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Substantial Notice Under the Digital Millennium Copyright Act

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SUBSTANTIAL NOTICE UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT

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I. INTRODUCTION

While the digital medium provides flawless copies, even when reproduced and disseminated many times,¹ this same trait of perfectly replicated copies causes enormous problems in copyright protection.² If an artist's work of art can be duplicated *ad infinitum* with no diminishment of quality, then the artist must have a sufficiently protective legal framework before the artist will publish his or her work of art.³ On the other hand, those proscriptions to copying the work of art

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1. Eddan Elizafon Katz, *Real Networks, Inc. v. Streambox, Inc. & Universal City Studios, Inc. v. Reimerdes*, 16 *BERKELEY TECH. L.J.* 53, 53 (2001).

2. See *id.*; Rebecca Morris, Note, *When Is a CD Factory Not Like a Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 *CARDOZO ARTS & ENT. L.J.* 257 (2000); Mary Ann Shulman, Comment, *Internet Copyright Infringement Liability: Is an Online Access Provider More Like a Landlord or a Dance Hall Operator?*, 27 *GOLDEN GATE U. L. REV.* 555, 555-58 (1997).

3. Shulman, *supra* note 2, at 558.

must remain sufficiently flexible so that society maintains proper access to information.⁴ The Digital Millennium Copyright Act (DMCA)⁵ attempts to accommodate both sides of this dilemma.⁶

However, the Internet presents a daunting task for copyright infringement enforcement because the traditional primary means of enforcement creates a negative backlash that would spell the doom of the Internet as an operative concept.⁷ Whereas, historically, copyright owners successfully went after the distributors of copyrighted material,⁸ to allow that on the Internet would cause Internet service providers to bring information transfer to a screeching halt.⁹ Defending copyright infringement charges is extremely costly, and the damages can be disastrous. Unless Internet service providers are provided protection against liability for copyright infringement, there would be few willing to take the considerable risk. The DMCA provides relief to Internet service providers while also holding them accountable for willful violations of the rights of copyright owners.

This Article addresses the requirements of substantial notification under the DMCA.¹⁰ First, the Article will present an overview of Title II of the DMCA. Second, the Article will review the facts of *ALS Scan, Inc. v. RemarQ Communities, Inc.*¹¹ and present the issue and its

4. See *id.* at 559.

5. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.). The DMCA consists of five titles. Title I is the World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms Treaties Implementation Act of 1998 and effectuates two 1996 WIPO treaties (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). *Id.* secs. 101–105. Title I deals with safeguards against circumvention of the technology copyright owners use to protect their products and also with corrupting or debasing copyright management information. *Id.* Title II is the Online Copyright Infringement Liability Limitation Act, which deals with restricting and narrowing the liability of online service providers. *Id.* secs. 201–203. Title III is the Computer Maintenance Competition Assurance Act, which deals with the expansion of the existing exemption in regard to allowing reproductions or adaptations to computer. *Id.* secs. 301–302. Title IV consists of miscellaneous provisions dealing with ephemeral recordings for broadcasters, distance learning study, exemption for nonprofit libraries and archives, webcasting amendments, and transfer rights in motion pictures. *Id.* secs. 401–407. Title V is the Vessel Hull Design Protection Act and deals with the protection of original designs for the hulls of vessels 200 feet less in length. *Id.* secs. 501–505. For a clear overview of DMCA, see U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (Dec. 1998), at <http://lcweb.loc.gov/copyright/legislation/dmca.pdf>.

6. See Shulman, *supra* note 2, at 555–60 (discussing the basic tension that exists between freedom of the flow of information and copyright protections).

7. Jennifer E. Markiewicz, Comment, *Seeking Shelter from the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMM.LAW CONSPPECTUS J. COMM. L. & POL'Y 423, 424 (1999).

8. *Id.* at 423 & nn.4–5.

9. Due to the volume of information facilitated through Internet service providers, it would be virtually impossible to police copyright violations and maintain any semblance of the speed of information dissemination.

10. 17 U.S.C. § 512 (Supp. V 1999).

11. 239 F.3d 619 (4th Cir. 2001).

importance. Third, the Article will analyze the district court's and court of appeals's holdings and evaluate the significance of this case in the e-commerce legal landscape. Finally, the Article will present its conclusions.

II. DIGITAL MILLENNIUM COPYRIGHT ACT: TITLE II

Understanding the need to protect Internet service providers while at the same time maintaining the creative and financial incentives of the copyright, Congress, in October 1998, enacted the DMCA.¹² The DMCA encompasses five titles;¹³ however, this Article will be concerned with only Title II—The Online Copyright Infringement Liability Limitation Act.¹⁴ This Title is an amendment to the Copyright Act.¹⁵ All further references to the DMCA in this Article will be references to Title II only.

A. General

The DMCA fashions four new limitations of liability for Internet service providers in adding a new § 512 to the Copyright Act.¹⁶ The new categories are delineated by type of service provider conduct. If various thresholds are met, there is limitation of liability for transitory communications,¹⁷ system caching,¹⁸ storage of information on systems or networks at the direction of users,¹⁹ and information location tools.²⁰ Each category of service provider conduct affects a total barrier to monetary damages²¹ and places restrictions on access to injunctive relief.²² Further, the DMCA does not preclude the service provider from having recourse to any of the defenses commonly used by copyright defendants.²³ The DMCA also eliminates for the service provider the conflict between accessibility to limitations of liability and the violation of the privacy rights of their subscribers.²⁴ Section

12. See Morris, *supra* note 2, at 299–300.

13. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

14. 17 U.S.C. § 512.

15. Digital Millennium Copyright Act, Pub. L. No. 105-304, tit. II, 112 Stat. 2860, 2877 (1998) (codified as amended at 17 U.S.C. § 512).

16. See Paul Veravanich, *Rio Grande: The MP3 Showdown at Highnoon in Cyberspace*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 433, 463–65 (2000) (discussing safe harbor provisions for Internet service providers); Jane C. Ginsburg, Comment, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 160–61 (1999) (describing the mechanism of the Online Copyright Liability Limitation Act).

17. 17 U.S.C. § 512(a).

18. *Id.* § 512(b).

19. *Id.* § 512(c).

20. *Id.* § 512(d).

21. *Id.* § 512(a), (b)(1), (c)(1), (d).

22. *Id.* § 512(j).

23. *Id.* § 512(i).

24. See *id.* § 512(m).

512(m)²⁵ explicitly removes any privacy law violations as a prerequisite to eligibility for the limitations of liability in § 512(a)–(d).²⁶ The small downside for service providers is that the DMCA sets out a subpoena procedure by which the copyright owner may force the service provider to reveal the identity of the purported copyright infringer.²⁷

To qualify for limited liability treatment under the DMCA, a party must first qualify as a service provider. There are two definitions of a service provider—a more restrictive definition for transitory communications²⁸ and a broader definition for the other three service provider conduct categories.²⁹ The broader definition explicitly includes the more restrictive definition.³⁰ Once an entity meets the definition of a service provider, the entity must then meet two additional mandatory conditions: (1) the service provider must have “adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers;” and (2) the service provider must “accommodate[] and . . . not interfere with standard technical measures.”³¹ Further, the term “standard technical measures” is defined as

Technical measures that are used by copyright owners to identify or protect copyrighted works and—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.³²

B. *Substantial Notification*

For system caching,³³ information residing on systems or networks at the direction of users,³⁴ and information location tools,³⁵ notifica-

25. *Id.*

26. *See id.* § 512(a)–(d).

27. *See id.* § 512(h).

28. *Id.* § 512(k)(1)(A). “[T]he term ‘service provider’ means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” *Id.*

29. *Id.* § 512(k)(1)(B). “[T]he term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A).” *Id.*

30. *Id.*

31. *Id.* § 512(i)(1).

32. *Id.* § 512(i)(2).

33. *Id.* § 512(b).

34. *Id.* § 512(c).

tion of the alleged infringement to the service provider is a prerequisite to relief.³⁶ To effectuate notification, the infringed party must provide the agent of the service provider a written communication that substantially contains six items.³⁷ The written notification must contain: (1) a physical signature of a person with authority to represent the copyright owner;³⁸ (2) identification of the alleged copyrighted work or a representative list of the works at the site;³⁹ (3) identification of the alleged infringing material and information rationally adequate to allow the service provider to locate it;⁴⁰ (4) the address, telephone number, and e-mail address of the complaining party;⁴¹ (5) a good faith statement that the material is in violation of the copyright laws;⁴² and (6) a statement under penalty of perjury from the authorized representative of the copyright owner that he or she is in fact the authorized agent and that the notification is accurate.⁴³ Failure to comply with the notification requirements could cause the infringed party to lose its remedy under the DMCA⁴⁴—the all important “take down,”⁴⁵ which requires the service provider upon proper notice to promptly eliminate or prevent access to the alleged infringing material.⁴⁶

The issue of substantial compliance with § 512(c)(3)(A) is at the heart of *ALS Scan, Inc. v. RemarQ Communities, Inc.*⁴⁷ This is a case of first impression,⁴⁸ and its holding is significant as the starting point in the analysis of the critical threshold element of substantial notification.

III. FACTS

In a letter⁴⁹ dated August 2, 1999, ALS Scan, Inc., a corporation whose business affairs include making and marketing “adult” photo-

35. *Id.* § 512(d).

36. *Id.* § 512(b)(2)(E), (c)(1)(C), (d)(3).

37. *Id.* § 512(c)(3)(A).

38. *Id.* § 512(c)(3)(A)(i).

39. *Id.* § 512(c)(3)(A)(ii).

40. *Id.* § 512(c)(3)(A)(iii).

41. *Id.* § 512(c)(3)(A)(iv).

42. *Id.* § 512(c)(3)(A)(v).

43. *Id.* § 512(c)(3)(A)(vi).

44. *Id.* § 512(c)(3)(B).

45. Ginsburg, *supra* note 16, at 162.

46. *Id.*; Morris, *supra* note 2, at 304–05.

47. See 239 F.3d 619, 620 (4th Cir. 2001).

48. *Id.*

49. *Id.* at 620–21. The parts of this letter pertinent to the court’s decision are as follows:

Both of these newsgroups [“alt.als” and “alt.binaries.pictures.erotica.als”] were created for the sole purpose of violating our Federally filed Copyrights and Tradename. These newsgroups contain virtually all Federally Copyrighted images. . . . Your servers provide access to these illegally posted images and enable the illegal transmission of these images across state lines.

graphs,⁵⁰ informed RemarQ Communities, Inc. (RemarQ), an online Internet service provider,⁵¹ that some of its subscribers were violating ALS Scan's copyrights and tradename.⁵² RemarQ provided access to approximately 24,000 members of its newsgroup base and to over 30,000 newsgroups, which covered a plethora of topics, including "arts, politics, religion, social issues, sports, and entertainment."⁵³ ALS Scan's letter to RemarQ was necessitated by ALS Scan's discovery that ALS Scan's name was in two of the titles of newsgroups to which RemarQ allowed access to its subscribers.⁵⁴ The Internet addresses for the two allegedly infringing newsgroups were alt.als and alt.binaries.pictures.erotica.als, which allegedly contained hundreds of copyright infringing postings.⁵⁵

ALS Scan's letter dated August 2, 1999, stated that ALS Scan believed these infringing newsgroups were created solely for the purpose of infringing upon ALS Scan's registered copyrights and tradename and contained virtually all infringing images.⁵⁶ Further, the letter informed RemarQ that it was facilitating the dissemination of these infringing images across state lines by providing access through its servers.⁵⁷ The letter noted itself clearly as a request for RemarQ to cease and desist its infringement-facilitating activities. In addition, the letter gave RemarQ actual Internet addresses for an infringing Web site and for ALS Scan's copyright information.⁵⁸

RemarQ replied with a refusal to assent to ALS Scan's requests but did apprise ALS Scan of its intention to remove all individual infringing postings at such time as ALS Scan sufficiently identified each individual infringing posting.⁵⁹ ALS Scan rejoined that the number of infringing images (over 10,000) and the period of infringement (several months) made it obvious that these infringing newsgroups were

This is a cease and desist letter. You are hereby ordered to cease carrying these newsgroups within twenty-four (24) hours upon receipt of this correspondence. . . .

American Online, Erol's, Mindspring, and others have all complied with our cease and desist order and no longer carry these newsgroups.

* * *

Our ALS Scan models can be identified at <http://www.alsscan.com/mod-linf2.html> [.]

Our copyright information can be reviewed at <http://www.alscan.com/copyrite.html> [.]

Id. (quoting letter from ALS Scan to RemarQ).

50. *Id.* at 620.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 620-21.

59. *Id.* at 621.

created exclusively for the purpose of infringing upon ALS Scan's federally copyrighted property.⁶⁰

Unable to reach an agreement, ALS Scan filed suit against RemarQ for violation of the Copyright Act, Title II of the DMCA,⁶¹ and unfair competition.⁶² ALS Scan demanded injunctive relief and actual and statutory damages.⁶³ Accompanying its complaint were affidavits in which the required elements of its cause were asserted.⁶⁴ RemarQ responded with "a motion to dismiss the complaint or, in the alternative, for summary judgment."⁶⁵ RemarQ further accompanied the motion with affidavits affirming its position that it would remove all individual infringing postings when ALS Scan sufficiently identified each infringing posting.⁶⁶ RemarQ also contended that ALS Scan's failure to follow the DMCA's notice requirement⁶⁷ gave RemarQ protection under DMCA's safe harbor provisions.⁶⁸

60. *Id.*

61. 17 U.S.C. § 512 (Supp. V 1999).

62. *ALS Scan, Inc.*, 239 F.3d at 621.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The DMCA notice provision for information residing on systems or networks at the direction of users is as follows:

(3) Elements of notification.

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

17 U.S.C. § 512(c)(3)(A) (Supp. V 1999).

68. The DMCA safe harbor provision for information residing on systems or networks at the direction of users is as follows:

(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copy-

The district court agreed with RemarQ's position and granted the motion to dismiss on the grounds

(1) that RemarQ could not be held liable for direct copyright infringement merely because it provided access to a newsgroup containing infringing material; and (2) that RemarQ could not be held liable for contributory infringement because ALS Scan failed to comply with the notice requirements set forth in the DMCA, 17 U.S.C. § 512(c)(3)(A).⁶⁹

IV. THE ISSUE PRESENTED

The issue before the court was "whether an Internet service provider enjoys a safe harbor from copyright infringement liability . . . when it is put on notice of infringement activity on its system by an imperfect notice."⁷⁰ In *ALS Scan*, the service provider, RemarQ, alleged coverage under § 512(c), which classified RemarQ as one which allowed storage of information or systems or networks at the direction of users.⁷¹ Under § 512(c), the service provider must meet a three-pronged test in order to avail itself of the safe harbor protection of the DMCA.⁷² The service provider must show that

(1) it has neither actual knowledge that its system contains infringing materials nor an awareness of facts or circumstances from which infringement is apparent, or it has expeditiously removed or disabled access to infringing material upon obtaining actual knowledge of infringement; (2) it receives no financial benefit directly attributable to infringing activity; and (3) it responded expeditiously to remove or disable access to material claimed to be infringing after receiving from the copyright holder a notification conforming with requirements of § 512(c)(3).⁷³

right 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, if the service provider—

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

17 U.S.C. § 512(c)(1).

69. *ALS Scan, Inc.*, 239 F.3d at 621.

70. *Id.* at 620.

71. *See id.* at 622–23.

72. *Id.* at 623.

73. *Id.*

The connections of the three prongs are conjunctive, so each prong must be independently satisfied.⁷⁴

V. THE CASE ANALYZED

A. *The District Court Holding*

The district court held that ALS Scan failed to substantially comply with two of the six notice elements under § 512(c)(3)(A).⁷⁵ Specifically, ALS Scan failed to include a representative list of the infringing items located on RemarQ's site⁷⁶ and failed to identify the infringing material that ALS Scan desired to be removed with enough information to allow RemarQ to locate the infringing material.⁷⁷ The district court agreed with RemarQ's contention that not all of the images posted on these newsgroups were ALS Scan's copyrighted images;⁷⁸ therefore, it was obligatory for ALS Scan to be specific as to the material that was copyrighted and to the material that ALS Scan desired RemarQ to remove.⁷⁹ The district court failed to find ALS Scan in substantial compliance even though

ALS Scan provided RemarQ with information that (1) identified two sites created for the sole purpose of publishing ALS Scan's copyrighted works, (2) asserted that virtually all the images at the two sites were its copyrighted material, and (3) referred RemarQ to two web addresses where RemarQ could find pictures of ALS Scan's models and obtain ALS Scan's copyright information.⁸⁰

To exacerbate matters, ALS Scan's name or copyright symbol appeared on the sites with the copyrighted images.⁸¹ The district court's definition of "substantial" seemed to border on "perfect."

B. *The Court of Appeals Holding*

Where the district court concentrated on ALS Scan's adherence to the elements of notification, the court of appeals focused on whether the notification given would be enough to reasonably give RemarQ actual or constructive notice of the alleged infringement.⁸² The court stressed that the safe harbor provisions were for innocent service providers who could show their lack of actual or constructive knowledge of the alleged infringement.⁸³ Once the service provider was im-

74. *See id.*

75. *Id.* at 624. For a listing of the six notice elements, see *supra* notes 37–43 and accompanying text.

76. *ALS Scan, Inc.*, 239 F.3d at 624.

77. *Id.*

78. *See id.*

79. *See id.*

80. *See id.* at 625.

81. *Id.*

82. *See id.*

83. *Id.*; see also 17 U.S.C. § 512(c)(1) (Supp. V 1999).

puted with knowledge of the infringement, the duty shifted to the service provider to incapacitate the infringing images.⁸⁴

With the focus on service provider knowledge, the court then asserted that “substantial” compliance was less than “perfect” compliance.⁸⁵ In other words, the DMCA anticipated that there would be problems with perfect compliance that would put an unreasonable burden of proof on the copyright holder. Moreover, the court noted that in respect to multiple works, the compliance level was further reduced because it allowed the copyright holder to give the service provider a representative list of the infringing materials.⁸⁶ Further, as to the copyright holder’s provision of information to the service provider to locate the infringing material, the court emphasized that the information need only be reasonably sufficient to allow the service provider to find the infringing material.⁸⁷ The court rationalized that the DMCA, in multiple infringement situations, was not attempting to place obstacles to compliance in the path of the copyright holders, but, on the contrary, it was trying to remove obstacles to compliance.⁸⁸ Overall creativity and economic development were enhanced when ideas were protected.

The court concluded that when ALS Scan gave RemarQ the addresses to two sites which were developed exclusively to disseminate the copyrighted material of ALS Scan and where ALS Scan told RemarQ that virtually all of the material on the two sites were ALS Scan copyrighted material, RemarQ had been given substantial notification of the infringing materials.⁸⁹

The court noted that should a copyright holder make false claims about alleged infringing materials, the DMCA provided remedies to the service provider.⁹⁰ Knowledge of material misrepresentations as to facts that cause a service provider to remove noninfringing material would subject the person making the misrepresentation to damages to the service provider and the actual copyright holder.⁹¹ The court then reversed the district court’s summary judgment in favor of RemarQ and remanded the case to the district court for further proceedings consistent with the court’s opinion.⁹²

84. *ALS Scan, Inc.*, 239 F.3d at 625.

85. *Id.*

86. *Id.*; see also 17 U.S.C. § 512(c)(3)(A)(ii).

87. *ALS Scan, Inc.*, 239 F.3d at 625; see also 17 U.S.C. § 512(c)(3)(A)(iii).

88. *ALS Scan, Inc.*, 239 F.3d at 625. In fact, if perfect compliance is required in terms of showing all infringing materials and their exact location, then infringers would benefit by simply increasing the volume of infringement to the point where it would be cost-prohibitive for the copyright holders to notify the service providers of all the infringements.

89. *Id.*

90. *Id.*; see also 17 U.S.C. § 512(f).

91. See 17 U.S.C. § 512(f).

92. *ALS Scan, Inc.*, 239 F.3d at 625–26.

VI. THE CASE'S SIGNIFICANCE: IS THE GLASS HALF EMPTY OR HALF FULL?

This is a case of first impression.⁹³ Therefore, it has the opportunity to lead the thinking on this issue of the factual basis of substantial notice. It establishes operational parameters that give certainty to business operations, from both the copyright holder and the service provider perspectives. The copyright holders need to know the extent of the information needed to provide notice so they are not simply spinning their legal wheels in their attempts to protect their copyrights. The service providers want to maintain the revenues from their subscribers but not at the expense of opening themselves up to uncharted litigation. Therefore, the issue of what constitutes substantial notice under the DMCA has critical significance.⁹⁴

Further, *ALS Scan*'s effect is not limited to information residing on systems or networks at the direction of users⁹⁵ but also affects substantial notification for system caching⁹⁶ and information location tools,⁹⁷ which both refer to § 512(c)(3) to define their notification provisions.⁹⁸ This relationship with other Internet operations gives *ALS Scan* greater impact and significance in the Internet framework.

Perspective is an important factor in determining the solution to any problem, and it is no different here. The district court approached this case from the view that the copyright holder's duty to comply with the substantial notice requirements was of paramount importance if the copyright holder desired to hold the service provider liable. This perspective was evident where, as noted by the court of appeals, the district court concentrated on the copyright holder's duty to provide notification⁹⁹ under § 512(c)(1)(C) while ignoring the allegations of the copyright holder that the service provider had actual knowledge of the infringing actions of the two newsgroups under § 512(c)(1)(A).¹⁰⁰

93. *Id.* at 620.

94. Adequate or sufficient notice is a concept that pervades the law and is indeed a requirement to procedural due process. *See City of Chicago v. Morales*, 527 U.S. 41, 56–60 (1999) (dictum) (stating ordinance failed to give adequate notice to ordinary citizens as to permissible conduct in respect to the term “loitering”); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (discussing the need for adequate notice of liability in Title IX student-on-student sexual harassment); *City of West Covina v. Perkins*, 525 U.S. 234, 240–41 (1999) (requiring adequate notice for police seizure of property for a criminal investigation); *E. Enters. v. Apfel*, 524 U.S. 498, 536 (1998) (alluding that sufficient notice of liability for future lifetime health benefits might be guaranteed to retirees); *BMW of N. Am. v. Gore*, 517 U.S. 559, 574–75 (1996) (indicating that the defendant did not receive adequate notice of the potential severity of the punitive damages).

95. 17 U.S.C. § 512(c)(1)(C).

96. *Id.* § 512(b)(2)(E).

97. *Id.* § 512(d)(3).

98. *Id.* § 512(b)(2)(E), (d)(3).

99. *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619, 623 (4th Cir. 2001).

100. *Id.*

While the court of appeals did not base its holdings on § 512(c)(1)(A),¹⁰¹ the court did discuss the requirement that the service provider be “innocent.”¹⁰² The court then intimated that, whether under the standard of a Rule 12(b) motion¹⁰³ or a summary judgment motion,¹⁰⁴ there was enough evidence for ALS Scan to prevail on the issue of RemarQ having actual knowledge of the infringing activity.¹⁰⁵ Although the court’s ruling is not based on § 512(c)(1)(A), the court’s mentioning of the prerequisite of RemarQ’s innocence as to knowledge of the infringing activities gives us insight into the court’s perspective. Further, a review of the court’s factual basis for its ruling,

ALS Scan provided RemarQ with information that (1) identified two sites created for the sole purpose of publishing ALS Scan’s copyrighted works, (2) asserted that virtually all the images at the two sites were its copyrighted material, and (3) referred RemarQ to two web addresses where RemarQ could find pictures of ALS Scan’s models and obtain ALS Scan’s copyright information,¹⁰⁶

indicates that the court was looking for facts that would meet the standard of RemarQ’s actual or constructive knowledge of the infringing activity.¹⁰⁷

It appears that once ALS Scan showed the court enough evidence to prove that the information provided to RemarQ gave RemarQ actual or constructive knowledge of the infringing activity and that RemarQ failed to prevent the infringement,¹⁰⁸ the court was satisfied that the substantial notification requirements were met for the purposes of the motion for summary judgment.¹⁰⁹

101. *Id.* at 625–26. There was no need for such basis because the court found that ALS Scan had substantially complied with 17 U.S.C. § 512(c)(1)(C). *Id.* at 624.

102. *Id.* at 625.

103. FED. R. CIV. P. 12(b)(6). The standard of proof for a Federal Rule of Civil Procedure (FRCP) 12(b)(6) motion to dismiss is that the allegations in the pleading must be accepted as true for the purposes of the motion. *E.g.*, *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001). Therefore, ALS Scan’s allegation that RemarQ had actual knowledge of the infringing activities must be deemed true, and the motion to dismiss must be denied.

104. FED. R. CIV. P. 56. The standard of proof for a FRCP 56 motion for summary judgment is that the evidence must be viewed in the light most favorable to the non-moving party. *E.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986). In the present case, there were contradicting affidavits from both sides, *ALS Scan, Inc.*, 239 F.3d at 624; therefore, ALS Scan, the non-moving party, should prevail.

105. *See ALS Scan, Inc.*, 239 F.3d at 623–24.

106. *Id.* at 625.

107. For the statutory provision requiring knowledge, see 17 U.S.C. § 512(c)(1)(A) (Supp. V 1999).

108. For the statutory provision requiring infringement preventions, see *id.* § 512(c)(1)(A)(iii).

109. *ALS Scan, Inc.*, 239 F.3d at 624. For the statutory provision requiring notification, see 17 U.S.C. § 512(c)(3)(A).

VII. CONCLUSION

The current slump notwithstanding, e-commerce is here to stay. The Internet has become an integral part of our business lives. While the DMCA has set the statutory framework,¹¹⁰ the courts must now give meaning to the statutory language in a case-by-case process. Substantial notification,¹¹¹ a crucial concept under the DMCA, has little meaning without factual standards. Because this case is of first impression, the court has the opportunity to set the tone for the determination of a factual standard.¹¹²

The court's holding gave a clear victory to copyright holders. Under *ALS Scan*, the copyright holder has only to meet the spirit, not the letter, of the law. Less than perfect compliance is required.¹¹³ The court's approach that the service provider should justify its qualification for the safe harbor forces the service providers to be wary of any notices given to it by the copyright holders. The standard is whether the copyright holder has provided the service provider sufficient information to give the service provider actual or constructive notice that infringement is taking place.¹¹⁴

While the holding is not what the service providers desired, it nevertheless gives clear and unambiguous direction to service providers who receive notification from copyright holders domiciled in the Fourth Circuit. Service providers with copyright holders domiciled outside of the Fourth Circuit must wait to see if their circuit courts agree with the reasoning of either the Fourth Circuit or the district court. This battle will probably be decided in the United States Supreme Court unless all the other circuit courts agree with the Fourth Circuit. In the balance of this titanic tug of war is nothing less than the defined architecture of the DMCA safe harbor.

110. 17 U.S.C. § 512.

111. *Id.* § 512(c)(3).

112. The court of appeals chose to approach its review from the perspective that the service provider must justify its qualification for the safe harbor, and the district court chose to approach its review from the perspective that the copyright holder must justify its substantial notification. The divergent approaches led each court to a different conclusion.

113. *ALS Scan, Inc.*, 239 F.3d at 625.

114. 17 U.S.C. § 512(c)(1)(A)(i)-(ii).