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## Don't Drink, Don't Smoke, Don't Download: Parents' Liability for their Children's File Sharign

Janelle A. Weber

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Weber: Don't Drink, Don't Smoke, Don't Download: Parents' Liability for  
**DON'T DRINK, DON'T SMOKE, DON'T DOWNLOAD:**  
**PARENTS' LIABILITY FOR THEIR CHILDREN'S FILE SHARING**

*Janelle A. Weber\**

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I. INTRODUCTION

When Darlene Emanski subscribed to America Online (AOL), she thought she was providing her teenage daughter with a fun and convenient means of researching school projects, communicating with friends, and listening to music now and then.<sup>1</sup> The Central Florida small business owner never imagined that she also might be enabling her daughter to become a digital music pirate.<sup>2</sup> Last year, AOL notified Emanski that the Recording Industry Association of America (RIAA)<sup>3</sup> had issued a subpoena to learn her identity, taking the first step toward suing her for copyright infringement.<sup>4</sup> Emanski was shocked.<sup>5</sup> Although she knew that her then fifteen-year-old daughter had downloaded some music, Emanski said she had no idea that in a matter of weeks the teen had amassed a library of more than seven hundred songs on the computer hard drive.<sup>6</sup> And, even though Emanski kept up to date with current affairs, she said

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1. See telephone interview with Darlene Emanski (Nov. 14, 2004) (on file with author); see also *Woman Facing \$457K in Fines for Daughter’s Illegal Downloading*, WFTV.COM, Oct. 6, 2004, <http://www.wftv.com/news/3788911/detail.html>.

2. See telephone interview with Darlene Emanski, *supra* note 1.

3. The RIAA is a trade association that represents major recording companies, including BMG Entertainment, Sony Music, and Virgin Records. See Recording Industry Association of America, About Us, <http://www.riaa.com/about/default.asp> (last visited July 9, 2005); Recording Industry Association of America, About Us: Distributed Labels of Reporting Companies, <http://www.riaa.com/about/members/default.asp> (last visited Feb. 28, 2005).

4. See telephone interview with Darlene Emanski, *supra* note 1. Section 512(h) of the Digital Millenium Copyright Act (DMCA), which has been incorporated into the 1976 Copyright Act, grants copyright owners the right to request the clerk of any federal district court to issue a subpoena to an Internet Service Provider (ISP) to identify an alleged infringer. See 17 U.S.C. § 512(h) (2005). For a discussion of the subpoena authority, see Jennifer Norman, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 COLUM. J.L. & ARTS 371, 392-96 (2003).

5. See telephone interview with Darlene Emanski, *supra* note 1.

she did not realize that her daughter was violating copyright law or that she could be held legally accountable for her daughter's conduct.<sup>7</sup>

Since receiving the notification from AOL, Emanski has taken steps to reduce her chances of eventually being sued by the RIAA.<sup>8</sup> She has informed herself about the restrictions against the unauthorized sharing of copyrighted music and has forbidden her daughter from further engaging in the practice.<sup>9</sup> Although the teenager initially was amused by the hubbub caused by her downloading, she has come to appreciate the gravity of the situation.<sup>10</sup> She has obeyed her mother's new rule and has returned to buying compact discs (CDs) to quench her thirst for new music.<sup>11</sup>

The RIAA's lawsuits against individuals served as a wakeup call not only to Emanski, but also to parents throughout the United States.<sup>12</sup> Since September 2003, the RIAA has filed suit against at least 11,809 individuals for allegedly trading music online.<sup>13</sup> Many of these persons are

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See* Jefferson Graham, *Recording Industry Sues Parents; Who is Responsible for Kids' Downloads?*, USA TODAY, Sept. 15, 2003, at D4; *see also* Frank Ahrens, *RIAA's Lawsuits Meet Surprised Targets; Single Mother in Calif., 12-Year-Old Girl in N.Y. Among Defendants*, WASH. POST, Sept. 10, 2003, at E1; Steve Knopper, *261 Music Fans Sued*, ROLLING STONE, Oct. 16, 2003, at 25.

13. *See* Recording Industry Association of America, Press Room: News & Views, <http://www.riaa.com/news/> (last visited July 9, 2005) (collecting press releases issued after each new round of lawsuits were filed). Each round contained the following number of lawsuits (the date of the RIAA press release is in parenthesis): 754 (Aug. 31, 2005); 765 (July 28, 2005); 784 (June 29, 2005); 91 (May 26, 2005); 725 (Apr. 27, 2005); 405 (Apr. 12, 2005); 753 (Feb. 28, 2005); 717 (Jan. 24, 2005); 754 (Dec. 16, 2004); 750 (Oct. 28, 2004); 762 (Sept. 30, 2004); 744 (Aug. 25, 2004); 506 (July 20, 2004); 482 (June 22, 2004); 493 (May 24, 2004); 477 (Apr. 28, 2004); 532 (Mar. 23, 2004); 531 (Feb. 17, 2004); 532 (Jan. 21, 2004); 41 (Dec. 3, 2003); 261 (Sept. 8, 2003). *Id.* These lawsuits total 11,809.

The RIAA initiated its policy of suing individuals after the decision of the U.S. District Court for the Central District of California in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004), *vacated by* 125 S. Ct. 2764, *remanded to* 2005WL1940358 (9th Cir. 2005). In *Grokster*, movie and record industry plaintiffs sued peer-to-peer (P2P), file-sharing services, Grokster, Ltd. and Streamcast Networks, Inc., for copyright infringement under the theories of vicarious liability and contributory infringement. *Grokster*, 259 F. Supp. 2d at 1031-32. The district court held the defendants were not liable under either theory. *Id.* at 1042-43, 1045-46. The court reasoned that the defendants, unlike Napster, had a decentralized system that did not require their users to go through their Internet servers for the purpose of searching and connecting with other users. *Id.* at 1039-40.

In response to the district court's decision, Sen. Orrin Hatch (R-Utah) introduced the Inducing Infringement of Copyrights Act of 2004, commonly referred to as the Induce Act. *See* S. 2560, 108th Cong. (2004). The bill, which died in committee, sought to create a new standard of contributory liability with the same strictness as the contributory liability doctrines. *See id.*; Thomas,

the parents of pre-teen and teenage Internet users.<sup>14</sup> In the wake of this innovative anti-piracy campaign, scores of parents have found it necessary to expand the scope of their parent-child discussions.<sup>15</sup> In addition to talking about sex, smoking, and substance abuse, many parents now also discuss the perils of file sharing.<sup>16</sup> Consequently, parents have had to examine their own views about the recording industry, intellectual property rights, and the interplay between law and morality.<sup>17</sup>

It is important to note that the RIAA did not specifically target parents.<sup>18</sup> When the trade association filed its lawsuits, it did not have any

Bill Summary & Status for the 108th Congress, S. 2560 (2004), <http://thomas.loc.gov/cgi-bin/bdquery/D?c108:1:/temp/~clo8em8m7d:> (noting the status of the bill). The bill would have made clear that anyone who “intentionally induce[d]” copyright infringement would be liable as an infringer. See S. 2560, 108th Cong. (2004). It defined “intentionally induces” as “intentionally aids, abets, induces, or procures.” S. 2560 § (g)(1). Since the bill focused on the defendant’s intentions and conduct, rather than on the type of technology it used, it would have enabled courts to find P2P networks liable for copyright infringement. See *The Intentional Inducement of Copyright Infringements Act of 2004, Hearing on H.R. 2560 Before the S. Committee on the Judiciary*, 108th Cong. (2004) (statement of the Honorable Marybeth Peters).

The Supreme Court’s recent ruling in *Grokster* may accomplish what Sen. Hatch sought to achieve through the failed Induce Act, however. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005). The Court stated that a person who distributes a product with the intent of enabling others to infringe copyright and who through words or actions shows an intent to cause and profit from such infringement is liable for the infringement. See *id.* at 2782. The Court found that the defendants could therefore be held liable for their users’ infringement. See *id.* at 2782-83. The Court noted that there was ample evidence of the defendants’ unlawful purpose. See *id.* at 2781-82.

The RIAA is likely to continue to sue individuals even if P2P networks are now exposed to contributory infringement liability as a result of the Supreme Court’s decision in *Grokster*. Some P2P networks would likely continue to operate. Furthermore, the RIAA would likely regard its lawsuits against individuals as a deterrent against unauthorized file sharing.

14. See Graham, *supra* note 12, at D4. The RIAA said it did not know how many of the defendants in the first round of lawsuits were children and how many were parents. See *Associated Press, Suing Parents for Copyright Infringement Could Be Difficult*, USA TODAY, Sept. 12, 2003, available at [http://www.usatoday.com/tech/news/techpolicy/2003-09-12-parents-riaa-odds\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2003-09-12-parents-riaa-odds_x.htm).

15. See Amy Harmon, *New Parent-to-Child Chat: Do You Download Music?*, N.Y. TIMES, Sept. 10, 2003, at A1 (reporting that the RIAA’s lawsuits prompted parents to discuss file sharing with their children).

16. See Benny Evangelista, *Parents Start To Rein in Kids Downloading Music; Recording Industry Suits Put a Crimp in Another Teen Pastime*, S.F. CHRON., Sept. 22, 2003, at E1 (reporting that after learning of the RIAA’s lawsuits one mother wrote in an e-mail: “I resent the fact that now parents have to add another dimension to ‘The Big Talk’ (about sex, drugs, alcohol, AIDS, peer pressure) and include a caution about music downloading and how it may financially devastate the family.”).

17. See Jennifer Howland, *Cyber-ethics Throw Wrench in Mom’s World View*, CHRISTIAN SCIENCE MONITOR (Boston, MA), Nov. 17, 2003, at Opinion 9 (mother of two teenage daughters expressing her views on the record industry and the ethics of downloading music).

18. In fact, it appears from the RIAA’s sample complaint for copyright infringement that the Association has alleged that the defendants had violated the 4

personal information on the individual defendants.<sup>19</sup> It merely had the name or Internet Protocol (IP) address of the persons who had subscribed to the Internet Service Providers (ISPs).<sup>20</sup> The fact that many parents have been snagged in the litigation has not caused the RIAA to retreat from its policy of suing individuals, though. The organization has stated that in today's world, parents need to be aware of their children's online activities.<sup>21</sup>

Since the RIAA has been willing to settle most lawsuits for several thousand dollars or less,<sup>22</sup> most parents have concluded that it is in their

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copyright owners' exclusive right to distribute and copy the copyrighted works. *See* Recording Industry Association of America, Sample Complaint for Copyright Infringement, <http://www.riaa.com/news/newsletter/pdf/sampleComplaint.pdf> (last visited May 18, 2005) [hereinafter RIAA, Sample Complaint]. The sample complaint did not include an alternative count of contributory infringement or vicarious liability. *See id.* If the RIAA proceeded in its lawsuit against a parent who had not engaged in unauthorized file sharing, it would probably have to amend its complaint to allege contributory infringement or vicarious liability. Federal Rule of Civil Procedure 15(a) would allow the RIAA to amend its complaint "by leave of court or by written consent of the adverse party." *See* FED. R. CIV. P. 15(a). The rule provides that "leave shall be freely given when justice so requires." *Id.*

19. *See* Recording Industry Association of America, Frequently Asked Questions About the Recording Industry's Use of "John Doe Lawsuits," [http://www.riaa.com/news/newsletter/012104\\_faq.asp](http://www.riaa.com/news/newsletter/012104_faq.asp) (last visited May 18, 2005) [hereinafter RIAA, "John Doe" Lawsuits].

20. *See id.* In September 2003, the RIAA first issued subpoenas to the ISPs to learn the identities of the alleged infringers, and then filed lawsuits against those individuals. *See id.* Most ISPs cooperated with the subpoenas but a couple, including Verizon Internet Services, challenged the subpoenas on statutory and constitutional grounds. *See* Recording Indus. Ass'n of Am., Inc. v. Verizon, 351 F.3d 1229 (D.C. Cir. 2003). In December 2003, the U.S. Court of Appeals for the D.C. Circuit held that under the Digital Millennium Copyright Act, a plaintiff could only issue a subpoena to an ISP storing infringing materials on its servers and not to an ISP that merely allowed files to be transferred between two Internet users. *Id.* at 1236-37. The RIAA changed its litigation procedure following that ruling. *See* RIAA, "John Doe" Lawsuits, *supra* note 19. The association now files "John Doe" lawsuits, using the alleged infringers' IP addresses as placeholders for the individuals' names, and then issues the subpoenas to the ISPs. *See id.* The effect of the D.C. Circuit's decision has therefore been to make the process slightly more complicated. *See* Alice Kao, Note, RIAA v. Verizon: *Applying the Subpoena Provision of the DMCA*, 19 BERKELEY TECH. L.J. 405, 426 (2004); *see also* Samantha Chang, *Verizon Ruling Misses Forest for Trees, Industry Says*, BILLBOARD, Jan. 10, 2004 (discussing the reaction to the *Verizon* decision).

21. RIAA Chairman Mitch Bainwol, in commenting on the RIAA lawsuit filed against a 12-year-old New York girl, said, "We're trying to send a strong message that you are not anonymous when you participate in peer-to-peer file sharing and that the illegal distribution of copyrighted music has consequences. And as this case illustrates, parents need to be aware of what their children are doing on their computers." Ahrens, *supra* note 12, at E1.

22. *See* John Accola, *Settling for (More Than) a Song; Some Downloaders Pay Up. To the Tune of \$1,000-\$4,000*, ROCKY MOUNTAIN NEWS (Denver, Co.), Oct. 23, 2003, at 1B. For a sample pre-litigation settlement agreement, *see* <http://www.riaa.com/news/newsletter/pdf/sampleAgreement.pdf> (last visited Mar. 25, 2005). During the first rounds of lawsuits, the RIAA sent a pre-lawsuit notification letter and offered persons a chance to settle before filing a lawsuit. *See* RIAA, "John Doe" Lawsuits, *supra* note 19. The association did this before amending the complaint with

best interest to stay out of court.<sup>23</sup> A parent who chooses to contest the action would be forced to spend thousands of dollars defending himself.<sup>24</sup> And if ultimately found liable, the parent could be forced to pay statutory damages ranging from \$750 to \$150,000 for each song his child illegally reproduced.<sup>25</sup>

Given parents' overwhelming incentive to settle, it is not surprising that as of the time this Note was written, there were no published legal decisions involving parents who have been sued as a result of their children's file sharing.<sup>26</sup> Apparently, no court has yet had the opportunity to consider whether and under what circumstances a parent could be held liable for the infringing conduct. The purpose of this Note is to examine this novel, unexplored question, thereby enabling courts, legislators, attorneys, families, and the record industry to better understand the legal and policy issues involved and to make informed decisions when confronted with this matter.<sup>27</sup>

the infringer's name and address. *See id.*

23. *See Accola, supra* note 22, at 1B. The statement of Erik Fischer, a Fort Collins, Co. attorney representing a defendant father, exemplifies this sentiment. *See id.* "You couldn't do two depositions and order copies for what we are going to settle for," Fischer said. *Id.* "We've talked about viable defenses, but it's hard to do anything but settle when the (record companies) are willing to settle for a lot less than it would cost to defend a client." *Id.*

24. *See id.*

25. *See* 17 U.S.C. § 504(c) (2005). A plaintiff may seek either actual or statutory damages. *See id.* Since individuals do not typically make a profit from the infringement, the RIAA has sought statutory damages. *See* RIAA, Sample Complaint, *supra* note 18. Statutory damages range from \$750 to \$30,000 per work, with a possible increase to \$150,000 for each infringed work in cases of willful infringement. *See* 17 U.S.C. § 504(c) (2005). The RIAA has said that it would leave it up to the court what damages to award. *See* RIAA, "John Doe" Lawsuits, *supra* note 19.

26. On March 27, 2005, the author conducted the following broad search on Westlaw in the "All Federal Cases" database with a date restriction of the most recent ten years: "parent & 'file sharing' & infringement." The search failed to yield any results for a copyright infringement case against a parent.

27. While there is a dearth of scholarly legal analysis on parents' potential liability for the unauthorized file sharing of their children, attorneys, professors, and other interested parties have briefly commented on the subject in news articles. *See, e.g.,* Graham, *supra* note 12, at D4 (reporting one law professor's view that proving the knowledge element of contributory infringement would be difficult); Robert Jacques, *Parents Liable for Kids' P2P Downloads*, VNUNET.COM, (Aug. 8, 2003), <http://www.vnunet.com/news/1142890> (reporting that some attorneys believe that parents could be held responsible if they know or should know that their child is sharing MP3 files and if they permit the conduct). Scholarly legal analysis has generally focused on the liability of corporations for file sharing of their employees, ISPs for the conduct of their subscribers, and bulletin boards and file-sharing services for the conduct of their users. *See generally* Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901 (2002) (discussing ISP liability); Mary M. Luria & Gary A. Kibel, *Corporate Liability for Online File Sharing*, 11 METROPOLITAN CORP. COUNS. 4 (2003) (discussing vicarious liability of employers); Benjamin A. Glatstein, Comment, *Tertiary Copyright Liability*, 71 U. CHI. L. REV. 1605 (2004) (analyzing liability of parent who issues indirect infringers); Andrea Sloan Pink, Comment, 6

Throughout this Note, the term “child” will refer to a minor child, and the term “parent” will refer to a parent or legal guardian. Part II suggests that a parent typically would not be held liable under the copyright doctrine of vicarious liability. It surmises that a parent could be held responsible under the related doctrine of contributory infringement, but it notes significant differences between parents and the defendants that have been found culpable in prevailing cases. In an attempt to resolve the uncertainty surrounding this issue, this author looks to a related area of law, torts, for guidance. Part III asserts that imposing parental liability in the copyright context would be consistent with common law precedent. Part IV shifts to a public policy discussion, pointing out the reasons it would be just to hold parents accountable for their children’s file sharing. Part V contends that contributory infringement could serve as a just theory of parental liability if applied in a manner that comports with key principles of common law and statutory tort law. This Note concludes with a broad recommendation that parents actively monitor their children’s Internet use, and thereby fulfill one of their important, new responsibilities in the digital age.

## II. PARENTS’ LIABILITY FOR THEIR CHILDREN’S FILE SHARING

A parent is not liable for his child’s copyright infringement solely because of the parent-child relationship.<sup>28</sup> A child is a separate legal individual liable for his own copyright infringement in the same manner and to the same extent as an adult.<sup>29</sup> This rule became widely apparent in September 2003 after the RIAA sued a 12-year-old New York girl for

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*Copyright Infringement Post Isoquantic Shift: Should Bulletin Board Services Be Liable?*, 43 UCLA L. REV. 587, 621 (1995) (commenting on indirect infringement). For an interesting discussion of derivative liability from an economic perspective, see Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J. L. & TECH. 395 (2003).

28. This was also the case under common law tort principles. PROSSER & KEETON ON THE LAW OF TORTS § 123 (W. Page Keeton et al. eds., 5th ed. 1984); *see also* 59 AM. JUR. 2D *Parent and Child* § 96 (2005); 45 AM. JUR. 2D *Proof of Facts* 549, at § 1 (2005). This legal division between parent and child was based on the notion that individuals of all ages should take responsibility for their willful, wrongful actions, and that liability should not be imposed without fault. *See* Ferdinand Fairfax Stone, *Liability for Damage Caused by Minors: A Comparative Study*, 5 ALA. L. REV. 1, 6, 31 (1952) (noting that the common law viewed the family as a “group of responsible individuals, child and adult alike”).

29. *See* FED. R. CIV. P. 17(b) (stating that the capacity of an individual to be sued shall be determined by the law of the individual’s domicile). The general rule among the states is that an infant is liable for his own torts, as long as the tort does not arise out of or is not related to a contract. *See* 42 AM. JUR. 2D *Infants* § 127 (2005); *see also* FED. R. CIV. P. 17(c) (providing that an infant’s representative may defend on behalf of the infant).



downloading the music of Mariah Carey and Christina Aguilera, among other artists.<sup>30</sup>

Notwithstanding a child's capacity to be sued, a parent theoretically could be held responsible for his child's file sharing under the principle of derivative liability.<sup>31</sup> Copyright law has long acknowledged that one person can be held liable for the infringement of another under certain circumstances.<sup>32</sup> At the time the 1976 Copyright Act was adopted, the Act did not expressly recognize derivative liability.<sup>33</sup> Section 106 of the Act<sup>34</sup> provides support for the concept, though. That section states that a copyright owner has the exclusive right "to authorize" others to exploit any of the six rights enumerated in the section,<sup>35</sup> such as the right to

30. See Lorena Mongelli, *Music Pirate: N.Y. Girl, 12, Sued for Web Songs Theft*, N.Y. POST, Sept. 9, 2003, at Sport & Late City Final 1; Soni Sangha & Phyllis Furman, *12-Year-Old Honor Student Among Those Hit With Music-Sharing Suit*, DAILY NEWS (N.Y.), Sept. 9, 2003, at Domestic News. The RIAA quickly settled the lawsuit for \$2,000. See Kyle Stock, *Charleston, S.C., Parents Opt Out of File-Servers to Dodge Download Liability*, POST AND COURIER, Sept. 23, 2003.

31. For a thorough discussion of the concept of derivative liability, see PAUL GOLDSTEIN, 4 COPYRIGHT § 6:1-6:23 (2d ed. 2002).

32. See SHELDON W. HALPERN, COPYRIGHT LAW: PROTECTION OF ORIGINAL EXPRESSION 551 (2002).

33. See MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 12.04[A] (2004). Later, the Semiconductor Chip Protection Act of 1984 added a provision concerning derivative liability to the act. See 17 U.S.C. § 905(3) (2005). That provision was "limited to the *sui generis* protection added in 1984 for semiconductor mask works, and is inapplicable to copyrightable works in general." NIMMER & NIMMER, *supra*, § 12.04[A]. The DMCA also added two significant provisions concerning derivative liability. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.). The first immunizes from indirect liability several types of entities, including ISPs, telecommunications companies, and Internet search engines, if they meet certain requirements. See 17 U.S.C. § 512 (2005). The second provides that a person may be held criminally liable for manufacturing, importing, or providing to consumers a device designed "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid . . . a technological measure" used to protect copyrighted work. 17 U.S.C. § 1201 (2005).

The Patent Act explicitly recognizes derivative liability. It provides that a person infringes a patent if he "actively induces infringement of a patent" or meets the definition of a contributory infringer. See 35 U.S.C. § 271(b)-(c) (2005); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434-35, 440, 442 (1984) (noting the differences between the Patent Act and Copyright Act).

34. See 17 U.S.C. § 106 (2005).

35. Section 106 provides that a copyright owner has "the exclusive rights to do and to authorize any of the following":

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the

reproduce a copyrighted work.<sup>36</sup> Accordingly, one who, without the permission of the copyright owner, authorizes another to reproduce a copyrighted work infringes the owner's reproduction right.<sup>37</sup> The legislative history to the 1976 Act further demonstrates that Congress intended derivative liability to be incorporated into section 106.<sup>38</sup> The House Report on the 1976 Act states that "[u]se of the phrase 'to authorize' is intended to avoid any question as to the liability of contributory infringers."<sup>39</sup>

In addition, an extensive line of cases under both the 1909 and 1976 Acts recognizes derivative liability.<sup>40</sup> Arguably the most significant case is *Sony Corp. of America v. Universal City Studios*.<sup>41</sup> In that case, Justice Stevens stated, "[V]icarious liability is imposed in virtually all areas of 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."<sup>42</sup>

As demonstrated in *Sony* and other cases, the doctrines of derivative liability have the potential to play an important role in copyright enforcement. They enable plaintiffs to save costs by suing one or a few indirect infringers instead of hundreds or thousands of direct infringers.<sup>43</sup>

copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

*Id.*

36. *See id.*

37. *See id.*

38. *See* H.R. REP. NO. 94-1476, at 159-60 (1976), reproduced in GOLDSTEIN, *supra* note 31, at A:149.

39. GOLDSTEIN, *supra* note 31, at 6:1; *see* H.R. Rep. No. 94-1476, at 160, reproduced in GOLDSTEIN, *supra* note 31, at A:149 (providing the following 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 to others for purposes of unauthorized public performance" and further noting that "[a] well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers); *see also* Peter Starr Prod. Co. v. Twin Continental Films, Inc., 783 F.2d 1440, 1443 (9th Cir. 1986), overruled on other grounds by *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088 (9th Cir. 1994) (stating that phrase "to authorize" was "intended to remove the confusion surrounding contributory and vicarious infringement").

40. NIMMER & NIMMER, *supra* note 33, § 12.04[A].

41. 464 U.S. 417 (1984).

42. *Id.* at 435.

43. *See* Lichtman & Landes, *supra* note 27, at 398.

They enable plaintiffs to obtain judgments in cases in which indirect infringers possess greater financial resources than direct infringers.<sup>44</sup> Furthermore, they allow plaintiffs to obtain relief for the violation of their rights even though the direct infringers are unknown or difficult to locate.<sup>45</sup>

Notwithstanding the common functions that the doctrines of derivative liability serve, they are actually quite distinct.<sup>46</sup> Vicarious liability and contributory infringement share only one factor in common. Both theories require the plaintiff to prove that one or more persons engaged in direct infringement.<sup>47</sup>

### A. Vicarious Liability

Vicarious liability has its origins in the tort law doctrine of respondeat superior.<sup>48</sup> It is not limited to that context, however.<sup>49</sup> A defendant may be held vicariously liable for another person's direct infringement if the defendant had the right and ability to supervise that person and a financial interest in that person's infringement.<sup>50</sup>

#### 1. Right and Ability to Supervise

Courts generally agree that a defendant possessed the right and ability to supervise if the defendant had previously supervised the direct infringer or had a contractual right to do so. For example, in *Fonovisa, Inc. v.*

44. See *id.* at 398-99; see also Michael B. Rutner, Note, *The ASCAP Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. REV. 1061, 1070 (1998) (noting that most persons who engage in online infringement "do not have enough assets to make legal action worthwhile").

45. For example, in *Sony Corp. of America*, the plaintiff did not know the identities of the multitude of consumers who used VTRs to violate copyright law. See *Sony Corp. of Am.*, 464 U.S. at 422-23 (1984). This is also often the case in Internet copyright infringement. See Hamdani, *supra* note 27, at 910 (noting that the "relative anonymity of Internet users makes detection of those who violate copyright laws very costly").

46. In *Sony Corp. of America*, the Court asserted that the doctrines are easily confused. *Sony Corp. of Am.*, 464 U.S. at 435, n.17. That seminal case and subsequent cases have helped to elucidate the distinctions, though.

47. See NIMMER & NIMMER, *supra* note 33, § 12.04[A][3][a].

48. See HALPERN, *supra* note 32, at 551; see also Lauren Krohn, *Causes of Action Against Employer to Recover Under Doctrine of Respondeat Superior for Intentional Torts Committed by Employee*, 17 CAUSES OF ACTION 647 § 2 (2004) (discussing the 18th century origins of the doctrine of respondeat superior).

49. See HALPERN, *supra* note 32, at 551.

50. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). In contrast to the theory of contributory infringement, the plaintiff does not have to prove that the defendant knew, or had a reason to know, of the person's infringing conduct. See *infra* Part II.C. The lack of scienter may affect the remedies available, though. See NIMMER & NIMMER, *supra* note 33, § 12.04[C][3].

*Cherry Auction, Inc.*,<sup>51</sup> the U.S. Court of Appeals for the Ninth Circuit found that the plaintiff had sufficiently alleged that a swap meet operator had the right and ability to supervise the independent vendors to whom the operator had rented booths.<sup>52</sup> The court pointed out, that under the swap meet contract, the operator had the right to ask the vendors to leave “for any reason whatsoever.”<sup>53</sup> The court further noted that the operator “controlled and patrolled” the vendors’ booths,<sup>54</sup> promoted the swap meet, and regulated customer access to the facility.<sup>55</sup> The court therefore asserted that the operator’s right and ability to supervise was both contractually permissible and physically feasible.<sup>56</sup>

Courts have also found a right and ability to supervise in cases in which it was far less practicable for the defendant to control the direct infringer. In *A&M Records, Inc. v. Napster, Inc.*,<sup>57</sup> the U.S. District Court for the Northern District of California found that the file-sharing service, Napster, had the right and ability to supervise its users.<sup>58</sup> Napster argued that it was difficult, if not impossible, to determine what constituted legal or illegal conduct on its service.<sup>59</sup> The court pointed out, however, that Napster had admitted to attempting to block infringing users.<sup>60</sup> The court therefore held Napster to the same standard as the swap meet operator even though it was arguably far more difficult for Napster to police the direct infringers.<sup>61</sup>

## 2. Financial Interest

Legal authorities have at times disagreed on the type of financial interest required to satisfy the second element of vicarious liability. Prior to the enactment of the 1976 Act, Congress stated that a defendant must “expect commercial gain . . . and either direct or indirect benefit” from the infringing activity.<sup>62</sup> However, in early cases, courts suggested that a defendant must have “an obvious and direct financial interest” in the

51. 76 F.3d 259 (9th Cir. 1996).

52. *Id.* at 262-63, 264 (holding that the complaint stated a valid cause of action for vicarious liability).

53. *Id.* at 262.

54. *Id.*

55. *Id.*

56. *See id.*

57. 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part on other grounds*, 239 F.3d 1004 (9th Cir. 2001).

58. *Id.* at 920-21.

59. *Id.* at 920.

60. *See id.*

61. *See id.* at 921.

62. *See* H.R. REP. NO. 94-1476, at 160 (1976), *reproduced in* GOLDSTEIN, *supra* note 31, at

infringement.<sup>63</sup> In one such case, *Shapiro, Bernstein & Co. v. H.L. Green Co.*, the U.S. Court of Appeals for the Second Circuit found that the defendant storeowner had a “direct financial interest” in its record concessionaire’s sale of bootleg records since the store received ten to twelve percent of the sale of each recording.<sup>64</sup>

Over the years, courts have gradually relaxed the financial interest requirement. In *Fonovisa*, the Ninth Circuit found that the plaintiff had sufficiently alleged that the swap meet operator received a “direct financial benefit.”<sup>65</sup> Yet, unlike the storeowner in *Shapiro, Bernstein & Co.*, the swap meet operator did not receive a percentage of the vendors’ sales of the counterfeit recordings; it merely earned a modest daily fee from the rental of the booths.<sup>66</sup> The court stressed that the operator received “substantial financial benefits” from the customers’ admission fees, concession sales, and parking fees.<sup>67</sup> These profits were generalized, and not directly traceable to the infringement.<sup>68</sup> Nonetheless, the court emphasized that all of these profits flowed from the draw of the counterfeit recordings.<sup>69</sup>

The financial interest element has been further loosened to net defendants that are not presently profiting from the infringement, but that hold out hopes of monetary gain. In *Napster*, the district court found that Napster possessed a financial interest in its users’ infringement even though the service was generating no revenue when the infringement occurred.<sup>70</sup> The court noted that Napster hoped to one day earn a profit as a result of an increase in its user base.<sup>71</sup> The court pointed out that Napster attracted users by offering free, infringing music.<sup>72</sup> Despite the *Napster* and *Fonovisa* courts’ modest relaxation of the financial interest requirement, the element remains a key factor in any vicarious liability analysis.<sup>73</sup>

63. See, e.g., *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). Courts in some more recent cases have characterized the financial interest requirement in this manner. See *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); *Playboy Enters., Inc. v. Starware Publ’g Corp.*, 900 F. Supp. 438, 441 n.4 (S.D. Fla. 1995).

64. *Shapiro, Bernstein & Co.*, 316 F.2d at 308.

65. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996).

66. *Id.*

67. *Id.*

68. See *id.*

69. See *id.* at 263-64.

70. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 921 (N.D. Cal. 2000), *aff’d in part, rev’d in part on other grounds*, 239 F.3d 1004 (9th Cir. 2001).

71. *Id.*

72. *Id.*

73. See *NAPSTER & NAPSTER, supra note 33*, § 12.04[A][1].

## B. *Proving that a Parent is Vicariously Liable*

Under the aforementioned standard of vicarious liability,<sup>74</sup> a parent could be held responsible for his child's file sharing if the plaintiff were able to show that the parent possessed the right and ability to supervise the child and a financial interest in the child's infringement.<sup>75</sup> A plaintiff would likely be able to demonstrate the former element,<sup>76</sup> but not the latter.<sup>77</sup> Thus, a parent would generally not be held vicariously liable for his child's file sharing.<sup>78</sup>

### 1. Proving Right and Ability to Supervise

A plaintiff would have no difficulty establishing that a parent had the right to supervise his child. Just as the swap meet operator in *Fonovisa* had the right to make determinations about its vendors' products,<sup>79</sup> a custodial parent has the right to make decisions regarding his child's education, recreation, and discipline.<sup>80</sup> A parent may forbid his child from engaging in certain activities, such as bullying or stealing. In the same way, a parent may prohibit his child from sharing music files and may punish him for disobeying. To prove the right of supervision, a plaintiff would merely have to establish the existence of the parent-child or guardian-child relationship and demonstrate that the parent had previously supervised the child. A plaintiff would not have to introduce a contract, as in *Fonovisa*,<sup>81</sup> since the parent-child relationship is founded on genetic ties or state adoption proceedings, not on contract law.<sup>82</sup>

A plaintiff would also be able to show that a parent had the ability to supervise his child. File sharing often occurs in the parent's home, an area over which the parent has dominion and control.<sup>83</sup> There are numerous

74. See *supra* Part II.A.

75. See *supra* Part II.A.

76. See *infra* Part II.B.1.

77. See *infra* Part II.B.2.

78. See *infra* Part II.B.3.

79. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996).

80. In *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the U.S. Supreme Court struck down a state statute requiring children to attend public schools. 268 U.S. 510, 534-35 (1925). The Court acknowledged the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.*

81. See *Fonovisa*, 76 F.3d at 262.

82. SAMUEL GREEN & JOHN V. LONG, *MARRIAGE & FAMILY LAW AGREEMENTS* § 5.40 (1984) (noting that adoption is governed by state statutes); LAURENCE D. HOULGATE, *FAMILY & STATE* 108 (1988) (noting that "[c]hildren born during the course of a marriage are legally presumed to be the legitimate offspring of the couple").

83. The concept that a "man's home is his castle" is well rooted in the common law. See *Minnesota v. Carter*, 525 U.S. 83, 99-100 (1998) (Kennedy, J., concurring) (discussing the historical origins of this axiom in the context of the Fourth Amendment).

steps a parent could take to control and supervise his child's Internet use in the home. The parent could begin by having a discussion with his child, in which the parent would explain the legal issues relating to file sharing and forbid the child from engaging in the activity.<sup>84</sup> The parent could then install an Internet filter to block file-sharing networks,<sup>85</sup> physically supervise the child while online,<sup>86</sup> install monitoring software to track the child's Internet use,<sup>87</sup> or periodically review the computer's folders for suspicious files.<sup>88</sup> If none of these actions proved successful, the parent could temporarily revoke or limit the child's Internet or computer privileges.

A clever child who was intent on trading files could certainly circumvent these measures. A child could swap files while the parent was occupied or at work, hide the files in an alternate hard drive, or even override the filtering software.<sup>89</sup> A court would be unlikely to absolve a parent of liability for any of these reasons, however. Any difficulties a parent might experience in monitoring a child's Internet use would pale in comparison to Napster's problems in policing the activities of hundreds of thousands of anonymous users on its service.<sup>90</sup> Furthermore, any

84. See Patrick E. Corbett, *Anatomy of a Computer Crime: Awareness of the Problem May Provide a Remedy*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 24-25 (2004) (encouraging parents to discuss Internet copyright issues with their children); Harmon, *supra* note 15, at A1 (reporting that the RIAA's lawsuits have prompted parents to ask their children whether they share MP3 files); Howland, *supra* note 17, at Opinion 9 (reporting a discussion in the author's household, in which the author's husband asked the couple's daughters if they had ever downloaded music and then forbade the activity). WiredSafety, an Internet safety group, has developed a helpful guide for parents on how to talk to their children about file sharing. See Parry Aftab, *Talking to Your Children About Downloading Music—A Parent's Guide*, [http://www.wiredsafety.org/resources/pdf/musicdownloads\\_parryguide.pdf](http://www.wiredsafety.org/resources/pdf/musicdownloads_parryguide.pdf) (last visited May 17, 2005).

85. See Marcy Zitz, *Selecting Filtering Software for Your Family*, <http://familyinternet.about.com/cs/filteringsoftware/a/aafiltering-p.htm> (last visited May 6, 2005) [hereinafter Zitz, *Filtering Software*]. For more information on Internet filters, see Janelle A. Weber, Comment, *The Spending Clause: Funding a Filth-Free Internet or Filtering Out the First Amendment?*, 56 FLA. L. REV. 471, 478 n.70 (2004).

86. See Corbett, *supra* note 84, at 25 (stating that parents and guardians need to be "actively involved" in monitoring their children's activities on the Internet).

87. See Marcy Zitz, *Top 4 Monitoring Programs*, <http://familyinternet.about.com/cs/toppicks/tp/monitoringsoft-p.htm> (last visited May 6, 2005). Monitoring programs include eBlaster, Child Safe, Parent Tools for AIM and Spector. See *id.*

88. Some parents have contacted local computer stores for assistance in removing file-sharing software from their hard drives. See generally Stock, *supra* note 30.

89. See Nik Bonopartis, *Tech Advances Raise Internet Risks*, POUGHKEEPSIE JOURNAL, Feb. 6, 2004, at 1A (noting that children may learn how to bypass a filter from their friends); Zitz, *Filtering Software*, *supra* note 85 (noting that a determined child may override the filtering software or use a friend's computer that does not contain the software).

90. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 920 (N.D. Cal. 2000) *aff'd* 238 F.3d 1004 (9th Cir. 2001).

admission by the parent that he had monitored the child's other activities, such as television viewing or homework, would support the contention that supervision was feasible.<sup>91</sup>

## 2. Proving Financial Interest

Demonstrating that a parent possessed a financial interest in his child's file sharing would prove substantially more difficult than establishing the right and ability to supervise. A plaintiff could argue that a child's file sharing enabled a parent to save money on the child's entertainment expenses. Consider the following example. Joel pays for his 13-year-old daughter Megan's music until she receives a new computer for her birthday and begins downloading music online. In one month, Megan downloads one thousand songs for free in violation of copyright law. If Joel had purchased those songs from a record-industry approved service for \$1 each, he would have paid \$1,000. Alternatively, if Joel had purchased those songs on \$15 full-length CD's, and each CD contained two of the songs on Megan's list, he would have paid \$7,500. Since Joel would rather use this money for other purposes, one might argue that he has a financial interest in his daughter's infringement.

This argument is simplistic and legally flawed. Although the music files had some financial value, Joel did not profit from Megan's acquisition of the music. Megan listened to the music on her own and did not share the files with her father. Moreover, although Joel might have saved some money as a result of his daughter's file sharing, he did not earn or hope to earn a profit from her infringement.<sup>92</sup> Megan downloaded the files for her own personal entertainment. She did not use them to produce and market pirated CDs and then share the proceeds with her father. As an aside, it is worth noting that Joel might not have saved that much money from his daughter's file sharing. If Megan had not been able to download the music, she would not have bought one thousand files or five hundred CDs because Joel probably would have never permitted it. File-sharing networks enable children to access music they would not have been able to own otherwise. It is therefore highly unlikely that a plaintiff would be able to prove the financial interest requirement.

## 3. Summary

Unless courts take the unlikely step of dramatically broadening the scope of the financial interest element, a plaintiff generally would not be

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91. *See id.* at 920-21.

92. *See* *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263-64 (9th Cir. 1996); *Napster*, 114 F.3d 989 (9th Cir. 2003).  
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able to hold a parent vicariously liable for his child's file sharing. A parent could possibly be held accountable for this infringement under the other theory of derivative liability, though. The doctrine of contributory infringement remains at the plaintiff's disposal.

### C. Contributory Infringement

Contributory infringement derives from the tort law concept of enterprise liability.<sup>93</sup> A defendant may be held liable as a contributory infringer if the defendant had knowledge of another person's direct infringement and materially contributed to that person's infringing conduct.<sup>94</sup> Each element presents unique challenges to a plaintiff.

#### 1. Knowledge

A plaintiff may satisfy the first requirement of contributory infringement by proving that the defendant knew or had a reason to know of the direct infringer's conduct.<sup>95</sup> These two degrees of knowledge are known as active and constructive knowledge, respectively.<sup>96</sup> Although demonstrating constructive knowledge may prove easier in some cases, a plaintiff may prefer to show actual knowledge since it suggests greater culpability and may lead a court to award enhanced statutory damages.<sup>97</sup> In either case, a plaintiff will probably be required to show more than mere "awareness of infringement"; a plaintiff will likely have to demonstrate "some meaningful capacity to prevent or discourage infringement."<sup>98</sup>

A plaintiff may show actual knowledge in a variety of ways. In *Fonovisa*, the Ninth Circuit found that the swap meet operator could have possessed actual knowledge that its vendors were selling counterfeit recordings on the premises.<sup>99</sup> The court stated that the operator must have known about the vendors' infringing activity, since prior to the plaintiff's lawsuit, law enforcement authorities had seized thousands of counterfeit recordings from the facility.<sup>100</sup> Then, after the operator failed to rectify the

93. NIMMER & NIMMER, *supra* note 33, § 12.04[A][2].

94. In *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, the Second Circuit articulated the prevailing test of contributory infringement. See 443 F.2d 1159, 1162 (2d Cir. 1971). The court stated that "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." *Id.*

95. See *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 404 (S.D.N.Y. 1966).

96. See *Screen Gems-Columbia Music, Inc.*, 256 F. Supp. at 404.

97. See *supra* note 25 (discussing statutory damages).

98. See *Lichtman & Landes*, *supra* note 27, at 396-97 (internal quotation marks omitted).

99. See 76 F.3d 259, 264 (9th Cir. 1996).

situation, authorities sent the operator a letter notifying the operator that infringing materials were still being sold.<sup>101</sup> In another case, *A&M Records, Inc. v. Abdallah*,<sup>102</sup> the U.S. District Court for the Central District of California found that a defendant who had supplied counterfeiters with nonstandard-length cassettes and other materials possessed actual knowledge that they were being used to create pirated recordings.<sup>103</sup> The court pointed out that on several occasions, the defendant had spoken with the counterfeiters about their intended use of the cassettes.<sup>104</sup> These two decisions demonstrate that a defendant may be found to have actual knowledge if the defendant has communicated with or received a relevant communication from the direct infringer or legal authorities.<sup>105</sup>

It is less clear what a plaintiff must demonstrate to prove constructive knowledge.<sup>106</sup> In *Napster*, the district court found that Napster possessed constructive knowledge of its users' unauthorized file sharing.<sup>107</sup> The court noted that Napster's executives were sufficiently familiar with intellectual property laws to sue a rock band that had used the company's logo.<sup>108</sup> The court also noted that the executives had downloaded files onto their own computers using the technology and had promoted the service by displaying infringing materials.<sup>109</sup> The *Napster* court's reasoning suggests

101. *Id.*

102. 948 F. Supp. 1449 (C.D. Cal. 1996).

103. *Id.* at 1456. Counterfeiters desire specially-timed cassettes because they do not leave large amounts of blank space at the end of each side. *Id.* at 1454.

104. *Id.* at 1454-55.

105. See *Abdallah*, 948 F. Supp. at 1454-56; *Fonovisa*, 76 F.3d at 261, 264.

106. See *Pink*, *supra* note 27, at 622 (“[W]hile knowledge is clearly a requirement of contributory copyright infringement, courts and commentators alike appear confused about the level of knowledge that is sufficient to create liability.”).

107. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 919 (N.D. Cal. 2000), *aff'd in part, rev'd in part on other grounds*, 239 F.3d 1004 (9th Cir. 2001). The district court also found that Napster possessed actual knowledge. *Id.* at 918. It noted that a document written by a Napster executive mentioned “the need to remain ignorant of users’ real names and IP addresses ‘since they are exchanging pirated music’” and that the RIAA had informed Napster of thousands of infringing files on its service, some of which were still available. *Id.* at 918. On appeal, the Ninth Circuit noted that it was “apparent from the record that Napster has knowledge, both actual and constructive, of direct infringement.” *Napster*, 239 F.3d at 1020. In terms of actual knowledge, it stated that Napster knew that infringing material was available on its system and that it could block suppliers of infringing material from accessing the system. *Id.* at 1022.

108. *Napster*, 114 F. Supp. 2d at 919.

109. *Id.* On appeal, the Ninth Circuit stated that in light of *Sony* it would not impute knowledge to Napster merely because the file-sharing technology could be used to infringe the plaintiffs’ copyrights. *Napster*, 239 F.3d at 1020-21. It stated that the district court had “improperly confined the use analysis to current uses, ignoring the system’s capabilities.” *Id.* at 1021. The court nonetheless affirmed the preliminary injunctions with directions to the district court for modification of their scope. *Id.* at 1027. The distinctions between the district court’s and Ninth

that a defendant would be more likely to have constructive knowledge of infringement perpetrated through file sharing if the defendant possessed legal sophistication and personal experience with file-sharing networks.<sup>110</sup>

## 2. Material Contribution

A plaintiff may fulfill the second requirement of contributory infringement by establishing that the defendant “encourage[d] or assist[ed]” the infringement of another.<sup>111</sup> The plaintiff may typically prove this in one of three ways. The plaintiff may show that the defendant provided the site and facilities, provided the machinery or materials, or engaged in conduct that facilitated the infringement and failed to take steps to prevent it.

### a. Providing Site and Facilities

In *Fonovisa*, the Ninth Circuit held that the plaintiff adequately alleged that the swap meet operator materially contributed to its vendors’ sale of counterfeit recordings by “actively striv[ing] to provide the environment and the market” for known infringing activity.<sup>112</sup> The court noted that the operator had provided the vendors with booth space, utilities, parking, advertising, and customers.<sup>113</sup> Although the court acknowledged that the operator may not have expressly promoted the sale of the pirated recordings, it found these other factors sufficient to reverse the district court, which had dismissed the plaintiff’s suit on the pleadings.<sup>114</sup>

### b. Providing Machinery or Materials

In *RCA Records, Inc. v. All-Fast Systems, Inc.*,<sup>115</sup> the U.S. District Court for the Southern District of New York enjoined a retail copy service

case since a parent, unlike Napster, is not entitled to the *Sony* defense. *See infra* text accompanying notes 115-24 (discussing *RCA Records, Inc. v. All-Fast Sys., Inc.*).

110. *See Napster*, 239 F.3d at 1027.

111. *See id.* at 1019; *see also* WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 1147 (1994).

112. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

113. *Id.*

114. *See id.* at 264-65. In much the same way, the U.S. Court of Appeals for the Third Circuit held that a videocassette retailer could have materially contributed to infringement by enabling the unauthorized public performance of the plaintiff’s films at the retailer’s stores. *See Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 64 (3d Cir. 1986). In *Columbia Pictures Industries*, the retailer allowed paying customers to use its viewing rooms to watch videos, which the customers either selected from the defendant’s library or brought with them. *Id.* The retailer’s employees did not operate the video cassette players but provided assistance to customers upon request. *Id.* at 61. The court found that the retailer “knowingly promot[ed] and facilitat[ed]” the infringement. *Id.* at 62 n.3. As a result, the court granted an injunction against the retailer. *Id.* at 64.

from allowing its customers to use a tape-duplicating machine in its store.<sup>116</sup> The court contrasted the copy service's situation with that of Sony, a manufacturer of videotape recorders (VTRs).<sup>117</sup> In *Sony*, the U.S. Supreme Court held that Sony was not liable as a contributory infringer for its customers' unauthorized reproduction of television programs because the VTR was a "staple article of commerce . . . capable of substantial noninfringing uses."<sup>118</sup>

The district court reasoned that the copy service, unlike Sony, had ample opportunity to control the use of the tape-duplicating machine by refusing to sell counterfeit copies.<sup>119</sup> The court noted that the copy service was aware of each use of the machine and made "hundreds of commercial decisions in exploiting" it.<sup>120</sup> The service therefore fit the traditional description of a contributory infringer.<sup>121</sup> The court noted that even if the machine was capable of substantial noninfringing uses, it was not a great burden on the copy service to avoid contributory infringement.<sup>122</sup> By contrast, the burden on the manufacturer of the tape-duplicating machines would be great since it could only stop the infringing use by terminating the sale of the devices entirely.<sup>123</sup> Since the copy service was not entitled to the *Sony* defense, the court determined that the plaintiffs were entitled to an injunction.<sup>124</sup>

### c. Facilitating Infringement and Failing to Take Steps to Prevent It

In *Casella v. Morris*,<sup>125</sup> the Eleventh Circuit held that, based on the district court's fact findings, a restaurateur materially contributed to

116. *See id.* at 340.

117. *See id.* at 339.

118. 464 U.S. 417, 442, 446 (1984). For a critique of *Sony*, see Lichtman & Landes, *supra* note 27, at 400-01.

119. *See RCA Records*, 594 F. Supp. at 339.

120. *Id.*

121. *See id.*

122. *Id.*

123. *Id.*

124. *See id.* at 340-41. In *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, the U.S. District Court for the Eastern District of New York held that the defendants, a chain of record stores, materially contributed to their customers' infringement of the plaintiffs' sound recordings by stocking their stores with coin-operated "Make-a-tape" machines. 360 F. Supp. 821, 821-22 (E.D.N.Y. 1973). Customers used these devices to make copies of copyrighted cassette tapes from the store's library for one-half or less of the price of the original recordings. *Id.* at 823. The defendants' employees did not operate the machines but were alleged to have assisted customers upon request. *Id.* at 822 n.3. The court found that irrespective of the role played by the defendants' employees, the defendants materially contributed by enabling the customers to access the machines and use them to illegally duplicate tapes. *Id.* at 823; *see also A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456 (C.D. Cal. 1996) (granting an injunction against a defendant who supplied audio equipment to the makers of counterfeit recordings).

125. 820 F.2d 362 (11th Cir. 1987).

another company's infringement when he purported to transfer the rights to the plaintiff's copyrighted songs to that company.<sup>126</sup> The restaurateur asked the plaintiff to write several songs for his establishments' star attraction, a troupe of robotic singing bears.<sup>127</sup> A dispute arose after the restaurateur failed to pay the plaintiff the total amount due for the licenses on the songs.<sup>128</sup> The plaintiff sent the defendant a cease-and-desist letter, informing him that further use of the songs would constitute infringement.<sup>129</sup> One month after this notification, the restaurateur sold the franchise rights to another company, nominally giving it the use of the licensed songs.<sup>130</sup> As part of the deal, the restaurateur obtained a ten percent interest in the company.<sup>131</sup> The court found that the restaurateur facilitated the company's eventual infringement of the songs through the purported transfer of the use rights.<sup>132</sup> The court additionally found that the restaurateur failed to take any steps to stop the transfer of the rights or to notify the purchasing company about the terminated licenses.<sup>133</sup> The court concluded that the restaurateur's "utter inaction" was enough to sustain a finding that he had induced the infringement.<sup>134</sup>

#### D. Proving Contributory Infringement

Applying the aforementioned standard of contributory infringement,<sup>135</sup> a parent could be held liable if the plaintiff was able to show that the parent had knowledge of his child's file sharing and materially contributed to that conduct.<sup>136</sup> A plaintiff could theoretically prove both elements.<sup>137</sup> Each element would present significant challenges, though.<sup>138</sup>

##### 1. Proving Knowledge

There are several ways in which a parent could acquire actual knowledge of his child's unauthorized file sharing. A parent could witness the child illegally download files. The child, or another person, such as a sibling, friend, or relative, could inform the parent of the child's infringing activity. File-sharing software on the computer's desktop could alert a

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126. *See id.* at 365-66.

127. *Id.* at 363.

128. *Id.* at 363-64.

129. *Id.* at 364.

130. *Id.*

131. *Id.*

132. *Id.* at 365-66.

133. *Id.*

134. *Id.* at 366.

135. *See supra* Part II.C.

136. *See supra* Part II.C.

137. *See infra* Parts II.D.1-2.

parent to the child's copyright violations. Or, a parent, perturbed by his computer's dwindling hard drive space, could discover infringing files in the computer's folders.

While any of these scenarios might lead a parent to acquire actual knowledge of his child's infringement, it is not at all certain that would be the result. A parent who is unfamiliar with computers and the Internet may witness his child download a music file but still may not comprehend what the child has done. Even a parent who is familiar with downloading and who knows that his child has acquired files online may not understand that this practice is a potential violation of copyright law. Unlike the executives in *Napster*,<sup>139</sup> many parents are unfamiliar with intellectual property laws.

A parent who is somewhat aware of the illegality of unauthorized file sharing may still be confused by legal technicalities and the advertising of file-sharing networks. A 23-year-old mother in California was sued after she allowed a teenage family friend to download music onto her computer using Kazaa.<sup>140</sup> The woman had read about the litigation involving Napster and the subsequent temporary shutdown of the service.<sup>141</sup> She said she "just assumed that if Napster was down, why would something be up that was illegal?"<sup>142</sup> Or, recall the situation of the 12-year-old girl who was sued by the RIAA.<sup>143</sup> The girl's mother said she had assumed it was legal to use the Kazaa Plus service since it charged a fee.<sup>144</sup> Moreover, at the time this Note was written, the Kazaa home page stated twice that "[h]aving Kazaa is 100% legal."<sup>145</sup> Although the statement is literally true, it is capable of misleading both children and parents.<sup>146</sup> "Having" Kazaa

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139. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 919 (N.D. Cal. 2000), *aff'd in part, rev'd in part on other grounds*, 239 F.3d 1004 (9th Cir. 2001). For example, Darlene Emanski said she was aware that her daughter had downloaded some music files but did not know that it was a violation of copyright law. See telephone interview with Darlene Emanski, *supra* note 1.

140. See Ahrens, *supra* note 12, at E1.

141. *Id.*

142. *Id.*

143. See Sangha & Furman, *supra* note 30, at Domestic News.

144. *Id.* "If you're paying for it, you're not stealing it, so what is this all about?" the mother said. *Id.*

145. See Kazaa, *Having Kazaa is 100% Legal*, <http://www.kazaa.com/us/help/new-100percentlegal.htm> (last visited Mar. 25, 2005). On an internal page on the site, Kazaa notes that "[u]se of the software to download or share copyrighted works without the permission of the copyright owner may be illegal in many jurisdictions." *Id.* Kazaa states that a user must therefore be certain that his use complies with the company's End User License Agreement. Kazaa, *End User License Agreement*, <http://www.kazaa.com/us/terms2.htm> (last visited May 6, 2005). The agreement states that a user must not "[t]ransmit, access or communicate any data that infringes any patent, trademark, trade secret, or other proprietary rights of any party." *Id.*

146. A competitor of Kazaa, such as Napster or iTunes, could potentially bring an action against the service under Section 43(a) of the Lanham Act. See 15 U.S.C. § 1125(a) (2005). Under  
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and “using” it to download files without the authorization of the copyright owner is not a distinction many persons would readily grasp.

Nonetheless, the publicity surrounding these individuals’ situations has certainly made many parents aware that unauthorized file sharing often constitutes copyright infringement. Even so, these parents may still not know when their child has engaged in illegal conduct. This is because there are several ways in which a person can legally download music files. For instance, an Internet user can legally download a file if given permission by the copyright owner.<sup>147</sup> Many artists and record companies promote their music by posting files on Web sites and allowing fans to download them for free.<sup>148</sup> Or, a person can legally download music through paid services, such as iTunes Music Store<sup>149</sup> and the new Napster.<sup>150</sup> Furthermore, one may download music if he has a fair use defense.<sup>151</sup> A child who downloads a song to gather information for a research paper on Internet copyright violations may have such a defense.<sup>152</sup>

the act, a corporation can be liable to a competitor who believes he is damaged by a “false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125(a)(1) (2005).

147. The 1976 Copyright Act only prohibits the unauthorized reproduction of a copyrighted work. See 17 U.S.C. § 106 (2005).

148. For example, MTV offers free downloads on its Web site. See MTV Music, <http://www.mtv.com/music/>. Independent artists also offer music on such sites as Sonic Awareness. See Sonic Awareness, <http://www.sonicawareness.com>.

149. Apple’s iTunes Music Store offers songs from independent artists and major labels for \$.99 per song. See Apple, iTunes Music Store, <http://www.apple.com/itunes/store/>.

150. Napster allows users to download an unlimited amount of songs for \$14.95 per month. See Napster, <http://www.napster.com>.

151. See 17 U.S.C. § 107 (2005). This section provides that the fair use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” *Id.* In determining whether a fair use exists, courts consider four factors. See *id.* These factors include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.* No single factor is dispositive. See Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110-11 (1990) (stating that the factors “direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright”).

Given these legitimate means of downloading files, a parent who catches a glimpse of a file-sharing network on the computer screen or who discovers music files on the hard drive may legitimately believe the child has downloaded the tunes legally.

A plaintiff would also have to overcome the challenge of finding cooperative witnesses to testify about the parent's actual knowledge. In *Abdallah*, the plaintiff introduced the testimony of the defendant's presumably disgruntled employee.<sup>153</sup> In a parental liability case though, the persons who might have spoken with the parent about the child's file sharing include the parent's spouse, the child himself, siblings, relatives, and friends. These persons have a close bond with the parent and are likely to view the parent's situation in a sympathetic light. They are therefore unpredictable witnesses who cannot be relied upon to provide useful evidence in a deposition or trial.

Similarly, a plaintiff would probably lack adequate documentary evidence to prove actual knowledge. Unlike plaintiffs in other cases, the RIAA has not sent cease-and-desist letters to individual file sharers and subsequently monitored their conduct, presumably because of the administrative and financial burden this would entail.<sup>154</sup> While the organization has sent scores of instant messages to persons informing them that unauthorized file sharing is illegal,<sup>155</sup> it is impossible to detect whether a parent actually received one of those messages. Given all of these obstacles in establishing actual knowledge, it is far more likely that a plaintiff would seek to prove constructive knowledge.

There are numerous factors that might give a parent a reason to know that his child has engaged in unauthorized file sharing. A parent may have a reason to know if the parent heard the child listening to an assortment of new music on his computer or discussing file sharing with his friends. A newspaper article or television report on the prevalence of file sharing among youths may lead a parent to suspect that his child has also engaged in infringing conduct. A parent may even have a reason to know by virtue of the fact that he owns the computer and subscribes to the ISP, or because the infringement is occurring under his own roof. Furthermore, applying the district court's reasoning in *Napster*, a parent might be more likely to

*Infringer*, 9 VILL. SPORTS & ENT. L.J. 57, 78 (2002). Gibbons states that a user's private distribution of MP3 files to friends or acquaintances may constitute a fair use. *Id.* Another commentator has argued that sampling, or downloading music to decide whether to purchase it, is also a fair use. See Valerie Alter, Note, *Building Rome in a Day: What Should We Expect from the RIAA?*, 26 HASTINGS COMM. & ENT. L.J. 155, 164-65 (2003).

153. *A&M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1454-55 (C.D. Cal. 1996).

154. See RIAA, "John Doe" Lawsuits, *supra* note 19 (noting that the RIAA must file "John Doe" lawsuits, and then issue a subpoena to learn an infringer's identity).

155. See Steve Seidenberg, *New Battleground in File-Sharing: After Copyright Loss, Strategy Shifts to Going After Individuals*, NAT'L L.J. May 5, 2003, at A15.



possess constructive knowledge if he was knowledgeable about copyright law and had previously downloaded songs.<sup>156</sup> Yet, in contrast to the executives in *Napster*,<sup>157</sup> a parent typically does not play such a critical role in facilitating the file sharing, and therefore would probably have less of a reason to know of the infringement.

In proving constructive knowledge, a plaintiff would still have to surmount the hurdle of introducing probative testimonial or documentary evidence. However, a plaintiff might not be required to prove that the parent actually knew that the particular files in question were acquired in an illegal manner.<sup>158</sup> Constructive knowledge therefore represents a feasible means of satisfying the knowledge element in a parental liability case.

## 2. Proving Material Contribution

After establishing the knowledge requirement, a plaintiff would need to show that a parent facilitated his child's file sharing under one of the three prevailing standards of material contribution.<sup>159</sup> A plaintiff would have strong arguments that a parent's conduct satisfied one or more of the three standards. However, a parent would also have viable counterarguments that his particular action, or inaction, was not analogous to that of defendants found liable in prevailing cases.

### a. Proving that a Parent Provides the Site and Facilities

A plaintiff could argue that a parent provides his child with the site and facilities for unauthorized file sharing in much the same way as the swap meet operator in *Fonovisa*.<sup>160</sup> A parent provides his child with a room, desk, lighting, Internet connection, food, and shelter. These amenities make it both possible and convenient for a child to engage in file sharing. A parent likely continues to provide these amenities after learning that a child has illegally acquired songs.

Although a parent arguably supplies his child with the site and facilities, it is unclear that the parent "actively strives" to facilitate the infringement or create a market for the infringing materials in the same

156. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 919 (N.D. Cal. 2000), *aff'd in part, rev'd in part on other grounds*, 239 F.3d 1004 (9th Cir. 2001).

157. See *id.*

158. See *supra* text accompanying notes 95-96 (noting that the constructive knowledge inquiry focuses on whether a defendant had a reason to know of the infringement).

159. See *supra* Part II.C.2.

160. See *generally* *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (holding that the plaintiff had sufficiently alleged that the swap meet operator materially contributed to its vendors' sale of counterfeit recordings by providing the vendors with booth space, utilities, parking, advertising and customers).

manner as the swap meet operator.<sup>161</sup> Unlike the operator,<sup>162</sup> a parent's motivation for providing his child with site and facilities is not to promote the child's file sharing. Instead, a parent provides his child with these amenities to enable him to complete his homework, surf the Internet, and communicate with friends. A parent is driven by his desire to fulfill his parental duties, not to line his pockets. Also, a parent does not actively or purposely put other file sharers in contact with his child. The parent passively brings the file sharers within the child's reach by furnishing the Internet connection.

Another important distinction concerns the nature of the parent-child relationship. In contrast to the swap meet operator-vendor relationship, a parent cannot terminate the parent-child relationship or expel the child from the home after discovering the infringing files. A parent may also be loath to fully revoke the child's Internet privileges, given the vast amount of worthwhile, educational material available online and the nature of the child's homework assignments. Thus, a parent may be able to defend successfully against a plaintiff's assertion that he provided the sites and facilities.

#### b. Proving that a Parent Provides the Machinery or Materials

Additionally, a plaintiff could assert that a parent, similar to the copy service in *RCA Records*, supplied his child with the machinery and materials that made the file sharing possible.<sup>163</sup> A parent furnishes his child with a computer, the primary tool he needs to engage in file sharing. In some cases, a parent also provides his child with blank CDs or an MP3 player, which enable the child to copy the files and to listen to them in other locations.

A parent is not absolved of liability merely because the computer or CDs are capable of substantial noninfringing uses, such as word processing or recording one's own works. As the court in *RCA Records* made clear, the *Sony* defense is available to the manufacturers of staple articles of commerce, not to consumers who have the ability to control the use of these products.<sup>164</sup> Thus, computer manufacturer Hewlett-Packard (HP) could assert the defense if it was sued as a result of an Internet user's illegal file sharing.<sup>165</sup> Yet a parent who purchased the computer would not

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161. *See id.* at 264.

162. *See id.*

163. *See generally* *RCA Records, v. All-Fast Sys., Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984) (enjoining a retail copy service from allowing customers to use a tape-duplicating machine in its store because the machine enabled the customers to engage in direct infringement).

164. *Id.* at 339.

165. *See id.*

be entitled to the defense.<sup>166</sup> Unlike HP, a parent has ample opportunity to control his child's computer use and to prevent infringing uses. It would therefore not substantially burden a parent to avoid contributory infringement. By contrast, HP undoubtedly would be harmed by having to prevent children's file sharing. HP could only do this by terminating the sale of its computers entirely or by eliminating the devices' ability to log on to the Internet.<sup>167</sup>

A parent is not necessarily as culpable as the copy service in *RCA Records*, however. Unlike this defendant, a parent does not charge the child a fee, and thus does not make a commercial decision every time the child uses the computer or goes online.<sup>168</sup> And unlike the copy service, a parent is probably not certain that each time his child browses the Internet, the parent is facilitating the child's infringement.<sup>169</sup> For these reasons, a parent may be able to distinguish *RCA Records* and similar cases.

### c. Proving that a Parent Facilitates Infringement and Fails to Take Steps to Prevent It

Finally, a plaintiff could argue that a parent acted like the defendant in *Casella* by facilitating his child's infringement and failing to take steps to prevent it.<sup>170</sup> A parent enables a child to engage in infringement when the parent subscribes to an ISP and gives the child permission to connect to the Internet without supervision. In cases in which the parent installs file-sharing software on the household computer or subscribes to a file-sharing service, such as Kazaa Plus, the plaintiff's argument would be even stronger. Moreover, under the Eleventh Circuit's reasoning, a parent may also facilitate a child's infringement when he fails to take steps to prevent the conduct,<sup>171</sup> such as placing restrictions on the child's Internet use or installing a filter. Thus, the parent may "induce" the child's infringement through his "utter inaction."<sup>172</sup>

It is unclear though, whether a court would find that a parent's action facilitated the infringement to the same degree as the restaurateur's conduct in *Casella*.<sup>173</sup> A parent's subscription to an ISP is not as closely

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See generally* *Casella v. Morris*, 820 F.2d 362 (11th Cir. 1987) (holding that a restaurateur materially contributed to another company's infringement when he purported to transfer the rights to the plaintiff's copyrighted songs to that company and failed to take any steps to prevent the likely infringement).

171. *See id.* at 365-66.

172. *See id.*

173. *See id.*

related to the direct infringement as the defendant's purported sale of the plaintiff's song rights.<sup>174</sup> The restaurateur attempted to sell the song rights to profit from the purchaser's infringement.<sup>175</sup> Furthermore, it was nearly inevitable that the purchaser would infringe the plaintiff's rights after the deal was completed.<sup>176</sup> By contrast, a parent primarily subscribes to an ISP to engage in activities that have no relation to infringement, such as reading the news, shopping, or paying bills. Although it may be foreseeable, it is not inevitable that a child will engage in file sharing upon the parent's subscription to the ISP. These counterarguments may not be available to all parents, however. A parent who subscribed to a file-sharing service on behalf of his child would more closely resemble the restaurateur since the connection between the parent's act and the child's infringement would be more naturally linked.<sup>177</sup>

### 3. Summary

Given the current state of the law, it is possible, but not certain, that a plaintiff could satisfy the material contribution element in a parental liability case. Although on its face a parent's action or inaction seems to fulfill each of the three standards, a parent may be able to distinguish the cases in which those standards were articulated. Consequently, it is an open question whether a plaintiff would be able to hold a parent liable for his child's file sharing under the doctrine of contributory infringement. It would therefore be useful to consider whether the imposition of parental liability in the file-sharing context would comport with the manner in which parental liability has been applied in a related area of law: torts.

### III. PARENTS' LIABILITY UNDER COMMON LAW TORT PRINCIPLES

Tort law is particularly relevant to the consideration of parental liability in copyright law. As noted previously, contributory infringement arose out of tort law.<sup>178</sup> Furthermore, tort law, unlike copyright law, comprises a well-developed body of common law rules dealing with a parent's liability for his child's intentional wrongs.<sup>179</sup> State legislatures largely abandoned

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174. *See id.*

175. *See id.*

176. *See id.*

177. *See Sangha & Furman, supra note 30, at Domestic News* (reporting that the mother of a 12-year-old girl that was sued for copyright infringement had subscribed to Kazaa Plus on her daughter's behalf).

178. *See NIMMER & NIMMER, supra note 33, § 12.04[A][2].*

179. *See Wade R. Habeeb, Annotation, Parents' Liability for Injury or Damage Intentionally Inflicted by Minor Child, 54 A.L.R. 3D 974 (2004)* (collecting cases in which plaintiffs sued parents on the basis of their children's intentional torts or the parents' own negligent supervision of their children).

these rules in the 1950s and 1960s in favor of a strict liability standard with relatively low caps on damages.<sup>180</sup> Notwithstanding this shift in the law,<sup>181</sup> the common law rules, and the reasoning underlying them, provide useful guidance in the area of copyrights.

### A. *Negligent Entrustment of Dangerous Instruments*

The first tort that is pertinent to this analysis involves dangerous instruments. At common law, a parent could be found negligent if he entrusted his child with or gave him access to a dangerous tool, such as a

180. See Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 631-32 (1997); Gilbert Geis & Arnold Binder, *Sins of their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 310 (1991); L. Wayne Scott, *Liability of Parents for Conduct of Their Child Under Section 33.01 of the Texas Family Code: Defining the Requisite Standards of "Culpability"*, 20 ST. MARY'S L.J. 69, 87-91 (1988). Legislatures in nearly every state passed these laws in an effort to curb juvenile delinquency and ensure that victims received some compensation for their injuries. *Id.* at app. (noting that as of 1987, 49 states had parental tort liability statutes); Note, *Vicarious Parental Liability in Connecticut: Is it Effective?*, 7 U. BRIDGEPORT L. REV. 99, 121-24 (1986) (citing states' parental liability statutes). These laws generally hold parents strictly liable for their children's "willful," "malicious," or "intentional" acts, allowing plaintiffs to recover damages for personal injury and in many cases, property damage. See Chapin, *supra*, at 632. The stringency of these laws is partly mitigated by their relatively low caps on damages. Scott's comprehensive, although now dated, study found the limits on recovery ranged from \$250 to \$15,000. See Scott, *supra*, at app.

181. Notwithstanding the low caps on damages, a few commentators have criticized civil and criminal parental civil liability statutes as ineffective and unduly harsh. See Chapin, *supra* note 180, at 672 (asserting these laws are a limited and "not . . . particularly effective" solution to a complex problem); Geis & Binder, *supra* note 180, at 321 (arguing that the statutes are misguided because they punish parents even though they are generally incapable of preventing their children's delinquent actions and are often doing the best they can); Comment, "Parental Responsibility" Ordinances—Is Criminalizing Parents When Children Commit Unlawful Acts a Solution to Juvenile Delinquency, 19 WAYNE L. REV. 1551, 1577 (1973) (arguing that "juvenile delinquency is a complex problem . . . [that] cannot be solved by a single, narrow approach" and that criminal parental responsibility ordinances seem to place a great burden on parents). Some commentators assert that other steps may be better suited toward decreasing delinquency. See Deborah A. Nicholas, Note, *Parental Liability for Youth Violence: The Contrast Between Moral Responsibilities and Legal Obligations*, 53 RUTGERS L. REV. 215, 242 (2000) (stating that one of the most effective ways of decreasing youth violence is "to create healthy circumstances under which families can grow and develop"). Nonetheless, a few commentators have defended parental liability acts as a legitimate civil remedy for victims. See Dana E. Prescott & Cynthia L. Kundin, *Toward a Model Parental Liability Act*, 20 CAL. W. L. REV. 187, 209-17 (1984) (proposing a model parental liability act and urging states to remove caps on damages); Andrew C. Gratz, Comment, *Increasing the Price of Parenthood: When Should Parents Be Held Civilly Liable for the Torts of Their Children?*, 39 HOUS. L. REV. 169, 199 (2002) (recommending that the Texas Legislature adopt section 31.6 of the Restatement, thereby permitting victims of child tortfeasors to recover damages for their injuries and encouraging parents to control their children).

gun.<sup>182</sup> A parent could also be found negligent if he supplied his child with an object that was potentially dangerous because of the child's immaturity or tendency to mishandle it, such as matches or a vehicle.<sup>183</sup> The dangerous instrumentality doctrine is based on the notion that it is foreseeable that providing a child with access to hazardous objects would result in harm to another.<sup>184</sup>

Although a computer is not typically thought of as a tool that can harm another person's body or property, it nonetheless shares some of the characteristics of a potentially dangerous instrument.<sup>185</sup> When a computer is placed in the hands of a pre-teen or teenage music lover, who has a demonstrated tendency to disrespect copyright law, it is foreseeable that it will be used to infringe a copyright owner's exclusive rights in his sound recordings.<sup>186</sup> A computer that is connected to the Internet can be as potentially hazardous to a copyright owner's intellectual property rights as a BB gun is to a neighbor's windows. It would therefore seem consistent with the dangerous instrument doctrine to hold a parent accountable for entrusting a child with a computer if the parent knows the child has a proclivity to practice unauthorized file sharing.<sup>187</sup>

### B. Negligent Parental Supervision

The second tort that is of interest to this analysis relates to a parent's supervision of his child. At common law, a parent could be held liable if he knew that his child had a tendency to engage in a particular intentional tort and notwithstanding, negligently failed to take reasonable steps to control him.<sup>188</sup> In applying this tort, courts sought to balance the interests of individual families and society at large.

182. See PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 28, § 123.

183. *See id.*

184. *See id.*

185. *See id.*

186. See 17 U.S.C. § 106 (2005).

187. See PROSSER & KEETON ON THE LAW OF TORTS, *supra* note 28, § 123.

188. *Id.*; see generally Habeeb, *supra* note 179 (collecting cases in which plaintiffs sued parents on the basis of their children's intentional torts or the parents' own negligent supervision of their children). The Restatement Second of Torts has articulated this tort in the following manner:

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

For example, in *Bieker v. Owens*,<sup>189</sup> the Arkansas Supreme Court considered whether a mother and father were accountable for their sons' alleged beating of another boy.<sup>190</sup> The court stated that it would be unreasonable to hold a parent absolutely responsible for the actions of his child "[s]ince each human mind and personality is exclusively that of the individual possessing it."<sup>191</sup> However, in this particular case, the parents repeatedly failed to take measures to stop their sons' violent behavior, and thereby "sanction[ed], ratif[ied], and consent[ed] to the wrongful acts."<sup>192</sup> In a concurring opinion, Chief Justice Harris stated that the majority's decision would make parents aware of their responsibilities.<sup>193</sup> He admonished parents who knew of their children's delinquent nature but who were unwilling to take action to minimize the detrimental effects.<sup>194</sup> In neglecting their parental duties, these parents placed the burden upon society at large.<sup>195</sup>

Today, a child's ability to harm another is not limited to the child's exertion of physical force against that person or his property. With the touch of a button, a child can infringe the rights of thousands of copyright owners. It would therefore seem consistent with the tort of negligent parental supervision to enable a record industry plaintiff to recover against a parent in the same way as the plaintiff in *Bieker*.<sup>196</sup> A parent who knows of his child's tendency to engage in file sharing, who supplies the child with a computer and Internet connection, and who consistently fails to take reasonable steps to prevent the infringement "sanction[s], ratif[ies], and consent[s] to the wrongful acts."<sup>197</sup> Like the parents in *Bieker*, the knowing parent of a file sharer could take a number of measures, such as forbidding the child from engaging in the conduct or installing an Internet filter, to reduce the probability or scope of the child's infringement.<sup>198</sup> By failing to take these steps, the parent abdicates his parental responsibilities and

189. 350 S.W.2d 522 (Ark. 1961).

190. *Id.* at 523.

191. *Id.* at 524; *see also* Norton v. Payne, 281 P. 991, 992 (1929) (stating that a parent should not be held to the same degree of liability as that of a person who owns a wild animal or vicious dog).

192. *Bieker*, 350 S.W.2d at 526.

193. *Id.* (Harris, C.J., concurring).

194. *Id.* (Harris, C.J., concurring); *see also* Stone, *supra* note 28, at 35 (arguing that imposing liability where parents have neglected their parental duties and such neglect is clearly related to the child's torts may impress upon parents "their obligations to themselves, the child, and the society in which they live").

195. *Bieker*, 350 S.W.2d at 526 (Harris, C.J., concurring).

196. *See id.* at 525-26.

197. *Id.* at 526.

198. *See supra* text accompanying notes 83-88 (discussing the measures a parent could take

thrusts a significant burden on the plaintiff.<sup>199</sup> In so doing, the parent externalizes the copyright harm, forcing the plaintiff to resort to litigation to protect its interests.<sup>200</sup>

### C. General Considerations

Although unauthorized file sharing differs substantially from the types of intentional torts that children have traditionally committed,<sup>201</sup> it is still reasonable to hold a parent accountable for this behavior. Unlike battery or property damage, which generally occur on neighborhood streets, unauthorized file sharing often occurs in the home. Because the home is a zone where the parent has complete authority<sup>202</sup> and substantial ability to exercise control over his child, it is natural to expect a parent to assume responsibility when the child's misdeeds occur there. Moreover, a parent has the ability to substantially deter copyright infringement in the home without expending significant cost or effort.<sup>203</sup>

The fact that file sharing may be more difficult to detect than other intentional torts does not mean that parents should not be held accountable for this conduct. The knowledge requirement of contributory infringement protects parents who did not know or have a reason to know of their child's infringement.<sup>204</sup> Courts have discretion to apply this element strictly so that parents who are unfamiliar with copyright law and who had no reason to suspect the infringing activity are not held liable.<sup>205</sup> It is therefore apparent from this analysis of common law tort principles that the imposition of parental liability in the copyright area would comport with legal precedent.

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199. See *Bieker*, 350 S.W.2d at 526 (Harris, C.J., concurring).

200. See *supra* text accompanying note 13 (noting the RIAA's lawsuits against individuals accused of unauthorized file sharing).

201. See *Habeeb*, *supra* note 179 (listing the shooting of BB guns and scaring of farm animals as common juvenile intentional torts).

202. See *Minnesota v. Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring) (discussing the historical origins of the notion that a "man's home is his castle" in the context of the Fourth Amendment).

203. See *Hamdani*, *supra* note 27, at 911 (noting that indirect liability should only be extended to those parties that can deter misconduct at a relatively low cost).

204. See *supra* Part II.C.1 (discussing the knowledge requirement).

205. See *Pink*, *supra* note 27, at 622 (noting that courts are often confused about the degree of knowledge required for liability). The confusion likely arises from courts' exercise of discretion



#### IV. POLICY REASONS SUPPORTING PARENTS' LIABILITY FOR THEIR CHILDREN'S FILE SHARING

Not only is parental liability in copyright law consistent with common law tort rules, it is also supported by policy considerations. A parent who knows that he could be held liable for his child's file sharing would be more likely to supervise his child's Internet use in an attempt to prevent the infringement.<sup>206</sup> Parental liability should therefore help reduce illegal file sharing, thereby providing an incentive for authors and copyright owners to continue to engage in productive efforts.<sup>207</sup>

Parental supervision would not only help reduce the child's unauthorized file sharing, but it would also help protect the child from accessing other harmful material on the Internet, such as pornography and violent content.<sup>208</sup> A parent who monitors his child's online activities would become attuned to these risks and would be more likely to discuss Internet-related issues with his child. If the lines of communication were opened, parents and children would be able to respond to Internet hazards together.

Furthermore, the imposition of parental liability may help foster a culture of respect for intellectual property law in the home. Many parents who presently turn a blind eye to their child's unauthorized trading of thousands of files would be enraged if they discovered that their child had shoplifted a single CD from a retail store.<sup>209</sup> The threat of a lawsuit may

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206. There is some indication that the RIAA's lawsuits have had an effect on the behavior of adult file sharers. See Pew Internet Project and comScore Media Metrix Data Memo, [http://www.pewinternet.org/pdfs/PIP\\_Filesharing\\_April\\_04.pdf](http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf). In a February-March 2004 telephone survey of 1,371 adult Internet users, 38% of respondents said they downloaded or shared files less often in the preceding months because of the RIAA's lawsuits; 60% said they did not change their habits. *Id.* at 1, 11. By contrast, in the November-December 2003 survey, 27% said they downloaded or shared less often because of the suits, while 71% said their habits remained the same. *Id.* at 11. The survey indicated that the retreat in file sharing was most noticeable among online men between the ages of 18 to 29 and those who have broadband connections at home. *Id.* at 1. Among Internet users who had never shared files online, 60% of respondents in the February-March 2004 survey said the RIAA lawsuits would keep them from engaging in the practice in the future. *Id.* at 2. Among this group, women with Internet access were more likely than men to respond that they were dissuaded by the lawsuits. *Id.*

207. U.S. copyright law is founded on the notion that authors should be given an economic incentive to produce works of authorship through the grant of a limited monopoly. See U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to legislative copyright and patent statutes "[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").

208. See Bonopartis, *supra* note 89, at 1A (reporting that "pornography, pedophiles and cyber stalkers, scams, spam e-mail hawking pornography and sex products, [and] gambling" present concerns for parents).

209. See Alfano, *supra* note 84, at 57.

encourage these parents to reconsider their contradictory views.<sup>210</sup> At the very least, it may lead parents to teach their children the importance of adhering to the law, even though the parent may personally disagree with it.<sup>211</sup>

## V. TAILORING CONTRIBUTORY INFRINGEMENT TO THE IMPOSITION OF PARENTAL LIABILITY FOR FILE SHARING

Although the imposition of parental liability in the file-sharing context is supported by policy reasons, it would not be “just” unless the doctrine of contributory infringement is appropriately tailored to parents’ unique circumstances.<sup>212</sup> The following suggestions would help to mitigate the hardship parents might experience in being exposed to contributory infringement liability.

### A. *Material Contribution*

To prove the material contribution element against a parent, a plaintiff should be required to prove by a preponderance of the evidence that the parent facilitated the child’s file sharing *and* failed to take *reasonable* steps to prevent it. This approach would be similar to that of the Eleventh Circuit in *Casella*.<sup>213</sup> This approach is necessary because, under a strict interpretation of the *RCA Records*<sup>214</sup> and *Fonovisa*<sup>215</sup> standards, a plaintiff might only have to prove that the parent knowingly provided the computer and blank CDs, or Internet connection, room, and utilities.<sup>216</sup> It is possible that a parent who regularly supervised his child’s Internet use and periodically browsed the computer’s files could still be held liable if the child engaged in the infringement while the parent was at work or asleep or if he otherwise hid his conduct. Imposing liability when the parent is

210. The Pew Internet Project-comScore Media Metrix survey indicates that an increasing number of individuals who currently download music files are concerned about copyright. See Pew Internet Project and comScore Media Metrix, *supra* note 206, at 11. In the February-March 2004 survey, 37% of respondents said they cared about whether the music they download was copyrighted, whereas 58% said they did not care. *Id.* In the April-May 2003 survey, 26% of respondents said they cared about copyright, whereas 70% said they did not. *Id.*

211. See Aftab, *supra* note 84, at 6 (noting that “[children] need to know that, in most cases, downloading and sharing music online are no different from that shoplifting example” and “[s]tealing is stealing”).

212. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (stating that 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”).

213. See *supra* Part II.C.2.c (discussing the Eleventh Circuit’s approach in *Casella*).

214. See *supra* text accompanying notes 115-24 (discussing the approach of the U.S. District Court for the Southern District of New York in *RCA Records*).

215. See *supra* Part II.C.2.a (discussing the Ninth Circuit’s approach in *Fonovisa*).

doing his utmost to prevent infringement would be unduly harsh. It would be tantamount to holding a parent strictly liable for his child's intentional torts—as under state parental liability acts—a practice that has been widely criticized by commentators.<sup>217</sup>

By requiring the plaintiff to prove that a parent failed to take reasonable steps to prevent the infringement, the doctrine of contributory infringement would more closely approximate the common law tort of negligent parental supervision.<sup>218</sup> This approach would allow a fact finder to engage in a modified negligence analysis to determine whether the parent's actions or inaction were reasonable in light of the family's personal circumstances and the parent's knowledge of copyright law and the child's file-sharing tendency. It would give a fact finder the leeway to determine in a particular case that a parent who was unable to prevent his child's infringement nonetheless made reasonable attempts to do so.<sup>219</sup> This approach would promote economic efficiency because parents would not be required to engage in excessive measures to monitor their children's Internet use.<sup>220</sup> A parent would be only held liable in cases in which the parent abdicated his parental responsibilities, externalizing the copyright harm.<sup>221</sup>

## B. Damages

Additionally, to make contributory infringement a just standard of liability for parents, it is necessary to consider the amount of damages available in a file-sharing action. As the law currently stands, a parent could be subject to extraordinary statutory damages under Section 504(c) of the Copyright Act.<sup>222</sup> If a child engaged in one thousand counts of infringement, and the court awarded the plaintiff the minimum statutory damages, \$750 per count, the parent would be liable for \$750,000.<sup>223</sup> This degree of exposure does not fit a parent's offense. Although a parent might

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217. See *supra* note 181 (discussing scholars' views on the harshness of parental liability acts).

218. See *supra* text accompanying notes 188-95; see also Lichtman & Landes, *supra* note 27, at 405-06 (discussing the application of a negligence rule to indirect liability).

219. See *Bieker v. Owens*, 350 S.W.2d 522, 524 (Ark. 1961) (stating that "each human mind and personality is exclusively that of the individual possessing it").

220. See Lichtman & Landes, *supra* note 27, at 405 (noting that negligence rules "hold a party liable in cases where that party's failure to take economically reasonable precautions results in a harm"). Lichtman and Landes note that a negligence approach would "not [be] radically different from current law." *Id.* They acknowledge that current law concentrates on the factors previously discussed in this Note, including knowledge, right and ability to control, and other factors, without giving a clear indication of why those issues are important. *Id.* They state that a negligence rule would "lay bare the underlying logic of the indirect liability inquiry." *Id.*

221. See *Bieker*, 350 S.W.2d at 526 (Harris, C.J., concurring).

222. See 17 U.S.C. § 504(c) (2005).

knowingly facilitate his child's infringement, the parent has no financial interest in the conduct.<sup>224</sup> Furthermore, aggregated statutory damages could have disastrous financial consequences for a family, leading to bankruptcy or a depletion of the child's college fund.

A plaintiff's damages against a parent should therefore be substantially restricted in the file-sharing context.<sup>225</sup> One possible solution would be to amend the 1976 Copyright Act to include a reasonable cap on damages for parents who are sued for their children's file sharing. This cap would apply no matter how many files the child copied. The cap could be consistent with the damage limits contained in state tort parental liability acts, which generally do not exceed \$15,000.<sup>226</sup> These acts prevent many plaintiffs from obtaining full compensation for their injuries, but they appropriately balance the interests of parents and plaintiffs.<sup>227</sup> A cap on copyright damages might prevent a record industry plaintiff from being made whole; however, it would recognize that a parent is fundamentally different from a person or business that is in the business of piracy.<sup>228</sup> A parent who provides his child with a computer and Internet connection is primarily motivated by his desire to help his child learn about technology and the world beyond his community, not a desire to make a quick profit.<sup>229</sup> Thus, through a reduction in the damages available and slight modification of the material contribution standard, contributory infringement could serve as a just standard of liability for a parent accused of facilitating his child's unauthorized file sharing.

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224. See *supra* Part II.B.2 (analyzing whether a parent has a financial interest in his child's infringement).

225. See J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages For Copyright Infringement*, 83 TEX. L. REV. 525, 558-59 (2004) (urging Congress to amend the Copyright Act's statutory damages provision in the file-sharing context because it imposes an "unconstitutional" and "grossly excessive" penalty).

226. See *supra* note 180 (discussing caps on state parental liability acts).

227. *But see* Prescott & Kundin, *supra* note 181, at 213 (urging state legislatures to remove caps on damages because "many victims are left with the bulk of their medical and repair expenses").

228. See *supra* Part II.D.2 (discussing the ways in which parents are different from the defendants that have been found liable in prevailing contributory infringement cases).

229. Another solution would be to shift to a specialized dispute resolution system, similar to the Uniform Dispute Resolution Policy for Internet domain name trademark disputes. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410-25 (2004). A team of expert panelists would review the plaintiffs' claims in a faster, more efficient manner, thereby allowing for the awarding of lesser

## VI. CONCLUSION

This Note suggested that a plaintiff might be able to hold a parent liable for his child's unauthorized file sharing under the doctrine of contributory infringement. However, it also noted that a parent might be able to distinguish prevailing cases applying the doctrine. This question likely will not be answered in court in the near future. For the moment, it is in the best interests of both the RIAA and parents to settle their disputes out of court.<sup>230</sup> This Note's consideration of a parent's potential liability has practical significance in the realm of litigation, though. It demonstrated that the RIAA has a good faith argument based on existing law or a nonfrivolous argument for the modification of existing law that a parent is liable for his child's file sharing.<sup>231</sup> Thus, the RIAA would generally be able to meet the requirements of Rule 11 if it were to sue a parent on the basis of contributory infringement.<sup>232</sup>

Because of the parties' current tendency to settle, the recommendations this Note offers for molding contributory infringement into a just theory of parental liability are not in dire need of implementation. The RIAA has not treated parents in an unjust fashion. Congress and the courts therefore do not need to undertake measures to protect parents from copyright infringement lawsuits at this time. This Note's recommendations would prove useful if the RIAA changed its approach and began demanding significantly higher settlement amounts or began taking cases to trial in an effort to call greater attention to the problem of unauthorized file sharing.

The RIAA's lawsuits against parents, although stressful for those particular families, may ultimately have positive consequences for society. Certainly, parenting a pre-teen or teenage child is no simple task. A parent must see to it that his child does not drink, smoke, fight, neglect his schoolwork, or associate with the wrong crowd. Ensuring that a child does not engage in unauthorized file sharing is one more obligation that some parents may, understandably, be reluctant to assume. Nonetheless, the

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230. By settling cases, the RIAA mitigates the effect of its seemingly harsh policy of suing individuals, thereby forestalling an even greater public backlash against the record industry. Parents, on the other hand, avoid the expense of hiring an attorney and the risk of losing their case.

231. See FED. R. CIV. P. 11. The rule provides that in presenting a pleading or other document to the court an attorney or unrepresented party certifies:

that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

FED. R. CIV. P. 11(b).

RIAA's lawsuits have called attention to the fact that in the digital age, parents have no choice but to accept Internet supervision as an important parental responsibility. Through a few clicks of a mouse, a child can infringe thousands of copyrights, fall prey to an Internet predator, or develop a gambling addiction. A parent should undertake reasonable efforts to protect his child from these threats. A parent should gladly accept his duty to supervise his child's Internet use and not foist this burden upon society at large.

