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# A First Amendment Perspective on the Construction of Third Party Copyright Liability

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# A FIRST AMENDMENT PERSPECTIVE ON THE CONSTRUCTION OF THIRD-PARTY COPYRIGHT LIABILITY

ALFRED C. YEN\*

**Abstract:** Third-party copyright liability raises specific First Amendment problems that remain relatively unexplored. Among other things, such liability separates the danger of liability from the benefits of speaking, making key actors prone to careless censorship of speech. This Article applies the First Amendment to third-party copyright liability by drawing lessons from the famous cases of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* It concludes that vicarious liability should be sharply curtailed, and that the application of presumed damages is constitutionally problematic in many contributory liability cases.

## INTRODUCTION

This Article offers preliminary thoughts about the application of the First Amendment to third-party copyright liability. Many authors have analyzed the overall relationship between copyright and the First Amendment,<sup>1</sup> but the First Amendment problems raised specifically by

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\* © 2009, Alfred C. Yen, Professor of Law, Law School Fund Scholar, and Director, Emerging Enterprises and Business Law Program, Boston College Law School. The author would like to thank Kara Hurvitz and John McKee for their research assistance, as well as the *Boston College Law Review* and its staff for holding this symposium and editing its papers.

<sup>1</sup> See, e.g., DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* (2009); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1029 (1970); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment*, 54 STAN. L. REV. 1, 7 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1183 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Pamela Samuelson, *Reviving Zacchini: Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836 (1983); Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1971); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393 (1989); Diane Leenheer Zimmerman, *Information as*

third-party copyright liability remain essentially unexplored.<sup>2</sup> This silence is perhaps explained by the judiciary's general view that copyright does not raise serious First Amendment concerns. Copyright unquestionably restricts speech. When an individual prints a book, performs music for others, or posts content on a web page, she clearly engages in speech protected by the First Amendment. Nevertheless, despite the First Amendment's admonition that Congress shall make "no law" abridging freedom of speech,<sup>3</sup> copyright does precisely that by making it generally illegal for an individual to engage in certain speech activities with works whose copyright is owned by someone else.<sup>4</sup> Many have suggested that the First Amendment affects the scope of copyright,<sup>5</sup> but courts do not agree.<sup>6</sup> Court after court has stated that copyright raises few, if any, First Amendment problems because copyright encourages the production of speech.<sup>7</sup> To the extent that copyright occasionally

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*Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

<sup>2</sup> See Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1870-72 (2000) (evaluating vicarious and contributory copyright liability in light of the First Amendment).

<sup>3</sup> U.S. CONST. amend. I.

<sup>4</sup> Copyright reserves to copyright holders the following exclusive rights:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (2006).

<sup>5</sup> See *supra* note 1.

<sup>6</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 218-19 (2003) (refusing to subject the Copyright Term Extension Act to First Amendment scrutiny); see also David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393, 1397 (2009) (discussing the courts' reluctance to restrain copyright by the First Amendment and calling for courts to read more accommodations into copyright law to protect important speech interests).

<sup>7</sup> See *Eldred*, 537 U.S. at 219 (noting that copyright encourages the production of speech and contains safeguards that reduce conflict with the First Amendment); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to

runs the risk of suppressing speech in a constitutionally problematic way, doctrines such as the idea/expression dichotomy and fair use ensure that copyright does not expand to the point where First Amendment objections become real.<sup>8</sup>

Even if the foregoing establishes copyright's general First Amendment compatibility, it does not properly account for peculiar free speech problems associated with third-party copyright liability. In particular, third-party copyright liability increases copyright's chilling of expression by separating the benefits of speaking from the burdens of liability. This chilling effect changes the incentives faced by key actors in ways that encourage the suppression of speech.

Consider, for example, a newspaper accused of infringement for posting on its website a book review that contains a long quote.<sup>9</sup> A newspaper in this position must decide whether to remove the review from its website. In doing so, it will weigh the risk of liability and the cost of defending itself against the value gained from continuing to speak. For purposes of contrast, consider the Internet service provider accused of third-party copyright infringement because it operates the server where the newspaper posted the book review. In deciding whether to remove the book review from the Internet, the service provider will consider the likelihood of liability and the cost of defense, but no countervailing value related to the service provider's own speech will offset these potential costs, for that value is enjoyed by the user, not the service provider.<sup>10</sup> Accordingly, the service provider will be more

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the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.”).

<sup>8</sup> See, e.g., *Eldred*, 537 U.S. at 198 (indicating that copyright law does not generally pose a conflict with the First Amendment); *Harper & Row*, 471 U.S. at 555–60 (rejecting the First Amendment as a limit on copyright); *New Era Publ'ns. Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (“The fair use doctrine encompasses all claims of first amendment in the copyright field.”); *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (“[T]he idea-expression dichotomy already serves to accommodate the competing interests of copyright and the first amendment.”).

<sup>9</sup> Such a use may or may not be infringement. Although it involves reproducing a portion of a copyrighted text, the fair use doctrine arguably excuses any infringement. See 17 U.S.C. § 107 (2006) (identifying criticism and comment as purposes justifying fair use treatment, depending on several factors, including the amount of borrowing and the effect on the market for the copyrighted work); see also *Harper & Row*, 471 U.S. 539 (analyzing whether fair use protects a news article discussing and quoting from Gerald Ford's memoirs).

<sup>10</sup> In theory, a service provider might worry that unwarranted removal of a user's content could be the basis for a breach of contract suit. A properly drafted service agreement, however, would likely offer complete protection from such liability.

willing to remove the accused book review from the Internet than the newspaper would be, and indeed most third-party defendants are quicker to suppress speech than primary speakers.<sup>11</sup>

The relatively high risk of chilling expression associated with third-party copyright liability suggests that the First Amendment is particularly relevant to the proper construction of this area of law. Indeed, as the following pages show, First Amendment principles have a great deal to say about the use of vicarious liability, contributory liability, and inducement, as well as the appropriateness of presumed damages in third-party copyright liability. This analysis requires two steps. First, this Article describes the present contours of third-party copyright liability and the open questions that might be influenced by First Amendment concerns.<sup>12</sup> Second, it connects the construction of third-party copyright liability to the chilling of speech.<sup>13</sup> In doing so, the Article uses insights borrowed from *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* to answer some of the open questions concerning the construction of third-party copyright liability.<sup>14</sup> Among other things, this Article argues that the First Amendment requires a narrow application of vicarious liability and that presumed damages cannot be granted in many cases of contributory liability.<sup>15</sup>

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<sup>11</sup> A good example of such willingness was the dispute between Professor Wendy Seltzer and the National Football League (“NFL”) over Professor Seltzer’s posting of a short clip from an NFL game displaying the NFL’s broad copyright claims to the video-sharing website YouTube. See Jacqui Chen, *NFL Fumbles Takedown Battle*, ARS TECHNICA, Mar. 20, 2007, <http://arstechnica.com/business/news/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions.ars>. The NFL immediately complained to YouTube, and YouTube promptly disabled access to Professor Seltzer’s posting despite the strong likelihood that Professor Seltzer’s posting constituted fair use. *Id.* If the NFL had complained instead to Professor Seltzer, it seems certain that Professor Seltzer would not have been as accommodating. See *id.* Indeed, she protested the NFL’s action to YouTube in order to get her posting restored. See *id.*

<sup>12</sup> See *infra* notes 16–97 and accompanying text.

<sup>13</sup> See *infra* notes 98–133 and accompanying text.

<sup>14</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The author previously suggested using these cases to limit third-party copyright liability. See Yen, *supra* note 2, at 1870–72. Rebecca Tushnet has also recently suggested the applicability of *New York Times Co. v. Sullivan* and its progeny to third-party liability. See Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1007 n.93 (2008) (stating that the reasoning of *New York Times Co. v. Sullivan* “supports rules that give intermediaries some extra protection against liability”).

<sup>15</sup> See *infra* notes 98–133 and accompanying text.

## I. THE LAW OF THIRD-PARTY COPYRIGHT LIABILITY

The present Copyright Act does not explicitly create causes of action for third-party copyright liability.<sup>16</sup> Courts have, however, used principles derived from the common law of tort to create three distinct causes of action for such liability: vicarious liability, contributory liability, and intentional inducement.<sup>17</sup> Each cause of action comes from different lines of case law.<sup>18</sup> As this section shows, certain interpretations of the law will likely increase the chilling effect on speech associated with third-party copyright liability.<sup>19</sup>

### A. Vicarious Liability

In 1963, the U.S. Court of Appeals for the Second Circuit's decision in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, supplied the modern elements of vicarious copyright liability.<sup>20</sup> In that case, the defendant, H.L. Green Company, operated a chain of department stores.<sup>21</sup> Green hired the Jalen Amusement Company as the concessionaire operating the music record departments in these stores.<sup>22</sup> The relationship between Green and Jalen was fairly close.<sup>23</sup> Jalen and its employees followed Green's policies, and Green had the authority to discharge Jalen's personnel.<sup>24</sup> Jalen deposited its receipts into Green's cash registers, and Green took the money.<sup>25</sup> Green then deducted its ten to twelve percent commission, the salaries of Jalen's employees, and taxes before returning any balance to Jalen.<sup>26</sup> Customers buying records re-

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<sup>16</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984) ("The Copyright Act does not expressly render anyone liable for infringement committed by another.").

<sup>17</sup> See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005) (establishing intentional inducement as a cause of action); *Gershwin Publ'g Co. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (establishing contributory liability as a cause of action); *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963) (establishing vicarious liability as a cause of action).

<sup>18</sup> See generally Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184 (2006) (providing a more detailed description of these causes of action); Yen, *supra* note 2 (same).

<sup>19</sup> See *infra* notes 20–97 and accompanying text.

<sup>20</sup> 316 F.2d at 307.

<sup>21</sup> *Id.* at 306.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Shapiro*, 316 F.2d at 306.

ceived receipts from Green with no mention of Jalen.<sup>27</sup> Unfortunately, some of the records sold by Jalen were infringing counterfeits.<sup>28</sup> The plaintiffs sued Green, contending that Green was liable for Jalen's infringement.<sup>29</sup>

The district court ruled in Green's favor,<sup>30</sup> but the Second Circuit reversed.<sup>31</sup> In deciding for the plaintiffs, the Second Circuit wrote:

When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.<sup>32</sup>

Given the close relationship between Green and Jalen, liability quickly followed.<sup>33</sup> Courts generally credit the above-quoted passage from *Shapiro* as the source of the two elements that govern vicarious copyright liability today: some level of control over another's infringement and a financial interest in that infringement.<sup>34</sup>

It is important to understand that vicarious copyright liability does not measure whether a defendant behaved culpably. The elements of control and financial interest measure whether a defendant's relationship to an infringer is sufficiently close to justify holding the defendant responsible for the infringer's behavior.<sup>35</sup> This does not mean that the defendant did anything wrong. There is nothing inherently unreasonable about having a close relationship with someone who happens to commit copyright infringement. Accordingly, vicarious liability merely reflects a judgment that it is fair to hold the defendant liable or that such liability would serve social goals of preventing infringement and raising compensation.<sup>36</sup> To borrow from the language of torts, vicarious copyright liability is a form of strict liability.<sup>37</sup>

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<sup>27</sup> *Id.* at 305–06.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 306.

<sup>30</sup> *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 135 U.S.P.Q. 181, 182 (S.D.N.Y. 1962).

<sup>31</sup> *Shapiro*, 316 F.2d at 307.

<sup>32</sup> *Id.* (internal citations omitted).

<sup>33</sup> *Id.* at 308–09.

<sup>34</sup> See *Banff Ltd. v. Limited, Inc.*, 869 F. Supp. 1103, 1107 (S.D.N.Y. 1994) (identifying *Shapiro* as the leading case on vicarious copyright liability).

<sup>35</sup> Cf. *Shapiro*, 316 F.2d at 308.

<sup>36</sup> See *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.*, 907 P.2d 358, 366 (Cal. 1995) (adopting this explanation for strict liability); *Huddleston ex rel. Huddleston v. Union Rural Elec.*

The principal controversy in the law of vicarious copyright liability concerns its scope. Some courts have taken *Shapiro's* precise formulation rather seriously, holding liable only those defendants who have close control over an infringer's behavior and take a portion of the infringer's actual sales. For example, in the 1994 case *Artists Music, Inc. v. Reed Publishing, Inc.*, heard by the U.S. District Court for the Southern District of New York, the defendant Reed Publishing organized a trade show at which it rented booths to various exhibitors, some of whom allegedly made unauthorized use of music in their displays.<sup>38</sup> The plaintiffs sued to hold Reed vicariously liable for any infringement,<sup>39</sup> but the court decided in Reed's favor at summary judgment.<sup>40</sup> In so deciding, the court rejected the plaintiff's entirely plausible interpretation of control and financial interest.<sup>41</sup> The defendant arguably had control because it could have prohibited the use of music by exhibitors or monitored such use.<sup>42</sup> The plaintiffs also argued that the defendant had a financial interest in the underlying infringements because music made the exhibits more attractive, thereby increasing the show's paid attendance and the defendant's revenue.<sup>43</sup> The court rejected these arguments, stating that control required more than the simple ability to prohibit generally the use of music and that financial interest required a cut of actual revenue, as opposed to a general business-related benefit.<sup>44</sup>

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Ass'n, 841 P.2d 282, 287 (Colo. 1992) (en banc) (same); *Bair v. Peck*, 811 P.2d 1176, 1182 (Kan. 1991) (same); *Adams v. N.Y. City Transit Auth.*, 666 N.E.2d 216, 218 (N.Y. 1996) (same).

<sup>37</sup> See *Yen*, *supra* note 2, at 1859.

<sup>38</sup> See *Artists Music*, 31 U.S.P.Q.2d at 1624–25, 1627.

<sup>39</sup> *Id.* at 1625–26.

<sup>40</sup> *Id.* at 1627.

<sup>41</sup> *Id.* at 1626–27.

<sup>42</sup> *Id.*

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

<sup>44</sup> *Artists Music*, 31 U.S.P.Q.2d at 1627. Other courts have taken a similar view. See *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (finding no vicarious liability against Internet service provider for allowing subscribers access to infringing copies of the plaintiff's work posted by a third party who was not a subscriber); *Goes Lithography Co. v. Banta Corp.*, 26 F. Supp. 2d 1042, 1045 (N.D. Ill. 1998) (holding that plaintiff failed to state a cause of action for vicarious copyright liability against parent corporation for infringement committed by its wholly owned subsidiary); *Burdick v. Koerner*, 988 F. Supp. 1206, 1210 (E.D. Wisc. 1998) (“[T]he better-reasoned case law demonstrates that in order to establish vicarious liability in the context of a claim for copyright infringement, a plaintiff must introduce evidence beyond a defendant's membership on a board of directors.”); *Marobie-FL Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1179 (N.D. Ill. 1997) (finding no vicarious liability against Internet service provider for infringing posting by its subscriber); *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs.*, 907 F. Supp. 1361, 1377 (N.D. Cal. 1995) (same); *Banff*, 869 F. Supp. at 1110.

*Artists Music* stands in sharp contrast to *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*, a 1994 case decided by the U.S. District Court for the District of Massachusetts, in which the plaintiff, a copyright holder, similarly claimed that the operator of a large computer trade show was vicariously liable for infringing performances of music by exhibitors.<sup>45</sup> Although the *Polygram* court found for the defendants because there was insufficient evidence of direct infringement,<sup>46</sup> the court interpreted the law of vicarious liability in the plaintiff's favor.<sup>47</sup> With respect to the right and ability to supervise, the *Polygram* court consciously rejected the proposition that a defendant had to have control over the "manner and means of performance."<sup>48</sup> Instead, the court endorsed the principle that the simple ability to veto the use of music by the primary infringer established the necessary control.<sup>49</sup> The court went even further in interpreting the requirement of an "obvious and direct financial interest." According to the court, the law permitted the imposition of vicarious liability on a showing of "either direct or indirect financial benefit."<sup>50</sup> This finding opened the door to the court's conclusion that "commercial gain from the overall operation and either a direct or indirect financial benefit from the infringement itself" would support liability.<sup>51</sup> The court reasoned that the defendant operated the trade show for profit, and that the performance of music by exhibitors made the show's exhibits more attractive to the show's attendees. Hence, the defendant had the necessary indirect financial interest.<sup>52</sup>

The different approaches outlined above have very different consequences for third-party copyright liability and its associated chilling of expression. A third-party defendant facing vicarious liability can avoid adverse consequences only by preventing infringement. And because she does not reap any of the benefits from the speech, she has little reason to avoid sweeping too broadly in order to avoid liability. Accordingly, if courts take the narrower *Artists Music* approach to vicarious liability, relatively few defendants have to worry about being vicariously responsible for the misdeeds of others, and fewer actors will take aggressive, overbroad action against noninfringing speech. This will keep

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<sup>45</sup> See *Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1317 (D. Mass. 1994).

<sup>46</sup> *Id.* at 1323.

<sup>47</sup> *Id.* at 1328-33.

<sup>48</sup> *Id.* at 1326.

<sup>49</sup> *Id.*

<sup>50</sup> *Polygram*, 855 F. Supp. at 1326.

<sup>51</sup> *Id.* at 1331.

<sup>52</sup> *Id.* at 1331-33.

copyright's chilling of expression relatively low. By contrast, if courts take the broader *Polygram* approach, more defendants will face liability and will therefore react by diligently suppressing all alleged infringing behavior with little regard for errors. Indeed, a defendant facing *Polygram*-type liability might prohibit all use of music at its trade show, regardless of whether the user had a license. This would increase copyright's chilling effect.<sup>53</sup>

### B. Contributory Liability

In the 1971 case, *Gershwin Publishing Corporation v. Columbia Artists Management*, the U.S. Court of Appeals for the Second Circuit wrote, “[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.”<sup>54</sup> Many courts have since adopted this formulation.<sup>55</sup> The *Gershwin* court applied this formulation to impose liability on Columbia Artists Management, a company that arranged performance opportunities for musicians.<sup>56</sup> Columbia sometimes did this by helping local communities organize concert series into which Columbia would book its artists.<sup>57</sup> Unfortunately, as Columbia knew, the local venues often did so without appropriate performance licenses.<sup>58</sup> The Second Circuit found that such knowledge, combined with the assistance given to the concert organizers, established contributory liability.<sup>59</sup>

Over time, courts have distilled the *Gershwin* statement to give contributory copyright liability two elements: knowledge and material con-

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<sup>53</sup> Several courts have taken a similar approach, interpreting vicarious liability broadly. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023–24 (9th Cir. 2001) (holding that having the ability to block users from accessing a system that allowed infringement and the role of music in attracting users to the system established the likelihood of vicarious liability); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (concluding plaintiff stated an adequate claim against flea market operators despite not alleging knowledge of specific instances of infringement nor a direct financial interest); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993, 1001–02 (E.D. Cal. 2004) (granting summary judgment against flea-market operators for infringement committed by vendors at flea market).

<sup>54</sup> 443 F.2d at 1162 (internal citation omitted).

<sup>55</sup> See *Napster*, 239 F.3d at 1019–20; *Fonovisa*, 76 F.3d at 264; *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1455 (C.D. Cal. 1996); *Demetriades v. Kaufmann*, 690 F. Supp. 289, 293 (S.D.N.Y. 1988).

<sup>56</sup> 443 F.2d at 1160.

<sup>57</sup> *Id.* at 1161.

<sup>58</sup> See *id.*

<sup>59</sup> *Id.* at 1162–63.

tribution.<sup>60</sup> These elements show that contributory liability operates on a theory different from vicarious liability. By imposing liability when the defendant knowingly contributes to infringement in a material way, contributory liability evaluates the culpability of a defendant's behavior. Again, to borrow from tort law, this makes contributory liability a fault-based, as opposed to strict liability, cause of action.<sup>61</sup>

As with vicarious liability, courts have interpreted contributory liability in divergent ways, disagreeing primarily about the meaning of "knowledge." Many courts interpret knowledge narrowly, limiting liability to those defendants who have relatively detailed and specific information about infringement that they support. For example, in the famous 1984 U.S. Supreme Court case, *Sony v. Universal City Studios*, the plaintiffs sued Sony for contributory liability on the ground that some consumers who purchased Sony Betamax videocassette recorders made infringing copies of the plaintiffs' movies and television shows.<sup>62</sup> Without question, Sony "knew" in the colloquial sense that some of its customers would infringe copyrights, and its product clearly provided important support to these infringers.<sup>63</sup> Nevertheless, the Court concluded that such knowledge was not enough to hold Sony liable for contributory infringement.<sup>64</sup> According to the Court, sufficiently culpable intent could be imputed to Sony only if the Betamax recorders were incapable of substantial non-infringing use.<sup>65</sup> The Court determined that time-shifting (the practice of making temporary copies of shows for later viewing) was a sufficiently substantial non-infringing use, making liability impossible.<sup>66</sup>

If *Sony* illustrates the type of knowledge insufficient to support contributory liability, a case like *A & M Records v. Abdallah*, a 1996 case from the U.S. District Court for the Central District of California, illustrates the kind of knowledge that supports it.<sup>67</sup> In that case, the defendant Abdallah sold time-loaded cassette tapes, which were ordinary blank cassettes that came with specified amounts of tape.<sup>68</sup> Legitimate producers of music used these cassettes in order to eliminate long pe-

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<sup>60</sup> See *Fonovisa*, 76 F.3d at 264; *Abdallah*, 948 F. Supp. at 1456.

<sup>61</sup> See Yen, *supra* note 2, at 1873.

<sup>62</sup> 464 U.S. at 419-20.

<sup>63</sup> *Id.* at 426 (noting that the trial court assumed that Sony had constructive knowledge of the likelihood that Betamax users would copy copyrighted programs).

<sup>64</sup> *Id.* at 439-56.

<sup>65</sup> *Id.* at 442.

<sup>66</sup> *Id.* at 456.

<sup>67</sup> 948 F. Supp. at 1449.

<sup>68</sup> *Id.* at 1453.

riods of silence that might otherwise have occurred at the end of standard length cassettes. For example, a twenty-five minute piece of music would come with five minutes of silence if recorded onto a standard thirty minute cassette. A time-loaded cassette, however, would eliminate this inconvenience by providing enough tape for only twenty-five minutes of recording.<sup>69</sup> Abdallah sold such time-loaded cassettes to people that he knew were producing counterfeit infringing recordings.<sup>70</sup> In some cases, Abdallah himself timed the performances to be duplicated in order to manufacture the appropriate length cassette.<sup>71</sup> When sued, Abdallah claimed that *Sony* protected him from liability because time-loaded cassettes were capable of substantial noninfringing uses.<sup>72</sup> The court rejected Abdallah's claim because Abdallah knew much more about the infringing behavior he supported than Sony did.<sup>73</sup> He knew the precise identities of the infringers, the actual works being infringed, and the ultimate use of the infringing copies.<sup>74</sup> This level of knowledge clearly established Abdallah's culpability, and liability followed.<sup>75</sup>

By way of contrast, a smaller number of courts have interpreted the knowledge requirement more generously, extending liability to defendants with a general, as opposed to a specific, level of knowledge about infringement by others. For example, in the 2002 case, *Perfect 10*

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<sup>69</sup> *Id.* at 1453–54.

<sup>70</sup> *Id.* at 1454.

<sup>71</sup> *Id.* at 1455.

<sup>72</sup> *Id.* at 1456.

<sup>73</sup> *Abdallah*, 948 F. Supp. at 1456–57.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Numerous cases adopt the limited approach to contributory liability identified here. See *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706–07 (2d Cir. 1998) (finding defendant not liable even though “star pagination” in legal case reports could have allowed others to infringe plaintiffs’ copyrights); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (finding defendant not liable for selling software that facilitated copying of computer programs on disks protected by anti-copying technology despite knowledge that customers might commit copyright infringement); *Faulkner v. Nat'l Geographic Soc'y*, 211 F. Supp. 2d 450, 474–75 (S.D.N.Y. 2002) (determining that sponsor of work containing infringing copies of photographs was not contributorily liable because sponsor made reasonable inquiry about possible infringement and received assurances from primary infringer); *Adobe Sys. Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1056 (C.D. Cal. 2001) (holding that a letter complaining about infringement committed by apparently unidentified exhibitors at a computer show was insufficient to establish summary judgment for plaintiff on the issue of defendant’s knowledge); *Livnat v. Lavi*, 46 U.S.P.Q.2d 1300, 1303 (S.D.N.Y. 1998) (“[A]ssistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in concert with the direct infringer.”); *Demetriades*, 690 F. Supp. at 294 (finding real estate broker not contributorily liable for selling land on which a house was built with the assistance of infringing architectural plans).

*v. Cybernet Ventures*, the U.S. District Court for the Central District of California used contributory liability to grant a preliminary injunction against a third-party defendant that provided age verification services to a number of pornographic websites.<sup>76</sup> The plaintiff in that case was Perfect 10, a magazine and website that owned copyright in a number of pornographic images.<sup>77</sup> Unfortunately for Perfect 10, a number of websites posted infringing copies of Perfect 10's images.<sup>78</sup> Many of these websites used the defendant Cybernet's services to make sure that only those over the age of eighteen accessed materials.<sup>79</sup> Perfect 10 sued and moved for a preliminary injunction, claiming that Cybernet was both vicariously and contributorily liable for the infringement of the websites using its services.<sup>80</sup> With respect to contributory liability, Cybernet had a lower level of knowledge than Abdallah did. Perfect 10 may have informed Cybernet that certain websites infringed, but Cybernet did not know the particulars of every act of infringement the way Abdallah did.<sup>81</sup> Nevertheless, the court granted Perfect 10's motion.<sup>82</sup>

Relaxing the interpretation of knowledge has potentially significant consequences for contributory liability. Contributory liability is intended to measure a defendant's culpability for knowingly supporting infringement. The more a defendant knows about the particulars of infringement, the more likely it is that she has unreasonably and culpably supported infringement. Conversely, if a defendant knows less, support will seem more reasonable. Accordingly, courts that impose liability on lower levels of knowledge risk converting contributory liability from a fault-based cause of action to something approximating strict liability. For example, consider what would happen if a simple, unspecified complaint could establish knowledge. If this were so, an Internet

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<sup>76</sup> 213 F. Supp. 2d 1146, 1169–71 (C.D. Cal. 2002).

<sup>77</sup> *Id.* at 1156–57, 1163.

<sup>78</sup> *Id.* at 1162.

<sup>79</sup> *Id.* at 1158–59.

<sup>80</sup> *See id.* at 1169–74 (discussing contributory and vicarious liability claims).

<sup>81</sup> *Cf. Perfect 10*, 213 F. Supp. 2d at 1169; *Abdallah*, 948 F. Supp. at 1454–55.

<sup>82</sup> *Perfect 10*, 213 F. Supp. 2d at 1193–94. Other cases reach similar results. *See Napster*, 239 F.3d at 1021–22 (finding sufficient knowledge to impose contributory liability on the basis of “demonstrated infringing use of the Napster system”); *Arista Records, Inc. v. Flea World, Inc.*, No. 03-2670 (JBS), 2006 WL 842883, at \*1 (D.N.J. Mar. 31, 2006) (granting summary judgment against operators of flea market for infringement committed by vendors); *UMG Recordings, Inc. v. Bertelsmann AG*, 222 F.R.D. 408, 413–14 (N.D. Cal. 2004) (denying defendants' motion to dismiss suit alleging that venture capital firm that took control of a company operating a file sharing network is liable for vicarious and contributory infringement); *Sinnott*, 300 F. Supp. 2d at 1000–01 (finding defendant liable for contributory infringement).

service provider could be given knowledge by delivery of a complaint to a customer service representative in a shopping mall. Thus, even though a service provider might not reasonably be required to respond to such a complaint, the law of contributory liability might create liability for failure to do so. This would be the equivalent of strict third-party liability because such notice could very easily be created by any copyright holder, and it would have the effect of increasing copyright's chilling effect on speech. Accordingly, the decision about whether to embrace the expansion of contributory copyright is of great significance to the construction of third-party copyright liability.

### C. *Intentional Inducement*

The 2005 U.S. Supreme Court case, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, established intentional inducement as the third and final cause of action of importance to this Article.<sup>83</sup> In *Grokster*, the defendants distributed software used to share files over the Internet on a "peer-to-peer" basis.<sup>84</sup> Although people could use the software to share any type of file, most uses involved the sharing of copyrighted music files.<sup>85</sup> The plaintiffs sued for vicarious and contributory liability, but the U.S. Court of Appeals for the Ninth Circuit held for the defendants because the defendants' software was capable of substantial non-infringing uses.<sup>86</sup> The Supreme Court vacated the court of appeals' opinion and remanded the case.<sup>87</sup> In so doing, the Court chose not to apply the standard formulations of vicarious and contributory liability described above. Instead, the Court opened a new branch of third-party copyright liability based upon intentional tort.<sup>88</sup> The Court stated that defendants who intended to cause infringement could be held liable for the infringement of others, even if they distributed technology that had substantial non-infringing uses:

*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

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<sup>83</sup> See *Grokster*, 545 U.S. at 936–37.

<sup>84</sup> *Id.* at 919–20.

<sup>85</sup> *Id.* at 922–23.

<sup>86</sup> *Id.* at 927–28.

<sup>87</sup> *Id.* at 941.

<sup>88</sup> *Id.* at 934–35.

law. . . . Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability.<sup>89</sup>

The Court then noted that the record contained ample evidence that the *Grokster* defendants wanted others to use their technology to infringe and remanded the case for further fact finding.<sup>90</sup> In so deciding, the Court made it clear that inducement applies to defendants who behave in a highly culpable manner, and that the cause of action does not include simply acting with the general knowledge that others may infringe:

[M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.<sup>91</sup>

For purposes of this Article, it is important to understand that there are now two separate bases on which to find a third-party copyright defendant liable on a fault basis. First, there is contributory infringement, which measures the defendant's culpability by evaluating her action in light of knowledge about another's infringement. Second, there is also now inducement, which measures a defendant's culpability by the object of her intent. As will later be shown, the differences between inducement and contributory liability can, from a First Amendment point of view, affect the kinds of damages recoverable by a copyright plaintiff.<sup>92</sup>

#### D. *Copyright Damages*

A brief description of copyright damages completes our tour of third-party copyright liability. Plaintiffs can recover two distinct forms of monetary damages under the Copyright Act: The first is ordinary com-

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<sup>89</sup> *Grokster*, 545 U.S. at 934–35.

<sup>90</sup> *Id.* at 924–26.

<sup>91</sup> *Id.* at 937.

<sup>92</sup> See *infra* notes 94–133 and accompanying text.

pensatory damages that require plaintiffs to prove any financial harm he or she has suffered or profits enjoyed by the defendant because of infringement.<sup>93</sup> The second is presumed damages, which plaintiffs can elect in lieu of ordinary damages.<sup>94</sup> Plaintiffs do not need to offer specific proof of harm or profit to recover presumed damages. Rather, a court may set the amount of those damages as it sees fit within a range of \$750 to \$30,000 per infringement.<sup>95</sup> If the defendant's infringement was willful, the court may increase the amount to \$150,000 per infringement.<sup>96</sup> If the defendant's infringement was innocent, the court may decrease the amount to as little as \$200 per infringement.<sup>97</sup>

## II. THE FIRST AMENDMENT AND THIRD-PARTY COPYRIGHT LIABILITY

The foregoing makes it possible to describe concisely the present organization of third-party copyright liability and some of the interpretive challenges that courts face.<sup>98</sup> In a nutshell, there are three causes of action for third-party copyright liability that correspond to three major forms of tort liability. Vicarious liability corresponds to strict tort liability.<sup>99</sup> Contributory liability corresponds to negligence.<sup>100</sup> Intentional inducement corresponds to intentional tort liability.<sup>101</sup> Plaintiffs who sue successfully under these causes of action may choose between ordinary compensatory damages and presumed damages.<sup>102</sup>

Presently, courts face two primary interpretive challenges when applying these causes of action. First, as noted earlier, it is possible to construe vicarious liability to hold a broad range of defendants liable without fault for infringement committed by others.<sup>103</sup> Doing this could decrease the amount of copyright infringement committed, but it would also increase copyright's chilling effect on speech. Second, it is possible to interpret contributory liability so that relatively low levels of knowledge expose defendants to potential liability.<sup>104</sup> In some cases, this level of knowledge is sufficiently low to effectively transform con-

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<sup>93</sup> 17 U.S.C. § 504(a)(1) (2006).

<sup>94</sup> *Id.* § 504(c).

<sup>95</sup> *Id.* § 504(a)(2).

<sup>96</sup> *Id.* § 504(c)(1).

<sup>97</sup> *Id.* § 504(c)(2).

<sup>98</sup> *See supra* notes 16–97 and accompanying text.

<sup>99</sup> *See supra* notes 20–53 and accompanying text.

<sup>100</sup> *See supra* notes 54–82 and accompanying text.

<sup>101</sup> *See supra* notes 83–92 and accompanying text.

<sup>102</sup> *See supra* notes 93–97 and accompanying text.

<sup>103</sup> *See supra* notes 45–52 and accompanying text.

<sup>104</sup> *See supra* notes 76–82 and accompanying text.

tributory liability from a fault-based cause of action to a strict liability cause of action.<sup>105</sup> This would also potentially stop more copyright infringement at the cost of greater chilling of speech.

To see the First Amendment implications of these interpretive challenges in more detail, a good place to start is the framework created by the U.S. Supreme Court in 1964, in the line of cases led by *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch*.<sup>106</sup> These cases govern the relationship between libel law and the First Amendment,<sup>107</sup> a relationship that is reasonably similar, though certainly not identical, to the one between copyright and the First Amendment. Like copyright, libel restricts speakers in order to advance a private interest. Copyright creates a private right of action to protect commercial interests that encourage the production of creative works. Libel creates a private right of action to protect an individual's interest in reputation.<sup>108</sup> Equally important, both libel and copyright have the potential to chill speech because mistakes are made when enforcing them and potential defendants cannot always be sure whether they are subject to liability.

The Supreme Court's reaction to the chilling effect associated with libel is instructive to those thinking about third-party copyright liability. At the time of *Sullivan*, common law libel held speakers strictly liable for false and defamatory statements.<sup>109</sup> Moreover, common law allowed plaintiffs to recover for, among other things, presumed damages without proof of pecuniary injury.<sup>110</sup> The Court recognized that this common law scheme created constitutionally objectionable risks of self-censorship.<sup>111</sup> The Court noted that the fear of damage awards, particularly those granted without proof of actual pecuniary loss, could frighten speakers more than criminal prosecution might frighten speakers.<sup>112</sup> Granted, in theory there would be no conflict if libel deterred only those spreading falsehoods, because the dissemination of

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<sup>105</sup> See *supra* notes 45–52 and accompanying text.

<sup>106</sup> *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>107</sup> See *Gertz*, 418 U.S. at 325; *Sullivan*, 376 U.S. at 256.

<sup>108</sup> See *Gertz*, 418 U.S. at 341 (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.”).

<sup>109</sup> 376 U.S. at 267 (explaining that the only defense to publication of libelous statements is truth).

<sup>110</sup> *Id.* (noting that “general damages are presumed, and may be awarded without proof of pecuniary injury”).

<sup>111</sup> *Id.* at 279.

<sup>112</sup> *Id.* at 277–78.

falsehoods does not serve First Amendment interests.<sup>113</sup> The Court, however, noted that liability against the disseminators of all falsehoods affected the dissemination of true statements as well:

Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.”<sup>114</sup>

The Court then concluded that the common law of libel could not constitutionally impose strict liability against the speaker of any falsehood concerning a so-called “public official.”<sup>115</sup> Instead, such liability could exist only if a speaker acted with “actual malice,” namely knowledge of falsity or reckless disregard for the truth.<sup>116</sup>

In 1974, *Gertz v. Robert Welch* offered the Court the chance to expand the First Amendment response to the chilling effect of libel.<sup>117</sup> In *Gertz*, the plaintiff was a lawyer—not a public official—who won a verdict of \$50,000 on a strict liability basis from the publisher of a false and defamatory statement.<sup>118</sup> The district court, however, entered a judgment notwithstanding the verdict on the ground that the *Sullivan* standard should have governed the case.<sup>119</sup> This allowed the Supreme Court to consider how, if at all, the constitutional limits identified in *Sullivan* applied in cases with plaintiffs who were not public officials.<sup>120</sup> The Court decided that the First Amendment did limit these actions, but that the precise limit depended on the identity of the plaintiff, the defendant’s culpability, and the type of damages sought.<sup>121</sup>

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<sup>113</sup> See *Gertz*, 418 U.S. at 340 (“[T]he erroneous statement of fact is not worthy of constitutional protection . . .”).

<sup>114</sup> *Sullivan*, 376 U.S. at 279 (internal citation omitted).

<sup>115</sup> *Id.* at 279–80.

<sup>116</sup> *Id.*

<sup>117</sup> 418 U.S. at 325.

<sup>118</sup> *Id.* at 328–29.

<sup>119</sup> *Id.* at 325.

<sup>120</sup> *Id.* at 332 (“The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.”).

<sup>121</sup> *Id.* at 342–47.

For all actions by public figures, namely those holding public office and others of significant notoriety, recovery of any type could exist only upon a showing of actual malice.<sup>122</sup> For actions by non-public figures, the rules are more complicated. As an initial matter, no recovery is possible unless the plaintiff can show that the defendant behaved negligently or worse.<sup>123</sup> Plaintiffs who prove only negligence, however, can recover only proven compensatory damages.<sup>124</sup> If a plaintiff wants to recover presumed damages, she must prove that the defendant acted with actual malice.<sup>125</sup>

*Sullivan* and *Gertz* establish a general constitutional preference for free speech over remedies for libel.<sup>126</sup> The common law rule applying strict liability to speakers of all false and defamatory statements does not work perfectly. Some libel would go unremedied, and some true speech would get suppressed. One might argue that the judicial system would make these errors in roughly equal amounts, and that a balanced approach to the tension between libel and free speech should accept this distribution of errors as an appropriate tradeoff. This is, however, precisely what the Supreme Court rejected. By making it harder for plaintiffs to win libel cases, the Court embraced the principle that errors against free speech are worse than errors permitting libel.<sup>127</sup> In other words, the First Amendment establishes that it is better to allow more libel to go unremedied in order to protect free speech than it is to lose free speech in order to prevent or remedy libel.

This preference should be extended to copyright. After all, courts deciding copyright cases will make errors similar to those made in libel cases. And again, one could argue that a fair balance accepts a roughly equal split between errors against speech and errors failing to remedy infringement. If the Supreme Court considered free speech more important than perfect enforcement of private actions in libel, however, it would seem to follow that free speech is more important than private

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<sup>122</sup> *Id.* at 342–43.

<sup>123</sup> *Gertz*, 418 U.S. at 347 (“We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”).

<sup>124</sup> *Id.* at 350.

<sup>125</sup> *Id.* at 349 (“It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.”).

<sup>126</sup> *Cf. id.* at 340 (rejecting punishment of errors to avoid restricting freedom of speech); *Sullivan*, 376 U.S. at 271–72 (“[E]rroneous statement is inevitable in free debate and . . . it must be protected if the freedoms of expression are to have the breathing space that they need to survive.”) (internal quotation omitted).

<sup>127</sup> *Cf. Gertz*, 418 U.S. at 347–48; *Sullivan*, 376 U.S. at 279–80.

actions in copyright. If this logic is correct, then it makes sense to consider whether, at least in some cases, the Constitution requires substantive changes in copyright. And indeed, it turns out that third-party copyright liability imposes liability in ways that *Sullivan* and *Gertz* considered problematic in the context of libel.

First, the application of vicarious liability is problematic because it is a form of strict liability.<sup>128</sup> Before *Sullivan* and *Gertz*, libel was a strict liability cause of action, but those cases now limit libel by requiring the plaintiff to show that the defendant acted with fault.<sup>129</sup> If this logic is applied to vicarious copyright liability, it seems reasonable to conclude that, at the very least, the aggressive expansion of vicarious liability adopted by some courts violates the First Amendment. One might be tempted to say that the application of vicarious liability should be entirely unconstitutional as a form of strict liability, but such a conclusion would probably be unwarranted. *Gertz* did say that courts could not impose libel liability without fault.<sup>130</sup> It seems unlikely, however, that the *Gertz* Court meant to eliminate *respondeat superior* from libel, and indeed, contemporary employers face liability for libel committed by employees within the scope of their employment.<sup>131</sup>

Additionally, *Sullivan* and *Gertz* cast doubt upon expansive interpretations of contributory liability. If courts follow the suggestion made above and limit the application of vicarious copyright liability to *respondeat superior*, then contributory liability will govern the vast majority of third-party copyright liability cases. If courts interpret contributory liability's elements of knowledge and material contribution as a method of establishing fault, there would appear to be no conflict with the First Amendment because plaintiffs would have to prove fault in order to recover. If, however, courts begin interpreting knowledge in such a way that contributory liability slides toward strict liability, they will create a conflict with *Sullivan* and *Gertz* because plaintiffs will be able to recover without proving fault.

Second, and perhaps even more strikingly, *Sullivan* and *Gertz* have something to say about the imposition of damages in third-party copyright liability cases. A major component of copyright's chilling of speech comes from the possibility of presumed damages. For example, a service provider like the video-sharing website YouTube hosts many

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<sup>128</sup> See *supra* notes 20–52 and accompanying text.

<sup>129</sup> See *supra* note 123 and accompany text.

<sup>130</sup> 418 U.S. at 347–48.

<sup>131</sup> See, e.g., *Mullinax v. Miller*, 531 S.E.2d 390, 393 (Ga. Ct. App. 2000) (noting that the doctrine of *respondeat superior* applies in libel cases).

instances of infringing content, but also many non-infringing uses of copyrighted works. When copyright holders complain to YouTube, thereby putting the company on notice for purposes of contributory infringement, YouTube must decide whether to capitulate to the copyright holder's demand to remove the alleged infringement or allow the use to remain. A meaningful part of this calculation is the cost of mistakenly failing to remove content that a court determines to be infringement. In many cases, the actual monetary loss to the copyright holder is small. A home video that uses copyrighted music in the background does not represent any meaningful likelihood of lost revenue to the copyright holder, and YouTube's financial risk would be fairly limited if the copyright holder had to prove damages by a preponderance of evidence. Presumed damages, however, radically change this calculation. Now, YouTube can no longer calculate that risk is low because the copyright holder can elect presumed damages that can run as high as \$30,000 per infringement.<sup>132</sup> Such damages, even if the likelihood is low, are no laughing matter, especially when thousands of similar uses probably exist on YouTube's servers at any given time. This problem is reasonably similar to the dilemmas faced by libel defendants before *Sullivan* and *Gertz*.

The constitutional solution from libel is applicable to third-party copyright liability. Under *Sullivan* and *Gertz*, a libel plaintiff cannot recover presumed damages unless the defendant acted deliberately or with reckless disregard for the truth.<sup>133</sup> If this limit were applied to third-party copyright liability, a plaintiff could recover presumed damages only from defendants who commit intentional inducement or contributory infringement rising beyond fault to recklessness. Although this may seem jarring at first, a sensible result would follow. If a service provider like YouTube gets a complaint of an infringing use, it would, as a matter of likely current practice, investigate the complaint. If the investigation reveals a clear case of infringement, YouTube's failure to remove the infringing content would support presumed damages—if the plaintiff elected them—because such failure to remove a clear case of infringement would be at least reckless. If the investigation revealed a debatable case of infringement, however, such as a possible fair use defense, YouTube's failure to remove the posted content could support only proven compensatory damages, not presumed damages, because YouTube's failure to remove such content is at best negligent.

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<sup>132</sup> See 17 U.S.C. § 504(c) (2006).

<sup>133</sup> See *supra* notes 122–125 and accompanying text.

## CONCLUSION

This Article has applied a First Amendment perspective to the construction of third-party copyright liability. In so doing, it has paid particular attention to the elevated risk of chilling non-infringing speech posed by third-party copyright liability. It then argued for a particular construction of third-party copyright liability that prevents this chilling effect from rising to constitutionally objectionable levels. This construction would include limiting vicarious copyright liability to the reach of *respondeat superior*, making sure that contributory liability remains an assessment of the defendant's fault and not a form of strict liability, and limiting the availability of presumed damages to cases of intentional inducement or reckless contributory liability.

It is, of course, possible to object to the suggestions made here. If nothing else, judicial reluctance to subject copyright to serious First Amendment scrutiny casts doubt on whether courts would actually use the First Amendment to impose the construction laid out here. Moreover, copyright and libel may raise similar First Amendment issues, but the differences may prove constitutionally significant. Indeed, although third-party copyright clearly chills some speech, it is possible that enough instances of arguable infringement are unaffected by this chilling effect because the relevant actors are simply unaware of copyright. Moreover, it is possible that, in some cases, copyright holders do not aggressively enforce their copyrights in ways that would significantly chill speech. For example, YouTube hosts many apparent infringements that copyright holders seem not to complain about.

Even if it turns out, however, that the First Amendment does not require the construction of third-party copyright liability suggested here, this Article raises issues that courts should consider. If nothing else, the application of First Amendment principles to third-party copyright liability exposes the relationship between such liability and the chilling effect on free speech, and it points the way to interpretations of law that are appropriately sensitive to First Amendment values.

