, but service providers that did attempt to regulate content could be found liable.⁵⁹ The ultimate effect

51. 47 U.S.C. § 230.

52. Section 230 of the CDA actually uses the term “interactive computer service” rather than “service provider,” but the terms seem to be interchangeable. *See supra* note 7 and accompanying text.

53. 47 U.S.C. § 230(e)(2).

54. *Id.* § 230(c)(1).

55. *Id.* § 230(f)(2).

56. *Id.* § 230(f)(3).

57. *Id.* § 230(a)(3).

58. 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. 1995).

59. The court distinguished this case from *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), in which a service provider was deemed to be a “distributor” and thus not liable for

of this decision was to discourage service providers from regulating third-party content. Section 230 of the CDA undoes this result.

¶26 As should already be evident from this discussion, section 230 of the CDA is dramatically different from the DMCA safe harbor provisions. Section 230 of the CDA is much simpler. Rather than providing a detailed set of requirements that must be followed in order to benefit from limited liability, it gives a blanket immunity to service providers for both providing and removing access to material. Under the CDA, the choice of implementing no restrictions, draconian restrictions, or restrictions anywhere between those extremes is entirely within the discretion of the service provider. For better or worse, the DMCA forgoes this simplicity in favor of detailed procedures that, while technically optional, are mandatory in order to gain protection from liability.

VI. REVIEW OF COMMENTARY ON THE DMCA SAFE HARBOR PROVISIONS

¶27 The DMCA safe harbor provisions have garnered significant criticism from legal commentators.⁶⁰ The thrust of this criticism can be summarized briefly. Instead of clarifying the uncertainty regarding the underlying liability of service providers for copyright infringement by their users, Congress chose to implement a system of procedures through which service providers could gain immunity from monetary liability. As a result of the remaining uncertainty regarding liability in the absence of the DMCA safe harbors, service providers will quickly adopt these procedures. Adoption of these procedures will prevent further judicial development of the underlying law regarding service provider liability and will result in the overzealous removal of content by service providers at the expense of legitimate First Amendment concerns.

¶28 In order to review properly the critical commentary on the DMCA safe harbor provisions, it is helpful to break down this summary into its four component criticisms. First, Congress failed by adopting the safe harbors instead of attempting to clarify the underlying liability for service providers. Second, the safe harbors will contribute to the continuation of the uncertainty surrounding liability of service providers. Third, the safe harbors will result in overzealous removal of content by service providers in an attempt to avoid uncertain liability. Fourth, the details of the counter-notification procedures potentially will result in impermissible restrictions on free speech by in effect granting temporary restraining orders prior to any determination by a court. Each of these criticisms will be examined in turn.

defamatory material provided by a third party because it did not know or have reason to know of the defamation. The *Stratton Oakmont* court found that Prodigy's affirmative attempts to regulate content made it a "publisher" and thus subject to liability as if it were the original source of the allegedly defamatory material. 1995 N.Y. Misc. LEXIS 229, at *10.

60. See, e.g., Band & Schruers, *supra* note 8; Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 403–15 (2002); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000).

A. Congress Failed by Not Clarifying the Underlying Liability of Service Providers

¶ 29 The first criticism is that Congress failed by adopting the safe harbor provisions rather than attempting to clarify the underlying law governing the liability of service providers for copyright infringement.⁶¹ This argument suggests that Congress instead should have attempted to clarify what constitutes direct, vicarious, and contributory infringement by service providers. This criticism seems to be unduly harsh. Given the ever-changing technological landscape, it was probably wise that Congress did not make such an attempt. Also, given the wide range of interests that would be affected by such legislation, it may have been practically impossible for Congress to pass adequate legislation. As a result, the DMCA safe harbors should be commended as an admirable attempt to address all of the competing concerns. However, this criticism does highlight the problems that have been created by continuing uncertainty about the extent of liability for service providers outside of the safe harbors.

B. The Safe Harbors Prevent Future Judicial Clarification

¶ 30 A more significant criticism is that the DMCA safe harbor provisions will prevent future judicial development of the underlying law of liability for copyright infringement as applied to service providers.⁶² According to this argument, service providers, being risk-averse, will widely embrace the safe harbors in an attempt to avoid the uncertainty of liability outside them. Due to the widespread use of the safe harbor procedures, courts will not be given the opportunity to decide cases clarifying the liability of service providers, as service providers will err on the side of caution and liberally remove content in response to notifications. The resulting lack of judicial clarification will reinforce the use of these procedures, thus creating a self-perpetuating cycle.

¶ 31 Although this argument is supported by service providers' actual adoption of the procedures provided by the DMCA safe harbor provisions, this argument is significantly weakened by the limited applicability of such provisions. The safe harbors protect service providers only from contributory liability, not direct or vicarious liability. As a result, judicial decisions regarding direct and vicarious liability should continue. This criticism is probably accurate with regard to future litigation concerning contributory liability, however, and serves to emphasize the significance of the final two criticisms.

C. Service Providers Will Overzealously Remove or Disable Access to Content

¶ 32 A much more troubling criticism is that the DMCA safe harbor provisions will result in overzealous removal of content by service providers.⁶³ Under the "notice and takedown" procedures, if a service provider receives notification from a copyright owner

61. See, e.g., Yen, *supra* note 60, at 1837, 1890-91.

62. See, e.g., *id.* at 1888.

63. See, e.g., Jackson, *supra* note 60, at 413; Yen, *supra* note 60, at 1888.

alleging copyright infringement, it can initially take one of two actions. On the one hand, it can remove or disable access to the allegedly infringing content. If it does so, it is protected from contributory liability by the safe harbors. On the other hand, it can refuse to remove or disable access to the allegedly infringing content, in which case it is unprotected by the safe harbors and faces full liability. In attempting to assess the merits of a complaint and determining which action to take, service providers basically function as “private judiciaries.”⁶⁴ Unlike a traditional public judiciary in a civil case, however, the service provider has a direct financial interest in the decision. If the service provider sides with the copyright owner and removes the content, it is immune from liability; if it sides with the alleged infringer, it exposes itself to liability. As a result of this financial interest, it is argued, the service provider will systematically favor the copyright owner.

¶ 33 There are three significant counterarguments to this criticism. The first counterargument is that many service providers will have competing financial interests that will prevent them from overzealously removing content. Although the fear of potential liability may tilt the balance in favor of copyright owners, the relationship between the service provider and the alleged infringer may counter this imbalance. A service provider that has a direct subscription relationship with the alleged infringer — as typically would be the case with a service provider hosting an alleged infringer’s Web site — will have a financial interest not only in retaining the alleged infringer as a paying customer, but also in retaining and attracting other customers. In many circumstances, this financial interest may be enough to ensure that the service provider adequately considers the interests of the alleged infringer and makes a fair determination based on the facts presented.

¶ 34 This counterargument is supported by the recent example of Verizon’s challenge against the Recording Industry Association of America (“RIAA”).⁶⁵ Using the subpoena power provided in section 512(h), the RIAA requested that Verizon identify one of its customers who allegedly downloaded over 600 copyrighted songs in a single day.⁶⁶ Rather than simply complying, Verizon chose to challenge the request in court.⁶⁷ After losing its case on statutory grounds, Verizon chose to challenge a second similar subpoena by the RIAA, this time primarily on constitutional grounds.⁶⁸ Again, Verizon lost its case. However, the fact that Verizon undertook multiple legal challenges suggests that in certain situations competing economic forces exist to make a challenge of the DMCA rules beneficial to service providers. Although this may be an anomalous example that does not suggest that service providers will make direct challenges in court

64. Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1257–59 (2002).

65. For a good discussion of this example and the related legal issues, see Martha M. Ciske, *For Now, ISPs Must Stand and Deliver: An Analysis of In re Recording Industry Association of America v. Verizon Internet Services*, 8 VA. J.L. & TECH. 9 (2003).

66. The RIAA knew the Internet Protocol (“IP”) address of the alleged infringer, but only Verizon had the information necessary to match this IP address with the name of the alleged infringer.

67. *In re Verizon Internet Servs. Inc.*, Subpoena Enforcement Matter, Recording Indus. Ass’n of Am. v. Verizon Internet Servs., 240 F. Supp. 2d 24 (D.D.C. 2003).

68. *In re Verizon Internet Servs. Inc.*, Subpoena Enforcement Matter, Recording Indus. Ass’n of Am. v. Verizon Internet Servs., 257 F. Supp. 2d 244 (D.D.C. 2003).

with any frequency, the Verizon example does illustrate that at least some service providers will not indiscriminately favor copyright owners at the expense of alleged infringers.

¶ 35 The second counterargument is that the provisions concerning unmeritorious claims set forth in section 512(f) should protect users from overzealous restrictions. As previously discussed, a copyright owner who “knowingly materially misrepresents ... that material or activity is infringing” is liable to alleged infringers and service providers for damages, including costs and attorney’s fees. This provision should serve to discourage illegitimate complaints. Of course, the strength of this discouragement depends on how strictly courts choose to enforce this provision — a factor that is far from clear.

¶ 36 The third and final counterargument is that the counter-notification procedures set forth in section 512(g) should function to protect adequately the interests of alleged infringers. Under these procedures, service providers are immune from liability for improperly removing or disabling access to content only if they notify the affected subscribers of such removal or disabling and provide an opportunity for the subscriber to challenge the complaint in a counter-notification. If the subscriber submits a counter-notification, the burden is then placed on the copyright owner to file an action in court. If no court action is filed, then the removed material will be replaced, causing only a temporary inconvenience to the alleged infringer. If a court action is filed, then the court becomes responsible for deciding the issue and the financial interest of the service provider is no longer an issue.

D. The Details of the Counter-Notification Procedures Are Unacceptable

¶ 37 There is also criticism that the details of the counter-notification procedures are insufficient from a First Amendment perspective.⁶⁹ Once an alleged infringer submits a counter-notification and the copyright owner decides to file an action in court, the service provider must continue to disable access to the content in order to remain protected by the DMCA safe harbor provisions. As one commentator has noted, this is equivalent to granting the copyright owner “a temporary restraining order and preliminary injunction without any hearing before a court or the posting of a bond.”⁷⁰ This effect is worrisome on account of the general reluctance to impose injunctions against speech, particularly prior to trial. This criticism of the safe harbor provisions seems to be valid. However, as this criticism already has been covered adequately elsewhere and applies equally to all types of service providers, it will not be considered further in this Note.

VII. APPLICATION OF THE DMCA SAFE HARBOR PROVISIONS TO SEARCH ENGINES

¶ 38 Despite the significant volume of commentary regarding the DMCA safe harbor provisions in general, there has yet to be any focus on the specific application of these

69. See, e.g., Yen, *supra* note 60, at 1889.

70. *Id.*

provisions to search engines. Application of the DMCA safe harbor provisions in this context seems particularly problematic. Many of the problems raised by the existing commentary are exacerbated when considered with respect to search engines. Additionally, search engines raise unique issues not addressed by the existing commentary.

¶39 The problems that arise from application of the DMCA safe harbor provisions to search engines stem from the nature of the relationship, or lack thereof, between search engines and alleged infringers. The nature of this relationship creates problems both due to inconsistencies in the plain language of the statute and because it upsets the careful balancing of interests that is intended by the detailed procedures of the safe harbors.

A. Problems with the Plain Language of the Statute as Applied to Search Engines

¶40 The plain language of the statute makes its application to search engines problematic. The statute specifically refers to “subscribers” and “account holders” in key parts of the safe harbor provisions. Both the initial eligibility requirements⁷¹ and the counter-notification procedures⁷² include such language. Although the DMCA does not define the terms “subscribers” or “account holders,” it seems clear that they have meanings distinct from the term “users,” which is found in other parts of the statute. The problem is that search engines typically do not have subscribers or account holders. Individuals who use search engines to locate materials typically are not required to log-in or pay for such service. Similarly, Web sites included in search engine indices generally do not have to take any affirmative steps or pay to be included. The fact that search engines do not have subscribers or account holders has some important implications when examining the application of the safe harbor provisions.

1. Initial Eligibility Requirements

¶41 Consideration of the effect of the lack of subscribers and account holders must begin with the initial eligibility requirements. This portion of the DMCA safe harbor provisions requires that service providers adopt and implement policies that provide for termination of “subscribers and account holders of the service provider’s system or network” who are repeat infringers and that service providers must inform their “subscribers and account holders” of such policies.⁷³ One plausible interpretation of this language is that service providers that do not have subscribers or account holders simply cannot fulfill the initial eligibility requirements and therefore are not eligible for the protection of the safe harbors. This interpretation would have the undesirable effect that the protection from the safe harbor provisions would be unavailable to the service providers with the least to gain from copyright infringement. Therefore, a more reasonable interpretation is that search engines and other service providers that lack

71. See *supra* Part IV.B.

72. See *supra* Part IV.D.

73. 17 U.S.C. § 512(i).

subscribers and account holders simply do not have to establish such policies in order to be eligible for the safe harbors.

2. Additional Requirements for “Information Location Tools”

¶42 Assuming that search engines are able to fulfill the initial eligibility requirements, it is then necessary to look to the additional requirements for “information location tools” to determine the applicability of the safe harbor provisions. This section of the statute simply refers to “users” rather than subscribers and account holders. As a result, it seems that search engines could benefit from the safe harbors if they meet the additional requirements set forth in section 512(d). The section setting forth the required elements of a sufficient notification also make no reference to subscribers or account holders. Therefore, it seems that search engines are subject to the “notice and takedown” procedures.

3. Counter-Notification Procedures

¶43 Problems arise again with the counter-notification procedures. In this portion of the safe harbor provisions, the term “account holder” is absent, but the term “subscriber” reappears. This section grants service providers immunity from liability to any party for removal of allegedly infringing materials “residing at the direction of *a subscriber of the service provider*,” (emphasis added) so long as the service provider “takes reasonable steps promptly to notify *the subscriber* that it has removed or disabled access to the material” (emphasis added) and fulfills the subsequent procedures if a counter-notification is filed.⁷⁴ Therefore, it seems that search engines, because they generally do not have subscribers, are not required to notify alleged infringers that their material has been removed.

4. Summary and Conclusions

¶44 Based on a literal reading of the entire statute, it seems that a typical search engine could benefit from the safe harbors even if it did not establish a policy to remove repeat infringers and did not make any attempt to notify alleged infringers when content is removed. Given the importance of the counter-notification procedures in particular, it is fortunate that Google and many other search engines have stated that they will follow such procedures.⁷⁵ It is unfortunate, however, that the plain language of the statute does not require them to do so.

¶45 It is unclear why Congress inserted the terms “subscriber” and “account holder” into crucial portions of the statute. On the one hand, this may be nothing more than a simple mistake on the part of Congress. If this is the case, then Congress should amend the statute to ensure both that search engines are protected by the safe harbors and that they are bound to the full procedures. In the absence of such an amendment, courts

74. 17 U.S.C. § 512(g).

75. Google’s policy regarding DMCA notifications can be found at <http://www.google.com/dmca.html> (last visited Jan. 25, 2004).

should interpret the language liberally to require that all service providers wishing to benefit from the safe harbors are subject to the full termination policy and counter-notification procedures. On the other hand, Congress may have believed that search engines either could not or should not be vulnerable to contributory liability for copyright infringement by third parties. If this is the case, then Congress should codify this result with a blanket immunity similar to the one established by section 230 of the CDA.

B. Problems Inherent in the Procedures as Applied to Search Engines

¶46 Even if the language of the DMCA safe harbor provisions is amended or interpreted so as to avoid the inconsistencies that arise when applied to search engines, the nature of the relationship between search engines and alleged infringers creates additional problems. The lack of a subscription relationship between search engines and alleged infringers suggests that search engines will be more likely than other types of service providers to overzealously remove content. Without a direct financial relationship between the search engine and the alleged infringer, there is nothing to counter-balance the threat of liability. As a result, search engines can be expected to be overly cautious when considering notifications by copyright owners, thus resulting in the removal of non-infringing materials.

¶47 Of course, the counter-notification procedures are designed to protect against the overzealous removal of content. Unfortunately, search engines are not in the best position to ensure that the counter-notification procedures work as designed. Due to the lack of relationship between search engines and alleged infringers, it may be difficult for search engines to provide adequate notice to alleged infringers so that they have the opportunity to defend their rights. If the counter-notification procedures do not work to notify alleged infringers of removed content, then the careful balancing of interests contemplated by the DMCA safe harbor provisions will be disrupted.

¶48 The seriousness of these problems from a constitutional perspective is tempered by the “state action” doctrine. This doctrine stipulates that the conduct of private actors generally is not required to comply with the Constitution. Therefore, indiscriminate or overzealous censoring of content on the part of search engines and other service providers usually would not be deemed a violation of the First Amendment. However, there are two plausible arguments for why the DMCA safe harbor provisions should not escape judicial scrutiny as a result of the state action doctrine.

¶49 First, the “entanglement/ delegation” exception to the state action doctrine may be applicable in this situation. This exception can apply if the government affirmatively authorizes, encourages, or facilitates constitutionally impermissible conduct by private parties. This exception is most often raised in cases dealing with racial equality and due process issues, but it occasionally has been applied to speech interests. It could be argued that the combination of the elaborate procedures established by the DMCA safe harbor provisions and the threat of liability, in essence, encourages service providers to violate the First Amendment. In other words, Congress has drafted search engines and other service providers into service as private copyright enforcement agents, while at the same time maintaining uncertain underlying liability for service providers, thus creating a

framework that encourages restrictions on content that would be impermissible if taken directly by the government. Under this reasoning, the resulting restrictions should be attributed to a state actor and subject to judicial review despite the fact that they actually are implemented by private parties. Although intuitively appealing, it seems that this argument is rather weak from a legal perspective and unlikely to succeed.

¶50 Second, the DMCA safe harbor provisions could be subject to a First Amendment challenge by analogy to the “permissive” provisions of the Cable Television Consumer Protection and Competition Act of 1992⁷⁶ addressed by the Supreme Court in *Denver Area Educational Telecommunications Consortium v. FCC*.⁷⁷ These permissive provisions allowed cable operators to choose whether or not to broadcast “patently offensive” sex-related programs on leased access and public, educational, and governmental access channels. These provisions in effect returned to cable operators some editorial discretion that had been removed by previous legislation prohibiting cable operators from exercising any editorial control over the content on such channels. The Court of Appeals for the District of Columbia Circuit held that it could not conclude that the actions taken by cable operators under these permissive provisions conflicted with the First Amendment because there was no state action.⁷⁸ Based on a combination of the several opinions issued by the Supreme Court, a majority of the Justices seemed to disagree with this position. Discussing the permissive provision regarding leased access channels, Justice Breyer, writing for Justices Stevens, O’Connor, and Souter, stated that the Court of Appeals, in deciding that no state action was present, “could not have meant that phrase literally, for, of course, petitioners attack ... a congressional statute — which, by definition, is an Act of ‘Congress.’”⁷⁹ Although Justice Breyer did not provide further explanation of why state action existed in this particular case, his substantive analysis of the permissive provisions necessarily implied that state action was present. Justice Kennedy, joined by Justice Ginsburg, offered a more explicit explanation of why state action existed in this case. Justice Kennedy noted that “[t]he plurality at least recognizes this as state action ... avoiding the mistake made by the Court of Appeals” and further explained that “[s]tate action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.”⁸⁰

¶51 Although the reasoning in these opinions is undeveloped and far from clear, the guidance from these opinions suggests that the threshold for finding state action is relatively low. As a result, the DMCA safe harbor provisions may be subject to substantive First Amendment review despite the fact that service providers ultimately make the choice over whether to remove or disable access to content.

76. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

77. 518 U.S. 727 (1996).

78. *Alliance for Community Media v. FCC*, 56 F.3d 105, 113 (D.C. Cir. 1995), *aff’d in part, rev’d in part*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

79. 518 U.S. at 737 (Breyer, J., plurality).

80. *Id.* at 782 (Kennedy, J., concurring in part and dissenting in part).

C. Policy Considerations

¶ 52 The problems raised by the application of the DMCA safe harbor provisions to search engines also create concerns from a policy perspective. Copyright infringement in the Internet age is an extremely serious problem, and innovative legal solutions should be encouraged. However, it is important that these solutions do not unnecessarily constrain the capability of the Internet to promote free expression. Given the crucial role of search engines for most Internet users, the problems of overzealous removal of content and ineffective counter-notification procedures are particularly troubling, and it seems that mechanisms that place additional burdens on search engines and encourage them to implement stringent restrictions on content should not be adopted lightly.

¶ 53 If search engines were the only, or best, possible point in the chain of service providers to crack down on copyright infringement, then a strong claim would exist for making search engines subject to the “notice and takedown” and other procedures of the DMCA safe harbor provisions. However, using these procedures against search engines seems to be less than ideal in many cases. In order for the approach of attacking allegedly infringing Web sites via search engines to be completely effective, copyright owners must send notifications to all search engines that includes the Web sites in their indices. Additionally, such an approach allows the Web sites to remain posted on the Internet and available to anyone who is able to locate them without the assistance of search engines. In the case of allegedly infringing Web sites that are domestically hosted, it seems that sending notifications to the service providers responsible for hosting such Web sites would provide equal or better protection of copyright.⁸¹ Therefore, in light of the unique importance of search engines and the apparent redundancy of making search engines subject to the “notice and takedown” and related procedures, the social costs of placing the burden of complying with the DMCA safe harbor provisions on search engines may not be justified. Although the case of internationally-hosted Web sites creates a more difficult situation, the inherent problems that exist when search engines make the determination of whether content should be removed suggest that this determination should be left to the courts.

81. This conclusion begs the question of why any copyright owner would send notifications to search engines if notifications to hosting service providers would provide equal or better protection. There are three possible explanations. The benign explanation is that under certain circumstances, such as when a copyright owner makes allegations against a large number of Web sites, it actually may be more efficient, from the perspective of the copyright owner, to send notifications to a few major search engines rather than a large number of hosting service providers. This explanation would not be relevant in circumstances concerning a relatively small number of allegations and would not explain why the burden in these circumstances should be shifted from copyright owners to search engines. The intermediate explanation is that copyright owners may be acting cautiously by sending complaints to every possible service provider. This explanation would highlight the point that notifications to search engines are often redundant and wasteful. Finally, the malign explanation is that copyright owners may recognize that search engines are more likely than hosting service providers to remove allegedly infringing content and, therefore, view search engines as easier targets. This explanation would be consistent with the argument that search engines are more likely than other service providers to overzealously remove content due to the lack of a subscription relationship with alleged infringers.

¶ 54 The combination of the importance of search engines for promoting free expression, the problems inherent in application of the DMCA safe harbor provisions to search engines, and the availability of other means for copyright owners to protect their interests suggests that Congress should devise an alternative system to be applied to search engines. The ideal alternative system would grant search engines complete immunity from monetary contributory liability for copyright infringement by third parties. This system would leave search engines open to claims for direct and vicarious liability, which should be applicable only in extraordinary circumstances where a search engine's conduct is particularly active and egregious. Also, the ideal system would allow courts to issue injunctions to search engines ordering them to remove from their indices Web sites that courts have determined to be infringing. This approach would allow courts to use search engines to protect the interests of copyright owners when other means are likely to be ineffective, without introducing all of the problems that arise when search engines attempt to implement the procedures of the DMCA safe harbors. Overall, this solution would avoid the shortcomings of the DMCA safe harbor provisions in the search engine context, while also eliminating the redundancy of imposing liability on search engines and recognizing the unique importance of search engines.

D. How Search Engines Should Respond

¶ 55 Search engines currently do not have much of a financial incentive to challenge the DMCA safe harbor provisions. However, Google's response of making notifications publicly available suggests that search engines are not entirely enamored with the procedures. It is reasonable to assume that all search engines would prefer a blanket immunity from contributory liability without having to incur the costs related to implementing the safe harbor procedures. Indeed, Google's response may be an attempt to draw attention to the situation with the hope that some other group will undertake the effort of persuading Congress to change the law. As the number of notifications increases, however, the cost of implementing the procedures may reach the point where search engines will find it in their best interests to take action on their own. Search engines may attempt to lobby Congress for new legislation. Given the significant influence of copyright owners, however, this approach may prove costly and ineffective. As an alternative, search engines may seek judicial clarification of the underlying liability. By refusing to remove allegedly infringing material in response to a notification, a search engine may be able to provoke a copyright owner to initiate a lawsuit against it.⁸² A favorable ruling in such litigation could eliminate the fear of contributory liability for search engines, thereby making it unnecessary to follow the safe harbor procedures in the future.

VIII. CONCLUSION

¶ 56 The DMCA safe harbor provisions are an innovative attempt by Congress to

82. Due to the fact that the decision of whether or not to follow the procedures and remove the material is made on a case-by-case basis, the search engine has substantial control to choose "attractive" potential plaintiffs.

combat widespread copyright infringement on the Internet while at the same time protecting service providers from a deluge of liability for the activities of their users and ensuring free expression in cyberspace. Unfortunately, the DMCA safe harbor provisions, like most of the commentary addressing them, fail to recognize the different relationships between different types of service providers and alleged infringers. The language of the statute makes its application to search engines unclear. At the very least, this language needs to be amended or liberally interpreted so as to make all of the safe harbor procedures applicable to search engines. However, simply addressing the inconsistencies in the language will not provide the ideal solution. Search engines are not in the appropriate position to balance adequately the interests of alleged infringers against the interests of copyright owners. The resulting imbalance is likely to result in overreaching restrictions on free speech. Similarly, copyright owners already have a number of other legal means to protect their interests. As a result, Congress should grant search engines complete immunity, without any accompanying procedural requirements, from contributory liability for the copyright infringing activities of third parties. This solution will leave copyright owners with other adequate mechanisms to protect their interests and will allow the Internet to come closer to reaching its potential for free expression.