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## Torts and the Construction of Inducement and Contributory Liability in *Amazon* and *Visa*

Alfred C. Yen\*

### Introduction

In *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,<sup>1</sup> the Supreme Court adopted intentional inducement as a cause of action for third party copyright liability.<sup>2</sup> Before *Grokster*, such liability existed in two forms, contributory liability and vicarious liability. Contributory liability applied if a defendant had knowledge of infringement by another and materially contributed to the infringement.<sup>3</sup> Vicarious liability applied if the defendant had control over another's infringement and had a direct financial interest in it.<sup>4</sup> Now, after *Grokster*, a defendant also faces liability if she acts with the object of promoting infringement by others.<sup>5</sup>

The *Grokster* Court adopted inducement because the traditional doctrines of contributory and vicarious liability did not express the full range of reasons that support third party liability. In particular, to the extent that such liability rests on a defendant's culpability, contributory liability failed to distinguish the unintended support of infringement that sometimes accompanies legitimate activity from the purposeful, deliberate support of infringement. This led to anomalous results that the Court decided to fix.

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<sup>1</sup> 545 U.S. 913 (2005).

<sup>2</sup> *Id.* at 936-37 (“[T]he inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

<sup>3</sup> *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971) (“one 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* is the seminal case cited for traditional contributory liability. Although its description of the doctrine refers to “inducement,” the vast majority of courts before *Grokster* focused on the elements of knowledge and material contribution. *See 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.”); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9<sup>th</sup> Cir. 1996) (analyzing knowledge and material contribution).

<sup>4</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963) (establishing vicarious liability “[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials.”); *Fonovisa, supra* note 3, at 261-64 (analyzing vicarious liability in terms of control and direct financial interest).

<sup>5</sup> *Grokster*, 545 U.S. at 936-37.

To see this problem, consider the potential contributory liability of an Internet service provider (“ISP”) for liability committed by its users. Every service provider that connects large numbers of people to the Internet knows that eventually some, perhaps even many, of them will eventually commit infringement. This arguably supports a conclusion that the ISP culpably contributes to infringement by providing Internet service and ought to pay for the resulting damages. However, the well-established and correct interpretation of contributory copyright liability rejects the notion that generalized knowledge of eventual infringement supports liability. Something more specific, such as notice about specific instances of infringement, is required.<sup>6</sup> This result follows the Supreme Court’s reasoning in the famous case of *Sony v. Universal City Studios*.<sup>7</sup> In *Sony*, the Court held that it is improper to impute culpability to a defendant who simply knows that its technology assists infringers.<sup>8</sup> If the defendant’s service is capable of substantial noninfringing use, liability does not exist.<sup>9</sup> Accordingly, courts will not hold ISPs generally liable for their users’ infringement because Internet service clearly supports a great deal of noninfringing use such as email, web browsing, downloads from iTunes, and shopping.

This conclusion makes sense. There is nothing culpable about distributing technology for legitimate use. If others decide to misuse the technology, responsibility for that misuse generally lies with the user, not the provider. Liability against the service provider makes sense only when the service is not capable of substantial noninfringing use because, under those conditions, effectively no legitimate use for the service exists. A defendant distributing such technology would then have no legitimate purpose for doing so, and culpability would follow.<sup>10</sup>

For purposes of contrast, consider the defendants in *Grokster*, who distributed file-sharing technology with the express aim of attracting users who wanted to commit

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<sup>6</sup> See *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (rejecting a blanket theory of liability and considering only the possibility of liability after defendant received notice from plaintiff); *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997) (also rejecting blanket theory of liability and considering only liability based only upon defendant ISPs knowledge about the existence of infringing material on a particular subscriber’s website); *Ellison v. Robertson*, 357 F.3d 1071 (9th Cir. 2004) (court considers only the possibility of liability arising because defendant reasonably should have known that infringing copies plaintiff’s works were stored on ISPs computers).

<sup>7</sup> 464 U.S. 417 (1984).

<sup>8</sup> See *Sony*, 464 U.S. at 208 (rejecting claim that merely supplying video cassette recorders establishes contributory liability in case where defendants knew that individuals sometimes use video cassette recorders to infringe).

<sup>9</sup> *Sony*, 464 U.S. 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.*”) (emphasis added).

<sup>10</sup> *Grokster*, 545 U.S. at 932 (“[W]here an article is ‘good for nothing else’ but infringement, ... there is no injustice in presuming or imputing an intent to infringe.”).

infringement.<sup>11</sup> Such behavior is culpable because, unlike our hypothetical ISP, the defendants distributed their technology for the purpose of causing infringement. They wanted infringement to occur. However, the then-existing doctrine of contributory liability did not hold these defendants liable because file-sharing technology is “capable of noninfringing use.”<sup>12</sup> For example, those distributing public domain works or works licensed from copyright holders can and do use file-sharing technology. The Ninth Circuit therefore applied *Sony* to excuse the defendants from liability.<sup>13</sup>

The *Grokster* Court applied inducement as a response to traditional contributory liability’s inability to hold intentionally culpable defendants liable. If culpability could not be properly inferred from the mere distribution of technology, it could be found if the defendant wanted to cause infringement by others. Inducement made sense because those who deliberately cause infringement deserve to be held liable for that infringement, even if the technology they distribute has substantial noninfringing use.<sup>14</sup>

Inducement had the beneficial effect of closing an apparent loophole in the law of third party copyright liability. However, its introduction raised tricky questions about the proper construction of the law. In many cases, defendants who would normally not be found liable under traditional contributory liability could plausibly be found liable as intentional inducers. Consider again our ISP. If the ISP knows that some of its users occasionally commit infringement, and the ISP deliberately continues to provide Internet service, doesn’t the ISP now intend for the infringement to continue? And if so, does it mean that inducement could supplant traditional contributory liability as the primary theory of third party copyright liability?

The answer to this question is not immediately obvious. The *Grokster* Court indicated that inducement exists only when intent was shown “by clear expression or other affirmative steps taken to foster infringement.”<sup>15</sup> However the Court did not elaborate on the meaning of this limitation. Accordingly, lower courts have inherited that task of using common law principles

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<sup>11</sup> *Grokster*, 545 U.S. at 937-40 (describing deliberate inducement by defendants and concluding that “[t]he unlawful objective is unmistakable.”).

<sup>12</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161 (9th Cir. 2004), *rev’d* 545 U.S. 913 (2005) (lower court finding that *Grokster* defendants’ software was capable of substantial noninfringing use).

<sup>13</sup> *Id.* at 1157 (affirming judgment in favor of *Grokster* defendants).

<sup>14</sup> *Grokster*, 545 U.S. at 934-35 (*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.”).

<sup>15</sup> *Id.* at 937. The Court also stated that “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based upon a failure to take affirmative steps to prevent infringement.” *Id.* at 939 n. 12.

derived from tort<sup>16</sup> to delineate the border between intentional inducement and ordinary contributory infringement.<sup>17</sup>

This Article examines two recent, closely followed opinions that apply tort law to the problem of contributory copyright liability, *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>18</sup> and *Perfect 10, Inc. v. Visa International Service Association*.<sup>19</sup> It makes sense to study these opinions because they involved large, high profile businesses whose primary services simultaneously supported infringing and noninfringing behavior. In *Amazon*, the plaintiff Perfect 10 (copyright holder in a number of pornographic images) sued Google because Google's search engine helped Internet users find and view infringing copies of the plaintiff's photographs.<sup>20</sup> In *Visa*, Perfect 10 sued credit card companies for processing credit card payments on behalf of websites that charged users to view infringing images.<sup>21</sup>

Claims like these are both plausible and problematic. The scope of copyright infringement on the Internet is significant. It is arguably wrong for businesses to profit from assistance provided to illegal activities. Furthermore, if Google and Visa withdrew that assistance, the incidence of copyright infringement would presumably decrease. At the same time, however, it is perhaps unfair to hold a business liable for supporting the infringement of others when the business did not act with the specific purpose of supporting infringement. Moreover, it may be socially undesirable to impose liability on these businesses for two reasons. First, attempts to stop infringement may be very costly and ineffective. Second, while liability may force entities like Google and Visa to withdraw their services from those who have committed infringement, liability may also cause withdrawal of services that support noninfringing behavior. Society must therefore balance the potential benefits of third party copyright liability against its associated costs.

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<sup>16</sup> *Id.* at 930 (noting origin of third party copyright liability in common law); *Id.* at 934-35 (identifying “rules of fault-based liability derived from the common law” as an appropriate basis for third party copyright liability).

<sup>17</sup> It is worth taking a moment to clarify the distinction between intentional inducement and “ordinary contributory infringement.” As noted earlier, the seminal formulation of contributory infringement in *Gershwin* contained references to inducement and “ordinary contributory infringement” (i.e. liability based upon knowledge and material contribution). *See supra* note 3. Accordingly, it is possible to identify both inducement and “ordinary contributory infringement” as forms of contributory infringement. This Article refrains from this practice because it can lead to the blurring of important distinctions between inducement and “ordinary contributory infringement.”

<sup>18</sup> 487 F.3d 701 (9th Cir. 2007), *amended* 508 F.3d 1146 (9th Cir. 2007). This Article analyzes the first *Amazon* opinion because the Ninth Circuit cites that opinion in *Visa* (the amended opinion came down after *Visa*.). This is strictly a matter of analytic convenience for purposes of this Article because construction and interpretation of contributory infringement and inducement is the same in both opinions. In referring to these opinions, the Article will refer to the first as “*Amazon I*” and the second as “*Amazon II*.”

<sup>19</sup> 494 F.3d 788 (9th Cir. 2007).

<sup>20</sup> *Amazon I*, 487 F.3d at 711-13.

<sup>21</sup> *Visa*, 494 F.3d at 793.

*Amazon* and *Visa* try to integrate contributory liability, inducement and tort law, but with only modest success. Two problems share the blame. First, the doctrinal formulations of contributory copyright liability do not map cleanly onto tort law. Accordingly, those formulations distract courts from the considerations most relevant to tort. Second, although both opinions acknowledge the importance of tort law to the construction of third party copyright liability, they pay insufficient attention to the overall structure of tort, distinctions between basic types of tort actions like intentional tort and negligence, and the reasons for those distinctions. This robs *Amazon* and *Visa* of truly cogent explanations for their results.

This Article proceeds in four parts. Part I describes the general problem of third party copyright liability and its relationship to tort law. Part II shows how tort law explains the results of *Amazon* and *Visa*. In so doing, Part II demonstrates the benefits of giving third party copyright liability a strong foundation in tort. Part III uses Parts I and II to analyze *Amazon* and *Visa*. It shows how those opinions fail to integrate tort law into copyright, and how this failure robs the opinions of cogent explanations for their results. Part IV concludes by arguing that courts can improve third party copyright liability by paying closer attention to tort law in two ways. First, courts should carefully limit the application of third party copyright liability inspired by intentional tort. Instead, courts should generally analyze third party copyright cases under the rubric of negligence. Second, courts need to reformulate the doctrine of contributory liability to take better account of the considerations of negligence law. This includes the explicit consideration of a defendant's simultaneous support for infringement and noninfringing activity.

## I. Third Party Copyright Liability and Tort

A great deal of infringement takes place over the Internet, and copyright holders often encounter difficulty when seeking redress against those directly responsible. Those who post infringing content on the Internet, whether through websites or peer-to-peer networks, often do so anonymously. Many infringers live in foreign countries that may have little interest in enforcing American copyright laws. Finally, copyright holders may discover that a particular infringer does not have sufficient assets to cover any judgment won.

Copyright holders have responded to these problems by suing business whose activities support infringement. Early suits targeted Internet service providers (ISPs) whose servers hosted infringing content.<sup>22</sup> Later suits expanded the list of defendants to include those who merely supported, but did not host, infringing content. These suits have included claims against file sharing services,<sup>23</sup> Internet auction sites,<sup>24</sup> age verification services,<sup>25</sup> search engines<sup>26</sup> and

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<sup>22</sup> See *Playboy Enterprises, Inc. v. Frena*, 893 F. Supp. 1552 (M.D. Fla. 1993) (suit against bulletin board service for infringement committed by users); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (suit against ISP for infringement committed by others).

<sup>23</sup> See *Grokster*, *supra* note 1; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

<sup>24</sup> See *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082 (C.D. Cal. 2001).

<sup>25</sup> See *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 114 (C.D. Cal. 2002).

credit card companies.<sup>27</sup> Copyright holders find these third party defendants attractive targets for suit because their identities are well-known, they must respond to litigation, and they often have significant assets from which to pay potential judgments. Moreover, if found liable, these defendants would probably respond by acting to discourage infringement. Of course, these defendants object to being sued for infringement committed by others, and they do not want to investigate or act against those accused of infringement.

The overall structure of tort law offers a framework for resolving these cases. Tort liability comes in two types. Most tort liability is fault-based. In tort cases involving fault, courts impose liability because the defendant proximately caused the plaintiff's injuries by behaving in a faulty (i.e. unreasonable) manner. Fault-based tort liability includes familiar actions for intentional torts like battery and negligence. Although a detailed explanation of fault would be extremely complicated and beyond the scope of this Article, it is worth noting that fault-based tort liability includes the notion that a defendant who has behaved unreasonably is culpable and deserves to be held liable for at least some of the consequences of his unreasonable behavior. In the case of intentional torts, the culpability arises because the defendant affirmatively hopes to harm or offend the victim of his action. In negligence, culpability arises because the defendant has not taken reasonable precaution against the risk of harm to the victim.

By contrast, a smaller number of cases involve strict liability, or liability without fault. Strict liability governs a relatively small portion of tort law because modern orthodoxy holds that a defendant should pay for injuries suffered by others only when the defendant's faulty behavior caused those injuries. Nevertheless, courts occasionally impose strict liability in order to ensure the compensation of victims, spread costs, and the encourage safety. This happens primarily in three areas – *respondeat superior* liability of masters for torts committed by servants within the scope of employment,<sup>28</sup> strict liability for abnormally dangerous activities,<sup>29</sup> and strict liability for non-negligent sellers of unreasonably unsafe products.<sup>30</sup>

Tort law gives courts three different reasons for holding a defendant liable for infringement committed by another. First, the defendant might have intended to cause infringement by others. Second, the defendant might have been careless in causing infringement by others. Finally, the defendant might be strictly liable for infringement caused by others. Let us take a moment to see how tort law separates these forms of liability, particularly (given the topic of this Article) intentional tort from negligence.<sup>31</sup>

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<sup>26</sup> See *Amazon I* and *Amazon II*, *supra* note 18.

<sup>27</sup> See *Visa*, *supra* note 19.

<sup>28</sup> See Rest. 3d (Agency) §7.03(2) (2006) (describing *respondeat superior*).

<sup>29</sup> See Rest. 2d (Torts) §§ 219, 220 (describing strict liability for abnormally dangerous activities); Rest. 3d (Torts) §20 (P.F.D. No. 1, 2005) (same).

<sup>30</sup> See Rest. 3d (Torts-Products Liability) § 1 (liability imposed on sellers of defective products); Rest. 2d (Torts) § 402A (same).

<sup>31</sup> Although beyond the scope of this Article, it is worth saying a little bit about the boundary between negligence and strict liability. Describing this boundary is tricky because strict liability could easily replace fault as the primary form of tort liability. Modern tort theory justifies strict liability on the ground that those who create risk, particularly business enterprises, should bear

At first inspection, the distinction between intentional torts and negligence appears simple. Intentional torts exist only when a defendant affirmatively wants to harm or offend the victim, while negligence requires only that the defendant act with unreasonable carelessness towards the victim. There is, however, a gray area that merits further examination. Some defendants may not want to harm or offend the victim, but nevertheless act knowing with substantial certainty that the undesired result will follow. For example, a hotel may know that bedbugs infest one of its rooms. If the hotel rents that room to a guest, it does so knowing with substantial certainty that the guest will suffer unwanted bites. Similarly, an automobile manufacturer knows that one of its cars will eventually hit a pedestrian. Thus, in a sense, the manufacturer makes and sells its cars knowing with substantial certainty that doing so will cause injury to a person.

Courts could treat cases like these as intentional tort or negligence. A person who acts knowing with substantial certainty that personal injury will follow in a sense desires that injury.<sup>32</sup> And, of course, such behavior may reflect unreasonable carelessness about harm to others. Interestingly, and tellingly for the construction of third party copyright liability, the tort system treats the only the former of these cases (i.e. cases like the renting of a bedbug-infested room) as intentional tort. The rest are evaluated as negligence cases. Courts do this because intentional tort doctrines have a wooden quality that renders them relatively unable to make fine distinctions about the circumstances in which a defendant acts. Accordingly, if intentional tort

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the costs of those risks. Thus, strict liability encourages those held liable to take precautions, raise compensation for losses, and spread costs through insurance. See Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 Mich. L. Rev. 1266, 1266-77 (1997). When taken at face value, the principles behind strict liability justify an extremely broad application. Every party with a causal relationship to potential accidents could take further precautions, provide compensation, and spread loss. If applied remorselessly, these ideas could create practically unlimited liability. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461, 527 (1985) (“The unavoidable implication of the three presuppositions of manufacturer power, manufacturer insurance, and internalization is absolute liability.”) For example, a pedestrian run over in a crosswalk by a drunk driver could plausibly allege that the driver, car manufacturer, tire manufacturer, beer manufacturer, aluminum can manufacturer, grocery store, gas station, and oil company had all caused his injury. Courts have, of course, instinctively resisted liability this broad because they understand the need for some kind of limiting principle to avoid a thicket of liability so extensive that unproductive and absurd results follow. Fault offers such a principle. Indeed, fault causes of action, especially negligence, give courts an opportunity to ask the kind of nuanced questions about a defendant’s conduct that affect both the defendant’s culpability and the social value of the defendant’s behavior. Accordingly, courts have, somewhat arbitrarily, limited strict liability actions to a few areas like *respondeat superior*, abnormally dangerous activities and portions of products liability, preferring instead to analyze the vast majority of cases under the framework of negligence.

<sup>32</sup> See *Garratt v. Dailey*, 279 P.2d 1091, 1093-94 (1955), appeal after remand, 304 P.2d 681 (1956) (defendant would have committed battery if he moved a chair knowing with substantial certainty that plaintiff would attempt to sit in chair and fall to the ground).

governed both our hypothetical hotel and car manufacturer, overbroad liability would follow. By contrast, analyzing these cases under negligence permits the sophisticated reasoning necessary to separate the culpable from the non-culpable.

Consider first the hotel's rental of the bug-infested room. Here, the hotel took a single act that exposed the victim to a single, substantially certain risk of injury. Such behavior seems comparably culpable to the deliberate imposition of such harm.<sup>33</sup>

By contrast, the hypothesized car maker may not be culpable at all because its behavior exposes multiple potential victims to much-less-than-certain risk. Certainty of harm arises through the repeated imposition of this less-than-certain risk. The sale of a single automobile creates a small risk of injury to pedestrians. Nevertheless, if enough automobiles get sold, the likelihood of injury to at least one pedestrian is substantially certain. This does not necessarily mean that the car manufacturer is as culpable as the hotel that rented the bug-infested room. Indeed, the manufacturer may not be liable at all. One cannot evaluate the car maker's culpability without knowing more about the specifics of each instance of risk. Were the brakes improperly designed? What did the operator of the car do? How did the victim behave? What was the weather at the time of the victim's injury? Did the manufacture of the car provide social benefits greater than the risk of harm? The answers to these and countless other questions could establish the car maker's culpable fault, or they could eliminate that possibility. It therefore makes little sense to treat the car maker's case as an instance of intentional tort. Indeed, if the behavior of car manufacturers and the like were considered intentional torts, the imposition of liability would become absurdly overbroad. For example, a pedestrian run over in a crosswalk by a drunk driver could plausibly allege that the car manufacturer, tire manufacturer, beer manufacturer, aluminum can manufacturer, grocery store, gas station, and oil company were all intentional tortfeasors because each of them sold a product knowing with substantial certainty that the product would eventually cause injury. Analyzing such cases under negligence works better because its emphasis on the particular circumstances of each defendant's behavior allows courts to weigh various pros and cons before concluding that a defendant's creation of risk justifies liability. This explains why courts restrict intentional tort liability to those cases in which a defendant's behavior creates a single, substantially certain likelihood of harm to the victim.<sup>34</sup>

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<sup>33</sup> See *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 675 (7th Cir. 2003) (knowing rental of bedbug infested room probably battery).

<sup>34</sup> See Restatement (Third) of Torts: Liability for Physical Harm § 1 (P.F.D. No. 1, 2005), comment e:

The substantial-certainty definition of intent requires an appreciation of its limits. In those occupational-injury cases in which courts have applied the substantial-certainty test, there generally is a localized job-site hazard, which threatens harm to a small number of identifiable employees during a relatively limited period of time. Likewise, in Illustration 3, it is the defendant's immediate neighbors whose property will be harmed as soon as the defendant engages in its activity. 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

## II. Applying Tort Law to the Facts of *Amazon* and *Visa*

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bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area. The test loses its persuasiveness when the identity of potential victims becomes vaguer and when in a related way the time frame involving the actor's conduct expands and the causal sequence connecting conduct and harm becomes more complex. Consider, for example, the company engaged in the mass production of products, which are distributed to consumers nationwide. The company may well know that in light of the inevitable limits of quality control, over time some number of its products will end up containing manufacturing defects of the sort that will cause physical injuries. The company's knowledge of the certainty of harm, at some undefined time and place, does provide an argument in favor of the company's liability. Yet that liability, when imposed, is understood as a form of strict liability, not as liability for anything that can properly be regarded as an intentional tort. Moreover, in many situations a defendant's knowledge of substantially certain harms is entirely consistent with the absence of any liability in tort. For example, an owner of land, arranging for the construction of a high-rise building, can confidently predict that some number of workers will be seriously injured in the course of the construction project; the company that runs a railroad can be sure that railroad operations will over time result in a significant number of serious personal injuries; the manufacturer of knives can easily predict that a certain number of persons using its knives will inadvertently cut themselves. Despite their knowledge, these actors do not intentionally cause the injuries that result. Moreover, despite their knowledge, none of the companies—absent further facts—can even be found guilty of negligence; nor does the knowledge possessed by the knife manufacturer subject it to liability under products-liability doctrines.

The foregoing sets the stage for a tort-inspired analysis of *Amazon* and *Visa*. In *Amazon*, the plaintiff Perfect 10 owned copyright in a number of pornographic images.<sup>35</sup> Perfect 10 alleged that Google was liable for infringement committed by others because Google’s search engine helped users gain access to infringing copies of Perfect 10’s images.<sup>36</sup> Although Perfect 10 asserted liability on a number of theories, the claim most relevant to this Article concerned “in-line linking” – Google’s practice of automatically indexing images from all over the Internet, displaying reduced quality versions of specific images (called “thumbnails”) in response to user queries, and allowing users to gain access to full quality images by clicking on the thumbnails.<sup>37</sup> In-line linking supported infringement because Google’s automatic indexing inevitably included infringing versions of images owned by Perfect 10.<sup>38</sup> Accordingly, Google’s search engine informed users about the existence and location of those infringing images, and users accessed those infringing images by clicking on the relevant thumbnails.<sup>39</sup> Perfect 10 sued Google and moved for a preliminary injunction preventing, among other things, Google’s in-line linking to infringing versions of Perfect 10’s photos.<sup>40</sup> The District Court denied Perfect 10’s motion, but the Ninth Circuit reversed on the issue of contributory infringement. According to the court, the District Court erred in holding that Google’s search engine categorically did not “materially contribute” to infringement. Instead, the District Court should have recognized that Google’s potential liability depended on the specifics of search engine technology and operation. The Ninth Circuit therefore remanded the case for further fact finding.<sup>41</sup>

Basic tort law offers a good explanation for *Amazon*’s result. As an initial matter, Google clearly did not commit an intentional tort because Google did not operate its search engine hoping to create infringement. True, Google knew with substantial certainty that its search engine would eventually support infringement. This substantial certainty was not, however, associated with a single, high certainty event like renting out a bedbug-infested room. Instead, the certainty arose from thousands (if not millions) of lower risk events, namely the ordinary search activities of numerous users. Similarly, the operation of a search engine does not correspond well to the existing accepted forms of strict liability. Google did not have a principal/agent or master/servant relationship with its users or those posting infringing images. Nor did operating a search engine create the unpredictable, high risk of personal injury associated with dynamite blasting. And of course, Google did not sell a defective product.

It is possible, however, that Google was negligent. Perfect 10 essentially claimed that Google knew its search engine increased the risk of infringement, and that Google failed to take a reasonable precaution against that risk – namely disabling or removing search engine results related to infringement. Of course, the mere fact that a precaution against risk exists does not mean that a defendant must take the precaution to avoid negligence. In order for the defendant to

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<sup>35</sup> *Amazon I*, 487 F.3d at 710 (referring to Perfect 10 as owner of copyright images).

<sup>36</sup> *Id.* at 713.

<sup>37</sup> *Id.* at 711-12 (describing in-line linking).

<sup>38</sup> *Id.* at 713 (referring to Google search engine’s indexing of images).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* 713.

<sup>41</sup> *Id.* at 713, 729.

be negligent, the precaution must be reasonable in proportion to the social benefits and losses associated with the precaution.

In cases like *Amazon*, determinations about negligence depend on three factors: the difficulty or cost of taking a precaution against infringement, the effectiveness of the precaution (i.e. the amount of infringement the precaution stops), and the amount of noninfringing behavior simultaneously supported by the defendant. The first two of these are fairly self-explanatory and obvious. As any given precaution becomes more difficult or costly for the defendant to undertake, courts will be less likely to hold the defendant liable for failing to take it. As the amount of infringement stopped by precaution rises, courts would more likely require the precaution. The third requires some elaboration, for it highlights the important possibility that stopping infringement has unintended consequences that make precaution less socially desirable.

When a defendant supports only infringement, it is easy to find him culpable (i.e. negligent) because no legitimate purpose for his behavior exists. However, if the same behavior supports both infringing and noninfringing activity, negligence becomes far less clear because the social value of the defendant's support for noninfringing behavior counterbalances the social loss of infringement. As a defendant's support for noninfringing activity grows in relation to any support for infringement, it becomes more and more reasonable for the defendant to continue his behavior even if support for infringement continues. This is particularly true when a defendant's support for noninfringing activity cannot be separated from his simultaneous support for infringement. If such separation were possible, a defendant might be able to take precaution against infringement without disturbing noninfringing behavior. However, if separation is not possible, then precaution against infringement will also suppress legitimate behavior. The loss of noninfringing behavior constitutes an unintended consequence of precaution that makes precaution less socially desirable as the effects on noninfringing behavior increase.

The three factors enumerated here identify the contours of relatively strong and weak cases for negligence. In particular, the case for negligence is strong when a defendant can take a simple, inexpensive precaution against infringement, the amount of infringement stopped is large, and the effect on noninfringing activity is small. Conversely, the case for negligence is weak when the precaution is difficult or expensive, when the infringement stopped is relatively small, or the effect on noninfringing behavior is large. Moreover, these factors explain the *Amazon* result because they show why the factual record did not contain enough information to resolve conclusively the question of Google's negligence.

From a tort perspective, Google might not be negligent. First, there is the problem of scale. While removing a single listing from Google's search engine results seems simple, the removal of many results—particularly in response to complaints from copyright holders—is something else. If Google is liable for failing to remove search results in response to Perfect 10's complaints, then presumably Google would be similarly liable for failing to act on complaints from any other copyright holder. Since the Internet harbors vast amounts of infringement, Google would probably have to employ many people full-time in order to avoid liability, or else embark on some kind of massive engineering effort to create an automated method for responding to complaints. The cost of these efforts alone make it unclear whether a court could

call Google's failure to implement them unreasonable. Perhaps infringement on the Internet is so serious that these costs are justified, or perhaps not.

Second, it is unclear how much infringement Google could actually stop. The removal of a particular search result makes it harder for a user to find a given instance of infringement, but it does not prevent the infringement. As an initial matter, the infringing material remains on the Internet. Additionally, users may be able to employ alternate searches that direct them to the infringing material. Finally, the primary infringer (e.g. a website posting infringing images) could re-post the infringing content at a different URL or with a different file name. This could facilitate the creation of a new search results for the infringing material.

Third, it seems quite likely that Google simultaneously supports infringing and noninfringing behavior, and that Google cannot act against infringement without harming noninfringing behavior. Some complaints from copyright holders will be mistaken or falsified, so Google will probably deliberately suppress noninfringing search results. Even if Google somehow managed to act only on verified complaints, it might still inadvertently remove noninfringing search results. For example, Google might de-list all search results with a particular name (perhaps the name of a particular image whose copyright has been infringed or the person depicted in such an image). Such de-listing would remove many search results for infringements, but it could easily remove noninfringing results as well. For example, Google might suppress licensed postings of a photograph infringed by others, fair use of the photograph, noninfringing textual discussion of the photograph, or even postings that have no relation to the photograph in question but happen to share the same name. If this happened, Google's efforts to stop infringement would also harm both posters of noninfringing material and users seeking noninfringing material. Indeed, efforts to suppress copyright infringement might significantly reduce the value of Google's search engine technology.

Unfortunately for Google, however, the factual record was too undeveloped to support these arguments. Neither party had introduced much evidence about the removal of search listings, their efficacy, nor the unintended consequences of such removal. Accordingly, it was still possible for Perfect 10 to show that Google could cheaply and effectively disable access to specific infringing files without affecting noninfringing behavior. The District Court did not yet know enough about Google's technology to decide otherwise, so further fact finding was necessary before the District Court could rule on Perfect 10's motion for injunctive relief.

In *Visa*, the plaintiff Perfect 10 (the same plaintiff as in *Amazon*) sued the credit card companies Visa and MasterCard for processing of credit card payments on behalf of websites that displayed infringing copies of Perfect 10 photographs. These websites operated as so-called "pay" websites, charging users a fee for access to images including those that infringed Perfect 10's copyrights. Perfect 10 claimed that its complaints put the credit card companies on notice that their financial services supported infringement, and that their continued provision of those services made them liable for the websites' infringement.<sup>42</sup> As in *Amazon*, the defendants moved

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<sup>42</sup> *Visa*, 494 F.3d at 792-93.

to dismiss. This time, the 9th Circuit agreed with the defendants and affirmed the district court's decision to dismiss.<sup>43</sup>

Once again, a tort analysis explains the Ninth Circuit's decision fairly well. The credit card companies were surely not intentional tortfeasors, as they did not specifically want to cause infringement. Similarly, the credit card companies did not have a principal/agent relationship with the infringing websites, nor are credit card services abnormally dangerous activities or defective products.<sup>44</sup> Accordingly, strict liability seems inappropriate as well.

Negligence, however, presents a harder case, especially in light of *Amazon*. If Perfect 10 might have proven that Google had simple, inexpensive, effective, and well-targeted precaution against infringement, might not Perfect 10 have done likewise with respect to credit card companies? Further analysis shows that the case against the credit card companies was not as close as the one against Google.

In *Amazon*, Perfect 10 wanted Google to withdraw search results selectively in response to specific allegations of infringement. This left open the possibility that Google's alleged negligence (namely the failure to withdraw particular search results) supported only infringing behavior. In *Visa*, Perfect 10 effectively claimed that the credit card companies were negligent for providing services to a long list of websites.<sup>45</sup> These websites, however, did more than infringe Perfect 10's copyrights. Most, if not all, displayed images that did not infringe Perfect 10's copyrights, and many displayed noninfringing text or images, as well as advertisements for various goods and services.<sup>46</sup> This meant that the credit card companies' alleged negligence simultaneously supported both infringing and noninfringing activity.

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<sup>43</sup> *Id.*

<sup>44</sup> See Rest. 3d (Torts) § 20 (P.F.D. No. 1, 2005) (describing abnormally dangerous activities as those creating a "foreseeable and highly significant risk of *physical* harm.") (emphasis added).

<sup>45</sup> *Id.* at 800 (referring to Perfect 10's allegation "that Defendants are still contributory infringers because they could refuse to process payments to the infringing websites and thereby undermine their commercial viability.").

<sup>46</sup> It is tricky to document the practices of the websites that Perfect 10 complained about. Perfect 10 apparently sent complaint letters listing large numbers of websites that allegedly infringed Perfect 10 material. Exhibit 4 to Perfect 10's First Amended Complaint contains a long list of websites alleged by Perfect 10 to have infringed Perfect 10's copyrighted material. See First Amended Complaint, Case No. C04-00371, at paragraph 70, available at <http://docs.justia.com/cases/federal/district-courts/california/candce/5:2004cv00371/17337/40/0.html> (allegation that Exhibit 4 contains list of infringers); <http://docs.justia.com/cases/federal/district-courts/california/candce/5:2004cv00371/17337/40/4.html> (list of sites alleged to have infringed).

These websites may or may not appear the way they looked when Perfect 10 filed its complaint, and indeed some have apparently disappeared. Nevertheless, cursory inspection of a few reveals that the websites display images which may or may not infringe copyrights held by others, contain links to other websites, distribute text apparently original to the websites' proprietors, and advertise various apparently legitimate articles for sale. See <http://celeborama.com/> (visited November 28, 2008);

More importantly, and in contrast to the situation in *Amazon*, Perfect 10 could not possibly show how the credit card companies could withdraw their services from these websites without destroying all of this associated noninfringing activity. Consider how Perfect 10's desired precaution would work. According to Perfect 10, withdrawing credit card services would reduce infringement by putting offending websites out of business.<sup>47</sup> However, if the desired precaution implied the destruction of these businesses, it necessarily also implied the destruction of all their noninfringing activities. In short, the unintended effect of the proposed precaution on noninfringing activities was too large, making the withdrawal of credit card services unreasonable. To put it differently, the credit card companies' support of noninfringing activity made the incidental support of infringement reasonable, leading the court to grant the defendants' motion to dismiss.

### III. Inducement and Contributory Liability as Expressed in *Amazon* and *Visa*

Common law tort reasonably explains *Amazon* and *Visa*'s results. By contrast, the doctrines of third party copyright liability do not do nearly as well. Problems arise because courts do not pay adequate attention to the structure of tort law. This renders third party copyright liability unfaithful to its tort roots and compromises conceptual and analytical clarity. The result is an inflexible formulation of doctrine that threatens overbroad liability and fails to direct judicial attention to important facts.

*Amazon*'s description of inducement and contributory liability exhibited these problems. These two causes of action are conceptually distinct, but the Ninth Circuit lumped them together. The *Amazon* court understood *Grokster* as establishing two forms of contributory liability—intentional inducement and the distribution of technology supporting infringement.<sup>48</sup> The first clearly corresponds to inducement. The second apparently corresponds to traditional contributory infringement. A defendant who simply distributes technology without intent to cause infringement may “materially contribute” to infringement. If she does materially contribute with knowledge that infringement will ensue, contributory liability would follow. The Ninth Circuit could have used this interpretation of the law to develop a clear understanding of inducement and traditional contributory liability based upon tort principles. Unfortunately, the court missed this opportunity.

As noted above, the Ninth Circuit's ultimate decision to require further fact finding is defensible under common law tort principles.<sup>49</sup> However, the court did not describe inducement and contributory liability in a way that connected third party copyright liability to tort. The court began by correctly rejecting the possibility of Google's liability for merely distributing its search engine.<sup>50</sup> Google's search engine had numerous noninfringing uses, and *Sony* stands for the general proposition that a defendant cannot be liable simply for distributing technology with

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[http://www.celebflix.com/free\\_sm/index.htm](http://www.celebflix.com/free_sm/index.htm) (visited November 28, 2008);

<http://www.mrskin.com/main> (visited November 28, 2008).

<sup>47</sup> *Id.* at 800.

<sup>48</sup> *Amazon I*, 487 F.3d 726.

<sup>49</sup> See *supra* note 41 and accompanying text.

<sup>50</sup> *Amazon I*, 487 F.3d 727.

substantial noninfringing use. However, because the court had enumerated only inducement and the distribution of technology as possible bases for liability, intentional inducement became the only possible theory under which to justify denying Google's motion to dismiss.<sup>51</sup> This proved problematic because Google did not look like an intentional inducer. Google clearly did not operate its search engine for the purpose of causing infringement. At best, Google operated its search engine knowing that eventually the technology would support infringement. The court attempted to fix this problem by stating that Google might be liable because it knew with substantial certainty that its technology would support infringement.

At first blush, this maneuver seems sensible and consistent with tort law. However, closer inspection reveals a serious problem, namely that *every* Internet technology provider knows that its technology will eventually support infringement. This implies that, unless some nuance enters the analysis, *every* Internet technology provider is liable for intentional inducement. The Ninth Circuit obviously did not desire such a result, and it avoided this scenario by grafting the doctrine of traditional contributory liability onto inducement. The court wrote, "[W]e hold that a computer system operator can be held contributorily liable if it 'has *actual* knowledge that *specific* infringing material is available using its system' and can 'take simple measures to prevent further damage' to copyrighted works, yet continues to provide access to infringing works."<sup>52</sup>

Brief reflection shows that, from a tort perspective, *Amazon* has improperly confused intentional torts and negligence. To be sure, courts will sometimes hold a defendant liable for an intentional tort if the defendant acts knowing with substantial certainty that injury will occur.<sup>53</sup> However, as noted earlier, that sort of intentional tort liability does not apply to certainty arising from the repetition of relatively small risk. It applies instead to the sort of certainty associated with a single, high probability (i.e. "substantially certain") event. When defendants create the certainty of injury through repeated encounters of lower risk events, courts use negligence to decide whether to hold the defendant liable at all. Courts do this because negligence allows courts to make nuanced determinations about the reasonableness of a defendant's behavior, especially when compared to the relatively wooden determinations that govern intentional torts.

*Amazon's* confusion eventually causes trouble precisely because *Amazon's* doctrinal formulation is too wooden. Copyright holders can notify practically every third party copyright defendant that "specific infringing material is available" because of the defendant's behavior, and it is easy to argue that third party defendants can take "simple measures to prevent further damage." After all, defendants who somehow support infringers can terminate those

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<sup>51</sup> *Id.* at 727 (considering possible liability of credit card companies for intentionally encouraging infringement).

<sup>52</sup> *Id.* at 729 (citations omitted).

<sup>53</sup> The classic case is *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (Wash. 1955). *See also* Rest. 2d (Torts) §8A (1965) ("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."); Restatement (Third) of Torts: Liab. Physical Harm § 1 (P.F.D. No. 1, 2005) (intent exists if a person acts "knowing that the consequence is substantially certain to result.").

relationships or otherwise withdraw the relevant services. If the defendant knows with substantial certainty that her behavior supports infringement and continues that behavior, she must intend to cause that infringement, and liability should follow.

This formulation holds far too many defendants liable for infringement committed by others. For example, an electrical power company could take the simple precaution of terminating electric service to infringers. If a copyright holder were to ever notify a power company that certain customers infringed specific works, liability apparently follows from *Amazon's* doctrinal formulation. From a tort perspective, this liability is problematic because electricity simultaneously supports a customer's noninfringing as well as infringing activity, and there is no way for the electric company to withdraw support only from infringement. If courts imposed liability on the power company (or any other provider of basic services) simply for continuing to provide services to customers accused of infringement, socially undesirable results would follow. Prudent, risk-averse electrical companies would begin immediately cutting power off to anyone accused of infringement. Although society would benefit from stopping a good deal of infringement, society would lose even more in the form of legitimate business activities. This explains why the Ninth Circuit erred in its application of tort law to copyright. Simple complaints of infringement alone should not create liability for those who support infringement, even if the suggested precaution is "simple." At the very least, liability should require consideration of the unintended consequences of precaution on noninfringing activity. Courts can generally find these consequences by studying the defendant's simultaneous support of noninfringing activity and a determining whether any suggested precaution against infringement will also destroy noninfringing activity.

*Visa* illustrates the problems that arise when courts try to follow the *Amazon* formulation. The *Visa* majority understandably dismissed the credit card company defendants, but it struggled to explain its decision cogently. According to the opinion, the court could not hold the credit card defendants liable for contributory infringement because they did not materially contribute to infringement. The *Visa* majority distinguished the case at hand from *Amazon* on the ground that the credit card companies' support of infringement was indirect when compared to the support offered by Google's search engine:

The search engines in *Amazon.com* provided links to specific infringing images, and the services in *Napster* and *Grokster* allowed users to locate and obtain infringing material. Here, in contrast, the services provided by the credit card companies do not help locate and are not used to distribute the infringing images. While Perfect 10 has alleged that Defendants make it easier for websites to profit from this infringing activity, the issue here is reproduction, alteration, display and distribution, which can occur without payment. Even if infringing images were not paid for, there would still be infringement.<sup>54</sup>

The majority further argued that liability broad enough to encompass the credit card defendants would be absurdly broad, including "a number of peripherally-involved third parties, such as computer display companies, storage device companies, and software companies that make the

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<sup>54</sup> *Visa*, 494 F.3d at 796.

software necessary to alter and view the pictures and even utility companies that provide electricity to the Internet.”<sup>55</sup>

The majority’s arguments make sense. Surely it is reasonable for some defendants to remain in business even if they know that their products or services sometimes support infringement. Unfortunately, *Amazon*’s formulation did not give the *Visa* court the tools to express or guide its thoughts about the relationship between credit card services and third party infringement or the consequences of liability. As Judge Kozinski pointed out in dissent, credit card services are arguably crucial to the commission of infringement, making their support material. Additionally, the credit card companies knew that their services supported infringement, and they could have done something simple (i.e. withdraw services) to stop the infringement.<sup>56</sup> Thus, under the wooden formulation of liability inherited from *Amazon*, liability was sufficiently plausible for Perfect 10 to survive a motion to dismiss.

In short, the *Visa* majority lacked the very thing identified as missing from *Amazon*, namely the realization that courts must consider unintended consequences against noninfringing activity before concluding that complaints of infringement create contributory liability. If *Amazon* had recognized this, the *Visa* court would have been able to better explain its intuition about credit card services in terms of tort law. Instead of arguing that credit cards do not offer material support for infringement (an argument insufficiently clear to support a motion to dismiss), the *Visa* majority should have focused more on the case against liability for the electric company, a result that Judge Kozinski’s dissent accepted.<sup>57</sup> For purposes of negligence, credit card companies greatly resemble electric companies. Both simultaneously and inseparably support infringing and noninfringing behavior. If either takes the proposed precaution of withdrawing service from alleged infringers, it will stop everything the infringer does, including all noninfringing activity. If, as seems uncontested, this justifies the electric company’s incidental support of infringement even after a copyright holder complains, the same result should follow for credit card companies. In either case, a motion to dismiss seems appropriate.

#### IV. Connecting Inducement and Contributory Liability to Tort

Two related things must happen to fix the problems created by *Amazon*. First, courts should pay more attention to the distinction between intentional tort and negligence in third party copyright liability. In the vast majority of third party copyright liability cases, defendants will not have acted with the specific purpose of causing others to infringe. This means intentional tort, including inducement, offers the wrong theory under which to analyze third party copyright liability claims. Negligence offers the correct theory. Courts may be tempted, as in *Amazon*, to analyze potential third party copyright liability under the “knowing with substantial certainty” branch of intentional tort. However, in the vast majority of cases, this form of liability would be

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<sup>55</sup> *Id.* at 800.

<sup>56</sup> *Id.* at 811-12, 816.

<sup>57</sup> *Id.* at 816 (expressing confidence that courts could distinguish Perfect 10’s claim against the credit card companies from “lawsuits against utility companies, software vendors and others who provide incidental services to infringers”).

inappropriate because the certain infringement associated with the defendant's behavior arises from the repetition of less-than-certain risk, and not a single occurrence with a certain outcome.

Second, courts should reformulate the law of traditional contributory liability to better express the nuances of negligence law. There are presently two elements to contributory liability, knowledge and material contribution. However, these elements do not draw judicial attention to the considerations that matter most to a sensitive negligence analysis. As noted earlier, a proper assessment of a third party defendant's culpability requires attention to at least three things: the cost or difficulty of the plaintiff's proposed precaution against infringement, the effectiveness of that precaution, and the unintended consequences of the proposed precaution.<sup>58</sup>

These considerations simply do not fit well into the elements of knowledge and material contribution. Knowledge and material contribution affect a defendant's potential culpability, but they do not tell the whole story. As the *Visa* court discovered, a long line of entirely legitimate businesses provide crucial support for copyright infringement. This line includes ISPs, computer manufacturers, software producers, stationery stores, and even the telephone and power companies. All of these (and indeed many more) potential defendants know that their services sometimes support infringement. Courts would probably not hold such defendants contributorily liable, but analysis of knowledge and material contribution do not explain why because those elements do not measure the difficulty or expense of precaution, the effectiveness of precaution, or the consequences of precaution for noninfringing behavior.

Things would work much better if courts reworked contributory liability by connecting it to the factors on which culpability depends. For example, a better definition of contributory liability might state, "A defendant is contributorily liable if he engages in specific behavior that he knows materially contributes to an amount of infringement that is unreasonably large when compared to 1) any noninfringing behavior simultaneously supported by that behavior and 2) the cost or difficulty of preventing infringement."

The steps suggested here would have avoided the difficulties encountered in *Amazon* and *Visa*. As an initial matter, a better understanding of the distinction between intentional tort and negligence would probably have changed *Amazon's* intentional tort analysis of third party copyright liability to negligence. The *Amazon* court could then have explained that the amount of infringement supported by Google's "infringing" listings might be unreasonable when compared to any support for noninfringing behavior and the ease of withdrawing support. This conclusion would follow if the plaintiff showed that Google knew of specific search results supporting infringement, that these search results did not also support noninfringing behavior, and that Google could easily remove these search results at a reasonable cost.

Even better, the *Visa* court could have used the suggested reformulation of contributory liability to explain why its case differed from *Amazon*. Instead of having to argue that the defendants supported infringement only indirectly, the *Visa* court could have noted that credit card services supported the sale of access to both infringing and noninfringing images, plus any other noninfringing commerce conducted by the primary infringers. The Ninth Circuit could then

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<sup>58</sup> See *supra* Part II.

have identified the unintended consequences of precaution on noninfringing behavior and concluded that the amount of supported infringement was reasonable in light of the noninfringing behavior supported by credit card services, even if the defendants could have easily and cheaply terminated those services.

## V. Conclusion

This Article has shown that *Amazon* and *Visa* suffered because the Ninth Circuit did not successfully integrate third party copyright liability and tort law. This was partly due to the court's lack of clarity about the distinction between intentional torts and negligence, but the court was also hampered by the existing formulation of contributory liability that did not express tort values very well. The Article has further shown that courts can improve the law of third party copyright liability by reworking the definition of contributory liability to include explicit consideration of factors that heavily affect a defendant's culpability. The suggested change is not radical. All that courts need do is evaluate whether a defendant's knowing support of infringement is reasonable in light of the defendant's simultaneous support for noninfringing behavior and the cost and difficulty of stopping infringement.

There may, of course, be other factors affecting a defendant's culpability beyond those identified here. However, it is clear that the existing law of contributory liability needs to be refined. Hopefully, this Article will help courts find improvements that implement the Supreme Court's clear statement that the law of third party copyright liability rests upon the common law of tort.