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# Computer Bulletin Board Operator Liability for Users' Infringing Acts

M. David Dobbins

## INTRODUCTION

As computer technology has advanced and become less expensive, its role in modern society has become increasingly important. One effect of this development is the growth in popularity of computer bulletin boards.<sup>1</sup> A computer bulletin board does exactly what its name implies — it allows users to post and read electronic messages by accessing a central computer via phone lines.<sup>2</sup> The content of an electronic message can be of the sort that would be found on a physical bulletin board,<sup>3</sup> such as a message concerning the time and location of a meeting, but may also consist of software,<sup>4</sup> digitized music,<sup>5</sup> scanned pictures,<sup>6</sup> or other information capable of being stored and interpreted by a computer.<sup>7</sup> Users post messages on the bulletin board through a process called *uploading* and receive information from the bulletin board through a process called *downloading*.<sup>8</sup>

Computer bulletin boards vary widely in volume of usage and purpose. Almost everyone has heard of the large online services like America Online, Prodigy, and CompuServe, which provide ac-

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1. See Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 90 (1993) (describing computer bulletin board technology as "occupying an increasingly important role in today's mass communications").

2. See generally Jay R. McDaniel, Note, *Electronic Torts and Videotext — at the Junction of Commerce and Communications*, 18 RUTGERS COMPUTER & TECH. L.J. 773, 781 (1992) (describing modem technology).

3. See David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 82 (1993).

4. See Louise Kehoe, *Illegal Software Merchant Hit*, FIN. TIMES, Dec. 3, 1992, at World Trade News 6 (describing a raid on thirteen bulletin board operations in Berlin that were distributing software illegally via computer bulletin boards).

5. See Irv Lichtman, *Pubs' Suit is Opening Salvo in War Over Computers, C'rights*, BILLBOARD, Dec. 11, 1993, at 10 (discussing a suit filed against CompuServe for distributing digitized copies of a copyrighted song via computer bulletin board).

6. See *Playboy Enters. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (suit against bulletin board operator for distributing digitized copies of copyrighted photographs). See generally Benjamin R. Seecof, Comment, *Scanning Into the Future of Copyrightable Images: Computer-Based Image Processing Poses a Present Threat*, 5 HIGH TECH. L.J. 371, 373-77 (1990) (discussing technology used to convert pictures into digitized images).

7. See Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 14 (1993) (describing the content of electronic messages).

8. Loundy, *supra* note 3, at 84 n.12.

cess not only to bulletin boards but also to online shopping, electronic versions of newspapers and magazines, and electronic mail. In addition, many smaller, locally run bulletin boards cater to more specialized interests.<sup>9</sup> Both large, online services and smaller, local bulletin boards have continued to grow in popularity. There are over four million users of the major online services, and individuals are setting up small, locally based bulletin boards every day.<sup>10</sup>

Another aspect of the growth in bulletin board technology is the Internet. The Internet is a collection of independently operated local and regional computer networks<sup>11</sup> connected through common procedures by which they address and route computer data.<sup>12</sup> Through the Internet, users can gain access to vast quantities of information<sup>13</sup> and exchange various forms of data, for example, computer software.<sup>14</sup> Current estimates indicate that there are around twenty-five million users of the Internet in thirty-three countries who are served by over seven hundred and fifty thousand independent host operators.<sup>15</sup> Current estimates indicate that these numbers are increasing rapidly.<sup>16</sup>

Bulletin board technology, with its ability to disperse vast quantities of information quickly,<sup>17</sup> has created a communications revolution.<sup>18</sup> The increase in popularity of bulletin boards, however, has also multiplied the opportunities for abuse of the technology. Illegal distribution of copyrighted materials on computer bulletin boards has become a serious problem. High quality digitized pictures, digitized music, and software are all capable of being uploaded and downloaded from computer bulletin boards,<sup>19</sup> and

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9. See *Local Computer Bulletin Boards Hum*, PROVIDENCE J. BULL., Aug. 18, 1994, at D1 (describing bulletin boards devoted to gay and lesbian issues); see also Colin O'Connell, *People Can Investigate Religions From Comfort of Homes*, OTTAWA CITIZEN, Sept. 24, 1994, at C5 (describing bulletin board devoted to religious issues).

10. *Local Computer Bulletin Boards Hum*, *supra* note 9, at D1.

11. These networks in turn consist of many separate bulletin board operators who are referred to as hosts.

12. Burk, *supra* note 7, at 8.

13. *Id.* at 15.

14. Bruce Schneier, *What is Happening to the Internet?*, MACWEEK, Apr. 27, 1992, at 26.

15. Daniel P. Dem, *Applying the Internet*, BYTE, Feb. 1992, at 111, 111; Schneier, *supra* note 14, at 24.

16. Current estimates are that hosts linked to the Internet increase at a rate of about twenty to thirty percent a year. *The Fruitful, Tangled Trees of Knowledge*, ECONOMIST, June 20-26, 1992, at 85, 86. Additionally, Internet usage is increasing at a rate of about 15% a year. *Local Computer Bulletin Boards Hum*, *supra* note 9, at D1.

17. See Burk, *supra* note 7, at 13.

18. See *id.* at 3-4.

19. See *supra* notes 4-6 and accompanying text.

users of bulletin boards have employed the technology to exchange a wide variety of copyrighted materials.<sup>20</sup>

Although it is clear that users who upload and download copyrighted materials without the permission of the copyright owners violate U.S. copyright law, it is unclear whether bulletin board operators are liable for the copyright infringement committed by users. Courts are just now beginning to grapple with this difficult issue,<sup>21</sup> and no clear consensus has developed on how to handle the problem.

Three distinct interests are involved in the resolution of this issue. First, copyright owners wish to preserve the integrity of their statutory monopoly against the challenges of new technology. Second, computer bulletin board operators have an interest in preserving the viability and growth of bulletin board technology and wish to avoid potentially prohibitive liability. Third, society at large seeks to accommodate the growth of useful new technologies and to encourage creative enterprises.

This Note argues that a computer bulletin board operator's liability for copyright infringement by users of the bulletin board should be analyzed under the theory of contributory copyright infringement. This Note calls for a standard of liability under contributory copyright infringement that accommodates the competing interests at stake in the resolution of this issue. Part I provides an overview of copyright infringement law and argues that in most situations the operator's actions, viewed independently, do not constitute copyright infringement. Part II explores theories of third-party liability. This Part rejects the doctrine of vicarious liability as an effective means for establishing bulletin board operator liability and argues that contributory copyright infringement theory provides a more solid foundation for finding operator liability. Part III then proposes that courts employ a negligence standard to analyze contributory copyright infringement claims against bulletin board operators.

## I. OVERVIEW OF COPYRIGHT INFRINGEMENT AND APPLICATION OF DIRECT INFRINGEMENT ANALYSIS

In order to determine whether a computer bulletin board operator is liable for the uploading and downloading of copyrighted material on her bulletin board, a court must first determine whether

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20. See, e.g., Michael Meyer & Anne Underwood, *Crimes of the 'Net'*, NEWSWEEK, Nov. 14, 1994, at 46 (describing the problem of computer software piracy on the Internet). See generally EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW* 56-64 (1994) (describing copyright issues regarding computer bulletin boards).

21. See, e.g., *Sega Enters. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994); *Playboy Enters. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

the operator's actions have directly infringed on the rights of a copyright owner or whether a theory of third-party liability must be applied. This inquiry, unfortunately, is not always an easy task as the line dividing direct and indirect infringement has become somewhat fuzzy.<sup>22</sup> The choice between direct and indirect infringement is important, however, because it determines the standard of liability. For example, under a theory of direct infringement, a plaintiff need not prove that the defendant had knowledge that his activity constituted infringement,<sup>23</sup> while under some theories of third-party liability, knowledge of the infringement is a required element.<sup>24</sup>

Section I.A provides an overview of copyright infringement law and situations in which direct and third-party theories of liability are applicable. Section I.B argues that a bulletin board operator who does not herself engage in uploading or downloading of copyrighted material is not directly infringing a copyright, and thus courts must apply a theory of third-party liability in order to find a bulletin operator liable in this situation.

### A. Copyright Infringement Law

Section 106 of the Copyright Act of 1976<sup>25</sup> gives copyright owners five distinct rights: 1) copying of the copyrighted work; 2) preparing derivative works; 3) distributing copies of the work; 4) performing the work publicly; and 5) displaying the work publicly.<sup>26</sup> Section 501 of the Copyright Act prohibits a person who is not the copyright owner from engaging in any of the enumerated activities under threat of civil liability as a direct infringer.<sup>27</sup>

An individual who engages in one of the prohibited activities is a direct infringer and may be liable to the copyright owner for either direct damages and profits arising out of the infringing use<sup>28</sup> or, alternatively, damages specified by the statute.<sup>29</sup> For example, if

22. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 n.17 (1984) (noting the lack of clarity in the application of theories of direct infringement, contributory infringement, and vicarious liability).

23. See *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988, 998-99 (2d Cir. 1983) (endorsing the principle that an individual can be a direct infringer even if copying is done subconsciously); see also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.08 (1995).

24. See *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971) ("One who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory infringer.'" (emphasis added) (footnote omitted)).

25. This act is codified as amended at 17 U.S.C. §§ 101-1010 (1988).

26. 17 U.S.C. § 106 (1988).

27. 17 U.S.C. § 501 (1988); see also *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 829 (8th Cir. 1992) (describing activities constituting direct infringement). See generally 2 NIMMER & NIMMER, *supra* note 23, § 8 (discussing the elements of copyright).

28. 17 U.S.C. § 504(b) (1988).

29. 17 U.S.C. § 504(c) (1988).

a person puts on a musical which includes performances of copyrighted songs, that person will be liable to the copyright owner for the profits from the performance that are attributable to the infringement and for the loss in market value of the copyrighted work due to the infringement.<sup>30</sup>

If a court finds that an individual did not herself engage in one of the activities enumerated in section 106, she may still be liable for copyright infringement under a theory of third-party liability.<sup>31</sup> Theories of third-party liability make people who are not themselves engaging in infringing activities liable for copyright infringement based on their connection to another person's violation.<sup>32</sup> For example, if the owner of a night club hires a band as an independent contractor to perform live music and the band performs a copyrighted piece of music without the copyright owner's permission, the band violates the performance right of the copyright owner and hence is a direct infringer.<sup>33</sup> However, the owner of the bar who hired the band has not acted in violation of the copyright owner's section 106 rights because hiring a band is not within the activities prohibited by the statute. Therefore, the owner's liability will not rest on a direct violation of the statute but rather on his relation to the infringing party and the act of infringement.<sup>34</sup> In contrast, if the owners of a bar or their agents play a piece of recorded music in the bar without the permission of the copyright owner, they are correctly labeled as "direct" infringers because they have directly violated the owner's section 106 "performance" right.<sup>35</sup>

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30. See generally *Frank Music Corp. v. MGM, Inc.*, 772 F.2d 505, 512-20 (9th Cir. 1985) (discussing proper application of damages for copyright infringement). For an example of the application of statutory damages, see *Engel v. Wild Oats, Inc.*, 644 F. Supp. 1089, 1091-92 (S.D.N.Y. 1986).

31. See 3 NIMMER & NIMMER, *supra* note 23, § 12.04[A][2][b] n.65 (criticizing a court for using the term "direct liability theory" when a theory of third-party liability was being applied).

32. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (describing the application of third-party liability for copyright infringement as "identifying the circumstances in which it is just to hold one individual accountable for the actions of another"); see also Alfred P. Ewert & Irah H. Donner, *Will the New Information Superhighway Create "Super" Problems for Software Engineers? Contributory Infringement of Patented or Copyrighted Software-Related Applications*, 4 ALB. L.J. SCI. & TECH. 155, 182-186 (1994) (describing direct infringement and contributory infringement).

33. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157 (1975) ("An orchestra or individual instrumentalist or singer who performs a copyrighted musical composition in . . . a public place without a license is . . . clearly an infringer under the statute. The entrepreneur who sponsors such a public performance for profit is also an infringer — direct or contributory.").

34. See *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72, 74-75 (W.D. Mo. 1977) (employing a theory of vicarious liability to find owner of a bar liable for a hired performer's act of direct infringement).

35. See *Lodge Hall Music v. Waco Wrangler Club*, 831 F.2d 77, 80 (5th Cir. 1987).

## B. Direct Infringement Law Applied to Bulletin Board Operators

It is often difficult to determine whether to characterize a person's actions as directly violative of the copyright owner's rights or only as potential third-party infringement. The decisions of the two courts that have addressed the issue of computer bulletin board operator liability reflect this difficulty. In *Playboy Enterprises v. Frena*,<sup>36</sup> the court had to determine an operator's liability for the acts of users who had uploaded and downloaded the plaintiff's copyrighted photographs. Despite the defendant's defense of lack of knowledge of the infringing activity,<sup>37</sup> the court found the operator liable as a direct infringer on the ground that providing access to the computer bulletin board was equivalent to "distributing" and "displaying" the infringing photos.<sup>38</sup>

By contrast, the other court that has analyzed a computer bulletin board operator's liability for infringing acts of users, *Sega Enterprises v. Maphia*,<sup>39</sup> used a theory of third-party liability. In that case, a bulletin board operator had allowed users to upload and download Sega's copyrighted video games. The court noted that, in the instances where the defendants did not themselves upload or download copyrighted games, liability could still be found under the third-party liability theory of contributory copyright infringement, stating, "[e]ven if Defendants do not know exactly when games will be uploaded to or downloaded from the MAPHIA bulletin board, their role in the copying, including the provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement."<sup>40</sup>

Without evidence of the operator's direct involvement in the uploading and downloading of copyrighted material, a direct infringement analysis is inappropriate. The *Frena* court, for example, overextended the meaning of the display and distribution rights to find direct liability for a bulletin board operator. Courts have consistently applied those provisions to find direct liability only for parties that have played a conscious, active role in the act that constitutes "display" or "distribution."<sup>41</sup> In the typical situation, a

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36. 839 F. Supp. 1552 (M.D. Fla. 1993).

37. *Playboy*, 839 F. Supp. at 1554. Since the case was decided on a summary judgment posture, the court was obligated to accept this asserted defense as true. 839 F. Supp. at 1555.

38. *Playboy*, 839 F. Supp. at 1556-57.

39. 857 F. Supp. 679 (N.D. Cal. 1994).

40. *Sega*, 857 F. Supp. at 686-87; see *infra* section II.B.

41. See, e.g., *Columbia Pictures Indus. v. Avco, Inc.*, 800 F.2d 59, 64 (3d Cir. 1986) (company which knowingly rented out rooms for the viewing of videotapes without permission of copyright owner to "display" movie found to directly infringe "display" right); *Columbia Pictures Indus. v. Redd Home, Inc.*, 749 F.2d 154, 158 (3d Cir. 1984) (same); *Iowa State University Research Foundation v. ABC*, 621 F.2d 57, 62 (2d Cir. 1980) (Broadcast network directly violated "display" right by broadcasting a film without the permission of the copyright holder.). Similarly, direct infringement of the "distribution" right has involved tak-

bulletin board operator provides the service with no intention to further infringing activity and often has no knowledge that the infringing activity is taking place.<sup>42</sup>

Merely providing access to the bulletin board is not, in and of itself, a violation of a copyright owner's section 106 right to "display" or "distribute."<sup>43</sup> Only the uploading and downloading of copyrighted material will provide a basis for finding a direct violation. If a user does upload or download copyrighted material, it is the user's uploading or downloading, not the operator's provision of a bulletin board, that is the primary cause of the violation of the copyright. The bulletin board is merely a tool by which the user infringes. Because it is only the actions of the user that subject the operator to potential liability, not the actions of the operator herself, a theory of third-party liability is appropriate.<sup>44</sup>

This conclusion is further compelled by the distinction the Supreme Court drew in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>45</sup> between supplying the means to violate a section 106 right and the direct violation of the right. The Court applied a theory of third-party liability to a manufacturer of video-cassette recorders (VCRs) for the infringing activities of the products' users. Despite the fact that the VCR enhanced the ability of the users of the VCR to infringe, the Court did not apply a theory of "direct" infringement to the manufacturers.<sup>46</sup> Like the manufacturer of the VCR in *Sony*, the operator of a bulletin board provides a *means* to infringe but is not himself a direct infringer.

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ing an active role in the activity which constitutes "distribution." See, e.g., *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 989 (D. Minn. 1986) (finding direct infringement by a group of defendants who actively took part in the enterprise to distribute copyrighted material).

This distinction is also apparent in other areas. For example, a concert promoter is not considered a "performer" of infringing songs but rather is held liable through his or her connection to the direct infringer — the band which "performs" the infringing songs at the concert. See, e.g., *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

42. See, e.g., *Meyer & Underwood*, *supra* note 20.

43. This, of course, is because the bulletin board initially has no material on it at all. Material must be put on the board before infringement can take place.

44. This sort of distinction has been shown in other cases. For example, in *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 402-05 (S.D.N.Y. 1966), the court reasoned that a theory of third-party liability could be employed to find liability against a radio station which ran noninfringing ads for an infringing record. Although the actions of the radio station alone could not constitute direct infringement, the relation of the activities of the station to facilitating the distribution of infringing records was a potential basis for third-party liability.

45. 464 U.S. 417 (1984).

46. *Sony*, 464 U.S. at 434 (describing plaintiffs' burden as "proving that users of the Betamax have infringed the [movie studios'] copyrights and that [the manufacturer of the Betamax] should be held responsible for that infringement").



Applying a direct infringement analysis to the operator of a computer bulletin board when no action of the operator alone could be considered infringement is inappropriate. It does not follow, however, that the operator should be free from liability. There are specific circumstances in copyright law when a third party should be held liable for the infringing actions of another.

## II. THIRD-PARTY LIABILITY FOR COPYRIGHT INFRINGEMENT

The Copyright Act of 1976 contains no specific statutory authority for finding liability against a party for copyright infringement committed by another party. This lack of specific statutory authority, however, has not protected third parties who are closely connected to an infringing activity.<sup>47</sup> Courts have developed two distinct theories of third-party liability in copyright infringement: vicarious liability and contributory copyright infringement.<sup>48</sup> The key distinction between these theories is that vicarious liability focuses on the relationship between the primary and third-party infringer, and contributory copyright infringement focuses on knowledge of and contribution to the illegal act.

Section II.A concludes that the doctrine of vicarious liability in copyright infringement law cannot be applied to find liability for computer bulletin board operators in most situations because operators do not possess the ability to control the activities of their users and usually do not directly benefit from the infringing acts of users. Section II.B then argues that the doctrine of contributory copyright infringement can be applied to find a computer bulletin board operator liable for infringing user activity.

### A. Vicarious Liability

The doctrine of vicarious liability in copyright law is based on the tort doctrine of respondeat superior<sup>49</sup> but is not limited to the employer-employee context.<sup>50</sup> In order to find a third party liable under this theory, a court must find that two elements are satisfied: the third party must have the right and ability to control and supervise the activities of the infringing party,<sup>51</sup> and the third party must

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47. *Sony*, 464 U.S. at 435 ("The absence of . . . express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." (emphasis added)); see also H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 158-60 (1976) (specifically recognizing that vicarious liability survives the Copyright Act of 1976).

48. See 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 6.1 (1989).

49. *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988).

50. GOLDSTEIN, *supra* note 48, § 6.3.

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

have an obvious and direct financial interest in the activities of the direct infringer.<sup>52</sup>

### 1. Control

The first element of a vicarious liability analysis is control. The concept of control in vicarious liability is based on a combination of legal and practical ability to control a third party's activities. A practical ability to control the third party, however, is essential:<sup>53</sup> in many cases where it would be legally *possible* for a party to insist upon the power to police and monitor the acts of another, courts have been unwilling to impose liability when it would be unrealistic and overburdensome for the defendant to exercise such power. This principle is supported by a comparison of the approaches courts have taken when confronted with situations where legal control was possible, but the level of practical control varied.

In *Davis v. E. I. DuPont de Nemours & Co.*,<sup>54</sup> a corporate sponsor of an infringing television program was found liable by the application of vicarious liability. The court found legal control in the fact that the sponsor "had to approve of several steps in the production of the television program."<sup>55</sup> Practical control was found because the sponsor had insisted on and played an active role in determining the content of the program.<sup>56</sup>

In contrast, practical control was found lacking in *Bevan v. Columbia Broadcasting System, Inc.*<sup>57</sup> Although the sponsors did have a provision in the sponsorship agreement "affording them the right to request alteration prior to filming,"<sup>58</sup> that agreement was also found to "vest sole direction and control over [the] production, performance and broadcasting" of the infringing television program in the network.<sup>59</sup> In this case, despite the fact that it would have been *possible* for the sponsor to insist on greater substantive control over the program, the court did not find the sponsor liable because

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52. *Shapiro*, 316 F.2d at 309; see also *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); *Southern Bell Telephone & Telegraph v. Associated Telephone Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985).

53. GOLDSTEIN, *supra* note 48, § 6.3.2; see also *Fonovisa, Inc. v. Cherry Auction, Inc.*, 847 F. Supp. 1492, 1496-97 (E.D. Cal. 1994); *Broadcast Music, Inc. v. Behulak*, 651 F. Supp. 57, 61-62 (M.D. Fla. 1986).

54. 240 F. Supp. 612 (S.D.N.Y. 1965).

55. *Davis*, 240 F. Supp. at 631.

56. *Davis*, 240 F. Supp. at 632 ("DuPont had the ultimate power to determine content of the program and exercised that power . . .").

57. *Bevan*, 329 F. Supp. 601 (S.D.N.Y. 1971).

58. *Bevan*, 329 F. Supp. at 610.

59. *Bevan*, 329 F. Supp. at 610.

in actuality it did not retain a *practical* ability to supervise the network's infringing actions.<sup>60</sup>

The degree of practical control necessary to support a finding of vicarious liability is a fact-specific inquiry. However, an examination of two extremes sheds light on the kind of issues at stake in this analysis.<sup>61</sup> The "dance hall" cases<sup>62</sup> illustrate a situation where degree of practical control was sufficient to sustain a finding of vicarious liability. In these cases, a dance hall proprietor — or proprietor of some other sort of entertainment business — is held liable for the infringing acts of an independent contractor, such as a band or an orchestra, that performed copyrighted music without the copyright owner's permission.<sup>63</sup> The requisite legal control is demonstrated by the contractual relationship between the proprietor and the contractor. Through contract, a dance hall proprietor is able to insist upon a right to supervise the activities of the band or orchestra. Practical control is present because the proprietor can easily monitor the band's performance and can insist on the particular music to be performed.

The "landlord-tenant" cases,<sup>64</sup> in which plaintiffs attempt to impose liability on a landlord for the infringing acts of her tenants, represent the opposite extreme. Although it is theoretically possible for a landlord to possess legal control by insisting on lease clauses that allow her to monitor and police the activities of her tenants, the lack of a business rationale for insisting on this kind of control and the practical difficulties in conducting monitoring of tenant activities make it impractical for landlords to exert much control over tenants. As a result, vicarious liability has not been a successful third-party liability theory in the landlord-tenant situation.<sup>65</sup>

60. *Bevan*, 329 F. Supp. at 610.

61. The leading case on vicarious liability suggests that the control requirement for the imposition of vicarious liability is best analyzed by placing a given situation on a spectrum between an employer-employee relationship and a landlord-tenant relationship. *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963).

62. *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Assn.*, 554 F.2d 1213 (1st Cir. 1977); *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D. Mo. 1977). These cases were cited by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 437 n.18 (1984).

63. See *Shapiro*, 316 F.2d at 307 ("[T]he cases are legion which hold the dance hall proprietor liable for the infringement of copyright resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income.").

64. See *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938); *Vernon Music Corp. v. First Dev. Corp.*, 1983-84 Copyright L. Dec. (CCH) ¶ 25,686 (D. Mass. June 19, 1984); *Fromont v. Aeolian Co.*, 254 F. 592 (S.D.N.Y. 1918).

65. See GOLDSTEIN, *supra* note 48, § 6.3.2 ("The reason courts do not impose vicarious liability on the landlord in these situations is that, because the tenant's activities will generally be closeted from the landlord's view, and because the landlord has no direct financial

The control requirement essential to the application of vicarious liability does not exist in the case of a bulletin board operator because an operator lacks practical control over the users' activity.<sup>66</sup> Although it might be possible for a bulletin board operator to prevent infringement by contemporaneously monitoring every upload and download to the bulletin board, requiring such control would be unrealistic and burdensome. In many cases, a bulletin board operator is a hobbyist who has neither the time to monitor constantly activity taking place on the board nor the financial resources to hire a monitor. The large volume of usage on commercial bulletin boards such as CompuServe also makes constant monitoring burdensome and expensive.<sup>67</sup> In addition, it is even possible for users to hide their activities, making it difficult for the operator to detect misuse despite monitoring efforts.<sup>68</sup>

The relationship between a computer bulletin board operator and the users of the board lies much closer to the "landlord-tenant" paradigm than to the "dance hall" paradigm. The operator does not hire the user to perform any services, and, unlike a dance hall proprietor, it is very difficult for an operator to monitor a user's activity. As demonstrated by the landlord-tenant cases, courts are reluctant to impose a monitoring requirement when it would be unrealistic and burdensome for a party to exercise control over the direct infringer.<sup>69</sup>

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interest in the tenant's activities, it will usually be impractical for the landlord to insist on, or to exercise, this degree of control.").

For example, in *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938), the plaintiffs owned a copyright for a handwriting analysis chart and discovered that a former employee of theirs had illegally copied this chart for use in her own handwriting analysis business. In addition to suing the former employee, the plaintiffs also sued the landlord of the location where the former employee had been selling infringing copies of their handwriting chart, despite the fact that the landlord did not know of the activity and was not involved with the infringing activity in any way. *Deutsch*, 98 F.2d at 688. The court refused to impose vicarious liability on the landlord, because the landlord was unaware of the infringing activity and had no business relationship with the tenant beyond that of landlord and tenant. *Deutsch*, 98 F.2d at 688; see also *Vernon Music*, 1983-84 Copyright L. Dec. (CCH) at 19,065 (citing lack of control by corporate landlord as a reason not to find vicarious liability).

66. The ability to gain the legal ability to control user activity might also be problematic in some circumstances — e.g., when users break into the board without permission or when the board is on a network and the individual operator does not control access. However, even if the operator had the legal ability to control user activity, it would not form a basis for the application of vicarious liability unless the practical ability to control also existed. See *supra* notes 53-68 and accompanying text.

67. See Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 *FORDHAM L. REV.* 439, 447 (1985). It would also be extremely difficult for monitors to determine the copyright status of the large amount of communications they would have to examine.

68. See Meyer & Underwood, *supra* note 20, at 46 (describing ability of some users to hide their actions from bulletin board operators).

69. See *supra* notes 64-68 and accompanying text.

## 2. Benefit

In addition to the requirement of control, courts impose vicarious liability on third parties only if the third party benefitted from the direct infringement. In order to meet this requirement, the vicarious infringer must have "an obvious and direct financial interest in the exploitation of copyrighted materials."<sup>70</sup> This requirement is typically fulfilled only when the third party's financial benefit is tied to the benefit the direct infringer receives from infringing acts.<sup>71</sup>

This test is easily met when a party is receiving a percentage from infringing sales. For example, in *Shapiro, Bernstein & Co. v. H. L. Green Co.*,<sup>72</sup> a chain store operator had allowed an independent concessionaire to sell infringing records in its stores in return for being given between ten and twelve percent of the concessionaire's gross receipts from the infringing sales. Here the benefit test was met because the chain store's profits were tied directly to the profit the direct infringer received from its infringing sales.<sup>73</sup>

The "dance hall" cases also demonstrate a situation in which direct benefit has been found because the profits the dance hall proprietor receives are directly tied to the profitability of the primary infringer. In a typical situation, a dance hall proprietor keeps a percentage of the gate receipts and thus directly benefits from the direct infringement of the band or orchestra because the dance hall operator receives a direct monetary benefit from every customer the band or orchestra attracts.<sup>74</sup> In contrast, if a dance hall proprietor rented the hall to an orchestra and retained no interest in the

70. *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); see also *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); GOLDSTEIN, *supra* note 48, § 6.3.1 (describing the benefit requirement of vicarious liability).

71. See *Vernon Music Corp. v. First Dev. Corp.*, 1983-84 Copyright L. Dec. (CCH) ¶ 25,686 (D. Mass. June 19, 1984) (holding that a landlord who charges a rent which is not "tied to the profitability" of the direct infringer is entitled to judgment as a matter of law); see also *Roy Export Co. v. Trustees of Columbia Univ.*, 344 F. Supp. 1350, 1353 (S.D.N.Y. 1972).

72. 316 F.2d 304 (2d Cir. 1963).

73. The *Shapiro* court stated:

By reserving for itself a proportionate share of the gross receipts from Jalen's sales of phonograph records, Green had a most definite financial interest in the success of Jalen's concession; 10% or 12% of the sales price of every record sold by Jalen, whether "bootleg" or legitimate, found its way — both literally and figuratively — into the coffers of the Green Company.

316 F.2d at 308.

74. See *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Assn.*, 554 F.2d 1213, 1215 (1st Cir. 1977); *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72, 74-75 (W.D. Mo. 1977).

The orchestra or the band directly benefits from their infringement if they keep a percentage of the gate receipts because they will earn more money if they can attract more customers. They would also benefit if they charge a flat fee because the fee they can charge will be greater depending on their ability to attract customers.

business done or in the gate receipts, no direct benefit would be found.<sup>75</sup>

For the same reason, a landlord usually has no direct financial interest in infringement committed by a tenant. The landlord receives a flat payment from her tenant regardless of the tenant's activities. The indirect interest the landlord might have in the infringement — for example, if the infringement makes the business conducted on the premises more profitable, the tenant will be more likely to pay rent — is not enough to establish the direct benefit required because the landlord expects no more or less money based on the profit the tenant receives from infringing.<sup>76</sup>

The benefit prong may or may not be met in the case of a bulletin board operator. In many situations, a bulletin board operator allows users to access the board for free and thus does not receive any financial benefit from the infringing use.<sup>77</sup> The benefit requirement is still unmet when the operator charges a flat fee for usage or a fee based on the amount of time used.<sup>78</sup> The operator's benefit in this circumstance is akin to the interest a landlord possesses in receiving rent from a tenant. Like a landlord, a computer bulletin board operator charging a flat fee for usage or a fee based on time receives the same "rent" regardless of the nature of the users' activity.<sup>79</sup>

The strongest argument for a finding of direct benefit would be that the availability of infringing material on a bulletin board would attract more users and therefore increase the fees that an operator would collect. If the amount of infringement occurring on the board were significant enough to have this effect, it could form a basis for a finding of benefit that is analogous to a dance hall proprietor's interest in gate receipts. However, this would still not provide a basis for vicarious liability because, as argued above, a

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75. See *Fromont v. Aeolian Co.*, 254 F. 592, 594 (S.D.N.Y. 1918) (analogizing an individual who rents a premises for the purposes of a performance without keeping an interest in the business to a landlord); see also *Broadcast Music, Inc. v. Larkin*, 672 F. Supp. 531, 534-35 (D. Me. 1987); *Roy Export Co. v. Trustees of Columbia Univ.*, 344 F. Supp. 1350, 1353 (S.D.N.Y. 1972) (refusing to find vicarious liability because the defendant had no financial interest in the infringing performance).

76. See, e.g., *Vernon Music Corp. v. First Dev. Corp.*, 1983-84 Copyright L. Dec. (CCH) ¶ 25,686 (D. Mass. June 19, 1984) (holding that a landlord who charges a rent that is not "tied to the profitability" of the direct infringer is "entitled to judgement as a matter of law"); see also GOLDSTEIN, *supra* note 48, § 6.3.2 n.14.

77. Cf. *Roy Export Co. v. Trustees of Columbia Univ.*, 344 F. Supp. 1350, 1352 (S.D.N.Y. 1972) (holding that an organization that did not financially benefit from the activities of the direct infringement could not be held liable under a theory of vicarious liability).

78. Most of the major online services use a fee arrangement similar to this. For example, America Online charges a flat fee for a set amount of use and an additional fee for time used beyond the set amount.

79. See *supra* notes 75-76 and accompanying text.

typical operator would be unable to control the users' infringing activity.<sup>80</sup>

Both control and benefit must be found in order to apply vicarious liability.<sup>81</sup> Although a computer bulletin board operator might sometimes benefit from the infringing activities of users, the operator is normally unable to exert the practical control necessary to sustain a finding of vicarious liability. Therefore, vicarious liability cannot, except in rare circumstance, provide a basis of third-party liability for bulletin board operators. In order to find a bulletin board operator liable for the acts of a third party, a different theory of third-party liability is necessary.

### B. *Contributory Copyright Infringement*

Contributory copyright infringement is a separate and distinct theory of third-party liability in copyright infringement<sup>82</sup> that stems from the tort doctrine of enterprise liability.<sup>83</sup> As the Second Circuit has stated, "[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."<sup>84</sup> Thus, instead of turning on control and benefit, the doctrine of contributory copyright infringement requires that a party possess knowledge of the infringing activity and assist in that infringing activity.

As the different standards of liability under each theory reflect, the theory of contributory copyright infringement and the theory of

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80. See *Broadcast Music, Inc. v. Behulak*, 651 F. Supp. 57, 62 (M.D. Fla. 1986) (refusing to find vicarious liability where a financial interest existed but an ability to control and supervise did not exist).

One can imagine a situation where a bulletin board operator hired a user as an independent contractor to upload infringing material in order to attract other users. In this circumstance, it would be possible to establish the practical ability to control that user's activity due to the business relationship entered into by the parties. See *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938) (refusing to find third-party liability because the third party was not in partnership with the direct infringer); *Vernon Music Corp. v. First Dev. Corp.*, 1983-84 Copyright L. Dec. (CCH) ¶ 25686, at 19065 (D. Mass. June 19, 1984) (refusing to find third-party liability for landlord because landlord was not involved in a "common enterprise" with the infringer). Vicarious liability theory would provide a solid basis for finding the bulletin board operator liable in this situation. Indeed, this situation would be exactly analogous to the "dance hall" cases. However, this fact pattern appears to be a rare occurrence.

81. See *Roy Export Co. v. Trustees of Columbia Univ.*, 344 F. Supp. 1350, 1352 (S.D.N.Y. 1972) (refusing to find vicarious liability where control was established but benefit was not found).

82. See *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 n.5 (S.D.N.Y. 1988) (emphasizing the distinct character of contributory copyright infringement as opposed to vicarious liability); see also GOLDSTEIN, *supra* note 48, § 6.1.

83. See *Demetriades*, 690 F. Supp. at 292; see also NIMMER & NIMMER, *supra* note 23, § 12.04[A.][2].

84. *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

vicarious liability address different concerns.<sup>85</sup> For example, knowledge that infringing activity is taking place is not required to impose vicarious liability but is required to find contributory copyright infringement. Conversely, while benefit is required to impose vicarious liability, a contributory infringer does not have to benefit from the infringing activity in order to be found liable. Vicarious liability turns upon the relationship between the defendant and the direct infringer<sup>86</sup> and is designed to prevent a third party from benefiting from activities of a direct infringer that it could and should have prevented.<sup>87</sup> In contrast, contributory copyright infringement turns on a defendant's relationship to the act of infringement.<sup>88</sup> This doctrine imposes liability on those who assist a party to commit the tort of copyright infringement and thereby serves as a disincentive to participation in infringing activity.<sup>89</sup>

Section II.B.1 explains the knowledge requirement of the contributory copyright infringement doctrine. Section II.B.2 explains the assistance prong of the contributory copyright infringement test. Section II.B.3 argues that the contributory copyright infringement standard presents the best theory for imposing third-party liability on computer bulletin board operators.

### 1. *Knowledge*

In order to impose liability under the theory of contributory copyright infringement, a court must find that the defendant had knowledge that infringing activity was taking place. The contributory infringer must be aware of the infringing activities and also that the acts are illegal.<sup>90</sup>

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85. See *Demetriades*, 690 F. Supp. at 292 n.5.

86. See GOLDSTEIN, *supra* note 48, § 6.1, at 708. See generally W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984) (discussing vicarious liability in tort).

87. See *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Assn.*, 554 F.2d 1213, 1214-15 (1st Cir. 1977) (arguing that vicarious liability serves to prevent individuals from profiting by another's infringement "by merely claiming ignorance that any violation would take place").

88. See GOLDSTEIN, *supra* note 48, § 6.1.

89. See generally KEETON ET AL., *supra* note 86, § 72 (discussing the doctrine of enterprise liability in tort).

90. One of the leading cases on contributory copyright infringement, *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966), supports the view that knowledge that the activity is illegal is necessary. In that case the direct infringer was a record company that distributed infringing records. The plaintiffs were unable to serve the direct infringer with process, *Screen Gems*, 256 F. Supp. at 401, so they instead brought suit against an advertising agency that created advertisements promoting the sale of the infringing records, a radio station which ran the advertisements, and the shipping agent hired by the direct infringer to ship the records. These defendants moved for summary judgment, arguing that they could not be found liable because they did not meet the criteria for vicarious liability. *Screen Gems*, 256 F. Supp. at 402. The court rejected this motion and instead applied a theory of contributory copyright infringement, emphasizing that there was a



The knowledge requirement may be fulfilled by showing either actual or constructive knowledge of the infringing nature of a direct infringer's act.<sup>91</sup> Constructive knowledge can be imputed to a party if the circumstances surrounding an activity should have indicated to the defendant that the activity was illegal.<sup>92</sup> For example, in *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*,<sup>93</sup> the court held that constructive knowledge could be imputed to an advertising agency that had made ads for a company that was selling illegally copied records and to a radio station that had aired those advertisements based on "well-known indicia of the fly-by-night" nature of the company that was selling the illegally copied records.<sup>94</sup> These indicia included the smallness of the record manufacturer, its lack of a permanent location, and the suspiciously low price of the records being sold.<sup>95</sup>

One common situation in which constructive knowledge must be imputed is when a defendant sells or manufactures equipment that facilitates the making of illegal copies, for example, video-

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question of fact as to the third-party defendants' knowledge of the nature of the direct infringer's activity. *Screen Gems*, 256 F. Supp. at 404-05. It is important to note that the factual issue was in regard to knowledge of the nature of the activity, not knowledge that the activity was taking place. *Screen-Gems*, 256 F. Supp. at 405 ("While the factual showing against [the defendants] is somewhat tenuous, sufficient [evidence] has been set forth to permit the trier of fact . . . to conclude that [the defendants] had either actual or constructive knowledge of the infringement . . ." (emphasis added)).

Other cases are in accord with this view. See, e.g., *Childress v. Taylor*, 20 U.S.P.Q.2d (BNA) 1181 (S.D.N.Y. 1990), *affid.*, 945 F.2d 500 (2d Cir. 1991). In this case, a theater owner was found not liable as a contributory infringer for an infringing performance that took place in his theater. The court based this decision on the fact that the owner did not have actual or constructive knowledge that the performance was infringing, despite the fact that the owner clearly knew that the performance was taking place. See also *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (describing the type of knowledge required as having "knowledge, or reason to know, of the *infringing nature*" of the direct infringer's activities (emphasis added)); *NIMMER & NIMMER*, *supra* note 23, § 12.04[A][2][a] ("Thus, if there is knowledge that the work in question *constitutes an infringement*, then one who causes another to infringe will himself be liable as an infringer . . ." (emphasis added)). But see *GOLDSTEIN*, *supra* note 48, § 6.2 n.1. Goldstein argues that the knowledge requirement means the contributory infringer need only be aware of the direct infringer's activities and not that these activities constitute copyright infringement. "To be liable for contributory infringement, the defendant need only know of the direct infringer's activities, and need not reach the legal conclusion that these activities infringe a copyrighted work." *Id.*

91. See, e.g., *ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1331-32 (N.D. Ill. 1990) (finding contributory copyright infringement based on a defendant's purchase of software with actual knowledge that the sale was in violation of the original copyright owner's license); see also *Ewert & Donner*, *supra* note 32, at 186.

92. See *GOLDSTEIN*, *supra* note 48, § 6.2 (arguing that constructive knowledge would exist if a defendant "knew of facts that would have prompted a reasonable person to inquire into whether an infringement was occurring"); see also *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 439 (1984) (recognizing constructive knowledge of wrongdoing for sellers whose customers use equipment to make unauthorized copies of copyrighted material).

93. 256 F. Supp. 399 (S.D.N.Y. 1966).

94. *Screen Gems*, 256 F. Supp. at 404.

95. *Screen Gems*, 256 F. Supp. at 404.

cassette recorders or quick audio-tape copiers. Because a manufacturer of such an item is unlikely to be aware of the activities of the consumers who purchase the product, actual knowledge that the device is being used to infringe copyrights is unlikely to be present. In this situation, courts must adopt a legal standard of liability that will determine when constructive knowledge should be imputed.

The Supreme Court squarely confronted this problem in *Sony Corp. v. Universal Studios, Inc.*<sup>96</sup> and adopted a lenient standard of liability for manufacturers of equipment capable of infringing uses. In this case, the copyright owners of various motion pictures attempted to hold Sony liable for copyright infringement because Sony produced and sold VCRs that allowed consumers to copy their films illegally. The Court dealt with this claim by borrowing the "staple article of commerce" doctrine from patent law,<sup>97</sup> holding that if a piece of equipment used for infringing copyright was "capable of substantial non-infringing uses,"<sup>98</sup> then the manufacturer of the equipment cannot be held liable as a contributory copyright infringer.<sup>99</sup> Because the Court found the "time shifting" capabilities of a VCR to be a substantial noninfringing use,<sup>100</sup> Sony was not held liable as a contributory copyright infringer.<sup>101</sup>

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96. 464 U.S. 417, 439 (1984) (describing the task of imposing third-party liability on a manufacturer as resting on the fact that "it has sold equipment with constructive knowledge of the fact that its consumers may use that equipment to make unauthorized copies of copyrighted material").

97. See *Sony*, 464 U.S. at 442.

98. *Sony*, 464 U.S. at 442.

99. The dissent in *Sony* adopted a similar test, but argued for a different standard of liability. While the majority required only that a product have significant non-infringing uses, the dissent argued that "a significant portion of the product's use" should be non-infringing. *Sony*, 464 U.S. at 491 (second emphasis added); see also A. Samuel Oddi, *Contributory Copyright Infringement: The Tort and Technological Tensions*, 64 NOTRE DAME L. REV. 47, 56-57 (1989) (arguing that the dissent's approach in *Sony* effectively imposed a negligence standard on manufacturers of equipment capable of infringing uses).

100. See *Sony*, 464 U.S. at 456.

101. The standard adopted by the Court in *Sony* has been applied to shield defendant manufacturers from liability as contributory infringers. For example, in *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988), the court refused to find a manufacturer of software that defeated copyright protection of other companies' software liable as a contributory infringer. Despite the fact that the software made it possible for users to infringe others' copyrights by making and distributing unauthorized copies of protected software, the court found that the ability of the program to facilitate the making of legal 'archival' copies for the legitimate buyers of the protected software was a 'substantial non-infringing use,' *Vault Corp.*, 847 F.2d at 262, and therefore declined to impose liability on Quaid under a contributory copyright infringement theory. *Vault Corp.*, 847 F.2d at 267.

The dissent in *Sony* worried that the staple article of commerce doctrine would effectively destroy the doctrine of contributory infringement. The dissent summed up its concern by arguing that "only the most unimaginative manufacturer would be unable to demonstrate that an image duplicating product is 'capable' of substantial non-infringing uses." *Sony*, 464 U.S. at 498. However, despite this worry, courts seem to have been able to pick out bogus and overimaginative justifications for products that promote copyright infringement. See Ewert & Donner, *supra* note 32, at 192 (arguing that courts have been able to detect purely imaginative uses and reviewing cases in which courts have detected such imaginative uses).

Despite the relatively low standard the Supreme Court imposed upon manufacturers of equipment capable of infringing uses, courts have imposed a higher duty of care upon persons who maintain control over equipment that has both infringing uses and "substantial non-infringing uses." In essence, courts apply a negligence standard: a person who offers access to a device with infringing uses owes a duty to copyright owners to prevent access to equipment when a reasonable person would know that the machine was going to be used for illegal purposes.

For example, in *RCA Records, Inc. v. All-Fast Systems, Inc.*,<sup>102</sup> a retail copy service had provided access to a machine capable of making copies of cassette tapes at fast speeds. Although the copy service did not supply original tapes for customers to copy, the employees of the store performed the actual copying at the request of customers.<sup>103</sup> Manufacturers of pre-recorded, copyrighted music cassettes brought suit against the copy service alleging copyright infringement. In addition to finding that the acts of the employees were enough to support a finding of direct infringement against the copy service,<sup>104</sup> the court also dealt with the possibility that allowing customers to have access to the machines to make their own copies might be a basis for contributory infringement liability. The court ordered that the store could not allow customers to use the fast copy machines if the retailer had "reasonable cause to believe [a customer] intend[ed] to use the machine to copy plaintiff's copyrighted recordings."<sup>105</sup> The court justified this standard of care by concluding that the retailer was in a better position to control the use of the potentially infringing device than a manufacturer.<sup>106</sup>

Bulletin board operators are not analogous to manufacturers. Under the *Sony* test, a court would not impose liability on a computer bulletin board operator if the bulletin board operator is considered a manufacturer who sold a product to a consumer. In the most limited sense, the computer bulletin board operator is just selling time to users to operate a central computer.<sup>107</sup> Although a

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102. 594 F. Supp. 335 (S.D.N.Y. 1984).

103. In a similar case, *Elektra Records Co. v. Gem Electronics Distrib.*, 360 F. Supp. 821 (E.D.N.Y. 1973), contributory infringement was found when the copying store provided access not only to a fast copy machine, but originals as well.

104. This finding of liability did not rest on a contributory copyright infringement theory, but instead on the acts of the employees who performed the act that constituted the illegal "copying." *All-Fast*, 594 F. Supp. at 337.

105. *All-Fast*, 594 F. Supp. at 339. In a similar case, the Eighth Circuit approved an injunction that required retailers to inspect the tapes the customers were copying before allowing them to use the fast-copying machines. See *RCA/Ariola Intl. v. Thomas & Grayston Co.*, 845 F.2d 773, 778 (8th Cir. 1988).

106. See *All-Fast*, 594 F. Supp. at 339.

107. See Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted By Others*, 22 CONN. L. REV. 203, 218-21 (1989).

computer bulletin board can be used to infringe copyright, many uses are non-infringing and legal. For example, bulletin boards provide a forum for debate of political and philosophical ideas.<sup>108</sup> Bulletin boards also provide a forum for individuals to socialize and build friendships.<sup>109</sup> Some have even met their spouses through computer bulletin boards.<sup>110</sup> Given the substantial noninfringing uses of bulletin boards, operators would not be liable if they were viewed as manufacturers.

On the other hand, a computer bulletin board operator retains more control over the potentially infringing device — the bulletin board — than a manufacturer does over, for example, a VCR after it has been sold to a user.<sup>111</sup> Like the owner of a shop that allows customers to use a fast audio-tape copying machine, the operator of a bulletin board is in the best position to control the use of the potentially infringing device. Courts have held individuals who allow others to have access to a machine with potential infringing uses to a negligence standard — i.e., courts will impute constructive knowledge to such an individual when a reasonable person would have known that users of the device were engaging in infringing acts.<sup>112</sup>

## 2. Contribution

In order to establish liability under a theory of contributory copyright infringement, a copyright holder must also prove that a defendant materially contributed to the infringing activities of the direct infringer.<sup>113</sup> Exactly what constitutes “material” contribution is a fact-specific inquiry, but the case law provides some guidelines. For example, a promoter who organized and directed a concert in which musicians performed copyrighted music without the copyright owner’s permission was held, through the acts of promoting the concert, to have provided the sort of “material” assistance nec-

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108. Schlachter, *supra* note 1, at 92 (describing computer bulletin boards as “a major force for intellectual, political, and informational exchanges”).

109. Mark A. Stamaty, *Well-Wishers on the Internet*, TIME, Sept. 5, 1994, at 18 (describing messages and support given by users of a local bulletin board when one of the users developed terminal cancer).

110. For example, conservative radio commentator Rush Limbaugh married a woman he met through an e-mail exchange. *Walking the Walk*, PEOPLE, June 13, 1994, at 70.

111. See *RCA Records, Inc. v. All-Fast Systems, Inc.*, 594 F. Supp. 335, 339 (S.D.N.Y. 1984) (arguing that manufacturers are not in a position to control the use of a device once it is sold to a consumer).

112. See *supra* notes 103-06 and accompanying text.

113. See *Gershwin Publishing Corp. v. Columbia Artists Management*, 443 F.2d 1159, 1162 (2d Cir. 1971); see also *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992); *Cable/Home Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990); *Columbia Pictures, Inc. v. Redd Home, Inc.*, 749 F.2d 154, 168 (3rd Cir. 1984).

essary to establish contributory copyright infringement.<sup>114</sup> Additionally, a court has held that a radio station that ran advertisements, which did not contain infringing material, promoting the sale of records that included infringing songs could be held liable as a contributory infringer based on its assistance to the direct infringer.<sup>115</sup>

In contrast, courts have concluded in some situations that the alleged contributing activity was too tangentially related to the direct infringement to establish material infringement. For example, one court refused to extend contributory copyright infringement liability to real-estate brokers who sold land to individuals who were making a home based on illegally copied architectural plans.<sup>116</sup>

It is important to note that the material contribution requirement and the knowledge requirement are interrelated. The substantial involvement necessary to support a finding of material contribution is often a key factor in proving that the defendant acted with constructive knowledge of the direct infringer's activity.<sup>117</sup>

### 3. *Application to Bulletin Board Operators*

Contributory copyright infringement provides an appropriate framework to determine a computer bulletin board operator's liability for direct infringement by users. First, the type of assistance that a bulletin board operator provides to an infringing user is "material." Without access to the bulletin board, the illegal copying and distribution of copyrighted material through the use of the bulletin board cannot take place. Courts have not hesitated to find that the material contribution requirement has been met in similar scenarios, where the third-party defendant supplied elements necessary to conduct copying.<sup>118</sup>

If a plaintiff can prove that a bulletin board operator had actual or constructive knowledge of infringing activities on a computer

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114. *Gershwin*, 443 F.2d at 1162-63.

115. *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403-05 (S.D.N.Y. 1966).

116. *See Demetriades v. Kaufmann*, 690 F. Supp. 289, 294 (S.D.N.Y. 1988); *see also Varon v. Santa Fe Reporter, Inc.*, 218 U.S.P.Q. (BNA) 716, 718 (D.N.M. 1982) (finding that an employee who provided her employer with an art magazine that included photographs of Georgia O'Keefe and her paintings, whose employer then copied the pictures from that magazine and illegally published them in a newspaper, was not liable because she "took no active part in the determination that the pictures would be used").

117. *See GOLDSTEIN, supra* note 48, § 6.2 ("The closer the defendant's acts are to the directly infringing activity, the stronger will be the inference that the defendant knew of the activity.").

118. *See Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 228 (S.D.N.Y. 1988); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 853 (S.D.N.Y. 1984); *Atari, Inc. v. JS & A Group, Inc.*, 597 F. Supp. 5, 8-10 (N.D. Ill. 1983); *see also NIMMER & NIMMER, supra* note 23, § 12.04[A][2][b] (discussing providing the means to infringe as constituting material contribution).

bulletin board, the board's operator should be held liable for contributory copyright infringement.<sup>119</sup> In some situations, the bulletin board operator's activities in soliciting infringing material and promoting the use of his board for copyright infringement will be so intimately connected to the act of direct infringement that constructive knowledge will be easily shown.<sup>120</sup> Absent this sort of obvious participation in the act of infringement, however, a large question is left open: under what circumstances should courts impute constructive knowledge to the bulletin board operator? It is the answer to this question that should determine the liability of an operator in most circumstances.

### III. DETERMINING COMPUTER BULLETIN BOARD OPERATOR LIABILITY UNDER CONTRIBUTORY COPYRIGHT INFRINGEMENT DOCTRINE

Whether a computer bulletin board operator has constructive knowledge of users' infringing activity will be the critical factor that determines an operator's liability under contributory copyright infringement doctrine. This Part argues that imputing constructive knowledge to a bulletin board operator only when she knows or should have known of infringing uses best accommodates the interests of the parties involved and comports well with precedent.

Courts should require that bulletin board operators be aware of what their users are doing. This can be accomplished if courts require bulletin board operators to engage in periodic monitoring of the contents of their boards. This limited monitoring requirement would ensure that obviously copyrighted material would be removed from the board relatively quickly. If an operator suspects that a certain file on his board contains copyrighted material, he should check the copyright status of the material before allowing users to download it. This periodic monitoring requirement should also be combined with a requirement to inform users that the board should not be used for illegal purposes.<sup>121</sup> These requirements are relatively easy for bulletin board operators to fulfill. As such, they take into account both the practical limitations on operator control and the balance between promoting new technology and protecting interests of copyright owners.

Courts' determinations should be informed by several fact-based tests. 1. How many infringing items were present on the board? If many items on the board contained infringing material, an operator should have been aware that users were abusing the

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119. *See, e.g., Sega Enters. Ltd. v. Maphia*, 857 F. Supp. 679, 686-87 (N.D. Cal. 1994).

120. *See Sega*, 857 F. Supp. at 686-87.

121. The University of Michigan computing environment contains such a notice.

board.<sup>122</sup> 2. How long had the infringing material been on the board? The longer material had been on the board the more courts should infer that the operator knew it was there. 3. What was the nature of the infringing item? If the item is the newest version of a popular software product or clearly marked as the intellectual property of the copyright holder, it would be relatively easy for the operator to determine the infringing nature of the item. It is highly unlikely, for example, that Microsoft would wish to distribute Windows '95 for free over the Internet while at the same time trying to sell it in stores. 4. Was it possible for the operator to know of the infringement? Some sophisticated hackers are able to camouflage their use of an innocent operator's bulletin board.<sup>123</sup> In this situation, the bulletin board operator has no reasonable means to discover the infringing use, and the knowledge element of contributory copyright infringement would therefore be missing. These tests, of course, are not exhaustive but they do shape a general approach to the inquiry.

This proposal properly balances the interests implicated in determining computer bulletin board operator liability. Computer bulletin board operators wish to avoid liability and minimize their risk so that they can continue to provide bulletin boards profitably.<sup>124</sup> If bulletin board operator liability for user copyright infringement is too broad, the costs of operating<sup>125</sup> and using bulletin boards would be inflated and the growth of beneficial communications technology — with many uses completely unrelated to copyright infringement<sup>126</sup> — might be stymied.<sup>127</sup>

Copyright holders, on the other hand, have an interest in being able to protect the integrity of their statutory monopoly. A decision never to hold bulletin board operators liable for user infringement would often deny a copyright owner any relief due to the difficulty of finding and locating the direct infringer.<sup>128</sup> The

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122. Cf. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 491 (1984) (Blackmun, J., dissenting) (suggesting the adoption of a test that would apply liability to the maker of a product based on the amount of the product's use that constitutes direct infringement).

123. See Meyer & Underwood, *supra* note 20, at 46.

124. For hobbyists who provide access to their bulletin boards for free, the measure of profit would be the personal gratification gained from pursuing the hobby. At some point the risks of running a bulletin board would outweigh this gratification.

125. See *supra* notes 66-68 and accompanying text for a discussion on the potentially high costs of constantly monitoring a bulletin board for infringing activity.

126. See *supra* notes 108-10 and accompanying text.

127. See GOLDSTEIN, *supra* note 48, § 6.2.2.

128. *Id.* This difficulty is avoided when applying contributory copyright infringement.

For an action of contributory copyright infringement to be maintained, the direct copyright infringer does not actually have to be joined in the suit against the contributory infringer. Indeed, the direct copyright infringer's identity need not even be known as long as direct infringement can be shown to have occurred. Ewert & Donner, *supra* note 32, at 183-84.

Supreme Court articulated similar interests when it announced the standard of liability to be imposed on manufacturers of devices with potentially infringing uses. "The staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective — not merely symbolic — protection of the statutory monopoly, and the rights of others to freely engage in substantially unrelated areas of commerce."<sup>129</sup>

The most important interest to consider in shaping the standard of liability for computer bulletin board operators, however, is that of society at large. Society has a substantial interest in maintaining the integrity of the copyright monopoly.<sup>130</sup> A standard of imputing constructive knowledge that is too low will diminish authors' incentives to engage in creative endeavors by making unauthorized production and distribution of their works too easy. This will, in turn, injure society by denying it the works that might have been encouraged by copyright protections.

Society also has an interest, however, in promoting the growth of information technology like computer bulletin boards. This technology has a wide array of useful applications, and some experts are predicting that such technology will create a "global revolution."<sup>131</sup> A standard which regularly holds all bulletin board operators liable for user infringement threatens the benefits derived from legal activities in an attempt to prevent illegal copyright infringement.<sup>132</sup>

Moreover, even if computer bulletin board operators could bear the costs of a contemporaneous monitoring requirement — which essentially would be required under a strict standard of liability — the burden of monitoring every communication would severely undermine the utility of bulletin boards. One of the major attractive features of a computer bulletin board is its ability to transmit large quantities of information quickly.<sup>133</sup> The time required to monitor every communication made via bulletin board and to make certain

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129. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442 (1984).

130. Copyright, in the words of the United States Constitution, serves "[t]o promote the Progress of Science and the useful Arts." U.S. CONST. art. I, § 8, cl. 8. As the Supreme Court has noted, copyright accomplishes this goal by granting an economic benefit as a reward for creative endeavors.

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and the useful Arts."

*Mazer v. Stein*, 347 U.S. 201, 219 (1954).

131. See Peter H. Lewis, *Cyberspace Experts Talk 'Revolution' Face to Face*, N.Y. TIMES, Aug. 23, 1995, at A9; see also *supra* note 1.

132. Similar concerns have led a court to refuse to find liability against a computer information service for defamatory statements posted on that service. See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139-141 (S.D.N.Y. 1991) (citing difficulty of monitoring and restriction of public access to information as reasons not to find liability).

133. See Burk, *supra* note 7, at 3.



that users posted no copyrighted material would negate the benefits that bulletin boards offer.

A contributory copyright infringement analysis which recognizes and accounts for the practical difficulties in monitoring bulletin board use balances these interests. Under such a standard, courts would impose liability on operators who run boards with the primary purpose of allowing users to distribute copyrighted works,<sup>134</sup> but not on operators who exercise reasonable control over their bulletin boards,<sup>135</sup> or who had no reason to know illegal conduct was occurring on their boards.

The court in *Playboy v. Frena*<sup>136</sup> chose to apply a direct infringement analysis to a computer bulletin board operator to find liability for user infringement. The facts on which the court focused in finding direct liability, however, fit readily into this Note's contributory copyright infringement framework. The infringing works were clearly identified as the works of Playboy, Inc.,<sup>137</sup> and there were one hundred and seventy photographs copyrighted by Playboy available on the board.<sup>138</sup> These facts could easily lead to the inference that the operator of the board had constructive knowledge that copyright infringement was occurring. The virtue of this approach is that it allows courts to hold offending bulletin board operators liable without casting the net of liability so wide as to discourage the operation of all bulletin boards.

### CONCLUSION

The two cases that discuss the liability of computer bulletin board operators for user copyright infringement represent only the first of many cases that will address this issue. This Note argues that applying a direct infringement approach to this situation is incorrect for both legal and public policy reasons. Refusing to apply direct liability to computer bulletin board operators, however, does not mean that copyright owners have no recourse against bulletin board operators. The current law provides a framework that allows courts to balance the interests of copyright owners, bulletin board operators, and society-at-large. A contributory copyright infringement analysis, sensitive to the practical limitations of an operator's ability to monitor user activity, balances these interests and provides courts with a mechanism to apply liability efficiently, without

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134. See, e.g., Louise Kehoe, *supra* note 4, at World Trade News 6 (describing a raid on thirteen bulletin board operations in Berlin that were distributing software via computer bulletin boards).

135. See, e.g., Meyer & Underwood, *supra* note 20, at 46.

136. 839 F. Supp. 1552 (M.D. Fla. 1993).

137. *Playboy*, 839 F. Supp. at 1559.

138. *Playboy*, 839 F. Supp. at 1554.

the disadvantages of an inflexible direct infringement approach. Through the application of this doctrine, courts will retain the ability to deal effectively with the quickly developing world of information exchange.