CONTRIBUTORY INFRINGERS AND GOOD SAMARITANS

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The parable of the Good Samaritan is a story of legal interpretation. As the story goes, a lawyer asks for the precise requirements for getting into heaven. The lawyer begins by setting out a supposedly established contractual principle: a person may enter heaven if he loves his neighbor as he would himself. The lawyer contends that this principle suffers from ambiguous language and asks for guidance in fleshing out the definition of "neighbor." Jesus answers the lawyer's request with the account of the Good Samaritan.[1] Unlike other passersby, the Good Samaritan comes to the aid of an injured stranger on the road, tending to the stranger's wounds and paying for his convalescence at a local inn.[2] The Samaritan's charity is all the more impressive because the stranger is a member of a rival religious sect.[3] After hearing the story, the lawyer realizes that the term "neighbor" is meant to be interpreted very broadly.

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1. *Luke* 10:25-37.
2. *Id.*
3. *Id.*

Despite the parable's legal bent, Anglo-American law has been reluctant to impose a legal duty on individuals to aid or protect others. While our legal system may be sympathetic to moral teachings like the story of the Good Samaritan, a countervailing concern, the need to safeguard individual autonomy, has largely blocked imposition of such a duty. Tort law teaches that, barring unique circumstances, individuals are under no obligation to assist their fellow man, even when their failure to act may result in death.[4]

Nevertheless, under certain conditions, courts will force us to embrace the better angels of our nature or face legal consequences. This Essay examines those conditions to assess whether they should have any bearing in setting the boundaries of contributory infringement law. More specifically, this Essay explores the situations where a defendant is obligated to protect others by controlling the tortious behavior of third parties. The rules establishing a duty to control another party are germane to commercial intermediaries who can face liability from the infringing acts of others. Should a duty be placed on providers of online services to control the actions of others for the benefit of intellectual property rights holders? For common law tort, such a duty arises only when a "special relationship" exists between the defendant and some other party, either the victim or the perpetrator, of the tortious act.[5] I contend that it only makes sense to recognize a special relationship between online service providers and their infringing clients under a very limited set of conditions.

Part I of this Essay describes existing contributory infringement doctrine. Part II examines the circumstances in tort law where courts have found that the relationship between the defendant and the direct actor justifies imposition of a duty to control the latter. Interestingly, the ability to manage the actions of the direct actor is not the only

4. Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1452 (2008). A few jurisdictions have enacted their own "Good Samaritan" laws. Joel Jay Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239, 257 n.100 (1991) (noting that "Good Samaritan" laws, while rare, exist in various states). But these laws typically only exempt actors from liability for their efforts to assist rather than creating a duty to come to the aid of another. *See* W. PAGE KEATON, PROSSER AND KEATON ON THE LAW OF TORTS § 56, at 375 n.21 (5th ed. 1984) (identifying only three states that impose a duty, under certain limited conditions, to rescue another in peril); *see also* 47 U.S.C. § 230(c) (setting out a safe harbor under the subheading "Protection for 'Good Samaritan' blocking and screening of offensive material" for Internet service providers that, in good faith, restrict access to indecent materials).

5. RESTATEMENT (SECOND) OF TORTS § 315 (1977).

requirement for imposing such a duty. Part III applies these findings from tort law to the specialized context of intellectual property.

I. PLACING CONTRIBUTORY INFRINGEMENT DOCTRINE IN THE CONTEXT OF TORT LAW

All three of the main intellectual property regimes recognize the doctrine of contributory infringement. Under current doctrine, to be contributorily liable, the defendant must satisfy two criteria.[6] First, the defendant must have actual or constructive knowledge that her actions are likely to facilitate infringement by another.[7] Second, the defendant's actions must materially contribute to the infringement.[8]

The Supreme Court has consistently located contributory infringement doctrine within the jurisprudence of common law tort.[9] Despite the absence of clear statutory authorization in the Copyright Act, the Court justified imposition of contributory liability for copyright infringement on the doctrine's prevalence in other legal realms.[10] Similarly, the Court approved contributory liability for trademark infringement based on common law principles of unfair competition.[11] In the 2005 *Grokster* case, the Court cited a tort law treatise to bolster its decision to create a new "inducement" form of indirect liability for copyright infringement.[12] Responding to this authority, the lower courts have recognized indirect liability for patent, copyright, and trademark

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

7. *See id.*

8. *See id.* A separate doctrine, vicarious liability, provides an alternate route for imposing liability on one party for the infringing conduct of another. The key difference between the two secondary liability theories is that vicarious liability is based solely on the relationship between the defendant and the direct infringer while contributory liability is based on the actions of the defendant as well as the defendant's state of mind in relation to the underlying infringement. Contributory infringement and vicarious infringement are discrete doctrines with differing theoretical justifications. 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 21:41 (2008). A discussion of vicarious liability is beyond the scope of this paper.

9. *See generally* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005).

10. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 434-35 (1984).

11. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 861 n.2 (1982) (White, J., concurring).

12. *Grokster*, 545 U.S. at 936. Inducement infringement holds responsible parties that encourage and specifically intend for the direct infringer to infringe. *Id.* at 919. All three of the main intellectual property regimes recognize some form of inducement infringement. *See* Charles W. Adams, *Indirect Infringement from a Tort Law Perspective*, 42 U. RICH. L. REV. 635, 636 (2007). The key difference between standard contributory infringement and inducement infringement is that the latter requires "clear expression" of the defendant's intent to cause others to infringe. *Grokster*, 545 U.S. at 919.

infringement and sometimes used common law tort jurisprudence as a talisman to ward off criticism of their indirect infringement decisions.[13]

However, when the specifics of modern indirect infringement case law are scrutinized, it is not clear that they owe much to tort law precedent. Instead, prudential concerns often provide the justification for contributory infringement decisions. Particularly in the case of online intermediaries, courts present contributory liability, not as the ineluctable result of established doctrine, but as a necessary weapon in the battle against direct infringers.[14] For example, in the *Grokster* decision, the Court started from the premise that mass online infringement threatened the holders of music and movie copyrights, and then worked backwards to articulate a new theory of contributory liability that would ensnare the developers of what it deemed to be a dangerous new technology.[15] The Ninth Circuit adopted a similar solution-oriented approach in imposing liability on the Google search engine for providing the means for consumers to seek out and locate infringing websites.[16] Even when finding in favor of the contributory defendant, courts tend to have one eye focused on the projected impact of their decision on economic incentives and consumer behavior.

It is not clear that this is the best approach to adjudicating contributory infringement cases, which are often disputes between traditional intellectual property rights holders and technological pioneers. As several scholars have already commented, it is impossible to determine ex ante the precise economic effects of calibrating

13. *E.g.*, Hard Rock Café Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143, 1148 (7th Cir. 1992) ("To answer questions of this sort, we have treated trademark infringement as a species of tort and have turned to the common law to guide our inquiry into the appropriate boundaries of liability."); Demetriades v. Kaufmann, 690 F. Supp. 289, 292 (S.D.N.Y. 1988) (contending that "copyright is analogous to a species of tort" and that vicarious and contributory liability in tort are "well-established precepts"); Transdermal Prods., Inc. v. Performance Contract Packaging, Inc., 943 F. Supp. 551, 553 (E.D. Pa. 1996) (explaining that contributory trademark infringement theory grew out of the common law).

14. *See Grokster*, 545 U.S. at 929-30; In re Aimster Copyright Litig., 334 F.3d 643, 645-46 (7th Cir. 2003); Tiffany, Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 502 (S.D.N.Y. 2008).

15. *Grokster*, 545 U.S. at 929 ("The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software."); *see also* Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1409-10 (2006) (criticizing the prudentialist reasoning of the *Grokster* decision).

16. Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 728-29 (9th Cir. 2007).

contributory infringement law in one way or another.[17] A technology that appears to threaten the incentives for intellectual property creation today may prove benign when examined years in the future.[18]

In light of the unreliability of this prudential approach to secondary infringement, it may be time to turn to a more in-depth analysis of tort law principles to help determine the boundaries of contributory infringement doctrine. The most natural source for guidance is the law of civil aiding and abetting. Aiding and abetting law parallels contributory infringement law as both doctrines require proof of a certain level of knowledge of the underlying illegal activity and a contribution to that activity by the contributory defendant.[19] The problem is that the law of aiding and abetting remains notoriously unsettled.[20] Despite agreement that a successful plaintiff must establish that the defendant had knowledge of the direct actor's wrongful conduct and that the defendant substantially participated in the underlying tort, "[g]eneral confusion has surrounded the question of what exact test courts should use to determine liability."[21] Uncertainty exists as to the boundaries of the knowledge inquiry.[22] Likewise, confusion exists as to how to define the "substantial participation" necessary for aiding and abetting.[23] In addition, the rules of aiding and abetting liability can change depending on jurisdiction,[24] the type of party involved,[25] and the underlying tort at issue.[26]

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17. *See, e.g.*, George L. Priest, *What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung*, *in* 8 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS 21, 21-23 (John Palmer ed., 1986).

18. *See* Tim Wu, *The Copyright Paradox: Understanding Grokster*, 2005 SUP. CT. REV. 229, 254 (2005) (discussing the Court's past reluctance to impose liability on new technologies like the record and the piano player given the Court's admitted inability to forecast the economic future).

19. Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 275 (2005) ("The fundamental basis for aiding and abetting liability is that the defendant both (1) knows of the primary actor's wrongful conduct; and (2) substantially assists or encourages the primary wrongdoer to so act."); *see also* In re Enron Corp. Securities, Derivative & "ERISA" Litigation, 511 F. Supp. 2d 742, 802 (S.D. Tex. 2005).

20. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983); AT&T v. Winback, 42 F.2d 1421, 1430 (3d Cir. 1994) ("And in fact, aiding and abetting liability is not a well-settled mechanism for imposing civil liability.").

21. Combs, *supra* note 19, at 254-55.

22. *Id.* at 265-67, 283. *See also* Laura A. Heymann, *Knowing How to Know: Secondary Liability for Speech*, (unpublished manuscript, on file with the author) (describing the inconsistent manner in which courts have applied the knowledge standard for contributory infringement).

23. Combs, *supra* note 19, at 293 ("the confusion begins when one attempts to apply the principles of the substantial factor test to the theory of civil aiding and abetting").

24. *See generally* Woodward v. Metro Bank of Dallas, 522 F.2d 84, 96-97 (5th Cir. 1975) (reviewing cases from different jurisdictions that do and do not accept silence and inaction as a basis for aiding and abetting liability).

Given all of these uncertainties, the Supreme Court's directive to lower courts to evaluate contributory infringement in light of "rules of fault-based liability derived from the common law" is ambiguous at best.[27] A schizophrenic body of aiding and abetting law offers no clear answer to the riddles of contributory infringement. Yet a separate but related area of tort doctrine may provide some guidance. In certain specified circumstances, tort law recognizes a duty to protect third parties from the actions of others. Like aiding and abetting, the law regards breach of the duty to protect third parties from others' misconduct as a distinct legal violation and not derivative of the direct actor's tort.[28] The interesting question is when should such a duty be recognized? To a large degree, courts wrestling with contributory infringement claims are asking the same question. When liability is imposed, contributory infringement law obligates intellectual property intermediaries to police the infringing activities of others. In charting the boundaries of contributory infringement, it makes sense to consult a well-developed body of tort jurisprudence that has already engaged in some of the hard thinking about when it makes sense to burden someone with the obligation to prevent illegal conduct by others. The next part describes the reasons common law courts have offered for imposing a duty to control others. Part III asks whether these reasons are applicable in the specialized world of intellectual property infringement, particularly in the online context.

II. TORT LAW'S REASONS FOR IMPOSING THE DUTY TO CONTROL ON OTHERS

The general rule in tort law is that there is no duty to act for the protection of others.[29] There are two exceptions to the rule, however. First, there is a duty to render aid or protection when there is a particular sort of relationship between the defendant and the victim of the tortious

25. *E.g.*, Reynolds v. Schrock, 142 P.3d 1062, 1071-72 (Or. 2006) (*en banc*) (recognizing qualified privilege for lawyers assisting in a client's breach of fiduciary duty to a third party).

26. For example, courts in Georgia, Maine, Montana, and Virginia refuse to recognize a cause of action for aiding and abetting fraud. Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW 1135, 1140 (2006).

27. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 934-35 (2005).

28. Neilson v. Union Bank of Cal., 290 F. Supp. 2d 1101, 1133 (C.D. Cal. 2003); Mason, *supra* note 26, at 1139.

29. Richards v. Stanley, 271 P.2d 23, 27 (Cal. 1954); RESTATEMENT (SECOND) OF TORTS § 315 (1977).

conduct.[30] The Restatement of Torts recognizes five categories of relationships between a defendant and victim that trigger a duty of affirmative action.[31] In all of these relationships, the former party maintains some sort of physical or economic power over the latter party. When the latter party is threatened with harm in the context of this relationship, the former party has a duty to take reasonable action to prevent such harm from occurring. For example, when a police officer places a suspect in handcuffs, the officer has a duty to protect the vulnerable suspect from assault by another.[32] Such an obligation is justified under the notion that the victim's ability to protect himself is compromised by virtue of this relationship while the defendant is in a superior position to prevent harm from occurring.[33]

This exception probably has little bearing in the intellectual property context. Secondary infringement law is a hot topic today because of potential liability for online intermediaries.[34] These intermediaries typically have no ongoing relationship with the intellectual property rights holders who contend that they are victims of infringement. Unlike a police officer and her prisoner or a mental hospital and its wards, internet intermediaries do not maintain financial or physical dominion over the intellectual property rights holders plagued by online infringement. For example, in a recent much discussed case involving contributory trademark infringement, an online auction site made possible the illegal activity of counterfeiters, who used the famous Tiffany mark to sell their own knockoff jewelry. Although the court found in favor of the auction house for different reasons, the auction house had no preexisting relationship with Tiffany, and thus, could not be deemed to have a duty to protect the jeweler's interests by virtue of a special relationship.[35]

The second exception however, does resemble the experience of many online intermediaries. A duty to act affirmatively to prevent harm to another also arises when a "special relationship" exists between *the*

30. *Id.*

31. The five categories are: (1) carrier-passenger; (2) innkeeper-guest; (3) landowner-invitee; (4) custodian-ward; and (5) employer-employee. DAN C. DOBBS, THE LAW OF TORTS 857 (2000)

32. *See* Jackson v. City of Kansas City, 947 P.2d 31, 40-41 (Kan. 1997); *see also* Young v. Huntsville Hosp., 595 So.2d 1386, 1388 (Ala. 1992) (hospital had duty to protect patient from sexual assault by others while she was anesthetized).

33. Victor E. Schwartz & Leah Lorber, *Defining the Duty of Religious Institutions to Protect Others: Surgical Instruments, not Machetes, are Required*, 74 U. CIN. L. REV. 11, 25-26 (2005).

34. 5 PATRY, *supra* note 8, at § 21:55.

35. Tiffany, Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 473 (S.D.N.Y. 2008) ("Tiffany does not sell or authorize the sale of Tiffany merchandise on eBay or other on line marketplaces.").

defendant and *the perpetrator* of the harm.[36] Even when such a special relationship is recognized and a duty to control the perpetrator is imposed, the defendant will only be liable when the tortious activity is reasonably foreseeable.[37] In the remainder of this Part, I discuss the factors that courts rely on to decide if this special relationship exists. In certain limited situations, the hallmarks of a "special relationship"—an ability to control the actions of the tortfeasor, preservation of a sphere of autonomy for the defendant even after imposition of the duty to control, and evidence of the defendant's personal culpability—can be found in the interactions between an intermediary and a direct infringer.

A. Control

The first element deemed necessary for recognition of a special relationship between the defendant and the perpetrator is control over the perpetrator's tortious activities.[38] To trigger a duty to police the conduct of the perpetrator, the defendant must have "taken charge" of the perpetrator.[39] This can be measured in various ways. Formal legal control over the defendant's activities will suffice. Thus, parole officers can become responsible for the actions of their parolees when armed with a court order conditioning parole on certain behavioral requirements such as drug testing and attendance at counseling sessions.[40] Similarly, landlords, who typically have the authority to prevent certain behaviors on their property, are deemed to have sufficient control over their tenants.[41] On the other hand, entities like voluntary treatment facilities, colleges, and halfway houses are routinely absolved from liability because they lack full physical custody and sufficient legal authority over their charges.[42]

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36. RESTATEMENT (SECOND) OF TORTS § 315 (1977).

37. *See, e.g.*, Thomas v. City Lights Sch., Inc., 124 F. Supp. 2d 707, 710 (D.D.C. 2000) ("A school's duty to supervise its students, however, is limited to a reasonable duty to guard against foreseeable harm.").

38. Couch v. Wash. Dep't of Corr., 54 P.3d 197, 202 (Wash. App. 2002).

39. *Id.*

40. *See* Taggart v. State, 822 P.2d 243, 255-56 (Wash. 1992); Cole v. Indiana Dept. of Corr., 616 N.E.2d 44, 46 (Ind. App. 1993); *see also* King v. Durham County Mental Health, 439 S.E.2d 771, 774 (N.C. App. 1994) (holding that without a court order mandating participation in a residential treatment program, defendant treatment facility did not have the necessary control for a "special relationship" with a violent patient).

41. *E.g.*, Parr v. McDade, 314 N.E.2d 768, 774-75 (Ind. App. 1974); R.B.Z. v. Warwick Dev. Co., 681 So.2d 566, 568 (Ala. App. 1996); Martinez v. Woodmar IV Condominiums, 941 P.2d 218, 220 (Ariz. 1997).

42. *E.g.*, Rousey v. U.S., 115 F.3d 394, 399 (6th Cir. 1997); Bailor v. Salvation Army, 51 F.3d 678, 683 (7th Cir. 1995); Swanson v. Wabash Coll., 504 N.E.2d 327, 330 (Ind. App. 1987).

Sufficient control may also be based on more informal understandings.[43] The control element is satisfied when the court determines that the relationship between the defendant and the perpetrator matches a category of relationships where the perpetrator will ordinarily comply with the defendant's wishes, even if they are not legally mandated to do so.[44] If the relationship is one where the defendant is normally expected to monitor the activities of the perpetrator, a relationship of control is inferred.[45] Thus, sufficient control to trigger the duty exists in the case of a parent whose six-year-old child is playing outside with a rifle. Because a minor is expected to obey his parents, and parents are expected to monitor their children, if the parent is aware of the child's activity and fails to take action, the parent is liable to others for the child's gunplay.[46] Although most employers lack a sufficient amount of control over their employees for a special relationship to be inferred, some courts have made an exception for churches and the priests associated with them because of the assumption that such organizations have greater influence over their employees' lives.[47] On the other hand, a passenger in a car driven by its owner will not be held responsible for the owner's reckless driving.[48] The reason, suggests one thoughtful treatment of the subject, is that social norms do not require one to obey or even acknowledge criticism of one's driving from a non-owner passenger. We all know how annoying backseat drivers are after all.[49] Because we do not expect our passengers to instruct us on how to drive, it would be unfair to impose liability on passengers for the reckless behavior of their drivers.

Sufficient control for a special relationship will also be found when the perpetrator uses an instrumentality knowingly provided by the defendant to commit the harmful act. Section 318 of the Restatement of Torts imposes liability when the defendant allows her chattels to be used by a third person.[50] Thus, car owners can be held responsible for the reckless driving of their vehicles by others.[51] Likewise, a grocery store

43. *Cf.* Farwell v. Keaton, 240 N.W.2d 217, 222 (Mich. 1976) (finding a "special relationship" between defendant and victim because they were "companions on a social venture").

44. Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 891 (1934).

45. *Id.*

46. RESTATEMENT (SECOND) OF TORTS, § 316 cmt. b, illus. 1.

47. *E.g.*, C.J.C. v. Corp. of Catholic Bishops of Yakima, 985 P.2d 262, 275 (Wash. 1999).

48. *E.g.*, Olson v. Ische, 343 N.W.2d 284, 287 (Minn. 1984).

49. *See* Harper & Kime, *supra* note 44, at 891.

50. RESTATEMENT (SECOND) OF TORTS § 318 (1977).

51. Smith v. Jones, 169 N.W.2d 308, 316 (Mich. 1969).

may be liable for the misconduct of its patrons when the instrument of their misconduct is one of its own shopping carts.[52] The rationale for imposing liability on the defendant in such a situation is that it is assumed that one has control over her own property.

There are some qualifications to the rule imposing liability on parties that own instrumentalities used wrongfully by others. The defendant must know or should know that it has the ability to control the tortfeasor's use of its chattel.[53] In most cases, sufficient control will only be inferred if the perpetrator uses the property in the defendant's presence.[54] Similarly, no special relationship exists if the defendant did not have a reasonable opportunity to prevent the wrongful use of the instrumentality.[55] Thus, the law only imposes a duty to control on those actually in a position to stop the wrongful conduct.

Even if a court finds the required amount of control in the defendant-perpetrator relationship, this is not sufficient to impose a duty on the defendant.[56] Two other elements must be satisfied before a duty to control will be imposed. Broadly speaking, in addition to its control analysis, a court will likely address the defendant's autonomy and personal culpability. With respect to autonomy, a court will examine how greatly the imposition of a duty to control will circumscribe the defendant's freedom of action. Regarding culpability, the court will look for signs of the defendant's personal blameworthiness, beyond the evidence of its control over the tortfeasor.

B. Autonomy

Admittedly, autonomy and culpability are vague concepts that could be subject to many potential meanings. Nevertheless, some rules

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52. Meade v. Kings Supermarket-Orange, 366 A.2d 978, 979 (N.J. 1976); *see also* Cashman v. Reider's Stop-N-Shop Supermarket, 504 N.E.2d 487, 491 (Ohio App. 1986) (Parino, J., concurring in part and dissenting in part).

53. RESTATEMENT (SECOND) OF TORTS § 318 (1977).

54. Harper & Kime, *supra* note 44, at 888-89; RESTATEMENT (SECOND) OF TORTS § 318 (1977) ("If the actor permits a third person to use land or chattels in his possession . . ., he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them . . . ."); Knight v. Rower, 742 A.2d 1237, 1240-42 (Vt. 1999) (finding no social host liability for landowning parents who were not present when alcohol was being served on their property).

55. Pulka v. Edelman, 358 N.E.2d 1019, 1022 (N.Y. 1976).

56. John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 888-89 & n.86; DOBBS, *supra* note 31, at 895.

of thumb can be gleaned from the case law regarding what types of evidence satisfy these components of the special relationship requirement. In a sense, the entire body of law that limits duties to act for another's protection or benefit to "special relationships" is based on a respect for individual autonomy. In large part, the need to preserve individual freedom of action has trumped countervailing theories of a moral duty to act.[57] It is understandable that this concern with autonomy remains a part of the special relationship analysis. Regarding the defendant's autonomy interest, the court will evaluate the potential number of parties that the defendant will be forced to regulate if a duty is imposed. Even when the relationship at issue clearly demonstrates sufficient control of the wrongful actor, courts will refuse to recognize a duty that threatens to subject the defendant to unlimited or unduly burdensome litigation. Thus, while landowners may have a duty to control the wrongful behavior of others on their land, this duty is typically only triggered when the wrongful actor is an invitee.[58] Although it might be possible to take action to prevent even trespassers from engaging in unlawful conduct on one's land, courts refuse to require such precautionary measures, in part, because of the great burden it would place on all landowners.[59] Similarly, social hosts typically have no responsibility for regulating the use of instrumentalities brought onto their property by their guests. As one court explained, the problem with imposing a duty to control such activity is that every host would be exposed to considerable litigation for all sorts of conduct involving usually benign items like fireworks, sporting equipment, and alcohol.[60]

In performing this analysis of the burden resulting from such a duty to control, courts not only examine the fiscal responsibilities such a duty entails, but also "the more esoteric costs involved with requiring certain actions to relieve potential liability."[61] For example, autonomy interests have been cited as a reason against imposing a duty on a pregnant woman to avoid negligently harming her fetus.[62] Although such a duty would not create crushing financial burdens for pregnant women, it

57. *See* Wendy E. Parmet, *Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture*, 55 FLA. L. REV. 1221, 1228 (2003); Richard Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 198 (1973).

58. *See* Hutchins v. 1001 Fourth Ave. Assoc., 802 P.2d 1360, 1367 (Wash. 1991).

59. *Id.* at 1369.

60. Luoni v. Berube, 729 N.E.2d 1108, 1112-13 (Mass. 2000).

61. Jupin v. Kask, 849 N.E.2d 829, 838-39 (Mass. 2006).

62. *See* Remy v. MacDonald, 801 N.E.2d 260, 263-64 (Mass. 2004); *see also* Chenault v. Huie, 989 S.W.2d 474, 477-78 (Tex. App. 1999).

would impose the "esoteric costs" courts consider, as such a duty would implicate almost every action of a pregnant woman's daily life.[63]

In addition, the court will likely assess whether imposition of a duty threatens to tarnish an important relationship between the defendant and the tortfeasor. Thus, while some jurisdictions recognize a special relationship between psychiatrists and their patients,[64] others refuse to impose a duty on psychiatrists because of concerns over destroying the confidential environment needed for successful therapy.[65] Similarly, despite an obvious ability to control, courts have refused to find a special relationship between military commanders and their personnel.[66] The case law suggests that relationships that require privacy and confidentiality to flourish are not appropriate candidates for a duty to control.

C. Culpability

Even if the control and autonomy elements are satisfied, a court will be loathe to find a special relationship unless there are also indices of the defendant's personal blameworthiness. One rule of thumb is that unless the relationship involves physical custody over the perpetrator, courts are reluctant to impose a duty on noneconomic relationships.[67] In other words, the controlling actor in a business relationship is more likely to be deemed personally blameworthy than others. Thus, a defendant had no responsibility for the conduct of her historically violent on-again, off-again boyfriend when she invited another man to her house.[68] The court seemed to think that the longstanding noneconomic social contact between the defendant and the boyfriend did not fit under the category of "special relationships."[69] In contrast, businesses are routinely found liable for injuries to visitors from the conduct of third persons on their property.[70] The economic relationship between a business and a tortious customer qualifies as a "special relationship," at

63. *Jupin*, 849 N.E.2d at 838-40.

64. *E.g.*, Estates of Morgan v. Fairfield Fam. Counseling Ct., 673 N.E.2d 1311, 1319 (Ohio 1997); Bradley v. Ray, 904 S.W.2d 302, 311 (Mo. App. 1995).

65. *E.g.*, Boynton v. Burglass, 590 So.2d 446, 448 (Fla. App. 1991).

66. *E.g.*, Hallett v. U.S. Dept. of Navy, 850 F. Supp. 874, 879 (D. Nev. 1994).

67. Schwartz & Lorber, *supra* note 33, at 25-26; Melissa Cassedy, Note, *The Doctrine of Lender Liability*, 40 U. FLA. L. REV. 165, 175 (1988).

68. Fiala v. Rains, 519 N.W.2d 386, 389 (Iowa 1994).

69. *Id.*

70. Harper & Kime, *supra* note 44, at 903.

least when the injury occurs on the business's premises.[71] When the relationship between the defendant and the perpetrator is established to enrich the defendant, a special relationship is likely to be inferred. To some degree, this conforms to common expectations. We expect business owners to keep us safe from other customers but we do not usually expect one-half of a romantic duo to control the behavior of the other.[72]

A court is also more likely to find a special relationship if the defendant is responsible for creating and maintaining the entire environment where the misconduct took place. It stands to reason that someone who provides the arena for someone else to commit wrongful conduct is more blameworthy than the person who provided more limited assistance. Thus, while colleges and universities are usually deemed to not have a special relationship with their students, courts will impose a duty when the college owns and maintains the property where the tortious activities took place.[73] Similarly, innkeepers have a duty to control unruly guests, and common carriers have a duty to control the tortious behavior of their passengers.[74] Moreover, some courts have suggested that a defendant homeowner may be liable for a failure to control a third party inside their home, even when she is not present when the wrongful act takes place.[75] Thus, although not explicitly mentioned in the case law, it seems that courts are more likely to impose the duty to control when the defendant has created the entire environment where the misconduct occurs.

Finally, if the tortfeasor used an instrumentality of the defendant to commit the wrongful act *and* the instrumentality is particularly dangerous, then the court is more likely to view the defendant as deserving of blame. Thus, the Massachusetts Supreme Court found a special relationship between a mentally ill adult that shot a police officer

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71. *Id.*

72. *See* Bauswell v. Mauzey, 936 F. Supp. 787, 789 (D. Kan. 1996) (babysitter not responsible for sexual molestation of children by her husband); *see also* Cuppy v. Bunch, 214 N.W.2d 786, 788 (S.D. 1974) (one friend is not expected to control the inebriated conduct of another friend).

73. *See* Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991) (holding that university owed legal duty to control students who injured another during a hazing ritual); *cf.* Collete v. Tolleson Unified Sch. Dist., 54 P.3d 823, 832 (Ariz. App. 2002) (holding that school had no duty to control operation of its students' motor vehicles while off campus, even if the school had a closed campus policy).

74. *E.g.*, Corinaldi v. Columbia Courtyard, Inc., 873 A.2d 483, 490 (Md. Spec. App. 2005).

75. *See, e.g.*, Chavez v. Torres, 991 P.2d 1, 6-7 (N.M. App. 1999).

and the girlfriend of the adult's father.[76] Because the girlfriend allowed her boyfriend to house dangerous firearms in her home, the court found that she had a duty to prevent her boyfriend's son from removing any of the firearms. Key to the court's analysis, in a section of the opinion entitled "public policy," was the recognition that "[a] firearm is a dangerous instrumentality."[77] The dangerousness of the instrumentality, the court explained, justified imposition of a duty to control others that would not pertain in the case of more benign instruments.[78] Similarly, the Restatement cautions that "if the chattel is one which can be safely used only if extreme caution is employed," then violation of a duty to control may be found for anything less than the owner's "constant vigilance" of third party users.[79]

III. APPLICATION TO CONTRIBUTORY INFRINGEMENT

Contributory infringement law may be gravitating towards some of the same considerations as courts evaluating the duty of a defendant to control the tortious behavior of others.[80] Courts already study the amount of control the contributory defendant has over the direct infringer. They also indirectly evaluate some of the autonomy and culpability concerns referred to in Part II. Yet this evaluation is not conducted in the same systematic way as decisions made regarding the presence or absence of a "special relationship." In this Part, I examine recent contributory infringement disputes under the template of "special relationship" jurisprudence. The result is an approach to contributory infringement that is slightly different than the current paradigm and that would exempt most purveyors of online technologies.

A. Evidence of Control

If the tort doctrine described in Part II is applied in the context of online intermediaries, in most cases, a special relationship would not exist. Three elements comprise a special relationship within the meaning of the Restatement. First, there must be a relationship of control over the direct infringer. Second, imposition of the duty must not overly restrict the defendant's autonomy. Third, there must be

76. Jupin v. Kask, 849 N.E.2d 829, 832 (Mass. 2006).

77. *Id.* at 838.

78. *Id.*

79. RESTATEMENT (SECOND) OF TORTS § 318 cmt. c (1977).

80. *See* Jay Dratler, Jr., *Palsgraf, Principles of Tort Law, and the Persistent Need for Common-Law Judgment in IP Infringement Cases*, 3 AKRON INTELL. PROP. L.J. 21 (2009).

evidence demonstrating the defendant's personal culpability. With regard to the first element, a court would need to investigate the working terms of the relationship between providers of Internet technologies and their users to determine if the former has "taken charge" of the latter. At first blush, the relationship between intermediaries and actual infringers seems much less coercive than the relationship between parole officers and parolees or other entities granted formal legal control over others. Yet the contractual terms of agreements between certain online intermediaries and their customers can be extremely one sided. Under the terms of service required to participate in most virtual worlds or social networking sites, the website developer has the right to monitor for infringing content, and remove that infringing content without notice.[81] Similarly, sites relying on user-generated content like YouTube ensure that they retain a license in user-contributed materials, including the ability to reproduce, distribute, and prepare derivative works of submitted videos.[82] In assessing the presence of a special relationship, what is key is determining whether the terms of a legal agreement or court order provide the defendant with authority to control the specific type of misconduct at issue.[83] A court may conclude that agreements between Internet entities and their users match this standard. Very often, the terms of end-user license agreements specifically address the issue of infringement.[84]

Even if formal legal control over the infringer is not found, sufficient control may be found based on the intermediary's actual behavior. A technologist that engages in regular monitoring of its client's activities demonstrates more control than one that does not engage in such surveillance. Intermediaries accused of infringement often do monitor their users' conduct. In fact, one might argue that such monitoring by content organizers has come to be expected. On the other hand, it is unclear whether there is a real social expectation that most

81. *See* Second Life Terms of Service Agreement, http://secondlife.com/corporate/tos.php (last visited February 23, 2009).

82. YouTube Terms of Use, http://www.youtube.com/t/terms (last visited Jan 7, 2008).

83. Couch v. Wash. Dep't of Corr., 54 P.3d 197, 204 (Wash. App. Div. 2002) (holding that insufficient control existed for a special relationship between a parolee and a parole office supervising only the parolee's legal financial obligation).

84. *See* Britton Payne, Note, *Super-Grokster: Untangling Secondary Liability, Comic Book Heroes and the DMCA, and a Filtering Solution for Infringing Digital Creations*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939, 969-70 (2006) (describing EULA for City of Heroes); Michelle Delio, *Rude Awakening for File Sharers*, http://www.wired.com/news/print/0,1294,60386,00.html (describing EULA for Kazaa software) (last visited Jan 7, 2008).

Internet intermediaries will exercise their discretion to alter their user's conduct. For some, the appeal of the Internet is its lack of authority.[85]

A key issue in determining whether the control element has been satisfied will be whether the direct infringer uses an instrumentality to infringe that has been provided by the defendant. The Restatement of Torts recognizes a special relationship when the defendant's chattels or instruments are used for tortious conduct with the defendant's knowledge.[86] As discussed above, many of the operative terms of service for online games and social networking sites reveal that the network developer already is aware of the potential for infringement. This may suggest to a court that the website's capabilities for the copying and distribution of intellectual property are instrumentalities used to infringe with the website's knowledge.[87] Under these circumstances, a court might conclude that sufficient control exists between the site owner and the direct infringer.[88]

On the other hand, another part of any analysis would be the real capability of the defendant to prevent the infringing activity of the direct infringer. If appropriate remedial action is not possible, then there should be no liability for failure to control. Courts routinely reject imposition of a duty to control when there was no real opportunity for the defendant to control the tortfeasor's conduct.[89] According to the Restatement, in situations where an instrumentality of the defendant is used tortiously by another, a duty to control may only be found when the defendant is present while the instrumentality is used.[90] Courts reason that when a defendant is not physically present, it lacks the ability to review use of its instrumentality and stop the tortious behavior.[91]

Of course, most infringing intermediaries are not physically present when the direct infringement occurs. Therefore, a rigid interpretation of the presence requirement would preclude liability on the basis of

85. *See* Mark Bartholomew, *Advertising in the Garden of Eden*, 55 BUFF. L. REV. 737, 755 (2007) (discussing the anti-trademark protection ethos of virtual worlds).

86. RESTATEMENT (SECOND) OF TORTS § 318 (1977).

87. *See* Candidus Dougherty & Greg Lastowka, *Virtual Trademarks*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 749, 826 (2008).

88. Jason C. Breen, *YouTube or YouLose: Can YouTube Survive a Copyright Infringement Lawsuit?*, 16 TEX. INTELL. PROP. L.J. 151, 172 (2007).

89. *E.g.*, Hartford Ins. Co. v. Manor Inn, 642 A.2d 219, 226-27 (Md. 1994) (no special relationship between mental hospital and patient when plaintiff injures others after escaping from hospital grounds); *cf.* Meany v. Newell, 352 N.W.2d 779, 781(Minn. App. 1984) (even if accident took place off premises, because consumption of alcohol took place on employer's premises, employer had duty to control actions of employee).

90. RESTATEMENT (SECOND) OF TORTS § 318 (1977).

91. *See, e.g.*, Knight v. Rower, 742 A.2d 1237, 1243 (Vt. 1999).

providing an instrumentality used to infringe. The Restatement, however, suggests that courts may adopt a broader view of this requirement that does not demand the defendant's actual presence at the scene of the misconduct. In a caveat to the section of the Restatement involving the duties of land and chattel owners, the authors explain that they express "no opinion as to whether there may not be a duty of reasonable care to control the conduct of the third person . . . where the [defendant], although not present, is in the vicinity, is informed of the necessity and opportunity of exercising such control, and can easily do so."[92] Some courts have used this caveat to suggest that defendant property owners may be liable for a failure to control a third party on their property even when they are not present when the wrongful act takes place.[93] Thus, the defendant's failure to be physically present at the moment of the tortious conduct does not necessarily preclude a finding of a special relationship. It is an open question whether a business's monitoring and surveillance of the infringer's online activities renders the business in the "vicinity" of the infringing conduct, and therefore part of a special relationship.

B. Autonomy and Culpability Concerns

With regard to the second element, a court would need to scrutinize the impact of imposing a duty to control the direct infringer on the intermediary's autonomy interests. Common law courts have traditionally been wary of imposing a duty on relationships between the defendant and tortfeasor that involve a need for confidentiality and reciprocity. Such concerns seem unlikely when considering the situation of indirect and direct infringers, however. Most contributory infringement cases involve interactions between business entities and their clients, a far different type of interaction than the social and familial relationships that courts have been careful to preserve.

Another consideration would be the potential number of third parties that the defendant would be obligated to control upon recognition of a special relationship. A court would consider whether the defendant is socially and economically positioned to manage such risk, or is already sufficiently burdened with other responsibilities. In many cases, the analysis might boil down to an assessment of the defendant's ability to detect infringing conduct or to filter infringing content out of its

92. RESTATEMENT (SECOND) OF TORTS § 318 caveat (1977).

93. *See, e.g.*, Chavez v. Torres, 991 P.2d 1, 6-7 (N.M. App. 1999).

system. To some extent, courts already conduct such an analysis in contributory infringement cases.[94] What the special relationship jurisprudence contributes is that a special relationship should never be recognized between an intermediary and someone unknown to the intermediary, or someone who only enjoys a transitory relationship with the intermediary. Instead, the scope of the duty would need to be confined to parties familiar with the defendant. This consideration would impact different infringement intermediaries in different ways. For many intermediaries, the direct infringer would be a client of theirs. A typical business's duty to act upon knowledge of its clients' preventable wrongdoing seems unlikely to jeopardize the business's autonomy interests.[95] But for businesses that rely on user generated content, their relationship with the direct infringer is often fleeting at best. For example, YouTube allows its users to upload content to its site, copies the content into its own software, stores the content on its own servers, and then allows the content to be accessed by the general public, all with a minimum of interaction or identification of the user.[96] As part of this procedure, videos that are longer than ten minutes are screened out. In large part, this process is automatic, which results in over one billion videos viewed per day.[97] In such a situation, a responsibility to supervise the conduct of content posters may prove too taxing to the freedom that courts believe individual entities should possess.

In addition to considering the defendant's autonomy interests, a court would need to assess the metrics of personal blameworthiness. If the relationship between the tortfeasor and the defendant is economic, recognition of a special relationship is more likely. Common law courts have already determined that noneconomic relationships must place the perpetrator in the custodial control of the defendant before a duty to protect others can be triggered. However, such formalized control is not

94. *E.g.*, Tiffany, Inc. v. eBay, Inc., 576 F. Supp. 2d 463, 508 (S.D.N.Y. 2008); *see also* A & M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095-96, 1098-99 (9th Cir. 2002) (affirming shut-down order where Napster "failed to prevent infringement of all of plaintiffs' noticed copyrighted works" because "more could be done to maximize the effectiveness of the new filtering mechanism").

95. *See, e.g.*, Microsoft Corp. v. Rechanik, 249 F. Appx. 476, 479 (7th Cir. 2007) (holding software seller contributorily liable for "ostrich-like business practices" in purchasing counterfeit software from customers and then reselling it without checking the software for authenticity).

96. Branwen Buckley, *Suetube: Web 2.0 and Copyright Infringement*, 31 COLUM. J.L. & ARTS 235, 235-36 (2008).

97. Kevin J. Delaney, *Google Push to Sell Ads on YouTube Hits Snags*, WALL ST. J., July 9, 2008 at A1.

required for interactions deemed economic. But to be deemed economic, the defendant must directly profit off of the direct actor. Merely using the direct actor to defray costs or as a conduit to other parties that can provide necessary funds is insufficient.[98] Given this precedent, many Internet intermediaries would likely be absolved from a duty to control infringers. In many cases, the intermediary does not charge a fee for use of its online service, making its relationship with its users not only somewhat attenuated but also not strictly economic.[99] For example, entities may post infringing materials on YouTube for free. Thus, for YouTube and other websites featuring user-generated content, their relationship with the direct infringer would be deemed noneconomic and less likely to be subject to a duty to control.

In looking for evidence of personal blame, courts also consider whether the defendant was responsible for creating the total environment where the tortious conduct by another could take place. Thus, another part of the culpability calculation would be to determine whether the contributory defendant put in place all of the necessary conditions for another to infringe. In one sense, online intermediaries do provide the entire arena where infringement occurs. Copyright infringement occurs on YouTube because YouTube provides the means to upload protected works and then distribute them to millions of potential viewers. Virtual worlds like Second Life create virtual environs where someone else's trademark can be copied, and then used commercially in a confusing manner. On the other hand, one might argue that instead of providing the environmental tools where infringement may take place, these businesses actually only provide a service that real world users employ in their own physical space to infringe.[100] Remember that the special relationship jurisprudence holds that a duty to control will usually be imposed when an instrumentality of the defendant is used by another to commit a tort. Recognizing this rule, the Seventh Circuit has tried to draw a distinction between a defendant's instrumentalities and its online services, holding that control sufficient for a special relationship exists only over uses of the former.[101] If other courts agree with the Seventh

98. *See* Elizondo v. Ramirez, 753 N.E.2d 1123, 1130-31 (Ill. App. 2001) (holding that collection of small cover charge is insufficient to establish special relationship of business invitor and invitee).

99. *See* Michael D. Marin & Christopher V. Popov, *Doe v. MySpace, Inc.: Liability for Third Party Content on Social Networking Sites*, 25 COMM. LAW. 3, 5 (Spring 2007).

100. For two contrasting takes on the relevance of comparing cyberspace to real world conditions, see Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521 (2003) and Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, J. L. ECON & POLY. 147 (2005).

101. Doe v. GTE Corp., 347 F.3d 655, 661 (7th Cir. 2003).

Circuit, then online service providers like Linden Labs, the makers of Second Life, could not be viewed as providing the total environment for infringement.

Another part of the culpability calculation would be to scrutinize the "dangerousness" of the technology at issue. A benign or neutral technology only rarely used for an infringing purpose would not implicate a special relationship between the technologist and the direct infringer. Most search engines would not enjoy a special relationship with the direct infringer since search engines are used for mostly non-infringing purposes. Nevertheless, one can envision some circumstances where a technology becomes "notorious" as primarily a mechanism for infringement and would be deemed a dangerous instrumentality by the court.[102] Of course, to some degree, this begs the question as to how much infringing activity there must be for a finding of "dangerousness." A similar conundrum plagues current contributory infringement jurisprudence as the Supreme Court has yet to provide a definition of "substantial non-infringing use."[103] Such values are difficult to quantify. What the "dangerousness" metric provides is one factor among many that a court can consider to determine if a duty should be imposed.

CONCLUSION

In evaluating the legal responsibility of indirect actors for intellectual property infringement, courts, in effect, are deciding whether to impose a duty to control the conduct of others. In a variety of alternative contexts, common law courts have made a similar determination. The general rule is that there is no duty to prevent tortious behavior by another. When a "special relationship" exists between the defendant and the direct tortfeasor, however, a duty to adopt reasonable strategies to control foreseeable illegal conduct is triggered. Although a "special relationship" analysis of potential contributory infringers leaves many questions, it does offer a new way to evaluate contributory liability that relies on an impressive body of past case law, providing additional legal content where it has been sorely needed.

Courts need to be cautious in inferring such special relationships in the interactions between direct infringers and their intermediaries. Some businesses may truly guide the actions of direct infringers, leaving them little discretion in their misdeeds. Others, however, particularly in the

102. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 924 (2005).
103. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 442 (1984).

online context, provide standardized functionality that can be used as the potential infringer sees fit. Imposing a duty to control on such actors contradicts traditional notions of responsibility. In most cases, these entities should not be held contributorily liable for the infringement of others. Online intermediaries make tempting targets for infringement suits given their deep financial resources, but imposing a duty on every such intermediary, regardless of the nature of its involvement with the direct infringer, would threaten the survival of nascent technologies and their ability to promote beneficial social change. As one important twentieth century figure recognized: "No one would remember the Good Samaritan if he'd only had good intentions—he had money as well."[104]

104. Interview by Brian Walden with Margaret Thatcher, in London, England (Jan. 6, 1980).