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WHERE THE NETCOM YARDSTICK COMES UP SHORT: COURTS SHOULD NOT APPLY THE FACTS OF NETCOM AS AN EXAMPLE OF INTERMEDIATE AND TRANSIENT STORAGE UNDER § 512(a) OF THE DMCA

Sean Croman

Abstract: Internet Service Providers (ISPs) risk substantial liability for passively contributing to subscriber-initiated acts of online copyright infringement. Cognizant of this problem, courts and Congress have taken differing approaches to limiting ISP liability. The Netcom court established that ISPs could store infringing material for eleven days without incurring liability for direct infringement, but did not similarly rule out liability for other forms of infringement. The Digital Millennium Copyright Act (DMCA) subsequently advanced the law of copyright by strengthening the protections enjoyed by copyright holders whose works face exploitation online, subject to four activity-specific "safe harbor" limitations on liability. For example, § 512(a) of the DMCA offers safe harbor for ISPs that store "intermediate and transient" copies of infringing material "in the course of" digital transmissions. In contrast, § 512(c) offers safe harbor for ISPs that store infringing material at the direction of users, subject to a strict notice-and-takedown requirement. In applying § 512(a), some courts consider the terms "intermediate" and "transient" to be facially ambiguous and look to the DMCA's legislative history for interpretive guidance. Relying heavily on a legislative committee report discussing a rejected version of the statute, courts in the Ninth Circuit have concluded that § 512(a) codifies the result of Netcom. Based on this conclusion, these courts endorse reliance on Netcom's facts as an example of § 512(a) activity. This Comment argues that courts should not consider or apply Netcom's facts as an example of intermediate and transient storage under § 512(a) for three reasons. First, the eleven-day storage of infringing material at issue in Netcom would not constitute intermediate and transient storage as subsequently defined by § 512(a). Second, courts that apply Netcom's facts as an example of intermediate and transient storage under § 512(a) obviate § 512(c)'s notice-and-takedown requirement. Third, the DMCA's text and legislative history confirm that Congress decided against codifying Netcom in favor of safe harbors that differ considerably from Netcom's holding. As a result, courts and prospective litigants must either wait for a predictable definition of intermediate and transient storage to develop through judicial interpretation of § 512(a)'s express terms or lobby Congress for a more definitive codified standard. ISP defendants might also seek timely relief under § 512(c) or assert common law defenses not codified within the DMCA's four corners.

The digital environment poses a significant threat to the interests of copyright holders. The Usenet, a worldwide community of electronic Bulletin Board Services (BBSs), is no exception. Millions of people

read and contribute Usenet postings on a daily basis. Postings frequently contain infringing material supplied by Usenet subscribers. Internet Service Providers (ISPs) in turn supply the infrastructure necessary for many subscribers to efficiently communicate, store, and access infringing content. Although ISPs perform a fundamentally passive role, they nevertheless contribute to the unlawful conduct of others by serving as a critical link in the widespread distribution of Usenet postings. Not surprisingly, ISPs risk liability for their contributory role in acts of online infringement.

Cognizant of the problems faced by ISPs, courts and Congress have taken differing approaches to limiting ISP liability for online copyright infringement. In Religious Technology Center v. Netcom On-Line Communication Services, Inc., the United States District Court for the Northern District of California held that an ISP could store infringing material for eleven days without liability for direct infringement. The court considered theories of liability discretely and did not similarly rule against other forms of infringement. Congress subsequently codified four activity-specific limitations on liability under § 512 of the Digital Millennium Copyright Act (DMCA). Unlike the disparate limitations on liability articulated in Netcom, DMCA safe harbors shield ISPs

in which infringing Usenet postings are widely distributed online) [hereinafter Ellison I].

4. See Netcom, 907 F. Supp. at 1365 n.4 (internal citations omitted).
5. See, e.g., Ellison v. Robertson, 357 F.3d 1072, 1075 (9th Cir. 2004) (recognizing that Usenet discussion group was "used primarily to exchange unauthorized digital copies" of copyrighted works) [hereinafter Ellison II].
7. See Netcom, 907 F. Supp. at 1369-70 (recognizing that ISPs perform functions that are "essential if Usenet messages are to be widely distributed").
8. See, e.g., Netcom, 907 F. Supp. at 1373 (recognizing that ISPs can be held liable for materially contributing to infringing conduct of third parties); Ellison I, 189 F. Supp. 2d at 1057 (agreeing with Netcom court's analysis of ISP liability).
10. See id. at 1373 ("Because the court cannot see any meaningful distinction (without regard to knowledge) between what Netcom did and what every other Usenet server does, the court finds that Netcom cannot be held liable for direct infringement.").
11. See id. at 1372-75, 1377 (ruling against direct and vicarious infringement on different grounds while holding that ISP defendant could be held liable for contributory infringement for independent reasons).
13. See Netcom, 907 F. Supp. at 1366-77 (considering theories of liability and related defenses
from all forms of infringement\textsuperscript{14} under specific statutorily-defined circumstances.\textsuperscript{15} For example, § 512(a) provides a safe harbor for ISPs that create "intermediate and transient" copies of infringing material "in the course of" digital transmissions.\textsuperscript{16} To qualify for safe harbor under § 512(a), ISPs may not allow anyone other than "anticipated recipients" of user-directed transmissions to access infringing material and must store infringing material for "reasonably necessary" periods of time.\textsuperscript{17} Section 512(c), by contrast, provides a safe harbor for ISPs that store content at the direction of users for longer durations.\textsuperscript{18} However, to qualify under § 512(c), ISPs must comply with a strict notice-and-takedown requirement,\textsuperscript{19} which § 512(a) lacks.\textsuperscript{20}

While Congress enacted the DMCA to clarify the rules of liability for online infringement,\textsuperscript{21} courts disagree on whether temporary Usenet storage constitutes § 512(a) activity and the extent to which \textit{Netcom} remains a relevant authority after the enactment of the DMCA.\textsuperscript{22} Courts in the Ninth Circuit have concluded that § 512(a) codifies the result of \textit{Netcom} based on favorable references to \textit{Netcom} in a legislative report describing a proposed limitation on liability that Congress rejected in favor of appreciably different safe harbors.\textsuperscript{23} Despite openly recognizing the problematic nature of outdated legislative records, these courts have applied \textit{Netcom}'s facts as an example of intermediate and transient storage under § 512(a).\textsuperscript{24} In contrast, courts in the Fourth Circuit have concluded that past common law standards should not influence DMCA

discretely).

\textsuperscript{14} See H.R. REP. NO. 105-551, pt. 2, at 50 (1998) ("The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement.").

\textsuperscript{15} See 17 U.S.C. § 512(a)-(d).

\textsuperscript{16} See \textit{id.} § 512(a).

\textsuperscript{17} See \textit{id.} § 512(a)(4).

\textsuperscript{18} See \textit{id.} § 512(c) (affording safe harbor without imposing "in course" storage or "reasonably necessary" period of time requirement).

\textsuperscript{19} See \textit{id.} § 512(c)(1)(C).

\textsuperscript{20} See \textit{id.} § 512(a).

\textsuperscript{21} See H.R. REP. NO. 105-551, pt. 2, at 23–25 (1998) (recognizing need to "more precisely define the relationship between intellectual property and electronic commerce").

\textsuperscript{22} See infra Part II.

\textsuperscript{23} See Ellison II, 357 F.3d 1072, 1081 (9th Cir. 2004); Ellison I, 189 F. Supp. 2d 1051, 1068–70 (C.D. Cal. 2002).

\textsuperscript{24} See Ellison II, 357 F.3d at 1081; Ellison I, 189 F. Supp. 2d at 1068–70.
outcomes. These courts have evaluated similar durations of temporary Usenet storage under § 512(c) rather than § 512(a).

This Comment argues that courts should not consider or apply Netcom's facts as an example of intermediate and transient storage under § 512(a) for three reasons. First, the eleven-day storage of infringing material at issue in Netcom would not constitute "intermediate and transient" storage as subsequently defined under § 512(a). Netcom did not exclusively store infringing material "in the course of" digital transmissions, did not restrict access to "anticipated recipients" of user-directed transmissions, and did not maintain infringing postings for a "reasonably necessary" period of time as required under the statute. Second, courts that apply Netcom's facts as an example of intermediate and transient storage under § 512(a) contravene § 512(c)'s notice-and-takedown provision. Third, the DMCA's text and legislative history confirm that Congress decided against codifying common law standards in favor of limitations on liability that differ substantially from the Netcom court's treatment of ISP liability.

Part I of this Comment reviews the facts and rationale of Netcom and discusses § 512's provisions in the context of underlying congressional goals. Part II examines how courts have reached differing conclusions regarding whether temporary Usenet storage constitutes § 512(a) activity and the continued relevance of Netcom. Part III explores how the DMCA's legislative history offers mixed guidance on the significance of Netcom within the DMCA's four corners. Part IV argues that Netcom's facts are an improper yardstick for measuring intermediate and transient storage under § 512(a) for three reasons: (1) Netcom's eleven-day storage of Usenet content did not constitute § 512(a) activity; (2)

25. See, e.g., ALS Scan, Inc. v. RemarQ Cmtys., Inc., 239 F.3d 619, 622 (4th Cir. 2001) (finding that "ultimate conclusion" on liability is controlled by Title II of DMCA).
26. See infra Part II.B.
27. See infra Part IV.A.
28. See infra Part IV.A.1.
29. See infra Part IV.A.2.
30. See infra Part IV.A.3.
31. See infra Part IV.B.
32. See S. REP. NO. 105-190, at 19 (1998) ("[T]he Committee decided to leave current law in its evolving state and, instead, to create a series of 'safe harbors,' for certain common activities of service providers.").
applying Netcom's facts as a § 512(a) yardstick obviates § 512(c)'s notice and takedown provision; and (3) Congress expressly considered and rejected the option of codifying Netcom. This Comment concludes that courts and prospective litigants must either wait for predictable standards of intermediate and transient storage to develop through judicial interpretation of § 512(a)'s express terms or lobby Congress for a more definitive standard. ISP-defendants might also seek timely relief under other DMCA safe harbors or assert common law defenses not codified within the DMCA's four corners.

I. SECTION 512 CODIFIES LIMITATIONS ON ISP LIABILITY THAT ARE UNLIKE PRIOR COMMON LAW STANDARDS

The DMCA advanced the law of copyright by clarifying the rules of liability for online infringement.\(^{34}\) Theories of infringement and related limitations developed incrementally at common law.\(^ {35}\) For example, the Netcom court established that ISPs could temporarily store infringing material without liability for direct infringement, but did not similarly rule on other theories of liability.\(^ {36}\) Congress subsequently advanced the law of copyright by codifying four activity-specific "safe harbor" limitations on ISP liability.\(^ {37}\) While the Netcom court addressed theories of infringement and related defenses discretely,\(^ {38}\) DMCA safe harbors conditionally shield qualifying ISPs from all forms of infringement.\(^ {39}\) Section 512(a) provides a safe harbor for ISPs that store "intermediate and transient" copies of infringing material "in the course of" digital transmissions.\(^ {40}\) In contrast, § 512(c) provides a safe harbor for ISPs that store content for longer periods of time at the direction of users.\(^ {41}\) To

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35. See DRATLER, JR., supra note 6, § 1.01, at 1-4.
36. See Netcom, 907 F. Supp. at 1372–75, 1377 (ruling against direct and vicarious infringement on different grounds while holding that ISP could be held liable for contributory infringement for independent reasons).
37. See 17 U.S.C. § 512(a)–(d); § 512(n) (confirming that each DMCA safe harbor contemplates a "separate and distinct" ISP function); see also H.R. REP. NO. 105-551, pt. 2, at 23–25, 50 (recognizing need to "more precisely define the relationship between intellectual property and electronic commerce," and confirming that "[t]he limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement").
38. See Netcom, 907 F. Supp. at 1372–75, 1377.
41. See id. § 512(c).
qualify for safe harbor under § 512(c), ISPs must promptly take down infringing material upon receiving notice of infringing activity.\textsuperscript{42} Because DMCA limitations on liability are not exclusive,\textsuperscript{43} ISP defendants that fail to qualify for DMCA safe harbors remain free to assert other common law defenses.\textsuperscript{44}

A. The Netcom Court Recognized that ISPs May Temporarily Store Infringing Usenet Content Without Incurring Liability for Direct Infringement

In Netcom, the U.S. District Court for the Northern District of California considered, as a matter of first impression, whether courts should hold ISPs liable for passively facilitating acts of online infringement.\textsuperscript{45} Plaintiff Religious Technology Center (RTC) held copyrights in the works of L. Ron Hubbard, the late founder of the Church of Scientology.\textsuperscript{46} Defendant Dennis Erlich allegedly infringed RTC's copyrights when he posted Hubbard's works on the Usenet discussion group alt.religion.scientology.\textsuperscript{47} Erlich gained access to the Internet through co-defendant Thomas Klemesrud's BBS.\textsuperscript{48} Klemesrud's BBS in turn obtained its Internet connection through co-defendant Netcom, which at the time was one of the largest providers of Internet access in the United States.\textsuperscript{49}

The Usenet, or "User Network," is an international collection of BBSs,\textsuperscript{50} also known as Usenet "peers,"\textsuperscript{51} whose computers connect with one another to exchange information online.\textsuperscript{52} Usenet customers read and contribute to particular Usenet sites.\textsuperscript{53} Usenet sites in turn distribute customer postings among other Usenet servers according to explicit and

\begin{footnotesize}
\begin{enumerate}
\item See id. § 512(c)(1)(C).
\item See id. § 512(l).
\item See id.
\item Id.
\item Id. at 1365–66.
\item Id. at 1366.
\item Id.
\item See id. at 1365 n.4.
\item See Ellison I, 189 F. Supp. 2d 1051, 1053 (C.D. Cal. 2002).
\item See id.
\item See Netcom, 907 F. Supp. at 1365 n.4 (citations omitted).
\end{enumerate}
\end{footnotesize}
implicit configuration settings.\textsuperscript{54} Usenet traffic flows over a wide range of digital networks, including the Internet,\textsuperscript{55} and reaches millions of people on a daily basis.\textsuperscript{56} ISPs play a significant role in the file sharing process by: (1) helping make it possible for information posted online to reach all Usenet servers worldwide in a matter of hours;\textsuperscript{57} and (2) retaining copies of Usenet postings for continued access by customers and other Usenet peers.\textsuperscript{58} For example, Netcom’s entire customer base and other Usenet peers could access Erlich’s infringing postings while they resided on Netcom’s system.\textsuperscript{59}

The litigants in Netcom did not dispute the processes by which Erlich’s postings were distributed online.\textsuperscript{60} Not long after Erlich posted the infringing material, Klemesrud’s BBS server copied the material to Netcom’s Usenet server.\textsuperscript{61} Netcom’s Usenet server then made the infringing material available to other Usenet servers, which in turn did the same for numerous other servers, until all Usenet sites worldwide had access to the material.\textsuperscript{62} The entire process took a matter of hours.\textsuperscript{63} Pursuant to an internal policy, Netcom retained copies of Erlich’s postings for eleven days, during which time Netcom’s customers and other Usenet peers could obtain copies of the infringing material directly from Netcom’s system.\textsuperscript{64} Although RTC informed Netcom when it learned of the infringing activity, Netcom took no action to remove or limit access to the infringing material.\textsuperscript{65}

On cross-motions for summary judgment, RTC claimed that Netcom had directly, vicariously, and contributorily infringed its copyright interests.\textsuperscript{66} All three forms of copyright infringement involve the

\textsuperscript{54. See id.}
\textsuperscript{55. See id.}
\textsuperscript{56. See id.}
\textsuperscript{57. See id. at 1367–68.}
\textsuperscript{58. See id. (recognizing that so long as infringing material was stored on Netcom’s system, Netcom’s customers and other Usenet sites could download infringing material).}
\textsuperscript{59. See id.}
\textsuperscript{60. See id. at 1367.}
\textsuperscript{61. See id.}
\textsuperscript{62. See id. at 1368.}
\textsuperscript{63. See id.}
\textsuperscript{64. See id. at 1367–68.}
\textsuperscript{65. See id. at 1368.}
\textsuperscript{66. See id. at 1367 (“Plaintiffs argue that, although Netcom was not itself the source of any of the infringing materials on its system, it nonetheless should be liable for infringement, either directly, contributorily, or vicariously.”).}
Unauthorized exercise of one or more of the exclusive rights of copyright holders as defined under the Copyright Act. Liability for direct infringement typically results from affirmative actions that directly violate a copyright holder’s exclusive rights. Liability for vicarious infringement requires proof that an infringing party had the right and ability to control activities in which that party had a direct financial interest. Liability for contributory infringement arises where one party knowingly induces, causes, or materially contributes to the infringing conduct of another.

The Netcom court addressed theories of liability and related defenses discretely. The court refused to impose liability for direct infringement after concluding that Netcom did not commit a volitional act in passively distributing infringing material. Consistent with this view, the court suggested that ISPs should generally be able to retain infringing material at the direction of subscribers for reasonably limited periods of time without giving rise to liability for direct infringement. In contrast, the court refused to impose liability for vicarious infringement because RTC

67. 17 U.S.C. § 106 (2000 & Supp. II 2002). In describing the exclusive rights of copyright holders, the Act states:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id.


69. See id. at 1382.

70. See, e.g., Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (describing how “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer”) (footnote omitted).

71. See Netcom, 907 F. Supp. at 1368–72 (recognizing in relevant part that “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party,” and “the mere fact that Netcom’s system incidentally makes temporary copies of plaintiffs’ works does not mean Netcom has caused the copying”).

72. See id. at 1368–72 (stating general unwillingness to hold ISPs directly liable for copies of infringing material made and stored on ISP’s system where infringing subscriber is clearly directly liable for same act).
failed to produce evidence that Netcom received a direct financial benefit from Erlich's postings.\textsuperscript{73}

The \textit{Netcom} court did not discuss similar limitations on liability in the context of contributory infringement.\textsuperscript{74} Instead, the court explicitly recognized that courts may hold ISPs contributorily liable for storing infringing material at the direction of users and then failing to take "simple" measures to prevent damage to copyright interests after receiving notice of the infringing activity.\textsuperscript{75} Summary judgment on contributory infringement was ultimately precluded by questions of fact regarding whether Netcom knew, or should have known, that it substantially contributed to Erlich's actions and whether Netcom could, upon receiving notice, have limited RTC's injury.\textsuperscript{76}

In short, the \textit{Netcom} court advanced but did not conclusively define the contours of ISP liability at common law. The court's decision established that: (1) ISPs could temporarily store infringing Usenet content for eleven days without incurring liability for direct infringement; (2) courts should not hold ISPs liable for vicarious infringement unless the ISP derived a direct financial benefit from the infringing activity; and (3) temporary storage of infringing material could give rise to liability for contributory infringement where an ISP fails to reasonably limit damage to copyright interests after receiving notice of infringing activity. Continued uncertainty over the landscape of liability prompted Congress to enact the DMCA.\textsuperscript{77}

\textbf{B. \textit{The DMCA Promotes E-Commerce by Strengthening Copyright Protections Subject to Four Activity-Specific Limitations on ISP Liability}}

Congress enacted the DMCA to promote e-commerce by enhancing the protection of copyright interests and clarifying the rules of liability for online infringement.\textsuperscript{78} The DMCA's legislative history confirms that

\begin{itemize}
\item \textsuperscript{73} \textit{Id.} at 1377.
\item \textsuperscript{74} \textit{See id.} at 1373–75 (discussing risk of liability for contributory infringement without reference to limitations on liability discussed in context of direct and vicarious infringement).
\item \textsuperscript{75} \textit{Id.} at 1375.
\item \textsuperscript{76} \textit{See id.} at 1374–75.
\item \textsuperscript{77} \textit{See H.R. REP. No. 105-551, pt. 2, at 23 (1998)} ("The Committee on Commerce believes it is important to more precisely define the relationship between intellectual property and electronic commerce . . ."); \textit{see also DRATLER, JR., supra} note 6, § 1.01, at 1-4 (discussing concerns that prompted Congress to enact DMCA).
\item \textsuperscript{78} \textit{See H.R. REP. NO. 105-551, pt. 2, at 23.}
\end{itemize}
Congress viewed the promotion of economic growth and the protection of intellectual property rights as complementary, rather than competing, goals. Legislative action was ultimately prompted by concerns that: (1) new technologies were creating new threats to copyrighted works at such a rate that copyright holders could not wait for common law protections to catch up; and (2) unclear common law standards placed ISPs in an undesirably tenuous position with regard to potential liability.

The DMCA’s most important titles, Titles I and II, focus squarely on issues related to the Internet. Title I strengthens the protections enjoyed by copyright owners whose works face exploitation online. Title II, codified at 17 U.S.C. § 512, defines four independent circumstances in which qualifying ISPs are shielded from liability for direct, vicarious, and contributory infringement. Section 512(a) provides a safe harbor for ISPs that passively transmit digital content and create “intermediate and transient” copies of infringing material “in the course of” digital network communications. Section 512(b) limits ISP liability for temporarily cached data. Section 512(c) limits ISP liability for storing material at the direction of customers, subject to a strict notice-and-takedown requirement. Section 512(d) limits ISP liability for referring or linking users to infringing material. Section 512(n) confirms that each DMCA safe harbor contemplates a “separate and distinct” activity-specific limitation on ISP liability.

79. See id.
80. See DRATLER, JR., supra note 6, § 1.01, at 1-4.
81. See id. § 6.01[2], at 6-19 to 6-20.
82. See id. § 1.02, at 1-5 to 1-6.
83. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01[C][1], at 12B-22 (2004).
85. See id. § 512(a).
86. See id. § 512(b).
87. See id. § 512(c).
88. See id. § 512(d).
89. See id. § 512(n). The Act’s legislative history verifies the activity-specific nature of DMCA safe harbors:

Consider, for example, a service provider that provides a hyperlink to a site containing infringing material which it then caches on its system in order to facilitate access to it by its users. This service provider is engaging in at least three functions that may be subject to the limitation on liability: transitory digital network communications under subsection (a), system caching under subsection (b), and information location tools under subsection (d).

C. Section 512(a) Provides a Safe Harbor for ISPs that Store Infringing Material in the Course of Digital Transmissions

Section 512(a) limits the liability of ISPs that store "intermediate and transient" copies of infringing material "in the course of" digital transmissions. As a threshold matter, § 512(a)'s limitations apply solely to "transitory digital network communications" and related storage activities. An ISP may seek relief from liability under § 512(a) only where the ISP: (1) passively transmits material as directed by a third party through the ISP's system; and (2) stores "intermediate and transient" copies of infringing material "in the course of" digital network communications. Intermediate and transient copies subsist exclusively while material is en route to intended destinations, and not under any other circumstances. Consequently, ISPs that store content at points where transmissions are initiated or received for any length of time cannot qualify for safe harbor under § 512(a) as a threshold matter. For example, ISPs that provide temporary storage space for online chatroom content, which may not reside on an ISP's system for longer than chatroom messages appear onscreen, must seek relief from liability under § 512(c) rather than § 512(a).

After meeting the aforementioned threshold criterion, transmission and storage activities must conform to five additional requirements in order for an ISP to qualify for safe harbor under § 512(a). First, a person other than the ISP must initiate or direct the transmission of infringing material. Second, the ISP must carry out the transmission, routing, and "in course" storage of infringing material through an automatic technical process. Third, the ISP may not select recipients of infringing material except as an automatic response to the request of

91. See id.
92. See id.
94. See id. at 50–51 (recognizing that "intermediate and transient" copies as contemplated under § 512(a) are created as automatic consequence of transmission process).
98. Id. § 512(a)(1).
99. Id. § 512(a)(2).
another person. Fourth, the ISP may not maintain copies of infringing material in a manner: (1) "ordinarily accessible" to anyone other than "anticipated recipients"; or (2) for longer than is "reasonably necessary" for the transmission, routing, or provision of connections. Fifth, the ISP may not modify infringing material.

The DMCA’s legislative history confirms the narrowing influence of subsections (a)(1) through (5). For example, a committee report that tracks the express language of each enacted provision specifies that ISPs must serve as passive "conduits" for the communications of others in order to qualify for safe harbor under § 512(a). To this end, subsection (a)(4)'s "reasonably necessary" requirement ensures that eligible copies of infringing material are made exclusively while infringing material is en route to its intended destination. In similar fashion, subsection (a)(4)'s "anticipated recipient" requirement prevents ISPs from qualifying for safe harbor under § 512(a) if they make stored content available to unintended third parties.

D. Section 512(c) Provides a Safe Harbor for ISPs that Store Copies of Infringing Material at the Direction of Customers, Subject to a Strict Notice-and-Takedown Provision

Section 512(c) limits the liability of ISPs that store copies of infringing material on their systems or networks at the direction of users. As a threshold matter, § 512(c) defines qualifying storage as "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider." ISPs need not store infringing material "in the course of" digital transmissions or retain infringing material for a "reasonably necessary" period of time to limit their liability under § 512(c). Section 512(c) therefore

100. Id. § 512(a)(3).
101. Id. § 512(a)(4).
102. Id. § 512(a)(5).
104. See id.
105. See id.
106. Id.
108. Id. § 512(c)(1).
109. See id. § 512(c) (lacking "in course" and "reasonably necessary" storage requirements).
contemplates longer periods of storage than § 512(a).\textsuperscript{110} That said, § 512(c) imposes a number of activity-specific constraints on safe harbor qualification.\textsuperscript{111} For example, an ISP may \textit{not} possess knowledge of infringing material stored on its system,\textsuperscript{112} nor may it obtain direct financial benefits from infringing activity and still qualify for safe harbor under § 512(c).\textsuperscript{113} Additionally, an ISP must, upon receiving notification of claimed infringement, "respond expeditiously" to remove or disable access to related infringing material stored on its system.\textsuperscript{114}

\textbf{E. The DMCA Operates Independently from Preexisting Common Law Rights, Remedies, and Defenses}

The DMCA does not abolish common law rights, remedies, or defenses.\textsuperscript{115} Section 512's provisions operate as independent statutory defenses to liability, and therefore apply only after circumstances demonstrate that an ISP is otherwise subject to liability under existing principles of law.\textsuperscript{116} To this end, § 1330 explicitly provides that the DMCA does not annul or limit common law rights or remedies otherwise available to potential litigants.\textsuperscript{117} Section 512(l) guarantees ISP defendants similar rights, providing that an ISP's failure to qualify for DMCA limitations on liability "shall not bear adversely" on the consideration of other common law defenses.\textsuperscript{118}

In sum, the Netcom court recognized that ISPs may temporarily store infringing material without liability for \textit{direct} infringement, but did not conclusively define the contours of ISP liability or related defenses. Congress subsequently codified four activity-specific limitations on ISP liability applicable to all forms of copyright infringement under § 512 of the DMCA. Section 512(a) specifically limits the liability of ISPs that create "intermediate and transient" copies of infringing material in the course of transitory digital communications. To qualify for safe harbor under § 512(a), an ISP must: (1) create copies of infringing material "in

\begin{itemize}
  \item \textsuperscript{110} See supra notes 91–96 and accompanying text.
  \item \textsuperscript{111} See 17 U.S.C. § 512(c).
  \item \textsuperscript{112} See id. § 512(c)(1)(A)(i)–(ii).
  \item \textsuperscript{113} See id. § 512(c)(1)(A)(ii).
  \item \textsuperscript{114} See id. § 512(c)(1)(B).
  \item \textsuperscript{115} See 17 U.S.C. § 1330.
  \item \textsuperscript{116} See id. § 1330.
  \item \textsuperscript{117} See H.R. REP. NO. 105-551, pt. 2, at 50 (1998).
  \item \textsuperscript{118} Id. § 512(l).
\end{itemize}
the course of” digital network communications;¹¹⁹ (2) not make infringing material available to anyone other than “anticipated recipients”;¹²⁰ and (3) not store infringing material for longer than “reasonably necessary” for the transmission, routing, or provision of connections.¹²¹ Section 512(c), by contrast, allows ISPs to retain infringing material for longer periods of time, subject to a strict notice-and-takedown requirement.¹²²

II. COURTS DISAGREE ON THE CIRCUMSTANCES IN WHICH TEMPORARY STORAGE CONSTITUTES § 512(a) ACTIVITY AND THE CONTINUED RELEVANCE OF NETCOM

Federal courts have reached differing results when applying § 512 in the context of temporary Usenet storage. Courts in the Ninth Circuit have concluded that § 512(a) codifies the result of Netcom and endorse reliance on Netcom’s eleven-day storage of infringing Usenet content as an example of “intermediate and transient” storage under § 512(a).¹²² In contrast, courts in the Fourth Circuit have concluded that § 512’s statutory provisions operate independently of Netcom and assess similar durations of storage under § 512(c).¹²³

A. Courts in the Ninth Circuit Have Relied on the Facts of Netcom as an Example of § 512(a) Activity

Although case law applying § 512(a) is limited, courts in the Ninth Circuit endorse reliance on the facts of Netcom as an example of intermediate and transient storage under § 512(a).¹²⁶ In Ellison v. Robertson,¹²⁷ the U.S. District Court for the Central District of

119. See id. § 512(a).
120. See id. § 512(a)(2)–(4).
121. See id. § 512(a)(4).
122. See id. § 512(c).
123. See infra Part II.A.
124. See, e.g., CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544, 555 (4th Cir. 2004) (“The DMCA has merely added a second step to assessing infringement liability for Internet service providers, after it is determined whether they are infringers in the first place under the preexisting Copyright Act.”).
125. See infra Part II.B.
126. See Ellison II, 357 F.3d 1072, 1081 (9th Cir. 2004); Ellison I, 189 F. Supp. 2d 1051, 1070 (C.D. Cal. 2002).
California held that defendant America Online (AOL) could store infringing Usenet content for fourteen days and still qualify for safe harbor under § 512(a).\textsuperscript{128} Plaintiff Harlan Ellison owned copyrights to a number of works of science fiction.\textsuperscript{129} Co-defendant Stephen Robertson posted Ellison’s works to a Usenet newsgroup, which in turn transmitted Robertson’s posting to AOL’s system.\textsuperscript{130} Pursuant to an AOL policy, AOL stored copies of the unlawful postings on its system for fourteen days,\textsuperscript{131} during which time AOL’s thirty million customers\textsuperscript{132} and other Usenet peers worldwide could access the infringing material.\textsuperscript{133} AOL moved for summary judgment\textsuperscript{134} and asserted numerous defenses to Ellison’s claims, including that AOL qualified for safe harbor under § 512 subsections (a) and (c).\textsuperscript{135}

In deciding whether AOL’s storage of infringing material constituted “intermediate and transient” storage as contemplated under § 512(a), the Ellison court relied heavily on references to Netcom contained in a legislative committee report discussing a version of § 512(a) that Congress considered and rejected.\textsuperscript{136} The court first deemed the terms “intermediate” and “transient” to be “rather ambiguous.”\textsuperscript{137} The court then looked to the aforementioned committee report for guidance.\textsuperscript{138} The report indicated in relevant part that the “reasonably necessary” requirement associated with the rejected version of § 512(a) was “drawn from the facts of the Netcom case” and intended to codify Netcom’s “implicit” limitation on liability for temporary storage.\textsuperscript{139}

The court ultimately concluded that Congress intended to codify Netcom’s facts as a limitation on liability for all forms of infringement based on similarities between a single subsection of the rejected proposal

\textsuperscript{128} \textit{Id.} at 1070.
\textsuperscript{129} \textit{Id.} at 1053.
\textsuperscript{130} \textit{Id.} at 1053–54.
\textsuperscript{131} \textit{Id.} at 1054.
\textsuperscript{132} See America Online, \textit{Who We Are}, at http://www.corp.aol.com/whoweare (last visited Mar. 19, 2005) (“Today, about 30 million people around the world count themselves as AOL members.”).
\textsuperscript{133} See \textit{Ellison I}, 189 F. Supp. 2d at 1053–54.
\textsuperscript{134} \textit{Id.} at 1055.
\textsuperscript{135} \textit{Id.} at 1067.
\textsuperscript{136} \textit{See id.} at 1069–70.
\textsuperscript{137} \textit{Id.} at 1068.
\textsuperscript{138} \textit{See id.} at 1068–70.
\textsuperscript{139} \textit{Id.} at 1069–70.
and a related subsection of the enacted law.\textsuperscript{140} Despite these similarities, the court recognized two distinct problems with its approach.\textsuperscript{141} First, the outdated legislative report contemplated a version of § 512 that differed "in a number of ways" from the subsequently enacted statute.\textsuperscript{142} Second, even if certain terms associated with the rejected proposal appear in the law enacted, the meaning of those terms might be quite different in the context of a law that contained "vastly more provisions" than the earlier version.\textsuperscript{143}

Nevertheless, the court applied \emph{Netcom}'s facts as an example of intermediate and transient storage under § 512(a).\textsuperscript{144} In doing so, the court reasoned that if eleven days constituted a reasonably limited period of time in \emph{Netcom}, then AOL's fourteen-day retention of infringing Usenet content met § 512(a)'s purportedly \emph{Netcom}-derived standard.\textsuperscript{145} The court discounted the three-day difference between AOL's fourteen-day storage of infringing material and the eleven-day storage at issue in \emph{Netcom} as "insufficient to distinguish the two cases."\textsuperscript{146} However, the court never discussed whether AOL limited distribution of the infringing material to "anticipated recipients"\textsuperscript{147} as expressly required by § 512(a)(4).\textsuperscript{148} Moreover, the court never addressed whether § 512(c) applied to the undisputed facts.\textsuperscript{149}

On appeal, the U.S. Court of Appeals for the Ninth Circuit agreed with the district court's construction of § 512(a), holding that if AOL met certain general threshold requirements for asserting safe harbor protection, then AOL would qualify for § 512(a)'s limitation on liability as a matter of law.\textsuperscript{150} The Ninth Circuit reasoned that the court below properly applied \emph{Netcom}'s facts as an example of intermediate and

\begin{footnotesize}
\begin{itemize}
\item[140.] See \textit{id.} at 1070 n.20.
\item[141.] See \textit{id.} at 1069--70.
\item[142.] \textit{Id.} at 1069.
\item[143.] \textit{Id.}
\item[144.] See \textit{id.} at 1070.
\item[145.] See \textit{id.}
\item[146.] \textit{Id.}
\item[147.] See \textit{id.} at 1067--72 (discussing § 512 limitations on liability without reference to the requirements of § 512(a)(4)).
\item[149.] See \textit{Ellison I}, 189 F. Supp. 2d at 1067--72 (discussing § 512 limitations on liability without addressing whether § 512(c) afforded a relevant safe harbor).
\item[150.] See \textit{Ellison II}, 357 F.3d 1072, 1074, 1081 (9th Cir. 2004).
\end{itemize}
\end{footnotesize}
transient storage under § 512(a).\textsuperscript{151} Like the court below, the Ninth Circuit never discussed whether AOL made infringing content available to unanticipated recipients,\textsuperscript{152} and it also never addressed whether § 512(c) applied to temporary Usenet storage.

B. Courts in the Fourth Circuit Do Not Consider Netcom’s Facts Relevant to DMCA Defenses and Find that Temporary Usenet Storage Constitutes § 512(c) Activity

Courts in the Fourth Circuit have concluded that § 512(c) governs limitations on liability for temporary Usenet storage and do not consider or apply Netcom’s facts when deciding the merits of related defenses.\textsuperscript{153} In ALS Scan, Inc., v. RemarQ Communities, Inc.,\textsuperscript{154} the U.S. Court of Appeals for the Fourth Circuit recognized that § 512(c) conditionally limits ISP liability for temporary storage activities.\textsuperscript{155} Plaintiff ALS Scan claimed that defendant ISP RemarQ had infringed its copyright interests by storing infringing material for at least eight days on newsgroups that RemarQ hosted.\textsuperscript{156} RemarQ did not monitor, regulate, or censor the newsgroup content posted by subscribing members.\textsuperscript{157} The district court relied on Netcom in concluding that RemarQ could not be held directly liable for passive acts.\textsuperscript{158}

On appeal, the Fourth Circuit concluded that § 512(c), rather than the principles articulated by the Netcom court, afforded RemarQ’s only defense.\textsuperscript{159} The court explained that, while it found the Netcom court’s

\textsuperscript{151} See id. at 1081.
\textsuperscript{152} See id. at 1080–82.
\textsuperscript{153} See, e.g., ALS Scan, Inc., v. RemarQ Cmty., Inc., 239 F.3d 619, 622–26 (4th Cir. 2001) (finding that “ultimate conclusion” on liability for temporary Usenet storage is controlled by Title II of DMCA and recognizing that § 512(c) “gives Internet service providers a safe harbor from liability for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”).
\textsuperscript{154} 239 F.3d 619 (4th Cir. 2001).
\textsuperscript{155} See id. at 623–26. When discussing the relevance of DMCA safe harbors, the RemarQ court concluded as follows:

The liability-limiting provision applicable here, 17 U.S.C. § 512(c), gives Internet service providers a safe harbor from liability for “infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider . . . .”

\textsuperscript{156} See id. at 620–21.
\textsuperscript{157} Id. at 620.
\textsuperscript{158} See id. at 621–22.
\textsuperscript{159} See id. at 622–23.
reasoning persuasive, the DMCA's express terms controlled the
"ultimate conclusion" on ISP liability. In the Fourth Circuit's view,
Netcom remained relevant only to the limited extent that § 512's actual
provisions specifically reflected the Netcom court's approach to limiting
ISP liability. In ruling on RemarQ's eligibility for safe harbor, the
court held: (1) that the court below failed to adequately consider
RemarQ's claims under § 512(c); and (2) that RemarQ was not
entitled to the DMCA safe harbor because ALS Scan had "substantially
complied" with § 512(c)'s notice requirement, while RemarQ had not
met its corresponding obligations.

The Fourth Circuit subsequently clarified its position on the continued
relevance of Netcom in CoStar Group, Inc. v. LoopNet, Inc., where the
court held that Netcom remains influential as common law precedent,
but only outside the DMCA's four corners. Like RemarQ, defendant
ISP LoopNet passively hosted infringing material. LoopNet customers
were responsible for posting the infringing material, which LoopNet
removed after receiving notice of the unlawful activity from plaintiff
CoStar. The district court below relied on Netcom in granting LoopNet
"conclusive immunity" from direct infringement as a "passive
provider of Internet services."

On appeal, CoStar argued that Netcom did not survive the DMCA's
enactment. The Fourth Circuit disagreed, holding that while DMCA
safe harbors are distinguishable from common law standards, Netcom
remains influential on the threshold question of whether courts should
hold passive actors strictly liable as direct infringers at common law.

160. See id. at 622.
161. See id. ("Although we find the Netcom court reasoning more persuasive, the ultimate
collection on this point is controlled by Congress' codification of the Netcom principles in Title II
of the DMCA.").
162. See id. at 623-26.
163. See id. at 625-26.
164. 373 F.3d 544 (4th Cir. 2004).
165. See id. at 552 ("[I]n enacting the DMCA, Congress did not preempt the decision in Netcom
nor foreclose the continuing development of liability through court decisions interpreting §§ 106
and 501 of the Copyright Act.").
166. See id. at 547.
167. Id.
168. Id. at 548 (internal quotation marks omitted).
169. See id. at 552.
170. See id. at 555.
171. See id.
The court recognized that DMCA limitations on liability are not exclusive and that ISPs accordingly remain “entitled to all other arguments” under the law, “whether by way of an affirmative defense or through an argument that conduct simply does not constitute a prima facie case of infringement under the Copyright Act.”172 The court also noted that while a rejected prior version of § 512 may have closely tracked the Netcom court’s reasoning, the enacted law differs in significant ways from the purportedly Netcom-derived version.173

In discounting the relevance of Netcom within the DMCA’s four corners, the Fourth Circuit identified three significant differences between the rejected proposal and the enacted legislation.174 First, the enacted legislation, unlike the rejected proposal, draws no distinction between direct and indirect liability.175 Second, the rejected proposal did not afford a distinct safe harbor for ISPs that store infringing material at the direction of users, as expressly contemplated under § 512(c).176 Third, the rejected proposal unconditionally shielded ISPs from direct liability for automatic processes, while the enacted law includes an entire layer of threshold conditions for safe harbor eligibility related to passive acts.177 The court ultimately considered these differences sufficient to conclude that the Netcom court’s approach to ISP liability did not govern the meaning of § 512’s terms.178 ISPs seeking relief under § 512 must therefore fulfill the conditions imposed by the statute once a prima facie case of infringement has been established.179

III. THE DMCA’S LEGISLATIVE HISTORY PROVIDES MIXED GUIDANCE ON THE RELEVANCE OF NETCOM

The DMCA’s legislative history confirms that § 512’s terms changed significantly during the legislative process.180 In fact, Congress

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172. See id. at 552.
173. See id. at 554–55 (discussing at length substantial differences between proposed limitations on liability premised on Netcom and enacted limitations on liability).
174. See id.
175. See id.
176. See id.
177. See id.
178. See id. (concluding that Congress “intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection” and, as such, that DMCA “merely added a second step to assessing infringement liability” after ISP is found otherwise subject to liability).
179. See id. at 555.
considered and rejected a version of § 512 that, like the standards articulated in *Netcom*, would grant ISPs immunity from liability for direct infringement without foreclosing liability for vicarious or contributory infringement under similar factual circumstances. Not surprisingly, congressional intent to codify *Netcom* appears in references to the rejected prior version of § 512. However, legislative reports associated with the limitations on liability that Congress enacted evince no congressional intent to codify common law standards. Rather, these records indicate that Congress decided to codify discrete new limitations on liability while leaving the common law, including the standards articulated in *Netcom*, in an “evolving state.”

A. Legislative History Discussing a Rejected Version of § 512(a) Suggests that Congress Previously Considered Codifying the "Essence" of *Netcom*

A committee report associated with a rejected version of § 512 indicates that Congress considered codifying the *Netcom* court’s approach to limiting ISP liability. One passage provides that § 512


183. See H.R. REP. NO. 105-551, pt. 2, at 49–66; S. REP. NO. 105-190, at 19–21 (discussing enacted DMCA limitations on liability without suggesting intent to codify *Netcom* or other common law principles).

184. A pertinent committee report states, in relevant part:

There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of “safe harbors,” for certain common activities of service providers.

S. REP. NO. 105-190, at 19.

was previously intended to codify the "core of current case law" dealing with ISP liability and that the rejected legislation, unlike the law enacted, distinguished "between direct infringement and secondary liability, treating each separately." Another passage indicates that § 512 was intended to codify Netcom in referencing language considered but not included in the DMCA. A frequently cited passage, which appears in a similarly outdated discussion of proposed limitations on liability that differ in many respects from the limitations on liability that Congress enacted.

At least one commentator reconciles the substantial differences between § 512's enacted text and prior legislative intent to codify the essence of Netcom by concluding that § 512 does indeed reflect the essence of decisions like Netcom: namely, a desire to avoid applying the usual rules of strict liability to ISPs acting as passive conduits for infringing material. In this commentator's view, § 512's complex terms confirm that, in the final analysis, "Congress neither 'codified' the Netcom decision nor gave the courts general instructions to satisfy that desire, however legitimate it may be." As such, § 512's limitations stand alone, and the common law applies only when § 512 "in all its detail and complexity" does not.

B. Legislative History Discussing the Version of § 512 that Congress Enacted Suggests that Congress Rejected the Option of Codifying the Netcom Court's Approach to Limiting ISP Liability

Legislative history discussing the enacted version of § 512(a) evinces a strong congressional desire to leave the common law, including the principles articulated in Netcom, "in its evolving state" and to codify

186. See id. at 11.
187. See id. at 11, 24–26 (referring to proposed limitations on liability that closely followed Netcom court's approach to liability as outlined at pp. 7–8 of same legislative committee report); see also Evans, supra note 181, at 475 ("Congress considered and rejected the option of simply adopting the Netcom rule shielding ISPs from direct liability for passive or automatic transmission of messages but leaving open the possibility of contributor or vicarious liability.").
190. See DRATLER, JR., supra note 6, § 6.01[3], at 6-40.1.
191. See id.
192. See id.
discrete statutory limitations on liability. Relevant passages discuss the types of intermediate and transient storage that constitute § 512(a) activity in specific terms. One such passage stipulates that § 512(a) applies only where: (1) transmissions are initiated by or at the direction of persons other than an ISP; (2) communications are carried out through an automatic technical process; (3) an ISP does not select the recipients of infringing material except as an automatic response to the request of another; (4) no copy of infringing material is maintained on the ISP's system in a manner ordinarily accessible to unanticipated recipients or for any longer than reasonably necessary; and (5) the content of infringing material is not modified by the ISP in the course of transmission. Another passage confirms that "intermediate and transient" copies are copies "made and/or stored in the course of a transmission," not copies made or stored at points where transmissions are initiated or received. Unlike the law enacted, the rejected proposal contained nothing comparable to § 512(a)'s "in course" storage requirement. In short, Congress seemingly decided to codify discrete new limitations on liability while leaving the common law, including the principles articulated in Netcom, in an "evolving state."

IV. COURTS SHOULD NOT CONSIDER OR APPLY NETCOM'S FACTS AS AN EXAMPLE OF § 512(a) ACTIVITY

Courts should not consider or apply Netcom's facts as an example of "intermediate and transient" storage under § 512(a) for three reasons. First, Netcom's eleven-day storage of infringing material did not constitute intermediate and transient storage as subsequently defined by

195. See id. at 51.
196. See id. at 50-51 (emphasis added).
198. A pertinent committee report states, in relevant part:

There have been several cases relevant to service provider liability for copyright infringement. Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of "safe harbors," for certain common activities of service providers.

S. REP. NO. 105-190, at 19.
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§ 512(a).\(^{199}\) Second, courts that apply *Netcom's* facts as an example of § 512(a) activity obviate § 512(c)'s notice-and-takedown provision.\(^{200}\) Third, the DMCA's text and legislative history confirm that Congress decided to create new limitations on liability that differ in significant respects from the *Netcom* court's treatment of ISP liability,\(^{201}\) while leaving the common law in an evolving state.\(^{202}\) ISPs that fail to qualify for safe harbor under § 512(a) may still assert other DMCA safe harbors and common law defenses.\(^{203}\)

**A. Storing Usenet Content for Subscriber Access Does Not Constitute Intermediate and Transient Storage as Defined Under § 512(a)**

Courts should not apply *Netcom's* facts as an example of intermediate and transient storage under § 512(a) because *Netcom's* eleven-day storage of infringing material would not constitute § 512(a) activity. In fact, *Netcom* would fail to qualify for safe harbor under § 512(a) for three reasons. First, *Netcom* did not store infringing material "in the course of" transmission.\(^{204}\) Rather, *Netcom* stored infringing material for longer than necessary to facilitate transmission.\(^{205}\) Second, *Netcom* did not limit access to "anticipated recipients" of infringing material.\(^{206}\) Third, *Netcom* did not store infringing material for a "reasonably necessary" period of time.\(^{207}\)

1. *Netcom's Eleven-Day Retention of Infringing Usenet Content Would Fail § 512(a)'s "in the Course of" Requirement*

*Netcom's* eleven-day storage of infringing material did not take place "in the course of" transmission as required by § 512(a). Section 512(a)

\(^{199}\) See infra Part IV.A.

\(^{200}\) See infra Part IV.B.


\(^{202}\) See S. REP. NO. 105-190, at 19 (1998) ("[T]he Committee decided to leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers.").


\(^{204}\) See infra Part IV.A.1.

\(^{205}\) See infra Part IV.A.1.

\(^{206}\) See infra Part IV.A.2.

\(^{207}\) See infra Part IV.A.3.
applies solely to "intermediate and transient" storage that occurs "in the course of" transmitting, routing, or providing connections. As a threshold matter, ISPs that store content at points where transmissions are initiated or received for any length of time cannot qualify for safe harbor under § 512(a). Erlich's infringing posting reached all Usenet servers worldwide in a matter of hours. Netcom stored the infringing material for eleven days. For the bulk of that time, the infringing material was not en route to a particular destination. Rather, the material lingered on Netcom's system where all of Netcom's subscribers and other Usenet peers could access it. As a result, the infringing content was not stored "in the course of" transmitting, routing, or providing connections as required by § 512(a).

2. Netcom's Eleven-Day Retention of Infringing Usenet Content Would Fail § 512(a)'s "Anticipated Recipients" Requirement

Netcom would also fail to qualify for safe harbor under § 512(a) because Netcom did not limit access to "anticipated recipients" of infringing material temporarily stored on its system. Section 512(a) denies safe harbor protection to ISPs that make infringing material "accessible to anyone other than anticipated recipients." After Ehrlich's local BBS server posted infringing material on Netcom's Usenet server, Netcom's entire customer base and all other Usenet peers, whether intended recipients of the posting or not, could access the infringing material. Netcom's eleven-day retention of infringing material would therefore fail § 512(a)'s "anticipated recipients" requirement, unless every member of Netcom's subscriber base, in addition to all members of the Usenet community worldwide, could be

211. Id. at 1367.
212. See id. at 1367–68.
213. See id.
215. Id. § 512(a)(4).
217. See id. at 1367.
reasonably classified as intended recipients of infringing postings. This interpretation would contravene § 512(a)’s plain meaning by rendering the “anticipated recipients” requirement meaningless.

3. **Netcom’s Eleven-Day Retention of Infringing Usenet Content Would Fail § 512(a)’s “Reasonably Necessary” Requirement**

Section 512(a) also denies safe harbor protection to ISPs that store copies of infringing material for longer than “reasonably necessary for the transmission, routing, or provision of connections.” Netcom stored infringing material for eleven days. Information posted by a Usenet subscriber reaches all Usenet servers worldwide in a manner of hours. While some period of storage is presumably necessary for the passive transmission of material between Usenet servers, storing infringing postings for eleven days cannot be reasonably necessary when transmission time is measured in hours, not days. As such, Netcom stored infringing material for longer than “reasonably necessary,” as contemplated under § 512(a).

B. **Courts that Consider and Apply Netcom’s Eleven-Day Storage of Infringing Usenet Content as a Yardstick Under § 512(a) Obviate § 512(c)’s Notice-and-Takedown Provision**

Courts that apply Netcom’s facts as an example of “intermediate and transient” storage under § 512(a) contravene § 512(c)’s notice-and-takedown provision. Congress did not include a notice-and-takedown requirement under § 512(a), presumably because ISPs that engage in properly classified § 512(a) activities do not retain infringing material long enough to make notice-and-takedown a practical solution. If Netcom’s eleven-day storage of infringing content truly constituted

222. See id. at 1368.
223. See id. at 1367–68.
224. See Ellison II, 357 F.3d 1072, 1081 (9th Cir. 2004); Ellison I, 189 F. Supp. 2d 1051, 1070 (C.D. Cal. 2002).
226. See id. § 512(a).
227. See H.R. REP. NO. 105-551, pt. 2, at 51 (1998) (confirming that intermediate and transient copies must be “made of material while it is en route to its destination” and not under any other circumstances) (emphasis added).
§ 512(a) activity, as suggested by courts in the Ninth Circuit, then every service provider that stores infringing Usenet content for eleven days, and possibly longer, could ignore § 512(c)'s notice-and-takedown provision. For example, if a copyright holder informed an ISP two days after a subscriber posted infringing content, the ISP could take no action for nine additional days without incurring any liability. Even the *Netcom* court recognized that failure to prevent damage to copyright interests upon notice of infringing activity could give rise to ISP liability for contributory infringement. Although mindful of ISPs’ exposure to liability, Congress was principally interested in promoting e-commerce by further safeguarding the rights of copyright holders and therefore could not have intended a contrary result.

A narrow reading of § 512(a) does not prevent ISPs from asserting other DMCA safe harbors or common law defenses. For example, ISPs may still argue that their temporary storage activities fall within the express provisions of § 512(c). The Fourth Circuit looked precisely to this safe harbor in assessing limitations on liability relevant to an ISP that stored infringing Usenet content for at least eight days. In doing so, the Fourth Circuit properly recognized that ISPs may store Usenet content at the direction of subscribers in compliance with § 512(c)'s strict notice-and-takedown provision without giving rise to liability.

Consistent with the Fourth Circuit’s position on common law rights,
ISP defendants might also argue that their actions do not constitute a prima facie case of infringement as a threshold matter before ever reaching DMCA limitations on liability.238

C. Section 512's Text and Legislative History Confirm that Congress Rejected the Netcom Court's Approach to Limiting ISP Liability

Courts that apply Netcom's facts as an example of intermediate and transient storage under § 512(a)239 erroneously rely on outdated legislative records and ignore § 512(a)'s express terms. These courts characterize Netcom's influence on § 512(a) according to a proposed limitation on liability that maintained Netcom's distinction between direct, contributory, and vicarious infringement.240 The legislative report associated with that proposal provides in relevant part that § 512(a)'s "reasonably necessary" requirement was drawn from the facts of Netcom and intended to codify Netcom's "implicit" holding by limiting liability for temporary storage.241 However, Congress rejected that proposal in favor of safe harbors that differ in significant respects from the Netcom court's holding.242 Despite recognizing the problematic nature of their reliance on outdated legislative records,243 these courts have still erroneously concluded that § 512(a) codifies Netcom's facts.244

More directly relevant legislative reports confirm that Congress decided to leave the common law, including the principles articulated in that in enacting the DMCA, Congress did not preempt the decision in Netcom nor foreclose the continuing development of liability through court decisions interpreting §§ 106 and 501 of the Copyright Act.

238. See id. (recognizing that DMCA limitations on liability are not exclusive and that ISPs accordingly remain "entitled to all other arguments under the law—whether by way of an affirmative defense or through an argument that conduct simply does not constitute a prima facie case of infringement under the Copyright Act").

239. 17 U.S.C. § 512(a); see Ellison II, 357 F.3d 1072, 1081 (9th Cir. 2004); Ellison I, 189 F. Supp. 2d 1051, 1068–70 (C.D. Cal. 2002).


243. See Ellison I, 189 F. Supp. 2d at 1069.

244. See supra Part II.A.
Netcom, in an "evolving state," and that § 512 was designed to create discrete statutory limitations on liability for specific ISP activities.\textsuperscript{245} Not surprisingly, legislative records associated with § 512's enacted terms evince no intent to codify the Netcom court's approach to liability or other common law principles.\textsuperscript{246} While Congress may have indeed codified the "essence" of cases like Netcom by limiting ISP liability in certain contexts,\textsuperscript{247} Congress expressly considered and rejected the option of codifying common law standards\textsuperscript{248} in favor of appreciably different statutory limitations on liability.\textsuperscript{249}

In sum, courts should not consider or apply Netcom's facts as an example of intermediate and transient storage under § 512(a) for three reasons. First, Netcom's eleven-day storage of infringing Usenet content would not constitute intermediate and transient storage as subsequently defined under § 512(a). Second, courts that apply Netcom's facts as an example of § 512(a) activity obviate § 512(c)'s notice-and-takedown requirement. Third, Congress openly considered and rejected a proposal to codify the Netcom court's approach to ISP liability. While Netcom may remain relevant as common law precedent outside of the DMCA's four comers, Netcom's facts are an improper yardstick for measuring intermediate and transient storage under § 512(a).

V. CONCLUSION

The DMCA's text and legislative history preclude reliance on the facts of Netcom as an example of intermediate and transient storage under § 512(a). Congress considered and rejected proposed legislation that would have essentially codified the Netcom court's approach to limiting ISP liability in favor of appreciably different safe harbors. Courts that apply Netcom's eleven-day storage of infringing Usenet content as an example of § 512(a) activity erroneously rely on outdated

\textsuperscript{245} See S. REP. NO. 105-190, at 19 (1998).
\textsuperscript{246} See H.R. REP. NO. 105-551, pt. 2, at 49-66 (1998); S. REP. NO. 105-190, at 19-21 (discussing enacted limitations on liability without evincing any congressional intent to codify Netcom's approach to ISP liability or other common law principles).
\textsuperscript{247} See DRATLER, JR., supra note 6, § 6.01[3], at 6-40.1.
\textsuperscript{248} S. REP. NO. 105-190, at 19.
depictions of the rejected legislative proposal in defiance of § 512(a)’s plain meaning. Consequently, courts and litigants seeking predictable outcomes under § 512(a) must wait for a consistent standard of intermediate and transient storage to develop through interpretation of § 512(a)’s express terms, or petition Congress for a more definitive codified standard. ISP defendants might also seek timely relief under other DMCA safe harbors, such as § 512(c), or resort to common law defenses not codified within the DMCA’s four corners.