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Religious Technology Center v. Netcom On-Line Communications Services, Inc.: The Knowledge Standard for Contributory Copyright Infringement and the Fair Use Doctrine

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Religious Technology Center

v.

Netcom On-Line Communications Services, Inc.

Internet Service Providers: The Knowledge Standard for Contributory

Copyright Infringement and The Fair Use Defense

By Eugene A. Burcher and Anna M. Hughes[*]

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I. Introduction

{1} With 30 million people connected worldwide and the ability to rapidly transfer large amounts of data, the Internet^[1] poses a great threat to owners of intellectual property.^[2] The Internet's rapid growth has led to substantial speculation about how courts will apply intellectual property law concepts to conduct in cyberspace.^[3] On November 21, 1995, U.S. District Judge Ronald Whyte ruled that an Internet Service Provider (ISP)^[4] could be liable for contributory copyright infringement when a subscribing member directly infringes a copyright.^[5]

{2} This case began on February 13, 1995, when armed police officers and attorneys from the Church of Scientology (the Church) raided the home of Dennis Erlich (Erlich), a former minister of the Church.^[6] Erlich was charged with copyright infringement of the Church's sacred writings. In addition to its civil action against Erlich, the Church also sued Netcom On-Line Communication Services, Inc. (Netcom), the ISP for the Bulletin Board System (BBS) containing the alleged infringing postings, and Tom Klemesrud, the operator of the BBS which Erlich used to transmit his postings. Judge Whyte issued a temporary restraining order against Erlich, Klemesrud, and Netcom in February 1995, ordering them to stop posting the infringing material. At the time of publication of this paper, both Netcom and Klemesrud have settled out of court with RTC; Erlich still remains a defendant.^[7]

{3} In *Religious Technology Center v. Netcom On-Line Communications Services, Inc.*, Judge Whyte held that Netcom could be liable if they knew or should have known of the infringing activity.^[8] This application of copyright law to cyberspace has already begun to set the standard for future conflicts.^[9] It also has helped to define the preventative steps necessary for ISP industry members to take so that they may avoid liability for infringing activity of their subscribers.^[10] These steps hinge on the ISP's knowledge of an infringer's activities.^[11]

{4} Judge Whyte rejected the charges of direct infringement and vicarious liability against the defendant ISP.^[12] He stated that a material issue of fact existed as to the ISP's knowledge of the infringing activity,^[13] and a material issue existed as to whether the ISP was entitled to a fair use defense.^[14] The scope of this paper is limited to the doctrine of contributory copyright infringement as applied to an ISP -- the knowledge required of the subscriber's infringing activity and the affirmative defense to contributory infringement: the fair use doctrine.^[15] In conclusion, the paper shows that constructive knowledge is all that is necessary to hold an ISP liable for infringing activity and that the success of a fair use defense will hinge upon the potential harm to the material's market.

{5} Before analyzing the case's specific issues, it is necessary to understand the background of the technology used to transmit postings over the Internet as well as some basic information about the parties.

II. The Technology

A. The Internet

{6} The Internet is a global system of networks that uses a common communications standard to link together the different computer networks and systems of individuals, universities and government agencies. [16] The Internet's networks are connected through the use of fiber optic links, regular phone lines, or high speed dedicated leased lines. [17] "Policies [and standards] regulating the Internet are made by the Internet Society Operating Committee," a voluntary membership organization dedicated to the promotion of networking technologies. [18] There are currently over 30 million users worldwide accessing the Internet, and the number is doubling yearly. [19]

{7} The Internet offers a wide range of applications, including: electronic mail (e-mail); Usenet groups; the World Wide Web; databases and public domain software; and data and file transfer. [20] Several of these applications, important to the understanding of this case, are discussed in the following sections.

B. Applications of the Internet

1. Usenet Newsgroups

{8} Usenet is a network of thousands of computers connected to the Internet that provides forums, referred to as newsgroups, "which allow users to exchange information on a variety of topics of shared interest." [21] A newsgroup is the simple way in which Usenet groups are categorized according to various areas of interest. [22] Internet users can search the various topics or provide their own knowledge on diverse subjects ranging from restaurants to horseback riding to sexual fetishes. [23] Within a matter of hours, an individual Usenet posting is distributed all over the world. [24] Many thousands of Internet users are Usenet participants.

2. Data and File Transfer

{9} The Internet can be used to transfer computer files such as programs, text or data from one computer to another. [25] For example, text can be moved from a newsgroup to a word processing file on the user's personal computer. Parties are then able to work more easily on common files even while physically separated by great distance. Information transferred over the Internet is in digital format, eliminating the need of the receiving party to retype the information. [26] Instead, the information may be further manipulated and even sent on to other Internet users. [27]

III. The Parties

A. Netcom, Klemesrud, and Erlich

{10} Netcom is an Internet service provider. [28] As an ISP, Netcom is paid a fee by subscribers to gain access to the Internet. [29] If the subscriber has a computer with a modem and a phone line, he or she can access the Internet and all of its resources. [30]

{11} Many bulletin board services (BBS's) are accessible through Usenet, [31] which functions as a world-wide distribution chain. [32] As a Usenet participant, Netcom provides its subscribers with Usenet access. [33] "Postings on a particular BBS can be accessed from any computer in the Internet through Usenet, if that BBS is a Usenet participant." [34]

{12} As an Internet service provider, Netcom does not determine the "content of the information available on the Internet" and consequently, does not control the information which may be accessed by its subscribers. [35] Service providers, such as America Online and CompuServe may offer limited access to the Internet, providing a specific menu, including value added services, limited Internet access and e-mail. [36] Instead of offering content-based services, Netcom is merely a conduit to the Internet and all the information available therein. [37]

{13} Tom Klemesrud, one of the defendants in this case, is a Netcom subscriber. [38] Klemesrud operates a BBS on Netcom. Through his BBS, Klemesrud can access over 900 newsgroups. [39] His subscribers can access these newsgroups and use them to post messages to the Usenet. [40] Additionally, individual subscribers are able to use the Internet through Klemesrud's connection which he maintains through Netcom. [41] Dennis Erlich is a subscriber to Klemesrud's Bulletin Board. [42] He is able to "dial-up" the computer that Klemesrud operates, and through that computer, he can post messages to the newsgroups on Usenet. [43] Information which is posted to a Usenet newsgroup is transferred to everyone on Usenet, no matter where the posting or message originated. [44]

B. The Church of Scientology

1. L. Ron Hubbard and the Religious Technology Center

{14} L. Ron Hubbard was a science fiction writer and founded the Church of Scientology. "His published books, monographs, internal-policy documents, and taped lectures form what the Church calls its sacred scriptures." [45] The Church's texts, which are used in the higher levels of the religion's training, are guarded very carefully. Many critics of the Church say that in reality, it is a "hugely profitable global racket that survives by intimidating members and critics in a Mafia-like manner." [46] The legal actions taken by the Church against numerous defendants nearly always focus on protecting the texts and scriptures from distribution and disclosure on the Internet. [47] The Religious Technology Center (RTC) owns a number of copyrights for these works and has filed many of the Internet-related legal actions. Some courts have indicated that RTC uses legal action in an attempt to restrict criticism of the Church. [48] RTC has stated that it is only protecting its copyrighted works from abuse and exploitation.

2. Controversy on the Internet - alt.religion.scientology

{15} Scott Goehring created the newsgroup "alt.religion.scientology" (a.r.s.) on July 17, 1991. He states that he created it as a joke and as a way for the Usenet to "disseminate the truth about this half-assed religion." [49] The newsgroup was never a quiet one, attracting both believers and skeptics. [50]

{16} The newsgroup was altered significantly by the presence of Dennis Erlich. Erlich had and still has very strong views against the Church of Scientology and its methods. He was unlikely to develop an amicable relationship with the Scientologists on the newsgroup. Erlich's postings often incited controversy. Consequently, "his critical posts, with quotations from the Church literature, turned a.r.s from a debating club into a battlefield." [51]

IV. The Applicable Law

{17} Copyright infringement is statutorily defined. In general, it is a violation of an exclusive right granted by the Copyright Act.^[52] The concept of contributory copyright infringement is a judicially created legal doctrine.^[53] It is designed to give a cause of action to a copyright owner against a third-party "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another."^[54] This third party may then be held liable as a "contributory infringer."^[55] The concept's basis lies in tort theory.^[56]

A. The Direct Infringement Requirement

{18} Before one can be held liable for contributory copyright infringement, another must have committed direct copyright infringement.^[57] It is clear, however, that this direct infringer need not be a party to the suit; nor is a finding of direct infringement required before one can be liable for contributory copyright infringement.^[58]

B. The Knowledge Standard

{19} Knowledge of the infringing activity is required for a finding of contributory copyright infringement.^[59] This knowledge of the infringing activity can be actual or constructive.^[60] "A person possessing information that objectively indicates the existence of direct infringement may be considered to have constructive knowledge of the infringement even if he is actually unaware of the infringement."^[61] The knowledge requirement is met by showing either what the accused infringer actually knew or what he should have known.^[62] This is a higher standard than is required by direct copyright infringement^[63] or by the patent law doctrine of contributory infringement.^[64]

C. Substantial Participation Requirement

{20} Inducing, causing or materially contributing to the infringing activity creates the element of substantial participation required for contributory infringement.^[65] The participation element and the knowledge element are directly interrelated.^[66] "The closer the defendant's [participation is] to the directly infringing activity, the stronger the inference will be that the defendant knew of the activity."^[67]

D. Fair Use Defense

{21} An affirmative defense to contributory copyright infringement is the fair use doctrine. Statutory factors of the fair use doctrine include: (1) purpose and character of use; (2) nature of copyrighted work; (3) amount and substantiality of portion used in relation to the copyrighted work as a whole; and (4) effect of use on the potential market for or value of copyrighted work.^[68]

{22} "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts.'"^[69] The fair use doctrine is based on factual determinations of each case individually; there are no "bright line rules," only the guidance provided by statutes and cases, which are not exhaustive of all possible fair uses.^[70] The Supreme Court has held in fair use cases that the purpose of the copyright protection is the main consideration and that the "underlying policy of promoting the development of new works" must also be considered.^[71] Reproduction of a copyrighted work which is used to promote "criticism, comment, news reporting, teaching, scholarship or research" will be found to be a fair use, and thus, not a copyright infringement.^[72]

{23} The purpose of the statute outlining the fair use of a work is to foster the author's creativity; therefore,

the copyright statute is not strictly applied in all cases.[73] All of the statutorily defined factors are to be explored together --not in isolation-- given the purpose and goals of copyright laws.[74]

V. Religious Technology Center v. Netcom

A. Facts

{24} In *Religious Technology Center v. Netcom*,[75] the District Court for the Northern District of California addressed the issue of the liability of an ISP (Netcom) and a BBS operator (Klemesrud) for the infringing activity of a subscriber (Erlich) to their services. The court used the following facts as the basis for its decision.

{25} Erlich is an expelled minister of the Church of Scientology. RTC is the owner of copyrights for some of L. Ron Hubbard's published and unpublished works; some of which are considered religious documents by the Church.[76] In its complaint, RTC states that Hubbard died in 1986 and that he was a philosopher who wrote about "applied religious philosophy and spiritual healing technology." [77] The writings formed the basis of the Church of Scientology's theology and the training manuals used to help members rise through the Church.[78] Hubbard is the author of the famous Scientology text called: *Dianetics: The Modern Science of Mental Health*. [79] Additionally, there is a special group of works, often called the "Advanced Technology materials," which the Church considers to be confidential and to contain "proprietary information constituting trade secrets." [80]

{26} In order to criticize the Church, Erlich posted some of these works to alt.religion.scientology.[81] To post his messages, Erlich subscribed to the BBS owned and operated by Klemesrud. Klemesrud used Netcom as the ISP for his BBS. Messages posted by Erlich remained on Klemesrud's BBS for 3 days and on Netcom's system for 11 days.[82] After those respective time periods, the messages were automatically removed. RTC first tried to stop the infringing activity by notifying Erlich that his actions were illegal. When this did not stop Erlich's postings, RTC contacted both Klemesrud and Netcom, notifying them of Erlich's illegal activity and requesting Erlich be denied access to their systems.[83] This notice was received by Netcom on the 10th day of the 11 day cycle for the infringing messages.[84]

{27} Instead of complying with RTC's demands, Klemesrud requested RTC prove copyright ownership to the disputed works.[85] Netcom took no action and did not look at the messages to determine the validity of the plaintiff's claim.[86] The result was that Erlich's postings remained on the BBS and available via the Internet for some period of time after Klemesrud and Netcom had received notice from the plaintiffs of the potential infringement.

{28} In his decision, Judge Whyte denied a motion for summary judgement by Netcom and a motion for judgment on the pleadings by Klemesrud.[87] He also denied a preliminary injunction requested by RTC against Netcom and Klemesrud.[88] In a separate ruling entered September 22, 1995, the District court granted RTC a preliminary injunction against Erlich for his infringing activity of posting these copyrighted works to the Internet.[89]

B. The Decision

1. No Direct Infringement or Vicarious Liability

{29} Judge Whyte refused to hold Netcom or Klemesrud directly liable for copyright infringement.^[90] Because neither Netcom nor Klemesrud initiated the copying done by Erlich, Judge Whyte concluded "the mere fact that Netcom's system incidentally makes temporary copies of plaintiff's works does not mean Netcom has caused the copying."^[91] Comparing Netcom's system to that of a public copying machine, Judge Whyte rejected the application of the strict liability standard for direct infringement and held that contributory infringement was more appropriate for machine owners such as Netcom and Klemesrud.^[92]

{30} The strict liability standard as applied in *Playboy Enterprises, Inc. v. Frena* ^[93] was also rejected by Judge Whyte.^[94] The court held that "the storage on a defendant's system of infringing copies and retransmission to other servers [was] not a direct infringement by the BBS operator of the exclusive right to reproduce the work where such copies [were] uploaded by an infringing user."^[95]

{31} Finally, Judge Whyte rejected application of direct infringement for public distribution and display of the copyrighted works.^[96] Netcom did not "create or control the content of the information available to its subscribers."^[97] "There [was] no logical reason to draw a line around Netcom and Klemesrud and say that they [were] uniquely responsible for distributing Erlich's messages."^[98] Netcom was not even the first link,^[99] and there were many other ways to access the Internet.^[100] "Where the BBS merely stores and passes along all messages sent by its subscribers and others, the BBS should not be seen as causing these works to be publicly distributed or displayed."^[101] Whyte also stated that "mere possession of a digital copy on a BBS that is accessible to some members of the public" may not constitute direct infringement of the exclusive right to publicly distribute and display.^[102] The court concluded that no purpose would be served by applying a direct infringement analysis.^[103]

{32} Judge Whyte also refused to hold Netcom or Klemesrud vicariously liable for copyright infringement.^[104] Although there was a material issue of fact for the first element of vicarious liability, the court rejected the second element.^[105] It was plausible that Netcom had the right and ability to control Erlich's message, but the court found that Netcom did not derive direct financial benefit from the infringing activity of its users.^[106]

2. Material Issue of Fact on Knowledge Element of Contributory Infringement

{33} Although the court rejected both direct infringement liability and vicarious liability, it refused to rule in either party's favor on the issue of contributory infringement. Judge Whyte stated that there was a material issue of fact as to the knowledge element of the alleged contributory copyright infringement by Netcom and Klemesrud.^[107] "Because Netcom was arguably participating in Erlich's public distribution of plaintiff's works, there [was] a genuine issue as to whether Netcom [and Klemesrud] knew of any infringement by Erlich before it was too late to do anything about it."^[108] If the plaintiffs could prove the knowledge element, Netcom could be liable because it did not cancel the infringing activity and stop the infringing material from being distributed worldwide, with its failure to act constituting substantial participation.^[109]

{34} Netcom presented four arguments to rebut the knowledge element;^[110] however, none of these were sufficient to persuade Judge Whyte that no material issue of fact existed. The arguments were: "(1) [Netcom] did not know of Erlich's planned infringing activities when it agreed to lease its facilities to Klemesrud; (2) [Netcom] did not know that Erlich would infringe prior to any of its postings; (3) [Netcom] is unable to screen out infringing postings before they are made; and (4) [Netcom's] knowledge . . . was too equivocal given the difficulty in assessing" the validity of RTC's claims and the question of whether Erlich's conduct fell under the fair use defense.^[111]

{35} Judge Whyte rejected arguments (1) through (3) by showing that Netcom had some control over the messages on its system and questioning whether they could have done something about Erlich's activities.^[112] Citing *Deutsch v. Arnold*,^[113] Netcom likened itself to the lessor of a premises.^[114] The court

rejected the argument that the measuring of whether there was knowledge should be made at the time of the signing of the lease.^[115] Because Netcom maintained control over the use of its system, unlike a lessor-lessee relationship, the court concluded that the knowledge element should be measured when "Netcom provided its services to allow Erlich to infringe plaintiff's copyrights."^[116]

{36} The court stated that Netcom could not have knowledge of the infringing activity before receipt of the letter notifying them of Erlich's activity.^[117] The court went on to say that there is a question of fact as to whether Netcom knew or should have known that Erlich had infringed plaintiff's copyrights following receipt of the plaintiff's letter and before it was too late to do anything about it.^[118]

{37} For two reasons, the court also rejected Netcom's fourth argument, that its knowledge was too equivocal after the notice.^[119] Netcom argued its position by showing the difficulty of assessing the validity of the Church's registrations and balancing that with Erlich's possible fair use.^[120] First, this was rejected because the works contained copyright notices.^[121] Second, it was rejected because of the burden this would put on a copyright owner to prevent the infringing activity.^[122]

{38} The court was more sympathetic to the argument that it was difficult for a BBS operator to quickly and fairly determine the existence of a fair use when there is at least a colorable claim of fair use.^[123] Its conclusion was that if

[a] BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system.^[124]

Because the plaintiffs notified Netcom of Erlich's activities, the court concluded there was an issue of fact as to Netcom's knowledge.^[125] Additionally, Netcom admitted it had not even looked at the messages, and had it done so, it would have investigated them further for infringement.^[126]

3. Substantial Participation Requirement

{39} The interrelationship between knowledge and participation is essential to a finding of contributory infringement.^[127] Comparing this case to *Fonsovia, Inc. v. Cherry Auction, Inc.*,^[128] the court found that Netcom was more than a mere lessor of a premises on which infringing activity took place.^[129] Because Netcom did not completely relinquish control over how its system was used, it would have been able to take simple measures to prevent further damage to the plaintiffs, assuming knowledge of the infringing activity.^[130] Therefore, combining the participation element and the knowledge element,^[131] the court concluded that there was a material issue of fact existed as to the plaintiff's theory of contributory infringement after Netcom was on notice.^[132]

4. Fair Use

{40} The court held that there was a material issue of fact as to whether Netcom's actions constituted a valid fair use under section 107 of the Copyright Act.^[133] By using the factors which section 107 takes into account for the fair use defense, the court conducted an equitable balancing test to come to its conclusion.^[134] Although Netcom had the ability to prevent further distribution of the works and the plaintiffs had not given permission for the viewing or copying of their works, there was no evidence that the use would significantly harm the market for the original. ^[135]

C. Implications of Judge Whyte's Decision

{41} The court denied RTC's request for a preliminary injunction against Netcom and Klemesrud. Because there was "little evidence that Netcom or Klemesrud knew or should have known that Erlich was engaged in copyright infringement" and that Erlich was not entitled to a fair use defense, RTC failed to meet their burden of showing a likelihood of success on the merits.^[136] RTC failed to show that the preliminary injunction currently in effect was insufficient to avoid any harm to its property rights.^[137] The preliminary injunction request was also overly broad, having a potentially chilling effect on free speech on either Netcom's or Klemesrud's systems.^[138]

VI. Analysis

{42} The court stated that Netcom and Klemesrud could be found liable for contributory infringement if the plaintiffs could prove the knowledge element.^[139] The concept of contributory copyright infringement knowledge has not been applied in the context of a BBS or an ISP.^[140] However, in predicting the application of the doctrine of contributory infringement to operators of BBS's, a number of commentators have discussed the knowledge requirement.^[141] An analysis of the knowledge sufficient to hold an ISP liable for contributory infringement will be discussed. First, the types of knowledge will be explored, followed by an integration of the capabilities of the ISP and the substantial participation element with the knowledge requirement. Throughout this analysis, a comparison of contributory copyright infringement cases will show how courts have applied this doctrine to similar fact patterns. Finally, the court's consideration of the fair use defense will be analyzed.

A. Actual Knowledge, Constructive Knowledge or No Knowledge

{43} Some commentators have discussed in great detail the application of actual versus constructive knowledge to contributory copyright infringement.^[142] It is clear that if an ISP has actual knowledge that infringing activity is taking place on its system, it must take action to avoid contributory infringement liability.^[143] However, "[c]onstructive knowledge can be imputed to a party if the circumstances surrounding the activity should have indicated to the defendant that the activity was illegal."^[144] One commentator has concluded that the knowledge standard for BBS operators should be that of negligence and the knowledge of a reasonable person.^[145]

{44} This measurement is different than the standard established for the tort of defamation as previously applied to BBS operators.^[146] In *Cubby Inc. v. CompuServe Inc.*,^[147] the Second Circuit dealt with the issue of a BBS operator's liability for a defamatory statement in an article posted on one of its forums. Holding that the BBS was liable only if it "knew or had reason to know" about the defamatory statements and took no action, the court limited the standard of knowledge to actual knowledge.^[148] Recognition of the special nature of the BBS and its ability to allow users to access material from around the world factored into the court's analysis.^[149] Also, the court felt that the BBS was more like a "distributor" than a publisher and thus lowered the knowledge standard.^[150] Another court that has dealt with this issue held that a BBS operator was a publisher because it used software to automatically pre-screen messages that were in bad taste or offensive.^[151] Treating a BBS operator as a "publisher" is a lower threshold for the knowledge requirement; it changes the level of knowledge to a strict liability standard.^[152] What appears to be common in both of these analyses is the capabilities that a BBS has in controlling its system.^[153] If a BBS can easily detect illegal messages and prevent them from being transmitted to the Internet, the BBS might be treated as a publisher. In most cases it is impractical to monitor every message. Thus, a BBS operator could be treated

as a distributor.

{45} The court rejected the strict liability standard of no knowledge in its refusal to hold Netcom liable for direct copyright infringement.^[154] The court relied on several sources to come to its conclusion.^[155] First, it distinguished Netcom from the machine operator in *MAI Systems Corp. v. Peak Computer, Inc.*^[156] In *MAI*, a machine operator uploaded a copyrighted computer software program into the RAM of the defendant's computer.^[157] The court in *MAI* concluded that this action was sufficient for the uploading to be considered a copy under the Copyright Act.^[158] Judge Whyte distinguished Netcom from *MAI* because the ISP was a passive participant in Erlich's illegal activity.^[159] Netcom was only a conduit for Erlich's activity, much like a photocopier owner.^[160] Therefore, the court felt that Netcom should be subject to liability only under the contributory infringement theory.^[161]

{46} The court also distinguished the case from *Playboy Enterprises, Inc. v. Frena*^[162] and *Sega Enterprises Ltd. v. MAPHIA*,^[163] two cases addressing "the liability of BBS operators for infringing files uploaded by subscribers."^[164] It is important to note that without regard to knowledge, the court could not distinguish what Netcom did from what any other Usenet server did in copying the messages.^[165] Holding Netcom liable for direct infringement was too broad because all Usenet servers could then be held liable for Erlich's infringing activity.^[166] Thus the court concluded that Netcom could not be held liable for direct infringement. In other words, Netcom could not be liable without knowledge of the infringing acts.^[167]

B. When Should Knowledge Be Measured?

{47} The court rebuffed Netcom's theory that knowledge should be measured at the time of signing the lease.^[168] Because Netcom still maintained control over its system, the court rejected the comparison of Netcom with that of a lessor of property (as in *Deutsch v. Arnold*).^[169] The court concluded that measurement of whether Netcom knew of the infringing activity should begin at the point that Netcom received notice of the infringing activity by RTC.^[170] The court also stated that the Church's works were marked with copyright notices, but did not further discuss whether this by itself constituted knowledge.^[171] The mere existence of a copyright mark is probably not sufficient to constitute knowledge. One author writes "[N]otice of copyright, whatever its practical value may be, has virtually no legal significance."^[172]

{48} It seems plausible that a telephone call warning of the infringing activity would be sufficient knowledge if knowledge begins upon receipt of notice. However, the court blends a number of factors that make the standard of knowledge a tougher question.^[173] An industry group known as the Computer Information Exchange (CIX)^[174] filed an *amicus curie* brief in *Religious Technology Center v. Lerma*.^[175]

{49} The brief supports a high standard of knowledge, arguing that ISP's are in a poor position to determine the validity of a copyright infringement claim.^[176] Many Usenet groups are used as a verbal discussion forum.^[177] Requiring an ISP to remove allegedly infringing material makes it susceptible to many frivolous infringement claims by parties who find the material on the Usenet group offensive, undesirable or contrary to their views.^[178] The brief argues that this places the ISP in a "Catch-22" position; either they remove all of the messages, or subject themselves to copyright infringement liability.^[179] Also, the ease of determining the validity of a copyright depends on the material itself.^[180] This raises the following question.

C. What Is the Effect of the Letter?

{50} The court is clear that there must be more than just a notification of infringement from a copyright owner to meet the knowledge element.^[181] How much more knowledge is the pivotal question: is a duty placed on the BBS operator to investigate every notification of infringement? One commentator analyzed the possibility of a duty requirement and concluded that one might exist depending on the amount of knowledge.

[182] An Information Infrastructure Task Force (IITF) "White Paper" [183] has taken the position that it is premature to reduce ISP liability for copyright infringement by a subscriber. After a long discussion, the IITF "White Paper" concludes that an ISP should be treated as a publisher - therefore demanding a strict liability standard. It takes this position because of the difficulty imposed upon a copyright owner in enforcing the rights to which he or she is entitled. [184] In contrast, the court rejected the direct infringement liability as a remedy to this issue. [185] In this light, it is useful to compare notification in the copyright context to that of patents, which has a statutorily created contributory infringement law. [186]

{51} In patent law, where courts require actual knowledge to find contributory infringement, [187] the concept of notification of infringement is well developed. Recently, a member of the patent bar detailed notification from the viewpoint of a plaintiff's attorney. [188] What can be gained from this comparison is that there are remedies for false infringement claims and there are duties imposed upon the receipt of such notification. [189] Comparing this to copyrights, the question becomes what quantity of information in the notification imposes a duty on the ISP to take steps toward removal of the infringing message. It would appear the court feels that RTC did not give enough information to impose a duty. [190] Therefore, a reasonable person standard is proposed to constitute knowledge of the infringing activity - requiring enough information for the ISP to make a determination under a reasonable person standard that there is infringement would suffice. If the ISP failed to take action sufficient to prevent the infringement from continuing, it would be liable for contributory infringement. However, the question remains as to what an ISP has the capability to do in such circumstances. [191]

D. Capabilities of the BBS or ISP

{52} Netcom and Klemesrud are incapable of monitoring all of the data passing through their systems. [192] Arguably, if they were able to detect the copyright symbol in the data, then they would have had knowledge that copyrighted material was being transmitted through their systems. However, as the court states, this probably would be insufficient to constitute knowledge of the infringing activity. [193] Copyrighted material is transmitted through the Internet frequently. [194] In order to perform the research necessary for this paper, copyrighted material was transmitted through the Internet - legally. In order to distinguish material legally transmitted and material illegally transmitted, something more than a copyright symbol is required. For example, the copyright symbol, combined with the letter sent by RTC, could be sufficient for a reasonable person to conclude that infringing activity was occurring, depending on the content of the notice.

{53} Perhaps the capabilities of the BBS should be taken into account to evaluate whether the knowledge of the infringing activity rises to the level necessary for contributory infringement. If an operator routinely screens information flowing through her system and is able to detect copyrighted material, then it is reasonable that, after sufficient notification of infringement, the ISP should remove the message. In its rebuttal to the IITF "White Paper," the ISP industry supports this position. [195] However, the question remains whether the operator has the capability to remove a message and the effects of such action on the alleged infringer. [196]

E. Substantial Participation

{54} Finally, the court conducted a cursory inquiry into the element of substantial participation. [197] It concluded that RTC raised a material issue of fact as to whether Netcom substantially participated in the infringement for two reasons. First, Netcom left the message on its system for some time after it was notified of the infringement. Second, this message was available worldwide through the Internet. [198] Substantial participation is generally viewed in the context of all of the alleged infringer's actions. In *Sega*, the defendant was found to have substantially participated when he solicited buyers for machines on which the infringing copies were made. [199] He also provided methods for sales to be conducted through his BBS and derived

direct financial benefit from these transactions.[200]

{55} The court's analysis demonstrates the interrelationship between knowledge and substantial participation. At one point, the court does not yield to Netcom's argument that the ISP is a mere conduit for Erlich's activity;[201] however, the court states that it is unlikely that Netcom's participation was substantial.[202] Some commentators and the industry's *amicus curiae* have referred to an ISP as being a passive part of the process; that they are mere conduits like the telephone company.[203] Although this element is not the focus of this paper, it does provide a basis upon which this case might be decided.

F. Fair Use

{56} The fair use defense says that members of the public may use the work without violating the copyright laws. The four factors which are considered by the court in determining whether the use of a copyrighted work is acceptable under the fair use defense are discussed below.

1. The Purpose and Character of the Use

{57} The court found that Netcom's use of the words was "clearly commercial." [204] However, the court cited the finding in *Campbell v. Acuff-Rose Music, Inc.*, that "a commercial use does not dictate against a finding of fair use, as most of the uses listed in the statute are 'generally conducted for profit in this country.'" [205] Any financial incentive gained by Netcom is unrelated to the specific copyright infringing posting.

{58} Netcom, as a conduit to the Internet, does not use or benefit from the postings sent by users and subscribers.[206] Netcom simply provides the means for access to the Internet.

{59} Rick Francis argues that Erlich does not subscribe directly to Netcom, but instead uses it through a bulletin board containing many other users. As a result, for Netcom to completely stop Erlich from posting, they would have to eliminate Klemesrud's entire bulletin board, terminating access for all its subscribers in the process.[207]

{60} Netcom enables its subscribers to connect to the Internet and access its various resources. The maintenance and operations of the numerous Internet applications are not serviced by Netcom. Netcom maintains a newsgroup for its subscribers, but the newsgroup is largely unmonitored and people are free to communicate with one another.[208] Because of the manner in which Netcom functions, it is unable to view the content of any message being posted to the Internet before it is distributed. Also, Netcom has declined to edit messages posted to the Internet by its subscribers.[209]

{61} "It is undisputed that . . . Netcom does not directly gain anything from the content of the information available to its subscribers on the Internet." [210] Consequently, since Netcom's interest in the copyrighted material is the same as with any other posting on its server, the court found this fact weighed in favor of Netcom. Netcom's purpose is the same whether or not the posting violates a copyright.

2. The Nature of the Copyrighted Work

{62} The nature of the work includes considerations of whether or not the material which is used is "published or unpublished and whether the work is informative or creative." [211] The court found that since Netcom's use of the works was "merely to facilitate their posting to the Usenet, which is an entirely different purpose than [RTC's or even Erlich's], the precise nature of those works is not important to the fair use determination." [212]

{63} However, an important fact that the court must consider is that some of the works posted by Erlich were unpublished. The other statutory factors may be more important with regard to the fair use on the part of Netcom, but the fact that some of RTC's works were unpublished, is a factor that tends to negate a finding of fair use. If those works are unpublished and not generally available, then if someone else published those works, the fair use defense is weakened. "Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and *whether* it will be made public."[\[213\]](#)

3. Amount and Substantiality of the Portion Used

{64} The third factor asks the court to consider the potentially infringing material's quality and importance, in addition to the quantity in question.[\[214\]](#) A relevant issue which must be addressed is whether a substantial amount of the work considered to be infringed upon was copied exactly from the original source.[\[215\]](#) Total duplication of a copyrighted work generally weighs against a finding of fair use. A demonstration that the copying was necessary for a noncommercial purpose can help overcome such a presumption .[\[216\]](#) The court found that Netcom copied no more than necessary to serve as a Usenet server.[\[217\]](#) Netcom must copy all of the files that are posted to enable their distribution. Additionally, the court has determined that prescreening the postings for copyright infringement is not feasible.[\[218\]](#)

{65} To the contrary, the court found that Erlich was not entitled to fair use because of the substantial portions of the writings which he posted to the newsgroup and the lack of additional commentary.[\[219\]](#) Furthermore, Erlich violated a temporary restraining order which prohibited him from further postings which were beyond fair use.[\[220\]](#) He continued to post to the newsgroup in violation of a court order. This may be considered against him when the court is determining the fair use of the various materials.

4. The Effect on the Potential Market for or Value of the Copyrighted Work

{66} For purposes of determining fair use, a court considers the effect of the use of the copyrighted work on the potential market for it. Additionally, the value of the copyrighted work is considered. This determination requires surveying the "extent of market harm caused by particular actions of alleged infringer and a consideration of whether unrestricted and widespread conduct of the sort engaged in by alleged infringer would result in substantially adverse impact on potential market for the original."[\[221\]](#) A court should regard the fourth factor as the most important, even though the final analysis by the court is done by balancing the four factors together.[\[222\]](#) "When a commercial use amounts to mere duplication of the entirety of an original, it clearly supersedes the objects of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur."[\[223\]](#)

{67} The court considered whether the Church will have a significant decline in their market for potential recruits as a result of these postings. This can be viewed two different ways. First, the court must determine if RTC is effected because people will not pay for the courses that are offered by the Church when users of the Internet already have the writings which are supposed to only be available to the highest in the Church. Second, the court must determine if these postings will cause people not to join the Church as a result of the criticism and exposure to the nature of the practices of the Church of Scientology. The Church believes that many of the practices can not be understood until members reach certain levels in the Church. Since they are available on the Internet, then people may be "turned off" by certain practices because they lack knowledge and understanding.

{68} The court decided that the effect on the potential market factor creates a genuine issue of fact which must be considered at trial. The court seemed concerned that the widespread distribution to a potential of over 30 million people may create some harm in the market.[\[224\]](#) However, in this preliminary stage, RTC was unable to bring forth any evidence which indicated that they were actually harmed in the market as a result of

these postings.^[225] Additionally, the Church admits that it is currently under no threat of competition, but states that splinter groups have attempted to form in the past.^[226] Netcom indicated that no evidence was available which indicates that any harm to the market has been sustained. The newsgroup a.r.s, by its name, attracts persons interested either in Scientology or the criticism of it. Not every person on the Internet has visited a.r.s. Therefore, it can not be concluded that 30 million people have seen the materials of the Church of Scientology. Many people have never heard of Erlich or the Church. The court must find that the Netcom's actions would result in a substantially adverse impact on the potential market for the writings.^[227]

{69} The IITF "White Paper" has stated that commercial uses that involve no transformation of the original and harm actual or potential markets will likely always be infringing. Nonprofit, educational, transformative uses will often be fair.^[228] Fair use involves a fact intensive analysis to determine whether use which falls between the two extremes is fair.

G. The Magnifying Effect of Harm by the Internet

{70} The burden rests with the Church to demonstrate that the use of the works which are copyrighted will cause harm in the market for these works.^[229] In *Lerma*,^[230] the court found that fair use defense existed because there is no separate market for the Church of Scientology materials. Scientologists in the lower levels and others who may happen on to the materials on the Internet are not able to understand them or use them effectively without the supervision of the Church. Because of the specialized nature of the works, there is no market for the writings which are in dispute without the presence of the guidance of the Church of Scientology.^[231]

{71} Therefore, even if the use of the Internet would cause for an increased market effect because of the widespread audience, the market for these specialized articles which go hand in hand with critical training is not diminished.

{72} However, if RTC is able to demonstrate that a harm is produced as a result of the mass distribution for which Netcom's server is responsible, the court could decide that such use is not fair, especially with respect to the unpublished materials. The effect of harm created by the Internet distribution has the ability to reach an audience far greater than most other media forms. Probably the only instrument with greater effect is the television.

VII. Conclusion

{74} Because this is a case of first impression of ISP liability for copyright infringement by one of its subscribers, it will set the standard for the near future on how ISP's operate; possibly the entire Internet. Because Klemesrud and Netcom have settled the case, the standards set by this opinion will establish the framework for future actions of copyright infringement on the Internet. Copyright owners will be more aware of what needs to be done to protect their rights; ISP's will know more clearly when they must act to limit the damage caused by copyright infringement committed by one of their subscribers.

{75} Courts are unwilling to completely absolve ISP's or BBS's for copyright infringing activity by a subscriber. The standard of knowledge required to impose liability is greater than strict liability. Constructive knowledge of the infringing activity may be sufficient for ISP's to be liable for contributory copyright infringement. The capabilities of the ISP, the amount of notice the ISP received and the amount the ISP participated in the infringement will all be relevant to this determination. Possibly, a court will apply a

reasonable person standard, taking into account the above factors. Under this standard, it is probable that the fact finder could have concluded that Netcom "knew or should have known" that Erlich's activities were illegal.

{76} If Netcom had been found liable for contributory infringement, the success of the fair use defense could have hinged on RTC's ability to bring forth any clear evidence which attributes a significant market harm to Netcom's involvement in the infringement. Whether the courts will extend their interest in the protection of the rights of copyright owners to the extent of imposing a duty on an ISP to actively monitor its system for infringing acts is not clear. The legislature could significantly alter this standard by accepting the IITF "White Paper" recommendation to impose a strict liability standard. However, it appears that the court in this case is opposed to such an expansive policy.

{END}

Footnotes

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[**]**NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Eugene A. Burcher & Anna M. Hughes, Casenote, Religious Tech. Ctr. v. Netcome On-Line Communications, Inc.: *Internet Service Providers: The Knowledge Standard for Contributory Copyright Infringement and The Fair Use Defense*, 3 RICH. J.L. TECH. 5 (1997), at <http://www.richmond.edu/jolt/v3i1/burhugh.html>.

[1] See Section II.A. explains the Internet in sufficient detail to understand the issues in this case. For a more detailed explanation see generally Adam Gaffin, *EFF's Guide to the Internet*, v. 3.19 (formerly *The Big Dummy's Guide to the Internet*) (last modified on Sept. 12, 1996)
<http://www.eff.org/pub/Net_info/EFF_Net_Guide/netguide.eff>.

[2] Jonathan Newcomb, *Stealing on the 'Net*, USA Today, Dec. 20, 1995, at A11.

[3] See, e.g., M. David Dobbins, *Computer Bulletin Board Operator Liability for Users' Infringing Acts*, 94 Mich. L. Rev. 217 (1995); Nina Elkin-Koren, *Copyright Law and Social Dialogue on the Information*

Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 345 (1995); Alfred P. Ewert & Irah H. Donner, *Will the New Information Superhighway Create "Super" Problems for Software Engineers? Contributory Infringement of Patented or Copyrighted Software-Related Applications*, 4 ALB. L.J. SC. & TECH. 155 (1994); I. Trotter Hardy, *The Proper Legal Regime For "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994); and A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47 (1989).

[4] There are many other names that an Internet Service Provider (ISP) is referred to in various written works. Examples are Internet Access Provider (IAP) and Bulletin Board System (BBS) Operator. In this paper, it is important to distinguish between someone who provides access to the Internet (ISP) and someone who operates a computer bulletin board. Although the court addresses their liabilities in the case by taking similar approaches to each, the ISP arguably has a more passive role in the alleged infringing activity. See Mem. of Law of the Commercial Internet Exchange Association in Supp. of Mot. for Leave to File Amicus Curiae Br. and of Mot. for Summ. J. of Def. Digital Gateway Systems at 3, *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995) (No. 95-1107-A) [hereinafter CIX Mem.] <http://www.eff.org/pub/Legal/Cases/Scientology_cases/cix_dgs_120495_amicus.brief>.

[5] See *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

[6] See Wendy M. Grossman, *alt.scientology.war*, WIRED, Dec. 1995 at 174. <<http://www.hotwired.com/wired/3.12/features/alt.scientology.war.html>>.

[7] See Tom Klemesrud, *Klemesrud Press Release* (Aug. 22, 1996). <http://www.eff.org/pub/Legal/Cases/Scientology_cases/960822_klemesrud_settle.announce>.

[8] *Netcom*, 907 F. Supp. at 1373-74.

[9] See, e.g., *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1361 (E.D. Va. 1995).

[10] See Shari Steele, *Congress vs. the Internet - The courts have upheld free speech. Why won't legislators?*, N.Y. TIMES, Dec. 9, 1995, at Op-Ed.

[11] See *Court Tackles Copyright Infringement on the Net*, INTERNET WEEK, Dec. 4, 1995.

[12] See *Netcom*, 907 F. Supp. at 1381.

[13] See *id.*

[14] See *id.*

[15] This paper uses the terms "contributory copyright infringement" or "contributory infringement" interchangeably. These terms are only intended to refer to the type of contributory infringement requiring knowledge and substantial participation by the defendant. Some courts have used these terms to refer to all third-party liability and include vicarious liability in their definition of contributory infringement. When referring to vicarious liability in this paper, that specific term will be used.

[16] See Declaration of Rick Francis in Support of Defendant Netcom's Opposition to Plaintiff's Request for Injunctive Relief at ¶ 3, *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (No. C-95-20091 RMW) [hereinafter Francis Decl.]. (Rick Francis is the "Vice President of Software Engineering for defendant Netcom On-Line Communication Services, Inc. ("Netcom")." Francis Decl. ¶ 1)

[17] *See id.* at ¶ 3.

[18] *Id.*

[19] *See* MTV Networks v. Curry, 867 F.Supp. 202, 203 n.1 (S.D.N.Y. 1994).

[20] Section II.B. *infra* will discuss Usenet groups, and data and file transfers.

Electronic mail (e-mail) is an application on the Internet which allows Internet users to exchange messages with others who have e-mail addresses. Messages can be sent in seconds to individuals, or groups on a mailing list. (Francis Decl., *supra* note 16, at ¶ 5.)

The World Wide Web is a "browsing and searching system" made up of many thousands of computer servers. Each server has a home page which is automatically called up when the user types in the address. Each server is then "linked by a special communications protocol called hypertext transport protocol (HTTP)." Through this open protocol, Internet users are able "to view and access graphics, video and audio" which may be kept at the home page. Users may also "leap instantly to further or related information on the same server" or other servers. *Id.*

Computers which are connected to the Internet serve as "repositories for vast amounts of data, graphics, public domain software and other programs that have been made available to the public." Through the Internet connection, a user "may access commercial, educational and government databases, newspapers, magazines, library card catalogs, industry newsletters, weather updates," etc. *Id.* The possibilities are wide reaching and new sites are added every day.

[21] *Id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.*

[28] *See id.* at ¶ 7.

[29] *See id.*

[30] *See id.*

[31] *See* HARDY, *supra* note 3, at 1000. This provides a detailed explanation of the term BBS and how the definition of this term can vary widely from system to system.

[32] *See* Francis Decl., *supra* note 16, at ¶ 9.

[33] *See id.*

[34] *Id.*

[35] *Id.* at ¶ 10.

[36] *See id.*

[37] *See id.*

[38] *See id.* at ¶ 13.

[39] *See id.*

[40] *See id.*

[41] *See id.* at ¶ 14.

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] Grossman, *supra* note 6, at 175.

[46] Richard Behar, *The Thriving Cult of Greed and Power*, TIME MAGAZINE (May 6, 1991) at 50 <<http://www.thur.de/religio/time.html>>.

[47] *See id.*

[48] *See infra* note 180.

[49] Grossman, *supra* note 6, at 174.

[50] *See id.*

[51] *Id.* at 176.

[52] The Copyright Act of 1976, 17 U.S.C. §§106 (1)-(3) & (5) (1996). The rights addressed by the court "include the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work." *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995).

[53] *See* DOBBINS, *supra* note 3, at 224.

[54] *Id.* at 230 (citing *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

[55] *Gershwin Publishing Corp.*, 443 F.2d at 1162.

[56] *See* NIMMER ON COPYRIGHT §12.04[A][2], at 12-75 (1996) (stating that contributory copyright infringement is "an outgrowth of the tort concept of enterprise liability."); EWERT & DONNER, *supra* note 3, at 187 (stating that "[t]he doctrine of contributory copyright infringement appears to have been borrowed from the general principles of joint-tortfeasors and from the contributory patent infringement doctrine");

ODDI, *supra* note 3, at 51 (1989) (stating that the "theory underlying contributory infringement parallels that of trespass on a property interest").

[57] See NIMMER ON COPYRIGHT §12.04[A][3][a], at 12-85 to -88 (1996); EWERT & DONNER, *supra* note 3, at 182 (giving as examples *Screen Gems-Columbia Music v. Mark-Fi Records*, 256 F. Supp. 399 (S.D.N.Y. 1966) and *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984)). *Sony Corp of Am. v. Universal City Studios* is the most recent Supreme Court decision to address the issue of "contributory copyright infringement." The Court analyzed the possibility of a producer of home VCR's being liable for the customers copying of copyrighted television programs. Because the use of the machine had substantial noninfringing purposes, the Court refused to hold Sony liable for the infringing acts of the VCR owners. This case is not discussed in this paper because the facts are too different to give any real benefit. For a detailed analysis of this case, see ODDI, *supra* note 3, at 51.

[58] See NIMMER ON COPYRIGHT §12.04[A][3][a], at 12-85 to -88 (1996). In *Religious Tech. Ctr. v. Netcom*, the court assumed that direct copyright infringement had taken place by the subscriber Erlich. This viewpoint was based in part on the preliminary ruling of September 22, 1995. See *infra* note 87. It is apparent that a ruling in favor of Erlich on the direct infringement claim would make the claims against Netcom and Klemesrud moot. In *Religious Tech. Center v. Lerma*, 897 F. Supp. 260 (E.D. Va. 1995), the court had to deal with similar issues. It denied the defense of fair use for a direct infringer who posted 33 works of the Church of Scientology on the Internet and granted summary judgment to RTC on this issue. See Leisa Goodman, *RTC Wins Summary Judgment In Lerma Case* (January 19, 1996) <news://alt.religion.scientology> Message-ID <4dpae\$28q@crl12.crl.com>; *Church Wins Internet Copyright Case: Don't Expect Much in Damages, Judge Warns*, RICHMOND TIMES-DISPATCH, Jan. 20, 1996, at B4.

[59] See EWERT & DONNER, *supra* note 3, at 185.

[60] See *id.* at 186.

[61] *Id.*

[62] See *id.*

[63] See *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal. 1995)(citing 17 U.S.C. §§ 501, 504 (1996)).

[64] See EWERT & DONNER, *supra* note 3, at 162. This article gives a good history of the patent doctrine of contributory infringement. The knowledge requirement for patent contributory infringement is actual knowledge. *Id.* See *infra* section V.B. for a more detailed discussion for the knowledge requirement.

[65] See *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2nd Cir. 1971); See also, DOBBINS, *supra* note 3, at 235.

[66] See DOBBINS, *supra* note 3, at 236.

[67] *Id.* at 236 n.117.

[68] See The Copyright Act of 1976, 17 U.S.C. § 107 (1996). In its entirety, this section states:

Notwithstanding the provisions of sections 106 [Exclusive rights in copyrighted works] and 106A [Rights of certain authors to attribution and integrity], the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for the purposes such as criticism, comment, news reporting, teaching (including

multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use on the potential market for or value of the copyrighted work.

The fact that a work is published shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors.

Id.

[69] U.S. CONST. art I, § 8, cl. 8; *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct.1164, 1169 (1994).

[70] *Campbell*, 114 S.Ct. at 1170 (citing 17 U.S.C. §§ 101, 107 (1996)).

[71] Jeffrey C. Selman, *Copyright Protection in a Digital World: Judicial, Legislative, Technological, and Contractual Solutions*, 7 J. PROPRIETARY RTS. 4, 6 (July 1995).

[72] *Campbell*, 114 S.Ct. at 1170.

[73] *See* The Copyright Act of 1976, 17 U.S.C. § 107 (1996); *see also Campbell*, 114 S.Ct. at 1170-71.

[74] *See Campbell*, 114 S.Ct. at 1170.

[75] 907 F. Supp. 1361 (N.D. Cal. 1995).

[76] *See Netcom*, 907 F. Supp. at 1365.

[77] Pl.'s Verified Compl. for Injunctive Relief and Damages for: (1)Copyright Infringement; and (2)Trade Secrets Misappropriation at ¶ 9, *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (No. C-95-20091 RMW) [hereinafter RTC Complaint] <http://www.eff.org/pub/Legal/Cases/Scientology_cases/cos_020895.complaint>.

[78] *See id.*

[79] *See Behar*, *supra* note 46, at 51.

[80] RTC Complaint, *supra* note 77, at ¶ 9. "In the 1960's, [Hubbard] decreed that humans are made of clusters of spirits (or "thetans") who were banished to earth some 75 million years ago by a cruel galactic ruler named Xenu." *Behar*, *supra* note 46, at 51. His religion is based on the need to remove the "thetans". His courses cost as much as \$1000 per credit and some pay \$300,000 to achieve the highest levels. *Id.* In Hollywood, Scientology has created "'Celebrity Centers,' a chain of clubhouses that offer expensive counseling and career guidance," in addition to pampering the members. *Id.* Members of the celebrity form of Scientology include actors "Tom Cruise and John Travolta, actresses Kirstie Alley, Mimi Rogers, and Anne

Archer, Palm Springs mayor and performer Sonny Bono, jazz [musician] Chick Corea and Nancy Cartwright, the voice [of cartoon star] Bart Simpson." *Id.* The methods of the Church vary tremendously between the treatment given to celebrities as opposed to average, unknown people. *Id.*

[81] "Newsgroup names start with one of a series of broad topic names. For example, newsgroups beginning with 'comp.' are about computer-related topics. These broad topics are followed by a series of more focused topics (so that 'comp.unix' groups are limited to discussion about Unix)." Adam Gaffin, *EFF's Guide to the Internet*, v. 3.19 (formerly *The Big Dummy's Guide to the Internet*) at Chapter 3.1. See supra note 1 for http address. In this case, the Usenet name starts with alt. meaning a controversial topic. The focus is narrowed to discussion of religion, specifically Scientology.

[82] See *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361, 1367 (N.D. Cal 1995).

[83] See *id.* at 1366.

[84] See *id.* at 1373-74.

[85] See *id.* at 1366. This section does not specifically say what Klemesrud did, but for further information see Court Reporter's Transcript of the Hearings, <http://www.eff.org/Legal/Cases/Scientology_cases/court_hearing_022195.Transcript>.

[86] See *id.* at 1374.

[87] See *id.* at 1383.

[88] See *id.*

[89] See Order Granting in Part and Den. in Part Pl.'s Application for a Prelim. Inj. and Def. Erlich's Mot. to Dissolve the T.R.O.; Den. Pl.'s Application to Expand the T.R.O.; Denying Pl.'s Mot. for Contempt; Granting Erlich's Mot. to Vacate the Writ of Seizure; and Den. Pl.'s Req. for Sanctions Against Erlich's Counsel, *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995) (No. C-95-20091 RMW) (this is an unpublished opinion) <http://www.eff.org/pub/Legal/Cases/Scientology_cases/whyte_cos_v_erlich_092295.ruling>.

[90] See *Netcom*, 907 F. Supp. 1372. In the decision, the court first addresses primarily Netcom's liability. Then in a separate section, the court states that all of the same arguments against Netcom apply to Klemesrud. Therefore, a number of quotations only refer to Netcom, but are just as applicable to Klemesrud.

[91] *Id.* at 1368-69.

[92] See *id.* at 1369.

[93] 839 F. Supp. 1552 (M.D. Fla. 1993).

[94] See *Netcom*, 907 F. Supp. at 1370. This case was distinguished by the court because RTC claimed that Netcom's computers had made the infringing copies, violating the right to reproduce a copyrighted work. In *Playboy*, the court ruled that the plaintiff had violated the copyright owner's right to publicly display the works. Judge Whyte addressed this issue which is discussed in the next paragraph of text.

[95] *Id.* at 1371.

[96] *See id.* at 1371-73.

[97] *Id.* at 1372.

[98] *Id.*

[99] *See id.* Netcom had no contractual relationship with Erlich. Klemesrud contracted with Netcom for their services and Erlich contracted with Klemesrud for his. The lack of a contractual relationship or the existence of one as applied to the liability of an ISP for acts by a subscriber has been analyzed by at least one commentator. *See* HARDY, *supra* note 3, at 1028.

[100] *See Netcom*, 907 F. Supp. at 1372.

[101] *Id.*

[102] *See id.*

[103] *See id.*

[104] *See id.* at 1377.

[105] *See id.* at 1374-77.

[106] *See id.* at 1377

[107] *See id.* at 1382. This is the conclusion of the court. The discussion of contributory infringement begins at 1373.

[108] *Id.* at 1374.

[109] *See id.*

[110] *See id.* at 1373.

[111] *Id.*

[112] *See id.* at 1373-74.

[113] 98 F.2d 686 (2d Cir. 1938). *See supra* section V.B.

[114] *See Netcom*, 907 F. Supp. at 1373.

[115] *See id.* at 1373-74.

[116] *Id.* (citing *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966)).

[117] *See id.* at 1374.

[118] *See id.*

[119] *See id.* at 1374.

[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See id.*

[126] *See id.*

[127] *See supra* section IV.C. for additional information regarding the substantial participation requirement.

[128] 847 F. Supp. 1492 (E.D. Cal. 1994).

[129] *See Netcom*, 907 F. Supp. at 1375.

[130] *See id.*

[131] *See supra* section IV.C. for additional information regarding the substantial participation requirement.

[132] *See id.*

[133] *See id.* at 1381.

[134] *See id.* at 1382.

[135] *See id.* at 1380. *Compare* Religious Tech. Ctr. v. Lerma, 908 F. Supp.1353 (E.D. Va. 1995). Although this case is somewhat different factually, the actions of the direct infringer are quite similar. It appears from the newspaper articles, that the fair use defense of the infringer was found not to be enough and the court granted summary judgment in RTC's favor. *Church Wins Internet Copyright Case: Don't Expect Much in Damages, Judge Warns*, RICHMOND TIMES-DISPATCH, Jan. 20, 1996, at B4; Leisa Goodman, *RTC Wins Summary Judgment In Lerma Case* (January 19, 1996) <news://alt.religion.scientology> Message-ID <4dpae\$28q@crl12.crl.com>.

[136] *Id.* at 1383.

[137] *See id.*

[138] *See id.*

[139] *See id.* at 1373.

[140] *See id.* at 1365.

[141] *See* sources cited *supra* note 3.

[142] *See e.g.*, DOBBINS, *supra* note 3, at 231-236; ELKIN-KOREN, *supra* note 3, at 374; EWERT & DONNER, *supra* note 3, at 182; ODDI, *supra* note 3, at 72.

[143] See DOBBINS, *supra* note 3, at 231-236.

[144] *Id.* at 232 n.92.

[145] See *id.* at 235.

[146] See ELKIN-KOREN, *supra* note 3, at 374.

[147] 776 F. Supp. 135 (S.D.N.Y. 1991).

[148] See *Id.* at 140-41; ELKIN-KOREN, *supra* note 3, at 374.

[149] See *Cubby*, 776 F. Supp. at 140.

[150] *Id.* at 139-41.

[151] See *Stratton Oakmont, Inc. v. Prodigy Services, Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Although this is an unpublished opinion, it gives the New York Supreme Court's initial position on the issue of ISP liability.

[152] *Id.*

[153] See *infra* section VI.D.

[154] See discussion *supra* section V.B.1.

155. See HARDY, *supra* note 3, at 1044 (analyzing the implications of a strict liability standard).

156. 991 F.2d 511 (9th Cir. 1993).

157. See *id.* at 517.

158. See *id.* at 517-19.

159. See *Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc.*, 907 F. Supp. 1361, 1368-69 (N.D. Cal. 1995).

160. See *id.*

161. See *id.* at 1369.

162. 839 F. Supp. 1552 (M.D. Fla. 1993).

163. 857 F. Supp. 679 (N.D. Cal. 1994).

164. *Netcom*, 907 F. Supp. at 1370-71. Much of the court's use of these cases is discussed in section V.B., *supra*.

165. See *id.* at 1372-73.

166. See *id.*

167. See *id.*

168. *See id.* at 1373-74.

169. 98 F.2d 686 (2d Cir. 1938).

170. *See Netcom*, 907 F. Supp. at 1373-74 (comparing *Screen Gems-Columbia Music, Inc v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966) (denying summary judgment for various defendants on a contributory infringement claim because a trier of fact could find that the defendants had implied knowledge of the infringing activity due to the "illicit nature of merchandise sold much below its market value"))).

171. *See id.* at 1374.

172. ARTHUR R. MILLER & MICHAEL H. DAVIS, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS and COPYRIGHT* § 20.8 (2d ed. 1990).

173. *See Netcom*, 907 F. Supp. at 1373-75. In its discussion of contributory infringement, the court blends the elements of ability to determine a possible fair use; control, capabilities of the ISP's system; notice, and participation. It is proposed that all of these elements have a part in determining the liability of an ISP. However, the court puts these factors into the two categories of knowledge or substantial participation. This is probably because case precedent has created these as a test for contributory copyright infringement.

174. CIX Mem., *supra* note 4, at 1. The Computer Information Exchange (CIX) is described in the brief as:

[T]he nation's largest nonprofit trade association comprised of commercial Internet access providers ("IAPs" or "access providers"). CIX presently consists of over 100 domestic members and over 50 international members, including large, dominant market participants as well as innovative, entrepreneurial niche providers. CIX's domestic members comprise over 75% of the nation's leading commercial Internet access providers. Nearly half a billion messages pass through the worldwide systems of CIX members daily. (footnotes omitted).

Id.

175. 908 F. Supp. 1362 (E.D. Va. 1995).

176. CIX Mem., *supra* note 4, at 4.

177. *See id.*

178. *See id.*

179. *Id.*

180. The RTC material which allegedly was infringed is not something that is easy to determine the validity of its copyright. The RTC has initiated lawsuits in a number of states which a number of people and at least one court feel are not based on the desire to protect their works against copyright infringement, but to quell a growing amount of criticism of the Church of Scientology. *See Religious Tech. Ctr. v. Lerma*, 1995 WL 710239 (E.D. Va. Nov. 29, 1995). In this case, the court rejected an emergency motion by RTC to prevent the *Washington Post* from being able to publish two lines of its protected documents. The court stated:

[T]he Court is now convinced that the primary motivation of RTC in suing [the defendants] is to stifle criticism of Scientology in general and to harass its critics. As the increasingly vitriolic rhetoric of its briefs and oral argument now demonstrate, the RTC is more concerned about criticism of Scientology than vindication of its secrets.

Id. at 1360.

181. *See* Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc., 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995).

182. *See* ODDI, *supra* note 3, at 86 (specifically section II.B., Duty Owed to Intellectual Property Owners).

183. *See* INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter IITF "White Paper"] (the online document is not paginated) <<http://www.uspto.gov/web/offices/com/doc/ipnii/>>. The IITF is the Information Infrastructure Task Force and describes itself as follows:

In February 1993, President Clinton formed the Information Infrastructure Task Force (IITF) to articulate and implement the Administration's vision for the National Information Infrastructure (NII).

The Working Group on Intellectual Property Rights, which is chaired by Assistant Secretary of Commerce and Commissioner of Patents and Trademarks Bruce A. Lehman, was established within the Information Policy Committee to examine the intellectual property implications of the NII and make recommendations on any appropriate changes to U.S. intellectual property law and policy. This Report represents the Working Group's examination and analysis of each of the major areas of intellectual property law, focusing primarily on copyright law and its application and effectiveness in the context of the NII.

Id.

184. *See id.*

185. *See Netcom*, 907 F. Supp. at 1372-73. These arguments are discussed in section VI.A., *supra*.

186. *See* Patent Act, 35 U.S.C.A. § 271(c) (West 1996).

187. *See* EWERT & DONNER, *supra* note 3, at 162.

188. *See* Ronald B. Coolley, *Notifications of Infringement and Their Consequences*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 246 (1995).

189. *See id.*

190. *See Netcom*, 907 F. Supp. at 1374-75.

191. *See* CIX Mem., *supra* note 4.

192. *See Netcom*, 907 F. Supp. at 1368.

193. *See id.* at 1374-75. It appears that the court feels that copyright notification on the transmitted documents combined with the notification from the plaintiffs rebuts the argument from the defendants that they did not know that the documents were copyrighted. The court goes on to support the copyright owners and the difficulty one would have if they were required to prove valid registration before the ISP was required to take action.

194. *See* CIX Mem., *supra* note 4.

195. *See* May Liang, *Intellectual Property and the National Information Infrastructure*, 415 PLI/Pat. 245, 260 (PLI Pat., Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3953, 1995).
196. In order to cancel messages on its system, it is clear that Netcom has the capability of removing a message. *See Netcom*, 907 F. Supp. at 1376. But once the message has been transmitted to the entire Internet and resides on many different computers, the effect of the ISP removing the message will be of little or no help to the copyright owner. There is a message called a cancelbot which can be sent, but there is a debate as to their effectiveness and usage on the Internet. *See* Grossman, *supra* note 6 (specifically see the section on dueling cancelbots).
197. *See Netcom*, 907 F. Supp at 1375.
198. *See id.*
199. *See* Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994).
200. *See id.* at 684.
201. *See Netcom*, 907 F. Supp at 1369 n.12.
202. *See id.* at 1383.
203. *See* CIX Mem., *supra* note 4.
204. *Netcom*, 907 F. Supp. at 1379.
205. *Id.* (quoting *Campbell*, 114 S.Ct. 1164, 1174 (1994)).
206. *See* Memorandum of Points and Authorities in Opposition to RTC's Request for Injunctive Relief, Religious Tech. Ctr. v. Netcom On-Line Communications Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) (No. C-95-20091 RMW)
<http://www.eff.org/pub/Censorship/CoS_v_the_Net/netcom_opposition_021795.memo>.
207. *See* Francis Decl., *supra* note 16, ¶ 15.
208. *See id.* at ¶ 11.
209. *See id.* at ¶ 12.
210. *Netcom*, 907 F. Supp. at 1379; *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). (In *Sega*, the court found an underlying commercial purpose by which the operator of the bulletin board profited from the widespread copying of Sega video games. Thus, this was not a fair use.)
211. *Netcom*, 907 F. Supp. at 1379.
212. *See id.*
213. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 551 (1985).
214. *See Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 1175 (1994).
215. *See id.* at 1175-76

216. *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984).
217. *See* Netcom, 907 F. Supp. at 1380.
218. *See id.* (citing Sega. v. Accolade, Inc., 977 F.2d 1510, 1526 (9th Cir. 1992)).
219. *See id.* at 1378.
220. *See* Declaration of Helena K. Kobrin, March 8, 1995
<http://www.eff.org/pub/Censorship/CoS_v_the_Net/kobrin_030895.declaration> (Helena Kobrin is the attorney for RTC).
221. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct.1164, 1177 (1994) (quoting NIMMER ON COPYRIGHT § 13.05[A][4], p. 13-102.61).
222. *See* Harper & Row, Publishers, Inc. v. Nation Enterprises 471 U.S. 539, 566 (1985) (fourth factor is generally determinative).
223. *Campbell*, 114 S.Ct. at 1177 (quoting Sony).
224. *See* Netcom, 907 F. Supp. at 1380.
225. *See id.* at 1380-81.
226. *See, e.g.,* Religious Tech. Ctr. v. Wollersheim, 796 F.2d. 1076 (9th Cir. 1986) (Church brought RICO action seeking injunction to prevent a splinter church from distributing to its adherents certain scriptures and materials allegedly stolen from it).
227. *See* ELKIN-KOREN, *supra* note 3 at 366.
228. *See* IITF "White Paper," *supra* note 183. The online document is not paginated. The discussion of fair use can be found in section 7.a. of the paper.
229. *See* Netcom, 907 F. Supp. at 1381.
230. *See* 897 F.Supp. 260 (E.D. Va. 1995).
231. *See id.* at 265.