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Bruce G. Joseph
202.719.7258
bjoseph@wrf.com

Ms. Cathy Catterson
Clerk of the Court
Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: Ellison v. America Online, Inc., No. 02-55797

Dear Ms. Catterson:

The Association of American Universities (AAU), American Council on Education (ACE), National Association of State Universities and Land-Grant Colleges (NASULGC), Association of Research Libraries (ARL), American Association of Law Libraries (AALL) and the American Library Association (ALA) (collectively "Educational *Amici*") submit this letter to the Court pursuant to the Advisory Committee Note to Circuit Rule 29-1, to express their support for the *amicus* brief submitted in the above captioned case by the Internet Commerce Coalition and the U.S. Internet Service Provider Association (the "Internet Coalitions Brief"). The *Ellison* case presents what should be a routine application of the service provider liability provisions of Title II of the Digital Millennium Copyright Act (DMCA) to protect AOL from liability as an Internet service provider. Unfortunately, it has recently come to our attention that four of the major record companies have filed an *amicus* brief (the "Record Company Brief") urging the Court to adopt a radically narrow and unsupportable interpretation of 17 U.S.C. § 512(a) that would exclude Internet access providers, including universities and libraries, from the protection afforded the conduit function by the DMCA. The record companies' interpretation of section 512(a) is wrong. The record companies also are wrong in their discussion of the repeat infringer policy in section 512(i).

The positions advanced by the record companies, if adopted, could prevent many universities and libraries throughout the nation from offering Internet services to students and faculty. This is precisely the result that Title II of the DMCA was intended to avert. As the Senate Judiciary Committee observed, the DMCA liability limitations serve a critical purpose to Internet service providers:

> [i]n the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. . . . [B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

S. Rep. No. 105-90, at 8 (1998) ("Senate Report").

AAU, ACE, and NASULGC represent thousands of U.S. institutions of higher learning, including the leading research universities in the United States. ARL, AALL, and ALA collectively represent many thousands of libraries and librarians across the nation. These institutions, large and small, are significant providers of Internet access and other Internet services to their students, faculty, staff and members of the community. The educational role of the Internet, with its wealth of information, cannot be underestimated. Section 512(a) is a critical component of the protection scheme established by Title II of the DMCA.

The Internet Coalitions Brief faithfully reflects the balance Congress sought between, on the one hand, providing service providers with reasonable certainty that they would not risk crippling legal exposure merely through continued operation of their networks and services, and on the other hand, providing an incentive for content owners and service providers to work together to combat online infringement. *See* Senate Report at 8-9. Educational *Amici* offer this letter to support the Internet Coalitions Brief and to amplify its discussion of the section 512(a) and 512(i) issues.

Section 512(a)

Section 512(a) was meant to (and does) apply to any entity, including universities, libraries and commercial Internet companies such as AOL, that provides access to the Internet. Universities and libraries cannot be subjected to copyright liability for the millions of messages (such as emails and other data transmissions) sent and received over their computer networks on a daily basis, and the millions of web pages visited by the millions of students, faculty, staff members and members of the community, connected to the Internet through their networks. *See, e.g.*, Senate Report at 52 n. 24. Like any service provider providing the network communications (or "conduit") function, universities and libraries have absolutely no practical ability to control or censor information that is simply transmitted across, and not persistently stored on, their networks and servers. Accordingly, when Congress crafted the various section 512 service provider protections, it included the broad section (a) provision protecting all "conduit" activities without the various requirements (such as notice and takedown, lack of knowledge or awareness of circumstances, etc.) that applied to system caching, information storage, and location tools. *Compare* 17 U.S.C. § 512(a) *with* § 512(b), (c) and (d).

Section 512(n) clearly establishes that the liability limitations of subsections (a) through (d) apply on a *function-by-function* basis, not an *entity-by-entity* basis. 17 U.S.C. § 512(n); Senate Report at 55-56. The Internet Coalitions Brief demonstrates that sections 512(a) and 512(k)(1)(A) merely require "transmitting, routing, or providing connections" for communications and say nothing about *where* on the Internet the conduit function is provided. Thus, the transmission of communications by Internet access providers falls within the plain language of section 512(a). The record companies are wrong when they assert that section 512(a) protection applies only to Internet backbone service providers.

The record companies' position is conclusively belied by other sections of Title II and by the Senate Report. Section 512(e), for example, establishes a special rule of "attribution" applicable to universities, making clear that "for the purposes of subsection (a)" the conduct of a faculty member or graduate student shall not be deemed the conduct of the institution. Subsection (e), and its express reference to subsection (a), would make no sense if subsection (a) were limited to backbone providers; subsection (a) clearly is intended to apply to universities when they provide Internet access.

Similarly, the Senate Report, describing the function-by-function rule of construction reflected in subsection (n) (then subsection (m)) provides the following example:

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

Senate Report at 55 (emphasis added). Backbone providers do not provide hyperlinks and do not cache. Those activities are the province of Internet access providers. Further, under the record companies' construction of the Act, no entity could provide the range of services described in the Senate Report and be eligible for the conduit safe harbor as described in the Senate Report.

Hundreds of thousands of universities, libraries, corporations, government agencies, and other entities provide Internet access functions to their users. Yet the position advocated by the record companies would lead to the absurd result that all of these entities are subject to unlimited liability for acting as a passive conduit in the transmission of copyrighted materials, because no other (functionally defined) liability limitation of section 512 applies to this conduit function. Congress neither intended nor provided for such a result. It similarly would make no sense to impose the "notice and takedown," "disabling access" and other requirements of sections 512(b)-(d) to such conduit activities, even if the language of those subsections could be stretched to cover that function.

Section 512(i)

The Internet Coalitions Brief is also correct that the obligation to adopt and implement a policy for the termination of repeat infringers is limited. Among other limitations, subsection (i) requires that there be *actual* infringement (not merely a copyright owner's allegations), that the infringement be *repeated*, and that *appropriate circumstances* exist to justify termination. All three of these requirements must be present. Not all unauthorized users of copyrighted works are "infringers." *See, e.g.*, 17 U.S.C. § 107 (fair use), 108 (library and archive exemptions), 109 (first sale), *et seq*. Noninfringing uses are likely to be particularly important in the academic

context, where educational, scientific, research, comment, criticism and other paradigmatic fair uses are commonplace. *See* 17 U.S.C. § 107. Congress specifically instructed that section 512(i) not require service providers to make "difficult judgments" on issues such as fair use or to "monitor" for infringement. Thus section 512(i) contemplates *adjudicated* or otherwise objectively determinable cases of infringement, *e.g.*, offering commercial content for sale. *See* Senate Report at 52. Second, by including the "appropriate circumstances" proviso, Congress did not impose a mandatory obligation to terminate accounts in *all* cases of repeat infringement, but rather, only particularly harmful or willful cases. Congress noted that there are "degrees of infringement . . . from the inadvertent [and] noncommercial, to the willful and commercial," Senate Report at 52, and recognized that the facts and circumstances of every case are different. Thus, the fact that a service provider has not actually terminated a subscriber under a repeat infringer policy should not give rise to an implication that section 512(i) has not been satisfied.

Educational *amici* thank the Court for consideration of their views and the views of the Internet Coalitions Brief.

Respectfully submitted,

Miriam M. Nisbet
Legislative Counsel
American Library Association
1301 Pennsylvania Ave., N.W., #403
Washington, D.C. 20004-1701

Prudence S. Adler
Associate Executive Director
Association of Research Libraries
21 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036

Robert L. Oakley
Washington Affairs Representative
American Association of Law Libraries
c/o Georgetown University Law Library
111 G Street, N.W.
Washington, D.C. 20001

Bruce G. Joseph
Scott E. Bain
Wiley Rein & Fielding LLP
Counsel for the Association of American Universities, the American Council on Education, and the National Association of State Universities and Land-Grant Colleges