I. INTRODUCTION

The Internet makes it possible for millions of people to buy and sell just about anything online.\(^1\) Internet auction sites, such as eBay, provide a forum for these transactions to occur.\(^2\) By offering 4,700 different categories of goods and services, eBay gives its users easy access to engage in economic commerce.\(^3\)

This easy access to e-commerce, however, comes at a cost to many copyright owners.\(^4\) With the advancements in technology, the standards of traditional copyright law must fight to keep up.\(^5\) Indeed, a recent decision stated that, “[t]he world wide web has progressed far faster than the law and, as a result, courts are struggling, to catch up.”\(^6\)

The struggle is evident in the analysis of vicarious liability cases leading up to and into the age of the Internet.\(^7\) It is also evidenced in the recent decision of

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2. eBay.com, User Agreement, at http://www.ebay.com/help/community/png-user2.html (last visited Mar. 18, 2003) (outlining services and terms of services offered by eBay). The terms of access include membership eligibility, fees and services, instructions for buying and selling on fixed and auction formats, privacy concerns and liability issues. Id.
3. Eric J. Sinrod, E-Legal: E-Bay not Secondarily Liable for Copyright Infringement, SPECIAL TO LAW.COM (Sept. 11, 2001).
Hendrickson v. eBay, Inc., where a court for the first time interpreted the safe harbor provisions of the Digital Millennium Copyright Act (DMCA). The court’s interpretation resulted in protection for eBay from secondary liability for copyright infringement.

Although the facts in Hendrickson proved favorable to eBay, the holding illustrates a move away from providing copyright protection on the Internet and a move toward protecting e-commerce. Nonetheless, post-eBay case law shows that it is still too early to determine the lasting effects. It is apparent that the widespread access to information and e-commerce will play an important role in the decision of whether an online service provider is liable for copyright infringement. Only time will tell how the law will balance the importance of e-commerce with the rights of copyright holders.

II. eBay: The Online Auction

eBay is an online service provider (“OSP”) that offers a venue for individuals to buy, sell and trade millions of items. As an OSP, eBay does not directly participate in the buying and selling of goods and services as a traditional auctioneer would. In contrast, eBay maintains that it merely provides a forum for its users to “offer, sell, and buy just about anything, at anytime, from anywhere.”

Despite the attempt to downplay its function, however, eBay readily admits that it is “the world’s largest online marketplace.” In addition to its auction format, eBay also offers its users a fixed marketplace method, where users can choose to sell or purchase goods or services at a fixed price. Regardless of

Mgmt., 443 F.2d 1159 (2d Cir. 1971); Shapiro, Bernstein & Co., v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963).
9. See generally id.
10. See generally id.; see also infra discussion section V and accompanying text (analyzing Hendrickson Court’s decision protecting eBay from secondary liability).
11. See infra discussion section VI and accompanying text (discussing how Hendrickson continues trend of protecting e-commerce); see also infra notes 47-50 and accompanying text (discussing Congress’ interest in protecting Internet commerce).
12. Eric J. Sinrod, E-Legal: E-Bay not Secondarily Liable for Copyright Infringement, SPECIAL TO LAW.COM (Sept 11, 2001); see also discussion section VI and accompanying text (discussing lack of clarity in post-eBay cases).
13. See infra discussion section VI (analyzing previous case law regarding relationship between liability and economics).
15. Id. An online service provider offers access to Internet and other online services.
17. eBay.com, Company Overview, at http://www.ebay.com/help/community/aboutbay/overview/index.html (last visited Mar. 18, 2003). In fact, eBay asserts that it is the “most popular shopping destination on the Internet” according to user minutes. Id.
18. Id.
whether the user selects the auction or fixed market place option, eBay claims no responsibility for the truth or accuracy of goods and services bought and sold on its site.\textsuperscript{19}

On any given day, eBay adds approximately one million new goods or services to its database, servicing approximately 42.4 million users on global scale.\textsuperscript{20} eBay requires that its users become members and sign user agreements before listing and selling items.\textsuperscript{21} Qualified users then interact in the initial transactions under assumed screen names, which ensures a level of privacy.\textsuperscript{22}

In the case of an auction, eBay automatically sends an e-mail to both the seller and highest bidder at its conclusion.\textsuperscript{23} eBay then reveals the identities of the parties only after consummation of the transaction.\textsuperscript{24} Although users control the transaction, in terms of pricing and communicating, eBay does receive a listing fee and a percentage of the final sale.\textsuperscript{25}

The high number of users, coupled with the private nature of the auction process, creates an environment for copyright infringement to thrive.\textsuperscript{26} The copyright holder is placed in a difficult, if not impossible, position of securing its property rights.\textsuperscript{27} The scope of infringement includes all forms of copyrighted materials, including books, movies, music recordings and software.\textsuperscript{28} The most serious form of copyright infringement, in terms of monetary loss, comes from the piracy of motion pictures and music, which results in billions of dollars in lost profits.\textsuperscript{29}

In an attempt to educate its users on the basics of copyright law, eBay provides general guidelines and fundamental rules pertaining to copyright.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{19} eBay.com, User Agreement, at http://www.ebay.com/help/community/png-user2.html (last visited Mar. 18, 2003) (asserting no responsibility over “quality, safety or legality” of items up for sale).
  \item \textsuperscript{20} Eric J. Sinrod, \textit{E-Legal: E-Bay not Secondarily Liable for Copyright Infringement}, at SPECIAL TO LAW.COM (Sept. 11, 2001); see also eBay.com, Company Overview, at http://www.eBay.com/community/aboutebay/overview/index.html (last visited Mar. 18, 2003).
  \item \textsuperscript{21} eBay.com, User Agreement, at http://www.ebay.com/help/community/png-user2.html (last visited Mar. 18, 2003) (describing eligibility, fees, services, rules and regulations). Individuals who choose to merely browse the auction site need not sign the user agreement. \textit{Id.}
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (describing eBay’s role in auction process).
  \item \textsuperscript{24} See \textit{id.}
  \item \textsuperscript{25} \textit{Id.} at 1094.
  \item \textsuperscript{26} 144 CONG. REC. S11887 (daily ed. Oct. 8, 2000) (statement of Sen. Kohl) (describing “epidemic” of copyright infringement on Internet).
  \item \textsuperscript{27} See \textit{id.}; see also infra note 84 and accompanying text (discussing burden on copyright holder to protect rights).
  \item \textsuperscript{28} \textit{Id.} (describing different forms of copyright infringement on Internet).
  \item \textsuperscript{29} See generally ifpi.org, Representing the Recording Industry Worldwide, at http://www.ifpi.org (last visited Mar. 18, 2003). The recording industry, for instance, lost 4.2 billion dollars due to pirated music sales on the Internet. \textit{Id.}
\end{itemize}
eBay also offers a Verified Rights Owner Program (VeRO) to all holders of intellectual property that focuses on protecting copyrights and trademarks. Members of VeRO receive certain benefits, including response to infringement allegations and limited information about eBay users. One key benefit VeRO offers is the ability to conduct automatic searches for possible infringing goods. Although VeRO members can report alleged incidents of copyright infringement directly to eBay staff, non-members must report such infringements directly to the copyright owner. eBay claims that the sheer number of users makes it prohibitively difficult to assure copyright protection. Despite eBay’s attempts to curtail and remedy alleged secondary copyright infringements, it continues to stress its lack of responsibility and ability to monitor its site. This inability of police power over items posted for sale provides a basis for contention regarding secondary liability for OSP’s.

III. EVOLUTION OF COPYRIGHT LAW

A. Early Statutory Protection: The 1976 Copyright Act

The 1976 Copyright Act (“Act”) governs traditional copyright issues, providing protection for original works of authorship fixed in a tangible medium of expression. The author obtains a bundle of rights if the work is sufficiently original and fixed in tangible form. Registration of the copyrighted work is not required to file suit for copyright infringement, but it does allow for statutory remedies, such as obtaining attorney’s fees in

32. Id. Other benefits of VeRO include access to customer support and priority e-mail queues regarding alleged infringements. Id.
33. Id. (describing search mechanism and process for VeRO members).
34. eBay.com, eBay’s Verified Rights Owner (VeRO) Program: Protecting Intellectual Property, at http://pages.ebay.com/help/community/VeRO-program.html (last visited Mar. 18, 2003). Due to the privacy of the auction transactions, it is obvious that non-members have an added challenge in remedying the alleged copyright infringement.
36. Id.; see also supra note 19 and accompanying text (stating eBay’s lack of responsibility for monitoring items listed for sale).
37. See, e.g., infra note 170 and accompanying text (discussing Hendrickson decision regarding copyright owner’s responsibility to provide exact numbers identifying infringing material).
38. 17 U.S.C. § 102(a) (2000). The Act protects the following categories of works: 1) literary; 2) musical, including any accompanying words; 3) dramatic, including any accompanying music; 4) pantomimes and choreographic; 5) pictorial, graphic and sculptural; 6) motion pictures and other audiovisual works; 7) sound recordings; and 8) architectural works.
The Act grants owners exclusive control over their copyrighted work. \(^{41}\) Copyright holders have exclusive rights to carry out themselves or authorize others to: 1) reproduce work in copies or phonorecords; 2) prepare derivative works; 3) distribute copies or phonorecords; 4) perform work publicly; 5) display copyrighted work publicly; 6) and perform work publicly through digital audio transmission if such work is a sound recording. \(^{42}\) In some cases, however, a copyright owner’s rights are limited. \(^{43}\)

The Internet posed many problems for the effect of the 1976 Copyright Act, as it did not address a system or provide guidelines for guarding against online copyright infringement. \(^{44}\) Vast amounts of information, including copyrighted material in every form, became available to millions of people to use and copy illegally. \(^{45}\) In response to the need for an enhanced form of protection for copyright holders on the Internet, Congress enacted the Digital Millennium Copyright Act. \(^{46}\)

**B. Digital Millennium Copyright Act**

In 1998, Congress passed The Digital Millennium Copyright Act (DMCA) in order to balance the need for copyright protection on the Internet with the growth of e-commerce. \(^{47}\) According to the legislative history, “[t]his bill recognizes the significance of our copyright laws as America and the world have become increasingly computerized. The Internet is rapidly changing our lives, and our copyright laws must keep pace.” \(^{48}\) To keep pace so to speak, the DMCA encouraged copyright owners to publish their work on the Internet with the assurance that the newly established guidelines would protect their copyrighted work. \(^{49}\) The DMCA also emphasized the importance of

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\(^{40}\) See id. The Berne Convention excluded the registration requirement for those countries participating in the convention. See generally Berne Convention for the Protection of Literacy and Artistic Works, Sept. 9, 1886, last revised July 24, 1971, 25 U.S.T. 1341.


\(^{42}\) Id.


\(^{44}\) See infra note 46 and accompanying text (finding no mention of protection of copyrighted works on Internet).


\(^{46}\) Id.


\(^{48}\) Id.

cooperation between copyright owners and Internet service providers in the
fight against copyright infringement on the Internet.50

1. DMCA Provisions Governing Copyright Protection on the Internet

The DMCA also responded to the negative economic impact of foreign
piracy, which amounts to an estimated 15 billion dollars each year.51 Thus, in
Article I of the DMCA, Congress included global online guidelines to protect
copyrighted work by incorporating the World Intellectual Property
Organization Copyright Treaty and the World Intellectual Property
Organization Performances and Phonograms Treaty.52 The two international
treaties established copyright protection and management systems, articulated
penalties for circumventing such systems, and designated forms of copyrighted
material entitled protection.53

Title II of the DMCA directly addressed the balance sought by Congress to
protect copyrighted materials and promote e-commerce by limiting the liability
of copyright infringement of OSP’s.54 This ensured, in effect, that copyright
protection did not come at a cost to the expansion of the Internet and e-
commerce.55 The language in these provisions went beyond the language in the
1976 Copyright Act, expanding protection from television broadcast systems to
digital transmissions, systems and networks.56


Section 512 of Title II of the DMCA provides safe harbor provisions for
service providers that limit liability for copyright infringement on the Internet.57
The DMCA defines a service provider as 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,

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(2000)).

eradicate piracy on Internet).

52. Id. (explaining foreign piracy as “just out of control”); see also generally 17 U.S.C. §§ 101-105


54. See supra notes 47-49, 51-52 and accompanying text (discussing legislative intent to protect Internet
economics and creative works); see also generally § 101, Title II.

copyright in the global, digital environment, the DMCA also clarifies the liability of service providers for
copyright infringement liability. Id. The service providers needed more certainty in this area in order to attract
the substantial investments necessary to continue the expansion and upgrading of the Internet. Id.

provider liability exemption).

without modification to the content of the material as sent or received." The definition also encompasses a “provider of online services or network access, or the operator of facilities thereof.” The DMCA does not specify whether the definition of “service provider” encompasses online service providers, Internet service providers, or both.

The first safe harbor provision, found in 17 U.S.C. § 512(a), applies when copyright infringement results when the service provider transmits, routes and provides connections for storing the material in the course of the above. The service provider can avoid liability if a third party creates the transmission, an automatic process controls the transmission, routing or connection, and a third party selects the recipients of the requested materials.

The provision also exempts service providers from liability if no copy remains in the provider’s storage for an unreasonable time, and if the work is not modified during the transmission or storage.

The second safe harbor provision deals with “System Caching.” Under 17 U.S.C. § 512(b), a service provider is exempt from monetary, injunctive and equitable relief for infringement of information temporarily stored on its system if a third person supplies the material, transmits the material, and an automatic process carries out the transmission of the material. In order to limit liability for infringement, however, a service provider must meet certain conditions. For example, the service provider must transmit the material without modification and conform to “industry standard data communications protocol.” In addition, the service provider cannot interfere with the technology related to the return of material to its recipient (with certain conditions in itself) and must permit access to stored information, if another individual requires such access. Finally, if the service provider receives sufficient notice of infringement, it must respond quickly and provide a

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60. Id. The distinction is important in that a “service provider” must fall within the statutory definition in order to qualify for the safe harbor provisions. 17 U.S.C. § 512(k)(1)(A) (2000); see also supra note 58.
62. 17 U.S.C. §§ 512(a)(1)-(3) (2000) (listing exemptions falling under category of transitory digital network Comm.s). The language in §§ 512(a)(1)-(3) is very similar to the language in the 1976 Copyright Act. The main difference, however, is that the DMCA provides relief from liability relating to digital network Comm.s, whereas the 1976 Copyright Act applies to television broadcast and satellite systems. See generally 17 U.S.C. §§ 101-105 (2000); 17 U.S.C. §§ 501(c)-(e) (2000); see also infra note 105.
64. See generally 17 U.S.C. § 512(b) (2000) (setting out system caching requirements as described in body).
68. 17 U.S.C. §§ 512 (b)(2)(C), (D) (2000). Section (C) only applies if the other individual’s technology does not interfere with the service providers system, is consistent with industry standards and does not remove unauthorized information from the service providers system or network. 17 U.S.C. § 512 (b)(2)(C) (2000).
remedy. The third safe harbor provision, pursuant to 17 U.S.C. § 512(c), addresses knowledge of the infringement and the service provider’s response to such knowledge. Generally, under this provision a service provider avoids liability if it does not have actual knowledge that its system or network contains infringing material, is not aware of infringing activity, or reacts expeditiously when knowledge of such material or activity becomes clear. Protection from liability also applies if the provider does not directly benefit from the infringing material or activity. The statute does not specify, however, what a “direct benefit” from infringing activity entails.

This provision requires the copyright holder to take affirmative steps to cure the copyright infringement. Although the copyright owner must initiate the process, the service provider must designate an agent to which it will send notification of the alleged copyright infringement. The designated agent must be easily accessible to the public and can be made available, for example, through its website.

To effect proper notification, the purported owner must substantially include certain information. First, the copyright holder, or an authorized person acting on its behalf, must submit a physical or electronic signature. Second, the supposed owner must sufficiently identify the allegedly infringed material, allowing the service provider to locate the material and contact the complaining party. Third, the alleged owner must provide a statement that it has a good

73. Id.; see also infra discussion sections IV(B) and accompanying text (discussing case law interpreting direct financial benefit regarding vicarious liability under DMCA application). According to traditional copyright law (pre-DMCA), obtaining a direct benefit from the infringement activity more often than not results in secondary copyright liability. See Ad&M Records v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) (stating direct financial benefit exists when potential future benefit); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996) (finding direct financial benefit from charging fees for daily rental, admission, parking, and concession); Shapiro, Bernstein & Co., v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (finding percentage of sales from infringing activity constitutes direct financial benefit). But see Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1376 (N.D. Cal. 1995) (holding fixed fee does not constitute a direct financial benefit).
76. 17 U.S.C. § 512 (c)(2) (2000). Such information, which is maintained by the Register of Copyrights, should include the agent’s name, number and e-mail address and other information deemed necessary. 17 U.S.C. §§ 512 (c)(2)(A), (B) (2000).
faith belief that the defendant infringed its copyrighted work.\textsuperscript{80} Finally, the owner must submit a statement under the pains and penalties of perjury that the notification is accurate and truthful.\textsuperscript{81}

This notification requirement is a crucial provision because the service provider can escape liability if it lacks actual or constructive knowledge of the infringing activity.\textsuperscript{82} Nonetheless, even if the service provider possesses knowledge, it remains exempt from liability if it acts promptly to remedy the situation.\textsuperscript{83} This provision not only illustrates the copyright owner’s burden of correcting the infringing activity, but also the minimal responsibility placed on the service provider.\textsuperscript{84}

The fourth safe harbor provision, 17 U.S.C. § 512(d), shields a service provider from liability for infringement if it refers or links its users to other locations that contain infringed copyrighted materials.\textsuperscript{85} For this protection to apply, the copyright infringement must occur through the use of information location tools, such as directories, hyperlinks or references.\textsuperscript{86} This provision, similar to §§ 512(b) and (c), also requires knowledge, lack of direct financial benefit related to the infringing activity and swift action after notification of infringement.\textsuperscript{87}

Although the safe harbor provisions of the DMCA do not grant service providers absolute immunity from secondary liability, the provisions do significantly limit liability if the providers meet certain criteria.\textsuperscript{88} The rationale for absolute liability clearly resulted from Congress’ desire to protect copyright owners’ materials.\textsuperscript{89} Yet, the extent of the limitations strongly reflects Congress’ intent to “facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development and education.”\textsuperscript{90}

\begin{itemize}
  \item \textsuperscript{83} 17 U.S.C. § 512 (c)(1)(C) (2000).
  \item \textsuperscript{84} See 17 U.S.C. § 512 (c)(3)(A)(i)-(vi) (2000); see also supra notes 77-81 and accompanying text (outlining notification requirements for alleged copyright holder). \textit{Contra infra} notes 116, 132, 146, 173-75 and accompanying text (analyzing evolving standard of service provider’s responsibility to police infringing activity).
  \item \textsuperscript{85} 17 U.S.C. § 512(d) (2000).
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} 17 U.S.C. §§ 512(d)(1)-(3) (2000).
  \item \textsuperscript{88} \textit{Infra} notes 167-71 and accompanying text (discussing application of notification provisions of DMCA to eBay).
  \item \textsuperscript{89} \textit{Supra} notes 47-49 and accompanying text (indicating importance of protecting copyrighted material on Internet).
  \item \textsuperscript{90} Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001) (citing S. Rep. No. 105-190, at 1 (2000)).
\end{itemize}
IV. DEVELOPMENT OF LIABILITY FOR COPYRIGHT INFRINGEMENT LEADING UP TO HENDRICKSON V. EBAY, INC.

Both the 1976 Copyright Act and the DMCA address the standards for direct and indirect copyright infringement. Over the years, courts have interpreted the statutory language and created common law standards of liability for traditional and digital forms of copyright infringement. Specifically, the courts established different criteria for direct and indirect liability, including vicarious and contributory forms. This note, however, will only substantively address direct and secondary or vicarious liability of online service providers.

A. Copyright Infringement Liability Generally

Copyright infringement liability can manifest itself in three ways: (1) direct or primary liability; (2) vicarious liability; and (3) contributory liability. To prove copyright infringement for each form of liability, a copyright holder must confirm ownership and demonstrate that the defendant copied the copyrighted work. A work is deemed copied if it “derive[s] from the copyrighted work, directly or indirectly, and [is] substantially similar in expression to the copyrighted work.”

Direct liability occurs when an individual violates a copyright owner’s exclusive copyright. Under this sort of liability, the infringer could face civil liability and perhaps pay, for example, actual damages and profits gained. The infringer may also be required to pay the copyright holder’s attorney’s fees.
and court costs. Such an individual can face criminal charges if he or she willfully infringes upon another’s work, or reproduces or distributes copyrighted work above a certain value. Although the civil liability provisions do not make any reference to the infringement of electronically or digitally copyrighted work, the criminal section provides such language.

Secondary liability, which encompasses vicarious and contributory liability, attaches when the responsible party is not the “actual” infringer. For vicarious liability to apply, an individual must have “the right and ability to supervise the infringing activity . . . and [have] an obvious and direct financial interest in the exploitation of copyrighted materials.” Conversely, contributory liability occurs when an individual actually causes or contributes to the infringing activity.

Under the 1976 Act, secondary liability primarily dealt with television broadcast systems. Exceptions to this form of liability applied in only two occasions: first to satellite, cable or broadcast systems; and second to providers who lacked control over content transmitted over their cables or wires. Although the DMCA provided new guidelines to include digital and electronic copyright infringement on the Internet, it did not rewrite traditional copyright law. The most significant change in the standard of liability, however, was the secondary liability protection available to service providers who fall within the DMCA’s safe harbor provisions. Thus, the remainder of this note will

104. Gershwin Pub’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). The key difference in distinguishing contributory liability with vicarious liability is that the former requires knowledge whereas the latter does not. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A][1], 12-70 (cited in Ellison v. Robertson, 189 F. Supp. 2d 1051, 1060 (C.D. Cal. 2002)).
105. 17 U.S.C. §§ 501(c)-(e) (2000) (finding only those involved in satellite, cable or broadcast systems secondarily liable). In situations where copyrighted material was transmitted without the owner’s consent, the operator of the cable or satellite system was treated as the “legal or beneficial owner of the material transmitted.” Id.
108. See supra discussion section III(B)(2) and accompanying text (explaining DMCA safe harbor provisions). Compare 17 U.S.C. §§ 501(c)-(e) (2000) (applying liability to only those engaged in satellite, cable or broadcast); 17 U.S.C. § 111(a) (2000), see also supra note 106 and accompanying text (allowing only
discuss the evolution of the standards that determine direct, and more importantly, vicarious liability for copyright infringement.

B. Case Law Illustrating the Evolution of Copyright Infringement Liability

1. Liability For Traditional Copyright Infringement

As stated above, direct liability for copyright infringement applied generally to a violation of the copyright owner’s exclusive right. The doctrine of vicarious liability, however, initially applied to landlord-tenant and proprietor-performer scenarios. The distinction between the two scenarios turned on whether the landlord or proprietor received some kind of benefit from the infringing activity. The courts then expanded the doctrine of secondary liability from the proprietor-performer context to include occasions when one possesses the “right and ability to supervise the infringing activity and receives a direct financial interest in such activities.”

_Gershwin Publishing Corp. v. Columbia Artists Management, Inc._ followed suit and relied on the above “Shapiro” test. The court found the defendant vicariously liable because it participated in the programming of the infringing activity and benefited substantially from said activity. Although the defendant had no “formal control,” it possessed the ability to police, which satisfied the _Shapiro_ test.

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110. Shapiro, Bernstein, & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (discussing precedent for application of vicarious liability). The landlord-tenant scenario dealt with a landlord leasing his or her property at a fixed rate to an individual who engages in copyright infringement, while the manager-performer scenario dealt with a manager renting space to a performer who performed copyrighted music without authorization. _Id._


112. Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963). The Defendant in _Shapiro_ actually supervised the infringer’s conduct and received a percentage of gross sales from the sale of pirated records. _Id._ In its reasoning, the Court stated “the imposition of vicarious liability in the case before us cannot be deemed unduly harsh or unfair. [The Defendant] has the power to police carefully the conduct of its concessionaire . . . our own judgment will simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised.” _Id._ at 308.

113. 443 F.2d 1159 (2d Cir. 1971).

114. Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1160 (2d Cir. 1971) (determining vicarious liability of association sponsoring act performing copyrighted work without authorization); _see also supra_ note 112 and accompanying text (stating _Shapiro_ vicarious liability test includes right and ability to control infringing activity).

115. _Id._

116. _Id._ The holding in _Gershwin_ essentially lowered the bar for control in finding that “constructive” control satisfied the _Shapiro_ test. _See id._
2. Liability for Digital and Electronic Copyright Infringement

The 1976 Copyright Act further clarified the standard for direct liability.\textsuperscript{117} Although the standard remained the same, the statutory language only applied to the traditional forms of copyright infringement.\textsuperscript{118} As a result, the decision rested with the courts as to when digital and electronic service providers fell within the traditional direct liability standard.\textsuperscript{119}

In \textit{Religious Tech. Ctr. v. Netcom On-Line Communication Servs, Inc.},\textsuperscript{120} the court determined the direct liability of an Internet access provider and Internet bulletin board service involved in automatically and temporarily storing copyrighted information posted by users.\textsuperscript{121} The court held that an operating system that temporarily housed information did not directly result in copyright infringement.\textsuperscript{122} Nonetheless, the court characterized service providers as more than mere “passive conduits for information.”\textsuperscript{123} The court carefully distinguished service providers from basic carriers, such as phone companies, because basic carriers enjoyed an exemption from liability if they did not possess direct or indirect control over the infringing material.\textsuperscript{124}

Despite the change in the various forms of copyright infringement, the courts were slow to catch up and followed the same judicial reasoning in cases decided before the 1976 Copyright Act.\textsuperscript{125} In determining the secondary liability issue in \textit{Religious Technology Center}, the court applied the standard used in \textit{Shapiro} and \textit{Gershwin}.\textsuperscript{126} The court found that the right to suspend and delete potentially infringing activity illustrated the right and ability to control, thus satisfying the first prong of the test.\textsuperscript{127} The second prong, however, did not

\begin{itemize}
\item \textsuperscript{117} See generally 17 U.S.C. § 501 (2000).
\item \textsuperscript{119} \textit{Infra} notes 120-24 and accompany text (examining development of direct liability of copyright infringement regarding service providers).
\item \textsuperscript{120} 907 F. Supp. 1361 (N.D. Cal. 1995).
\item \textsuperscript{121} \textit{Id.} at 1367-68. In reference to the storage of information, once it is stored, other users can download the information via the Internet. \textit{Id.}
\item \textsuperscript{122} \textit{Id.} at 1368.
\item \textsuperscript{123} Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1370 (Cal. N.D. 1995) (finding defendants not within common carrier exemption); \textit{see also infra} note 124 and accompanying text (providing definition for service providers).
\item \textsuperscript{124} Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (stating service providers offer more than just “wire[s] and conduits”). At the time the court decided \textit{Religious Technology Center}, common carriers were exempt from liability under 117 U.S.C. § 111(a)(3) if there was no direct or indirect control over the infringed content. \textit{Id.} (citing 117 U.S.C. § 111(a)(3) (2000)). The court, however, left the decision for the legislatures as to whether online service providers should also be exempt from liability. \textit{Id.}
\item \textsuperscript{125} \textit{Supra} notes 102-08 and accompanying text (discussing standards for secondary liability for copyright infringement).
\item \textsuperscript{126} \textit{Supra} discussion section IV(B)(1) and accompanying text (setting out standard for secondary liability in \textit{Shapiro}, and followed in \textit{Gershwin}).
\item \textsuperscript{127} Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1370 (N. D. Cal. 1995). The court rejected the defendant’s claim that it could not screen all of the messages posted by its 500 subscribers. \textit{Id.}
\end{itemize}
pass muster because the receipt of a fixed fee did not constitute a direct financial benefit.\textsuperscript{128}

One of the most recent and influential cases interpreting the application of the secondary liability doctrine for service providers stems from a non-Internet copyright infringement case.\textsuperscript{129} In Fonovisa, Inc. v. Cherry Auction, Inc.,\textsuperscript{130} the issue involved whether secondary liability attached to an operator of a swap meet or flea market for copyright infringement perpetrated by its customers.\textsuperscript{131} The court found the swap meet operator liable because it acquired the right and ability to supervise (by promoting the event), controlled its access, and attained the ability to terminate any vendor.\textsuperscript{132} The operator also satisfied the direct financial benefit test, since it “substantially benefit[ed]” from charging a daily rental fee, an admission fee, and other fees, including parking and concession fees.\textsuperscript{133}

The Fonovisa Court did not address the issue of whether or not fees imposed by the swap meet operators constituted fixed fees.\textsuperscript{134} Nevertheless, the fees in Fonovisa arguably served different purposes than the fees in Religious Technology Center.\textsuperscript{135} In one sense, the rental and admission fees charged in Fonovisa were similar to the membership fee charged in Religious Technology Center in that they both provided access to the service.\textsuperscript{136} In another sense, however, the fees imposed in Fonovisa aimed at increasing the number of participants at the swap meet.\textsuperscript{137} The key difference in the analysis of direct financial benefit test was that the operators in Fonovisa had knowledge of the activity, whereas the providers in Religious Technology Center did not.\textsuperscript{138} Even though a provider may be vicariously liable in the absence of knowledge,

\begin{itemize}
  \item \textsuperscript{128} \textit{Id.} The court argues that a fixed fee did not in any way improve the defendants’ services or appeal to new subscribers. \textit{Id. at} 1377.
  \item \textsuperscript{129} Supra discussion section IV(B)(2) and accompanying text (explaining holding in Fonovisa).
  \item \textsuperscript{130} 76 F.3d 259 (9th Cir. 1996).
  \item \textsuperscript{131} Id. at 261.
  \item \textsuperscript{132} Id. at 262 (discussing similarity of present facts to Shapiro and Gershwin). The Fonovisa Court’s reasoning is similar to that used in Religious Technology Center. Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc., 907 F. Supp. 1361, 1370 (N. D. Cal. 1995) (stating right to suspend or delete demonstrates right to control).
  \item \textsuperscript{133} Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996). The court rejected the argument that a direct benefit must be “tied to the sale of particular infringing items.” Id. Rather, the fact that “all of [the fees] flow directly from customers who want to buy the counterfeit recordings at bargain basement prices” to the operators constitutes direct benefit. Id.
  \item \textsuperscript{134} Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996) (lacking analysis of fixed rate).
  \item \textsuperscript{135} Supra notes 128 and 133 and accompanying text (describing what constitutes fixed fee in Fonovisa and Religious Technology Center).
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263-64 (9th Cir. 1996); see also supra note 133 and accompanying text (discussing court’s rational in finding economic benefit).
\end{itemize}
Fonovisa implicitly considers the defendant’s knowledge in determining whether a direct financial benefit exists. After the enactment of the DMCA, the courts not only interpreted the new statutory treatment given to online service providers, but also incorporated the established precedents that applied to traditional forms of copyright infringement. In the case of A&M Records, Inc. v. Napster, Inc., the court decided the first major post-DMCA case regarding Internet copyright infringement. In Napster, the defendant operated a system of “peer-to-peer” sharing of MP3’s. The system allowed its users to store MP3’s on their computers making them available to other users, search for MP3’s on other users’ computers, and transfer copies over the Internet.

In analyzing the first prong of the vicarious liability test, the court found Napster’s ability to decline service and right to terminate accounts equivalent to having the right and ability to supervise the infringer’s conduct. The court stated that in order to avoid liability, the “reserved right to police must be exercised to its fullest extent.” In terms of the second prong, the court relied on the interpretation from Fonovisa that a direct financial benefit arises if the infringing activity increases the number of users. Considering the fact that Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 261 (9th Cir. 1996), and Shapiro, Bernstein & Co., Inc., v. H. L. Green Co., 316 F.2d 304, 306 (2d Cir. 1963)). The court, however, goes beyond the standard set forth in Shapiro, by requiring that providers police at the “fullest extent.” A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001).
Napster did not impose a fee to access its system, the court focused on the connection between the infringing activity and future revenue.\textsuperscript{148} Indeed, the thrust behind this argument appears to be the enormous revenues lost to illegal swapping and copying of copyrighted music.\textsuperscript{149}

Even if the court found Napster vicariously liable, Napster could still escape liability if it fell within the safe harbor provisions of § 512 of the DMCA.\textsuperscript{150} Yet, the court preserved this issue for trial and refused to address the substantive matter.\textsuperscript{151} Nonetheless, the court did not accept the proposition that the safe harbor provisions will never provide protection from vicarious liability.\textsuperscript{152}

The development of vicarious liability for copyright infringement follows a certain trend.\textsuperscript{153} The same rational of preserving and advancing e-commerce motivated Congress to enact the DMCA, as well as the courts to decide whether service providers are vicariously liable.\textsuperscript{154} As forums for copyright infringement grew in size, and as the exact financial benefit became less clear, the court placed more stringent requirements on the providers to ensure against infringement.\textsuperscript{155}

V. HENDRICKSON V. EBAY: CHANGE IN INTERNET COPYRIGHT LAW

Despite the existence of other case law regarding the liability of online service providers, \textit{Hendrickson v. eBay, Inc.}\textsuperscript{156} was the first case to determine whether the safe harbor provisions of the DMCA applied to Internet auction

\footnotesize{(stating \textit{Fonovisa} Court’s reason for finding economic benefit).}

\textsuperscript{148} A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) (stating Napster benefits from improved system of providing music by attracting more members).

\textsuperscript{149} \textit{See supra} notes 45 and 51 and accompanying text (noting Congress’ concern for effect of Internet piracy and extent of monetary loss resulting from piracy); \textit{see also supra} notes 52-53 and accompanying text (illustrating response to concern of piracy).

\textsuperscript{150} A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001) (discussing Napster’s affirmative defense of falling within safe harbor provisions as Internet service provider).

\textsuperscript{151} \textit{Id.} at 1025 (expressing doubt regarding application of safe harbor provisions to Napster). The court also weighed in the hardship factor on the Plaintiffs if an injunction was lifted. \textit{Id.}

\textsuperscript{152} \textit{Id.;} A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1025 (9th Cir. 2001) (citing Charles S. Wright, Notes & Comments: Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998, 75 WASH. L. REV. 1005, 1028-31 (2000) (stating Congressional intent to provide limited liability relief)).

\textsuperscript{153} \textit{See supra} discussion sections IV(B) and accompanying text (discussing development of vicarious liability for copyright infringement). Arguably, the trend indicates imposition of liability for providers who injure the economy. \textit{See id.}

\textsuperscript{154} \textit{See supra} notes 45-48 and accompanying text (discussing legislative history, which indicates economics as reason for passing DMCA).

\textsuperscript{155} \textit{See A&M Records, Inc. v. Napster, Inc.,} 239 F.3d 1004, 1023 (9th Cir. 2001) (noting right to police amounts to right and ability to control); \textit{Fonovisa, Inc. v. Cherry Auction, Inc.,} 76 F.3d 259, 263 (9th Cir. 1996) (finding ability to control when able to supervise and control vendors); \textit{Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.,} 907 F. Supp. 1361, 1370 (N.D. Cal. 1995). \textit{But see supra} note 128 and accompanying text (finding fixed fee not direct financial benefit in \textit{Religious Technology Center}).

\textsuperscript{156} 165 F. Supp. 2d 1082 (C.D. Cal. 2001).
Hendrickson combined an analysis of existing law regarding vicarious liability with an interpretation of the application of the safe harbor provisions. In finding eBay exempt from secondary liability, it is apparent that the court showed a readiness to protect e-commerce at the expense of intellectual property right holders.

In Hendrickson, the Plaintiff alleged that an individual sold copies of his copyrighted digital video disk (DVD) on eBay. In response to Hendrickson’s cease and demand letter, eBay requested additional information identical to the requirements in the Notification section of the DMCA. Hendrickson, however, refused to complete the notification form and did not notify eBay of any specifics of the alleged copyright infringement.

The court began its vicarious liability analysis by first determining whether eBay constituted an Internet service provider under the definition in the DMCA. Although this issue in itself presented a matter of first impression, the court stated simply “there is no dispute over whether eBay is an Internet service provider.” The only support given for this conclusion was the broad nature of the statutory definition. This decision by the court not only opened the door to other “online service providers,” but also allowed eBay to qualify for the safe harbor provisions.

The court’s analysis of the safe harbor provisions dealt solely with 17 U.S.C. § 512(c), concerning the service provider’s knowledge of the alleged infringement and its response to such infringement. The main thrust of the

157. Id. at 1083; supra notes 150-51 and accompanying text (explaining Napster Court’s refusal to consider application of safe harbor provisions). But see supra note 152 and accompanying text (showing Napster Court’s unwillingness to find no service providers could fall within provision).


159. Eric J. Sinrod, E-Legal: E-Bay not Secondarily Liable for Copyright Infringement, SPECIAL TO LAW.COM (Sept. 11, 2001).


161. Id. at 1095 (discussing eBay’s Notice of Infringement form sent to Hendrickson); 17 U.S.C. § 512(c) (2000) (setting forth DMCA notification requirements for copyright owner).

162. Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1085 (C.D. Cal. 2001). Hendrickson eventually complied with the notification requirements, but only after legal action began. Id.

163. Id. at 1088.

164. Id. The court stated that eBay constitutes a “provider of online services or network access, or the operator of facilities therefore.” Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1088 (C.D. Cal. 2001). This conclusion leaves the door open to other service providers who offer more than mere access or facilities, as eBay clearly does. In fact, the court in its opinion stated that eBay overstates its classification as merely an “online venue that publishes ‘electronic classified ads.’” Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1084 (C.D. Cal. 2001). Although this statement does not in itself mean that eBay does not fall within the DMCA definition of online service provider, it does seem to warrant more analysis than simply stating the definition is broad. Id.

165. Id.

166. Supra notes 163-64 and accompanying text (interpreting DMCA service provider provision as broad leaves definition open-ended).

167. See generally Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1088-94 (C.D. Cal. 2001) (discussing application of 17 U.S.C. § 512(c) to eBay); 17 U.S.C. § 512(c) (2000); supra discussion section III(B)(2) and
court’s argument is that Hendrickson failed to meet any of the notification requirements set forth in the statute, and therefore could not establish that eBay had actual or constructive knowledge of the infringing activity. The court did not accept Hendrickson’s cease and desist letter as an attested statement of the accuracy of the alleged infringing activity. Similarly, the court did not find Hendrickson’s identification of the infringing individual’s user names sufficient to allow eBay to locate the infringing materials. Due to the failure to comply with the notification requirements, Hendrickson’s notification was not a factor for determining whether eBay had actual or constructive knowledge.

The court then considered whether eBay possessed the right and ability to control the infringing activity. It held that eBay’s ability to “remove or block access” to allegedly infringing materials did not constitute having the ability to control. The court reasoned that an online provider could not be excluded from the safe harbor provisions while at the same time acting in accordance with DMCA provisions. In addition, eBay did not play an affirmative role in the listing, selling or bidding of items, and did not directly participate in the consummation of the sale.

Since eBay did not have the right or ability to control the infringing material,
the court did not discuss whether eBay received a direct financial benefit.\textsuperscript{176} Had the court discussed the matter, it could have relied on previous case law interpreting the second prong of the vicarious liability test.\textsuperscript{177} For example, much like the operator in Shapiro, who earned a percentage of gross sales from the infringing activity, eBay received a percentage of the final fee based on the highest bid.\textsuperscript{178} Following the Shapiro court, eBay’s compensation constitutes a direct financial benefit.\textsuperscript{179}

If the court, however, followed the holding in Religious Technology Center, the fee eBay imposes for listing items on its website would not constitute a direct financial benefit.\textsuperscript{180} In addition, the court could look to the slightly different direct benefit analysis in Fonovisa and Napster, relating to the increase in customers.\textsuperscript{181} Yet, the court’s opinion does not provide guidance as to whether the availability of infringing materials would lead to increase in users.\textsuperscript{182} Regardless of which precedent would apply, eBay would have qualified for the safe harbor provisions if it in fact received a direct financial benefit.\textsuperscript{183}

VI. POST HENDRICKSON V. EBAY, INC. – CONTINUED PROTECTION FOR INTERNET SERVICE PROVIDERS?

For the most part, recent cases adhere to the Hendrickson decision in their vicarious liability analysis. In Costar Group, Inc., and Costar Realty Information, Inc. v. Loopnet, Inc.,\textsuperscript{184} the court followed the eBay line of reasoning.\textsuperscript{185} In finding the service provider free from liability, the court held

\textsuperscript{176} Id. at 1093 (stating failure to prove right and ability to control prevented review of direct financial benefit).

\textsuperscript{177} See generally supra discussion sections IV(B) and accompanying text (discussing various courts’ interpretations of what constitutes direct financial benefit).

\textsuperscript{178} Supra note 112 and accompanying text (finding percentage of sales from infringing activity amounts to direct financial benefit in Shapiro); Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (stating eBay receives percentage of final fee).

\textsuperscript{179} Supra note 112.

\textsuperscript{180} Supra note 128 and accompanying text (stating fixed fee not financial benefit); Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (describing how eBay charges “insertion fee” for listing items on website).

\textsuperscript{181} Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263-4 (9th Cir. 1996) (finding direct financial benefit where infringing activity increases number of participants); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) (relying on test in Fonovisa).

\textsuperscript{182} See generally Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082 (C.D. Cal. 2001) (providing no information regarding increase in user participation based on accessibility of copyrighted materials).

\textsuperscript{183} See Costar Group, Inc. and Costar Realty Information, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 699 (D. Md. 2001) (stating safe harbor provisions do not require direct financial benefit showing if no right or ability to control).

\textsuperscript{184} 164 F. Supp. 2d 688 (D. Md. 2001).

\textsuperscript{185} Costar Group, Inc. and Costar Realty Information, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 691-92 (D. Md. 2001). The service provider in this case posted photographs of commercial real estate on its site for the Plaintiff. Id.
that it neither had the right and ability to control nor a direct financial benefit.\(^{186}\)

In Ellison v. Robertson,\(^ {187}\) the court somewhat clarified Hendrickson’s analysis of the right and ability to control portion of the vicarious liability test by stating that “the DMCA requires more than the mere ability to delete and block access to infringing material after that material has been posted in order for the ISP to be said to have ‘the right and ability to control such activity.’”\(^{188}\) AOL did not have the right or ability to control the illegal activity, more or less the ability to block access, because it could not control the infringing activity at the “root level.”\(^ {189}\) In terms of a direct financial benefit, the court relied on the Fonovisa and Napster interpretation, finding the infringing materials did not draw in customers.\(^ {190}\) Although Costar and Ellison somewhat clarify the Hendrickson decision, the application of the DMCA in regard to vicarious liability remains uncertain.

The holding in Hendrickson v. eBay, Inc. proves significant because it is the first case to determine the application of the safe harbor provisions to Internet auction sites.\(^ {191}\) Indeed, the holding is perhaps even more significant for the fact that it shows the court’s willingness to shield online service providers from indirect liability.\(^ {192}\) This protection, however, comes at the cost of copyright infringement.\(^ {193}\)

Although Hendrickson is a case of first impression, it follows a natural progression from previous case law.\(^ {194}\) Despite the fact that the courts in Fonovisa and Napster did not protect the providers from indirect liability, there

186. Id. at 704. In regard to the “right and ability to control,” the court held that Loopnet did not have any powers beyond being able to block or control access. Id. Further, since Loopnet did not charge a fee for the real estate listing, it did not obtain a direct financial benefit from the real estate listings. Costar Group, Inc. and Costar Realty Information, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 704 (D. Md. 2001).
187. 189 F. Supp. 2d 1051 (D. Md. 2002). In Ellison, the defendant copied and uploaded plaintiff’s copyrighted works onto a USENET, which allowed other peers to access the work. Id. at 1054. The information on one USENET can be viewed by USENET peers, of which AOL belonged. Id.
188. Id. at 1061. The Ellison court felt that Hendrickson overstated the right and ability to control issue, and thusly clarified it. Ellison v. Robertson, 189 F. Supp. 1051, 1061 (D. Md. 2002); see also Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001) (discussing how right to block should not prevent application of safe harbor provisions).
192. See generally supra discussion section V and accompanying text (discussing Hendrickson holding shielding eBay from secondary liability.)
193. Id. and accompanying text (stating reasons why Hendrickson lost copyright infringement argument).
194. Supra notes 172-78 and accompanying text (analyzing evolution of case law and application of precedent to Hendrickson decision).
II. Conclusion

_Hendrickson v. eBay, Inc._ shows a court’s readiness to protect the rights of an e-commerce provider over the rights of a copyright owner. It is evident that the standards for determining secondary liability involve inconsistencies. The central theme with regard to financial benefit, however, illustrates the importance of protecting Internet generated revenues.

The decision in _Hendrickson_ creates an opportunity for other service providers to seek protection from copyright infringement liability. Virtually any Internet service provider now falls within the online service provider...
definition provided in the DMCA. As a result, more service providers will seek shelter under the safe harbor provisions. Therefore, with the protection offered by the DMCA coupled with the court’s willingness to protect economic activity, the future seems glum for copyright holders.

Still, the favorable facts to eBay’s case ought to be taken into account. eBay attempted to remedy the problem and Hendrickson continuously failed to comply with eBay’s notification requirements. That said, post-Hendrickson case law illustrates that facts in favor of the service provider are not necessary to preclude liability.

It is likely that courts in the future will protect and promote e-commerce, regardless of whether it protects against copyright infringement. Although Congress and the courts attempt to seek a balance between encouraging economic activity and copyright protection, the emphasis clearly lies on economic benefit. Only time will tell the fate of the copyright holder in a world dominated by e-commerce.

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