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COPYRIGHT LIABILITY FOR THOSE WHO PROVIDE THE MEANS OF INFRINGEMENT: IN LIGHT OF THE RIAA LAWSUITS, WHO IS AT RISK FOR THE INFRINGING ACTS OF OTHERS?

Karen Horowitz¹

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Abstract

To date, the Recording Industry Association of America (RIAA) has become increasingly tough on the illegal downloading of copyrighted materials. In light of the increased prevalence of suits against minors or persons with little ability to pay, individuals or institutions that provide the means for the infringing activities, such as guardians or network owners (including, for example, the owner of an unsecured home network or the owner of an Internet café), need to be aware of the potential liability they might face. To place liability upon an individual or institution providing Internet access, a plaintiff could file suit for indirect copyright infringement under the doctrines of vicarious liability, contributory infringement, or inducement. Alternatively, to receive damages from the guardian of a minor child, the plaintiff could file suit against the minor child and attempt to satisfy any judgment from that claim through state parental liability statutes. This Article will discuss these approaches to liability and the risks facing these classes of actors.

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INTRODUCTION

<1>As of June 2006, the Recording Industry Association of America (RIAA) had brought suit against 17,587 individuals.² This group includes Vickey Sims, the mother of a teenager, Nicole Phillips, who downloaded 1,200 MP3s by artists such as George Strait and Kirk Franklin.³ Although Sims “does not even know how to download a song,” the RIAA is seeking a \$75,000 judgment against her.⁴ The group of 17,587 individuals also includes Marie Lindor, a woman who does not even own a computer, but left an unsecured, unencrypted wireless router operating in her apartment.⁵ These claims raise the issue of whether an individual or institution, such as the owner of an unsecured network or of an Internet café or the guardian of a minor child, that did not directly engage in any infringing activity, may be held liable under existing law.⁶ Because the guardians of minor children are so often in the position of providing the means through which another individual engages in copyright infringement, examining the ways in which a copyright holder can extend liability to guardians serves to illustrate the manner in which liability could be placed on other network owners.

<2>A record company could file suit for indirect copyright infringement under the doctrines of vicarious liability, contributory infringement, or inducement if it wanted to place liability upon either a guardian for the alleged infringing activities of a child, an Internet café owner for the activities of a customer, or a network owner for the activities of a user.⁷ Although this would not permit the record company to reach the network owner or Internet café owner directly, the record company could alternatively file suit against the minor child and attempt to satisfy any judgment from that claim through state parental liability statutes. The merits of these claims are highly dependent upon the specific facts involved. In the typical file-sharing cases, where the individual or institution providing the means for the infringement is unaware of the infringing activity, there is little risk of liability. However, where there is tacit approval or encouragement of the infringing action, indirect liability could possibly be found. This Article will discuss these approaches to indirect liability and these classes of actors in turn.

VICARIOUS LIABILITY

<3>Vicarious copyright liability is found when the defendant has the right and ability to control the infringing activity, as well as a direct

financial interest in the exploitation of copyrighted materials. Each of these elements presents a unique obstacle to indirect liability when considered in the context of a network owner or a guardian.

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Control

<4>First, to be held accountable under a theory of vicarious copyright liability, the network owner or guardian must have the ability to control the actions of the direct infringer.⁹ It appears that to be held vicariously liable, the network owner or guardian must have “the practical, rather than the strictly legal, ability to control the activities of the direct infringer.”¹⁰ However, in some cases, legal authority over the infringing actor has been held sufficient to meet the control requirement. For example, the Ninth Circuit, in *Fonovisa v. Cherry Auction*, held that the operator of a swap meet, who had a contractual right to exclude a vendor for any reason, possessed the control required to establish vicarious liability.¹¹ In *Davis v. E. I. DuPont de Nemours & Co.*, the sponsor of a television program was also held vicariously liable for failing to exercise its contractual right to review scripts so as to prevent copyright violations from occurring.¹²

<5>Conversely, particularly where the exercise of legal authority would be impracticable, other courts have declined to hold that it is sufficient to establish the control element of vicarious liability.¹³ For example, in *Adobe Systems, Inc. v. Canus Productions, Inc.*, a California federal district court found that the ability of the landlord to control the crowds and the flow of traffic into a trade show, or to respond to theft or vendor disputes within the trade show complex, was not equivalent to the practical ability to police the content of vendors’ booths.¹⁴ In a similar case, *Bevan v. Columbia Broadcasting System, Inc.*, the sponsor of a television program was not held vicariously liable for copyright infringement even though he possessed the contractual right to request alterations of the script prior to filming.¹⁵

<6>In the case of a guardian with an infringing child, it may be very difficult for the plaintiff to demonstrate that the guardian possessed the requisite level of control. The guardian’s computer expertise, the time, place, and manner in which the infringing activities occurred, and other factual considerations will certainly be at issue in determining whether this element of liability has been met.¹⁶ For example, in situations where the guardian has no computer knowledge and the computer is solely used by the minor child, it seems implausible that a court would find that the guardian had control over the minor child’s infringing activities. As the guardian’s computer expertise and involvement in the child’s use of the computer increases, control is more likely to be found. This

Santangelo, where the court denied the defendant's motion to dismiss the plaintiffs' direct infringement claim against her, but expressed skepticism that "an Internet-illiterate parent, who does not know Kazaa from a kazoo," could be held liable for copyright infringement committed by a child who downloads music over the Internet without the parent's knowledge or permission but using the parent's Internet account.¹⁷

<7>More sophisticated network owners, however, should be aware that they could easily be found to have control over the activities of the direct infringer. While a home wifi operator may be found to have no more control than a typical guardian, in the case of an Internet café owner, for example, a certain degree of computer expertise may be presumed. Moreover, by taking steps to secure the network or to prevent access to certain known file-sharing websites, an ability that a sophisticated network owner is more likely to possess than a guardian or a home wifi operator, the network owner would be able to prevent the infringing activities in most cases.

Financial Benefit

<8>The defendant network owner or guardian must also receive a financial benefit from the infringing activity in order to be held accountable under vicarious copyright liability.¹⁸ To satisfy this element, there must be a "causal relationship between the infringing activity and any financial benefit a defendant reaps."¹⁹ Accordingly, in *Roy Export Establishment Co. v. Trustees of Columbia University*, the university was not found vicariously liable because it received no financial benefit when a university student group showed a copyrighted film on campus.²⁰ Similarly, in *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors and Northwest Nexus, Inc.*, a website hosting company was not vicariously liable for hosting a site that contained copyrighted images because it charged a flat hosting fee and its profits did not depend on traffic generated by the alleged infringement.²¹ However, the financial benefit need not directly flow from the infringing activity. In *Davis v. E.I. DuPont De Nemours & Co.*, the sponsor of an infringing television show was found to benefit from increased sales which were a result of the program's publicity.²²

<9>In typical file-sharing cases, a plaintiff would probably be unable to demonstrate that either a guardian or a network owner derives a financial benefit from the infringing actions of another party because the infringing actions typically only provide benefits for that actor. It could be argued that a guardian does benefit from the minor child's infringement because the guardian would otherwise have purchased the songs for the child.²³ It is rarely the case,

however, that a guardian would purchase all the music for the minor child; there are no studies where a reputable surveyor such as Gallup actually demonstrates that the albums would have been purchased if they had not been downloaded instead.²⁴ Whether a network owner will be deemed to derive a financial benefit from the infringement is highly dependent on the particular factual situation involved. Network owners are more likely to be found vicariously liable when they intend for third parties to access their networks than when the third parties gain access without the network owner's awareness.²⁵ The Napster court, for example, found that "financial benefit exists where the availability of infringing material acts as a draw for customers."²⁶ Accordingly, if a network owner profits by providing a service where third parties are lured by the ability to commit infringing acts, he can be held vicariously liable. An Internet café owner may need to be wary here; if it could be shown that customers were visiting the café due to their ability to commit copyright infringement there, a financial benefit could be found.

<10> It should be noted, however, that there are currently no cases holding that the mere owner of an Internet account is vicariously liable for the infringing activities of third persons.²⁷ To make a sufficient case of vicarious liability, the plaintiff must specifically allege that the defendant profited from a direct infringement; the allegation that the defendant owned the Internet account alone is not enough.²⁸

CONTRIBUTORY INFRINGEMENT

<11> If the elements for vicarious liability are not met, a defendant network owner or guardian may alternatively be held liable if he knowingly "induces, causes, or materially contributes to" ²⁹ the copyright infringement.³⁰

Material Contribution

<12> Some courts have held that a defendant materially contributes to the infringing activity by providing the "site and facilities."³¹ In *Fonovisa*, the court found that the operator of a swap meet who provided "space, utilities, parking, advertising, plumbing, and customers" to the direct infringers could be liable for contributory copyright infringement.³² Similarly, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, a company which provided a service that automatically distributed all Usenet postings did satisfy the material contribution element of contributory infringement.³³

contributed to the infringing activities when the assistance provided Washington Journal of Law, Technology & Arts, Vol. 4, Iss. 3 [2008], Art. 4 is not directly related to the infringing activities.³⁴ For example, in *Perfect 10, Inc. v. Visa International Service Association*, the defendant was not held liable for providing credit card processing services to a copyright infringer because those services did not directly assist the infringing activity.³⁵ Likewise, in *Demetraides v. Kaufman*, the sale of an unimproved lot upon which an infringing house was subsequently built did not constitute a material contribution to the infringing activity.³⁶

<14> Whether or not a guardian has materially contributed to the infringing activities of this child is likely to depend on the particular support and resources provided. This would be the case as well with a network owner and its relationship to third parties. Providing access to an Internet connection (and perhaps to a computer as well) is likely to be viewed by the court as a material contribution, as it is analogous to the site and facilities provided in *Fonovisa*. However, as discussed below, given the substantial non-infringing uses of those resources, a guardian probably does not need to fear liability for contributory infringement.

Knowledge

<15> The defendant network owner or guardian must also have knowledge of the direct infringement to be found liable for contributory copyright infringement. The knowledge standard is generally recognized as the objective “[know], or have reason to know” standard.³⁷ There is no requirement that the defendant have actual knowledge of the infringement. In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, the court held that advertisers and distributors could be held liable for contributory copyright infringement if they should have known of the infringement based on indications such as a product prices far below market value.³⁸ Similarly, in *Aveco*, the court found that a video rental store that rented out rooms with videocassette players could be held liable even without actual knowledge that copyrighted materials were being played in those rooms.³⁹

<16> Mere knowledge that copyright infringement might possibly be occurring, however, is not sufficient to support a claim of copyright infringement. In *Adobe v. Canus*, the court held that receiving a letter referring to possible sales of infringing products was not enough to establish knowledge of infringement.⁴⁰ The U.S. Supreme Court also has declined to find that the knowledge requirement of contributory copyright infringement is met when the material provided has substantial non-infringing uses. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court held that manufacturers of videocassette recorders were not liable for ~~infringing uses of the technology~~ because the recorders could

<17> However, a defendant may be liable for infringement if a person or entity is willfully blind to the knowledge of the infringing activity.⁴² In *Louis Vuitton S.A. v. Lee*, the court held that although a finding of contributory trademark infringement required the defendant to have knowledge that the mark was counterfeit, it was sufficient that the defendant failed to inquire further because he was afraid of what the inquiry would yield.⁴³

<18> In the typical file-sharing cases, a guardian would probably not meet the knowledge standard since computers and Internet connections have substantial non-infringing uses. Although the guardian's computer expertise and knowledge of file-sharing would likely come into play, it seems unlikely that liability would be imposed given the possible educational value of providing computer access to children. However, in a situation where the guardian was aware of the infringing activities of their child, guardians could be facing liability. Home network owners are less likely than guardians to be directly aware of the infringing acts of another party. However, they may face liability under the "reason to know" prong because they are operating a network without supervising how it is being used at all. This is another situation where the network owner's computer expertise would come into play. Internet café owners may face the most risk of liability here if their business is targeted in such a way as to give them "reason to know" that infringement is occurring.

INDUCEMENT

<19> In June 2005, the Supreme Court recognized inducement as a distinct form of contributory copyright infringement.⁴⁴ In *MGM v. Grokster*, copyright holders sued the distributors of free software used primarily to download copyrighted materials. The distributors argued that they could not be found liable for contributory infringement since substantial non-infringing uses for the software existed. The court, however, held that a person who distributes a device with the goal of encouraging copyright infringement is liable for the resulting incidents of infringement which occur.⁴⁵ Using the theory of inducement, a copyright holder may prevail on a claim of contributory infringement if he can prove that the accused has made an affirmative act directed at encouraging infringing uses and has the intent of promoting copyright infringement.⁴⁶

<20> Inducement is unlikely to be relevant for most typical guardian/child file-sharing lawsuits. However, network owners who, for example, own a coffee-shop or a similar establishment and encourage customers to bring in their computers and use the network may risk liability if they are seen as encouraging acts of

infringement to occur.

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STATE PARENTAL LIABILITY

<21> Copyright owners might also attempt to hold guardians liable for the infringing activities of their children by using state laws which assign liability to parents for the torts of their minor children.⁴⁷ Although this analysis will differ based on the peculiarities of state law, in general, two questions should be considered: (1) the applicability of the law to the tort of copyright infringement; and (2) whether the law is preempted by the Copyright Act.⁴⁸

Applicability to Copyright Infringement

<22> Common law generally precludes the collection of judgments against "assets in which the judgment debtor has no interest," which includes the assets of the parent of a minor child.⁴⁹ Many states, however, have carved out an exception to this rule in the case of willful misconduct and have allowed parental liability based on damage the child has done to "property."⁵⁰ In some states, these statutes may apply only to the damage of physical property, rendering them inapplicable to cases of copyright infringement.⁵¹ If, however, the parental liability statute extends to intangible intellectual property, then copyright infringement might be found to cause harm or damage.

<23> In addition, state parental liability statutes have various standards of intent that must be met before parental liability will be found.⁵² Some states require only "willful conduct" on the part of the minor, while others require that the harm itself be willful.⁵³ Others go further and require "willful and malicious" activity for parental liability.⁵⁴ This differs from the intent standard in a typical copyright case; in states requiring malice or an intent to cause harm, the plaintiff must prove this further element before parental liability for the minor child's infringement will be applied.⁵⁵

<24> Assuming that the statute is applicable to copyright infringement, and that the conduct of the child meets the statutory intent requirements, the amount of damages that may be assessed against the guardian may be limited by the statute.⁵⁶ If such a statutory cap exists, the court will need to decide whether it is to be applied to each instance of copyright infringement or as an overall cap on liability for the entire course of infringement.

<25> The California Court of Appeals grappled with a similar issue in *Thrifty-Tel, Inc. v. Bezenek*.⁵⁷ There, the parents were held liable under California's parental liability statute for multiple instances in

which their sons and sons' friends hacked into the phone company network in order to make long-distance phone calls.⁵⁸ Without resolving the issue, the court identified three possible interpretations of the California statute which placed a monetary cap on liability for "each tort:" (1) each individual instance of hacking could be treated as a separate tort; (2) each session could be treated as a tort; or (3) the entire course of action could be treated as a collective tort.⁵⁹

<26> In the case of copyright infringement caused by illegal file-sharing or downloading of music, the difference would be dramatic. Treating the entire course of file-sharing as a tort would sharply limit parental liability, while considering each song as a separate tort could lead to astronomical damages against the guardian.

Preemption

<27> The application of state parental liability statutes to copyright actions may be barred by the doctrine of preemption. An action brought under state law may be expressly preempted by section 301 of the Copyright Act or may be subject to a field preemption.⁶⁰

<28> Section 301 of the Copyright Act bars all claims based on state-granted rights "that are equivalent to any of the exclusive rights within the general scope of copyright..."⁶¹ Whether or not a state action is explicitly barred is generally determined by the "extra-element test:" if the state claim requires an extra element beyond those required for copyright infringement, then it is not equivalent and therefore not preempted.⁶² The extra element must change the nature of the claim so that it is qualitatively different from a copyright infringement claim.⁶³ For example, a claim based on contract law satisfies the extra-element test and is not preempted by the Copyright Act,⁶⁴ but claims that add only an element relating to the defendant's state of mind do not satisfy the extra-element test and are preempted.⁶⁵

<29> In the case of a claim made using a state parental liability statute, the court may find that the claim is founded on a violation of the rights enumerated in the Copyright Act, and that such claims are therefore preempted. Alternatively, the courts could decide that the scope of those against whom damages may be collected is distinct from the issue of the original infringement, and that such claims are therefore not explicitly preempted.⁶⁶

<30> Even if claims using state parental liability statutes are not expressly preempted by section 301, they may still be barred by a field preemption. A court could find that the Congressional intent to create indirect copyright liability conflicts with any state law

creating alternate forms of indirect liability, and is accordingly preempted by the Supremacy Clause.⁶⁷

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DIGITAL MILLENNIUM COPYRIGHT ACT SAFE HARBOR

<31>The simplest and cheapest way a network owner may protect against liability for copyright infringement resulting from users' actions is to comply with the safe harbor provisions of the Digital Millennium Copyright Act (DMCA).⁶⁸ Under the statutory definition provided in the DMCA, network owners are considered to be "service providers."⁶⁹ The DMCA prevents service providers from being found liable for copyright infringement, provided that they meet certain requirements. First, the service provider must not initiate the transmission of the infringing material, and cannot be responsible for the selection of the material or the recipients except through automatic processes. Further, the service provider must also not retain a copy of the infringing material and must not modify its content.⁷⁰

Limitations to the Safe Harbor Provisions

<32>The DMCA does not grant blanket protection from copyright infringement liability. The service provider may not take advantage of the DMCA's safe harbor provision if: (1) the service provider has actual knowledge that the material or an activity using the material on the system or network is infringing; (2) the service provider is aware of facts or circumstances from which infringing activity is apparent; or (3) the service provider does not expeditiously remove or disable access to the material upon obtaining such knowledge or awareness of the infringing material.⁷¹ In addition, if the network owner has the right and ability to control the infringing activity and if the network owner receives a financial benefit directly attributable to the infringing activity, the network owner will not be protected by Section 512 of the DMCA.⁷²

CONCLUSION

<33>Although it would be likely to occur only under rare circumstances, network owners and guardians could potentially face liability for the infringing activities of their children or third parties using theories of vicarious liability, contributory infringement, inducement, or through a state parental liability statute. These claims are very fact-specific. In the typical file-sharing cases, where the guardian or network owner is not particularly skilled with computers and has no knowledge of the infringing actions, there is little risk of liability. However, in other situations, particularly where the guardian or network owner receives a clear financial benefit

and tacitly approves of or encourages the infringing action, indirect liability could possibly be found.

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Footnotes

1. Karen Horowitz, University of Washington School of Law, Class of 2008. Thank you to Professors Jane Winn and Anita Ramasastry of the University of Washington School of Law, Professor Wendy Seltzer of Northwestern University School of Law, and Ari Okano for their guidance during the writing process.
2. *RIAA Watch*, BLOGSPOT, June 16, 2006, <http://sharenomore.blogspot.com>.
3. Steve Knopper, *RIAA Will Keep on Suing*, ROLLING STONE, June 9, 2005, available at http://www.rollingstone.com/news/story/7380412/riaa_will_keep_on_suing.
4. *Id.*
5. *RIAA Sues Woman That Has No Computer*, AFTERDAWN.COM, Feb. 5, 2006, <http://www.afterdawn.com/news/archive/7280.cfm>.
6. It is significant to note that Section 512 of the Digital Millennium Copyright Act insulates certain types of on-line service providers from liability. If the putative defendant meets the definition of a service provider found in Section 512(k), and all the other conditions are met, then the defendant will not have any liability for contributory or vicarious infringement.
7. Any claim of indirect infringement requires proof of direct infringement as a necessary element. *See, e.g., A&M Records v. Napster*, 239 F.3d 1004, 1013 (9th Cir. 2001) (holding that the defendant, Napster, which provided a platform for users to upload and download music files in a compressed digital format, could be held liable for contributory infringement of the plaintiff record company's copyrights).
8. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (holding that the owner of a chain of department stores where a concessionaire was selling counterfeit recording was liable for the infringement because the defendant (1) could control the premises and (2) obtained a direct financial benefit).

9. Fred von Lohmann, *IAAL: What Peer-to-Peer Developers Need to Know about Copyright Law*, ELECTRONIC FRONTIER FOUNDATION, Jan. 2006, http://www.eff.org/IP/P2P/p2p_copyright_wp.php.
10. PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 6:22 (Aspen 2005).
11. *Fonovisa v. Cherry Auction*, 76 F.3d 259, 262 (9th Cir. 1996).
12. *Davis v. E. I. DuPont de Nemours & Co.*, 240 F. Supp. 612, 632 (S.D.N.Y. 1965).
13. GOLDSTEIN, *supra* note 10, at § 6:22.
14. *Adobe Systems, Inc. v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044 (C.D. Cal. 2001) (holding that *Fonovisa* rested on an inference of a practical ability to control ongoing infringing activity based on the factual situation and denying permanent injunction in action for contributory and vicarious copyright infringement against computer fair proprietors based on unauthorized sale of software by vendors).
15. *Bevan v. Columbia Broadcasting System, Inc.*, 329 F. Supp. 601, 610 (S.D.N.Y. 1971).
16. Although parents have a legal ability to control the actions of their children, these factors would serve to illustrate whether a parent had the practical ability to control the infringing activities of his/her child. Chris Conley, *Memorandum: Parental Liability for Copyright Infringement by Minor Children*, ELECTRONIC FRONTIER FOUNDATION, Nov. 1, 2005, http://www.eff.org/IP/P2P/Parent_Liability_Nov_2005.pdf.
17. *Elektra Entertainment Group, Inc. v. Santangelo*, 2005 WL 3199841, at *3 (S.D.N.Y. 2005).
18. *See, e.g., Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-99 (1931); *Dreamland Ballroom, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929).
19. *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (holding that the "direct financial benefit" element of a vicarious copyright infringement claim can be satisfied by showing that infringing matter on a website is part of the website's draw to users, even if the proportion of the OSP's income directly linked to the infringing activity is not "substantial." However, the court also stated that "the central question of the 'direct financial benefit' inquiry [for vicarious liability] ...

is whether the infringing activity constitutes a draw for subscribers, not merely an added benefit.).
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20. Roy Export Establishment Co. v. Trustees of Columbia University, 344 F. Supp. 1350 (S.D.N.Y. 1972).
21. Marobie-FL, Inc. v. National Association of Fire Equipment Distributors and Northwest Nexus, Inc., 983 F. Supp. 1167 (N.D.Ill. 1997).
22. Davis v. E.I.DuPont De Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965).
23. Mark Zuckerman & Devon Bush, *Memorandum: Parental Liability for Copyright Infringement by Child*, ELECTRONIC FRONTIER FOUNDATION, Oct. 24, 2003, (on file with the author).
24. Janis Ian, *The Internet Debacle: An Alternative View*, JANISIAN.COM, May 2002, http://www.janisian.com/article-internet_debacle.html.
25. See, e.g., Eric Bangeman, *RIAA Appeals Attorneys' Fees Award*, Feb. 22, 2007, <http://arstechnica.com/news.ars/post/20070222-8902.html>. The RIAA has also extended the line of reasoning and argues that network owners with a "reason to know" of the infringing activity should be held liable. In the case of someone with an open wireless network, that could constitute something as simple as experiencing traffic slowdowns. Eliot Van Buskirk, *RIAA Fights Back, Threatens Open Wi-Fi*, LISTENING POST, Feb. 22, 2007, http://blog.wired.com/music/2007/02/riaa_contests_d.html.
-
26. See Lohmann, *supra* note 9.
27. Capitol Records, Inc. v. Foster, 2007 U.S. Dist. LEXIS 29131, *10 (W.D. Okla. Feb. 6, 2007) (granting in part defendant's application for award of attorneys' fees).
28. *Id.*
29. Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that an organization that promoted infringing concerts sponsored by an affiliated group had the "ability to supervise the infringing activity" and therefore, for this and other reasons, was liable for contributory infringement).
30. There is no a priori difference in liability that turns on whether an individual or institution is found liable for

vicarious or contributory infringement. Both contributory and vicarious infringement are treated as

“infringements” of copyright under the Copyright Act with no distinction as to the entity that infringes. An infringement then subjects the entity to the range of remedies in chapter 5 of the Act. Section 504 provides for statutory damages—i.e., damages without proof of loss—or actual damages, which include lost profits to the extent that the latter are not included in proven loss. As a practical matter, the measure of damages can vary dramatically. In the case of actual damages, the measure of damages depends on the plaintiff’s ability to prove damages, including lost profits. Both contributory and vicarious infringers may have significantly different degrees of liability depending on the plaintiff’s particular business model and its ability to prove lost profits. In the case of statutory damages, the court has wide discretion to award damages based in part on its assessment of the defendant’s willfulness in the infringing activity. Although copyright infringement is a strict liability statutory tort, “innocent” infringement will trigger the lowest range of possible damages.

31. *Fonovisa*, 76 F.3d at 264. See also *Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986).
32. *Fonovisa*, 76 F.3d at 264.
33. *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).
34. 3-12 MELVILLE NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.04[A][3][a] (2007) (“the ... assistance must bear some direct relationship to the infringing acts.”).
35. *Perfect 10, Inc. v. Visa International Service Association*, 2004 WL 1773349, at *3-4 (N.D. Cal. 2004).
36. *Demetraides v. Kaufman*, 690 F. Supp. 289, 291-93 (S.D.N.Y. 1988).
37. See *Gershwin*, 443 F.2d at 1162.
38. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 404-05 (S.D.N.Y. 1966).
39. *Aveco*, 800 F.2d at 62.
40. *Adobe*, 173 F. Supp. 2d at 1056.
41. *Sony Corp. of America v. Universal City Studios, Inc.*,

464 U.S. 417, 427 (1984).

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42. "Willful blindness is knowledge, in copyright law." In re Aimster Copyright Litigation, 334 F.3d 643, 650 (7th Cir. 2003).
43. *Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th Cir. 1989).
44. *MGM v. Grokster*, 545 U.S. 913 (2005).
45. *Id.* at 918.
46. See Lohmann, *supra* note 9.
47. See Zuckerman, *supra* note 23.
48. Copyright Act, 17 U.S.C. § 301 (2008).
49. *Bass v. Bass*, 140 A.D.2d 251, 253 (N.Y.A.D. 1988).
See also Andrew C. Gratz, *Increasing the Price of Parenthood: When Should Parents be Held Civilly Liable for the Torts of Their Children?*, 39 *Hou. L. Rev.* 169 (2002).
50. See, e.g., NY Gen Oblig § 3-112 (2007).
51. In California, parents are "jointly and severally liable ... for any damages" up to \$25,000 "resulting from the willful misconduct" of the child. Cal. Civil Code § 1714.1(a) (2008). This statute has been applied to damage to intangible property, but has collected a sequence of tortious actions into a single tort for the purposes of applying the cap on parental liability. There is some precedent that suggests that California law might limit recovery to actual rather than statutory damages. In New York, parents are liable when their children "willfully, maliciously or unlawfully" damage property, which appears to allow a broader range of activities to be ascribed to the parent. However, the damages may not exceed \$5,000 per violation. Furthermore, damages may be mitigated based on the parents' financial status (to a minimum of \$500) or based on diligent supervision. NY Gen. Oblig. § 3-112. In Texas, parents are only liable for property damage when a child "willfully and maliciously" causes harm to the property of another or when the child's negligent conduct is reasonably attributable to the parent's failure to discipline. Tex. Fam. Code § 41.001 (2007). In the case of music download, proving that the harm was malicious may be difficult. Texas also has a statutory cap of \$25,000 per incident. Tex. Fam. Code § 41.002 (2007).

52. Pamela Graham, *Parental Liability Laws: Let the Punishment Fit the Crime*, 33 Loy. L.A. L. Rev. 1719 (2000).
53. Cal. Civil Code § 1714.1(a) (requiring "willful misconduct"), NY Gen. Oblig. § 3-112 (requiring willful, malicious, or unlawful damage to property), Tex. Fam. Code § 41.001 (requiring either negligent conduct that is reasonably attributable to the failure of the parent to discipline or willful and malicious conduct).
54. *Id.*
55. Amy L. Tomaszewski, Note, *From Columbine to Kazaa: Parental Liability in a New World*, 2005 U. Ill. L. Rev. 573 (2005).
56. See Zuckerman, *supra* note 23.
57. Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468 (1996).
58. *Id.* at 477.
59. *Id.* at 477 n.13.
60. See Zuckerman, *supra* note 23. Constitutional preemption clause found at U.S. Const. Art. VI, Section 2.
61. 17 U.S.C. § 301.
62. Ritchie v. Williams, 395 F.3d 283, 287-88 (6th Cir. 2005).
63. Computer Associates Intern, Inc. v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992).
64. ProCd, Inc. v. Zeidenberg, 86 F.3d 1447, 1454 (7th Cir. 1996).
65. Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc., 501 F.Supp. 848, 853 (S.D.N.Y. 1980), *aff'd* 723 F.2d 195 (2d Cir. 1983), *reversed and remanded*, 471 U.S. 539 (1988).
66. For example, the 11th Circuit has held that a common law indemnity claim by a defendant in a copyright suit was not expressly barred by the Copyright Act. *Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001).
67. Mark Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 Cal. L. Rev. 111 (1999).
68. Richard Keyt, *Digital Millennium Copyright Act ("DMCA")*

<http://www.keytlaw.com/Copyrights/dmca.htm>.

Recently, the RIAA has attempted to seek a permanent injunction against Usenet.com, barring it from inducing copyright infringement by its users, along with damages and attorneys' fees. This may be an example where the Safe Harbor provisions of the DMCA will be found to apply. See Eric Bangeman, *RIAA shifts legal battle to a new front, sues Usenet access provider*, October 16, 2007, <http://arstechnica.com/news.ars/post/20071016-riaa-shifts-legal-battle-to-a-new-front-sues-usenet-access-provider.html>.

69. A service provider is an "entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." Digital Millennium Copyright Act, 17 U.S.C. § 512(k)(1) (2008).
70. 17 U.S.C. § 512(a) provides that "a service provider shall not be liable for monetary relief, or . . . for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if: (1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content."

71. See Keyt, *supra* note 68.
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72. *Id.*