

Article

Third-Party Copyright Liability After *Grokster*

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This Article studies the construction of third-party copyright liability in light of the recent Supreme Court case *Metro-*

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*Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹ This inquiry is important and timely because third-party copyright cases have become high stakes affairs that potentially affect the viability of entire industries. Copyright holders worry that digital technology, particularly the Internet, will destroy the value of copyrights by facilitating rampant copyright infringement. Anyone with a personal computer can make perfect copies of copyrighted works and post them on the Internet, making it possible for millions of people² to download free copies of music and movies.³ Copyright holders believe that these free downloads

1. 125 S. Ct. 2764 (2005).

2. Official statistics for Internet usage do not exist. The number of Internet users worldwide now exceeds one billion. Internet World Stats, Internet Usage Statistics, <http://www.internetworldstats.com/stats.htm> (last visited Oct. 19, 2006). According to the Computer Industry Almanac, worldwide Internet users are projected to number nearly 1.8 billion by the end of the decade. Press Release, Computer Indus. Almanac Inc., USA Leads Broadband Subscriber Top 15 Ranking (Nov. 14, 2005), <http://www.c-i-a.com/pr1105.htm>.

3. The International Federation of the Phonographic Industry (IFPI) claims that the number of infringing music files available on the Internet fell slightly from 900 million in January 2004 to 870 million in January 2005. INT'L FED'N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 23 (2005), <http://www.ifpi.org/site-content/library/digital-music-report-2005.pdf>; see also INT'L FED'N OF THE PHONOGRAPHIC INDUS., DIGITAL MUSIC REPORT 16–21 (2006), <http://www.ifpi.org/library/digital-music-report-2006.pdf> (describing file-sharing activity and industry efforts to curb it). Estimates of the impact of infringing downloads on music sales vary. See Stan J. Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far*, 15 ADVANCES STUDY ENTREPRENEURSHIP, INNOVATION & ECON. GROWTH 229, 240–51 (2004) (finding that alternative theories do not explain an obvious drop in record sales); Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on Music Sales: Cross-Section Evidence*, 1 REV. ECON. RES. ON COPYRIGHT ISSUES 71, 75 (2004), available at http://www.serci.org/docs_1_2/waelbroeck.pdf (finding a twenty percent decrease in music sales due to file sharing); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29, 53 (2006) (finding 0.2 lost album sales for each illegally downloaded album); Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis with a Panel of Countries*, TOPICS ECON. ANALYSIS & POL'Y, 2005, at 1, 5–6 (documenting a 6%–12% decrease in music sales due to file sharing, correcting for broadband penetration, per capita GDP, and other factors); Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis* 4 (June 2005) (unpublished manuscript, on file with The Minnesota Law Review), available at <http://economics.missouri.edu/Seminars/PDF/strumpf.pdf> (showing no effect on music sales). In regard to movie downloading, one source estimates that, in 2005 alone, film studios lost \$447 million as a result of illegal downloading in the United States. See Sarah McBride & Geoffrey A. Fowler, *Studios See Big Rise in Estimates of Losses to Movie Piracy*, WALL ST. J., May 3, 2006, at B1.

represent lost sales, and they understandably worry that their businesses will fail unless the downloads are stopped.⁴

The normal remedy for copyright infringement is litigation against infringers. However, the number of computer-based infringers is so large that copyright holders cannot find and sue them all.⁵ Copyright holders have therefore sued many providers of Internet-related technologies and services in an attempt to hold these providers liable for infringement committed by others. These actions include claims against Internet service providers, creators of file-sharing technology, search engine companies, venture capitalists, and credit card companies.⁶ The plaintiffs in these cases have typically argued that the defendant should be held liable for someone else's infringement because the defendant supported that infringement.⁷

4. Several artists have voiced this concern, including Steve Smith, singer for Dirty Vegas ("It's having an effect on us as a new band. If you stop buying the CDs in the shops, then we don't get to make the music."), DMX ("[Piracy is] killing the industry as we know it. Stop stealing. Go in the store and buy like everybody else."), and Luciano Pavarotti ("Artists and composers—particularly the younger ones—will not stand a chance of creating music in the future if their recordings are simply stolen in this way."). MusicUnited.org, What the Artists and Songwriters Have to Say, http://www.musicunited.org/3_artists.html (last visited Oct. 19, 2006).

5. See *supra* note 3 (discussing the wide availability of infringing music files available on the Internet).

6. See *Ellison v. Robertson*, 357 F.3d 1072, 1074 (9th Cir. 2004) (third-party copyright liability action brought against an Internet service provider); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (third-party copyright liability action brought against a peer-to-peer network creator); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (third-party copyright liability claim against the creator of a file-sharing network); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 495 (E.D. Pa. 2006) (action against a search engine company for, among other things, third-party copyright liability); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 831 (C.D. Cal. 2006) (claims of primary and third-party copyright liability against a search engine operator); *Newborn v. Yahoo!, Inc.*, 391 F. Supp. 2d 181, 183–84 (D.D.C. 2005) (third-party copyright liability claim against the Yahoo! and Google search engines); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, No. C 04-0371, 2004 WL 1773349, at *1 (N.D. Cal. Aug. 5, 2004) (third-party copyright liability suit against credit card companies that processed payments for businesses allegedly committing infringement); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 409 (N.D. Cal. 2004) (third-party copyright liability action against venture capitalists who funded a peer-to-peer technology provider); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1365–66 (N.D. Cal. 1995) (third-party copyright liability suit against an Internet service provider); Complaint at 16, 34, 43, *Perfect 10, Inc. v. Amazon, Inc.*, No. CV05-4753, 2005 WL 1935670 (C.D. Cal. June 29, 2005) (third-party copyright liability claims brought against a search technology provider).

7. *Ellison*, 357 F.3d at 1074–75 (alleging that the defendant Internet ser-

These lawsuits have proven controversial. On one hand, copyright holders have legitimate interests in preventing infringement and receiving compensation for infringement. On the other hand, third-party defendants understandably wonder why they should pay for another person's misbehavior. Indeed, defendants rightfully worry that liability could drive them out of business because the costs of Internet-related infringement could be enormous. It is not even clear where society's best interests lie. Third-party copyright liability benefits society by encouraging individuals to stop others from infringing, but those benefits come at a price because third-party defendants cannot focus precautions solely on infringers.⁸ Accordingly, third-party copyright liability suppresses noninfringing as well as infringing behavior. Society's best interests therefore require some kind of balance between the desirable and undesirable consequences of third-party copyright liability, but it is not obvious how that balance should be struck.

To make matters worse, fundamental contradictions exist in the relevant case law. Before *Grokster*, courts took two distinct approaches to third-party copyright liability. Some applied such liability in a relatively limited way, while others applied it more expansively. This division rendered the law incoherent, and it polarized debate about third-party copyright liability because both sides could credibly claim that existing precedent supported their positions.⁹

vice provider should be liable for providing subscribers with access to the USENET newsgroup, where infringing copies of the plaintiff's works were on display); *In re Aimster Copyright Litig.*, 334 F.3d at 645 (contending that the creation of the defendant's file-sharing network establishes third-party copyright liability); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d at 851–53 (arguing that the defendant Google should be held liable because it supports infringement by others); *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 799 (N.D. Cal. 2005) (“[P]laintiffs allege that by investing in Napster and assuming control of the operation of the Napster file-sharing network, the named defendants contributorily and vicariously infringed plaintiffs' exclusive rights under the Copyright Act.”); *Visa*, 2004 WL 1773349, at *2 (claiming that financial services provided by the defendants to the infringers renders the defendants liable for infringement); *Religious Tech. Ctr.*, 907 F. Supp. at 1365 (alleging that the defendant Internet service provider should be held liable because the infringer gained Internet access through defendant's system); Complaint, *supra* note 6, at 34, 43 (alleging defendant's support for copyright infringement via search technology).

8. See *infra* pp. 213–14 (discussing the undesirable consequences of holding Internet service providers liable for their customers' infringing activities).

9. See Craig A. Grossman, *The Evolutionary Drift of Vicarious Liability and Contributory Infringement: From Interstitial Gap Filler to Arbiter of the Content Wars*, 58 SMU L. REV. 357, 378–95 (2005) (describing the expansive

Grokster gave the Supreme Court the opportunity to clarify third-party copyright liability law. The *Grokster* defendants distributed software that established peer-to-peer networks on the Internet.¹⁰ These networks allowed users to make any type of file available for others to download.¹¹ The associated software also allowed users to submit search queries to locate desired files.¹² In theory, the networks created by the defendants could have been used solely to exchange files that would not infringe copyright. However, the vast majority of files exchanged over the networks turned out to be infringing copies of copyrighted songs and movies.¹³ The *Grokster* plaintiffs owned the copyrights in many of the works most commonly shared over the defendants' networks.¹⁴ They sued, arguing that the defendants were liable for the infringement committed by the networks' users.¹⁵ The district court decided the case in the defendants' favor at summary judgment on the ground that the noninfringing uses of the defendants' network were sufficient to excuse the defendants from liability.¹⁶ The Ninth Circuit affirmed, and the Supreme Court granted certiorari.¹⁷

Predictably, both parties and numerous amici urged the Court to choose existing interpretations of law that favored their particular interests. The Court acknowledged the parties' differing interpretations of the law, but it did not resolve the case by choosing between them.¹⁸ Instead, the Justices unanimously adopted a dormant theory of third-party copyright liability—inducement—and used it to reverse the decision below.¹⁹ According to the Court, noninfringing uses could not excuse a defendant from third-party copyright liability if the

application of third-party copyright liability in the contributory infringement context); *infra* Part I (describing conflicting interpretations of third-party copyright liability).

10. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770 (2005).

11. *Id.* at 2770–71.

12. *Id.*

13. *Id.* (“[A]lthough the [defendants’] networks . . . can be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization.”).

14. *Id.* at 2771.

15. *Id.*

16. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035–36 (C.D. Cal. 2003).

17. *Grokster*, 125 S. Ct. at 2774–75.

18. *Id.* at 2778–80.

19. *Id.* at 2779–83.

defendant deliberately induced others to infringe.²⁰ The Court identified enough evidence of such inducement by the defendants to make summary judgment inappropriate,²¹ and remanded the case for further consideration.²²

Grokster is not a simple case. It initially appears to complicate matters by endorsing inducement without explicitly resolving the conflicts in existing law. However, careful analysis of the conflicting theories that animate copyright liability shows that *Grokster* created an improved framework for future construction of third-party copyright liability.²³

20. *Id.* at 2779 (“[N]othing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.” (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984))).

21. *Id.* at 2780–83.

22. *Id.* at 2783. All nine Justices joined the opinion of the Court. Justices Ginsburg and Breyer each wrote concurrences joined by two other Justices. Justice Ginsburg took the position that the Ninth Circuit misapplied *Sony* and that the evidence of noninfringing uses of the defendants’ networks was insufficient to grant the defendants’ motion for summary judgment. *Grokster*, 125 S. Ct. at 2783 (Ginsburg, J., concurring). Justice Breyer disagreed, stating that, but for evidence of deliberate inducement, the defendants should not have been held liable because their networks were sufficiently capable of noninfringing uses. *Id.* at 2787–89 (Breyer, J., concurring); *see also id.* at 2788 (“[T]he evidence now before us shows that *Grokster* passes *Sony*’s test—that is, whether the company’s product is capable of substantial or commercially significant noninfringing uses.”).

23. Not every commentator concludes that *Grokster* improved the law of third-party copyright liability. Professor Tim Wu argues that *Grokster* was wrong to introduce intent to copyright law, and that the social welfare costs and benefits of a defendant’s behavior should be the only determination controlling third-party copyright liability. Tim Wu, *The Copyright Paradox*, 2005 SUP. CT. REV. 229, 249–51. Professor Wu makes a provocative point, one that is consistent with the usual refrain that copyright functions solely as an incentive for the production of creative works. *E.g.*, *Sony*, 464 U.S. at 429 (stating that the copyright monopoly exists to advance the public interest by motivating the creative activity of authors); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (emphasizing that the economic philosophy behind copyright law is to advance the public interest by encouraging individual effort). However, consistency with the primary justification for copyright is not, in and of itself, a sufficient reason to make considerations like a defendant’s intent irrelevant to the question of third-party copyright liability. This is because such liability is not a “core” component of copyright. Third-party copyright liability entered copyright because courts analogized copyright to tort law. *See infra* note 24 and accompanying text (supporting the proposition that third-party copyright liability arose from common law tort). It therefore makes just as much sense to prefer the basic principles of tort over those of copyright when constructing third-party copyright liability. As of now, matters of intent occupy a prominent place in torts, and there is no sense that courts are about to abandon the doctrines of intentional torts. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR

Courts consistently state that the doctrines of third-party copyright liability arose from common law tort.²⁴ It therefore comes as no surprise that the most important theories of tort, fault and strict liability, shed considerable light on the construction of third-party copyright liability.²⁵ For example, third-party copyright liability could be a matter of fault. If so, liability exists because a defendant's behavior is culpable or socially

PHYSICAL HARM § 5 (Proposed Final Draft No. 1, 2005) (imposing liability for intentional causation of physical harm); RESTATEMENT (SECOND) OF TORTS § 13 (1965) (imposing liability for intentional causation of harmful or offensive physical contact). Granted, one could argue that tort law itself should abandon questions of intent in favor of a strict social cost-benefit analysis. However, that position remains controversial. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 191 (1980) (arguing that wealth maximization alone cannot serve as an adequate governing principle for law); George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279, 282–89 (2002) (reviewing debates between economic and corrective justice theories of tort and criticizing the economic approach to tort theory); Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More than Money*, 76 N.Y.U. L. REV. 114, 146–47 (2001) (arguing that an altered cost-benefit analysis can compensate even the least compensable risks); David McCarthy, *Rights, Explanation, and Risks*, 107 ETHICS 205, 212–15 (1997) (arguing that wealth maximization can only be reconciled with individuals' rights to be free of risks imposed by others where a social good sufficiently outweighs the infringement of these rights); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (proposing an economic theory of negligence); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979) (arguing that wealth maximization is the best governing principle for law); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 607–08 (1992) (noting tension between ethical and economic approaches to tort law and the ability of the negligence standard to account for both).

24. See *Grokster*, 125 S. Ct. at 2767–68 (stating that doctrines of third-party copyright liability emerged from the common law); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (“[V]icarious copyright liability is an ‘outgrowth’ of respondeat superior.”); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261–62 (9th Cir. 1996) (“The concept of vicarious copyright liability was developed in the Second Circuit as an outgrowth of the agency principles of respondeat superior.”); *Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 472–73 (S.D.N.Y. 2002) (referring to common law tort origins of vicarious and contributory copyright liability), *modified*, 220 F. Supp. 2d 237 (S.D.N.Y. 2002), *aff’d*, 409 F.3d 26 (2d Cir. 2005).

25. Several other articles also explore insights derived from the connection between tort and third-party copyright liability. See Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239 (2005); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833 (2000); Alfred C. Yen, *Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE W. RES. L. REV. 815 (2005) [hereinafter Yen, *Peer-to-Peer*].

costly.²⁶ Alternatively, the same area of law might involve strict liability. If so, liability exists because it encourages defendants to stop others from infringing and to raise compensation for victims of infringement.²⁷

Reference to tort clarifies the conflicting choices made by courts before *Grokster*. Some courts adopted a limited approach to third-party copyright liability because they were sensitive to its disadvantages.²⁸ These courts generally preferred fault-

26. This Article is not the forum for surveying the extensive jurisprudence of fault or settling theoretical and doctrinal debates about the subject. Nevertheless, it is appropriate to say a few words about the way this Article uses the term “fault.” Common law courts often use fault to identify the culpable behavior that justifies a defendant’s legal liability for injuries suffered by another. Fault exists when the defendant’s behavior is unreasonable. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 (stating that a person acts negligently if the person fails to exercise “reasonable care”); *id.* § 5 (imposing liability for intentional causation of physical harm); *id.* § 6 (imposing liability for negligent causation of physical harm); RESTATEMENT (SECOND) OF TORTS § 13 (imposing liability for intentional causation of harmful or offensive physical contact); *id.* §§ 283, 284 (describing negligence as a form of unreasonable behavior); DAN B. DOBBS, *THE LAW OF TORTS 2* (2000) (“In the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was at fault in a legally recognizable way.”). Of course, a uniform definition for unreasonable behavior does not exist. However, judgments about the reasonableness of a defendant’s behavior often involve determinations about the defendant’s motivation for acting, the risks and benefits associated with the defendant’s behavior, and social custom. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 (stating that intent depends on the purpose of defendant’s action); *id.* § 3 (noting that the primary factors in determining negligence are foreseeable likelihood of harm, foreseeable severity of potential harm, and the burden of precaution against harm); *id.* § 13 (describing the relevance of custom to the determination of negligence); RESTATEMENT (SECOND) OF TORTS § 8A (stating that intent depends on the actor’s desire to cause the consequences of her act); *id.* § 291 (“[An] act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”). This Article’s use of fault encompasses all of these possibilities.

27. *Fruit v. Schreiner*, 502 P.2d 133, 141 (Alaska 1972) (noting that respondeat superior exists to internalize costs and spread loss); *Riviello v. Waldron*, 391 N.E.2d 1278, 1280–81 (N.Y. 1979) (noting that respondeat superior exists out of concern for preventing injury, ensuring compensation, and spreading loss); see also Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997) (stating that strict liability is a form of enterprise liability); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 462–64 (1985) (connecting strict liability to enterprise liability).

28. The leading case articulating this view is *Sony*, 464 U.S. 417. See *infra* Part I.A and text accompanying notes 185–90 (discussing *Sony* and other cases taking a similar view); *infra* note 60 (listing cases that limit the scope of third-party copyright liability).

based constructions of the law because determinations of fault often include a sophisticated balancing of social costs and benefits.²⁹ This approach made it possible to protect innocent defendants from bearing responsibility for the misdeeds of others while limiting liability to situations where the benefits outweighed the costs. By contrast, other courts expansively applied third-party copyright liability because they considered the prevention of infringement paramount.³⁰ These courts frequently adopted strict liability constructions of the law because they saw little need to balance the social costs and benefits of liability. They also expansively interpreted the law to prevent cynical, faulty defendants from exploiting doctrinal ambiguity to escape liability, even if this meant exposing innocent defendants to unwarranted liability.³¹

Grokster addressed these conflicting choices in two ways. First, Justice Souter's opinion of the Court referred repeatedly to concepts of fault, justifying inducement on the ground that those who want to cause infringement are culpable.³² Indeed, the Court's preference for fault was so strong that the Court subtly restated the formulation for vicarious liability to exclude strict liability.³³ This established fault as the dominant theory of third-party copyright liability and cast doubt on strict liability interpretations of the law.

Second, *Grokster*'s adoption of inducement greatly reduced the justification for expansively interpreting pre-*Grokster* doctrines of third-party copyright liability. As noted earlier, expansive liability ensures that culpable defendants do not escape liability, but it also risks holding innocent defendants liable for the behavior of others and suppressing noninfringing behavior. This Article will show that inducement gives courts a new tool for holding culpable defendants liable while reducing the risk of undesirable side effects.³⁴ Future courts should therefore apply

29. See *supra* note 26 (discussing fault); *infra* text accompanying notes 185–90 (discussing cases that narrowly interpret third-party copyright liability).

30. The leading case articulating this view is *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). See *infra* Part I.B and text accompanying notes 191–202 (discussing *Fonovisa* and other cases taking a similar view).

31. See *infra* Part I.B and text accompanying notes 191–202 (discussing cases that expansively interpret third-party copyright liability).

32. See *infra* text accompanying notes 218–24 (analyzing *Grokster*'s references to fault).

33. See *infra* text accompanying note 235 (quoting *Grokster*).

34. See *infra* Part IV (arguing that *Grokster*'s inducement analysis offers

pre-*Grokster* doctrines cautiously to minimize those undesirable side effects while judiciously using inducement to make sure that the most culpable defendants face liability.

The Article proceeds in five parts. Part I describes the doctrines that governed third-party copyright liability before *Grokster*. This description shows that courts generally interpreted those doctrines with fairly well-articulated limits, and that a few courts disregarded these limits in order to apply third-party copyright liability expansively. Part II uses fault and strict liability to expose the theoretical and practical tradeoffs implicit in these differing constructions of the law. Next, Part III analyzes the *Grokster* case and its use of fault to explain third-party copyright liability. Part IV describes the implications of *Grokster*'s reliance on fault and sets forth the general contours of an improved, post-*Grokster* construction of third-party copyright liability. The Article concludes in Part V with some thoughts about the future of third-party copyright liability.

I. THIRD-PARTY COPYRIGHT LIABILITY BEFORE *GROKSTER*

Two causes of action derived from tort, contributory copyright liability and vicarious copyright liability, governed pre-*Grokster* third-party copyright liability. Courts developed these doctrines along two distinct lines. Most adopted a relatively limited interpretation of the law, imposing third-party copyright liability only on defendants who had close relationships with primary infringers. A smaller number of courts applied third-party copyright liability more expansively, imposing liability on a wide range of defendants, including those who had relatively remote relationships with copyright infringers. This Part surveys the relevant case law.

A. THE LIMITED INTERPRETATION OF CONTRIBUTORY LIABILITY AND VICARIOUS LIABILITY

1. Contributory Copyright Liability

Courts routinely cite *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.* for the proposition that "one who, with knowledge of the infringing activity, induces, causes or

an improved construction of third-party copyright liability).

materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”³⁵ This definition includes the word “induces,” a term which carries great significance after *Grokster*. However, the leading elaborations of contributory liability before *Grokster* did not analyze the meaning of inducement. They described instead the type of knowledge and material contribution required to establish liability.³⁶

The intuition expressed by contributory liability is simple. If a person knows that another is committing copyright infringement, it is arguably wrong for that person to assist the infringer. That intuition does not, however, define the level of knowledge or assistance necessary to create legal liability for another’s infringement, for different types of knowledge and assistance imply very different results. Consider first a defendant who sells custom-length blank cassette tapes to a person he knows will use the tapes to make unauthorized copies of copyrighted music for sale to the public.³⁷ This seller is quite

35. 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434–38 (1984); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001); *Fonovisa*, 76 F.3d at 262; *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987); *Too, Inc. v. Kohl’s Dep’t Stores, Inc.*, 213 F.R.D. 138, 141 (S.D.N.Y. 2003); *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 696 (D. Md. 2001), *aff’d*, 373 F.3d 544 (4th Cir. 2004); *A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1455–56 (C.D. Cal. 1996); *Ez-Tixz, Inc. v. Hit-Tix, Inc.*, 919 F. Supp. 728, 732 (S.D.N.Y. 1996); *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1320 (D. Mass. 1994); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 256 (D. Neb. 1982); *F.E.L. Publ’ns, Ltd. v. Nat’l Conference of Catholic Bishops*, 466 F. Supp. 1034, 1040 (N.D. Ill. 1978).

36. A few cases base contributory liability on a defendant’s encouraging others to commit infringement. *E.g.*, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1292–95 (D. Utah 1999). However, the vast majority do not analyze contributory liability this way, preferring instead to concentrate on the requirements of knowledge and material contribution. *Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 473 (S.D.N.Y. 2002) (“[T]he standard for contributory infringement has two prongs—the ‘knowledge’ prong and the ‘material contribution’ prong.”), *modified*, 220 F. Supp. 2d 237 (S.D.N.Y. 2002), *aff’d*, 409 F.3d 26 (2d Cir. 2005); *Intellectual Reserve*, 75 F. Supp. 2d at 1293 (stating that knowledge and participation are touchstones of contributory infringement); *Ez-Tixz*, 919 F. Supp. at 734 (“Contributory liability requires a showing of (1) actual or constructive knowledge and (2) participation.”); *Demetriades*, 690 F. Supp. at 293 (“[B]enefit and control are the signposts of vicarious liability, [whereas] knowledge and participation [are] the touchstones of contributory infringement.”).

37. These facts are loosely based on *Abdallah*, 948 F. Supp. at 1453–55. *See infra* text accompanying notes 61–73 (summarizing *Abdallah*).

culpable because he knows exactly who commits the infringement, understands the nature of the infringement, and provides assistance that directly supports the infringement. By contrast, consider a defendant who processes credit card transactions despite learning that certain unidentified customers take credit cards in payment for the sale of infringing goods.³⁸ This defendant is less culpable than the seller of blank tapes because his knowledge of identity is less specific and his support is less directly related to infringement. Accordingly, the scope of contributory copyright liability depends on whether liability requires fairly specific knowledge and direct assistance, or whether general knowledge and indirect assistance will suffice. Courts differ in their answers to this question, but a majority of courts require relatively specific knowledge and direct assistance.³⁹

This limited approach to contributory liability starts with *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*⁴⁰ The *Gershwin* defendant was Columbia Artists Management, a company that managed concert artists and created opportunities for them to perform.⁴¹ Columbia sometimes created performance opportunities by organizing local community performance associations who would in turn sponsor annual concert series for which Columbia could book its performers.⁴² Columbia provided regular assistance to these local associations.⁴³ It also contacted its artists to get the titles of the works being performed, and it printed programs for each performance.⁴⁴ Unfortunately, many of these performances took place without appropriate copyright licenses, and a number of copyright holders sued Columbia.⁴⁵ The district court held Columbia liable on

38. These facts are loosely based on *Perfect 10 Inc. v. Visa International Service Ass'n*, No. C 04-00371 JW, 2004 WL 3217732 (N.D. Cal. Dec. 3, 2004).

39. *Sony*, 464 U.S. at 439 (holding that the defendant's general knowledge that users of its Betamax videorecorders might commit infringement is not enough to support a claim of third-party copyright liability); see also *infra* text accompanying notes 59–60 (concluding that a defendant cannot generally be held liable merely because it knows that others will use items sold by the defendant to commit copyright infringement).

40. 443 F.2d 1159 (2d Cir. 1971).

41. *Id.* at 1160.

42. *Id.* at 1160–61.

43. *Id.* at 1161.

44. *Id.*

45. *Id.* at 1160.

theories of contributory and vicarious liability, and the Second Circuit affirmed.⁴⁶

On the whole, Columbia was a rather culpable defendant. It knew the specific identities of the infringers, the works being infringed, and the dates on which infringement would happen.⁴⁷ Moreover, Columbia supported this infringement by organizing the entities that sponsored infringing concerts and providing logistical assistance.⁴⁸ Accordingly, *Gershwin* is consistent with the proposition that liability exists only when the defendant has fairly specific knowledge of infringement and offers direct assistance.

The Supreme Court reinforced the limited interpretation of contributory liability in *Sony Corp. of America v. Universal City Studios, Inc.*⁴⁹ In that case, the plaintiffs held copyright in a number of works that were broadcast for television viewing and copied by individuals using videotape recorders (VCRs) made and sold by Sony.⁵⁰ The claim against Sony was simple. Sony knew that some of the people who bought VCRs would use them to commit infringement, and yet Sony assisted them by selling VCRs.⁵¹ The Ninth Circuit agreed with this argument and held Sony liable.⁵²

46. *Id.* at 1162–63.

47. The opinion is not perfectly clear regarding the basis for Columbia's knowledge that infringing performances were taking place. Columbia stipulated that it made no efforts to obtain licenses for the performances, but that does not necessarily mean that the artist or the local venue would not obtain one. *Id.* at 1161. However, it seems likely that Columbia knew the actual practices of its artists and venues. Indeed, the court stated that Columbia "knew that copyrighted works were being performed . . . and that neither the local association nor the performing artists would secure a copyright license." *Id.* at 1163.

48. *Id.* at 1160–61.

49. 464 U.S. 417 (1984).

50. *Id.* at 419–20.

51. *Id.* at 422–24.

52. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 975–76 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984) ("First, the knowledge element is clearly satisfied. The corporate appellees 'know' that the Betamax will be used to reproduce copyrighted materials. In fact, that is the most conspicuous use of the product. That use is intended, expected, encouraged, and the source of the product's consumer appeal. The record establishes that appellees knew and expected that Betamax's major use would be to record copyrighted programs off-the-air. Second, there is no doubt that appellees have met the other requirements for contributory infringement—inducing, causing, or materially contributing to the infringing conduct of another. The corporate appellees are sufficiently engaged in the enterprise to be held accountable.").

The Supreme Court reversed, holding that Sony did not have the type of knowledge necessary to support infringement.⁵³ In so doing, the Court worried that broad third-party copyright liability would harm the public interest by deterring productive, legitimate behavior.⁵⁴ Copyright therefore had to “strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.”⁵⁵ The Court rejected the Ninth Circuit’s finding that Sony had actual knowledge of infringement, stating that constructive knowledge offered the only plausible method for supporting Sony’s liability.⁵⁶ In theory, Sony’s knowledge about its customers’ use of VCRs might have established constructive knowledge, but the Court held that such knowledge could not exist as long as VCRs were “capable of substantial noninfringing uses.”⁵⁷ The Court concluded that VCRs were indeed capable of substantial noninfringing uses and decided the case in Sony’s favor.⁵⁸

The implications of *Sony* are significant. Sony clearly knew (“actually knew” in the colloquial sense) that some users of VCRs would commit infringement.⁵⁹ *Sony* therefore supports the proposition that a defendant cannot be held liable merely because it knows that others will use something the defendant sells to commit copyright infringement. Something more is needed. The thing being sold must be incapable of substantial noninfringing use, or the defendant must have more specific knowledge about infringement, perhaps by knowing the precise identity of the infringer and the works being infringed.⁶⁰

53. *Sony*, 464 U.S. at 439 (“If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material. There is no precedent in the law of copyright for the imposition of vicarious liability on such a theory.”).

54. *Id.* at 442.

55. *Id.*

56. *See supra* note 53 (quoting *Sony*).

57. *Sony*, 464 U.S. at 442 (“Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.”).

58. *Id.* at 456.

59. *See supra* note 52 (quoting the Ninth Circuit’s *Sony* opinion).

60. Other courts have endorsed this position. *See Matthew Bender & Co. v. W. Publ’g Co.*, 158 F.3d 693, 696 (2d Cir. 1998) (finding the defendant not liable even though so-called “star pagination” in legal case reports might allow

For example, in *A&M Records, Inc. v. Abdallah*, the defendant Abdallah sold “time-loaded” cassette tapes.⁶¹ Such tapes are ordinary blank cassettes that have been loaded with an amount of tape designed to run for a particular time.⁶² Legitimate producers of recorded music use them to reproduce music programming of nonstandard length.⁶³ To illustrate, if twenty-six minutes of programming are duplicated on a standard thirty-minute cassette, listeners would be inconvenienced by long periods of silence at the end of the tape.⁶⁴ A cassette with precisely twenty-six minutes of tape is far more desirable.⁶⁵ Abdallah sold time-loaded cassettes to specific individuals, knowing they used the tapes to produce counterfeit recordings of popular music.⁶⁶ In some cases, Abdallah timed the length of legitimate tapes slated for counterfeiting in order to determine the type of cassette needed.⁶⁷ Abdallah claimed that *Sony* shielded him from contributory liability because blank time-loaded cassette tapes are capable of substantial noninfringing use.⁶⁸ Abdallah was correct in his characterization of such

others to infringe plaintiffs’ copyrights); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (finding the defendant not liable for selling software that facilitated copying of computer programs on disks protected by anti-copying technology, despite the defendant’s knowledge that customers might commit copyright infringement); *Faulkner v. Nat’l Geographic Soc’y*, 211 F. Supp. 2d 450, 474–75 (S.D.N.Y. 2002) (finding the sponsor of a work containing infringing copies of photographs not contributorily liable because the sponsor made a reasonable inquiry about possible infringement and received assurances from the primary infringer), *modified*, 220 F. Supp. 2d 237 (S.D.N.Y. 2002), *aff’d*, 409 F.3d 26 (2d Cir. 2005); *Adobe Sys. Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1056 (C.D. Cal. 2001) (finding that a letter complaining about infringement committed by unidentified exhibitors at computer shows was insufficient to establish summary judgment for the plaintiff on the issue of the defendant’s knowledge); *Livnat v. Lavi*, No. 96 Civ. 4967 (RWS), 1998 WL 43221, at *3 (S.D.N.Y. Feb. 2, 1998) (“[A]ssistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer.”); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 290–94 (S.D.N.Y. 1988) (finding that a real estate broker was not contributorily liable for selling land on which a house had been built with the assistance of infringing architectural plans).

61. 948 F. Supp. 1449, 1453 (C.D. Cal. 1996).

62. *Id.*

63. *Id.* at 1456.

64. *Id.* at 1454.

65. *Id.*

66. *Id.* at 1454–55.

67. *Id.* at 1455.

68. *Id.* at 1456–57.

tapes, for legitimate producers of music frequently use them.⁶⁹ However, the court correctly rejected Abdallah's use of *Sony* because he knew exactly to whom he was selling the tapes and the precise nature of the buyers' behavior.⁷⁰ Moreover, Abdallah's assistance went beyond the mere sale of blank tapes.⁷¹ He even financed his customers after a police raid.⁷² Therefore, Abdallah's direct assistance, coupled with his specific knowledge of his customers' infringing activities, justified the district court's imposition of contributory infringement.⁷³

2. The Limited Interpretation of Vicarious Copyright Liability

Courts have also adopted limited interpretations of vicarious liability. *Shapiro, Bernstein & Co. v. H.L. Green Co.* provides the modern definition of the doctrine.⁷⁴ In *Shapiro*, the Jalen Amusement Company had made counterfeit recordings of a number of songs in which the plaintiffs held copyright.⁷⁵ Jalen, the concessionaire who operated the record department in stores owned by the defendant H.L. Green Co., sold the counterfeit recordings in Green's stores.⁷⁶ Green's relationship with its concessionaire was fairly close.⁷⁷ Jalen had operated Green's record department for thirteen years,⁷⁸ Jalen and its employees were obligated to follow Green's rules and regulations, and Green had the authority to discharge Jalen's employees.⁷⁹ Daily receipts from the sale of records went into Green's cash registers, and Green's cashiers took custody of the money.⁸⁰ Green then deducted its ten to twelve percent commission, the salaries of Jalen's employees, and taxes, before giving the balance to Jalen.⁸¹ Customers who purchased records from Jalen received receipts from Green with no mention of Jalen.⁸² The

69. *See id.* at 1456.

70. *Id.* at 1456–58.

71. *Id.* at 1457.

72. *Id.*

73. *Id.* at 1456. *See supra* note 60 for examples of other cases that adopt the limited approach to contributory liability identified here.

74. 316 F.2d 304 (2d Cir. 1963).

75. *Id.* at 306.

76. *Id.*

77. *See id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

plaintiffs sued Green, contending that it was liable for Jalen's infringement, but the district court found for Green.⁸³

The Second Circuit reversed.⁸⁴ In so doing, the court understood that Jalen was not technically Green's employee.⁸⁵ Nevertheless, the court believed that the policies supporting respondeat superior would be well served by holding Green liable.⁸⁶ The court wrote:

When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.⁸⁷

In the case at hand, Green had considerable control over Jalen's behavior through Green's ability to dictate policy and employment, operate its stores, and control financial receipts.⁸⁸ Green's percentage commission also gave it a direct financial interest in Jalen's infringement.⁸⁹ Accordingly, the court appropriately held Green vicariously liable.⁹⁰

Shapiro implied that vicarious copyright liability requires a fairly high level of control over and an immediately direct financial interest in another's infringement. On the issue of control, Green had a great deal of power over Jalen, particularly with respect to the conduct of Jalen's employees, their payment, and the handling of revenue raised from record sales.⁹¹ Such power exceeded the simple ability to influence whether infringement occurred. It bordered on the active, day-to-day management of the underlying infringer's business. Similarly, with respect to financial interest, Green took a percentage of every infringing record sale.⁹² Jalen's infringement led directly to money in Green's coffers. That is why the Second Circuit used Green's "obvious and direct financial interest" in Jalen's infringement to justify liability.⁹³ The result presumably would

83. *Id.* at 305.

84. *Id.* at 307.

85. *Id.*

86. *Id.*

87. *Id.* (citation omitted).

88. *Id.* at 306.

89. *See id.*

90. *Id.* at 308–10.

91. *Id.* at 306.

92. *Id.*

93. *Id.* at 307.

have been different if Green had had only an obscure and indirect financial interest in Jalen's behavior.

Many courts have followed this interpretation of *Shapiro*. For example, in *Banff Ltd. v Limited, Inc.*, the Southern District of New York considered the claim that the defendant Limited, Inc. was liable for infringement committed by its corporate subsidiary.⁹⁴ The court recognized that it could have interpreted *Shapiro*'s language to impose liability on the defendant because a corporate parent legally controls its subsidiaries and benefits from the subsidiaries' profits.⁹⁵ However, the court feared that this interpretation would hold every parent liable for the infringing acts of its subsidiaries.⁹⁶ Such a result would improperly expand copyright's reach, so the court interpreted *Shapiro* narrowly. The court stated that the formal relationship between two parties did not control the existence of vicarious liability.⁹⁷ Liability could exist only if the parties' paths "cross[ed] on a daily basis, and the character of this intersection must be such that the party against whom liability is sought is in a position to control the personnel and activities responsible for the direct infringement."⁹⁸

Similarly, in *Artists Music, Inc. v. Reed Publishing (USA), Inc.*, the defendant organized a trade show at which it rented booths to various exhibitors.⁹⁹ The plaintiffs alleged that some of those exhibitors performed some of the plaintiffs' copyrighted music without licenses.¹⁰⁰ The plaintiffs sued, claiming that Reed was vicariously liable for the infringing performances.¹⁰¹ Both parties moved for summary judgment, and the court decided in favor of Reed.¹⁰² The court's rejection of the plaintiffs' arguments clearly expressed a limited vision of vicarious liability. The defendant unquestionably had some ability to control whether infringement occurred, because it could have prohibited the use of music by exhibitors or monitored such use. The plaintiffs contended that this ability established a right and

94. 869 F. Supp. 1103, 1105 (S.D.N.Y. 1994).

95. *Id.* at 1107.

96. *Id.*

97. *Id.* at 1109.

98. *Id.*

99. Nos. 93 CIV. 3428(JFK), 73163, 1994 WL 191643, at *1 (S.D.N.Y. May 17, 1994).

100. *Id.* at *2.

101. *Id.*

102. *Id.* at *3, 6-7.

ability to supervise,¹⁰³ but the court rejected this argument, citing *Shapiro*.¹⁰⁴

The plaintiffs also argued that the defendant had a financial interest in the underlying infringements because music made the exhibits more attractive, thereby increasing the show's paid attendance and the defendant's revenue.¹⁰⁵ The court rejected this interest as insufficient,¹⁰⁶ a conclusion that made sense given the obvious distinction between the direct generation of cash receipts through infringement in *Shapiro* and the secondary, indirect economic effects identified by the *Artists Music* plaintiffs.¹⁰⁷

B. THE EXPANSIVE INTERPRETATION OF CONTRIBUTORY AND VICARIOUS COPYRIGHT LIABILITY

The limited interpretation of third-party copyright liability was a well-established part of pre-*Grokster* law, for it was consistent with the seminal cases in the field and endorsed by the Supreme Court in *Sony*. However, a few courts interpreted the law differently. Their opinions expanded third-party copyright liability, making it significantly easier to hold defendants liable for the misconduct of others.

103. *Id.* at *4.

104. *Id.* at *5–6.

105. *Id.* at *6.

106. *Id.*

107. Other courts take a similar view. See *Ellison v. Robertson*, 357 F.3d 1072, 1081 (9th Cir. 2004) (finding no vicarious liability against the Internet service provider America Online (AOL) for allowing its subscribers access to infringing copies of the plaintiff's work posted by a third party who was not an AOL subscriber); *Goes Lithography Co. v. Banta Corp.*, 26 F. Supp. 2d 1042, 1045 (N.D. Ill. 1998) (finding that the plaintiff failed to state a cause of action for vicarious copyright liability against a parent corporation for infringement committed by its wholly owned subsidiary); *Burdick v. Koerner*, 988 F. Supp. 1206, 1210 (E.D. Wis. 1998) (“[T]he better-reasoned case law demonstrates that in order to establish vicarious liability in the context of a claim for copyright infringement, a plaintiff must introduce evidence beyond a defendant's membership on a board of directors.”); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & Nw. Nexus, Inc.*, 983 F. Supp. 1167, 1179 (N.D. Ill. 1997) (finding no vicarious liability against an Internet service provider for its subscriber's infringing posting of photographs); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1377 (N.D. Cal. 1995) (finding no vicarious liability against an Internet service provider for infringing postings of texts by a third party to an online bulletin board service). It should be noted that the author served as an expert witness at the district court level in *Ellison* on behalf of AOL with respect to issues related to the Digital Millennium Copyright Act. Those issues are not directly related to this Article.

*Fonovisa, Inc. v. Cherry Auction, Inc.*¹⁰⁸ is the leading case that adopts an expansive interpretation of third-party copyright liability. The defendants operated the Cherry Auction swap meet, which rented booth space to vendors for a daily fee.¹⁰⁹ Cherry Auction knew that a number of these vendors sold counterfeit music tapes.¹¹⁰ The Fresno County Sheriff raided Cherry Auction's swap meet in 1991, seizing over thirty-eight thousand counterfeit recordings and making twenty-seven arrests.¹¹¹ In 1992, the Sheriff sent a letter to Cherry Auction stating that vendors continued to sell counterfeit recordings and that Cherry Auction had agreed to provide the Sheriff with identifying information about the infringers.¹¹² The plaintiff's own investigator also observed infringement at the swap meet by over fifty percent of the vendors.¹¹³ Despite such knowledge, Cherry Auction continued to operate the swap meet and rent space to infringers, and it never gathered the information it had agreed to provide the Sheriff.¹¹⁴ In fact, the defendants apparently had created two categories of spaces for rent, reserving one for those who preferred not to provide identification.¹¹⁵ This behavior allowed the majority of infringers to rent in relative anonymity.¹¹⁶ The plaintiffs sued on theories of contributory and vicarious liability.¹¹⁷

The case against the *Fonovisa* defendants was questionable under the limited interpretation of third-party copyright liability. With respect to contributory liability, the *Fonovisa* defendants knew less about and did less to help infringement than the *Shapiro* or *Abdallah* defendants did. Those operating the Cherry Auction only knew that infringement took place at the swap meet, but they did not know the precise identities of the miscreants or the works infringed.¹¹⁸ Renting booths to in-

108. 76 F.3d 259 (9th Cir. 1996).

109. *Id.* at 261.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (noting observation of widespread infringement); *see also* *Fonovisa, Inc. v. Cherry Auction, Inc.*, 847 F. Supp. 1492, 1494 (E.D. Cal. 1994) (noting observation of infringement by "ten of fifteen" and "twelve of seventeen" vendors), *rev'd*, 76 F.3d 259 (9th Cir. 1996).

114. *Fonovisa*, 76 F.3d at 261.

115. *Fonovisa*, 847 F. Supp. at 1494.

116. *Id.*

117. *Id.*

118. The district court opinion and the Ninth Circuit opinion recount that

fringers facilitated the sale of infringing goods, but the *Fonovisa* defendants did not organize infringing entities or print programs for infringing performances, nor did the *Fonovisa* defendants measure the time of music being copied or finance infringers.¹¹⁹ With respect to vicarious liability, Cherry Auction did not control its vendors the way Green controlled Jalen in *Shapiro*, nor did Cherry Auction derive revenue from each infringing sale.¹²⁰ The district court recognized this and dismissed the plaintiff's complaint, citing *Gershwin* and *Shapiro* as support.¹²¹ The plaintiff appealed, and the Ninth Circuit reversed.¹²²

The Ninth Circuit's interpretation of third-party copyright liability clearly differed from the limited interpretation that this Article has already described. The court held that Fonovisa had alleged sufficient knowledge to support contributory liability even though the defendants lacked the specific knowledge found in *Gershwin* and *Abdallah*.¹²³ Additionally, the court weakened contributory liability's requirement of material contribution by endorsing the idea that simply providing the means to infringe creates contributory liability.¹²⁴

Fonovisa did even more to expand vicarious liability. In *Shapiro*, the defendant Green had the ability to fire Jalen's employees, collected Jalen's cash receipts, paid Jalen's taxes, and issued paychecks on Jalen's behalf.¹²⁵ The *Fonovisa* defendants could do none of these things. Nevertheless, the court

the defendants were aware of infringing sales, but neither opinion states that the defendants knew the precise identities of the infringers or the works infringed. See *Fonovisa*, 76 F.3d at 261; *Fonovisa*, 847 F. Supp. at 1494.

119. See *supra* text accompanying notes 40–48, 61–73 (describing *Gershwin* and *Abdallah*).

120. See *supra* text accompanying notes 77–81 (describing the defendant's relationship with the infringer in *Shapiro*).

121. *Fonovisa*, 847 F. Supp. at 1495–97 (citing *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963); *Demetriades v. Kaufmann*, 690 F. Supp. 289 (S.D.N.Y. 1988)).

122. *Fonovisa*, 76 F.3d at 259.

123. *Id.* at 264; see also *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162–63 (2d Cir. 1971) (describing the extent of Columbia's knowledge); *A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1454–55 (C.D. Cal. 1996) (describing Abdallah's specific knowledge); *supra* text accompanying notes 40–48, 61–73 (describing *Gershwin* and *Abdallah*).

124. See *Fonovisa*, 76 F.3d at 264.

125. See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 306 (2d Cir. 1963); *supra* text accompanying notes 77–81 (discussing the infringer/third party relationship in *Shapiro*).

found that the defendants had sufficient control because they could terminate vendors who committed infringement.¹²⁶ With respect to financial benefit, the Ninth Circuit was equally generous. Under *Shapiro*, vicarious liability could not exist unless the defendant had a *direct* financial interest in the underlying infringement.¹²⁷ Green had a direct financial interest because it took a percentage of each infringing sale by Jalen.¹²⁸ By contrast, the *Fonovisa* defendants had a much less direct interest in infringement because they did not share the revenues of infringers who rented swap meet booths.¹²⁹ This distinction did not impress the *Fonovisa* court, for it considered an *indirect* financial benefit alone sufficient to support vicarious liability.¹³⁰ This interpretation of the law directly contradicted the requirement of direct financial interest found in *Shapiro* and many other cases, and it was crucial to the court's decision in the plaintiffs' favor.¹³¹

Fonovisa is not the only case to apply third-party copyright liability expansively.¹³² Indeed, this approach has become suffi-

126. *Fonovisa*, 76 F.3d at 262–63.

127. *Id.* at 263.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Fonovisa's* departure from *Shapiro* was no accident, for the Ninth Circuit explicitly drew support from *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314 (D. Mass. 1994), a case in which the District of Massachusetts explicitly adopted the notion that an indirect financial interest could support vicarious liability. *Id.* at 1326. It is worth pointing out that this Article is not taking the position that the result of *Fonovisa* was wrong. The *Fonovisa* defendants supported and profited from infringers in a culpably cynical way that made their liability appropriate. This Article simply observes that the doctrinal interpretation used to reach this result leads to broader third-party copyright liability than the interpretation associated with *Sony* and the other cases discussed earlier. As will be discussed later, this expansive interpretation of the law exposes innocent actors to undue threats of liability that threaten the public interest. *See infra* text accompanying notes 191–202 (discussing expansive interpretations of third-party copyright liability). This Article further asserts that the Supreme Court addressed this problem through its adoption in *Grokster* of a fault-based theory of third-party copyright liability and the endorsement of intentional inducement as a form of such liability. *See infra* Part IV.

132. *See* *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023–24 (9th Cir. 2001) (determining that the defendant's ability to block users from accessing its system combined with the role of music in attracting users to its system establishes likelihood of vicarious liability); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670 (JBS), 2006 WL 842883, at *1 (D.N.J. Mar. 31, 2006) (granting summary judgment against flea-market operators for infringement committed by vendors); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408,

ciently common to suggest that a remote business relationship with an infringer is enough to create third-party liability.¹³³ For example, in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, the plaintiff Perfect 10 held copyrights in a number of pornographic images distributed via its magazine and website.¹³⁴ To Perfect 10's dismay, some competitor websites displayed infringing copies of Perfect 10 images.¹³⁵ Perfect 10 could presumably have sued each of these websites for copyright infringement, but it chose instead to sue Cybernet Ventures, a company which ran an age verification service (AVS) called Adult Check.¹³⁶

Adult Check's primary function was to verify the ages of viewers who wished to see the pornographic images on a number of independent websites that voluntarily chose to use the Adult Check service.¹³⁷ A new viewer who visited an affiliated website received the opportunity to purchase a password to a number of affiliated websites through Cybernet. Cybernet charged the viewer a fee via credit card and verified the viewer's age, using the credit card as a proxy for age.¹³⁸ Cybernet also offered different tiers of password membership, with viewers who paid higher fees gaining access to "higher-quality" websites.¹³⁹ Cybernet reviewed the various websites in its network for the quality of its images, monitored compliance with its policies, and shared the fees it collected with affiliated websites that referred customers.¹⁴⁰ Perfect 10 moved for a preliminary injunction, that among other things, would have required Cybernet to enforce Perfect 10's copyright interests against affiliated websites.¹⁴¹

412–14 (N.D. Cal. 2004) (denying the defendants' motion to dismiss a suit alleging that the venture capital firm that took control of a company operating a file-sharing network is liable for vicarious and contributory infringement); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 994 (E.D. Cal. 2004) (granting summary judgment against flea market operators for infringement committed by vendors).

133. See *Motorvations Inc. v. M&M Inc.*, No. 2:99cv0824, 2001 WL 1045617 (D. Utah July 6, 2001) (finding defendant automobile dealerships vicariously liable for infringement of copyrighted advertising because of the defendants' ability to reject the advertising).

134. 213 F. Supp. 2d 1146, 1156–57 (C.D. Cal. 2002).

135. *Id.* at 1162.

136. *Id.* at 1158.

137. *Id.* at 1157–58.

138. *Id.*

139. *Id.* at 1158.

140. *Id.* at 1158–59, 1173.

141. *Id.* at 1191–95 (outlining the terms of the preliminary injunction

The limited approach to third-party copyright liability casts doubt on Perfect 10's suit against Cybernet. Granted, Cybernet arguably marketed a number of websites and worked to create a uniform appearance and brand, but those activities do not necessarily establish the elements of a third-party copyright claim. With respect to contributory liability, Cybernet's knowledge seemed too general, because many of the complaints it received were "generic."¹⁴² Additionally, it is hard to see how processing membership payments and password systems contributed directly to infringement. These payments may have provided economic support to infringing websites, but that does not rise to the level of arranging infringing performances for one's own clients or providing blank tapes for use by known counterfeiters. For vicarious liability, it seems difficult to conclude that Cybernet could control the underlying infringement, as each individual website was responsible for its own content and servers.¹⁴³ Moreover, Cybernet's revenue did not come directly from infringement in the same way that Green's revenue came from Jalen's. Considering these facts under the usual standard that preliminary injunctions are issued only when the plaintiff shows a strong likelihood of success on the merits,¹⁴⁴ Perfect 10's chances for success would seem slim.

Nevertheless, the *Perfect 10* court granted the desired preliminary injunction, relying heavily on *Fonovisa* to create an interpretation of third-party copyright liability that comfortably supported its decision. The court began by adopting *Fonovisa*'s expansive view of contributory liability, concluding that

granted on the plaintiff's behalf).

142. *Id.* at 1169.

143. *Id.* at 1158 ("Individual 'webmasters' run the websites that make up the Adult Check 'network.' . . . Each webmaster is responsible for running the website, including creating the site's content, finding a server to host the site and other technical details . . .").

144. *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1979) (explaining that "a substantial likelihood that plaintiff will prevail on the merits" is among the prerequisites for issuance of a preliminary injunction); *see also* *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601 (8th Cir. 1999) (explaining that "the probability that the moving party will succeed on the merits" is a factor considered for a preliminary injunction); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (quoting *Callaway*, 489 F.2d at 572); 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2948 (2d ed. 1995), *quoted in* *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." (footnotes omitted)).

Cybernet's general level of knowledge was comparable to Cherry Auction's.¹⁴⁵ Next, the court cited *Fonovisa* for the proposition that general support for an infringer's business, as opposed to direct support of infringement, satisfies the requirement of material contribution.¹⁴⁶ The court made similar use of *Fonovisa* to support its findings about vicarious liability. Remember that *Fonovisa* found a relatively indirect financial interest in infringement sufficient to support vicarious liability.¹⁴⁷ Cybernet therefore could not escape liability simply because it did not take a share of any profits raised from infringement.¹⁴⁸ To the contrary, Cybernet had the necessary financial interest because the availability of infringing images attracted people to websites where they were encouraged to purchase age verification services.¹⁴⁹ Finally, the court cited *Fonovisa* in concluding that Cybernet's ability to terminate infringers from its membership program and control customer access through passwords established the control necessary to support vicarious liability.¹⁵⁰

Motorvations Inc. v. M&M Inc. offers yet another example of the expansive interpretation of third-party copyright liability.¹⁵¹ The plaintiff Motorvations specialized in designing advertisements for car dealerships.¹⁵² James Whipple, who was also in the advertising business, copied Motorvations' prior work in order to promote a car-sale event for Motorvations' former client, Larry H. Miller Chrysler/Plymouth (Miller).¹⁵³ Motorvations sued Whipple for copyright infringement and Miller for vicarious and contributory infringement.¹⁵⁴ In addition, Motorvations sued Karl Malone Toyota (Malone), who joined the event that Whipple was promoting, but did not deal directly

145. 213 F. Supp. 2d at 1169–70 (“This evidence of notice compares favorably with the allegations of notice in [*Fonovisa*].”).

146. *Id.* at 1170–71.

147. *See* *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996); *supra* text accompanying notes 127–31 (discussing *Fonovisa*'s broad interpretation of financial benefit).

148. 213 F. Supp. 2d at 1171 (expressing strong disagreement with Cybernet's contention that it lacked a sufficient financial interest for vicarious liability).

149. *Id.* at 1170–71.

150. *Id.* at 1171–72.

151. No. 2:99cv0824, 2001 WL 1045617 (D. Utah July 6, 2001).

152. *Id.*

153. *Id.*

154. *Id.*

with Whipple.¹⁵⁵ The court rejected the contributory copyright claims at summary judgment, but held that Miller and Malone were vicariously liable.¹⁵⁶

The *Motorvations* approach to vicarious liability is expansive, especially when one keeps in mind the facts of cases like *Shapiro*. Neither defendant supervised Whipple to the extent that Green supervised Jalen, nor did Miller or Malone receive revenue directly from the infringement.¹⁵⁷ Indeed, Malone had no direct dealings with Whipple.¹⁵⁸ Nevertheless, the court held Miller and Malone liable at summary judgment.¹⁵⁹ The court understood that Miller and Malone had relatively distant relations with Whipple, but it feared the consequences of failing to hold them liable. Miller and Malone might be innocent, but other defendants would take advantage of the law's leniency by turning a "blind eye" to infringement.¹⁶⁰ The court therefore preferred to hold Miller and Malone liable to ensure liability against all irresponsible parties. The court accomplished this objective by holding that Miller and Malone's mere ability to reject the advertising established sufficient control, and that the defendants had a direct financial interest in creation of Whipple's advertisement.¹⁶¹

A simple hypothetical demonstrates how cases like *Fonovisa*, *Perfect 10*, and *Motorvations* greatly expand the scope of third-party copyright liability.¹⁶² Imagine an aggressive copy-

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* ("In a business relationship of this sort, it would be all too easy for a principal to turn a blind eye to tortious and infringing conduct, and neglect what would otherwise be its duty to prevent the same, with the expectation that the agent will bear sole responsibility. Furthermore, the relationship's particular ability to avoid determinative evidence establishing the parties' respective roles facilitates a principal's ability to, after-the-fact, deny its ability to supervise, especially when it can be held liable if the same is established.")

161. The *Motorvations* court said practically nothing about its conclusion that sufficient financial interest existed, but it must have thought that the relationship between the advertisement and the financial success of the car-sale event was enough to establish a "direct financial interest." *See id.*

162. Several authors have analyzed the expansive nature of *Fonovisa*. *See* Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 397 (2002); Barbara Kolsun & Jonathan Bayer, *Indirect Infringement and Counterfeiting: Remedies Available Against Those Who Knowingly Rent to Counterfeiters*, 16 CARDOZO ARTS & ENT. L.J. 383, 407-09 (1998); Kenneth A. Walton, *Is a Website Like a*

right holder who wants to hold the electric company responsible for copyright infringement. His argument is simple. A lot less infringement would occur if the electric company would stop selling electricity to infringers because infringers need electricity to access the Internet, burn CDs, or use their computers. To this end, he discovers the names and addresses of various infringers and sends a complaining letter to the electric company. He claims that if the electric company does not turn off the power to the identified infringers, he will sue.

This hypothesized claim is deliberately farfetched. The Supreme Court's *Sony* decision would surely rule out contributory liability based on constructive knowledge derived from awareness that people use electricity to commit infringement because electricity is capable of substantial noninfringing uses such as running refrigerators and illuminating light bulbs.¹⁶³ To the extent that the argument for contributory liability might rest on actual knowledge of specific individuals committing infringement, the electric company would still not be liable because it is not substantially involved in infringement.¹⁶⁴ Finally, vicarious liability would not exist because the electric company does not dictate who commits infringement, and its financial interest is remote.¹⁶⁵

However, the expansive interpretation endorsed by *Fonovisa* makes the opposite result plausible. The electric company can control whether infringement occurs by turning off the power. Additionally, the electric company has at least an indirect interest in the underlying infringement because infringing behavior increases the demand for electricity. Given *Fonovisa's* view that the ability to exclude someone from a swap meet and the ancillary effect of infringement on concession sales is

Flea Market Stall? How Fonovisa v. Cherry Auction Increases the Risk of Third-Party Copyright Infringement Liability for Online Service Providers, 19 HASTINGS COMM. & ENT. L.J. 921, 942–44 (1997); Yen, *Peer-to-Peer*, *supra* note 25, at 829; Sverker K. Högborg, Note, *The Search for Intent-Based Doctrines of Secondary Liability in Copyright Law*, 106 COLUM. L. REV. 909, 930–31 (2006).

163. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984) (rejecting liability for a provider of technology as long as the technology is “capable of substantial noninfringing uses”).

164. See *supra* text accompanying notes 66–73 (discussing Abdallah’s direct assistance to infringers and his specific knowledge of infringers’ activities).

165. See *supra* Part I.A.2 (discussing limited interpretations of vicarious liability).

enough to establish vicarious liability,¹⁶⁶ the electric company's vicarious liability is no longer farfetched. *Fonovisa* similarly affects the analysis of the electric company's contributory liability.¹⁶⁷ Knowledge arguably exists because our hypothetical plaintiff sent letters identifying infringers to the electric company.¹⁶⁸ Moreover, infringers could never commit the infringement without electricity. Hence the electric company offers the same kind of support, if not stronger support, to infringers as did *Cherry Auction*.¹⁶⁹

166. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262–64 (9th Cir. 1996); *supra* text accompanying notes 125–31 (describing how *Fonovisa* expanded vicarious liability).

167. See *Fonovisa*, 76 F.3d at 264; *supra* text accompanying notes 123–24 (describing how *Fonovisa* expanded contributory liability).

168. In fact, the percentage of electric-company customers who commit infringement is probably quite high because electronic equipment that gets used for infringement has become ubiquitous. For example, every use of a photocopying machine raises the possibility of infringement because copyright reserves to authors the right to reproduce copyrighted works, and practically every office and many homes contain photocopying machines. See 17 U.S.C. § 106 (2000) (listing exclusive rights reserved to copyright owners); *id.* § 107 (codifying doctrine of fair use, which limits the exclusive rights of copyright holders under various circumstances); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (finding that a copyshop committed infringement by making photocopies on behalf of professors for use as course readings at a university); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 914 (2d Cir. 1995) (affirming that the defendant Texaco committed infringement when its employees made photocopies of journal articles for later use in scientific research). Videotape recorders are equally common, and are often used to make and keep copies of television programming on a long-term basis. Although the Supreme Court has held that making of short-term copies for purposes of time shifting is fair use, the making of copies for long-term purposes could easily be considered infringement. See *Sony*, 464 U.S. at 454–55 (affirming the lower court's conclusion that time shifting is fair use). Additionally, the development of digital video recorders like TiVo have compounded the likelihood of infringement by making recording easier and permitting the sharing of recordings between devices. See *TiVoToGo*, <http://www.tivo.com/4.9.4.1.asp> (last visited Oct. 19, 2006) (describing the TiVoToGo service). Finally, the common ownership of personal computers connected to the Internet makes the commission of infringement, however inadvertent, quite likely. See *supra* notes 2–3 and accompanying text (showing many opportunities for Internet users to commit infringement).

169. Granted, the *Fonovisa* court may not have wanted to hold the electric company liable for infringement committed by others. However, the point being made here is not that the court intended such a result but rather that the interpretation embraced by the court contained no obvious limit to stop such a result from occurring. This sets the stage for the expansion of third-party copyright liability.

II. TRADEOFFS IN THE CONSTRUCTION OF THIRD-PARTY COPYRIGHT LIABILITY

Fonovisa and its progeny meant that the pre-*Grokster* law of third-party copyright liability contained two divergent lines of cases. The first line applied liability relatively narrowly, limiting liability to defendants who are closely involved with infringement committed by others. The second line took a much broader approach, expanding liability to defendants whose goods or services support infringement indirectly or occasionally. The inconsistency of pre-*Grokster* law raises the question of why courts would interpret the same doctrines so differently. Answering this question is not easy, and it requires exploration of the theory and practical consequences of third-party copyright liability. This exploration shows that courts have adopted different interpretations of third-party copyright liability because they disagree about tradeoffs implicit in constructing the law.

Courts agree that third-party copyright liability is a descendant of common law tort,¹⁷⁰ and tort law offers two theories that motivate third-party copyright liability. Such liability could exist because a defendant's faulty behavior caused someone else to infringe. Alternatively, it could exist because, at least in some situations, defendants are strictly liable for infringement committed by others.

Fault and strict liability explain third-party copyright liability in different ways. Courts use fault to identify defendants who deserve to be held liable. Fault generally means that the defendant intended to injure the victim or failed to take reasonable precautions against the possibility of the victim's injury.¹⁷¹ Faulty defendants deserve to be held liable because

170. See *supra* note 24 and accompanying text (supporting the proposition that third-party copyright liability arose from common law tort).

171. DOBBS, *supra* note 26, at 2–3 (describing two general categories of fault: intentional wrongs and negligent wrongs); see also *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (“[A person’s negligence depends on] the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”), *rev’d*, 312 U.S. 492 (1941); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005) (stating that a person acts negligently if the person fails to exercise “reasonable care”); *id.* § 5 (imposing liability for intentional causation of physical harm); *id.* § 6 (imposing liability for negligent causation of physical harm); RESTATEMENT (SECOND) OF TORTS § 13 (1965) (imposing liability for intentional causation of harmful or offensive physical contact); *id.* §§ 283, 284 (describing negligence as a form of unreasonable behavior).

they have done something wrong and are culpably responsible for the victim's injury.¹⁷² This explanation implies that third-party copyright liability exists to hold defendants responsible for the consequences of unreasonably supporting infringement. By contrast, courts impose strict liability in tort with relatively little regard for whether defendants have behaved unreasonably. Instead, the objective is to make defendants prevent injuries and raise compensation for tort victims.¹⁷³ This approach suggests that third-party copyright liability exists to deter infringement and ensure compensation for any infringement that occurs.

Strict liability and fault identify important social benefits associated with third-party copyright liability. It is good for society to discourage infringement, raise compensation, and hold unreasonable actors liable for the consequences of their behavior. However, it is important to recognize the undesirable side effects that accompany pursuit of these worthy goals.

Consider the potential third-party copyright liability of Internet service providers (ISPs). ISPs support infringement, but they also support a great deal of legitimate, noninfringing behavior such as email, web surfing, and shopping. If society adopted a blanket rule that ISPs must always pay for infringement committed by their subscribers, ISPs would respond by stopping some infringement and paying for the rest. Society would benefit because copyrights would be more secure, but at least two potentially undesirable consequences would follow.

First, such broad liability would certainly fall on ISPs that do not deserve liability because their behavior is reasonable. As an extreme example, an ISP might comprehensively monitor its subscribers and suspend all who are suspected of infringement. Such an ISP would stop a great deal of infringement, but sooner or later a mistake would be made and infringement would occur. It is unfair to hold such an ISP liable because the precautions it took against infringement seem more than reasonable. The culpability that might otherwise justify liability simply does not exist.

172. See DOBBS, *supra* note 26, at 2 (“[T]orts are traditionally associated with wrongdoing in some moral sense.”); Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 294–95 (1994) (explaining that liability in tort exists only when a defendant has done something wrong, particularly the intentional or negligent acts that constitute faulty behavior).

173. See *supra* note 27 and accompanying text (discussing the rationale for strict liability).

Second, such broad liability would create social losses by suppressing valuable noninfringing behavior. Some ISPs may respond to blanket liability by going out of business, thereby causing the loss of all the noninfringing behavior the ISP previously supported. If an ISP chose to stay in business, it would sometimes mistakenly identify a subscriber's behavior as infringing and deny service to a noninfringer. Even if the ISP simply chose to pay for its subscribers' infringement, it would likely do so by levying a fee on all of its subscribers, including those who do not commit infringement. These noninfringing subscribers would have to pay more for Internet service, and subscribers at the margin would ultimately forego the use of the Internet and its benefits.

This analysis shows that courts must balance the advantages and disadvantages of third-party copyright liability. Striking this balance requires as much art as science. As an initial matter, some of the relevant costs and benefits seem incommensurable. It may be possible to put a dollar value on copyright security, but the injustice of imposing liability on a defendant who has behaved reasonably defies simple monetization. Moreover, some of the considerations that are theoretically quantifiable will prove elusive to measure. There may be a theoretical dollar value for the noninfringing behavior that is suppressed as third-party copyright liability expands. However, the ways in which those losses occur are so diverse that an accurate measurement seems unlikely and certainly beyond the means of courts. Courts must therefore make sensitive, almost philosophical, judgments about the social importance of deterring infringement, compensating victims, and holding the culpable liable, and they must do likewise for the social costs of exposing reasonable, innocent defendants to liability and suppressing legitimate, noninfringing behavior. Only then can they decide whether the pursuit of admirable objectives justifies the collateral losses that inevitably follow.

Judges disagree about the interpretation and scope of third-party copyright liability because they have different opinions on the theory and practical implementation of the law. The relevant pattern of disagreement emerges by recognizing that vicarious copyright liability is a form of strict liability, while contributory liability is a form of fault-based liability that resembles negligence. Vicarious copyright liability is strict because courts impose it without regard to the reasonableness of the defendant's behavior. Such liability exists when the defen-

dant has “the right and ability to supervise” an infringer and “an obvious and direct financial interest” in the infringement.¹⁷⁴ If vicarious copyright liability were based on fault, then defendants would be able to escape liability by taking reasonable precautions that excuse them from liability for any infringement that happens to occur.¹⁷⁵ However, the elements of vicarious liability obviate that possibility because precautions taken by the defendant do not affect the defendant’s control over or financial interest in any underlying infringement. In short, vicarious liability exists as long as a defendant has the necessary relationship with an infringer.¹⁷⁶

Contributory liability is a form of fault-based liability because it mimics tort law’s inquiry into a defendant’s potential negligence. Standard tort law imposes on defendants the duty to behave as a reasonable person in the same or similar circumstances.¹⁷⁷ When courts evaluate whether a defendant is negligent, they determine what the defendant knew or reasonably should have known about the consequences associated with his behavior and whether the defendant acted reasonably

174. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

175. *See Russ v. State*, 191 So. 296, 298 (Fla. 1939) (“Negligence is the failure to observe for the protection of another’s interest such care, precaution and vigilance as the circumstances justly demand”); *Weinberg v. Dinger*, 524 A.2d 366, 374 (N.J. 1987) (“To act non-negligently is to take reasonable precautions to prevent the occurrence of foreseeable harm to others.”); *Hart v. Ivey*, 420 S.E.2d 174, 177–78 (N.C. 1992) (“Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions.”).

176. The point being made here can perhaps be seen more easily by considering the vicarious tort liability of an employer under respondeat superior. For example, a package delivery service would be held vicariously liable if a delivery truck operated by a full-time, salaried employee during regular working hours runs a red light and strikes a pedestrian. Liability exists no matter how many precautions the delivery service has taken because liability is strict. Precautions taken by the delivery service do not affect the existence of liability. They can only affect the likelihood of an accident. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 4, scope note, at 276–77 (“A highly important rule of strict liability is respondeat superior, which renders employers liable for harms caused by the negligence (and sometimes the intentional torts) of their employees, acting within the scope of employment.”).

177. *Sanders v. Scarvey*, 224 So. 2d 247, 250 (Ala. 1969) (“Negligence means the failure to exercise reasonable or ordinary care, such care as a reasonably prudent person would have exercised under the same or similar circumstances.”); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 (stating that a person acts negligently if the person fails to exercise “reasonable care”); RESTATEMENT (SECOND) OF TORTS §§ 283, 284 (1965) (describing negligence as a form of unreasonable behavior).

in light of those consequences.¹⁷⁸ Contributory liability depends on the defendant's knowledge of and material contribution to the infringement of another.¹⁷⁹ These elements amount to asking what a defendant knew or reasonably should have known about another's infringement and whether the defendant behaved reasonably in light of that knowledge.¹⁸⁰ Liability is a matter of fault because defendants can escape liability by refusing to provide material contribution to known infringers—a form of behaving reasonably in light of what they know.

The foregoing shows that vicarious and contributory liability affect third-party copyright liability very differently. Contributory liability's reliance on fault implies that contributory liability meaningfully limits the scope of third-party copyright liability. In tort, fault imposes liability only on culpable defendants who deserve to be held liable because they have intentionally or negligently injured others. Accordingly, the mere fact that a defendant could have taken precautions against a plaintiff's injury does not, in and of itself, justify liability. Something more is required, namely a finding that the defendant's behavior was unreasonable with respect to the plaintiff.¹⁸¹ Fault significantly limits third-party copyright liability because many individuals who might limit or stop infringing behavior are not unreasonable for having failed to do so. For example, landlords certainly support infringement because some of their renters will commit infringement, and landlords

178. *Knapp v. Stanford*, 392 So. 2d 196, 199 (Miss. 1980) (“The test [for negligence] is whether the actor being charged with negligence in any circumstance acted as a reasonable and prudent person would have acted under the same or similar circumstances.”); RESTATEMENT (SECOND) OF TORTS § 284(a) (“Negligent conduct may be . . . an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another . . .”).

179. *See Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *supra* text accompanying notes 35–36 (discussing the definition of contributory liability).

180. The connection between contributory copyright liability and negligence is explored further in Yen, *Peer-to-Peer*, *supra* note 25, at 855–59.

181. *See Rogers v. Retrum*, 825 P.2d 20, 23 (Ariz. Ct. App. 1991) (finding that simple exposure to risk is not enough to establish a defendant's negligence); *Lane v. City of Buffalo*, 250 N.Y.S. 579, 584 (N.Y. App. Div. 1931) (“The test of actionable negligence is not what could have been done to have prevented a particular accident, but what a reasonably prudent and careful person would have done under the circumstances in the discharge of his duty to the injured party. Failure to guard against a remote possibility of accident, or one which could not, in the exercise of ordinary care, be foreseen, does not constitute negligence.”).

could take precautions to reduce infringement. However, simply renting property is not unreasonable behavior. Accordingly, a court applying fault principles would not ordinarily hold landlords liable for infringement committed by tenants.¹⁸²

By contrast, vicarious liability expands third-party copyright liability because vicarious liability is strict. As noted earlier, courts impose strict liability in tort because it deters tortious conduct and raises compensation for victims.¹⁸³ Strict liability broadens third-party copyright liability because its rationale applies to almost any defendant who has influence over infringement by others. After all, such a defendant could use her influence to stop or reduce infringement, so liability will force her to do so or raise money to pay for it. Accordingly, a court applying strict liability might hold almost any defendant liable in order to encourage precaution against infringement and ensure the payment of compensation to copyright holders.¹⁸⁴

The relationship between the theories and doctrines of third-party copyright liability makes it possible to identify how judicial attitudes towards the advantages and disadvantages of such liability emerge in the theoretical and doctrinal choices that this Article has described. On one hand, some courts think that the advantages of third-party copyright liability are modest, especially when compared to the risks of exposing innocent defendants to liability and suppressing noninfringing behavior. These courts prefer fault-inspired constructions of the law because fault is sensitive to the problems associated with third-party copyright liability. Accordingly, they limit the application of vicarious liability to a relatively narrow range of facts and interpret contributory liability with considerable regard for the defendant's possible innocence and the legitimate noninfringing activities the defendant supports. Two cases discussed earlier, *Sony Corp. of America v. Universal City Studios*¹⁸⁵ and *Banff Ltd. v. Limited, Inc.*,¹⁸⁶ illustrate this perfectly. In *Sony*, the Supreme Court refused to entertain seriously the possibility of

182. See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 306–08 (2d Cir. 1963); *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938).

183. See *supra* note 27 and accompanying text (discussing the rationale for strict liability).

184. See Priest, *supra* note 27, at 527 (noting that the “unavoidable implication” of enterprise liability is “absolute liability”).

185. 464 U.S. 417 (1984).

186. 869 F. Supp. 1103 (S.D.N.Y. 1994).

vicarious liability,¹⁸⁷ and it went on to find in Sony's favor precisely because it worried that the losses associated with third-party copyright liability outweighed any gains.¹⁸⁸ In *Banff*, Judge Haight understood the "serious implications in greatly expanding the reach of the Copyright Act,"¹⁸⁹ and refused to hold a parent corporation vicariously liable for the infringement of its subsidiary.¹⁹⁰

On the other hand, some courts have great confidence in the benefits of third-party copyright liability and worry very little about the associated losses. These courts are comfortable with the consequences of strict liability, and they gravitate toward the expansive application of vicarious and contributory liability with relatively little concern for the consequences that may follow. *Fonovisa, Inc. v. Cherry Auction, Inc.*¹⁹¹ vividly exemplifies this reasoning. Remember that the *Fonovisa* defendants had a good case under a limited interpretation of third-party copyright liability, and the district court dismissed the plaintiffs' complaint on that basis.¹⁹² The Ninth Circuit's reversal therefore required expansive interpretations of both vicarious and contributory liability.¹⁹³ A telling combination of theory and factual circumstance made this possible.

With respect to vicarious liability, the court adopted a clear strict liability rationale that embraced third-party liability as valuable without considering the potential negative consequences.¹⁹⁴ The court approvingly cited *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*, a case in which the District of Massachusetts considered a suit for vicarious copyright liability against the operator of a trade show for the unlicensed use of music by some of the show's exhibitors.¹⁹⁵ These facts

187. Sony's treatment of vicarious liability is a bit puzzling. The Court uses the term "vicarious liability." *Sony*, 464 U.S. at 439. However, the analysis surrounding use of that term is clearly borrowed from contributory liability because it concentrates on Sony's knowledge, and knowledge is not an element of vicarious liability. This blending of vicarious liability into contributory liability suggests the Court's sensitivity to the undesirable side effects of strict liability and the Court's preference to limit the scope of vicarious liability.

188. *Id.* at 441–42.

189. 869 F. Supp. at 1107.

190. *Id.* at 1107–11.

191. 76 F.3d 259 (9th Cir. 1996).

192. *Id.* at 262, 264.

193. See *supra* text accompanying notes 108–31 (describing how *Fonovisa* expanded third-party copyright liability).

194. See *Fonovisa*, 76 F.3d at 262–64.

195. 855 F. Supp. 1314, 1317–18 (D. Mass. 1994), cited in *Fonovisa*, 76 F.3d

were similar to those of *Artists Music, Inc. v. Reed Publishing (USA), Inc.*,¹⁹⁶ a case discussed earlier as an example of limited vicarious liability. The reader will recall that the *Artists Music* court did not believe that a trade show operator had enough control over or financial interest in an exhibitor's infringement to justify liability.¹⁹⁷ The *Polygram* court reached exactly the opposite conclusion, adopting a strict liability theory of the case:

Modern decisions, when explaining policy justifications for vicarious liability rather than merely citing precedent, commonly refer to risk allocation. When an individual seeks to profit from an enterprise in which identifiable types of losses are expected to occur, it is ordinarily fair and reasonable to place responsibility for those losses on the person who profits, even if that person makes arrangements for others to perform the acts that foreseeably cause the losses. The law of vicarious liability treats the expected losses as simply another cost of doing business. The enterprise and the person profiting from it are better able than either the innocent injured plaintiff or the person whose act caused the loss to distribute the costs and to shift them to others who have profited from the enterprise. In addition, placing responsibility for the loss on the enterprise has the added benefit of creating a greater incentive for the enterprise to police its operations carefully to avoid unnecessary losses.¹⁹⁸

This led the court to the consciously broad interpretation of vicarious liability that the *Fonovisa* court later adopted.

With respect to contributory liability, the *Fonovisa* court concentrated on facts that made the defendants seem culpably responsible for assisting infringement. Among other things, the defendants knew that a number of their renters committed infringement because of the raid conducted by the sheriff and the complaints received from the plaintiff.¹⁹⁹ They promised to help the sheriff identify infringers, but never followed through.²⁰⁰ In fact, they appear to have facilitated hiding the infringers' identity by creating a class of booths that could be rented any-

at 262.

196. Nos. 93 CIV. 3428(JFK), 73163, 1994 WL 191643, at *1-2 (S.D.N.Y. May 17, 1994).

197. Interestingly, the *Artists Music* court used fault to explain its reasoning: "The purpose of imposing vicarious liability is to punish one who unfairly reaps the benefits of another's infringing behavior." *Id.* at *4. This statement implies that the *Artists Music* court was uncomfortable about the prospect of holding a defendant liable unless the defendant had done something truly blameworthy.

198. *Polygram*, 855 F. Supp. at 1325.

199. *Fonovisa*, 76 F.3d at 261.

200. *Id.*

mously.²⁰¹ These facts show that the defendants were not innocent, accidental supporters of infringement. To the contrary, they cynically calculated that infringement was good for their business and took deliberate steps for the purpose of perpetuating infringement. The defendants wanted infringement to occur, and they wanted to capitalize on it for business purposes. In short, leaving aside questions of law, the defendants were culpable and deserved to be held liable.

The Ninth Circuit must have been outraged by the idea that such cynically culpable defendants could escape liability for operating a business that profited so openly from infringement. The injustice of the district court's decision probably convinced the Ninth Circuit that a great deal of good would come from holding the defendants liable—enough good to overcome any undesirable consequences associated with an expansion of third-party copyright liability's scope. Accordingly, the court expanded the scope of contributory copyright liability to make sure that culpable actors would be held responsible for infringement they supported, but it simultaneously opened the door to overbroad liability that threatens innocent actors while imposing more social costs than benefits.²⁰²

In short, courts failed to give the pre-*Grokster* law of third-party copyright liability a coherent structure for two reasons. First, they could not agree about the advantages and disadvantages of such liability. Second, they had not resolved whether

201. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 847 F. Supp. 1492, 1494 (E.D. Cal. 1994), *rev'd*, 76 F.3d 259.

202. *See supra* text accompanying notes 162–69 (analyzing the effects of an expansive interpretation of third-party copyright liability). The same thinking existed in *Motorvations Inc. v. M&M Inc.*, No. 2:99cv0824, 2001 WL 1045617 (D. Utah July 6, 2001). The court wrote:

In a business relationship of this sort, it would be all too easy for a principal to turn a blind eye to tortious and infringing conduct, and neglect what would otherwise be its duty to prevent the same, with the expectation that the agent will bear sole responsibility. Furthermore, the relationship's particular ability to avoid determinative evidence establishing the parties' respective roles facilitates a principal's ability to, after-the-fact, deny its ability to supervise, especially when it can be held liable if the same is established.

Id. This language shows a court concerned more about stopping infringement than protecting an innocent defendant from liability. The court knew that it was interpreting the law to prevent cynical actors from disclaiming responsibility, and the court decided that it was important to stop these cynical actors, even if the occasional “wrong” result had to be tolerated. *See Grossman, supra* note 9, at 359 (arguing that expansion of third-party copyright liability to “get at the bad guys” created doctrine that can no longer limit the scope of third-party copyright liability).

such liability is primarily a matter of fault or strict liability. Improvement in the law therefore required a framework that clearly delineates the relative roles of fault and strict liability, while taking a stance on the relative importance of the advantages and disadvantages associated with third-party copyright liability. This background explains why *Grokster* became an important case. Many anticipated that the Supreme Court would use *Grokster* to clarify the law by definitively choosing one interpretation that clearly identified the parameters of third-party copyright liability. As will be discussed below, the Court did not do this as directly as some might have hoped. It did, however, discuss third-party copyright liability in a manner that promotes a more coherent and effective structure for the law.

III. *GROKSTER*

Grokster was the third of three closely followed cases about the liability of peer-to-peer technology providers.²⁰³ In all three cases, the plaintiffs held copyright in various works that were traded over peer-to-peer networks created by the defendants, and the plaintiffs claimed that the defendants were vicariously and contributorily liable for making infringement over those networks possible. Decisions in the first two of these cases favored the plaintiffs,²⁰⁴ but the Ninth Circuit granted summary judgment to the *Grokster* defendants.²⁰⁵ The Supreme Court granted certiorari and reversed.²⁰⁶

The Supreme Court could have decided *Grokster* for either party because each side had support from one branch of pre-*Grokster* law. For example, the Court could have applied liability expansively under *Fonovisa* and its progeny. Vicarious liability would have existed because the *Grokster* defendants had

203. The other cases were *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), and *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

204. See *In re Aimster*, 334 F.3d at 656 (rejecting the defendant's appeal and affirming the district court decision in favor of the plaintiffs); *Napster*, 239 F.3d at 1024 (agreeing with the district court's conclusion that the plaintiffs had demonstrated a likelihood of success on their third-party copyright liability claim).

205. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1163–67 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764 (2005).

206. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2782–83 (2005).

at least some control over their users' infringement²⁰⁷ and made peer-to-peer technology available to infringers in the hope of eventually turning a profit through advertising revenue.²⁰⁸ Contributory liability would have been found because the defendants created their networks despite knowing that many people would use the networks for infringement.²⁰⁹

The Court could just as easily have used *Sony* to deny liability under a limited interpretation of third-party copyright liability. The Sony Corporation knew that many individuals committed infringement with VCRs and still sold the technology that made infringement possible.²¹⁰ However, the Supreme Court refused to hold Sony liable.²¹¹ As an initial matter, the generalized knowledge that some individuals used VCRs to commit infringement did not establish Sony's actual knowledge of infringement. Sony's liability therefore depended on the imputation of constructive knowledge to Sony.²¹² However, the Court held the imputation of such knowledge inappropriate because VCRs were capable of "substantial noninfringing uses."²¹³ Application of this logic would have excused the *Grokster* defendants from liability. After all, the defendants' networks supported more than infringing behavior. The district court found that users traded public domain files as well as copyrighted files with the permission of copyright holders. Such activity comprised a distinct minority of network activity, but it was sufficient for the district court and the Ninth Circuit to characterize the noninfringing uses as "substantial."²¹⁴ The Supreme

207. For example, the defendants could have refused to distribute the software or designed safeguards into their networks.

208. *Grokster*, 125 S. Ct. at 2774.

209. *Id.* at 2772.

210. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423–24 (1984) (mentioning surveys taken by Sony that showed some users accumulating libraries of tapes recorded from off-air broadcasting).

211. *Id.* at 421.

212. *Id.* at 439 ("If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material.")

213. *Id.* at 442 ("[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."); *id.* at 456 (concluding that the Betamax videotape recorder was capable of substantial noninfringing uses).

214. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161–62 (9th Cir. 2004), *vacated*, 125 S. Ct. 2764; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1035–37 (C.D. Cal. 2003),

Court therefore had the chance to establish *Sony's* control over cases like *Grokster*, or to limit *Sony's* application in favor of reasoning like *Fonovisa's*.

Grokster was a tricky case for the Supreme Court because it embodied the problematic tradeoffs that already plagued the law. Application of *Sony* would have had the laudable effect of protecting innocent defendants from liability and avoiding any chill on noninfringing behavior. However, it also would have jeopardized the cases of copyright holders against cynical and unethical defendants who wanted to exploit *Sony's* pro-defendant standard. Almost every technology that supports copyright infringement can also be used for noninfringing purposes. Unethical and cynical individuals would then claim that they could support and profit from infringement by citing our hypothesized *Grokster* decision for the proposition that a very small percentage of legitimate use was enough to shield a technology provider from third-party copyright liability, no matter what.

The most obvious "solution" to this problem would have been an interpretation of *Sony* that allowed courts to more easily hold defendants liable. Such an intellectual maneuver would have been similar to the one made by the *Fonovisa* court, and the Court could have accomplished it either by holding the defendants vicariously liable or by adopting the plaintiffs' argument for contributory liability against distributors of technology "principally" used for infringement.²¹⁵ Such an interpretation of *Sony* would indeed have stopped the unethical and cynical from evading liability. Unfortunately, it would also have exposed many innocent technology providers to liability simply because others use their technology to infringe, and it could easily have discouraged people from creating valuable technology, thereby harming the public interest.²¹⁶

The Court chose not to follow either branch of pre-*Grokster* law, opting instead to endorse a new, third branch of third-

aff'd, 380 F.3d 1154, *vacated*, 125 S. Ct. 2764.

215. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2778 (2005) (noting the plaintiffs' argument that *Sony* did not apply to products used principally for infringement).

216. *See id.* at 2775 (recognizing the possibility of discouraging innovation through third-party copyright liability); Transcript of Oral Argument at 10-16, *Grokster*, 125 S. Ct. 2764 (No. 04-480), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-480.pdf (recording various Justices expressing concern about discouraging innovation if the plaintiffs' position was adopted).

party copyright liability. This left *Sony's* sensitivity about the negative consequences of such liability intact while creating a new cause of action to protect copyrights. The Court began with a perceptive and nuanced understanding of contributory liability. Before *Grokster*, the overwhelming majority of cases analyzed such liability under a single rubric that depended on the elements of knowledge and material contribution.²¹⁷ Justice Souter correctly recognized that these elements worked by measuring the culpable fault of a defendant.²¹⁸ Justice Souter's explicit reference to fault made it possible to explain the logic of *Sony* in a way that would protect innocent technology providers from suit while imposing liability on unethical and cynical distributors of technology.

The Court began by reviewing *Sony's* logic and its relationship to patent law's staple article of commerce doctrine. The Court wrote:

In sum, where an article is "good for nothing else" but infringement, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe. Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one's products will be misused.²¹⁹

This passage demonstrates the Court's concern for separating innocent technology providers whose users happen to commit infringement from those whose behavior is so culpable that liability is justified. Moreover, the Court clearly did not consider a defendant sufficiently culpable simply for knowing that its technology could be used to infringe. A "more acute fault" was required.²²⁰ This requirement made the plaintiffs' suggested interpretation of *Sony* unsatisfactory because it would impose liability on too many innocent defendants.

It was equally clear, however, that the Court was not going to allow *Sony* to shield all distributors of technology simply be-

217. See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *supra* text accompanying notes 35–36 (discussing the definition of contributory liability).

218. *Grokster*, 125 S. Ct. at 2777–78 (noting that *Sony* could not be "faulted" simply for selling VCRs and that liability is reserved for cases of "more acute fault" than the simple understanding that a defendant's products would be misused); *id.* at 2779 (stating that the *Sony* rule limited culpable intent).

219. *Id.* at 2777–78 (citations omitted) (quoting *Canada v. Mich. Malleable Iron Co.*, 124 F. 486, 489 (6th Cir. 1903)).

220. *Id.* at 2778.

cause people might use the technology legally. The Court understood that the culpability of a technology provider depends on the provider's intent as well as the technology's characteristics. It is one thing to distribute technology that could be used to infringe in the hope that others will use it legitimately. It is something else to distribute the same technology in the hope that others will use it to infringe. The court wrote:

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law. Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability.²²¹

The *Grokster* Court's use of fault created two different ways of analyzing the third-party copyright liability of technology providers. The first approach identifies fault from the characteristics and uses of technology distributed by the defendant, and it is limited by *Sony*. A defendant who distributes technology presumably knows what its technology does and how it might be used. If the technology is used for infringing purposes, the defendant's knowledge of such use provides a plausible basis for labeling the defendant's behavior faulty. However, *Sony* limits the imposition of such liability to cases where the defendant's technology is not capable of substantial noninfringing use because a more permissive regime of liability would expose too many innocent defendants to liability.²²²

The second approach identifies fault from evidence of the defendant's deliberate inducement of infringement and is not limited by *Sony*.²²³ Someone who advertises use of a particular technology for infringement or instructs users on how to commit infringement is culpable if infringement results. Moreover, that culpability does not depend on the characteristics of the technology in question. The defendant would be equally culpable if the technology in question has many or very few nonin-

221. *Id.* at 2779 (citation omitted) (footnote omitted).

222. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439–42 (1984).

223. *Grokster*, 125 S. Ct. at 2779 (“Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple article rule will not preclude liability.”).

fringing uses because the defendant's culpability arises from his specific desire to cause infringement. Accordingly, *Sony* does not affect the third-party copyright liability of defendants who intentionally induce infringement.²²⁴

The identification of two distinct analyses for third-party copyright liability profoundly affected the outcome of *Grokster*. If liability could be derived only from characteristics of the defendants' technology, the defendants would presumably have escaped liability because the district court found that the defendants' technology was capable of substantial noninfringing use. However, the possibility of liability based on the defendants' intentional inducement opened the door to holding the defendants liable despite those noninfringing uses. The Court drew particular attention to evidence suggesting that the *Grokster* defendants wanted their users to infringe. Among other things, the defendants tried to attract users of other peer-to-peer file-sharing programs that were widely used to infringe,²²⁵ encouraged users to infringe,²²⁶ and planned to capitalize on infringement they knew would occur.²²⁷ The Court went on to find that the Ninth Circuit had failed to consider evidence of the defendants' intent to cause infringement, vacated, and remanded for further consideration.²²⁸

224. *Id.* at 2779 ("Evidence of 'active steps . . . taken to encourage direct infringement,' such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law's reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use." (quoting *Oak Indus., Inc. v. Zenith Elecs. Corp.*, 697 F. Supp. 988, 992 (N.D. Ill. 1988))).

225. *Id.* at 2772 (referring to the defendants' attempt to recruit those who used the file-sharing program Napster).

226. *Id.* ("[E]ach [defendant] clearly voiced the objective that recipients use [the technology] to download copyrighted works, and each took active steps to encourage infringement.").

227. *Id.* at 2774. ("[The defendants'] principal object was [to] use . . . their software to download copyrighted works."); *id.* at 2780–82 (describing purposeful behavior of the defendants).

228. *Id.* at 2778–79, 2783. The district court recently granted a motion against defendant StreamCast Networks on the theory suggested by the Supreme Court. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, No. CV0108541SVWPJWX, 2006 WL 2806882, at *14–23, 29 (C.D. Cal. Sept. 27, 2006) (order granting plaintiffs' motion for summary judgment on liability against defendant StreamCast Networks, Inc.). The other *Grokster* defendants apparently settled. *Id.* at *1.

IV. THE CONSTRUCTION OF THIRD-PARTY COPYRIGHT LIABILITY AFTER *GROKSTER*

It may seem on first inspection that *Grokster* has done nothing to improve the construction of third-party copyright liability and may have confused things even more. The case left behind three distinct causes of action for third-party copyright liability. If courts could not agree about the proper interpretation of the two doctrines that existed before *Grokster*, they should have even more trouble agreeing about vicarious liability, contributory liability, and inducement. This reaction to *Grokster* is wrong. In reality, *Grokster* laid the groundwork for constructive change in the law by emphasizing fault, and not strict liability, as the primary theory of third-party copyright liability. This emphasis on fault discredited the expansive application of third-party copyright liability found in *Fonovisa* and its progeny. It further implied that the limited application of contributory liability and inducement should become the backbone of the law, with a smaller role reserved for vicarious liability.

A. THE PRIMACY OF FAULT AS A THEORY OF THIRD-PARTY COPYRIGHT LIABILITY

Grokster sent a strong signal that the Supreme Court considers fault the primary theory of third-party copyright liability. Note that the Court could have easily reversed the Ninth Circuit by adopting a strict liability theory of the case. Such a decision would have been consistent with the imposition of vicarious liability, and it would have sent a strong message that security of copyright mattered more to the Court than a defendant's innocence or the suppression of noninfringing behavior. Of course, the Court chose not to do this, preferring instead to explain its decision with a new cause of action based on fault.²²⁹ This implied that the Justices were uncomfortable with strict liability and preferred a fault theory of the case because fault offered a better framework for balancing the advantages and disadvantages of third-party copyright liability.

The initial conceptualization of *Grokster* illustrates the Court's commitment to fault. The Court recognized that third-party copyright liability has its costs, and that balancing is cru-

²²⁹ See *Grokster*, 125 S. Ct. at 2779–80; *supra* text accompanying notes 218–24 (analyzing *Grokster*'s references to fault).

cial to proper construction of the law.²³⁰ The Court knew that the case for liability against the defendants was strong, yet it eschewed strict liability in favor of fault. In fact, the Court's commitment to fault was so strong that it changed the rationale of vicarious liability from strict liability to fault. Justice Souter wrote: "One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."²³¹ At first inspection, this sentence looks like a routine statement of the basic elements for third-party copyright liability. The language feels like boilerplate, and the Court cites to the seminal cases defining those elements, *Gershwin* and *Shapiro*.²³² However, closer examination reveals that something more significant is going on. The reference to *Gershwin* was generally accurate, and it obviously foreshadowed the Court's later adoption of inducement.²³³ However, the reference to *Shapiro* introduced an important change. *Shapiro* stated that:

When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.²³⁴

This is a clear statement of strict liability. A defendant with the appropriate relationship to an infringer is liable for any infringement that occurs, no matter what. The defendant can exercise all the control that she has over the infringer in an effort to stop infringement, but this will not excuse her liability. By contrast, *Grokster*'s statement of vicarious liability allows the defendant to escape liability by exercising control. The Court

230. *Grokster*, 125 S. Ct. at 2775 ("The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.")

231. *Id.* at 2776 (citing *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)).

232. *Id.*

233. The *Gershwin* court stated: "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

234. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (citation omitted).

stated that a defendant “infringes vicariously by profiting from direct infringement *while declining to exercise a right to stop or limit it.*”²³⁵ No longer does a defendant face liability even if she exercises control. To the contrary, she escapes liability if she exercises whatever control she has, even if she fails to stop the infringement. This means that a defendant is not at fault if she takes reasonable precaution against the possibility of harm to the plaintiff, a result that is theoretically consistent with the Court’s later assertion that those who induce infringement deserve to be held liable.²³⁶

B. THE CONSEQUENCES OF FAULT

Grokster’s reliance on fault points the way to an improved, more coherent construction of third-party copyright liability. Remember that judicial disagreement about fault and strict liability contributed a great deal to the inconsistencies of pre-*Grokster* law. *Grokster* settled this disagreement by clearly turning away from the strict liability rationale that supported *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*²³⁷ and *Fonovisa, Inc. v. Cherry Auction, Inc.*²³⁸ This preference for fault created a framework that will govern the future interpretation of vicarious liability, contributory liability, and inducement in copyright.

First, and most importantly, courts should limit vicarious liability to a relatively narrow range of facts. Expansive application of such liability of the sort found in *Fonovisa* and *Motortions Inc. v. M&M Inc.*²³⁹ would make perfect sense if strict liability were the primary rationale governing third-party copyright liability. However, *Grokster* made strict liability a secondary justification for such liability. Future courts should therefore restrict the application of vicarious copyright liability,

235. *Grokster*, 125 S. Ct. at 2776 (emphasis added).

236. It is, of course, possible that the Court was simply lax in its formulation of vicarious liability and that no push toward fault was implied. There are two reasons to discount this possibility. First, the language used is an unmistakable change from *Shapiro*, and its reference to fault matches the important role played by fault in the rest of the opinion. Second, Justice Souter is a deliberate legal writer, a “lawyer’s lawyer” who would not inadvertently depart from a clear, well-known formulation of doctrine.

237. 855 F. Supp. 1314 (D. Mass. 1994).

238. 76 F.3d 259 (9th Cir. 1996).

239. No. 2:99cv0824, 2001 WL 1045617 (D. Utah July 6, 2001).

perhaps to the general contours of respondeat superior, in order to avoid contradicting *Grokster*'s reliance on fault.²⁴⁰

240. As a normative matter, employers probably should be held strictly liable for infringement committed by their employees within the scope of employment. Respondeat superior offers a sensible model for vicarious copyright liability because it preserves results that are well accepted as a matter of tort law while providing sufficiently distinct yet flexible limits on the reach of liability. In general, respondeat superior imposes liability on an employer for torts committed by an employee within the scope of employment. RESTATEMENT (THIRD) OF AGENCY § 2.04 (Tentative Draft No. 2, 2001); RESTATEMENT (SECOND) OF AGENCY § 219 (1957). However, the relationship between employer and employee is defined in fairly general terms under the law of agency:

Numerous factual indicia are relevant to whether an agent is an employee. These include: the extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. Also relevant is the extent of control that the principal has exercised in practice over the details of the agent's work.

RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. f (Tentative Draft No. 5, 2004); see also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (listing various factors relevant to determination of whether an employer/employee relationship exists under the laws of agency in a copyright case involving the work-made-for-hire doctrine); RESTATEMENT (SECOND) OF AGENCY § 220 (setting forth a list of factors relevant to the existence of an employer/employee relationship within agency law). The result of this generality is flexibility that permits courts to extend third-party liability to a reasonably narrow range of cases beyond the strict confines of a formal, salaried employer/employee relationship. This flexibility supports the decision reached in *Shapiro*, because the defendant store owner Green exercised a great deal of control over the behavior of its concessionaire Jalen for many years—control reasonably similar to that exercised by an employer over a formal, salaried employee. See *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 306 (2d Cir. 1963); *supra* text accompanying notes 79–91 (describing the control exercised by Green). Still, this flexibility would not support the result reached in *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002), or *Motorvations*, because the defendants in those cases had considerably less control than Green did over Jalen. See *supra* text accompanying notes 137–40, 143, 150–61 (describing the control exercised by the defendants in *Perfect 10* and *Motorvations*). For additional discussion of the normative desirability of limiting vicarious liability to the approximate contours of respondeat superior, see Högberg, *supra* note 162, at 939–40.

Second, courts should cautiously apply contributory liability to make sure that the doctrine does not turn into a form of strict liability. As was noted earlier, courts sometimes interpret the elements of knowledge and material contribution quite expansively. This is precisely what happened in *Fonovisa* and its progeny. The result may not technically be strict liability, but the effect is quite similar because innocent defendants face a real risk of liability.²⁴¹ If concern about the negative consequences of third-party copyright liability casts doubt on the expansive interpretation of vicarious liability, it should do likewise for the expansive interpretation of contributory liability. Courts should therefore eschew interpretations drawn from cases like *Fonovisa* in favor of those drawn from *Sony* precisely because *Sony* takes careful account of a defendant's potential innocence and the unintended negative social consequences of third-party copyright liability.

Third and finally, courts must vigilantly limit the scope of inducement to keep that doctrine from destroying the rationale behind fault-based third-party copyright liability. Such vigilance is necessary because plaintiffs will surely urge courts to apply inducement broadly. After all, *Sony* does not apply to inducement actions, so courts can hold defendants liable as inducers without explicitly considering the undesirable side effects of third-party copyright liability. It therefore makes sense for plaintiffs to sue under inducement whenever possible because doing so would reach many defendants who would not be liable under *Sony*.

The case for expansively applying inducement starts with the observation that defendants often know that their behavior will make significant infringement possible. If those defendants persist in such behavior, even for reasons unrelated to infringement, they should be held liable because they effectively want the infringement to happen and therefore are culpable. If accepted, this interpretation of inducement might impose liability on manufacturers of CD burners because manufacturers know that people often use those products to make infringing copies of music. The same conclusion might also apply to almost anyone whose behavior regularly supports infringement by others.²⁴²

241. See *supra* text accompanying notes 162–69, 191–202 (demonstrating how *Fonovisa* expanded third-party copyright liability).

242. This Article is not alone in predicting that litigants will advance claims like this. See Jane C. Ginsburg & Sam Ricketson, *Inducers and Author-*

Careful reflection shows that this interpretation of inducement is superficially attractive, but flawed. As an initial matter, Justice Souter's opinion carefully circumscribes inducement's reach:

[M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.²⁴³

Additionally, a broad cause of action for inducement may sound in fault, but it is inconsistent with the fault-based framework created by *Grokster*. Once again, the common law of tort provides the crucial insight, for inducement and the law of intentional tort both require intentional behavior by the defendant. In tort, courts define intent in two ways. A defendant accused of battery has intent if he acts with the express purpose of causing harmful or offensive contact on the plaintiff's body.²⁴⁴ Alternatively, intent exists if the defendant merely "knows with substantial certainty" that his conduct will cause such harmful or offensive contact.²⁴⁵ This dual definition of intent shows that the suggested broad application of inducement is simply the attempt to apply the second, alternate formulation of intent from tort. The claim is that third-party copyright

isers: A Comparison of the US Supreme Court's Grokster Decision and the Australian Federal Court's KaZaa Ruling, 11 MEDIA & ARTS L. REV. 1, 7 (2006), available at <http://ssrn.com/abstract=888928> (predicting that inducement will displace *Sony*-type inquiries involving substantial noninfringing uses).

243. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2780 (2005).

244. RESTATEMENT (SECOND) OF TORTS § 13(a) (1965) ("An actor is subject to liability to another for battery if . . . he acts intending to cause a harmful or offensive contact with the person of the other or a third person . . .").

245. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 (Proposed Final Draft No. 1, 2005) ("A person acts with the intent to produce a consequence if . . . the person acts knowing that the consequence is substantially certain to result."); RESTATEMENT (SECOND) OF TORTS § 8A ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."). See generally David J. Jung & David I. Levine, *Whence Knowledge Intent? Whither Knowledge Intent?*, 20 U.C. DAVIS L. REV. 551 (1987) (reviewing intent as defined by the first *Restatement of Torts* and the *Restatement (Second) of Torts*); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 471 (1992) (discussing intent and its role in tort law).

defendants intentionally induce infringement if they know with substantial certainty that their behavior will lead to infringement. After all, a person who knows that his behavior will surely cause harmful or offensive contact to another “wants” that contact to happen if he doesn’t change his behavior to stop it. Knowing with substantial certainty therefore makes a defendant culpable in a way that is comparable to a defendant who acts with the express purpose of causing harmful or offensive contact. Accordingly, third-party copyright defendants are as culpable as those who truly want infringement to occur simply because they know that their technologies or services lead to infringement.

The broad interpretation of inducement fails because it rests on an insufficiently nuanced understanding of tort law. The typical “knowing with substantial certainty” case involves a defendant who has certainty about a single act that exposes the plaintiff to a single instance of potential harm. In the classic case of *Garratt v. Dailey*, the defendant was a boy who pulled a chair out from under a plaintiff who was in the process of sitting down.²⁴⁶ The plaintiff, who fell to the ground and suffered injury, sued for battery.²⁴⁷ The trial court accepted the defendant’s protestation that he did not want the plaintiff to get injured and found for the defendant.²⁴⁸ However, the Supreme Court of Washington reversed on the ground that the trial court failed to consider whether the defendant knew with substantial certainty that the plaintiff would fall to the ground because the defendant had pulled the chair away.²⁴⁹

By contrast, tort law does not extend liability on the basis of substantial certainty to defendants whose substantial certainty comes from the repetitive creation of risk associated with the widespread manufacture and distribution of products. Consider the sale of automobiles, guns, alcohol, and cigarettes. Those who make and sell these things know with substantial certainty that some of their products will eventually injure someone, yet they are not held liable for those injuries as bat-

246. 279 P.2d 1091, 1092 (Wash. 1955).

247. *Id.*

248. *Id.*

249. *Id.* at 1093, 1095; *see also* RESTATEMENT (SECOND) OF TORTS, § 8A illus. 1 (“A throws a bomb into B’s office for the purpose of killing B. A knows that C, B’s stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.”).

terers. Liability, if any, exists under doctrines like negligence and products liability.²⁵⁰

The reasons for this are instructive. People have legitimate reasons for making and selling items like cars, guns, alcohol, and cigarettes. If battery were to control tort responsibility for the injuries these products cause, liability would turn on a blunt determination of whether the defendants knew that people would be injured. Manufacturers of widely distributed products always know that injuries are inevitable, so liability would seem certain. However, such a result would be absurd and unfair because the legitimate reasons for making these items sometimes make the associated risk of injury reasonable. Doctrines like negligence and products liability consider the reasonableness of a defendant's behavior in sophisticated ways that battery does not.²⁵¹ It is therefore a mistake to determine the liability of manufacturers on the basis of substantial certainty because doing so would supplant the sophisticated balancing analyses of negligence or products liability.²⁵² Courts

250. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 cmt. e (“The applications of the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area.”). Other authors have also discussed these issues. See James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1138–43 (2001) (noting the need to limit intent based on substantial certainty); Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165, 1172–73 (2001).

251. Both negligence and products liability weigh the social value of the defendant's behavior against any associated risks. Defendants become liable if these risks are unreasonable when compared against any social value. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998) (“A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”); RESTATEMENT (SECOND) OF TORTS § 291 (“[An] act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (analyzing numerous cases involving design-defect and the risk-benefit tests and suggesting that the design-defect test in products liability cases is similar to the negligence analysis of reasonableness).

252. See Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery*, 74 TEMP. L. REV. 355, 362–65 (2001) (noting that broad readings of intent would improperly swallow huge areas of negligence or strict products liability law).

understand this, and that is why they reject intentional tort liability in such cases.

For example, in *Shaw v. Brown & Williamson Tobacco Corp.*, the plaintiff sued a cigarette manufacturer for injuries the plaintiff contended arose from exposure to second-hand smoke.²⁵³ The plaintiff's complaint included claims for negligence and battery.²⁵⁴ The defendant responded by moving to dismiss all of the plaintiff's claims.²⁵⁵ The court granted the defendant's motion on battery, but it allowed the plaintiff's claim for negligent failure to warn to proceed.²⁵⁶

With respect to battery, the plaintiff argued that the manufacturer knew with substantial certainty that second hand smoke would eventually contact an unwilling person, causing injury.²⁵⁷ The logic of this claim is similar to the argument that a manufacturer of technology induces infringement because it knows that someone will eventually use the technology for infringement. The *Shaw* court recognized this logic, and rejected it:

Brown & Williamson did not know with a substantial degree of certainty that second-hand smoke would touch any particular non-smoker. While it may have had knowledge that second-hand smoke would reach some non-smokers, the Court finds that such generalized knowledge is insufficient to satisfy the intent requirement for battery. Indeed, as defendant points out, a finding that Brown & Williamson has committed a battery by manufacturing cigarettes would be tantamount to holding manufacturers of handguns liable in battery for exposing third parties to gunfire. Such a finding would expose the courts to a flood of farfetched and nebulous litigation concerning the tort of battery. It is unsurprising that neither plaintiffs nor the Court have been able to unearth any case where a manufacturer of cigarettes or handguns was found to have committed a battery against those allegedly injured by its products.²⁵⁸

253. 973 F. Supp. 539, 541–42 (D. Md. 1997).

254. *Id.*

255. *Id.* at 542.

256. *Id.* at 552.

257. *Id.* at 548 (“Plaintiffs argue that the intent requirement is satisfied by Brown & Williamson’s intentional manufacture, marketing, and distribution of Raleigh cigarettes, on the basis that such acts ‘set[] in motion the inevitable series of events leading to plaintiff Robert Shaw’s injuries.’” (alteration in original)).

258. *Id.* It is worth noting that courts in workers’ compensation cases sometimes appear to expand the understanding of intent along the lines suggested by the *Shaw* plaintiff. The facts of these cases typically involve an employer whose negligent behavior leads to an employee’s injury. The employee sues the employer, but the employer moves to dismiss on the ground that workers’ compensation provides the exclusive remedy for the employee’s in-

The foregoing shows why it is important to limit the reach of inducement. If *Grokster's* inducement is the conceptual analog of an intentional tort, then traditional doctrines shaped by *Sony* are conceptual analogs of negligence and products liability. Remember that *Sony's* assessment of noninfringing uses essentially asks whether a defendant's conduct is reasonable. If a technology has sufficient noninfringing uses, then it is reasonable to make and sell it. If those uses are lacking, selling the technology is unreasonable and liability follows.

Courts need to apply inducement narrowly because broad application will destroy the nuanced analysis established by *Sony* and endorsed in *Grokster*. Many, if not all, manufacturers of technology stand in positions similar to those occupied by manufacturers of socially valuable products because technology makers know that someone will eventually use their products to infringe. If courts adopt a broad interpretation of inducement, then substantial certainty about the consequence of infringement will be enough to establish third-party copyright liability, even in cases where the defendants make technology with substantial noninfringing uses. Such a result would make no sense because it would destroy our ability to distinguish between culpable defendants who sell technology with no legitimate uses and innocent defendants who sell technology with legitimate uses. These defendants can be separated only if the law is sensitive to the presence of noninfringing uses in cases where defendants do not want infringement to occur. Courts must therefore limit the reach of intentional inducement in order to preserve the nuances associated with the *Sony* rule, just as they limit the reach of battery to preserve the nuances of negligence and products liability.²⁵⁹

jury. Employees generally fight these motions for dismissal by claiming that the employer deliberately or intentionally injured the employee because the employer knew with substantial certainty that its behavior would cause injury to an employee. Courts sometimes accept this argument, suggesting that "knowledge with substantial certainty" makes otherwise negligent conduct intentional. However, these cases are better understood as defining the scope of workers' compensation and not the general shape of tort law. See *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507, 508 (Conn. 1994); *Turner v. PCR, Inc.*, 754 So. 2d 683, 684 (Fla. 2000), *superseded by statute*, FLA. STAT. § 440.11(1)(b) (2003), *as recognized in* *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 781 & n.1, 784 n.5 (Fla. 2004); *Sherner v. Conoco, Inc.*, 995 P.2d 990, 998–99 (Mont. 2000); *Birkliid v. Boeing Co.*, 904 P.2d 278, 280–81 (Wash. 1995).

259. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2781 n.12 (2005) ("Of course, in the absence of other evidence of intent, a

Supporters of expansive third-party copyright liability will understandably balk at the suggestion made here. In their opinion, cases like *Sony* are far too lenient on defendants because they leave behind loopholes to be exploited by cynical faulty defendants. Expansive interpretations of third-party copyright liability are therefore necessary, they argue, because those interpretations make it possible to hold all faulty defendants liable. These supporters acknowledge the exposure of innocent defendants to liability and the suppression of noninfringing behavior as unfortunate, but they argue that these consequences are less important than guaranteeing the security of copyright against cynically faulty behavior. It is therefore important for courts to follow the lead of cases like *Fonovisa* and interpret contributory liability and inducement as broadly as possible.

To be sure, the arguments suggested here have some appeal, but *Grokster* has accounted for them rather well. The argument in favor of expansive liability operates from a concern that cynical defendants will deliberately encourage infringement in hopes of profiting from it. This is exactly what happened in *Fonovisa*, where the defendants purposefully helped infringers hide their identities in order to protect the rental fees paid by infringers.²⁶⁰ There is, however, no longer much need to interpret third-party copyright liability expansively to catch these defendants because a properly limited inducement cause of action can do so with a much smaller risk of unfortunate consequences.

Remember that the touchstone of inducement is the deliberate promotion of infringement by others.²⁶¹ Inducement will therefore impose liability on many, if not all, of the cynical defendants whose behavior justifies the expansive interpretation of third-party copyright liability, and it will accomplish this

court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.”); Henderson & Twerski, *supra* note 250, at 1138–43 (discussing the importance of limiting the reach of intentional torts based on substantial certainty); Sebok, *supra* note 250, at 1172–73 (identifying problems with intent based on substantial certainty and advocating its elimination).

260. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 847 F. Supp. 1492, 1494 (E.D. Cal. 1994), *rev'd*, 76 F.3d 259 (9th Cir. 1996).

261. See *Grokster*, 125 S. Ct. at 2777–78; *supra* text accompanying note 221 (quoting *Grokster*).

task with relatively few unfortunate side effects. *Fonovisa's* expansive interpretation of contributory liability successfully held cynically faulty defendants liable, but it paved the way for claims against all kinds of innocent defendants like Internet service providers, credit card companies, and even the electric company.²⁶² If the *Fonovisa* court had applied inducement to its cynical defendants, it would likely have found them liable because the defendants behaved in a manner deliberately calculated to assist infringers.²⁶³ However, the same reasoning would not have exposed Internet service providers, credit card companies, or the electric company to liability because none of them wants infringement to occur. In short, *Grokster* effectively eliminated the need for expansive interpretations of contributory liability by endorsing inducement, a cause of action that achieves the goals of expansive contributory liability with far fewer undesirable side effects.²⁶⁴ This answers the concerns of those who argue for the expansive interpretation of third-party copyright liability.

262. See *supra* text accompanying notes 162–69 (analyzing the effects of an expansive interpretation of third-party copyright liability).

263. See *supra* text accompanying notes 109–16, 202 (describing the *Fonovisa* defendants' behavior and the court's perception that the defendants were cynically culpable).

264. This Article does not claim that every expansive third-party copyright liability case was correctly decided. Indeed, some of those cases were mistakes that could have been avoided if courts had used the analytical tools suggested here. For example, consider the finding of vicarious liability against Malone in *Motorvations Inc. v. M&M Inc.*, No. 2:99cv0824, 2001 WL 1045617 (D. Utah July 6, 2001). Recall that Malone was held vicariously liable for infringement committed by the advertiser Whipple despite never dealing with Whipple at all. The court justified finding liability against Malone because it was afraid that other defendants would take advantage of an ambiguity in the law to escape liability. *Id.* The court's solution was to interpret the law so that Malone was liable. See *supra* note 202 (discussing *Motorvations*). *Motorvations* is troubling because it holds a defendant vicariously liable for the infringement of another despite having only a remote business relationship with the infringer. The court's motivation for doing so is perfectly understandable, but the results make overbroad liability far too likely. This problem could have been avoided by using the framework suggested by this Article. Malone would probably have escaped vicarious liability because it did not have a respondeat superior relationship with Whipple. Also, Malone would probably have escaped inducement and contributory liability because it neither wanted infringement to occur nor acted in an unreasonably careless manner. At the same time, the court would not have had to worry as much about future cynical defendants escaping liability because those defendants would likely want infringement to occur. The court could have accordingly used inducement to impose liability on those defendants.

C. THE IMPROVED CONSTRUCTION OF THIRD-PARTY COPYRIGHT LIABILITY

It is now possible to summarize the improved construction of third-party copyright liability after *Grokster*. There are now three causes of action for such liability: vicarious liability, contributory liability, and inducement. In the vast majority of cases, the existence of liability depends on a showing that the defendant is at fault. This means that contributory liability and inducement will govern most third-party copyright liability cases, with vicarious liability limited to those cases where agency principles such as respondeat superior would impose strict liability on defendants. Additionally, courts should apply contributory liability and inducement conservatively. In particular, courts must avoid interpreting contributory liability in expansive ways that expose innocent defendants to liability and suppress noninfringing behavior. Instead, courts should make sure that the law of contributory liability remains sensitive to the culpability of defendants and the social costs and benefits associated with their behavior. Finally, inducement should be found only when the defendant acts for the express purpose of encouraging infringement. Plaintiffs should not be allowed to recover when a defendant simply knows with substantial certainty that his behavior will support infringement. Such a construction of the law is flawed because it would destroy the sensitive balancing that must occur when the defendant does not deliberately want infringement to occur.

CONCLUSION

This Article began with a description of third-party copyright liability before *Grokster*. It showed that pre-*Grokster* law had an inconsistent structure that led to significantly divergent interpretations of the law. This divergence made the law incoherent because plaintiffs and defendants alike could never be sure what line of cases the courts would apply. The Article then analyzed *Grokster* and showed that the Supreme Court has made significant choices that imply a limited construction of third-party copyright liability. To be sure, some will not agree about whether the Supreme Court's choices are normatively desirable, and they will argue for a return to expansive third-party liability. However, the Article has shown that the limited approach described here will accomplish many of the objectives that inspire expansive liability with far fewer negative consequences.

Of course, it would be foolish to claim that *Grokster* has settled all controversies related to third-party copyright liability, and no such claim is made here. Even if courts adopt the construction of third-party copyright liability proposed here, many unresolved questions will remain. For example, vicarious liability may have a limited role in third-party copyright liability, but the precise contours of its limits are not clear. The doctrine's origins in respondeat superior suggest that such liability could be limited to employers being sued for infringement committed by their employees.²⁶⁵ Nonetheless, it is conceivable that courts will identify other limits that would not overwhelm the fault-based construction of the law. Similarly, contributory liability may now become the dominant doctrine in third-party copyright liability, but that doctrine does not identify the kinds of behavior that future courts will find unreasonable. Individuals pursuing legitimate objectives will inevitably expose copyright holders to the risk of infringement, and victims of infringement will claim that defendants should have done more to protect copyright. It remains to be seen whether courts will give defendants the duty to affirmatively thwart infringement or whether the honest pursuit of legitimate objectives will be found reasonable.²⁶⁶ Finally, courts will surely face unknown difficulties when they are asked to begin applying the doctrine of inducement.

All of these challenges are significant, and there will be others as well. Nevertheless, the intellectual foundations provided by *Grokster* represent a distinct improvement over those available before *Grokster*. If nothing else, the construction of third-party copyright liability offered here will give courts a coherent framework that encourages courts to approach difficult issues in a cogent, reasonably consistent way. It is this Article's hope that decisions made within this framework will, in the long run, benefit society.

265. See *supra* note 240 and accompanying text (arguing that vicarious liability should be limited to the contours of respondeat superior).

266. See David G. Post et al., "Nice Questions" Unanswered: *Grokster*, Sony's Staple Article of Commerce Doctrine, and the Deferred Verdict on Internet File Sharing, 2005 CATO SUP. CT. REV. 235, 257–61 (describing questions left unanswered by *Grokster*); Christine Pope, Note, *Unfinished Business: Are Today's P2P Networks Liable for Copyright Infringement?*, 2005 DUKE L. & TECH. REV. 22, ¶¶ 29–36, <http://www.law.duke.edu/journals/dltr/articles/PDF/2005DLTR0022.pdf> (surveying post-*Grokster* ambiguity in the law).