MEMORANDUM

To: Corynne McSherry
From: Chris Conley, Anne Kelson and Shane Wagman, EFF legal interns[1]
Re: Memo re: Parental Liability for Copyright Infringement by Minor Children
Date: July 19, 2010

QUESTIONS PRESENTED

1. Are parents secondarily liable for the direct copyright infringement performed by their minor children on family computers?
2. Are parents liable for judgments against their minor children for damages resulting from copyright infringement?

SHORT ANSWERS

1. Parents may be found liable, but the inquiries will be highly fact specific. They will more likely be found contributorily infringing rather than vicariously infringing.
2. Claims based on state parental liability statutes will depend on the precise statute being considered, but in many states the statute may not apply to actions based on copyright infringement or may be preempted by the Copyright Act.

DISCUSSION

I. Are Parents Secondarily Liable For Their Minor Child(ren)'s Copyright Infringement?

From 2003-2008, American recording companies sued over 30,000 individuals for allegedly using peer-to-peer technologies to engage in copyright infringement. Within the last year, an entity calling itself the U.S. Copyright Group has filed copyright infringement suits against close to 15,000 individuals for allegedly uploading and downloading movies using BitTorrent software.[2] It is likely that some defendants are parents whose minor children may have used household Internet connections for allegedly infringing activities without the parent's participation or knowledge.[3] Thus,

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[1] Originally drafted Nov. 1, 2005, revised May 1, 2007, and July 19, 2010.
[2] Sam Adams, *"Hurt Locker's" illegal downloading wars*, SALON.COM, June 3, 2010, *available at* http://www.salon.com/entertainment/movies/film_salon/2010/06/03/hurt_locker_piracy; Amanda Becker, *New District law group tackles move filesharing*, WASH. POST, June 14, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/11/AR2010061105738.html?hpid=topnews.
[3] Memorandum of *Amicus Curiae* Electronic Frontier Foundation, et al., Supporting Third Party Time Warner Cable's Motion to Quash or Modify Subpoena, *ACHTE/NEUNTE BOLL KINO BETEILIGUNGS GMBH & CO KG v. Does 1-2,094*, CA. 1:10-cv-00453-RMC 10 (D.D.C. June 2, 2010) (quoting *BMG Music v. Does 1-203*, No. Civ.A. 04-650, 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004)) (in large-scale lawsuits, a defendant "could be an innocent parent whose internet access was abused by her minor child").

these lawsuits raise the issue of whether parents might be held liable under existing law if their minor children have in fact engaged in copyright infringing activities.

Prior to 2005, only two theories of secondary liability existed in copyright law: contributory liability and vicarious liability.[4] In 2005, the Supreme Court added the inducement doctrine, which provides that secondary liability can be imposed upon a showing of "clear expression of affirmative steps" taken to promote infringing.[5]

In 2010, a federal district court in Texas expressed skepticism about both contributory and vicarious infringement:

> Contributory and vicarious infringement are judgemade doctrines that expand the copyright act far past the language of the statute. They should not be recognized. If Congress had wanted to include these theories, it would have codified them. Its silence is not an invitation for courts to torteify what is essentially a violation of a property right.

Plaintiff has appealed the decision.

A. Contributory Liability.

One who knowingly "induces, causes or materially contributes to the infringing conduct of another" commits contributory infringement.[6] A typical contributory infringement requires proof of two elements: knowledge and material contribution.[7]

1. Knowledge

The requisite level of knowledge sufficient to impose contributory liability is unclear.[8] The classic standard is that the defendant must "[k]now, or have reason to know" of the infringement.[9] For example, a video rental store that rented out rooms with videocassette players may be held liable even without proof of actual knowledge of the playback of copyrighted materials in those rooms.[10] Additionally, in *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, the court held that advertisers and distributors may be held liable under a theory of contributory infringement if they should

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[4] Alfred C. Yen, *Torts and the Construction of Inducement and Contributory Liability In Amazon and Visa*, 32 COLUM. J.L. & ARTS 513, 513 (2009) ("[b]efore Grokster, such liability existed in two forms, contributory liability and vicarious liability"). A threshold requirement of both vicarious and contributory liability is an act of direct infringement. 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 21:40 (Thomas Reuters 2010) [hereinafter "PATRY"].

[5] *Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 934-35 (2005).

[6] *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[7] PATRY, *supra* note 3, at § 21:46; *see also Demetirades v. Kaufmann*, 690 F. Supp. 289, 293 (S.D.N.Y. 1988) ("knowledge and participation [are] the touchstones of contributory infringement").

[8] PATRY, *supra* note 3, at § 21:47 ("courts in copyright cases appear to split over whether actual or constructive knowledge is sufficient"). The lack of clarity may be due partially to the tenuous balance between the fact that requiring actual knowledge would "discourage potential defendants from investigating" infringing behavior, while allowing constructive knowledge to be sufficient would potentially "impose drastic costs on Internet businesses" that provide platforms for speech and content distribution. *Id.* at § 21:47

[9] *See Gershwin,* 443 F.2d at 1162.

[10] *Columbia Pictures Indus, Inc. v. Aveco, Inc.,* 800 F.2d 59, 62 (3d Cir. 1986).

have known of the infringement by indications such as a product priced far below market price.[11]

Nevertheless, this kind of constructive knowledge of infringement will not cause contributory liability to attach when the product or service used to infringe is capable of substantial non-infringing uses.[12] This principle comes from *Sony v. Universal Studios*, which addressed Sony's secondary liability for third party users' infringing use of Betamax video tape recorders.[13] The Supreme Court refused to find sufficient knowledge even though Sony had constructive knowledge of the product's infringing uses because "the product [was] widely used for legitimate, unobjectionable purposes."[14] Following this precedent, the Ninth Circuit refused to "impute the requisite level of knowledge to Napster [a peer-to-peer file sharing technology] merely because peer-to-peer file sharing technology may be used to infringe plaintiffs' copyrights," and instead predicated secondary liability on Napster's actual knowledge of specific instances of infringing behavior.[15] It thus seems that in the Internet context, actual knowledge is preferred for imposing liability, although willful blindness can also be used to show the requisite knowledge.[16]

2. Material Contribution

There are two strands of material contribution: one involves providing the "site and facilities" for infringing activity and the other involves inducing the infringing behavior.[17]

i. Material Contribution: Site and Facilities

The "site and facilities" prong of material contribution comes from *Fonovisa, Inc. v. Cherry Auction, Inc.*[18] In that case, the court held that the operator of a swap meet could be liable on a theory of contributory copyright infringement where the meet operator supplied the "environment and market for counterfeit recording sales to thrive" including provision of "space, utilities, parking, advertising, plumbing, and customers."[19]

Extension of *Fonivisa* in the online context has resulted in caselaw holding that one materially contributes to infringement by "designing, distributing, supporting, and

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[11] 256 F.Supp. 390, 404-405 (S.D.N.Y. 1966).
[12] *Lime Group*, 2010 WL 2291485, at *22 (showing substantial non-infringing use "shields some defendants from liability for contributory infringement").
[13] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1986).
[14] *Id.* at 442.
[15] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21 (9th Cir. 2001); *see also Amazon*, 487 F. 3d at 727 (product or service "cannot be held liable for contributory infringement *solely* because [its] design . . . facilitates such infringement").
[16] *See In re Aimster Copyright Litigation,* 334 F.3d 643, 650 (7th Cir. 2003).
[17] PATRY, *supra* note 3, at §21:48; *see also Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 693, 706 (2d Cir. 1998) ("[t]wo types of activities that lead to contributory liability are: (i) personal conduct that encourages or assists the infringement; and (ii) provision of machinery or goods that facilitate the infringement").
[18] PATRY, *supra* note 3, at § 21:48 (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).
[19] *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

maintaining" a program or website that increases the ease of infringement.[20] In *A&M v. Napster*, the Ninth Circuit found Napster had materially contributed to copyright infringement because "[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which defendant boasts."[21] Additionally, in *Arista Records LLC v. UseNet.com, Inc.*, operating computer servers which facilitate the connection, download requests and storage of infringing files was held to be material contribution because it "literally creates the 'site and facilities' . . . used to directly infringe copyrights."[22]

Notably, material contribution must be "substantial" in order for liability to attach.[23] Merely supplying the means to infringe cannot give rise to contributory liability.[24] Thus, in *Newborn v. Yahoo!, Inc.*, the "mere operation of a website business" – in this case, a search engine – was insufficient to establish material contribution when there was no indication of a relationship between the website's services and the allegedly infringing activity.[25] Moreover, financial assistance is not, in itself, material contribution.[26]

Failure to take preventative steps to stop infringement may also constitute material contribution. For example, in *Perfect 10 v. Amazon Inc.*, the court held Google could have materially contributed to infringement if, having knowledge of infringing activity on their site, they failed to take down the infringing material.[27] Since " services or products that facilitate access to websites throughout the world can significantly magnify the effects of otherwise immaterial infringing activities," material contribution could be found through a showing that Google "could take simple measures to prevent further damage . . . and failed to take such steps."[28]

The assistance provided to the infringer, however, must be related directly to the alleged infringing activities.[29] Thus, in *Perfect 10, Inc. v. Visa International Service Association*, providing credit card processing services to a website allegedly engaging in copyright infringement was not material contribution because those services "do[] not directly assist the allegedly infringing [activity]."[30] And in *Demetriades v. Kaufmann*, the

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[20] *Lime Group*, 2010 WL 2291485, at *23.
[21] *Napster*, 239 F.3d at 1022 (quoting *Napster,* 114 F.Supp.2d at 919-20); *see also Aimster*, 252 F. Supp. 2d at 651 (holding that defendant materially contributed to online infringement by providing the "software and the support services necessary for individual Aimster users to connect with each other").
[22] 633 F. Supp. 2d 124, 155 (S.D.N.Y. 2009).
[23] *Id.*
[24] 391 F.Supp.2d 181, 186 (D.D.C. 2005).
[25] *Id.* at 189.
[26] *Berry v. Deutsche Bank Trust Co. Americas*, No. 07 Civ. 7634 (WHP), 2008 WL 4694966, at *4 (S.D.N.Y. Oct. 21, 2008) (defendants who provided financial assistance to a direct infringer during bankruptcy proceedings did not materially contribute to the infringement).
[27] *Amazon*, 487 F. 3d at 729.
[28] *Id.*
[29] "The authorization or assistance must bear a direct relationship to the infringing acts, and the contributory infringer must have acted in conceit with the direct infringer." *Livnat v. Lavi,* No. 96 Civ. 4967 (RWS), 1998 WL 43221, at *3 (S.D.N.Y. Feb, 2, 1998).
[30] *Perfect 10, Inc. v. Visa International Service Association*, No. C 04-0371 JW, 2004 WL 1773349, *3-4 (N.D. Cal. Aug. 5, 2004).

sale of an unimproved lot, subsequently used for the construction of an allegedly infringing house, did not constitute material contribution to infringing activity.[31]

ii. Material Contribution - Inducement

Contributory liability may also attach if one can show that the defendant has induced the third party to infringe by "distribut[ing] 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."[32] In *Metro Goldwyn Mayer v. Grokster*, the Supreme Court found that defendant peer-to-perr filesharing networks induced infringement by "aiming to satisfy [known sources] of demand for copyright infringement," failing to implement or maintain filtering software, and a business model dependent on high volume use "which the record shows is infringing." More recently, a New York district court held that Limewire ("LW"), a similar peer-to-peer filesharing site, induced infringing behavior.[33] The court emphasized the following factors as proof of inducement: "(1) LW's awareness of substantial infringement by users; (2) LW's efforts to attract infringing users; (3) LW's efforts to enable and assist users to commit infringement; (4) LW's dependence on infringing use for the success of its business; and (5) LW's failure to mitigate infringing activities."[34]

3. Application

It is questionable whether parents can be held liable for their minor child(ren)'s infringing activity under contributory infringement. Constructive knowledge of infringing behavior may or may not be sufficient, since Internet access itself has substantial noninfringing uses. If the parent has actual knowledge of specific instances of infringement, then the risk of liability may increase. Nevertheless, merely providing Internet access for the household may not be substantial enough to rise to the level of material contribution, unless there is evidence that the parent actively induced the child to infringe.

Although there is little case law directly on point, an Oklahoma district court opinion addressing an application for an award of attorney's fees in the context of a copyright infringement suit may provides some guidance as to the potential for parents to be held contributoriliy liable.[35] In *Capital Records, Inc. v. Foster*, Defendant had been accused of infringing plaintiff's copyrights and had argued that her estranged husband and adult daughter had access to her account and may have downloaded the content at issue.[36] The court expressed significant doubts that the defendant, who had merely "maintained an Internet account which a member of her household used to infringe the plaintiff's copyrights" could be held secondarily liable for the infringement.[37]

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[31] 690 F. Supp. 289, 291-93 (S.D.N.Y. 1988).
[32] *Grokster*, 545 U.S. at 936-37; *see also Lime Group*, 2010 WL 2291485, at *15 (to establish inducement, must show "the defendant (1) engaged in purposeful conduct that encouraged copyright infringement, with (2) the intent to encourage such infringement").
[33] *Lime Group*, 2010 WL 2291485.
[34] *Id.* at *16.
[35] *Capital Records, Inc. v. Foster*, No. Civ. 04-1569-W, 2007 WL 1028532 (W.D.Okla. Feb. 6, 2007))
[36] *Id.* at *1.
[37] *Id.* at *3.

B. Vicarious Liability.

A person can be vicariously liable for infringement if she has has the right and ability to supervise or control the infringing behavior and if she financially benefits from the user's infringement.[38] Unlike contributory liability, vicarious liability does not require knowledge.[39]

4. Right to Supervise / Control.

Traditionally, courts have treated legal authority over the infringing actor as dispositive on the element of control. For example, in *Fonovisa v. Cherry Auction*,[40] the Ninth Circuit held that the operator of a swap meet, who had a contractual right to exclude a vendor for any reason, possessed the control required to establish vicarious liability. In *Davis v. E. I. DuPont de Nemours & Co,* a district court held that the sponsor of a television program "was under a duty to exercise its [contractual right to review scripts] so as to insure against copyright violation."[41]

However, other courts have held that legal authority alone is not sufficient to establish the control element of vicarious copyright liability, particularly where the exercise of that authority is impracticable. In *Adobe Systems Inc. v. Canus Productions, Inc.*, a California district court interpreted *Fonovisa* as resting on an inference of a practical ability to control ongoing infringing activity based on the factual situation, and held that a larger-scale trade show with minimal infringing activity did not demonstrate the level of actual control necessary to impart vicarious liability.[42] Similarly, in *Bevan v. Columbia Broadcasting System, Inc.*, the court held that the sponsor of a television program was not vicariously liable for copyright infringement even though the sponsor had the contractual right to request alteration of the script prior to filming.[43]

In the Internet context, the right an ability to control does not extend to instances in which a website can stop assisting infringing activity, but not stop infringement altogether. In *Amazon*, a search engine was not vicariously liable for the infringing behavior of third party websites because, even if it stopped indexing infringing content, it could not control whether the third party infringers continued to infringe on their own websites.[44] Similarly, credit card companies used by website consumers do not have the ability to control the infringing behavior of third parties purchasers: "the mere ability to withdraw a financial 'carrot' does not create the "stick" of 'right and ability to control'

[38] *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963); *see also Demetirades,* 690 F. Supp. at 293 ("benefit and control are the signposts of vicarious liability"); PATRY, *supra* note 3, at § 21:67.
[39] 14 A.L.R. Fed. 825 (1973).
[40] 76 F.3d 259, 262 (9th Cir. 1996).
[41] 240 F. Supp. 612, 632 (S.D.N.Y. 1965).
[42] 173 F. Supp. 2d 1044 (C.D. Cal. 2001). *See also Artists Music, Inc. v. Reed Publishing (USA), Inc.*, Nos. 93 CIV. 3428(JFK), 73163, 1994 WL 191643 (S.D.N.Y. May 17, 1994) (ability to police exhibition "at great expense" does not suffice to impose vicarious liability).
[43] 329 F. Supp. 601, 610 (S.D.N.Y. 1965).
[44] *Amazon*, 487 F. 3d at 731.

that vicarious infringement requires."[45] In contrast, Napster had sufficient control over its users because it had the ability to deny them access to the means of infringement.[46]

5. Financial Benefit

In addition to control, vicarious liability requires that the defendant receive a direct financial benefit from the infringing activity.[47] The direct benefit test has been refined to state that a financial benefit exists where the availability of infringing material 'acts as a "draw" for customers.'"[48] For example, in *A&M v. Napster*, the court found financial benefit in a business model predicated on increasing the site's userbase when increasingly infringing activity acted as the draw for more and more users.[49] In contrast, a search engine did not receive a financial benefit from infringing works posted on its recently purchased USENET Internet message board.[50]

Moreover, there must be a "causal relationship between the infringing activity and any financial benefit a defendant reaps."[51] Thus, where a university student group showed a copyrighted film on campus, the university was not vicariously liable for copyright infringement because it received no financial benefit from the performance.[52] Additionally, where a company charged a flat fee to host a web site that contained copyrighted images, the hosting company was not vicariously liable because its profits did not depend on the traffic generated by the alleged infringement.[53]

6. Application

It is highly unlikely that parents will be held vicariously liable for their minor childs' infringing behavior. Content owners would have to demonstrate that the parents had sufficient control, which may depend on the parent's technological literacy. As one court questioned doubtfully in dicta, "is an Internet-illiterate parent, who does not know Kazaa from a kazoo, and who can barely retrieve her e-mail, liable for copyright infringement committed by that parent's minor child []?"[54] Moreover, proving that a parent gained a financial benefit from their child's infringing behavior may prove to be an insurmountable obstacle.

C. Common Law Tort Liability

Copyright owners may attempt to hold parents liable based on common law tort doctrines. Various common law doctrines may be used to hold parents liable for

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[45] *Visa*, 494 F. 3d at 803.
[46] *Napster*, 239 F.3d at 1024. ("Napster, however, has the ability to locate infringing material listed on its search indices, and the right to terminate users' access to the system."
[47] *Shapiro,* , 316 F.2d at 307 (there must be an "obvious and direct financial interest").
[48] *Napster*, 239 F.3d at 1023 (quoting *Fonovisa,* 76 F.3d at 263-64).
[49] *Id.*
[50] *Parker v. Google, Inc.*, 242 F. App'x 833 (3d Cir. 2007).
[51] *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).
[52] *See Roy Exp. Establishment Co. v. Trs. of Columbia Univ.*, 344 F. Supp. 1350 (S.D.N.Y. 1972).
[53] *See Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distributors and Northwest Nexus, Inc*., 983 F. Supp. 1167 (N.D. Ill. 1997).
[54] *Elektra Entm't Group, Inc. v. Santangelo,* No. 05 Civ. 2414(CM), 2005 WL 3199841, *3 (S.D.N.Y. Nov. 28, 2005).

copyright infringement. The two most applicable are negligent entrustment and negligent supervision.[55]

The doctrine of negligent entrustment imposes liability on those who entrust a product to a third party whom they know is likely to use the product in an unreasonable and dangerous manner, and whose use results in harm.[56] Liability under a negligent entrustment claim relies on the premise that the defendant has a duty not to enhance or assist foreseeable risks.[57] The most important factor in proving negligent entrustment is establishing the defendant's degree of knowledge regarding the third party's propensity to use the chattel in a harmful manner – without the requisite knowledge, liability under a negligent entrustment doctrine cannot be imposed.[58]

Some have argued that because the underlying premise of negligent entrustment is that "the defendant paved the way for a truly reckless individual to be imposing serious risks of injury on the public at large," liability should not depend on whether the defendant specifically provided a chattel.[59] For example, in *Vince v. Wilson*, defendant was liable for injuries resulting from a car accident after having provided her drug-addicted, unlicensed grandson with the funds to purchase the car, even though she did not actually sell him or physically entrust him with the car.[60] Ownership and right to control the instrumentality were only factors to be considered in a broader negligence evaluation.[61]

Negligent supervision imposes liability when a parent knows he or she has the ability to prevent the child from intentionally harming or creating an unreasonable risk of harm to another, and negligently fails to do so.[62] Unlike negligent entrustment, the elements needed to show negligent supervision must be shown to have existed at the time the harm occurred, not at the time of the entrustment.[63] Thus, in *Russell*, a district court

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[55] Janelle A. Weber, Note, *Don't Drink, Don't Smoke, Don't Download: Parent's Liability for Their Children's Downloading*, 57 FLA. L. REV. 1163, 1190-93 (2005).

[56] RESTATEMENT (SECOND) OF TORTS § 390 (1965). ("[o]ne who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them").

[57] *See generally Id.*

[58] *Hamilton v. Beretta*, 92 N.Y.2d 222, 237 (N.Y. Ct. of Appeals 2001) ("The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion. . . . without the requisite knowledge, the tort of negligent entrustment does not lie").

[59] Robert Rabin, ENABLING TORTS, 49 DEPAUL L. REV. 435, 439 (1999).

[60] *Vince v. Wilson*, 151 Vt. 425, 561 A.2d 103, 106 (Vt.,1989).

[61] *Id.* at 105 ("the issue is clearly one of negligence to be determined by the jury under proper instruction; the relationship of the defendant to the particular instrumentality is but one factor to be considered").

[62] A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.
Restatement (Second) of Torts § 316 (1965).

[63] *Russell ex rel. Russell v. Braden ex rel. Farran-Flaherty,* 42 Kan.App.2d 811, 819, 217 P.3d 997, 1002, (Kan.App.,2009).

denied summary judgment on the grounds that no evidence had been presented showing that it was foreseeable that a minor child would shoot another minor child in the eye using a paintball gun on the day of the shooting, rather than at the time the gun was given to him.[64]

Common law negligence claims were created to provide a source of compensation for victims of harm.[65] Thus, it may be possible to use common law negligence claims to hold parents liable for the infringing acts of their children. If one can show that the parents knew the children were prone to copyright infringement, negligent entrustment may attach. If instead one can show that the parents had the means to control the infringing behavior at the time of infringement, for example by using filtering or blocking software, then they may be held liable under a theory of negligent supervision.

D. Are Parents Liable For Judgments Against Their Minor Children From Damages Resulting From Copyright Infringement?

Currently, statutory damages for non-willful copyright infringement range from between $750 to $30,000 per work.[66] If the infringement is found to be willful, damages may reach as high as $150,000 per work. This section considers whether parents can be compelled to pay damages for their children's infringement based on state laws assigning liability to parents for the tortious actions of their minor children. The law in any given state should be assessed to determine if it is applicable to an action based on copyright infringement, and, if so, if it is preempted by the Copyright Act.

E. Statutory Liability and Cap on Damages.

7. General Background

State common law generally precludes the collection of judgments against "assets in which the judgment debtor has no interest," which includes the assets of the parent of a minor child.[67] Many states, however, have enacted statutes that create liability based on damage the child has done to property.[68] These statutes differ in several aspects that are relevant to claims based on copyright infringement.

First, the statute may apply only to damage to *physical* property, which calls into question its applicablity to cases of copyright infringement, which involve intangible property.[69] Although there are no direct cases on point, in *Thrifty-Tel, Inc. v. Bezenek*, [70]

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[64] *Id.* ("[f]oreseeability for negligent entrustment is not necessarily equivalent to the foreseeability required for negligent supervision").
[65] Chad Silver, Note, *Censure the Tree for its Rotten Apple: Attributing Liability to Parents for the Copyright Infringement of their Minor Children*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 977, 995 (2006) ("Courts began to impose liability upon a parent for the acts of their children for two reasons: to create a source of compensation for the victim and to compel parents to supervise their children more closely").
[66] 17 U.S.C. § 504(c)(1) (2006).
[67] *Bass v. Bass*, 528 N.Y.S.2d 558, 561 (1st Dep't 1998). *See also* Andrew C. Gratz, *Increasing the Price of Parenthood: When Should Parents be Held Civilly Liable for the Torts of Their Children?*, 39 Hou.L.Rev. 169 (2002).
[68] *See eg.*, Karen Horowitz, *Copyright Liability For Those Who Provide the Means of Infringement: In Light of the RIAA Lawsuits, Who Is At Risk For the Infringing Acts of Others?*, 4 SHIDLER J. L. COM. & TECH. 8 (2008) (citing NY Gen Oblig § 3-112 (2007)).
[69] *See id.*
[70] 54 Cal.Rptr.2d 468 (1996).

parents of minor children who hacked into a phone company's computerized switching network and made unauthorized long distance calls were held liable under California's parental liability statute, which provides remedy for injuries to "the person or property of another."[71] This suggests that courts in some states may consider extending the definition of "property" to intangible property.

Second, state statutes have varying knowledge requirements: some states require only "willful conduct" on the part of the minor, others require that the harm itself be willful, and still others require "willful and malicious" activity for parental liability.[72] These state statutory requirements may be distinct from the "willfulness" inquiry in a typical copyright case—willfulness in copyright is a matter of remedial enhancement, not a question of intent or knowledge for liability. In states where malice or intent to cause harm may be required, the plaintiff must prove these further elements to establish parental liability for alleged copyright infringement. For example, in *Leonard v. O'Neil*, a New York court held that a minor did not "'maliciously or unlawfully' damage or destroy [her neighbor's car] by taking the car without authorization for several days, during which period the car was vandalized.[73]

Assuming that the statute is applicable to damage to intangible property, and that the conduct of the child meets the applicable statutory requirements, the actual extent of damages that may be assessed against the parent may also be statutorily prescribed. If a statutory cap on monetary liability exists, the court will need to decide whether it is to be applied to each instance of copyright infringement individually or as an overall cap on liability for the entire course of infringement.

The California Court of Appeals identified this question in *Thrifty-Tel*.[74] In that case, the parents were held liable under California's parental liability statute for multiple instances in which their sons and the sons' friends hacked into the phone company network in order to make long-distance phone calls without cost.[75] Without resolving the issue, the Court of Appeals identified three possible interpretations of language in the California parental liability statute capping parental liability at $10,000 for "each tort": treating each individual instance in which the sons and friends improperly used the access code as a separate tort for purposes of applying the statutory cap on parental liability, treating each session of hacking as a separate tort, or treating the entire course of action as a single tort for purposes of cap application.[76] In a claim of copyright infringement, the difference is dramatic: treating the entire course of file-sharing as a single tort for the purposes of parental liability would result in much lower liability for parents than treating each song as a separate tort for purposes of capping damages.

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[71] Cal. Civil Code §1714.1(a)
[72] Compare Cal. Civil Code §1714.1(a) (requiring "willful misconduct"), N.Y. Gen. Oblig. §3-112 (requiring "willful[], malicious[], or unlawful[]" damage to property) and Tex.Fam.Code §41.001(b) (requiring "willful and malicious" damage to property). *See also* Fred von Lohmann, *Memorandum* (April 2003) (available at http://www.eff.org/IP/P2P/p2p_bankruptcy_memo.pdf) (discussing the requirement of willfulness in the context of bankruptcy).
[73] 608 N.Y.S.2d 618, 620 (N.Y.Just.Ct. 1994).
[74] 54 Cal.Rptr.2d 468 (1996).
[75] *See id.*
[76] *See id.* at n.13, Cal. Civil Code § 1714.1.

8. Specific Statutes

A comparison of selected jurisdictions may be useful in understanding the variation in state law regarding parental liability for property damage inflicted by a minor child.

In California, parents are "jointly and severally liable … for any damages" up to $25,000 "resulting from the willful misconduct" of the child.[77] This statute has been applied to damage to intangible property, but has collected a sequence of tortious actions into a single tort for the purposes of applying the cap on parental liability.[78] There is some precedent that suggests that California law might limit recovery to actual rather than statutory damages.[79]

In New York, parents are liable when their children "willfully, maliciously or unlawfully" damage property, which appears to allow a broader range of activities to be ascribed to the parent.[80] However, the damages may not exceed $5,000 per violation. Furthermore, damages may be mitigated based on the parents' financial status (to a minimum of $500) or based on diligent supervision.[81]

In Texas, parents are only liable for property damage when a child "willfully and maliciously" causes harm to the property of another.[82] In the case of music download, proving that the harm was malicious may be difficult. Texas also has a statutory cap of $25,000 per incident.[83]

F. Preemption Analysis

Even if state law provides that parents are liable for the tortious actions of their minor children, and that law is applicable to a claim for copyright infringement under the specific facts of the case, the application of state law to copyright actions may be expressly preempted by § 301 of the Copyright Act. Alternately, such an action may be barred by conflict preemption in light of copyright's secondary liability doctrines.

Explicit preemption within the domain of the Copyright Act is governed by § 301, which bars all claims based on state-granted rights "that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . ."[84] The general test for explicit preemption is the extra-element test: "Under this analytical device, if the state claim requires an 'extra element,' beyond those required for copyright infringement, then it is not 'equivalent,' and therefore not preempted."[85] This extra element must "change the nature of the claim so that it is *qualitatively* different from a

[77] Cal. Civil Code § 1714.1.
[78] *See Kessler*, 19 Cal.Rptr.2d at 642.
[79] *See id.*
[80] N.Y. Gen. Oblig. § 3-112.
[81] *See id.*
[82] Tex.Fam.Code § 41.001(b).
[83] *See id.*
[84] 17 U.S.C. §301. The Copyright Act does not apply to sound recordings fixed before February 15, 1972, and thus explicit preemption would not apply to state law claims for such recordings.
[85] *Ritchie v. Williams*, 395 F.3d 283, 288 (6th Cir. 2005) (quoting *Wrench v. Taco Bell Corp*., 256 F.3d 446, 454 (6th Cir. 2001)).

copyright infringement claim."[86] Therefore, courts have held that a claim based on contract law satisfies the extra-element test and is not preempted by the Copyright Act.[87] However, courts have ruled that claims that add only an element relating to the defendant's state of mind do not satisfy the extra-element test and are therefore preempted by § 301.[88] In any event, it would appear that any claim based on a state parental liability act would have to be explicitly founded on an underlying violation of the rights enumerated in the Copyright Act, which may be grounds for preemption separate and apart from an "extra element" analysis.

Alternately, a court may view the scope of those against whom damages may be collected as distinct from the issue of infringement liability and thus not explicitly preempted by § 301. For example, the Eleventh Circuit has held that a common law indemnity claim by a defendant in a copyright suit was not expressly barred by the Copyright Act.[89]

Even if not expressly preempted pursuant to § 301, a claim based on a state parental liability statute may still be precluded due to conflict or field preemption.[90] A court could hold that the Congressional intent, as developed in the judge-made jurisprudence of contributory infringement and vicarious liability, to establish indirect copyright liability conflicts with any state law creating alternate forms of indirect liability, and is thus preempted by the doctrine of conflict preemption under the Supremacy Clause.[91]

CONCLUSION

Parental liability under secondary copyright infringement and common law tort theories will turn on the facts of the case. Parents who know their minor child is committing copyright infringement, are computer literate, and have the ability to control their minor child's infringing behavior are more likely to be held liable than parents who are completely unaware of their child's online activities and provide no support for infringement other than Internet access.

Liability under state statutes is likely to depend on the statute's applicability to copyright infringement and its knowledge requirement. Statutes applicable to intangible property and have more lenient knowledge requirements make it easier for plaintiffs to

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[86] *Computer Associates Intern., Inc. v. Altai, Inc*., 982 F.2d 693, 716 (2nd Cir. 1992). *Cf.* Goldstein, *supra* note 10, at 15:11 ("To save a state right from preemption, the extra element must relate to the economic scope of the right.").

[87] *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); *Wrench LLC v. Taco Bell Corp*., 256 F.3d 446, 456 (6th Cir. 2001)

[88] *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc*., 501 F.Supp. 848, 853 (S.D.N.Y. 2004) (tortious interference with contract claim preempted by § 301 of Copyright Act when only extra elements were awareness of existence of contract and intent to interfere with contract).

[89] *Cf. Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001) (state common law indemnity claim not preempted by § 301).

[90] *See id.*

[91] *See id.* at 1287-88 ("If the [plaintiffs] had brought any type of copyright claim against Luster, [field preemption] may have precluded the suit."); *see generally* Mark Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 Cal. L. Rev. 111 (1999).

hold parents liable for their minor child's infringing activities. However, some state laws may be preempted by the Copyright Act.