

KNOWING HOW TO KNOW: SECONDARY LIABILITY
FOR SPEECH IN COPYRIGHT LAW

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Contributory copyright infringement has long been based on whether the defendant, “with knowledge of the infringing activity,” induced, caused, or materially contributed to another’s infringing conduct. But few court opinions or scholarly articles have given due consideration to what it means to “know” of someone else’s infringing conduct, particularly when the unlawfulness at issue cannot truly exist until a legal judgment occurs. How can one “know,” in other words, that a court or jury will deem a particular use infringement rather than de minimis or fair use? At best, contributory defendants engage in a predictive exercise—in some cases, a more certain one, to be sure, but a predictive exercise nonetheless. To recognize this is not a mere semantic excursion: once a decision maker has determined that infringement has occurred, it is more likely, through hindsight bias, to determine that a defendant “knew” of this infringement at the relevant time, despite the realities of monitoring and assessing content.

Drawing on both the legal and epistemological literature, this Article recommends a better framing for the issue of knowledge in contributory infringement doctrine—an approach that has implications not only for copyright law but for the regulation of online content more generally.

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I. INTRODUCTION

During the 2008 presidential election season—when online campaign-related activity took place at nowhere near the level it does now—Senator John McCain’s campaign wrote a letter to YouTube, disputing YouTube’s removal of a number of campaign videos for alleged copyright infringement.¹ The campaign claimed that the videos included “fewer than ten seconds of footage from news broadcasts . . . as a basis for commentary on the issues presented in the news reports, or on the reports themselves,” which constituted “paradigmatic examples of fair use.”² YouTube had removed the videos upon receipt of a claim of copyright infringement pursuant to the Digital Millennium Copyright Act (“DMCA”)³—a claim that the campaign viewed as “both unfortunate and unnecessary.”⁴ “[N]othing in the DMCA,” wrote the campaign, “requires a host like YouTube to comply automatically [sic] with takedown notices, while blinding itself to their legal merit (or, as here, their lack thereof),” particularly “in the context of a fast-paced political campaign.”⁵ The campaign thus asked YouTube to commit to a “full legal review of all takedown notices on videos posted from accounts controlled by (at least) political candidates and campaigns” and to decline to respond to notices that it determined, after such a review, were without legal merit.⁶ “Surely,” the campaign asserted, “the protection of core political speech, and the protection of the central role YouTube has come to play in the country’s political discourse, is worth the small amount of additional legal work our proposal would require.”⁷

In her response, YouTube’s chief counsel pointed out that while the DMCA’s notice, takedown, and counter-notice structure undoubtedly results in some abuse of the system, further efforts on

1. Letter from Trevor Potter, Gen. Counsel, McCain-Palin 2008, to Chad Hurley, CEO, YouTube (Oct. 13, 2008), <https://amlawdaily.typepad.com/amlawdaily/files/mccain-letter-20081013.pdf>.

2. *Id.*

3. 17 U.S.C. § 512 (2018). The relevant statutory scheme is officially titled the Online Copyright Infringement Liability Limitation Act, but courts and commentators alike typically refer to it by the name of the overall legislation. See Digital Millennium Copyright Act, Pub. L. No. 105–304, § 201, 112 Stat. 2877 (1998).

4. Letter from Trevor Potter, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

YouTube's behalf to reduce legal error were not feasible. "[A] detailed substantive review of every DMCA notice is simply not possible due to the scale of YouTube's operations," she wrote.⁸

Any such review would have to include a determination of whether a particular use is a "fair use" under the law, which is a complex and fact-specific test that requires the subjective balancing of four factors. . . . No number of lawyers could possibly determine with a reasonable level of certainty whether all the videos for which we receive disputed takedown notices qualify as fair use.⁹

The response from YouTube's counsel is even more understandable now than it was at the time. As one point of comparison, a 2017 study reported that, in early 2016, Google was receiving "between 17 and 21 million [takedown] requests *a week* for its Web Search service."¹⁰ In terms of sheer volume, the kind of review requested by the McCain campaign would be impossible with even a fraction of the submissions. But the response also suggests a more fundamental problem with this review: determining whether a claim of infringement is correct is not always possible to do "with a reasonable level of certainty." In some instances, a reviewer with a basic understanding of copyright law might accurately predict how a court would rule—perhaps for the classic music file trading scenario or a video of an entire television episode, posted without commentary, on YouTube. But there are instances when the use of an entire copyrighted work has been deemed fair use, even without commentary or other transformation;¹¹ without training on such issues and time to properly consider them, these considerations become more complicated and proxies become less useful.

Two more recent examples further highlight the uncertainty in predicting determinations of infringement. One involves the question of how copyright law responds to new technologies. In March 2006, Cablevision announced the availability of a remote DVR system,

8. Letter from Zahavah Levine, Chief Counsel, YouTube, to Trevor Potter, Gen. Counsel, McCain-Palin 2008 (Oct. 14, 2008), <http://www.dmlp.org/sites/citmedialaw.org/files/08-10-14YouTube%20Response%20to%20Sen.%20McCain.pdf>.

9. *Id.*

10. JENNIFER M. URBAN ET AL., NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 32 (2017).

11. *E.g.*, Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 84 (2d Cir. 2014) ("In the context of news reporting and analogous activities . . . the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration."); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) ("The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.").

whereby Cablevision customers could record television programming for later viewing on servers maintained by Cablevision, rather than on a set-top box.¹² Cablevision's system seemed to have been designed with avoiding liability for copyright infringement in mind; each customer's recordings were saved to separate server space allocated to that customer, and each customer viewed only those copies when playback was requested.¹³ Cartoon Network and other content owners alleged, inter alia, that the playback of programming in response to customers' requests constituted an infringing public performance.¹⁴ Not so, said the Second Circuit: "Because each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance."¹⁵

Aereo, Inc., some years later, offered to New York City subscribers—i.e., in the Second Circuit—a service by which subscribers could watch local television programming over the internet. From the subscribers' perspective, this system "function[ed] much like a television with a remote Digital Video Recorder ("DVR") and [a] Slingbox."¹⁶ No doubt deeply familiar with the court's opinion in *Cartoon Network*, Aereo set up its system with separate antennas for each subscriber, creating individual copies of each program transmitted.¹⁷ The Second Circuit, relying on its opinion in *Cartoon Network*, likewise held that Aereo's transmissions were not public performances.¹⁸ But this result was reversed by the U.S. Supreme Court. Without discussing *Cartoon Network*, the majority held that the technology underlying the system's structure was irrelevant; what mattered was Congress's "regulatory objectives," Aereo's "commercial objective," and the "viewing experience of Aereo's subscribers"—none of which distinguished Aereo's system from that of a cable operator.¹⁹ Thus, the Court concluded, just as a cable system engages in a public performance of the programming it transmits—and is required by statute to obtain a license for that transmission—so did Aereo.²⁰

12. *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008).

13. *Id.*

14. *Id.* at 134.

15. *Id.* at 139.

16. *WNET, Thirteen v. Aereo, Inc.* 712 F.3d 676, 680 (2d Cir. 2013), *rev'd and remanded sub nom.* *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431 (2014).

17. *Id.* at 680–81.

18. *Id.* at 695.

19. *Aereo*, 573 U.S. at 446. Justice Scalia's dissent cited *Cartoon Network* several times. *Id.* at 452–61 (Scalia, J., dissenting).

20. *Id.* at 451. On remand, the district court entered a preliminary injunction; Aereo later filed for bankruptcy. *Am. Broad. Cos. v. Aereo, Inc.*, Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); Emily Steel,

The other example involves a determination of fair use. In 2011, Russell Brammer, a photographer specializing in stock photography, took a time-lapse photograph of the Adams Morgan neighborhood in Washington, D.C., at night, which he posted to Flickr.²¹ The organizer of an annual film festival found the photograph online and posted it to the festival's website for attendees.²² After successfully getting the festival's organizer to take down the photo, Brammer filed suit for copyright infringement.²³ The defendant moved for summary judgment, contending that its use of the photo constituted fair use.²⁴ The district court granted the motion, finding that the defendant's use of the photograph was "transformative in function and purpose" because while Brammer's purpose was expressive, the defendant's purpose was "informational: to provide festival attendees with information regarding the local area."²⁵ Moreover, the court concluded, the defendant's use was made in good faith because the festival's organizer "found the photo online and saw no indication that it was copyrighted," so he believed that the photograph was free for public use.²⁶ The defendant, the court concluded, was using the photograph "purely for its factual content"—to show festival attendees "a depiction of the Adams Morgan neighborhood"²⁷—and had not harmed the plaintiff's market; the plaintiff had published the photograph on the internet and had been compensated by others for its use.²⁸ Thus, the court concluded that the four fair use factors favored the defendant and granted summary judgment.²⁹

Perhaps unsurprisingly, this result was swiftly reversed on appeal. Noting that fair use "presents a mixed question of law and fact,"³⁰ the Fourth Circuit held that the district court erred in every

Aereo Concedes Defeat and Files for Bankruptcy, N.Y. TIMES, Nov. 21, 2014, at B2.

21. *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 261 (4th Cir. 2019).

22. *Id.*

23. *Id.* Brammer also filed suit for removal and alteration of copyright management information under 17 U.S.C. § 1202 (2018); the district court determined that he later abandoned that claim. *Brammer v. Violent Hues Prods., LLC*, No. 1-17-CV-01009, 2018 WL 2921089, at *1 (E.D. Va. June 11, 2018), *rev'd*, 922 F.3d 255 (4th Cir. 2019).

24. *Brammer*, 922 F.3d at 261. The four fair use factors are:

(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.

17 U.S.C. § 107 (2018).

25. *Brammer*, 2018 WL 2921089, at *2.

26. *Id.*

27. *Id.*

28. *Id.* at *3.

29. *Id.*

30. *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 261 (4th Cir. 2019).

aspect of its assessment of the four fair use factors, including whether the defendant's purported good faith should have tipped the balance in its favor.³¹ Indeed, rather than simply declaring that summary judgment was inappropriate and remanding for trial on the fair use defense, the Fourth Circuit concluded that the defense failed as a matter of law and remanded the case for further proceedings.³² (Since the defendant apparently did not otherwise challenge the claim of infringement, the Fourth Circuit's opinion would seem to require a finding of liability on remand, absent settlement.)

The point of these examples is not to offer a judgment on their merits. Rather, it is to highlight that—as with many questions of law—it is often difficult to predict how a court will rule on a claim of copyright infringement, even if the facts are undisputed. This is especially true for entities removed from the allegedly infringing acts—the platforms, the venue hosts, the video hosting sites. And yet, the commonly accepted standard for contributory copyright infringement provides for liability in terms that suggest factual certainty: when one “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”³³

The concept of knowledge as a touchstone for secondary liability is not, of course, unique to copyright infringement. Within the realm of secondary liability for others' speech, we see this same standard present in liability for defamation. In defamation cases, the issue of whether a nonpublisher intermediary can be held liable for facilitating a speaker's defamatory speech (often called “distributor liability”) largely turns on whether the secondarily liable party “knew or had reason to know” about the unlawful speech at issue.³⁴ Because the implication of such a standard is that the defendant did not take appropriate action upon gaining this knowledge, the standard is akin

31. *Id.* at 269.

32. *Id.*

33. *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (citing *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966)). As I will discuss later in this Article, the DMCA's safe harbor for providers also incorporates knowledge into its assessment of potential liability. *See* 17 U.S.C. § 512(c)(1)(A) (2018) (stating that a provider qualifies for a safe harbor from liability only if, inter alia, the provider “does not have actual knowledge that the material or an activity using the material on the system or network is infringing” and “in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent.”); *infra* text accompanying notes 189–213.

34. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977) (“[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”); *see also* Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 231–32 (2002) (describing the different forms of liability).

to liability based on negligence, as opposed to the strict liability assigned to publishers.

But despite the importance of the knowledge standard to a finding of liability for contributory copyright infringement, the case law has never been clear on what “knowledge” means. Indeed, given that what the defendant is supposed to “know” is a legal status—whether the original speaker is engaged in lawful or unlawful activity—it is arguably impossible for the defendant to acquire such knowledge before that status has been adjudicated. At best, such a defendant can make a prediction of the likely outcome of that legal proceeding.³⁵ In some instances—perhaps file trading of entire musical works—that prediction asymptotically approaches certainty. But in other cases, the availability of a fair use or other defense—even for a use that employs the entire protected work—makes “knowing” whether the speaker is engaging in lawful or unlawful speech much less clear. And because a court would determine whether any direct infringement has occurred before it considered questions of secondary liability, the risk of hindsight bias means that courts adjudicating questions of contributory infringement may well deem the legal status of speech more “knowable” post hoc than it was before.

This is not to say that copyright law is hopelessly indeterminate—that those engaging in parodies, cultural critiques, and educational uses, for instance, must withdraw from the public arena for fear that a future court might conclude that what they are doing is infringement. Some uses—such as quoting small portions of a book in a book review—have been so ingrained in our collective judgment as fair uses that predictions as to a future adjudication of lawfulness can be said to be virtually certain.³⁶ This might lead one to think, as Chief Justice Roberts said in his confirmation hearing, that what courts are doing is stating whether a pitch is a ball or a strike³⁷—confirming or revealing some state of being that already exists in the world. But it’s important to recognize, as baseball umpire Bill Klem famously noted in a Holmesian turn, “[I]t ain’t

35. For discussions of probabilistic knowledge, see generally, for example, Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1 (2012), and Mark P. McKenna, *Probabilistic Knowledge of Third-Party Trademark Infringement*, 2011 STAN. TECH. L. REV. 10 (2011).

36. Several scholars have persuasively argued that the fair use doctrine is more predictable than some have asserted. See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 554–56 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 717–19 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 51 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2588 (2009).

37. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit) (“I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

nothing till I call it.”³⁸ The copying in *Brammer* was ultimately not a fair use, but only because our federal judicial system gives the Fourth Circuit interpretive authority over the district courts in its region—and because the plaintiff pursued an appeal in the first place.³⁹

Whether the law calls this predictive ability “knowledge” may seem like a mere semantic issue. But the word itself is likely doing some persuasive work because concluding that a party “knew” about something beforehand suggests a higher level of culpability than might have existed at the time. Characterizing the requirement instead as an assessment of whether the defendant made a reasonable judgment as to the status of the speech better calibrates the vocabulary to the task at hand. And because these are scenarios in which the suppression of speech is potentially at stake, it is important to at least get the concepts right.⁴⁰

II. THE CONCEPT OF KNOWLEDGE IN CONTRIBUTORY COPYRIGHT INFRINGEMENT

A. *The Concept of Knowledge in Tort Law*

Before considering the role of knowledge in copyright infringement specifically, it might be helpful to consider its role in tort law more generally. Although the Copyright Act doesn’t address secondary liability directly,⁴¹ since copyright infringement is a tort, it would be natural that tort doctrine’s general theories of secondary liability would also apply to cases of copyright infringement, which the Supreme Court has confirmed.⁴² For example, section 876 of the *Restatement (Second) of Torts* notes that one is subject to liability for harm resulting to a third person from another’s tort if that person

38. Nick Paumgarten, *No Flag on the Play*, NEW YORKER (Jan. 20, 2003), <https://www.newyorker.com/magazine/2003/01/20/no-flag-on-the-play>; see also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 991, 994 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

39. *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 269 (4th Cir. 2019).

40. Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1888 (2000) (asserting that because of free speech concerns, “courts must not impute knowledge to ISPs for purposes of contributory infringement unless it is quite clear that infringement has occurred”).

41. See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 434 (1984) (“The Copyright Act does not expressly render anyone liable for infringement committed by another.”). An alternative interpretation is that the Copyright Act’s provision that the owner of copyright “has the exclusive rights to do *and to authorize*” certain uses conveys Congress’s intent to provide for contributory infringement. 17 U.S.C. § 106 (2018) (emphasis added).

42. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (noting that doctrines relating to secondary liability for copyright infringement “emerged from common law principles and are well established in the law”).

“knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”⁴³ In order to be liable, one must give substantial assistance or encouragement to another to aid him in committing tortious conduct, knowing that the conduct is tortious.⁴⁴ The causative relationship between the defendant’s actions and the tortfeasor’s actions alone is insufficient, lest liability turn into a manifestation of the butterfly effect, with no limitation on the scope of liability. (Were that to occur, providers of electricity, water, and other contributions to activity could all be held liable for any resulting harm.) This also means that contributory liability, in general, is not a strict liability offense. If that were the case, merely providing assistance would be sufficient for liability. By requiring knowledge in addition to a contribution, tort doctrine aims to characterize the activity as fault-based—that the defendant, knowing that it was facilitating tortious activity, did so anyway.⁴⁵

Our next task, then, is to unpack what is meant by “knowledge.” The *Restatement (Second)* defines “reason to know” and “should have known,” but it does not appear to attempt to define the pure state of “knowledge,”⁴⁶ although it is the basis for some of its conclusions regarding the application of primary liability. For example, as to the basis for holding the author or original publisher liable for a defamatory statement, the *Restatement (Second)* states that such individual “usually knows or can find out whether a statement in a

43. RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979). The Restatement takes no position on whether this is applicable “when the conduct of either the actor or the other is free from intent to do harm or negligence but involves strict liability for the resulting harm.” *Id.* § 876 caveat. The still-developing *Restatement (Third)* may, of course, provide additional guidance on these concepts.

44. *Id.* § 876(b).

45. Dan L. Burk, *Toward an Epistemology of ISP Secondary Liability*, 24 PHIL. & TECH. 438, 443 (2011) (“Law is often occasioned on the knowledge or other mental state of those to whom it applies From a utilitarian standpoint, such scien-ter requirements calibrate liability to the actor’s ability to acquire, comprehend, and act upon socially relevant information; from a deontological standpoint, scien-ter attempts to calibrate liability to the actor’s moral culpability.”).

46. See *Bank of New Orleans & Trust Co. v. Monco Agency Inc.*, 719 F. Supp. 1328, 1331–32 (E.D. La. 1989) (“The Court’s finding that actual knowledge is required by the Restatement [for negligent misrepresentation] is buttressed by the fact that the definition section of the Restatement (Second) of Torts defines the terms ‘reason to know’ and ‘should know,’ thereby indicating that ‘know’ has a different definition.” (footnote omitted) (citing RESTATEMENT (SECOND) OF TORTS § 12 (AM. LAW INST. 1965))), *aff’d sub. nom.* *First Nat’l Bank of Commerce v. Monco Agency Inc.*, 911 F.2d 1053 (5th Cir. 1990); *Webster v. Culbertson*, 761 P.2d 1063, 1067 (Ariz. 1988) (“‘Reason to know’ is not equivalent to ‘actual knowledge.’”).

work produced by him is defamatory or capable of a defamatory import.”⁴⁷

“Reason to know,” per the *Restatement (Second)*, exists when “the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.”⁴⁸ The *Restatement (Second)* goes on to note that the phrase means:

that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.⁴⁹

Thus, as Kenneth Simons has noted, “reason to know” “occupies a space between negligence and recklessness, on the one hand, and knowledge on the other: It requires the actor to have *actual* subjective awareness of circumstances from which he *should* infer the fact in question.”⁵⁰

By contrast, a party “should know” a fact if “a person of reasonable prudence and intelligence or of the superior intelligence of the actor would ascertain the fact in question in the performance of his duty to another, or would govern his conduct upon the assumption that such fact exists.”⁵¹ For example, in *Dunn v. Hovic*,⁵² the court found no abuse of discretion in the lower court’s admission of an industry report on acceptable levels of asbestos exposure introduced for the purpose of demonstrating what the defendant manufacturer “reasonably should have known had it either conducted its own tests or been in contact with others in the industry . . . that were testing.”⁵³

Thus, as the *Restatement (Second)* suggests, the standards “reason to know” and “should have known” differ in whether a duty of investigation is required. “Reason to know” “implies no duty of knowledge on the part of the actor” whereas “should know” “implies that the actor owes another the duty of ascertaining the fact in

47. RESTATEMENT (SECOND) OF TORTS § 581 cmt. c (AM. LAW INST. 1977). *But see* Benjamin Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 21 n.139 (2016) (discussing the “remarkable dearth of support for knowledge-based distributor liability,” despite *Restatement (Second) of Torts* § 581).

48. RESTATEMENT (SECOND) OF TORTS § 12(1) (AM. LAW INST. 1965).

49. *Id.* § 12 cmt. a. The comment goes on to note that the phrase carries the same meaning as in the *Restatement of Agency*. *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 9 (AM. LAW INST. 1958)).

50. Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1095 n.119 (2006).

51. RESTATEMENT (SECOND) OF TORTS § 12(1) (AM. LAW INST. 1965).

52. 1 F.3d 1362 (3d Cir. 1993).

53. *Id.* at 1370 (alteration in original) (quoting *George v. Celotex Corp.*, 914 F.2d 26, 29 (2d Cir. 1990)).

question.”⁵⁴ Thus, an actor governed by a “reason to know” standard is assessed based only on the information the actor had at the time, while an actor governed by a “should know” or “should have known” standard is required to pursue the inquiry to some objectively determined point, at which stage his knowledge is assessed based on the information thus acquired.⁵⁵ For example, in *Torkie-Tork v. Wyeth*,⁵⁶ a 2010 case involving a products liability claim for failure to warn about the risks of a pharmaceutical, the court noted that a failure to warn claim under Virginia law “rests on a *reason to know* standard rather than the broader *should have known* standard.”⁵⁷ Hence, “[t]he only dangers for which [the manufacturer] had a duty to warn adequately are those dangers which [it] knew or had reason to know existed based on the science available at the time the product left [the manufacturer’s] hands”; it had no duty to conduct additional testing beyond that already required by the Food and Drug Administration.⁵⁸

B. Gershwin Publishing Corporation *and Its Progeny*

These definitions, however, do not seem to be pertinent to the standard for contributory copyright infringement, which focuses on knowledge of a legal status rather than of a factual status. The case typically cited as establishing the standard for contributory infringement is *Gershwin Publishing Corporation v. Columbia Artists Management, Inc.*,⁵⁹ a 1971 case from the Second Circuit.⁶⁰ The

54. RESTATEMENT (SECOND) OF TORTS § 12 cmt. a (AM. LAW INST. 1965).

55. See *Foremost-McKesson Corp. v. Allied Chem. Co.*, 680 P.2d 818, 822–23 (Ariz. Ct. App. 1983) (finding that a “should know” standard places a “heavy burden” on manufacturers to discover products’ dangers and provide warnings compared to the duty borne by those subject to a “knows or has reason to know” standard); *Liebelt v. Bob Penkhus Volvo-Mazda, Inc.*, 961 P.2d 1147, 1149 (Colo. App. 1998) (holding that a “should know” standard creates a duty to investigate and a “reason to know” standard does not); *Christians v. Homestake Enters., Ltd.*, 303 N.W.2d 608, 620 (Wis. 1981) (noting that the “key difference” between the two standards is whether the defendant is charged with “the duty to perform whatever affirmative action would be taken by a reasonable person” in the defendant’s position to discover the fact in question); RESTATEMENT (SECOND) OF TORTS § 401 cmt. a (AM. LAW INST. 1965) (“The words ‘reason to know’ do not impose any duty to ascertain unknown facts . . .”); *id.* § 339 reporter’s note 3 (describing change in standard governing duty of liability of landowner toward children for artificial condition on the land and stating that “‘should know’ involves an obligation of reasonable care to investigate the facts, while ‘has reason to know’ means that he knows enough to infer that the fact exists, or to govern his conduct on the assumption that it exists”). *But see* *Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex. 1974) (concluding that there is “no essential distinction” between a “reason to know” and a “should have known” standard).

56. 757 F. Supp. 2d 567 (E.D. Va. 2010).

57. *Id.* at 572.

58. *Id.* at 573.

59. 443 F.2d 1159 (2d Cir. 1971).

60. *Id.*

litigation was brought as a test case by the American Society of Composers, Authors, and Publishers (“ASCAP”) against Columbia Artists Management, Inc. (“CAMI”) to determine whether CAMI could be held liable for unpaid licensing fees relating to music in ASCAP’s catalog that was performed at local community concerts that CAMI facilitated.⁶¹ CAMI acknowledged that the performing artists and the local community concert associations could have been held directly liable for infringement but challenged ASCAP’s attempt to hold CAMI liable.⁶² Relying on two earlier cases, the district court found that CAMI “caused” the copyright infringement by “organizing, supervising, and controlling” the local associations and that CAMI “knowingly participated in the infringement.”⁶³ On appeal, the Second Circuit affirmed, holding that just as a party can be held vicariously liable for another’s copyright infringement, “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.”⁶⁴ Accordingly, it held that the district court properly found CAMI liable as a contributory infringer since CAMI knew that compositions subject to copyright were being performed without a license⁶⁵ and engaged in “pervasive participation” in setting up the concerts, thus “causing” the infringement.⁶⁶ (It also held that CAMI “was in a position to police the infringing conduct of its artists” and “derived substantial financial benefit from the actions of the primary infringers” and therefore could also be held liable on a theory of vicarious liability.)⁶⁷

61. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 312 F. Supp. 581, 581 (S.D.N.Y. 1970), *aff’d*, 443 F.2d 1159 (2d Cir. 1971).

62. *Id.* at 581.

63. *Id.* at 583 (citing *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 (2d Cir. 1963); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399 (S.D.N.Y. 1966)). The holding in *Shapiro* rested on a theory of vicarious liability (holding a department store liable for the infringement of one of its concessionaires, regardless of knowledge of the infringing activity) and is now typically cited for that doctrine. See *Shapiro*, 316 F.2d at 308. In *Screen Gems*, the court noted that the plaintiffs put forward a theory of contributory liability precisely because the defendants in the case could likely not be held liable under a theory of vicarious liability. *Screen Gems*, 256 F. Supp. at 403 (“Since infringement constitutes a tort, common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy, and the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tort-feasor is applicable in suits arising under the Copyright Act.” (footnote omitted)).

64. *Gershwin*, 443 F.2d at 1162 (citing *Screen Gems*, 256 F. Supp. at 403) (footnote omitted).

65. *Id.* at 1161 (“CAMI stipulated that it deliberately made no effort to obtain copyright clearance for musical compositions included in the programs and performed at community concerts.”).

66. *Id.* at 1163.

67. *Id.*

The *Gershwin* court rested its holding on the general principles of tort law described above. It did not, however, clarify the nature of its reference to knowledge—whether it was limited to actual knowledge or also encompassed “reason to know” or “should have known.” In *Gershwin*, the artist management agency defendant was held to be secondarily liable for infringement because it organized the community concerts at issue in advance, knew which songs would be performed, and knew that no licenses had been obtained.⁶⁸ Like a newspaper’s decision to publish in the first instance, the management agency here could have decided whether to engage in these activities at all, knowing the scope of its own due diligence. The performers were the ones engaging in direct copyright infringement, but the agency was involved in facilitating virtually all aspects of the performance. There was, therefore, no reason for the court to devote much attention to what facts the defendant knew at the time of the performances or whether those facts would have given rise to an understanding that copyright infringement was likely to be taking place.

But as with the tort doctrine more generally, the *Gershwin* court’s requirement of both a material contribution and knowledge conveyed its understanding that contributory copyright infringement is not a strict liability offense (as compared to direct copyright infringement, where liability would turn merely on the completion of the act).⁶⁹ If contributory copyright infringement were intended to be a strict liability offense, merely providing material assistance to an infringer would be sufficient for liability. The requirement of knowledge is not simply about ensuring that the act is volitional—otherwise internet platforms could escape liability for contributory infringement on this ground alone.⁷⁰ Rather, the knowledge requirement connotes, as Alfred Yen has observed, that liability is fault based.⁷¹ To the extent the standard is aimed at deterrence, requiring knowledge in addition to a material contribution conveys that the putative contributory infringer has an opportunity to determine whether to continue the contribution or not and thus avoid (additional) liability.

68. *See id.* at 1162–63.

69. *Cf.* Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 979 (2007) (“It was well-established, prior to *Sony*, that copyright infringement, whether direct or indirect, is a strict liability offense.”).

70. *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 440 (5th Cir. 2017) (noting that every circuit to consider the question has concluded that direct infringement requires volitional conduct); *id.* at 444 (reaching the same conclusion), *cert. denied*, 138 S. Ct. 236 (2017).

71. Alfred C. Yen, *Third-Party Copyright Liability After Grokster*, 91 MINN. L. REV. 184, 216 (2006) (“Liability is a matter of fault because defendants can escape liability by refusing to provide material contribution to known infringers—a form of behaving reasonably in light of what they know.”); *see also* Alfred C. Yen, *A First Amendment Perspective on the Construction of Third Party Copyright Liability*, 50 B.C. L. REV. 1481, 1494–95 (2009).

This conclusion is further supported by the Supreme Court's decision in *Sony Corp. of America v. Universal Studios, Inc.*⁷² The question in the case was whether Sony could be held liable for contributory copyright infringement for selling video cassette recorders given that the primary use of the equipment was to make copies of copyrighted television programming without the authorization of the copyright owners.⁷³ The recorder was the means by which the copying was effected, so whether Sony had provided a material contribution to infringement was not disputed. The question, then, was whether Sony could be said to have had knowledge of the infringing activity given that the infringement took place after the sale had concluded.⁷⁴ The Court held that Sony could not be liable simply because it had constructive knowledge of later infringement—in other words, the knowledge that some of its customers would inevitably commit infringement at some point in the future.⁷⁵ Rather, borrowing from patent law's staple article of commerce doctrine, the Court held that because the recorders were capable of substantial noninfringing uses—the authorized recording of programming in some cases and the fair use of time shifting in others—attributing the requisite knowledge to Sony based merely on the low statistical probability of some infringing uses would be inappropriate.⁷⁶ Put otherwise, if the device at issue had no substantial noninfringing uses, the likelihood of subsequent infringing use would be high (or even 100 percent), such that Sony could be said to “know” the infringing nature of the future uses. Thus, if the contribution to copyright infringement could be characterized as the provision of a product, and that product had substantial noninfringing uses, a defendant would have the requisite knowledge of infringement only if it knew of the particular unlawful use to which its customer would be putting the product at the time of the sale. After the transaction, the provider would either never learn about the unlawful use or learn about it too late to change the nature of its contribution to the activity.⁷⁷ As the Fourth Circuit has put it, “the

72. 464 U.S. 417 (1984).

73. *Id.* at 428.

74. *Id.* at 438–39.

75. *Id.* at 439.

76. *See id.* at 442, 456.

77. By contrast, as the Ninth Circuit held in *A&M Records, Inc. v. Napster, Inc.*, where the defendant provides a service and so has an ongoing relationship with the customer, later-acquired knowledge of unlawful activity by the customer could provide an opportunity for the defendant to cease contributing to that activity by changing the nature of the ongoing service. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001).

While commentators anticipated that the result in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, would depend on whether the Court saw the defendant provider of peer-to-peer technology as offering a good (software) or a service (a peer-to-peer network), the Court was able to evade consideration of this distinction by resting its holding on a conclusion that the defendants had induced

proper standard requires a defendant to have specific enough knowledge of infringement that the defendant could *do* something about it.”⁷⁸

It should be noted that courts in copyright cases appear to have converged on the conclusion that the knowledge requirement is an objective one, requiring either actual knowledge (or its equivalent, willful blindness) or “reason to know”; the negligence standard of “should have known” is not sufficient.⁷⁹ This means that, in general, parties are not under an obligation to investigate or to monitor in order to learn of potential infringement. Courts in the Second Circuit in particular have emphasized that appropriate evidence in assessing whether an alleged contributory infringer possessed the requisite knowledge is external to the particular mental state of the defendant and can include such evidence as “cease-and-desist letters, officer and employee statements, promotional materials, and industry experience.”⁸⁰

C. Knowledge of What?

This framing of the knowledge requirement does not, however, directly address what it means to know or have reason to know of the infringing activity. One option is that the defendant need only have knowledge of the underlying act that is later deemed to constitute infringement. For example, a defendant flea market that provides one of its vendors with the space to construct its booth and facilitates transactions and knows that the vendor is selling DVDs of popular films could be liable under such a theory by simply knowing that DVDs are being sold, regardless of whether the defendant knows whether those DVDs are lawful or infringing. Alternatively, the requirement could be that the defendant must have knowledge of the legal status of the other party’s actions. Using the example here, the defendant flea market must know not only that the vendor is selling DVDs of popular films but also that those DVDs are infringing (and not, for example, sales of secondhand DVDs, which would be lawful

infringement through e-mail communications, advertising, and other actions. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005). See generally Laura A. Heymann, *Inducement as Contributory Copyright Infringement: Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 37 INT’L REV. INTELL. PROP. & COMPETITION L. 31 (2006) (providing detailed analysis of *Grokster* and its anticipated effects).

78. *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 311–12 (4th Cir. 2018).

79. See, e.g., *id.* at 310; *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) (“The knowledge standard is an objective one; contributory infringement liability is imposed on persons who ‘know or have reason to know’ of the direct infringement.”) (citing *Napster*, 239 F.3d at 1020) (other citations omitted); *NCR Corp. v. Korala Assocs. Ltd.*, 512 F.3d 807, 816 (6th Cir. 2008).

80. *Smith v. BarnesandNoble.com, LLC*, 143 F. Supp. 3d 115, 124 (S.D.N.Y. 2015), *aff’d on other grounds*, 839 F.3d 163 (2d Cir. 2016) (quoting *Capitol Records, LLC v. ReDigi Inc.*, 935 F. Supp. 2d 640, 658 (S.D.N.Y. 2013)).

under copyright law's first sale doctrine). Perhaps surprisingly, there is little doctrinal assistance in answering this question directly.⁸¹ Some courts have indicated that simply knowing of the defendant's activity is not enough, but in opinions in which the question was not squarely presented.⁸² The Ninth Circuit suggested in 2011 that the standard was "know or have reason to know" and suggested in 2013 that the standard was either actual knowledge or willful blindness, although the discussion was not key to the result in either case.⁸³

It seems, however, that if the standard is intended to assign fault based on a conclusion that the defendant provided assistance at a time when it could have made the opposite decision, in light of the

81. See, e.g., *Erickson Productions, Inc. v. Kast*, 921 F.3d 822, 832 (9th Cir. 2019) (describing "[i]nconsistency in our case law on the 'knowledge' element of contributory liability"). The scholarship has given relatively little attention to this question, although Paul Goldstein takes the position that the defendant "need only have known of the direct infringer's activities, and need not have reached the legal conclusion that these activities infringed a copyrighted work." See GOLDSTEIN ON COPYRIGHT § 8.1 n.1 (2017-2 supp.) ("This rule is dictated by the more general rule that innocence is no defense to an action for copy-right infringement."); *id.* § 8.3.2 (2019-1 supp.) ("This requirement [in section 512(c)(1)(A)'s reference to 'infringing' material] distinguishes section 512(c)'s knowledge requirement from the more general knowledge requirement of contributory infringement, where the defendant need only have known of the direct infringer's activities, and need not have been on notice that the activities infringed copyright in the work.").

A Westlaw search for cases quoting Goldstein on this point yielded only five federal opinions. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 199 F. Supp. 3d 958, 978-79 (E.D. Va. Aug. 8, 2016), *rev'd on other grounds*, 881 F.3d 293 (4th Cir. 2018); *Montalvo v. LT's Benjamin Records, Inc.*, 56 F. Supp. 3d 121, 134 (D.P.R. 2014); *Sarvis v. Polyvore, Inc.*, No. 12-12233-NMG, 2013 WL 4056208, at *8 (D. Mass. Aug. 9, 2013); *Elsevier, Ltd. v. Chitika, Inc.*, 826 F. Supp. 2d 398, 404 (D. Mass. 2011); *Jalbert v. Grautski*, 554 F. Supp. 2d 57, 68 (D. Mass. 2008) ("Although the defendant must have knowledge of the infringing activity, 'the defendant need only have known of the direct infringer's activities, and need not have reached the legal conclusion that those activities infringed a copyrighted work.'") (citing GOLDSTEIN ON COPYRIGHT § 8.1 n.1 (2005)).

82. *Scholz Design Inc. v. Jaffe*, 488 F. Supp. 2d 749, 750 (N.D. Ill. 2007) (finding after a bench trial that there was no evidence that the defendant customers "had any knowledge that the copyrighted design of the plaintiff was being infringed by their architect (if indeed it was being infringed). What the evidence showed, at most, is that defendants knew one of the plaintiff's designs would be used in the construction of their house. There is no evidence that either defendant had any reason to suspect that their architect was infringing any copyright"); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 262 (D. Neb. 1982) ("The defendants . . . had no knowledge, and no reason to know, of the infringing nature of the . . . plans supplied to them by Belmont. . . . Therefore, even if [defendants] were considered to have 'materially contributed' to the infringing conduct of Belmont, such contribution was made without knowledge of Belmont's infringing activity and cannot be considered a contributory infringement.").

83. *Compare Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1072-73 (9th Cir. 2013), *with Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 943 (9th Cir. 2011) (citing *Napster*, 239 F.3d at 1020).

knowledge it possessed, that knowledge must relate to the lawfulness of the activity in question. Just as an individual would not be held to have engaged in aiding and abetting criminal activity simply by holding a locked lobby door open for someone who turned out to be a burglar, a contributory infringer should not be deemed to have abetted infringement without knowledge that what it was abetting was infringement. If that were the case, there would be no reason to include a knowledge requirement at all. Indeed, the doctrine of willful blindness in copyright law—the concept that avoiding learning about potentially unlawful behavior should be treated as knowledge—rests on the assumption that the defendant is deliberately avoiding gaining knowledge of bad behavior.⁸⁴

One might argue that this goal is still satisfied by characterizing the knowledge requirement simply as an awareness of the activity, which then gives rise to an obligation on the defendant's part to investigate that activity before providing any material assistance. But if that were true, the knowledge requirement ultimately becomes knowledge of the infringing nature of the activity. Let us assume again our flea market defendant, who provides the same material assistance to its vendors as previously described. If the defendant is held liable for contributory infringement on the grounds that it knew that its vendors were selling DVDs, presumably the deterrence goal is not to stop flea markets from offering space to all DVD sellers but to investigate more thoroughly the nature of the goods they are selling—in other words, to assess the lawfulness of their activity and provide assistance only to those who are not infringing.

The consideration becomes more extensive (but not entirely helpful) in discussions of secondary liability for defamation—that is, liability for distributing material that is ultimately judged to be defamatory. (These cases would tend to be relevant because they also involve the balance of liability for tortious activity against the possibility of suppression of lawful speech.) Here, the *Restatement (Second)* notes that, except for radio or television broadcasters, “one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.”⁸⁵ But whether

84. *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003) (“Willful blindness is knowledge, in copyright law . . . as it is in the law generally. One who, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings is held to have a criminal intent . . . because a deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind.”) (citations omitted).

85. RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977). The *Restatement (Second)* defines “delivers” as referring to the “transfer or possession of a physical embodiment of the defamatory matter” and defines “transmits” as including in addition “the conveyance of defamatory words by methods other than

“defamatory character” means “the character of the material, which a court later deems to be defamatory” or means “that the material would likely (or certainly) be deemed defamatory” is not clear from the context.

If we consider an analogy from the Supreme Court’s cases on obscenity prosecutions, it might seem as if the former is meant. In *Smith v. California*,⁸⁶ for example, the Court held that a city ordinance making it illegal “for any person to have in his possession any obscene or indecent writing” in any place of business where books were sold could not be constitutionally enforced because it imposed strict liability for distribution of obscene materials.⁸⁷ Without a *scienter* requirement, the threat of enforcement would mean that the bookseller would sell only those books it had inspected, which “may tend to work a substantial restriction on the freedom of speech and of the press.”⁸⁸ A different result was obtained, however, in *Hamling v. United States*,⁸⁹ where defendants challenged their federal convictions for mailing obscene materials on the grounds that the government failed to show that the defendants knew the materials were obscene.⁹⁰ It was enough, the Court held, that the statute required that the defendants “knowingly” used the mail,⁹¹ which the Court interpreted as requiring “that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials.”⁹² “To require proof of a defendant’s knowledge of the legal status of the materials,” the Court continued, “would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.”⁹³ In so holding, the Court quoted from its previous opinion in *United States v. Wurzbach*:⁹⁴

Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.⁹⁵

This language suggests that a defendant would be deemed to have knowledge if it was aware of the risk that a court would find the

physical delivery, as in the case of a telegraph company putting through a call.”
Id. § 581 cmt. b.

86. 361 U.S. 147 (1959).

87. *Id.* at 148–49.

88. *Id.* at 150.

89. 418 U.S. 87 (1974).

90. *Id.* at 119.

91. *Id.* at 119, 123 (citing 18 U.S.C. § 1461 (1972)).

92. *Id.* at 123.

93. *Id.*

94. 280 U.S. 396 (1930).

95. *Hamling*, 418 U.S. at 124 (citing *Wurzbach*, 280 U.S. at 399).

material it distributed to be unlawful—in other words, that the character of the materials was such that a finding of obscenity was plausible. This suggests not simply an awareness of the underlying activity but a further awareness of the characteristics of the activity that could give rise to a conclusion that the activity is wrongful. This is perhaps not quite the same as knowledge of the legal status of the activity, but it is closer than the above language might suggest.

But what of the material that one might not have predicted to be unlawful but was ultimately deemed so—the reverse of the *Brammer* district court decision described above? Could such a defendant be said to have had knowledge (or reason to know) of the character of the material? The examples from the *Restatement (Second)* regarding defamatory material suggest perhaps not, insofar as such material would not have given rise to any particular suspicions of unlawfulness. A newsdealer, for example, “is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items” unless there are “special circumstances that should warn the dealer that a particular publication is defamatory.”⁹⁶ One set of “special circumstances” may be the overall nature of the publication: “[W]hen a dealer offers for sale a particular paper or magazine that notoriously persists in printing scandalous items, the vendor may do so at the risk that any particular issue may contain defamatory language.”⁹⁷ The same holds true for a bookstore or library: if there are “no facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains matter which upon inspection, he would recognize as defamatory,” the vendor or lender is not liable, nor does it have any duty of inspection if the author or publishing house is reputable.⁹⁸ But if the author or publisher has a track record of publishing “notoriously sensational or scandalous books,” the bookstore or library assumes the risk of being held liable for defamation.⁹⁹ The import of the *Restatement (Second)*’s examples is that whether an intermediary would have “reason to know” of a statement’s defamatory character is a question of circumstance; in other words, it is a fact-specific inquiry. If special circumstances exist, the defendant must then decide whether to take the risk that a court will later deem the material to be unlawful.

Some examples from the case law might help to illustrate this point. In *Auvil v. CBS “60 Minutes,”*¹⁰⁰ a group of Washington apple growers brought a defamation claim against the CBS television network and three CBS local affiliates based on a report on the newsmagazine show *60 Minutes* concerning the use of the carcinogen

96. RESTATEMENT (SECOND) OF TORTS § 581 cmt. d (AM. LAW INST. 1977).

97. *Id.*

98. *Id.* § 581 cmt. e.

99. *Id.*

100. 800 F. Supp. 928 (E.D. Wash. 1992).

Alar on apples.¹⁰¹ In dismissing the claim against the affiliates, the court found that the affiliates had no obligation to review the broadcast for defamatory statements during the three-hour period between receiving the transmission from the network and airing the show:

With the possible exception of re-run movies, the content of which is already widely known and/or catalogued, plaintiffs' construction would force the creation of full time editorial boards at local stations throughout the country which possess sufficient knowledge, legal acumen and access to experts to continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face \$75 million dollar lawsuits at every turn. That is not realistic.¹⁰²

In *Sandler v. Calcagni*,¹⁰³ the court ruled that a contract printer that worked with authors to transform submitted PDFs into finished books could not be held liable for defamation under a theory of distributor liability based on defamatory material in one of the books it printed.¹⁰⁴ The printer, the court found, lacked actual knowledge because neither the printer nor any of its employees knew the contents of the book, nor had any employee "received any information to make [the company] question the content and factuality of the manuscript."¹⁰⁵ The court also noted that the printer had no duty of inspection.¹⁰⁶

Finally, tracking the examples in the *Restatement (Second)* are *Church of Scientology of Minnesota v. Minnesota State Medical Association Foundation*,¹⁰⁷ in which the fact that the original author was the American Medical Association gave rise to no special circumstances indicating a risk of liability for defamation,¹⁰⁸ and *Spence v. Flynt*,¹⁰⁹ in which the court noted that a distributor of *Hustler* magazine who had been involved in extensive defamation litigation with the plaintiff "knew that his continued distribution of the magazine made him vulnerable to the possibility of future legal responsibility for its content."¹¹⁰

101. *Id.* at 930–31.

102. *Id.* at 931; *cf.* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (applying cost-benefit analysis to negligence).

103. 565 F. Supp. 2d 184 (D. Me. 2008).

104. *Id.* at 195–96.

105. *Id.* at 195.

106. *Id.* at 195–96.

107. 264 N.W.2d 152 (Minn. 1978).

108. *Id.* at 156 ("The article's original publisher was known to be reputable, therefore MSMA and its officers had no reason to believe that the article was false and defamatory.").

109. 647 F. Supp. 1266 (D. Wyo. 1986).

110. *See id.* at 1274 ("Jackson, Wyoming is a relatively small community in which news of Gerry Spence, one of its most famous citizens, travels fast. The dispute between Mr. Spence and *Hustler* was well-known to Mr. Lynch. This was

With these cases as our backdrop, we can turn to analyzing results in copyright infringement cases, which often involve providers or platforms with no knowledge of special circumstances that would make a prediction of infringement more likely. Some courts analyzing knowledge in the contributory infringement context have thus been more forgiving of defendants. An early case in this regard was the 1995 decision in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,¹¹¹ involving the question of whether an online bulletin board service (“BBS”) could be contributorily liable for infringement committed by its users.¹¹² Netcom argued that basing knowledge on the receipt of notice was insufficient given the difficulty in determining whether the use was fair.¹¹³ The court acknowledged that, in some cases, verification of infringement would be challenging:

Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder’s failure to provide the necessary documentation to show that there is a likely infringement, the operator’s lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system.¹¹⁴

Because, however, Netcom admitted that it conducted no investigation after having received notice, the court held that questions remained as to Netcom’s knowledge.¹¹⁵

In a more recent case, *CoStar Group, Inc. v. LoopNet, Inc.*,¹¹⁶ the district court similarly noted that, absent notice from the copyright owner, a defendant would have difficulty determining whether infringement had occurred given the possibility that the use fell within the scope of a licensing agreement.¹¹⁷ “In the case of a service provider,” the court concluded, “knowledge giving rise to liability only exists when there is no colorable claim of users’ noninfringement. . . . [T]he bare claim of infringement by a copyright holder does not necessarily give rise to knowledge of an infringement.”¹¹⁸ And, even more recently, the Second Circuit held

simply not a case of an innocent magazine seller unwittingly disseminating allegedly libelous material.”)

111. 907 F. Supp. 1361 (N.D. Cal. 1995).

112. *Id.* at 1367.

113. Netcom had also argued that it was too difficult to determine whether the allegedly infringed material was covered by a valid registration, *id.* at 1374, but since registration is not required for copyrightability under the 1976 Act, this seems like an easily dismissed argument.

114. *Id.*

115. *Id.* at 1374–75.

116. 164 F. Supp. 2d 688 (D. Md. 2001), *aff’d*, 373 F.3d 544 (4th Cir. 2004).

117. *Id.* at 698.

118. *Id.* at 698, 707 (citing *Netcom*, 907 F. Supp. at 1374).

in *Capitol Records, LLC v. Vimeo, LLC*¹¹⁹ that the fact that a video—containing substantially all of a song protected by copyright—that was posted to a video-sharing platform was viewed by an employee was not sufficient to establish that the provider had either actual knowledge or reason to know of infringement. This was in part because “the service provider’s employee cannot be expected to know how to distinguish, for example, between infringements and parodies that may qualify as fair use” or to know “how likely or unlikely it may be that the user who posted the material had authorization to use the copyrighted music.”¹²⁰

At least some courts, however, have not been as generous with respect to possible copyright infringement. Take, for example, the district court’s opinion in *Capitol Records, LLC v. ReDigi, Inc.*,¹²¹ which granted summary judgment to the plaintiff on the question of contributory infringement.¹²² The defendant, ReDigi, offered an online marketplace for secondhand digital music.¹²³ Users who had purchased music on iTunes or from another ReDigi user could upload those files to a cloud-based locker.¹²⁴ Users could then sell the music file in the locker to another user for ReDigi credit, which could be used to purchase additional music.¹²⁵ In an attempt to forestall a finding of copyright infringement, ReDigi designed the system so that its scanning software would delete local copies of the files, packet by packet, on the computer being used as the file was uploaded to ReDigi’s locker.¹²⁶ Because, however, the transfer of the file to the locker implicated the owner’s reproduction rights (and could not be saved by resorting to the first sale doctrine, which applies only to the owner’s distribution rights), the district court concluded that this user activity constituted direct infringement.¹²⁷ Having so determined, the court then considered whether ReDigi was engaging in contributory and vicarious infringement. The contributory infringement analysis required a determination of whether ReDigi knew or should have known that this user activity constituted copyright infringement.¹²⁸ In determining that it had “little difficulty” in concluding that ReDigi had the requisite knowledge, the court highlighted the uncertainty in the law as evidence of knowledge:

Despite the fact that ReDigi boasted on its website that it was “The Legal Alternative” and insisted “YES, ReDigi is LEGAL,”

119. 826 F.3d 78 (2d Cir. 2016).

120. *Id.* at 96–97.

121. 934 F. Supp. 2d 640 (S.D.N.Y. 2013), *aff’d*, 910 F.3d 649 (2d Cir. 2018).

122. *Id.* at 659–60.

123. *Id.* at 645.

124. *Id.*

125. *Id.* at 646.

126. *Id.* at 645–46, 650.

127. *Id.* at 650, 655–57.

128. *Id.* at 658.

ReDigi warned investors in its subscription agreements that “the law cannot be said to be well-settled” in this area and that it could not guarantee ReDigi would prevail on its copyright defenses. The Recording Industry Association of America (“RIAA”) sent ReDigi a cease-and-desist letter in November 2011, advising ReDigi that its website violated Capitol’s and other RIAA members’ copyrights. Further, ReDigi was ensnared in a licensing dispute over song clips and cover art shortly after its launch, plainly indicating that infringement could be afoot. ReDigi was also, of course, aware that copyright protected content was being sold on its website — a fact central to its business model and promotional campaigns. Finally, ReDigi’s officers claim to have “researched copyright law [and] consulted with attorneys” concerning their service, and also to have met with record companies “to get input, get marketing support[,] and enter into deals with the labels.” By educating themselves, the officers presumably understood the likelihood that use of ReDigi’s service would result in infringement. Indeed, though ReDigi attempts to use its consultations with counsel as a shield, it is telling that ReDigi declined to reveal any of the advice it received on the subject.¹²⁹

The question of knowledge was not an issue on appeal; ReDigi appealed (and lost) only on the questions of first sale and fair use,¹³⁰ which may seem to support (with hindsight bias) the district court’s conclusion that knowledge of infringement was obvious. But at the time, ReDigi did not know that its users would be deemed to be infringers given the state of the doctrine and its potential application to new technologies.¹³¹ It should be concerning that acknowledgment of uncertainty in the doctrine (seeking legal advice and licensing deals in a case that even the district court acknowledged raised a “novel question”)¹³² was treated as clear evidence of knowledge of infringement at the very time that those activities were being undertaken.

129. *Id.* at 658–59 (alteration in original) (citations omitted). *But see* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (“[W]e reject Acuff–Rose’s argument that 2 Live Crew’s request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew’s actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation.”).

130. *See* *Capitol Records, LLC v. ReDigi, Inc.*, 910 F.3d 649, 656, 663 (2d Cir. 2018).

131. *Compare, e.g.*, *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121, 137 (2008) (holding that the provision of television programming over the internet through individual server space on remote DVR system is not an infringing public performance), *with* *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 449 (2014) (holding that the provision of television programming over the internet through individual antennas is an infringing public performance (but not discussing *Cartoon Network*)).

132. *ReDigi*, 934 F. Supp. 2d at 648.

The district court in *Cariou v. Prince*¹³³, by contrast, found knowledge based on *not* seeking legal advice.¹³⁴ The case involved the well-known appropriation artist Richard Prince's use of a number of photographs created by the plaintiff, Patrick Cariou.¹³⁵ In addition to the suit against Prince, Cariou also sued the Gagosian Gallery, Larry Gagosian, and Rizzoli International Publications.¹³⁶ In holding the Gagosian defendants liable not only for direct infringement but also for contributory infringement, the district court noted that the defendants "were well aware of (and capitalized on) Prince's reputation as an appropriation artist who rejects the constricts of copyright law, but they never inquired into the propriety of Prince's use of the photos."¹³⁷ Accordingly, the court concluded, the Gagosian defendants knew or should have known that Prince's use of the photographs was infringing when they promoted his work, despite the argument that his activity constituted a fair use.¹³⁸ And, indeed, the finding of infringement was largely reversed on appeal, with the Second Circuit holding that Prince's use of twenty-five of the thirty works at issue was fair use as a matter of law and remanding the case for reconsideration of the five remaining works.¹³⁹

D. What Is Knowledge?

Here, though, is the question that these varying conclusions surface: Is it even possible to "know" whether another's activity is infringing, given that infringement is a legal status that does not exist until a court pronounces it so? Or is what the courts have characterized as "knowledge" really an assessment of unlawfulness, where a determination of fault would depend on how reasonable that assessment was deemed to be under the circumstances?¹⁴⁰ The cases

133. 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *judgment rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

134. *Id.* at 345-355.

135. *Id.* at 343-44.

136. *See id.* at 337. Rizzoli was later voluntarily dismissed from the case. *See* Docket Entry 29, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2010) (No. 1:08-CV-11327).

137. *Cariou*, 784 F. Supp. 2d at 354-55.

138. *Id.* at 355.

139. *Cariou v. Prince*, 714 F.3d 694, 706, 712 (2d Cir. 2013). The case settled in March 2014. Brian Boucher, *Landmark Copyright Lawsuit Cariou v. Prince Is Settled*, ART AM. (Mar. 18, 2014, 6:01 PM), <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/>.

140. Daphne Keller has reported that in some jurisdictions, a provider is not deemed to know that a user's content is unlawful until it is adjudicated as such by a court, with exceptions for "manifestly" unlawful content. Daphne Keller, *Toward a Clearer Conversation About Platform Liability, Emerging Threats*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), <https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability> (citing sources from Argentina, Brazil, Chile, India, and Spain).

discussed above all suggest that the concept of “knowledge” as used in contributory infringement doctrine is something of a misnomer. Knowledge (and its corollary, reason to know) does not describe a certainty regarding a fact in the world but rather a prediction of a legal status. (The *Restatement (Second)* states that both standards “are used with respect to existent facts.”)¹⁴¹ The standard does not require the defendant to proactively investigate, but once circumstances are brought to its attention that suggest some level of probability that the underlying speech is unlawful, it is then incumbent on the defendant to make a decision as to whether to accept the risk that continued material assistance will render it secondarily liable.

Indeed, it is questionable whether the fact that something is infringing can even be known at all *ex ante*. An instance of speech cannot be inherently infringing in the same way that a car can be red; infringing speech takes on that characteristic as a legal matter only after a judicial body has determined it to have that characteristic. The fact that a car is red depends on shared and received understandings, but it is unlikely to be debated or to depend on the result of a future determination. In other words, we know to use the word “red” to describe the color of a particular car because we have been taught that a particular color perception should be described using the word “red.” Assuming no issues of color perception, once that visual transmission has been made, we can say that we know that fact (the color of the car) because it can be perceived without the need to rely on information from another source. But this is not true of the status of infringement. A song that is substantially similar to another song may well be determined not to be infringing based on the conclusion that the creator did not have access to the original (and therefore did not copy it)¹⁴² or the conclusion that the defendant was engaging in fair use. *Brammer*, as noted above, is an example of how the status of a particular use is only as determinable as the most recent court to have opined on it.

Unfortunately, we use the concepts of “knowledge” and “fact” both to describe things that fall into the “my car is red” category and to describe things that fall into the “this speech is infringing” category,¹⁴³ despite the fact that the latter conclusion is more legal

141. RESTATEMENT (SECOND) OF TORTS § 12 cmt. a (AM. LAW INST. 1965) (emphasis added).

142. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (“[I]f by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.”).

143. Brian Leiter, *Law and Objectivity*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 969, 975 (Jules Coleman & Scott Shapiro eds. 2002) (“Most philosophers who deny the metaphysical objectivity of morality claim that its semantic is non-cognitive: rather than stating facts (that either obtain or do not obtain), ethical statements, according to *non-cognitivism*, express

than factual. (The deceptively simple verb “is” to connect the two—rather than “is likely to be adjudicated as” or some other variant—also elides this distinction.) And although it is true that, in a highly metaphysical sense, we might say that a car isn’t red *ex ante*—it only becomes red once there is someone to perceive it as such (the age-old question involving the sound of a tree falling alone in the forest)—the problem is even more acute with the types of determinations at issue here. The very nature of the determination—whether speech is infringing—is such that the speech does not take on that characteristic until a judicial body declares it to be such. Before any such judicial determination, then, any “knowledge” of that speech’s legal status on the part of an intermediary is nothing more than a prediction of what a judicial body is likely to conclude.

This view is supported by looking to epistemological scholarship. Central to the shift in the view of what constitutes knowledge is a 1963 article by Edmund Gettier titled *Is Justified True Belief Knowledge?*¹⁴⁴ In the article, Gettier rejected prior attempts to state necessary and sufficient conditions for knowledge based on the claim that knowledge consists of a justified belief in a true proposition.¹⁴⁵ In other words, Gettier argued, if an individual has justifiable grounds for believing a proposition that turns out to be true, but on different grounds, that individual cannot be said to have known the proposition. So, for example, Gettier posited that Smith believes that “Jones owns a Ford” and has “strong evidence” for this proposition and that Smith “has another friend, Brown, of whose whereabouts he is totally ignorant.”¹⁴⁶ Taking then, the proposition that “[e]ither Jones owns a Ford or Brown is in Barcelona” (choosing Barcelona at random), Smith would say that the proposition is true based on his belief that Jones owns a Ford.¹⁴⁷ Gettier then asked us to suppose that Jones actually does not own a Ford, but, as it turns out, Brown is in Barcelona.¹⁴⁸ Even though Smith’s belief that the proposition is true was correct, it was not correct for the reason Smith believes it is, and so Smith cannot be said to have known the proposition.¹⁴⁹

Michael Clark, writing shortly after the publication of Gettier’s article, augmented Gettier’s theory by proposing that for an

attitudes or feelings of various kinds. Non-cognitivists bear the burden, then, of explaining away the surface grammar and logical structure of ethical discourse which make it indistinguishable from ordinary empirical discourse (compare: ‘This distribution is unjust,’ with ‘That chair is red’).” (citation omitted).

144. Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 *ANALYSIS* 121 (1963).

145. *Id.*; see, e.g., A.J. AYER, *THE PROBLEM OF KNOWLEDGE* 34 (1956) (“I conclude then that the necessary and sufficient conditions for knowing that something is the case are first that what one is said to know be true, secondly that one be sure of it, and thirdly that one should have the right to be sure.”).

146. Gettier, *supra* note 144, at 122.

147. *Id.* at 122–23.

148. *Id.* at 123.

149. *Id.*

individual to truly know a proposition, his belief that the proposition is true must be “fully grounded”—meaning that the individual must have justifiable grounds for relying on the particular evidence at hand.¹⁵⁰ To revisit Gettier’s example from above, it would not be enough, according to Clark, that Smith has “strong evidence” that Jones owns a Ford; we would need to ask *why* Smith believes that proposition and whether those grounds are justifiably relied upon.¹⁵¹ (For example, Smith might say that his belief was based on a report from Brown, who has always proved to be reliable in the past, even if he was incorrect in this instance.)¹⁵² Alvin Goldman was similarly aligned in his approach to the issue, characterizing knowledge as requiring a causal connection between what makes a proposition true and why the individual believes it to be true.¹⁵³ Furthermore, Goldman argued, the supporting inferences leading an individual to believe something to be true must be warranted—in other words, they must “confirm [the proposition] very highly, whether deductively or inductively,” as opposed to merely being “lucky guesses.”¹⁵⁴

Isaac Levi, by contrast, took issue with the focus on justification, instead arguing from a pragmatic perspective. It is not important, Levi contended, how an individual acquires knowledge; our focus should be on how that individual maintains knowledge and avoids introduction of subsequent error.¹⁵⁵ Thus, there is no distinction between believing a proposition to be true and knowing it to be true:

From X’s point of view at *t*, there is no difference between what he fully believes at *t* and what he knows at *t*. From his point of view at *t*, if he fully believes *h* at *t*, the falsity of *h* is not a serious possibility for him at *t*. Hence, according to X, *h* is true. There is no need for justification. How could there be, given that the falsity of *h* is not a serious possibility? Only if one insists that in order to claim knowledge that *h*, X must also show that he admitted *h* into his corpus legitimately, could an opening be made for a distinction between knowing that *h* and his believing that *h*. But it is precisely this sort of pedigree epistemology that I mean to reject.¹⁵⁶

To some extent, Levi’s relativistic view of knowledge is embedded in the very way that we let juries decide cases. When a jury concludes, in a civil matter, that an event is more likely than not to have occurred or, in a criminal matter, that an event occurred beyond a

150. Michael Clark, *Knowledge and Grounds: A Comment on Mr. Gettier’s Paper*, 24 ANALYSIS 46, 47 (1963).

151. *Id.*

152. *See id.* at 46–47.

153. Alvin Goldman, *A Causal Theory of Knowing*, 64 J. PHIL. 357, 358 (1967).

154. *Id.* at 363.

155. ISAAC LEVI, *THE ENTERPRISE OF KNOWLEDGE: AN ESSAY ON KNOWLEDGE, CREDAL PROBABILITY, AND CHANCE* 28 (1980).

156. *Id.*

reasonable doubt, we cannot say that the event occurred as a matter of epistemological certainty. Witnesses might be lying, key evidence might not have been presented, and individual jurors might be employing erratic reasoning processes. Indeed, the ability of some criminal defendants to have their convictions reversed based on DNA or other newly discovered or analyzed evidence tells us that a jury's conclusion as to what happened in any case is not "fact" but rather is a particular legal kind of fact: facts that we accept as true for purposes of the case before us at the time. When a jury concludes that a defendant was at the crime scene because it disbelieves his alibi and believes other witnesses, the defendant was, for all legal purposes, at the crime scene, even if this is not actually true.¹⁵⁷

This is perhaps even more true when we consider the juridical "fact" of whether an action is lawful or unlawful. Whether a particular physical touching of another is "harmful or offensive" (and thus constitutes a battery), for example, is a determination that is stated in fact-like language but is actually a legal determination of what the particular decision maker at the time believes has met that standard.¹⁵⁸ And that conclusion—given that it is a question of "fact"—can differ from court to court and over time as well. What may be harmful or offensive to one jury may not be so to another.¹⁵⁹

157. See Joseph W. Little, *Introduction to the Law of Torts*, 45 ST. LOUIS U. L.J. 715, 718 (2001) ("In a sense, the jury's fact-finding role mirrors that of those football officials who review television tapes of the play to make an instant replay decision. The actual 'truth' of the replay depends upon camera angles, television lens' fidelity, the presence of occluding bodies between the lens and the play and similar factors. By contrast, the fidelity of a jury's 'instant replay' decisions as measured by 'truth as God knows it' is a function of the amount and quality of the evidence submitted to it, the skill of the lawyers and the capabilities of the jurors. When parties dispute historical facts (such as What happened?, When?, Where? By whose acts? and Why?) juries must provide the answers (often embodied in verdicts). These 'findings of fact' become the legal version of the historical truth and they determine who wins and who loses the cases.").

158. See, e.g., *White v. Univ. of Idaho*, 768 P.2d 827, 828 (Idaho Ct. App. 1989) ("[A] person may commit a battery when intending only a joke, or a compliment—where an unappreciated kiss is bestowed without consent, or a misguided effort is made to render assistance.").

159. MICHAEL P. LYNCH, *TRUE TO LIFE: WHY TRUTH MATTERS* 44 (2004) ("Whether it is legal to buy alcohol, or carry a handgun, depends on where you are. As a result, while legal truth is objective in that we can make mistakes about what does or doesn't fit with the body of law, it is also relative—whether an action is legal or not depends on the system of law in question. In this sense, the pluralist intuition behind relativism I noted earlier seems apt with regard to the law: there can be more than one true description of "legal reality"—of what actions are legal and what are not."); see also, e.g., DENNIS PATTERSON, *LAW AND TRUTH* 5–6 (1996) (describing the key difference between the realist position and the anti-realist position as being that the former claims that a "truth" exists outside of our ability to recognize it (i.e., an objectivist position), while the anti-realist claims that "truth" is only what we agree on); Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 300 (1998) ("[S]ome facts seem easily severable from value judgments, or the application of legal norms: for example,

This is particularly true of “factual” determinations that have a purely legal or social origin. Whether a physical touching is “harmful” or “offensive” is a way of assigning a legal label to a characteristic that has a physical resonance; the harm of such a touching is felt by the plaintiff, and the label is a way of encouraging jurors to think about the harm at issue. With speech that is “infringing,” the harm of the speech is purely that created by the law—infringing speech is harmful not because of the feelings it engenders but because society has determined that authors should have certain legal rights and that infringing speech violates those rights.¹⁶⁰

This is not, therefore, what Alvin Goldman has characterized as a “veriphobic” view of the world in which the concepts of truth and falsity have no meaning whatsoever—a relativistic view that holds that knowledge is simply a matter of “institutionalized belief” or “social doxology.”¹⁶¹ Rather, this is the recognition that a legal characteristic is not the same thing as a natural fact and that our current secondary liability doctrine is unclear about what it expects of intermediaries in this regard. It is inapt, therefore, to say that a party had knowledge about something that did not, in fact, exist at the time (a declaration of infringement), even if one could have predicted that result. In at least some instances—*Aereo* and *Brammer* are but two examples—educated observers could differ in their judgment. It is therefore inappropriate to say that such judgment constituted knowledge.¹⁶²

was a certain chemical present in the deceased’s blood? Other facts, however, consist of complex social evaluations: for example, was a situation dangerous, or is a picture sexually explicit? . . . Establishing that somebody died is much less dependent on changing social views than establishing that he was engaged in provocative or life-threatening behavior at the time of his death. A stronger conception of objectivity can thus be applied in the former than in the latter case.”)

160. Compare, for example, Dennis Patterson’s description of the legal term “negotiable instrument”:

Like the vast majority of general legal terms, “negotiable instrument” is an artifact, a creature of convention. The meaning of “negotiable instrument” is not “given by the way the world is”; there is no “real nature” of a negotiable instrument. We do not “discover” the meaning of “negotiable instrument” by discerning objects in the world having rigidly designated natural properties. It is only in and through the institutional conventions of commerce that “negotiable instrument” has its meaning. To know the meaning of this general legal term, one must consult the conventions for its use, for it is solely against that background that participants in legal discourse frame interpretive arguments. Those arguments are shaped through and through by institutional conventions that are constitutive of law.

PATTERSON, *supra* note 159, at 54 (footnotes omitted).

161. ALVIN I. GOLDMAN, *KNOWLEDGE IN A SOCIAL WORLD* 7 (1999).

162. Cf. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 201 (2011) (“What is perverse about the use of *know* in [such a] context is not that some individuals get credit for prescience that they do not deserve. It is that the language implies

The concept of “knowledge” is particularly problematic in the context of contributory infringement because the underlying facts that go into a determination of infringement often depend on facts related to (and often known only to) the copyright owner: that she is the owner of the work, that she did not authorize its use, and so forth. This phenomenon is not always troubling; as Alvin Goldman notes, we often rely on the testimony of unfamiliar reporters as we make decisions in our daily lives:

If you arrive at an airport and the public address system announces a one-hour delay of your flight, you will typically assign a high probability to that statement (or the statement that it is delayed by *at least* one hour). But you have no knowledge whatever of the speaker’s individual characteristics. (Here the speaker is delivering a report second hand; but I allow that to pass in this context.) Have you made an unreasonable probability estimate, indefensible by Bayesian standards? Not necessarily. First, you have background information about the sorts of flight information available to personnel using the public address system. Second, you have some idea of how employees are likely to be chastised or disciplined for serious errors. Third, you have general information, partly derived from knowledge of “folk psychology,” about how individuals will typically respond to their job’s incentive systems. . . . Thus, hearers may be positioned to make reasonably accurate likelihood estimates without knowing anything distinctive about the specific reporter, just by knowing the circumstances of her employment.¹⁶³

Central to the persuasiveness of Goldman’s point, however, is our willingness to treat that voice as expert for the proposition it states—we assume, in other words, that the voice we hear over the public address system is both someone authorized to make such announcements (and not, say, an interloper who has taken control of the microphone) and someone who has sufficient incentives to announce correct information.¹⁶⁴ This is not, however, as likely to be true in the situations at issue here. One might argue that certain owner characteristics might lead an intermediary to credit information more robustly—the fact that a report is coming from a large, respected corporation rather than from an unknown individual, for example. But, as experience has demonstrated, even such actors

that the world is more knowable than it is. It helps perpetuate a pernicious illusion.”).

163. GOLDMAN, *supra* note 161, at 125.

164. Cf. C.A.J. Coady, *Testimony and Observation*, 10 AM. PHIL. Q. 149, 151–52 (1973) (noting that verifying the reliability of experts often requires either reliance on the reports of others, which raises the same issue, or investigating the accuracy of past statements, which obviates the need for the expert).

have little incentive to understate their legal claims.¹⁶⁵ In *Reno v. ACLU*,¹⁶⁶ for example, in which the Supreme Court largely invalidated the Communication Decency Act (“CDA”)’s attempt to regulate indecent speech on the internet, the Court rejected the government’s assertion that the “knowledge” requirement of 47 U.S.C. § 223(a) and (d) saved the CDA from overbreadth because it ensured that only speech to minors was at issue and not speech communicated to adults.¹⁶⁷ Given the way in which such “knowledge” would be obtained, the Court noted, the statute “would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old child . . . would be present.”¹⁶⁸

This consideration of whether it is possible to “know” a future legal conclusion highlights that the knowledge requirement refers, at best, to having a “reason to know,” so long as we give “know” a nonintuitive meaning. One cannot have actual knowledge of a prediction—as any reputable lawyer will say when she gives advice, no legal outcome is a certainty. And one can only have “reason to know” that infringement has taken or will take place if we interpret this phrase as meaning “reason to predict that a court shall so conclude” from an objective perspective. The fact that contributory infringement can also be based on inducing another to infringe and yet still require knowledge—the standard is “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”¹⁶⁹—highlights that knowledge is inherently a predictive exercise. One cannot induce a past act of infringement, so any “knowledge” that accompanies inducement must mean an expectation that the other party will follow through on what appears to be infringement.¹⁷⁰

165. See, for example, the letters posted at the website LUMEN, <https://www.lumendatabase.org/>, formerly known as Chilling Effects. See also JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 42–43 (2011) (detailing overreaching copyright claims by creators and content producers).

166. 521 U.S. 844 (1997).

167. *Id.* at 849, 880.

168. *Id.* at 880.

169. *Gershwin Publ’g. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (citing *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966), *aff’d*, 327 F. Supp. 788 (S.D.N.Y. 1971), *rev’d on other grounds sub nom.* *Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp.*, 453 F.2d 552 (2d Cir. 1972)).

170. See Menell & Nimmer, *supra* note 69, at 1017 (noting that the plaintiffs in *Sony* would not likely have succeeded on an inducement theory because that theory would have “required Sony to know or have reason to know that home taping was illegal. Given the uncertainty surrounding the contours of fair use, it seems doubtful that this element could have been established.”).

III. NOTICE AND KNOWLEDGE

Unfortunately, courts compound the fuzziness around what knowledge really means in this context in their discussion of notice—specifically, their conclusions that the notice sent by the copyright owner either provided the defendant with actual knowledge of infringement or provided the defendant with reason to know of infringement.

This distinction was not apparent in *Gershwin* given the defendant's thoroughgoing engagement with the community concerts at issue in the case. The defendant obtained all the information relevant to its decision to go forward from its own activities and discussions with the local concert organizers; it was not trying to evaluate the use of a copyrighted work that was entirely unfamiliar to it. The more difficult cases are ones in which the secondarily liable party isn't an active participant in the infringement *ex ante* in the *Gershwin* sense but instead provides the facilities for infringement on an ongoing basis and is thus put in the position of constantly having to make decisions as to individual acts of alleged infringement that have already occurred. In *Fonovisa, Inc. v. Cherry Auction, Inc.*,¹⁷¹ involving the provision of swap meet facilities, the court departed broadly from the concept of knowledge on which the holding in *Gershwin* is predicated. Here, the court found that the plaintiff adequately alleged knowledge not as a result of Cherry Auction's awareness of its own investigatory efforts (or lack thereof) but as a result purely of notice: a visit by and letter from the sheriff's department and an investigatory visit by the plaintiff.¹⁷² The court did not evaluate the nature of the notice, whether the notice would have led to the conclusion that the material being distributed was unlawful, or the basis for its conclusion that the material at issue was infringing. All of that was assumed, resulting in the conclusion that notice equaled knowledge.¹⁷³

171. 76 F.3d 259 (9th Cir. 1996).

172. *Id.* at 261 ("There is also no dispute for purposes of this appeal that Cherry Auction and its operators were aware that vendors in their swap meet were selling counterfeit recordings in violation of Fonovisa's trademarks and copyrights. Indeed, it is alleged that in 1991, the Fresno County Sheriff's Department raided the Cherry Auction swap meet and seized more than 38,000 counterfeit recordings. The following year, after finding that vendors at the Cherry Auction swap meet were still selling counterfeit recordings, the Sheriff sent a letter notifying Cherry Auction of the on-going sales of infringing materials, and reminding Cherry Auction that they had agreed to provide the Sheriff with identifying information from each vendor. In addition, in 1993, Fonovisa itself sent an investigator to the Cherry Auction site and observed sales of counterfeit recordings.").

173. *See id.* at 264. The in-person visit by law enforcement is simply the written notice in a stronger form.

In both *A&M Records, Inc. v. Napster, Inc.*¹⁷⁴ and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,¹⁷⁵ the Ninth Circuit assumed the expansive definition of knowledge that *Fonovisa* provided, in which knowledge and notice are essentially equivalent, and the only issue is the timing of that knowledge. The Ninth Circuit concluded that Napster had *actual* knowledge of the infringing conduct as a result of notices from the RIAA of infringing material being traded using the Napster search index and that Napster's continued participation in that infringement—in other words, its failure to remove those song titles from the index in response to the notices—was a knowing, material contribution to any future acts of infringement of that material.¹⁷⁶ In contrast, the Ninth Circuit concluded in *Grokster* that whatever knowledge Grokster might eventually have obtained through the RIAA's notices came too late—in other words, after it had already provided the material contribution (the distribution of the technology).¹⁷⁷ But neither case questioned whether the notice was, by itself, sufficient to provide “knowledge of the infringing activity.” And because many intermediaries distribute speech online with some degree of permanence—websites, message boards, online forums, and so forth—the timing question is not likely to be an issue. As in *Fonovisa*, the notice will come at a time when the provider can do something about the accused infringement (i.e., take it down or leave it up), and so the issue of whether notice equals knowledge is highly relevant.

Indeed, courts often elide this consideration by concluding that notice provided by an agent of the copyright holder also provides the requisite knowledge—in other words, being informed by a third party that a customer or vendor is engaging in copyright infringement is equivalent to knowing that infringement is taking place. For example, in *UMG Recordings v. Sinnott*,¹⁷⁸ the court concluded that it was “clear” that the defendant had both actual and constructive knowledge of his vendors' sales of infringing CDs and cassettes because RIAA investigators “identified themselves to Sinnott, and explained that three MFM vendors were selling infringing CDs or cassettes, requested his assistance in putting a stop to the infringing activity, explained Sinnott's potential liability, and offered to train Sinnott and his staff to recognize infringing sound recordings.”¹⁷⁹ Because the defendant did not contest that he received and understood this message, the court found that he possessed knowledge of the claimed infringement.¹⁸⁰ The court in *Monotype*

174. 239 F.3d 1004 (9th Cir. 2001).

175. 380 F.3d 1154 (9th Cir. 2004), *vacated*, 545 U.S. 913 (2005).

176. *Napster*, 239 F.3d at 1004, 1020 n.5.

177. *Grokster*, 380 F.3d at 1162. The Supreme Court's decision in the case was based on a theory of inducement. *Grokster*, 545 U.S. at 936–37, 941.

178. 300 F. Supp. 2d 993 (E.D. Cal. 2004).

179. *Id.* at 999.

180. *Id.*

Imaging, Inc. v. Bitstream, Inc.,¹⁸¹ to take another example, characterized the doctrine thus: “The knowledge element for contributory copyright infringement is met in those cases where a party has been notified of specific infringing uses of its technology and fails to act to prevent future such infringing uses, or willfully blinds itself to such infringing uses.”¹⁸²

By contrast, in *CoStar Group, Inc. v. LoopNet, Inc.*,¹⁸³ in which the plaintiff brought suit against the operator of a real estate website where agents had posted the plaintiff’s photographs without authorization, the court was less sanguine about the effect of notice, writing that “the bare claim of infringement by a copyright holder does not necessarily give rise to knowledge of an infringement.”¹⁸⁴ And *Lockheed Martin Corp. v. Network Solutions, Inc.*,¹⁸⁵ a contributory trademark infringement case, offers the following:

The mere assertion by a trademark owner that a domain name infringes its mark is not sufficient to impute knowledge of infringement to NSI. . . . In holding that the degree of uncertainty over infringing uses of domain names makes it inappropriate to impose contributory liability on NSI, the Court is not making new trademark rules for the Internet. Contributory infringement doctrine has always treated uncertainty of infringement as relevant to the question of an alleged contributory infringer’s knowledge. A trademark owner’s demand letter is insufficient to resolve this inherent uncertainty.¹⁸⁶

181. 376 F. Supp. 2d 877 (N.D. Ill. 2005).

182. *Id.* at 886; *see also* Century Consultants, Ltd. v. Miller Grp., Inc., No. 03-3105, 2008 WL 345541, at *7 (C.D. Ill. Feb. 7, 2008) (finding knowledge established through contract that required defendant to create a program that would incorporate plaintiff’s works).

183. 164 F. Supp. 2d 688 (D. Md. 2001).

184. *Id.* at 691–92, 707 (citing Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc., 907 F. Supp. 1361, 1374 (N.D. Cal. 1995)).

185. 985 F. Supp. 949 (C.D. Cal. 1997).

186. *Id.* at 963–64 (citations omitted). *But see* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 n.19 (1984) (“We have consistently rejected the proposition that a similar kinship exists between copyright law and trademark law, and in the process of doing so have recognized the basic similarities between copyrights and patents.”); Mark Bartholomew, *Copyright, Trademark and Secondary Liability After Grokster*, 32 COLUM. J.L. & ARTS 445, 454–56 (2009) (contrasting knowledge requirements under copyright law and trademark law).

One commentator has also elided this distinction in defamation cases. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 152, 230 n.97 (2007) (“When the statement was first posted, AOL would clearly not be liable. But after Zeran told AOL that it was false and begged them to take it down, then AOL had reason to know it was defamatory.” (discussing *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997))).

Indeed, as Dan Burk has suggested, invoking the epistemological literature, the simple receipt of a notice cannot be said to be “knowledge” of the information it contains; at the very least, to say that one knows something is to convey that one believes that she knows it, which requires some level of reflection on the truthfulness of the information.¹⁸⁷

This is not to say, however, that a defendant might not be justified in relying on a notice from a copyright owner to make a prediction about the likelihood of a court’s conclusion that the activity claimed as infringement is indeed infringing. Some such defendants will not be trained in copyright law or will not have the time or resources to acquire additional information or advice to assist in their evaluation of the claim and might reasonably conclude that the notice is reliable. But to call this decision-making process “knowledge” mischaracterizes what is happening and, as I will discuss, has the potential to distort a court’s evaluation of the defendant’s conduct.¹⁸⁸

It is, of course, true that even the “reason to predict” conception of knowledge has very little relevance to a good deal of online activity. Such a standard might work for defendants similar to those in *Gershwin* and *Fonovisa*, where the number of claims to consider is relatively small and the risk to protected speech minimal. An online service provider or platform, by contrast, has significant resource constraints on its ability to make any predictions about claimed infringement; for such providers, referring to knowledge in any form is highly misdescriptive.

The DMCA acknowledges this only partially. Section 512 provides, in pertinent part, that a service provider shall not be liable for damages for copyright infringement committed on its service by its users so long as the provider “does not have actual knowledge” that the material is infringing; the provider, in the absence of actual knowledge, “is not aware of facts or circumstances from which infringing activity is apparent”; and the provider, upon obtaining such knowledge or awareness, “acts expeditiously to remove, or

187. Burk, *supra* note 45, at 443 (“Knowledge and information are typically distinguished in epistemological discussions; often information is regarded as prerequisite to knowledge, but the latter is viewed as requiring some additional degree of cognition, application, contemplation, or awareness beyond the simple provision of information. . . . Statutory provisions that involve ‘knowledge’ or acting ‘knowingly’ as the legal requirements for mental state generally contemplate not merely possession of information, but awareness or appreciation of the information.”).

188. At least one court has recognized this distinction. See *LoopNet*, 164 F. Supp. 2d at 707 (noting that notice provided under the DMCA gives a provider the option of responding via the takedown process of 17 U.S.C. § 512(c)(1)(C) or “refus[ing] to remove the allegedly infringing material and expos[ing] itself to the choppy waters of contributory infringement liability,” but that the notice does not “automatically equate to knowledge for the purpose of assessing liability”), *aff’d*, 373 F.3d 544 (4th Cir. 2004).

disable access to, the material.”¹⁸⁹ It further provides that the safe harbor from liability shall apply so long as, upon receipt of a qualifying notice of claimed infringement, the provider “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.”¹⁹⁰ The first of these provisions appears to simply enact secondary liability doctrine more generally in its reference both to “actual knowledge” and to “facts or circumstances from which infringing activity is apparent” (put otherwise, “reason to know”). For this reason, to the extent this provision provides a safe harbor at all, it seems to be only with respect to direct infringement for publicly displaying, performing, or distributing infringing material.

The statute’s reference to “facts or circumstances from which infringing activity is apparent” implements what the legislative history refers to as a “red flag” test—“information of any kind that a reasonable person would rely upon,” including a notice.¹⁹¹ In other words, a service provider is not required to proactively monitor its service for evidence of infringing activity, but “if the service provider becomes aware of a ‘red flag’ from which infringing activity is apparent, it will lose the limitation of liability if it takes no action.”¹⁹² Consistent with a “reason to know” standard, the congressional report further notes that this part of the test is objective—what would have been apparent to “a reasonable person operating under the same or similar circumstances.”¹⁹³ In other words, as the Second Circuit noted in *Capital Records, LLC v. Vimeo, Inc.*,¹⁹⁴ “the actual knowledge provision turns on whether the provider actually or ‘subjectively’ knew of specific infringement, while the red flag provision turns on whether the provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”¹⁹⁵ This provision therefore codifies to some extent the idea

189. 17 U.S.C. § 512 (c)(1)(A) (2018).

190. *Id.* § 512(c)(1)(C).

191. H.R. REP. NO. 105–551, pt. 1, at 25 (1998); H.R. REP. NO. 105–551, pt. 2, at 53 (1998) (describing facts or circumstances that constitute a “red flag” as when infringing activity “would have been apparent to a reasonable person operating under the same or similar circumstances”); S. REP. NO. 105–190 (1998). The first part of the House report (from the Judiciary Committee) incorrectly states that this standard “differs from existing law, under which a defendant may be liable for contributory infringement, if it knows *or should have known* that material was infringing.” H.R. REP. NO. 105–551, pt. 1, at 25; *see also* 6 PATRY ON COPYRIGHT § 21:85 (2020) (characterizing the Judiciary Committee report as unreliable); Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 252 (2009) (noting that “Congress intended to establish a high standard of knowledge,” under which “[i]t is not enough that facts suggest potential or possible infringement, or that facts might raise a suspicion of infringement”).

192. H.R. REP. NO. 105–551, pt. 2, at 53.

193. *Id.*

194. *Capital Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 93 (2d Cir. 2016).

195. *Id.* (quoting *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012)).

that a provider can “know” that infringement has occurred, although it couches it in predictive language. In this regard, it is important to note that the “reasonable person” is “an ordinary person—not endowed with specialized knowledge or expertise concerning . . . the laws of copyright.”¹⁹⁶ Thus, the Second Circuit held in *Vimeo* that evidence that an employee of a video-hosting platform had seen a video posted by a user that included all or substantially all of a song protected by copyright, which the plaintiff alleged was “recognizable,” was not sufficient “to make infringement *obvious* to an ordinary reasonable person, who is not an expert in music or the law of copyright.”¹⁹⁷

The third provision, typically referred to as “notice and takedown,” is where much activity takes place. As noted, the DMCA provides that upon receipt of a qualifying notice, the provider can take advantage of immunity from liability if it takes down the material identified in the notice.¹⁹⁸ The provider must then notify the user, who has the opportunity to file a counter-notice challenging the basis for the removal.¹⁹⁹ If the user files a counter-notice, the provider must replace the material no earlier than ten and no later than fourteen days later, unless the copyright owner initiates an action in court against the user.²⁰⁰ (The fact that reposting of the material is delayed for ten days upon receipt of the counter-notice was part of the basis for Senator McCain’s counsel’s concern.)²⁰¹

Because this procedure appears in the same part of the statute as the reference to actual knowledge, some courts and commentators have described the DMCA’s provisions as establishing a “notice equals knowledge” scenario;²⁰² the idea is that the notice provided by the copyright owner establishes knowledge on the part of the service provider, who must then remove the material or fall victim to the earlier part of the statute. But this isn’t quite accurate. To begin with, section 512 provides a safe harbor from liability; failure to qualify for the safe harbor simply means that liability is analyzed under traditional secondary liability doctrines. If receipt of a notice

196. *Id.* at 94.

197. *Id.*

198. 17 U.S.C. § 512(c)(1)(C) (2018).

199. *Id.* § 512(g)(2).

200. *Id.*

201. *See supra* text accompanying notes 1–7.

202. *See, e.g.,* *CoStar Grp., Inc. v. LoopNet, Inc.*, 164 F. Supp. 2d 688, 702 (D. Md. 2001) (characterizing a DMCA notice as one of “three types of knowledge of infringement that can take a service provider out of the safe harbor”); Lee, *supra* note 191, at 252; Yen, *supra* note 40, at 1884; Emily Zarins, Note, *Notice Versus Knowledge Under the Digital Millennium Copyright Act’s Safe Harbors*, 92 CALIF. L. REV. 257, 260 (2004) (“Courts have used section 512 notifications from a copyright owner to the service provider to establish prematurely the knowledge element of contributory copyright infringement.”); *id.* at 261 (proposing to refer to a section 512 notice as a “notice of claim” as opposed to a “notice of actual infringement”).

equaled knowledge, liability under contributory infringement doctrine (absent the safe harbor) would be virtually unavoidable.

In addition, in providing a safe harbor, section 512 distinguishes between a service provider that has actual knowledge of infringement (or reason to know of infringement) and expeditiously removes or disables access to the material in question and a service provider that expeditiously removes or disables access to material in response to a qualifying notice of claimed infringement.²⁰³ This latter provision is simply a “notice equals notice” scenario, in which the statute creates powerful incentives to remove material upon notice, regardless of whether the provider would have concluded that the claimed infringement is likely to be found infringing by a court.²⁰⁴ Courts are therefore speaking imprecisely when they equate *defective* notices with lack of knowledge—in other words, when they conclude that a notice that fails to comply with the DMCA’s statutory requirements

203. 17 U.S.C. § 512(e)(1)(A), (C); *see also* Zarins, *supra* note 202, at 275.

204. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 115 (2007) (“Notice and takedown therefore rewards overzealous copyright owners who use the DMCA mechanism to rid the Web even of legitimate content, secure in the expectation that ISPs will take everything down rather than risk their eligibility for the safe harbor.”). Additional support for this interpretation comes from 17 U.S.C. § 512(g)(1), which provides a safe harbor from liability for good faith removal of material “claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing,” so long as the provider complies with the statute’s provisions regarding notice to the user and any counter notice that is submitted.

The Fourth Circuit has pointed to this language to reject the argument that section 512(i)(1)(A)’s requirement that providers have a policy for termination of “repeat infringers” refers only to those users who have been adjudicated to be infringers. *BMG Rights Mgmt. (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293, 302 (4th Cir. 2018). David Nimmer takes a more nuanced view. David Nimmer, *Repeat Infringers*, 52 J. COPYRIGHT SOC’Y U.S.A. 167, 184 (2005) (noting that an infringer in subsection 512(i) is either someone who has been found by a court to have infringed or someone “about whom the service provider has actual knowledge that s/he has engaged in infringement,” but not someone who is merely the subject of a notice or someone who has apparently infringed, “given that appearances may turn out to be deceptive at the end of the day”); *see also* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1421 (2004) (proposing an administrative procedure to determine repeat infringers so as to achieve a middle ground between being deemed an infringer merely upon receipt of a claim and full legal adjudication).

By contrast, section 230 of the CDA which provides a safe harbor for service providers for much third-party content, does not condition immunity on lack of knowledge. *See* 47 U.S.C. § 230. A provider can receive notice of material claimed to be defamatory, for example, and can choose whether to remove that material or to keep it up; even if the material is ultimately deemed to be unlawful, the provider is still immune from liability, assuming the remainder of the statutory scheme is satisfied. *See, e.g.*, Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. ONLINE 33, 34–36 (2019).

likewise fails to give the provider knowledge of infringing material.²⁰⁵ (This language is understandable given the statute's provision that a defective notice "shall not be considered . . . in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.")²⁰⁶ Even putting aside the problematic use of "knowledge," a provider in receipt of a defective notice may still well be in precisely the same place that it would have been with a conforming notice. It may be aware of the material at issue; it is now able (or not able) to make a prediction about the material's legality regardless.

Indeed, it is particularly interesting that while the DMCA talks about knowledge of infringement on the part of the service provider, the copyright owner who submits a notification need only have a "good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."²⁰⁷ The copyright owner can be held liable for damages if it "knowingly materially misrepresents" that the material at issue is infringing.²⁰⁸ In *Lenz v. Universal Music Corp.*,²⁰⁹ the Ninth Circuit interpreted this as a subjective test, noting that the inquiry lies "not in whether the court would adjudge the video [at issue] as a fair use, but whether [the copyright holder] formed a good faith belief that it was not" and, therefore, whether the copyright holder knowingly misrepresented that it had formed such a belief.²¹⁰ (This approach, notably, does not focus on whether the belief turned out to be accurate.) The court went on to hold that the willful blindness doctrine could, in appropriate circumstances, "be used to determine whether a copyright holder 'knowingly materially misrepresent[ed]' it held a 'good faith belief' that the offending activity was not a fair use."²¹¹ Relying on the Supreme Court's opinion in *Global-Tech Appliances, Inc. v. SEB*

205. See, e.g., *Rosen v. Hosting Servs., Inc.*, 771 F. Supp. 2d 1219, 1222 (C.D. Cal. 2010) ("Because the notice is defective, as a matter of law [by referencing a celebrity who did not appear in the material at the URLs listed in the notice], HSI cannot be charged with having the requisite knowledge to be contributorily liable."); see also R. Anthony Reese, *The Relationship Between the ISP Safe Harbors and the Ordinary Rules of Copyright Liability*, 32 COLUM J.L. & ARTS 427, 438 (2008) (noting that a provider does not have to take any action in response to a statutorily defective notice, even if that notice has information that would provide knowledge of infringement).

206. 17 U.S.C. § 512(c)(3)(B)(i). The statute further provides that if a notification substantially complies with the requirements of identifying the copyrighted work, identifying the infringing material, and providing contact information for the complaining party, the service provider must promptly contact the notifying party or take other reasonable steps to obtain a fully (substantially) compliant notice. See 17 U.S.C. § 512(c)(3)(B)(ii).

207. 17 U.S.C. § 512(c)(3)(A)(v).

208. 17 U.S.C. § 512(f).

209. 815 F.3d 1145 (9th Cir. 2016).

210. *Id.* at 1153.

211. *Id.* at 1155.

S.A.,²¹² the court concluded that a finding of willful blindness in this context would mean that the copyright holder “subjectively believed there was a high probability that the video constituted fair use” and “took deliberate actions to avoid learning of this fair use.”²¹³ So the language establishing the nature of the copyright owner’s claims is framed in terms of belief and likelihood; it would seem odd if the service provider’s actions upon receipt of those claims were judged according to a different mental state.

IV. KNOWLEDGE AND THE RISK OF HINDSIGHT BIAS

A. *Contributory Infringement and Heuristics*

Reframing knowledge to mean prediction of a judicial outcome still does not tell us, however, what level of risk should trigger a defendant’s decision-making obligation. Imagine, for example, a situation in which facts or allegations are brought to a defendant’s attention, the defendant decides not to alter its course of action, and the underlying speech is ultimately deemed infringing. Would the defendant’s decision to take no action ever be deemed lawful under the circumstances? If the answer is no, does that tell us something about whether the knowledge requirement is actually operating as a constraint on liability?

The risk is heightened in online spaces if both the reporting and the responding processes are automated.²¹⁴ Indeed, as Niva Elkin-Koren has noted, a move toward “algorithmic fair use” necessarily entails embracing an evaluation of the probability of fair use and, concomitantly, liability based on the reasonableness of the process rather than the “correctness” of the conclusion.²¹⁵ And what is an

212. 563 U.S. 754 (2011).

213. *Lenz*, 815 F.3d at 1155.

214. James Grimmelman, *To Err Is Platform*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), <https://knightcolumbia.org/content/err-platform> (“Courts and commentators sometimes talk about platform passivity as a justification for immunity. But this is best understood as a shorthand for the argument that a truly ‘passive’ intermediary typically lacks the knowledge about specific harmful content that it would need to make reliable filtering decisions.”) (emphasis omitted).

215. Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. REV. 1082, 1098–99 (2017); see also Lemley, *supra* note 204, at 110 (“[T]here is no way to automate the process of determining legal liability.”). In a superseded opinion, the Ninth Circuit in *Lenz* had proposed that copyright owners could meet their burden under the DMCA to take fair use into account by employing algorithmic methods. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1135 (9th Cir. 2015) (“We note, without passing judgment, that the implementation of computer algorithms appears to be a valid and good faith middle ground for processing a plethora of content while still meeting the DMCA’s requirements to somehow consider fair use.”), *amended and superseded on denial of reh’g*, 815 F.3d 1145, 1148 (9th Cir. 2016); cf. Laura A. Heymann, *Reasonable Appropriation and Reader Response*, 9 U.C. IRVINE L. REV. 343, 365 n.127 (2019) (suggesting that a “reasonable observer” approach to the transformativeness analysis of the first fair use factor

algorithm except an automated replication of a decision-making process—in this case, the process that would be used by a lawyer to determine the likelihood of infringement or fair use had she been able to read and synthesize every prior case on the subject?

What is the problem, one might ask, with characterizing this state of affairs as knowledge? Does it matter in the end? It's hard to say for sure, of course, but one way in which it might matter is in the various heuristics used in decision-making from which courts are not immune, particularly hindsight bias and confirmation bias. Hindsight bias—in lay terms, the “I knew it all along” effect—describes a heuristic in which an event seems much more probable, in hindsight, once it has happened.²¹⁶ It is uncomfortable to admit that a result took us by surprise or that we changed our mind on a topic; it is often easier to conform our recollections of what we knew or believed in the past to what we know or believe now. Confirmation bias is the tendency to interpret or seek out evidence to match a conclusion one has already reached and, by contrast, to reject or reframe evidence that runs counter to that conclusion.²¹⁷

Baruch Fischhoff is credited as an early proponent of a theory of hindsight bias as a way of explaining human decision-making. In his 1975 article in the *Journal of Experimental Psychology*, Fischhoff concluded that “[r]eporting an outcome's occurrence consistently increases its perceived likelihood and alters the judged relevance of data describing the situation preceding the event.”²¹⁸ Notably, however, decision makers are typically “unaware of the effect that outcome knowledge has on their perceptions” and so “tend to believe that this relative inevitability was largely apparent in foresight.”²¹⁹ Indeed, as Daniel Kahneman writes,

A general limitation of the human mind is its imperfect ability to reconstruct past states of knowledge, or beliefs that have changed. Once you adopt a new view of the world (or of any part of it), you immediately lose much of your ability to recall what you used to believe before your mind changed.²²⁰

“may ultimately result in limiting the scope of appellate review to assessing the process employed by the district court rather than the result reached”).

216. Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1630 (2009).

217. See, e.g., Stacey Dogan, *Bounded Rationality, Paternalism, and Trademark Law*, 56 HOUS. L. REV. 269, 284–85 (2018) (citing Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q.J. ECON. 37 (1999)).

218. Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288, 292 (1975).

219. *Id.* at 297.

220. KAHNEMAN, *supra* note 162, at 202.

Studies show, moreover, that this bias exists in assessing others' predictions as well as our own²²¹ and that there is likely little that can be done to eliminate the effect of the bias on decision-making.²²²

Despite this, as Jeffrey Rachlinski has noted, our legal system often assumes that decision makers will be able to overcome the effects of hindsight bias.²²³ Every time a judge or jury is asked to determine whether a defendant took an appropriate action at a particular time in light of the circumstances present at that time, that decision maker is expected to cast its mind back to before the incident in question, uninfluenced by what it has learned since (or, indeed, by the occurrence of the incident itself). This bias is likely to be prevalent in situations where the question is whether the defendant "knew or had reason to know" of a particular fact,²²⁴ such as with contributory copyright infringement.

Courts have been particularly attuned to the possible effect of hindsight bias in assessing obviousness in patentability determinations,²²⁵ but less so, it would seem, in cases involving copyright infringement—except perhaps to the extent courts assess the reasonableness of a party's position in determining whether that party is entitled to attorney's fees.²²⁶ However, the issue has not escaped the attention of scholars, who have noted, for example, that evidence of actual copying—which comes early in the analysis—tends to bias the decision maker in favor of the plaintiff on the issue of infringement because of the belief that the defendant would not have copied if that copying was not valuable to the defendant.²²⁷ So it should not be surprising if contributory infringement analysis is also affected by the cumulative effects of hindsight bias and confirmation bias. Having first made the determination that direct infringement has occurred, a decision maker may well evaluate the evidence as to knowledge in the subsequent contributory infringement analysis with the implicit goal of confirming the correctness of its prior determination of direct infringement. If the circumstances seem like

221. *Id.* at 203; Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 588–90 (1998).

222. Rachlinski, *supra* note 221, at 603.

223. *Id.* at 571.

224. *See id.* at 591.

225. *See, e.g.*, *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 36 (1966); Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1399–1400 (2006).

226. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1988 (2016) (“Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety. And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.”).

227. Balganes, *supra* note 216, at 1630–31 (2009); *see also* Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303, 1339 (2012).

evidence of obvious infringement to the court—judged many months (or years) later, with full information, and in the reflective confines of a courtroom—they may well seem to have been equally obvious at the time the defendant made its decision about its own participation.

Another general consideration is that the language around contributory copyright infringement facilitates a tendency toward hindsight bias. For example, the characterization of evidence of infringement as a “red flag” may well suggest to the reader of the opinion that the infringement was obvious at the time and that any reasonable person would have been able to predict, with near certainty, that a court would later find infringement. This is perhaps true in some cases, but it would be difficult to say it is true in all cases. The other risk inherent in the effect of hindsight bias in this context is the way in which the bias may affect the decision-making of defendants. A defendant who is aware that a judge or jury, having found copyright infringement, will be more likely to conclude that the defendant knew of the infringement at the time may take more precautions than would otherwise be warranted in order to counteract the effect of the bias.²²⁸ In the context of contributory infringement, those precautions may involve removing material that ultimately would not have been judged to be infringing. This, then, may result in something of a feedback loop, as the additional bias of interpreting subsequent remedial measures as evidence of wrongdoing may lead decision makers to double down on the conclusion that the defendant had the requisite knowledge.²²⁹

It is, of course, difficult to identify a case in which one can say with certainty that the combination of hindsight bias and confirmation bias affected the outcome of the contributory infringement determination, since as readers of opinions, we are at risk of falling victim to the same heuristic. One example, perhaps, is the district court’s opinion in *Cariou v. Prince*, discussed earlier. As the reader will recall, the case involved over twenty-five photographs (all originally taken by Patrick Cariou) used in subsequent work by

228. Rachlinski, *supra* note 221, at 572, 597; *see also id.* at 573 (noting that because of the effect of the bias, determining whether individual results are unjust because of the bias is difficult).

229. Federal Rule of Evidence 407 makes inadmissible to prove negligence post-incident measures “that would have made an earlier injury or harm less likely to occur.” FED. R. EVID. 407. This does not map squarely onto incidents of copyright infringement—removing infringing material is not the same as, say, a policy of inspection beforehand—but the effect may well be the same. Note that the DMCA provides that “[t]he failure of a service provider’s conduct to qualify for limitation of liability under this section”—say, for example, by deciding not to take down material pursuant to notice—“shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.” 17 U.S.C. § 512(l) (2018).

appropriation artist Richard Prince.²³⁰ The Gagosian Gallery and Larry Gagosian were named as defendants on both direct infringement and secondary liability theories.²³¹ The court, as expected, first considered the defendants' challenge to the scope of the copyright for the photographs and the defendants' fair use argument.²³² As to the latter, the court devoted significant time to the propriety of Prince's actions per Second Circuit doctrine that considers this evaluation to be "an integral part of the analysis under the first [fair use] factor."²³³ The district court cited Second Circuit case law for the proposition that "it has been considered relevant within this subfactor that a defendant could have acquired the copyrighted [material] legitimately."²³⁴ But rather than mirroring the Second Circuit in interpreting this consideration as going to how the defendant acquired the materials (for example, via theft or by encouraging an authorized user to exceed the scope of authorized access), the district court instead determined that Prince had acted in bad faith because he had not requested a license to use the photographs—the necessity of which, of course, was the very issue being decided in the case.²³⁵ Having decided that Prince acted in bad faith by not seeking a license (for what the Second Circuit later determined was largely a fair use), the district court concluded that the Gagosian defendants equally acted with bad faith.²³⁶ The gallery and its owner knew that Prince was an appropriation artist but failed to ask whether Prince had obtained a license and continued to sell the paintings after receiving Cariou's cease-and-desist notice.²³⁷ (Of course, appropriating without asking permission, and relying on the fair use doctrine, is largely the point of the endeavor for most appropriation artists.)

Having rejected the defendants' fair use argument, the court made short work of the contributory infringement analysis.²³⁸ The

230. *Cariou v. Prince*, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011), *judgment rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

231. *Id.* at 354.

232. *Id.* at 346–47.

233. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478 (2d Cir. 2004) (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991)).

234. *Cariou*, 784 F. Supp. 2d at 351 (quoting *NXIVM*, 364 F.3d at 478).

235. *Id.* ("Prince's employee contacted the publisher of *Yes, Rasta* to purchase additional copies of the book, but apparently neither Prince nor his employee ever asked the publisher about licensing or otherwise sought permission to use *Yes, Rasta* or the Photos contained therein legitimately. Nor did Prince attempt to contact Cariou by email and inquire about usage rights to the Photos, even though *Yes, Rasta* clearly identified Cariou as the sole copyright holder and even though Cariou's publicly-accessible website includes an email address at which he may be reached. Under these circumstances, Prince's bad faith is evident.") (citations omitted).

236. *Id.*

237. *Id.*

238. The court also found the Gagosian defendants liable for direct infringement and for vicarious infringement. *Id.* at 354.

defendants were marketing and promoting Prince's work; hence, the material contribution prong was satisfied.²³⁹ And as to knowledge of infringement, the court essentially rehearsed its bad faith analysis, concluding that the defendants "were well aware of (and capitalized on) Prince's reputation as an appropriation artist who rejects the constricts of copyright law, but they never inquired into the propriety of Prince's use of the Photos."²⁴⁰ Notably, on appeal, the Second Circuit did not devote any consideration to whether Prince or the Gagosian defendants had acted in bad faith; indeed, it noted Prince's long career as an appropriation artist and the number of museums in which his work had been displayed—perhaps an example of hindsight bias and confirmation bias in reverse.²⁴¹

B. *Knowing How to Know*

How, then, should the doctrine respond to these concerns—both the idea that knowledge is an inapt way to describe the decision-making process and the fact that heuristic biases are likely to infect the subsequent evaluation of this process? One solution is to make more robust the negligence aspects of the framework—to frame the consideration not as whether the defendant knew or should have known about infringement but rather whether the defendant's decision to continue providing material assistance in light of available information represented a reasonable assessment of the risk of liability.²⁴² This may seem like mere semantics, but describing the

239. *Id.* at 354–55.

240. *Id.*

241. *Cariou v. Prince*, 714 F.3d 694, 698–99 (2d Cir. 2013). The court's conclusion that twenty-five of Prince's works constituted fair use as a matter of law necessitated reversing the district court's conclusion as to secondary liability for infringement of those photographs and remanding for reconsideration of secondary liability as to the remaining five if the district court were to find direct infringement on remand. As noted, *supra* note 139, the case ultimately settled. As to the potential effect of bias in such determinations, see Andrew Gildea & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. ONLINE 88, 98 (2013).

242. The inducement theory of contributory infringement may eliminate the problem to some extent—in that a defendant who induces another to commit infringement may have a strong belief that the induced activity will be deemed to be infringement—but this still requires some level of predictive activity (and is still subject to a risk of hindsight bias that may color the court's view of what is considered to be inducement). *Cf., e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937–38 (2005) ("It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files.").

fault not as knowledge but rather as predictive ability may guard against the risk of hindsight bias described above.

Another solution—by no means a salutary one, but one that should be acknowledged—is simply to revise the doctrine by statute to admit that the contributory liability framework is based on notice, not knowledge. When a copyright owner informs the operator of a flea market that some of its vendors are engaging in copyright infringement, the operator may not have the resources or ability to investigate, confirm, or rebut this assertion. The operator may glean additional facts—for example, the cover of a DVD case may look unofficial or photocopied—but the operator is likely to be no more in a position to conclude that infringement is taking place than it was before receiving the notice, except in a minimum of circumstances. This is even more true, as noted above, in an online environment, where opportunities for additional investigation are limited. Such an approach would have the effect of extending the notice-and-takedown safe harbor of the DMCA to contributory infringement claims more generally, in that a defendant would be deemed not liable for contributory infringement if it cuts off its contribution to alleged infringing activity upon receipt of a substantially reliable notice.²⁴³

To guard against the harm that would come from a heckler's veto, in which copyright owners would be incentivized to overnotify, such a codification of the doctrine would need to include similar provisions as those currently in the DMCA: the opportunity for notification of a challenge made by the alleged direct infringer and penalties for the knowing submission of a notice that substantially misrepresents the legal claims at issue. Such a system may prove to be cumbersome in certain contexts—and experience with section 512 of the DMCA reveals the many ways in which these safeguards can fail—but it would at least add an extra level of protection to the de facto system that already exists, in which putative defendants, anticipating that a court will find knowledge resulting from notice, remove access to material upon receipt of notice, regardless of the notice's validity.

V. CONCLUSION

Characterizing the nature of the defendant's actions in contributory infringement cases is not merely a matter of semantics. As described above, the use of the word "knowledge" to mean what can only be, at best, a prediction can have an effect on the decision as to liability and may well lead courts, juries, and policy makers to overestimate the ability of service providers to identify and respond to problematic material on their platforms. Indeed, by describing the kinds of evidence that justify a conclusion that the defendant had the

243. Cf. Christopher A. Cotropia & James Gibson, *Convergence and Conflation in Online Copyright*, 105 IOWA L. REV. 1027, 1049–66 (2020) (criticizing the convergence of the common law and the DMCA in copyright cases).

requisite knowledge, courts are essentially defining “knowledge” as the existence of such evidence. In this sense, “knowledge” becomes a legal conclusion, not a factual one, subject to renewed evaluation by an appellate court.²⁴⁴

This effect may also have implications for other forms of secondary liability, such as the current debates—both congressional and academic—over whether section 230 of the CDA should be amended. Section 230 goes further than the DMCA, providing that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and that no such provider or user shall be liable for voluntary, good-faith actions to remove objectionable material from a service.²⁴⁵ In essence, as the Fourth Circuit has noted, Congress recognized that the flourishing (and realities) of the internet warranted a system in which service providers could maintain policies and take actions regarding material on their services without fear of liability.²⁴⁶ Absent such a provision, service providers would almost certainly err on the side of removing material upon receipt of a complaint. Section 230, of course, thus has the inevitable result of some amount of objectionable material remaining online, even with the best of intentions on the part of the service provider. Yet calls for statutory reform of section 230 to require a provider to take steps to address “unlawful uses of its services” seem to be overly optimistic about the ability of service providers to make efficient and correct legal judgments about each of the thousands (if not millions) of complaints they receive.²⁴⁷ These

244. Cf. Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 LAW & PHIL. 321, 381 (2005) (“It is not the fact that some evidence has sufficient probative value that justifies an inference — the fact that a particular inference is sufficiently strong means that evidence has the probative value it does.”).

245. 47 U.S.C. § 230 (2018).

246. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.”); *id.* at 331 (“Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.”).

247. See, e.g., Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 419 (2017) (proposing that section 230’s safe harbor be available only to a service provider that takes “reasonable steps to prevent or address unlawful uses of its services” and defining “reasonable” (but not “unlawful”) only by noting that the determination of reasonableness “would take into account differences among online entities”); cf. Goldman, *supra* note 204, at 45 (noting that a safe harbor

commentators are understandably concerned about harmful material that has proliferated on some sites. But they have not yet explained how service providers will know how to know. And until this happens—both in copyright law and elsewhere—we should refrain from calling the activity on which liability depends “knowledge.”

conditioned on reasonableness “would make Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of [a] defendant’s behavior” and “would also cause more collateral censorship, as Internet services remove legitimate borderline content to safely ensure a future judge might consider their efforts ‘reasonable’ or ‘in good faith’”).