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BACK TO THE FUTURE: THE *NAPSTER* DECISION CONFIRMS THE APPLICABILITY OF TRADITIONAL COPYRIGHT PRINCIPLES TO THE INTERNET

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INTRODUCTION

The recent opinion in *A&M Records, Inc. v. Napster, Inc.*² was widely characterized as groundbreaking and precedent-setting.³ In truth, while the application of copyright law to the Internet certainly presents novel issues, the *Napster* decision primarily makes clear that Internet companies are subject to the same legal tenets that have long applied to traditional businesses, at least for purposes of copyright law. The *Napster* decision reflects traditional principles of copyright law — rooted in the constitutional grant of copyright and reflected in the doctrines of contributory copyright infringement and vicarious liability. At their core, these are policy determinations necessary to assure that copyright remains “the engine of free expression”⁴ by delineating those circumstances under which it is just to hold one responsible for infringing conduct.⁵ In that light, no basis exists to depart from such principles, regardless of the nature of the copyrighted works or the medium in which they are used. The Court in *Napster* agreed, applying these principles to an Internet business whose primary (if not exclusive) *raison d’être* was the facilitation of the infringement of copyrighted works.⁶

This article will review the doctrines of contributory and vicarious copyright infringement through to their application by courts over the last several years to infringement in the Internet context, culminating in the *Napster* decision. The starting point of that discussion is a brief summary of the interplay between the First Amendment and copyright protection. We then turn to the copyright doctrines of contributory infringement and vicarious liability, as implemented to promote these basic principles.

II. THE FIRST AMENDMENT BACKGROUND

The *Napster* Court quickly dismissed in one paragraph Napster’s argument that its activities were protected by the First Amendment.⁷ However, that cursory treatment is the

¹ Mr. Frackman and Mr. Goldman are partners in the Los Angeles law firm of Mitchell Silberberg & Knupp LLP, and admit their bias as lead counsel for the recording industry plaintiffs in the *Napster* case. The authors thank Drew E. Breuder and Marc E. Mayer for their assistance in the preparation of this article.

² 239 F.3d 1004 (9th Cir. 2001). The opinion has been amended slightly (but not substantively). Nos. 00-16401, 00-16403 (April 3, 2001). On June 22, 2001, the Ninth Circuit denied Napster’s petition for rehearing. The Court of Appeals partially remanded the case for the immediate entry of a modified preliminary injunction, which was entered by the District Court on March 5, 2001. Proceedings relating to the preliminary injunction mandated by the Court of Appeals and entered by the District Court are ongoing and are not discussed in this article.

³ See, e.g., Jeremy Blackowicz, *RIAA v. Napster: Defining Copyright for the Twenty-First Century*, 7 B.U. J. Sci. & Tech. L. 182 (Winter 2001) (“Napster now stands at the brink of a legal precedent that may decide the degree of control copyright owners will retain over the Internet.”); Michael I. Rudell and Neil J. Rosini, *Napster Nipped by Ninth Circuit*, 225:3 N.Y.L.J. 3 (Feb. 23, 2001); *Napster Ruling Angers Fans, Pleases Artists*, U.S.A. Today, February 13, 2001.

⁴ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

⁵ See *Sony Corporation v. Universal Studios, Inc.*, 464 U.S. 417, 435 (1984) (“vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”).

⁶ 239 F.3d at 1028 (“We are at a total loss to find any ‘special circumstances’ simply because this case requires us to apply well-established doctrines of copyright law to a new technology.”). Cf. *UMG Recordings, Inc. v. M3.Com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) (“The complex marvels of cyberspatial communication may create difficult legal issues; but not in this case.”). A basic discussion of the operation of the Napster system can be found at 239 F.3d at 1011-12 and in the District Court opinion, 114 F. Supp. 2d at 901-08 (N.D. Cal. 2000).

⁷ 239 F.3d at 1028 (“We, however, briefly address Napster’s First Amendment argument so that it is not reasserted on remand.”).

culmination of years of development and exposition of the law. The fallacy in Napster's contention that its "right" to publish a directory and its users' "right" to exchange information were protected free speech is evident from the very purpose of copyright. This historical perspective provides the backdrop for the contributory infringement and vicarious liability doctrines the *Napster* Court applied to the Internet.

The Copyright Clause was designed "[t]o promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁸ Thus, the primary objective of copyright is not to reward the labor of authors but to promote the public interest in the creation of intellectual property by protecting individual effort from infringement and preserving (for limited times) the creators' right to compensation.⁹ This both encourages and permits creators to create.¹⁰ The scope of protection provided by the copyright law is guided by this objective.¹¹

Viewed in this way, the relationship between the First Amendment and the copyright law is complementary and balanced.¹² This balance is all the more critical in the Internet arena, where unauthorized distribution and copying is immediate and worldwide. Ideally, intellectual property is protected up to, but not beyond, the point where protection promotes the creation of expression.¹³ In the context of Napster, this translates into the question, what creator would (or could) devote a career to writing music if his or her creations were provided immediately to consumers for free? More specifically, as Mike Stoller (one of the music publisher plaintiffs) stated:

"Where would I be today if, after composing 'Hound Dog' with Jerry [Leiber], anyone could have recorded it, and anyone else could have copied that recording, without paying us? Probably, I would not be a professional songwriter. Probably, I would not have devoted my full-time efforts to composing and songwriting over the course of my career. Possibly, I would have occasionally written some music for fun, but, almost certainly, I would not have had the luxury to compose full time (as I have) because I would have made my living in some other fashion Few people could afford to be professional artists if they are not paid for their work. That, without question, would mean a very different musical world. And we would all be poorer for it."¹⁴

III. DIRECT INFRINGEMENT

Any discussion of contributory or vicarious infringement necessarily begins with direct infringement, since a claim for contributory or vicarious infringement requires a direct

8 U.S. Const. Art. I section 8, cl. 8. The seminal copyright statute (providing for a term of up to 28 years) was the English Statute of Anne (1709-10). See discussion in *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 974-75 (4th Cir. 1990).

9 *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991).

10 "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 Useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("the immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good."); *Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 524-25 (1994).

11 *Twentieth Century Corp.*, 422 U.S. at 156 ("When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."); see also *Religious Technology Center v. Lerma*, 40 U.S.P.Q.2d 1569, 1574 (E.D. Va. 1996) ("new technologies—from television, to video cassette recorders, to digitized transmissions—have been made to fit within the overall scheme of copyright law and to serve the ends which copyright was intended to promote.").

12 *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 857 n.8 (5th Cir. 1979) ("The First Amendment and copyright are . . . mutually supportive."); see also *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 222 (S.D.N.Y. 2000) (balancing First Amendment interests against the "goals of unquestionably high social value" embodied in copyright law); *Religious Technology Ctr. v. Netcom On-Line Communication Servs., Inc.*, 923 F. Supp. 1231, 1258 (N.D. Cal. 1995) ("the Copyright Act itself embodies a balance between the rights of copyright holders, and protection of the First Amendment."); *Veeck v. Southern Building Code Congress Int'l, Inc.*, 241 F.3d 399, 408-09 (5th Cir. 2001).

13 Any concerns for overprotection, i.e., limiting access to the public, "are allayed by the fair use doctrine," *Napster*, 239 F.3d at 1028; see also *Reimerdes*, 82 F. Supp. 2d at 220-22; or by the Copyright Act's distinction between protectible "expression" and unprotectible "ideas." See Eugene Volokh and Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 Yale L.J. 2431, 2433-35 (1998), citing *Harper & Row*, 471 U.S. at 560; *Eldred v. Reno*, 239 F.3d 372, 375-76 (D.C. Cir. 2001).

14 Declaration of Mike Stoller, filed June 12, 2000, in support of Plaintiffs' Motion for Preliminary Injunction, at ¶¶ 11-12.

infringement (although the direct infringer need not be named as a defendant).¹⁵ A *prima facie* case of direct copyright infringement consists of “ownership” of the copyrighted material and a violation of one or more of the copyright holder’s exclusive rights.¹⁶ The exclusive rights granted to copyright holders include the rights to reproduce copies of their copyrighted work (the “reproduction right”), and to distribute copies of their work to the public (the “distribution right”).¹⁷

Within the past decade, courts that examined the issue had little difficulty holding that users of an Internet site who provided copyrighted works for download by others (i.e., distribution), or actually downloaded those works (i.e., reproduction), were liable for direct copyright infringement.¹⁸ The *Napster* Court, too, found that Napster users who download copyrighted files or made those files available for others to download are direct infringers: “[P]laintiffs have shown that Napster users infringe at least two of the copyright holders’ exclusive rights: the rights of reproduction, section 106(1); and distribution, section 106(3).”¹⁹

While a few early Internet cases found operators of online bulletin boards directly liable for infringement initiated by their users,²⁰ later cases disagreed.²¹ The construct of the Napster system itself permitted the argument against direct infringement because the infringing music files were not stored on and did not pass through the Napster servers.²² Owners of copyrighted material were left with two choices to protect against massive on-line infringement of their works: The first was to proceed against users for direct infringement. However, the Internet brought with it substantial, if not insurmountable, difficulties in enforcing copyright rights against direct user infringers. *Napster* is illustrative: it simply would not be feasible to bring actions against all individual users for direct infringement. The sheer number of such direct infringers (Napster at one time claimed almost 70 million users), as well as the anonymity provided and protected by Napster, and the likelihood that individual users would lack the financial ability to satisfy any judgment, make such direct actions impractical and undesirable.²³

The second, and most logical and pragmatic solution for copyright owners in such circumstances, was an action directly against the “hub,” like Napster, that enables and facilitates the direct infringements of others. This suggested a shift to the doctrines of

15 *Danjaq SA v. MGM/UA Communications Co.*, 773 F. Supp. 194, 201 (C.D. Cal. 1991), *affd.* 979 F.2d 772 (9th Cir. 1992); *Sega Enters., Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (“*Sega I*”); 3 Melville B. Nimmer and David Nimmer, *Nimmer On Copyright*, section 12.04[A][2][b] (hereinafter “*Nimmer*”) (“There can, by definition, be no contributory liability if that conduct which is aided by the putative contributory infringer is not itself infringing.”).

16 *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). “Ownership” of the copyrighted material in question may be proven by direct evidence (such as the testimony of the copyright owner) or by timely obtained certificates of copyright registration. See 17 U.S.C. section 410(c); *Apple Computer, Inc. v. Formula Int’l Inc.*, 725 F.2d 521, 523 (9th Cir. 1984); *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 912-13 (D. Conn. 1980) (copyright registration and renewal certificates constitute prima facie evidence of the validity of the copyright).

17 17 U.S.C. section 106(1), (3).

18 See, e.g., *Sega Enters., Ltd. v. MAPHIA*, 857 F. Supp. 679, 686 (N.D. Cal. 1994) (“*Sega I*”); *Sega II*, 948 F. Supp. 923, 931-32; *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 512-14 (N.D. Ohio 1997); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993); *Playboy Enters., Inc. v. Webbworld, Inc.*, 968 F. Supp. 1171, 1174-75 (N.D. Tex. 1997) (“*Webbworld I*”); *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 551 (N.D. Tex. 1997) *affd.* 168 F.3d 486 (5th Cir. 1999) (“*Webbworld II*”); *Sega Enters., Ltd. v. Sabella*, 1996 WL 780560, at *7 (N.D. Cal. 1996); *Creative Labs, Inc. v. Cyrix Corp.*, 42 U.S.P.Q.2d 1872, 1875-76 (N.D. Cal. 1997); *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167, 1173 (N.D. Ill. 1997); see also *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517-19 (9th Cir. 1993) (“copying” within the meaning of the Copyright Act occurs whenever a computer program is transferred from a permanent storage device to a computer’s random access memory).

19 239 F.3d at 1014.

20 *Frena*, 839 F. Supp. at 1556; *Central Point Software, Inc. v. Nugent*, 903 F. Supp. 1057, 1060 (E.D. Tex. 1995); *Sega I*, 857 F. Supp. at 687, 689.

21 *Religious Technology Ctr. v. Netcom On-Line Communications Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995); *Sega II*, 948 F. Supp. at 923, 936 (in which the Court, relying primarily on *Netcom*, “superseded” its prior position on direct infringement – though not contributory infringement); *Marobie-FL*, 983 F. Supp. at 1178; *Sabella*, 1996 WL 780560, at *7. But see *Hardenburgh*, 982 F. Supp. at 512 (BBS operator’s encouragement of infringing photo uploads, and screening procedure designed to avoid uploading pornography, constituted sufficient volitional activity to transform him from a mere “passive” provider of space where infringement occurred so as to warrant direct (and contributory) copyright liability); *Webbworld I*, 968 F. Supp. at 1174-75 (defendant website operator is not “an information conduit” like *Netcom*); *Webbworld II*, 991 F. Supp. at 522 (direct infringement where defendant took affirmative steps including using its “ScanNets software to troll the Usenet for . . . product.”).

22 114 F. Supp. 2d at 907.

23 See, e.g., D. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner’s Guide*, 33 U.S.F. L. Rev. 1, 6-7 (1998) (hereinafter “*Weiskopf*”) (imposing liability on direct copyright infringers “may be practically impossible. Indeed, because people can operate with almost complete anonymity in cyberspace, identifying infringers can be difficult. Additionally, physically locating the accused violator can be impossible, even if one could determine their ‘cyberspace address.’”); Mary Ann Shulman, *Internet Copyright Infringement Liability: Is an Online Access Provider More Like a Landlord or a Dance Hall Operator?* Golden Gate U.L. Rev. 555, 569 (1997) (hereinafter “*Shulman*”) (“although copyright owners may have a strong legal case against individual users making unauthorized copies on the Internet, locating them may be almost impossible, and the cost of litigation against these individuals would likely dwarf the amount of any recovery.”).

contributory and vicarious infringement as the claims of choice for copyright owners seeking to protect their rights on the Internet. Even prior to *Napster*, the efficacy (if not necessity) of contributory or vicarious liability claims in comparable situations was discussed by courts and commentators.²⁴ The Court of Appeals' opinion in *Napster* is the most definitive statement that traditional principles of contributory and vicarious infringement are as applicable to the Internet as to any other context.²⁵ The remainder of this article describes the evolution of these doctrines and their applicability to copyright infringement on the Internet.²⁶

IV. CONTRIBUTORY INFRINGEMENT

Contributory liability originates in tort law. Specifically, the doctrine of contributory infringement arises out of the theory of enterprise liability — that liability should attach whenever a person knowingly contributes to the infringing conduct of another.²⁷ While there is no express provision in the Copyright Act imposing liability for infringements committed by others,²⁸ contributory copyright infringement has long been recognized as a necessary and appropriate adjunct to insure the efficacy of the copyright system.²⁹ The classic definition of contributory infringement was provided in *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*:³⁰ “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.”³¹ The Court of Appeals reaffirmed the *Gershwin* formulation in *Fonovisa, Inc. v. Cherry Auction, Inc.*³² — the most recent and important appellate decision on contributory (and vicarious) infringement prior to *Napster*. In *Fonovisa*, the Court of Appeals held that the operator of a swap meet could be both contributorily and vicariously liable for the sales of counterfeit recordings by vendors on its premises.³³ Commentators were quick to see *Fonovisa's* rationale as transferable to the Internet,³⁴ and in *Napster* the Court so incorporated the *Fonovisa* analysis.³⁵

24 See, e.g., *Sega I*, 857 F. Supp. at 687; *Weiskopf*, 33 U.S.F.L. Rev. at 12; N. Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 *Cardozo Arts & Ent. L.J.* 346, 363 (1993); R. Carter Kirkwood, *Comment: When Should Computer Owners be Liable for Copyright Infringement by Users?*, 64 *U. Chi. L. Rev.* 709, 728-29 (1997) (hereinafter “Kirkwood”); J. Markiewicz, *Seeking Shelter From the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 *CommLaw Conspectus* 423, 427 (1999).

25 See *n.6 supra*. See also *Columbia Pictures Indus., Inc. v. Redd Home, Inc.*, 749 F.2d 154, 157 (3rd Cir. 1984) (defendant “is not immune from liability for copyright infringement simply because the technologies are of recent origin or are being applied to innovative uses”); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 2000 WL 710056, *1 (S.D.N.Y. 2000) (“Defendant’s copyright infringement was clear, and the mere fact that it was clothed in the exotic webbing of the Internet does not disguise its illegality.”).

26 Discussion of the Digital Millennium Copyright Act (“DMCA”) is beyond the scope of this article. Although it was adopted less than two years before the *Napster* case was filed, it clearly did not anticipate such a system. See *Napster*, 239 F.3d at 1025; see also *A&M Records, Inc. v. Napster, Inc.*, 54 U.S.P.Q.2d 1746 (N.D. Cal. 2000) (denying Napster’s motion for summary adjudication under DMCA section 512(a)). In any event, the DMCA itself provides exceptions to its “safe-harbor” protections for those who commit contributory infringement or are vicariously liable. 17 U.S.C. section 512(c)(1)(A)(i)-(iii), (B) and 512(d)(1)(A), (B). See also *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (DMCA safe harbor application “is not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement”).

27 3 *Nimmer* at section 12.04[A][2]; *Sony*, 464 U.S. at 434; see also *Demetriades v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988). There is, however, authority for contributory infringement in the statutory language, which grants copyright owners the right to “authorize others” to exploit the exclusive rights granted by copyright. 17 U.S.C. section 06. By including the “to authorize” language, Congress “intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it for the purposes of an unauthorized public performance.” H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61, reprinted in 1976 U.S. Code Cong. & Admin. News at 5674; S. Rep. No. 473, 94th Cong., 1st Sess. 57 (1975). See also *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1093 (9th Cir. 1994) (right to authorize codifies liability for contributory infringement).

29 See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911) (Justice Holmes noted that liability for “contributing to infringement” is consistent with “principles recognized in every part of the law.”).

30 443 F.2d 1159 (2d Cir. 1971).

31 *Id.* at 1162.

32 76 F.3d 259 (9th Cir. 1996). Counsel for *Fonovisa* (and one of the authors of this article) also was counsel for the record company plaintiffs in *Napster*. Coincidentally, Chief Judge Schroeder, who wrote the *Fonovisa* opinion, also was on the three member Court of Appeals panel that decided *Napster*.

33 *Fonovisa*, 76 F.3d at 262.

34 See, e.g., 1 *Nimmer* section 12A.01[C] at 12A-8 (1999 Supp.) (“Though that case itself [*Fonovisa*] arose in a rather low-tech posture, the breadth of its holding created concern among high-tech companies that they too could be ensnared in the web of liability.”); D. Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 *Harv. J.L. Tech.* 1, 34 (1996) (*Fonovisa* “provides a liberalization of the standards for vicarious liability in cyberspace”); Angela R. Dean, *Expanding the Doctrines of Vicarious and Contributory Copyright Infringement*; *Fonovisa, Inc. v. Cherry Auction Inc. Targets the Primary Distribution Channels for Counterfeit Merchandise*, 4 *Vill. Sports & Ent. L.J.* 119, 144-145 (1997) (“The courts may eventually apply the concepts of vicarious liability and contributory copyright infringement set forth in *Fonovisa, Inc.* to Internet access and on-line service providers who fail to take steps to eliminate copyright infringement activity on their networks.”); *Shulman*, 27 *Golden Gate U.L. Rev.* at 585 (“By applying the legal principles in *Fonovisa* . . . future courts may hold an online access provider both contributorily liable and vicariously liable for the infringing conduct of subscribers.”); Keith Stephens and John P. Sumner, *Catch 22: Internet Service Providers’ Liability for Copyright Infringement Over the Internets* 24, 14-5 *Computer Law*, 1-4 (May 1997) (discussing applicability of *Fonovisa* to liability of Internet service providers).

35 239 F.3d at 1019-20. The District Court had “largely agreed” with the characterization of the Napster system as an “Internet swap meet.” 114 F. Supp. 2d at 919.

A. Knowledge

Courts have found the required level of contributory infringement knowledge satisfied in a variety of different ways,³⁶ including: specific notice of infringement;³⁷ the abnormally low price of the infringing goods;³⁸ the recent release or popularity of the work copied;³⁹ unusual business arrangements with the direct infringer;⁴⁰ physical control over the copying process;⁴¹ advertising or solicitation of infringement;⁴² the ability to track infringement;⁴³ a previous pattern of infringement;⁴⁴ and the specific nature of the goods or products involved.⁴⁵

Courts that have dealt with the “knowledge” component of contributory infringement in the Internet context generally followed the “knew or should have known” test of *Gershwin*, affirmed in *Fonovisa*. Two cases decided the same day in 1996, in the same district as *Napster*, are examples of this approach. In *Sega II* and *Sabella*, the Court discussed and found the requisite knowledge in the on-line context. In *Sabella*, the Court addressed whether a BBS operator had knowledge of the copyright infringements committed by its users. In finding sufficient evidence to support the inference that there was reason to know of the infringements, the Court recited a number of factors, including that the operator had the ability to track user uploads and downloads of the infringing files, and the operator advertised for sale copiers which could play the infringing files.⁴⁶ In *Sega II*, the Court found knowledge based, in part, on evidence of a screen printout of user uploading and downloading statistics from the BBS showing that the operator tracked, “or at least had the ability to track,” user uploads and downloads.⁴⁷

The other notable case on this issue is *Netcom*, where the Court considered the contributory liability of an Internet service provider, Netcom, for infringing material posted on a BBS for which it provided Internet access. The Court described the issue on Netcom’s summary judgment motion as whether Netcom had sufficient information to know or to have reason to know of likely infringement (as the result of a letter notifying it) “before it was too late to do anything about it.”⁴⁸ The Court then left the answer to await a trial (which never took place because of a settlement).⁴⁹

Although some characterized *Netcom* as creating a new test for what constitutes knowledge (at least for an ISP),⁵⁰ in *Napster*, the Court specifically reaffirmed that the knowledge requirement in the Internet context could be satisfied by actual or constructive knowledge, which should dispel any doubt that *Netcom* had changed that general standard.⁵¹

36 Constructive knowledge is sufficient. *Gershwin*, 443 F.2d at 1162; *Cable/Home Communication Corp. v. Network Prods, Inc.*, 902 F.2d 829, 845-46 & n.29 (11th Cir. 1990); *Napster*, 239 F.3d at 1020 (“know or have reason to know”).

37 *Fonovisa*, 76 F.3d at 261, 264.

38 *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 404 (S.D.N.Y. 1966).

39 *Universal City Studios, Inc. v. American Inc.*, 217 U.S.P.Q. 1076, 1077 (N.D. Ill. 1981); *Hardenburgh*, 982 F. Supp. at 514.

40 *Re-R Recreation Products, Inc. v. Joan Cook Inc.*, 25 U.S.P.Q.2d 1781, 1784-85 (S.D.N.Y. 1992) (a \$500,000 fee for merely pointing out a popular product to an infringer who copied it, the absence of a written agreement, and the lack of cover letters when payment was sent).

41 *RCA Records v. All-Fast Sys., Inc.*, 594 F. Supp. 335, 339 (S.D.N.Y. 1984).

42 *Sega II*, 948 F. Supp. at 933; *Sega I*, 947 F. Supp. at 683; *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3rd Cir. 1986); *Wales Indus. Inc. v. Hasbro Bradley, Inc.*, 612 F. Supp. 510, 518 (S.D.N.Y. 1985).

43 *Sega II*, 984 F. Supp. at 933.

44 *Fonovisa*, 76 F.3d at 264.

45 *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 858 (S.D.N.Y. 1984) (“very nature of color separation manufacture — the photographing of the packaging of the copyrighted records and tapes — would suggest infringement to a rational person”); *Recording Industry Ass’n of America, Inc. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1074 (9th Cir. 1999) (“By most accounts, the predominant use of MP3 is the trafficking in illicit audio recordings.”).

46 1996 WL 780560, *8.

47 948 F. Supp. at 928. See *Hardenburgh*, 982 F. Supp. at 510, 514 (BBS operators possessed constructive knowledge of infringing activity of users, finding that they had adopted the equivalent of a policy of “willful blindness” to the infringements by encouraging subscribers to upload any and all photographs while concomitantly ignoring the strong likelihood that copyrighted photos were among those being uploaded); *Sega I*, 857 F. Supp. at 686 (provision of facilities — copiers and bulletin board — direction, and encouragement); see also B. Kolsun and J. Bayer, *Indirect Infringement and Counterfeiting: Remedies Available Against Those who Knowingly Rent to Counterfeiters*, 16 *Cardozo Arts & Ent. L.J.* 383, 389-90 (1998) (noting that *Fonovisa* reaffirmed the imposition of liability based on “willful blindness”).

48 907 F. Supp. at 1374.

49 See Ian C. Ballon, *Pinning the Blame in Cyberspace: Towards a Coherent Theory for Imposing Vicarious Copyright, Trademark and Tort Liability for Conduct Occurring over the Internet*, 18 *Hastings Comm/Ent L.J.* 729, 766-70 (1996) (describing the “Netcom Guidelines” adopted as a result of settlement).

50 *Kirkwood*, 64 U. Chi. L. Rev. at 725.

51 239 F.3d at 1020. (“Contributory liability requires that the secondary infringer know or have reason to know of direct infringement,” citing *Netcom*).

The Court of Appeals affirmed the finding that Napster had both actual⁵² and constructive knowledge⁵³ of direct infringement. The Court's discussion of the knowledge requirement then was directed largely to the issue of whether the "staple article of commerce doctrine" of *Sony*⁵⁴ precluded Napster's liability. The Court held that under this doctrine, constructive knowledge could not be imputed "merely because" the Napster system "may be used" to infringe plaintiffs' copyrights.⁵⁵ However, here, the analysis stopped with Napster's actual knowledge of infringement. For that reason alone, the imposition of liability on Napster was not inconsistent with either *Sony's* staple article of commerce doctrine or *Netcom's* requirement of specific information to show likely infringement.

B. Material Contribution

In addition to the requisite knowledge of direct infringement, contributory infringement requires that there be a "material" contribution to the direct infringement.⁵⁶ The amount of the necessary contribution is not objectively quantifiable, but is based on an overall assessment of the quality of the contribution.⁵⁷ For example, in *Gershwin*, the Court upheld the ruling that a concert promoter was contributorily liable for the unauthorized performance of copyrighted works at a concert which, among other things, it had promoted extensively.⁵⁸ Courts also apply contributory liability to those who provide the materials or equipment utilized by the direct infringer.⁵⁹ Finally, in *Fonovisa*, the Court recognized that in certain situations those who provide support services or the "site and facilities" (i.e., the environment) necessary to the infringing activity may be liable for contributory infringement. In *Fonovisa*, the ongoing infringements which occurred at the swap meets were facilitated by defendants' activities because "it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet. These services include, *inter alia*, the provision of space, utilities, parking, advertising, plumbing, and customers."⁶⁰ The Court in *Fonovisa* also apparently relaxed the previous requirement that participation by the defendant must be "substantial."⁶¹ Although some early Internet cases applied the previous "substantial participation" language,⁶² more recent decisions, relying on *Fonovisa*, have provided a more expansive

52 Napster's actual knowledge was based on its internal documents acknowledging its users' exchange of "pirated music," and specific written notice of infringing files being distributed over the Napster system. 239 F.3d at 1020 n.5.

53 Napster's constructive knowledge was based on its executives' recording industry experience; its executives' downloading of copyrighted material; its enforcement of intellectual property laws; and its promotion of the site by using screenshots of infringing material. *Id.*

54 464 U.S. at 417.

55 239 F.3d at 1020-21.

56 *Gershwin*, 443 F.2d at 1162; see also *Demetriades*, 690 F. Supp. at 294 (defendants must be substantially involved in or substantially aid or encourage the infringement).

57 3 *Nimmer* section 12.04[A][2][a] at 12-72 n.8; *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396-97 (1968).

58 443 F.2d at 1163 (while the defendant promoter had "no formal power to control" the local association sponsoring the concert or the artists for whom it served as an agent, it "caused" the copyright infringement by its "pervasive participation" and assistance in creating an audience for the concert); see also *Screen Gems*, 256 F. Supp. at 403 (advertising agency that placed ads for the sale of infringing records, radio station that broadcast the ads, and packaging agent that shipped infringing "bootleg" records each could be held contributorily liable); *Redd Horne*, 749 F.2d at 160-61 (corporate defendant that advertised and promoted infringing activity was liable for contributory infringement); *Cable/Home Communication*, 902 F.2d at 845-47 (party that financially promoted and encouraged the manufacture of "pirate chips" that copied copyrighted computer program was liable for direct and contributory infringement).

59 *RCA Records*, 594 F. Supp. at 339 (defendant operator of a specialized cassette-copying machine used to make copies of plaintiffs' copyrighted tapes contributorily liable: "Since only 'Rezound' cassettes sold by defendant can be used in the machine, defendant . . . is in a position to prevent such use by withholding sale of the cassette."); *A&M Records, Inc. v. General Audio Video Cassettes, Inc.*, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) (defendants contributorily liable for selling blank "time loaded" audio tapes to customers who used these same materials in connection with a massive counterfeiting operation); *Atari, Inc. v. JS&A Group, Inc.*, 597 F. Supp. 5, 8-9 (N.D. Ill. 1983) (strong likelihood of success of contributory infringement claim against defendants who manufactured and marketed a device for the duplication of computer game programs).

60 76 F.3d at 264. The Court also noted that the defendants' concealment of the identities of its infringing vendors contributed to the infringement. *Id.* See also *Columbia Pictures*, 800 F.2d at 62 n.3, 64 (defendant materially contributed to the unauthorized public performance of plaintiffs' copyrighted videocassettes by "encourag[ing] the public to make use of its facilities [i.e., private screening rooms] for the purpose of viewing such tapes and mak[ing] available its rooms and equipment to customers who bring cassettes with them.").

61 76 F.3d at 1374. See M. Gross, *Intellectual Property*, 13 Berkeley Tech. L. J. 101, 105 (1998) (*Fonovisa* "relaxed" the test for material contribution from "substantial participation" to a more lenient "participation" standard.); *Weiskopf*, 33 U.S.F. L. Rev. at 30, 31. See also *General Audio Video Cassettes*, 948 F. Supp. at 1456 (relying on *Fonovisa*, the Court focused on defendants' conduct in acting "as a contact between his customers and suppliers of other material necessary for counterfeiting" and his selling of duplicating machines and time-loaded cassettes).

62 See, e.g., *Netcom*, 907 F. Supp. at 1374 ("if plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Ehrlich's infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial participation.").

definition of contributory infringement in the Internet context.⁶³ In either event, the cases generally had no difficulty in finding sufficient contribution.

The Court of Appeals in *Napster* adopted the view (and the precise language) of *Fonovisa* that the element of contribution was satisfied where the defendant provides the “site and facilities” for direct infringement,⁶⁴ and quoted the District Court’s view that “without the support services [Napster] provides, Napster users could not find and download the music they want. . . .”⁶⁵ The Court even referred favorably to *Netcom*’s pronouncement that the “failure to cancel [a user’s] infringing message and thereby stop an infringing copy from being distributed” constitutes sufficient contribution.⁶⁶ *Napster* thus reaffirmed that “material contribution” is readily found in the Internet context.

V. VICARIOUS INFRINGEMENT

Contributory and vicarious infringement are separate theories of liability, with different foundations in the law.⁶⁷ Vicarious copyright infringement initially was conceived of as an outgrowth of the agency principles of *respondere superior*,⁶⁸ i.e., that it was appropriate in certain circumstances to place responsibility on one who had the right and ability to control the infringing conduct of another. Because of this origin, unlike contributory infringement, knowledge of direct infringement is not necessary for vicarious infringement.⁶⁹ Instead, the ability to control profitable infringement makes it appropriate to place the responsibility of preventing it on those who can effectively exercise that control,⁷⁰ as well as reasonable to place liability for losses on those who profit from infringement.⁷¹

Beginning with the decision in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, the doctrine of vicarious copyright liability began to expand beyond the confines of the traditional employer-employee context. In *Shapiro*, the owner of a chain of department stores was held vicariously liable for the unlawful sale of counterfeit recordings. These sales had been made by an independent concessionaire operating pursuant to a license agreement, rather than by the department store, which received royalties from the concessionaires’ sales but had no knowledge of infringement. In holding the department store owner liable for the concessionaire’s infringing activities, the Court essentially ignored any technical classification of their relationship. Instead, the Court was concerned with “placing responsibility where it can and should be effectively exercised.”⁷² To decide that issue, the Court considered two lines of cases: the “landlord-tenant” cases, where the courts held that a landlord lacking knowledge of the infringing acts of its tenant and who did not exercise control over the leased premises was not liable for infringing sales by its tenant,⁷³ and the “dance hall” cases, which held that the operator of an entertainment venue was liable for infringing performances when the operator (1) could control the premises, and (2) obtained

⁶³ *Sega I*, 857 F. Supp. at 687 (BBS operators potentially were liable for contributory copyright infringement for the infringing activities of its users because their “role in the copying, including provision of facilities, direction, knowledge and encouragement, amounts to contributory copyright infringement.”); *Sabella*, 1996 WL 780560, at *8 (“Sabella did more than provide the site and facilities for the known infringing conduct. She provided a road map . . . for easy identification of Sega games available for downloading.”); *Sega II*, 948 F. Supp. at 933 (defendants liable for contributory infringement because they had “actively solicited users to upload games” and “provided the facilities for copying the games by monitoring, and operating the BBS software, hardware and phone lines necessary for the users to upload and download games”); see also *Creative Labs*, 42 U.S.P.Q.2d at 1872 (preliminary injunction issued against defendant which was “likely contributorily liable” for copyright infringement, because it encouraged and provided the resources for “the copying by others of the . . . software that [plaintiff] made available on its website”); *Hardenburgh*, 982 F. Supp. at 514 (encouragement of BBS subscribers to upload information, including infringing adult files, constituted sufficient contribution to the infringing activity).

⁶⁴ 239 F.3d at 1022.

⁶⁵ *Id.*, quoting 114 F. Supp. 2d at 919-20.

⁶⁶ 239 F.3d at 1022.

⁶⁷ See *Demetriades*, 690 F. Supp. at 292 n.5; *Nimmer* section 12.04[A][2][a], at 12-73; 2 P. Goldstein, *Copyright*, section 6.0, 6:4.

⁶⁸ See, e.g., *M. Witmark & Sons v. Calloway*, 22 F.2d 412-14 (E.D. Tenn. 1927).

⁶⁹ See, e.g., *Bradbury v. Columbia Broadcasting Sys.*, 287 F.2d 478, 485 (9th Cir. 1961); *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 565 (S.D.N.Y. 1995).

⁷⁰ *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 308 (2d Cir. 1963).

⁷¹ *Polygram Int'l Publishing, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994).

⁷² 316 F.2d at 308.

⁷³ See, e.g., *Deutsch v. Arnold*, 98 F.2d 686, 687 (2d Cir. 1938); *Fromont v. Aeolian Co.*, 254 F. 592, 593-94 (S.D.N.Y. 1918).

a direct financial benefit from the audience who paid to enjoy the infringing performance.⁷⁴ The *Shapiro* Court concluded that the “dance hall” model more appropriately effectuated the policies of copyright law to require consent from copyright owners to exploit their works: “Where the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials— even in the absence of actual knowledge that the copyright monopoly is being impaired — the purposes of the copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation.”⁷⁵

The *Gershwin* Court later articulated what became the traditional test for vicarious liability thusly: “even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”⁷⁶ The Court in *Fonovisa* traced this development of the law and adopted the *Gershwin* test.⁷⁷

A. Right and Ability to Supervise

In *Shapiro*, the Court relied on the ability of the department store to police its concessionaire and its contractual retention of “the ultimate right of supervision over the conduct of the record concession and its employees” in finding the first requirement of vicarious copyright infringement satisfied.⁷⁸ In *Gershwin*, the defendant was held vicariously liable despite (unlike *Shapiro*) his lack of legal, contractual ability to control the direct infringements which had occurred. Rather, in light of the practical right to control, evidenced by “pervasive participation in the formation and direction” of the direct infringers, including promoting them and creating an audience for them, the defendants were deemed to be in a position to police the direct infringers, thereby satisfying the “control” element of vicarious liability.⁷⁹ The Court imposed liability despite the defendants’ deliberate attempts to disavow and shift any responsibility on their part for potential copyright infringement.⁸⁰ In *Fonovisa*, the legal right and ability to control (by the contractual terms of use) and the practical right (by supervision and policing) coalesced.⁸¹

Thus far, fewer courts have dealt with vicarious infringement in the Internet context than with contributory infringement. The *Netcom* Court found that Netcom was not entitled to summary judgment on the issue of whether it had the right and ability to control its subscribers’ activities, given Netcom’s explicit reservation of (and exercise of) the right to take remedial action against subscribers, its express prohibition against copyright infringement, and its ability to delete infringing messages.⁸² In *Webbworld I*, the defendant operators of the infringing website were held vicariously liable for the posting of infringing photos on their website because they “had the right and ability to control what occurred” on the site.⁸³ The same result was reached in *Webbworld II* on the basis that the defendant

⁷⁴ See, e.g., *Buck v. Jewell-LaSalle Realty Co.*, 238 U.S. 191, 198-99 (1931); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 E.2d 354, 355 (7th Cir. 1929).

⁷⁵ 316 E.2d at 307.

⁷⁶ 443 E.2d at 1162.

⁷⁷ 76 F.3d at 262.

⁷⁸ 316 E.2d at 308-09.

⁷⁹ 443 E.2d at 1163. See also *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988) (manufacturer of specialized cassette duplicating machine vicariously liable where it had issued instructions on the use of the machines to retailers, required strict compliance with the rules and regulations set out in its operations manual, and had represented that it “policed” the use of its duplicating machines in order to prevent the unauthorized duplication of copyrighted materials).

⁸⁰ 443 E.2d at 1161. This strategy routinely has been unsuccessful. See *Ches Music, Inc. v. Sipe*, 442 F. Supp. 1184, 1185 (D. Minn. 1977); *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72, 74-75 (W.D. Mo. 1977); *Rexnord Inc. v. Modern Handling Sys., Inc.*, 379 F. Supp. 1190, 1196 (D. Del. 1974); *RCA/Ariola*, 845 F.2d at 777.

⁸¹ 76 F.3d at 262-63. See also *PolyGram*, 855 F. Supp. at 1326 (defendants have control if they “either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program”).

⁸² 907 F. Supp. at 1375-76. The Court rejected Netcom’s argument that it “could not possibly screen messages before they are posted given the speed and volume of the data that goes through its system,” given evidence that easy software modification could identify postings that contain particular words or come from particular users. *Id.* Whether the power has been exercised is irrelevant. *Broadcast Music, Inc. v. Harimarc Corp.*, 9 U.S.P.Q. 2d 1561, 1563 (N.D. Ill. 1988); *Webbworld*, 968 F. Supp. at 1177; *Webbworld II*, 991 F. Supp. at 554. Similarly, the cost of exercising control also is irrelevant. *PolyGram*, 855 F. Supp. at 1325; *Webbworld I*, 968 F. Supp. at 1175; *Hardenburgh*, 982 F. Supp. at 510-11; *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 686 n.14 (S.D.N.Y. 1979).

⁸³ 968 F. Supp. at 1177 (“Defendants’ arguments to the contrary, including their contention that they lacked control because the process was automated, are unavailing.”).

“created and controlled operation over the ScanNews software that was the heart of the Webworld enterprise.”⁸⁴

In *Napster*, the Court of Appeals again followed *Fonovisa* and held that “[t]he ability to block infringers’ access to a particular environment for any reason whatsoever is evidence of the right and ability to supervise.”⁸⁵ The Court relied on Napster’s express policy reserving the “right to refuse service and terminate accounts in [its] discretion, including, but not limited to, if Napster believes that user conduct violates applicable law . . . or for any reason in Napster’s sole discretion, with or without cause.” In addition, the Court held that Napster also had the practical ability to police its system by locating infringing material on its search indices and by terminating users’ access to the system. Therefore, “[t]o escape imposition of vicarious liability, the reserved right to police must be exercised to the fullest extent.”⁸⁶

B. Direct Financial Benefit

The direct financial benefit requirement initially was described as “an obvious and direct financial interest in the exploitation of copyrighted materials.”⁸⁷ *Fonovisa* found a direct financial benefit when it addressed whether swap meet operators, who received entrance fees from customers and charged daily rental fees to the infringing vendors in exchange for booth space, were vicariously liable. In enunciating what has been described as the “draw” test, *Fonovisa* found that the owners had “reap[ed] substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices.” The availability of counterfeit sound recordings at low prices “enhance[d] the attractiveness of the venue to potential customers,” effectively “drawing” them to the swap meets. These constituted “direct” benefits.⁸⁸

Internet cases have followed the financial benefit standard set forth in *Fonovisa*. The Court in *Sega I* found that the operators profited by the unlawful activities of their electronic bulletin board because “the existence of the distribution network for Sega video game programs increases the prestige of the MAPHIA bulletin board . . .”⁸⁹ In *Webbworld I*, even though defendants charged a fixed fee for viewing infringing images, a sufficient financial benefit existed to support a finding of vicarious infringement because the infringing photographs “enhanced the attractiveness of the Neptics website to potential customers . . .”⁹⁰

If anything, the “draw” test has even greater force in the context of the Internet, where value often was perceived as, in part, dependent on the number of users, notwithstanding the lack of present revenue. This type of value — derived by giving away information at no charge as a means of building reputational capital to be later converted into financial gain — was referred to as the “Netscape strategy.”⁹¹ The Court of Appeals in *Napster* specifically confirmed the applicability of the “draw” test to the Internet, affirming the finding that the availability of unauthorized music attracted more users to register with the Napster system. And, since there was “ample evidence [that] supports the district court’s finding that Napster’s future revenue is directly dependent upon ‘increases in userbase,’”⁹² Napster directly benefitted from the infringement.

⁸⁴ 991 F. Supp. at 554.

⁸⁵ 239 F.3d at 1023.

⁸⁶ *Id.* This issue (what is “the fullest extent?”) remains a focus of current proceedings in the District Court.

⁸⁷ *Shapiro*, 316 F.2d at 307; *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992).

⁸⁸ 76 F.3d at 263. A few courts previously had applied similar reasoning in finding the existence of a direct financial interest. See, e.g., *Famous Music Corp. v. Bay State Harness Horse Racing and Breeding Ass’n, Inc.*, 554 F.2d 1213, 1214 (1st Cir. 1977) (race track owner vicariously liable for infringing performances of a band that entertained patrons who were not “absorbed in watching the races”); *Herbert v. The Shanley Co.*, 242 U.S. 591, 595 (1917) (hotel and restaurant owners caused infringing performances to attract customers and made a profit from the sale of food).

⁸⁹ 857 F. Supp. at 684.

⁹⁰ 968 F. Supp. at 1177. *But see Netcom*, 907 F. Supp. at 1377 (plaintiff did not provide any evidence that infringement “in any way enhances the value of Netcom’s services to subscribers or attracts new subscribers”). Because the Court cited only the subsequently reversed District Court opinion in *Fonovisa* to support this position, this aspect of the *Netcom* analysis is no longer valid.

⁹¹ David R. Johnson and David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1384-85 (1996).

⁹² 239 F.3d at 1023.

VI. CONCLUSION

The *Napster* decision teaches an elementary lesson — albeit one that has sometimes been lost in the excitement over the emergence of digital technology and the new media of the Internet: new methods of transmitting expression may require the application of traditional principles, developed over many decades of jurisprudence, in new ways, but they do not require jettisoning those principles — which, after all, ultimately are well-tested tools designed to determine when it is fair to hold one responsible for the misappropriation of another's creative output.