ASSESSING THE EFFICACY OF THIRD-PARTY LIABILITY COPYRIGHT DOCTRINES AGAINST PLATFORMS THAT HOST AI-GENERATED CONTENT

Abstract: In an online landscape where algorithm-driven social media platforms host millions of users that create, post, or interact with material that is infringing on its face, the Digital Millennium Copyright Act (DMCA) is failing. In 1998, Congress passed the DMCA to address emerging methods of copyright infringement that accompanied the public's use of the internet and other technologies. The DMCA shields online service providers (OSPs) from liability for a user's infringement so long as the OSP enacts the prescribed reporting mechanism for copyright holders to remove infringing content online. Now, copyright holders face another significant challenge: generative AI systems have emboldened its users with unprecedented opportunities and abilities to infringe, while certain OSPs circulate—and thus, promote—AI-generated, infringing derivative content. To demonstrate this tension, this Note discusses Universal Music Group's removal of its catalog from TikTok's platform and evaluates the efficacy of third-party liability copyright doctrines. This Note argues that the doctrinal ambiguities of contributory infringement and inducement render them ill-equipped to confront the rapid creation and dissemination of AI-generated content online. Instead, this Note contends that vicarious liability, having clearly articulated doctrinal elements, enables creators to enforce their copyrights against OSPs, which in turn, incentivizes OSPs to undertake proactive measures to mitigate user-infringement. This Note also discusses the European Union's Digital Services Act and AI Act and asserts that these Acts fairly distribute legal responsibilities that effectively enforce copyright without impeding the public's access to helpful technologies. As the United States articulates an AI legislative framework, this Note proposes that OSPs should use the elements of vicarious liability as an applicable threshold to gauge their potential liability in their pursuit of innovation.

INTRODUCTION

"TikTok is a playground,"[1] a succinct, yet aptly described, boast from the platform itself illustrating its niche in pop culture: a forum availing an unprecedented level of interaction between artists and users.[2]

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[1] *See Year on TikTok 2021 Music Report*, TIKTOK (Dec. 13, 2021), https://newsroom.tiktok.com/en-us/year-on-tiktok-music-report-2021 [https://perma.cc/RSJ6-GZSN] (crediting TikTok's dominant position in the music industry to its unique "playground" aspect, where artists inspire users to create trends that become defining cultural movements).

The toys on this playground are the artists' songs.[3] Artists use TikTok as a marketing platform for new releases to reach and gain new fans.[4] TikTok creators play with the toys and gain the inspiration to create content specific to the song.[5] The inspired content can take many forms, such as choreography that other users attempt to recreate, which boosts the song's streams and engagement on TikTok.[6]

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[2] *See id.* (quoting Ole Obermann, TikTok's Global Head of Music, who remarked on the platform's ability to connect a global audience "to new artists, new sounds, underground and DIY scenes as well as the classic hits," creating a new, passionate, interconnected online community); *see, e.g.*, *2024 Music Report*, LUMINATE & TIKTOK (Feb. 13, 2024), https://sf16-sg.tiktokcdn.com/obj/eden-sg/fuuvieh7uvzpsh/Music%20Impact%20Report%20-%20Final.pdf [https://perma.cc/XPP3-PJXB] (reiterating TikTok's continued influence on the global music industry).

[3] *See Year on TikTok 2021 Music Report*, *supra* note 1 (explaining that music connects TikTok creators and communities together because creators use music and add their own creative flair to bring forth a trend); *see also* Andria Moore & Palmer Haasch, *20 of the Most Viral Dances on TikTok, from 'Corvette Corvette' to the 'Renegade,'* BUS. INSIDER (Feb. 5, 2021), https://www.businessinsider.com/tiktok-dances-renegade-say-so-and-more-19-top-2020-3 [https://perma.cc/J98J-4ADU] (discussing that viral dance trends on TikTok demonstrate TikTok's influence on popular culture and that TikTok dances are an undeniable part of modern youth culture).

[4] *See* Nancy Dillon & Ethan Millman, *Taylor Swift, Olivia Rodrigo Songs Vanish from TikTok as Licensing Battle with Universal Music Heats Up*, ROLLING STONE (Feb. 1, 2024), https://www.rollingstone.com/music/music-news/universal-music-group-tiktok-songs-removed-1234958500/ [https://perma.cc/6K4S-QMJW] (discussing that TikTok is the music industry's most influential marketing tool). TikTok, having more than 150 million users in the United States alone, has skyrocketed new artists' careers and re-popularized songs in artists' older catalogs back to the top of music charts. *Id.*; *see 2024 Music Report*, *supra* note 2 (citing Chappell Roan and Sabrina Carpenter as recent examples of an artist's "meteoric rise" originating from the platform); *see also* Murray Stassen, *13 Out of the 14 No.1 Songs in the US in 2022 Were Driven by Viral Trends on TikTok*, MUSIC BUS. WORLDWIDE (Dec. 16, 2022), https://www.musicbusinessworldwide.com/13-out-of-the-14-no-1-songs-in-the-us-in-2022-were-driven-by-viral-trends-on-tiktok/ [https://perma.cc/7Y34-S3HD] (noting that viral trends on TikTok contribute to a song's charting success because thirteen out of the fourteen songs that were at the top of the Billboard Hot 100 had such trends on the platform); *see, e.g.*, TAYLOR SWIFT, *Anti-Hero*, *on* MIDNIGHTS (Republic Records 2022) (spending eight weeks at the top of the Billboard Hot 100); HARRY STYLES, *As It Was*, *on* HARRY'S HOUSE (Erskine Records & Columbia Records 2022) (spending fifteen weeks at the top of the Billboard Hot 100). In fact, TikTok reported that 85% of all the Billboard Global 200 entries in 2024 had experienced high engagement on the platform beforehand. *2024 Music Report*, *supra*; *see also Year on TikTok 2024: A Little Creativity Sparks a Lot of Impact*, TIKTOK (Dec. 4, 2024), https://newsroom.tiktok.com/en-us/year-on-tiktok-2024 [https://perma.cc/6S3A-S35J] (providing that in 2024, thirteen out of the sixteen Billboard Hot 100 No. 1 songs had TikTok trends).

[5] *See* Margaret Fuhrer, *TikTok Is Dead (Maybe). Long Live TikTok Dance.*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/arts/dance/tiktok-dance-evolution.html [https://perma.cc/PD9E-SL7N] (recognizing that whether a song has a trending TikTok dance is crucial to the song's commercial success and providing examples of TikTok-bolstered careers of the artists, Megan Thee Stallion and Lizzo).

[6] *See 2024 Music Report*, *supra* note 2 (providing that TikTok users in the United States are 74% more likely to encounter *and* share new music on social media platforms than other platform users); Moore & Haasch, *supra* note 3 (discussing that the most popular TikTok dance, which is referred to colloquially as the "renegade," was among the first to go viral on the platform, with nearly thirty million users recreating Jalaiah Harmon's choreography to the song, "Lottery"); K CAMP, *Lottery*, *on* WAYY 2 KRITICAL (Rare Sound, Empire Records & Interscope Records 2019). In early 2020, due to

On October 21, 2022, when Taylor Swift released her tenth studio album *Midnights*, TikTok creator and longtime fan of Swift, Mikael Arellano, choreographed a short dance to the chorus of one of the songs, "Bejeweled."[7] On October 22 and 23, 2022, Arellano posted two TikToks performing his choreography, and to date, these TikToks have 10.5 million views and 1.4 million likes.[8]

The choreography was simple, short, and sweet, and thus easy for other users to replicate.[9] Even Swift herself interacted with several of Arellano's videos that were set to her songs.[10] Not only did Swift interact with Arellano's content, but she also incorporated his choreography for her "Bejeweled" performances on her Eras Tour, which ran for twenty-one months and grossed $2.2 billion in ticket sales.[11] Swift's song, "Bejeweled," was Arellano's toy on the TikTok playground; and their interaction is a prime example of TikTok's

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its TikTok virality, "Lottery" was re-titled to "Lottery (Renegade)." *See How K Camp's 'Lottery' (aka 'Renegade') Went Viral—and What Happened Next*, MUSIC ALLY (Mar. 9, 2020), https://musically.com/2020/03/09/k-camp-lottery-renegade-viral/ [https://perma.cc/2D3N-DR22] (reasoning that the song's re-titling was to ensure that people were able to locate the actual song because the TikTok choreography was to the beginning of the song that repeats the word "renegade," which caused people to identify the song as "Renegade" rather than its official title, "Lottery").

[7] *See* Marisa Dellatto, *Taylor Swift's 'Midnights' Occupies Entire Billboard Top 10 Singles Chart*, FORBES, https://www.forbes.com/sites/marisadellatto/2022/10/31/taylor-swifts-midnights-occupies-entire-billboard-top-10-singles-chart/?sh=149573987d82 [https://perma.cc/A3DP-ST52] (Oct. 31, 2022) (discussing *Midnights*' immediate commercial success, with ten out of thirteen of the album's songs on Billboard's Top 10 list after the album's first week of release, and the song, "Bejeweled," was ranked sixth on the Billboard Top 10 list); TAYLOR SWIFT, *Bejeweled*, *on* MIDNIGHTS (Republic Records 2022). On February 4, 2024, at the 66th GRAMMY Award Ceremony, *Midnights* was awarded the GRAMMY for Album of the Year. *See* Douglas Markowitz, *2024 GRAMMYs: Taylor Swift Makes GRAMMY History with Fourth Album of the Year Win for 'Midnights*,*'* RECORDING ACAD. (Feb. 4, 2024), https://www.grammy.com/news/taylor-swift-album-of-the-year-2024-grammys-speech [https://perma.cc/YS88-PSMM] (reporting that *Midnights* was Swift's fourth win in this category and thus, made history as the artist with the most Album of the Year wins, breaking her tie with Frank Sinatra, Paul Simon, and Stevie Wonder).

[8] Mikael Arellano (@mikaelarellano), TIKTOK (Oct. 22, 2022), https://www.tiktok.com/t/ZPR3AQSNq/ [https://perma.cc/F3BX-7NBF]; Mikael Arellano (@mikaelarellano), TIKTOK (Oct. 23, 2022), https://www.tiktok.com/t/ZPR3AgTvu/ [https://perma.cc/HMX4-RQK2].

[9] *See* Brittany Spanos, *Taylor Swift Fan Mikael Arellano Is Making TikTok Shimmer*, ROLLING STONE (Nov. 8, 2022), https://www.rollingstone.com/music/music-features/taylor-swift-tik-tok-bejeweled-trend-mikael-arellano-1234626909/ [https://perma.cc/86ZX-X6GS] (discussing that within three weeks, most of the 150,000 TikToks set to "Bejeweled" were recreating Arellano's choreography).

[10] *See id.* (discussing that because Arellano's TikToks garnered mass public attention, it became so mainstream to the extent that Swift interacted with both of Arellano's TikToks to "Bejeweled" as well as other users' TikToks that recreated his original choreography).

[11] *See* Kayleigh Roberts, *Taylor Swift Surprised a Fan by Doing His Viral "Bejeweled" TikTok Dance on the Eras Tour*, COSMOPOLITAN (Apr. 2, 2023), https://www.cosmopolitan.com/entertainment/celebs/a43488940/taylor-swift-surprised-fan-viral-tiktok-dance-bejeweled-eras-tour/ [https://perma.cc/UR6H-D9B9] (explaining that when Swift performed Arellano's "Bejeweled" choreography on the opening night of her Eras Tour, the crowd recognized the viral TikTok immediately); *see also* Ben Sisario, *Taylor Swift's Eras Tour Grand Total: A Record $2 Billion*, N.Y. TIMES (Dec. 9, 2024), https://www.nytimes.com/2024/12/09/arts/music/taylor-swift-eras-tour-ticket-sales.html [https://perma.cc/K37K-YWC6] (providing the Eras Tour's gross ticket sales).

ability to facilitate interactions between artists and users that boost creative efforts, commercial success, and user engagement.[12]

Under U.S. copyright law, a derivative work is a work that has been altered from or based upon a preexisting work.[13] The copyright owner of a work has the exclusive right to prepare and authorize the creation of a derivative work.[14] Thus, when a TikTok creator modifies or alters a song and creates a viral trend using it, all subsequent TikToks that recreate the trend are using an unauthorized derivative work.[15] Although Arellano created the "Bejeweled" trend without making any changes to the song itself, there are trends that use artificial intelligence (AI) models or systems[16] to alter the song from its origi-

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[12] *See Year on TikTok 2021 Music Report*, *supra* note 1 ("TikTok is a playground where artists and creators can interact . . . . Stars can preview new songs to a legion of hungry fans, who jump at the opportunity to create content inspired by a musical element or favorite lyric."); *see, e.g.*, Roberts, *supra* note 11 (reporting on the attendees' excited reaction to Swift's incorporation of Arellano's choreography in her performance and summarizing the two's interactions on TikTok).

[13] *See* 17 U.S.C. § 101 (defining a derivative work as "a work based upon one or more preexisting works"). Section 101 of the Copyright Act provides examples of derivative works which include: an abridgment, art reproduction, condensation, dramatization, fictionalization, motion picture version, translation, musical arrangement, sound recording, translation, "or any other form in which a work may be recast, transformed, or adapted." *Id.* Section 101 further provides that "[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" *Id.*; *see* Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) (concluding that a work is derivative when "it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work").

[14] *See* 17 U.S.C. § 106 (listing the six exclusive rights the copyright owner has to do and to authorize). The six exclusive rights a copyright owner has are:

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Id. The derivative work right is listed as one of the six exclusive rights a copyright owner has. *Id.* § 106(2).

[15] *See* Conor Murray, *Why Sped-Up Music—from SZA, Steve Lacy and Many More—Took Over TikTok and Became a Key Marketing Strategy*, FORBES (Jan. 18, 2023), https://www.forbes.com/sites/conormurray/2023/01/18/why-sped-up-music-from-sza-steve-lacy-and-many-more-took-over-tiktok-and-became-a-key-marketing-strategy/?sh=5bbf1ef477e0 [https://perma.cc/5R7Y-TVSD] (providing that although over one hundred thousand TikToks used SZA's song "Kill Bill" as an audio, over one million TikToks used the unofficial sped-up version); SZA, *Kill Bill, on* SOS (Top Dawg Ent. & RCA Records 2022).

[16] The U.S. Copyright Office (Copyright Office) defines artificial intelligence (AI) as "[a] general classification of automated systems designed to perform tasks typically associated with human intelligence or cognitive functions." Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948 (Aug.

nal form, such as sped-up remixes or deepfakes[17] of artists singing covers of another's artists song.[18] In fact, some artists have reacted unfavorably towards these AI-generated unauthorized works.[19] Further, although such trends increase the original work's popularity, because the TikToks replicating the trend use only the derivative work rather than the original, the original work's copyright owner loses potential licensing revenue.[20] Furthermore, because deriva-

30, 2023). In their Notice of inquiry, reported in the *Federal Register* in 2023, the Copyright Office provided a Glossary of Key Terms, and within, a distinction between AI models and AI systems. *See id.* (defining an AI model as "[a] combination of computer code and numerical values (or 'weights,' which is defined below) that is designed to accomplish a specific task"); *id.* (defining an AI system as "[a] software product that substantially incorporates one or more AI models and is designed for use by an end-user," and said product "may be created by a developer of an AI model, or it may incorporate one or more AI models developed by third parties"); *see also id.* at 59949 (defining weights as "[a] collection of numerical values that define the behavior of an AI model," which "are stored within an AI model and reflect inferences form the training process"). To help understand the distinction between an AI model from a system, the Copyright Office uses OpenAI's ChatGPT as an example: GPT-4 is an AI model, available to users on ChatGPT, which is the generative AI system that incorporates GPT-4. *See id.* at 59948–49; *see also infra* note 241 (detailing the operative definitions of a general-purpose AI model and AI systems in the European Union (EU)).

[17] *Deepfake*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining deepfake as "[a] false video, audio recording, or other medium that is generated or manipulated by computer, often using artificial intelligence, with the intent to deceive viewers or listeners").

[18] *See* Conor Murray, *TikTok's Most Popular Songs in 2023 Were Sped-Up Remixes*, FORBES (Dec. 7, 2023), https://www.forbes.com/sites/conormurray/2023/12/07/tiktoks-most-popular-songs-in-2023-were-sped-up-remixes/ [https://perma.cc/7FLH-5MDL] (discussing that in 2023, sped-up remixes were the most popular songs on TikTok, and because sped-up remixes are unlicensed altered audio tracks, this phenomenon caused record labels to lose revenue they would have otherwise received); *2024 Music Report*, *supra* note 2 (providing that artists' streaming numbers boost an average of an 11% over three days once their TikTok-viewing numbers peak).

[19] *See, e.g.*, Artists Rts. All., *200+ Artists Urge Tech Platforms: Stop Devaluing Music*, MEDIUM (Apr. 1, 2024), https://artistrightsnow.medium.com/200-artists-urge-tech-platforms-stop-devaluing-music-559fb109bbac [https://perma.cc/WKP9-P4WF] (releasing an open letter signed by 246 artists calling upon AI developers, digital platforms, and tech companies for the responsible development and use of AI technologies in a manner that advances human artistry rather than devalues or replaces it); Joe Coscarelli, *An AI Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html [https://perma.cc/4W33-NS86] (discussing Drake's disdainful response towards artificially generated covers, where the AI system uses an artist's voice to sing another artist's song). Drake, in response to an AI-generated track that used his voice to perform Ice Spice's song, "Munch (Feelin' U)," wrote on Instagram, "This is the final straw AI." *Id.*; ICE SPICE, *Munch (Feelin' U)*, *on* LIKE..? (2022); *see also* Chloe Veltman, *When You Realize Your Favorite New Song Was Written and Performed by . . . AI*, NPR (Apr. 21, 2023), https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd [https://perma.cc/37KT-BZ5W] (explaining that the AI-generated song, "Heart on My Sleeve," which simulates Universal Music Group (UMG) artists Drake and The Weeknd's voices, resulted in UMG asserting copyright violation to remove "Heart on My Sleeve" from platforms).

[20] *See* Murray, *TikTok's Most Popular Songs*, *supra* note 18 (explaining that sped-up remixes divert revenue from shareholders and instead generate revenue for the uploaders of the sped-up remixes); *see also* Tim Ingham, *So . . . How Much Did TikTok Actually Pay the Music Industry from Its $4bn in Revenues Last Year?*, MUSIC BUS. WORLDWIDE (July 14, 2022), https://www.musicbusinessworldwide.com/so-how-much-did-tiktok-actually-pay-the-music-industry-from-its-4bn-in-revenues-last-year/ [https://perma.cc/FVC4-NBVH] (noting that Kate Bush, whose song "Running Up That

tive works are commonplace on TikTok, the loss of licensing revenue has become increasingly troublesome to artists, recording labels, and others within the music industry.[21]

Due to the advent and increase of specialized generative AI models, the ability to create derivative works has become much quicker and easier.[22] An AI model may be designed specially to generate content in only text, visual, or audio form, and multiple models may form an AI system that users may access.[23]

Generative AI models are able to generate specialized content because the AI undergoes training during their initial development stage, when preexisting works are uploaded to its software.[24] The AI draws data from the preexisting works to then create inferences between the works.[25] The AI refines this ability, and uses these inferences to generate content that is responsive to a given prompt.[26] Now, individual users, with the access to and assistance of generative AI systems, wield unprecedented power to generate, modify, and disseminate unauthorized derivative works.[27]

Hill," which soared in popularity after its feature on Season 4 of Netflix's *Stranger Things* in May 2022, did not receive any royalties from TikTok for the five billion times her song was played, but her distributor, Warner Music Group, received a "blind check" from TikTok, and the check's amount was unreported); Kate Bush, *Running Up That Hill*, *on* HOUNDS OF LOVE (EMI 1989); *cf. Our Annual Music Economics Report*, SPOTIFY, https://loudandclear.byspotify.com/#payouts [https://perma.cc/3QVE-L8VE] (Mar. 2025) (announcing that in 2024, Spotify became the highest-paying retailer in music industry history when it paid over $10 billion in royalties in a single year, of which almost $4.5 billion was paid to music publishers).

[21] *See* Murray, *Why Sped-Up Music*, *supra* note 15 (discussing that artists must consider the impact of sped-up remixes to achieve chart success). For example, Steve Lacy was urged by his record label to release a sped-up version of his song "Bad Habit" because the unofficial sped-up version was diverting streams away from the official version, which was stalled at second on the Billboard Hot 100. *Id.* After the sped-up remix was released, "Bad Habit" reached the top of the Billboard Hot 100. *Id.*; STEVE LACY, *Bad Habit*, *on* GEMINI RIGHTS (RCA Records 2022).

[22] *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16191 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt 202) (discussing the difficulty in applying current copyright doctrines to AI-generated content and providing that AI systems will not be awarded copyright over a generated work because the AI does not satisfy the human authorship requirement).

[23] *E.g.*, *id.* (explaining how generative AI systems are trained to generate content); *see* Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948 (Aug. 30, 2023) (including in its definition that an AI system "is designed for use by an end-user").

[24] *E.g.*, *What Is Artificial Intelligence (AI)?*, INT'L ORG. FOR STANDARDIZATION, https://www.iso.org/artificial-intelligence/what-is-ai [https://perma.cc/E8D9-9Q5H] (explaining how AI models are trained through limited datasets).

[25] *See, e.g.*, Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. at 16191 (detailing how AI systems are trained with preexisting works to create inferences that allows the AI systems to generate works that are responsive to a user's prompt); INT'L ORG. FOR STANDARDIZATION, *supra* note 24 (same).

[26] *See* INT'L ORG. FOR STANDARDIZATION, *supra* note 24 (providing that generative AI models are trained to gain the ability to reason and problem-solve to provide the optimal response to a prompt).

[27] *See* Gil Appel, Juliana Neelbauer & David A. Schweidel, *Generative AI Has an Intellectual Property Problem*, HARV. BUS. REV. (Apr. 7, 2023), https://hbr.org/2023/04/generative-ai-has-an-intellectual-

Generative AI as an instrument for creative expression stands at the crossroads of innovation and legal ambiguity.[28] Currently, AI is largely unregulated in the United States while federal law attempts to answer initial questions regarding copyright protections, namely the use of preexisting copyrighted works for training.[29] In turn, software developers and users are left uncertain on the heights which innovation and creative expression may reach before it crosses into copyright infringement.[30]

Nevertheless, absent prescribed legal boundaries surrounding AI-generated content, some in the music industry are drawing their own.[31] Most prominently, in January 2024, Universal Music Group (UMG) announced its

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property-problem [https://perma.cc/Y4UY-7Z8W] (discussing that generative AI transformed the landscape of content creation because it enables the masses who previously lacked the necessary capabilities or advanced technology to create at an unprecedented speed).

[28] *See Artificial Intelligence Study*, U.S. COPYRIGHT OFF., https://www.copyright.gov/policy/artificial-intelligence/ [https://perma.cc/82SA-GCRB] (announcing that their office is collecting information to determine the current issues and concerns existing in copyright law and generative AI). The Copyright Office's AI Study's collection of public comments began on August 20, 2023, and reply comments were due on December 6, 2023. *Id.*

[29] *See* Appel et al., *supra* note 27 and accompanying text (commenting on the dissemination of generative AI systems to the public); *see, e.g.*, Haleluya Hadero & David Bauder, *The New York Times Sues OpenAI and Microsoft for Using Its Stories to Train Chatbots*, ASSOCIATED PRESS, https://apnews.com/article/nyt-new-york-times-openai-microsoft-6ea53a8ad3efa06ee4643b697df0ba57 [https://perma.cc/Y5SQ-BE9H] (Dec. 27, 2023) (stating that *The New York Times* commenced their lawsuit against OpenAI and Microsoft to prevent the use of *The New York Times*' stories for AI training); Hillel Italie, *'Game of Thrones' Creator and Other Authors Sue ChatGPT-Maker OpenAI for Copyright Infringement*, ASSOCIATED PRESS, https://apnews.com/article/openai-lawsuit-authors-grisham-george-rr-martin-37f9073ab67ab25b7e6b2975b2a63bfe [https://perma.cc/XE3A-8B5C] (Sept. 21, 2023) (explaining that seventeen authors, including George R.R. Martin, sued OpenAI because of its unauthorized use of the authors' copyrighted works and even called this practice a "systematic theft on a mass scale"). Beyond the United States, international authors and publishers are initiating lawsuits against AI developers that allege similar facts and claims of copyright infringement. *E.g.*, Benoit Berthelot, *Meta Faces Legal Challenge by French Publishers Over AI Training*, BLOOMBERG L. (Mar. 12, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/artificial-intelligence/BNA%2000000195-89ed-dcee-a395-d9ef4d260003 [https://perma.cc/ME3H-WVWG] (reporting that major French authors and publishers sued Meta Platforms Inc. (Meta) and in their complaint, which was filed in France, the authors and publishers allege that Meta infringed on their copyrights by using their literary works to train Llama, Meta's generative AI model, without authorization); Arpan Chaturvedi & Munsif Vengattil, *Indian News Agency ANI Sues OpenAI for Unsanctioned Content Use in AI Training*, REUTERS, https://www.reuters.com/technology/artificial-intelligence/indian-news-agency-ani-sues-openai-unsanctioned-content-use-ai-training-2024-11-19/ [https://perma.cc/7B8E-SMGZ] (Nov. 20, 2024) (providing that ANI sued OpenAI because OpenAI "refused to obtain a lawful license or permission" to use ANI's original works to train ChatGPT, and argued that ChatGPT permanently stores ANI's works in its memory since "there is no programmed deletion").

[30] *See Artificial Intelligence and Copyright*, U.S. COPYRIGHT OFF., https://www.regulations.gov/docket/COLC-2023-0006/comments [https://perma.cc/D4RS-TYCE] (depicting the 10,370 public comments that were submitted in response to the Copyright Office's AI study).

[31] *See An Open Letter to the Artist and Songwriter Community—Why We Must Call Time Out on TikTok*, UNIVERSAL MUSIC GRP. (Jan. 30, 2024), https://www.universalmusic.com/an-open-letter-to-the-artist-and-songwriter-community-why-we-must-call-time-out-on-tiktok/ [https://perma.cc/B6KT-BBSH] (reporting that UMG and TikTok failed to reach a renewed licensing agreement).

catalog removal from TikTok because the two companies were unable to reach an agreement on a renewed licensing contract.[32] In its announcement, it provided three issues of disagreement: (1) proper compensation for UMG's artists and composers, (2) artist-protection against harmful AI content, and (3) user-online safety.[33] Critically, UMG denounced TikTok's open-armed approach towards infringing AI-generated content while failing to compensate UMG's artists' music.[34] From UMG's perspective, TikTok's meager efforts to limit copyright infringement along with its active encouragement of AI-generated content functionally impairs the royalties UMG's artists deserve.[35] Moreover, UMG criticized TikTok's promotion and dissemination of infringing content, as well as its development of AI tools to facilitate such infringement, because it renders UMG solely responsible for removing infringing content on the platform.[36]

UMG's announcement startled the music industry.[37] UMG, an industry leader valued at $54 billion, holds more than one-third of the music market.[38] Moreover, UMG's catalog includes works from prominent artists such as Tay-

[32] *Id.*; *see* Annabel Rackham, *More Music Leaving TikTok Over Universal Music Row*, BBC (Feb. 27, 2024), https://www.bbc.com/news/entertainment-arts-68412642 [https://perma.cc/G7JQ-5GKU] (reasoning that the inability to reach a renewed licensing contract was due to disagreement over how much TikTok should pay UMG's artists).

[33] *See* UNIVERSAL MUSIC GRP., *supra* note 31 (claiming that TikTok responded to UMG with "indifference," "intimidation," and bullying tactics to attempt to reach a renewal).

[34] *See id.* (asserting that TikTok offered a disproportional compensation rate, despite its immense and growing usership, rapidly increasing advertising revenue, and increasing dependence on music-based works); *cf.* Spotify, *supra* note 20 (paying a record-breaking $10 billion in royalties).

[35] *See* UNIVERSAL MUSIC GRP., *supra* note 31 (likening TikTok's actions toward AI-generated content as "nothing short of sponsoring artist replacement by AI" because TikTok continues to develop tools that facilitate and promote AI-generated music content while demanding a contractual fee that allows such content to considerably dilute the royalties rightfully deserved to human artists).

[36] *See id.* (describing that UMG's "only means available to seek the removal of infringing or problematic content (such as pornographic deepfakes of artists) is through the monumentally cumbersome and inefficient process which equates to the digital equivalent of 'Whack-a-Mole'"). In a scathing response, TikTok denounced UMG's "false narrative and rhetoric," claiming that UMG placed corporate greed above their artists' and songwriters' interests. *TikTok Statement in Response to Universal Music Group*, TIKTOK (Jan. 30, 2024), https://newsroom.tiktok.com/en-us/tiktok-statement-in-response-to-universal-music-group [https://perma.cc/J9MV-HUDB].

[37] *See Update on Universal Music Publishing Group*, TIKTOK (Feb. 28, 2024), https://newsroom.tiktok.com/en-us/umpg-update-february-28-2024 [https://perma.cc/R4CD-BVLN] (explaining that UMG required TikTok to remove all songs that were sung by UMG's artists and all songs that were written by artists under its publishing arm, Universal Music Publishing Group (UMPG)).

[38] *See Universal Music Group N.V.*, WALL ST. J., https://www.wsj.com/market-data/quotes/UMGNF [https://perma.cc/SB3A-SZ4B] (Feb. 21, 2025) (listing UMG's market cap as of February 2025); Anita Ramaswamy, *TikTok and Universal Will Stage Reunion Tour Soon*, REUTERS, https://www.reuters.com/breakingviews/tiktok-universal-will-stage-reunion-tour-soon-2024-02-05/ [https://perma.cc/PJE2-SMZD] (Feb. 6, 2024) (providing UMG's valuation and role in the music industry in 2024); *cf.* SPOTIFY, *supra* note 20 (paying almost $4.5 billion to music publishing copyright holders, who represent the songwriters).

lor Swift, Bad Bunny, Sting, and The Weeknd, among others.[39] Artists under UMG expressed mixed opinions, with some disappointed that TikTok was no longer an available marketing tool while others supported UMG's critical stance against TikTok's inadequate artist compensation.[40] On January 31, 2024, when UMG and TikTok's contract expired and UMG removed its catalog, the silence on the playground was deafening.[41]

Although UMG and TikTok reached a renewal agreement by May 2024,[42] the music industry's desire and urgency for clear expectations surrounding AI-generated content has only increased.[43] Tech developers and digital platforms such as TikTok are unsure of the extent of their responsibility to mitigate copyright infringement on their platforms.[44] Meanwhile, corporate copyright hold-

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[39] *Artists & Writers*, UNIVERSAL MUSIC PUBL'G GRP., https://www.umusicpub.com/us/Artists.aspx [https://perma.cc/9WQK-MY5N]. In early February 2024, TikTok removed UMG's recording catalog. *See* Ethan Millman, *More UMG Music Is Getting Removed from TikTok*, ROLLING STONE (Feb. 27, 2024), https://www.rollingstone.com/music/music-news/umpg-music-is-getting-removed-from-tiktok-1234976458/ [https://perma.cc/5RWR-254L] (explaining that UMG's recording catalog consists of the works sung by artists that are signed to a UMG record label). In late February 2024, TikTok removed UMPG's publishing catalog. *See id.* (explaining that UMPG's publishing catalog consists of the works that were written by songwriters that are signed to UMPG). *But see infra* note 42 (providing that UMG and TikTok announced their new agreement on May 1, 2024).

[40] *See* Millman, *supra* note 39 (discussing that the artists' responses to UMG's removal varied, with some artists agreeing that TikTok should compensate according to the significant role music plays on the platform but other artists viewing TikTok has a promotional device, and were thus left frustrated when UMG pulled their catalog from TikTok without consulting them before taking away their foremost advertising tool for their songs); *see also* Murray, *Why Sped-Up Music*, *supra* note 15 (demonstrating how a song finally reached the top of the Billboard Hot 100 when a sped-up remix was released).

[41] *See* Sian Cain, *Universal Music Group Threatens to Pull Song Catalog from TikTok in Furious Open Letter*, THE GUARDIAN (Jan. 30, 2024), https://www.theguardian.com/music/2024/jan/31/tiktok-universal-music-group-umg-music-catalogue-rights-negotiation [https://perma.cc/6VRQ-WDG4] (discussing that TikTok's development of AI tools was one of the key reasons for UMG's removal); *see, e.g.*, Mikael Arellano (@mikaelarellano), TIKTOK (Feb. 1, 2024), https://www.tiktok.com/t/ZPR3ffvt5/ [https://perma.cc/MV7K-V8JN] (performing his choreography while singing an acapella performance of "Bejeweled" because Swift's music was unavailable to use as an audio on TikTok's platform at the time of its posting); *see also, e.g.*, *supra* note 8 and accompanying text (Arellano's viral TikToks posted in October 2023).

[42] *Universal Music Group and TikTok Announce New Licensing Agreement*, TIKTOK (May 1, 2024), https://newsroom.tiktok.com/en-us/universal-music-group-and-tiktok-announce-new-licensing-agreement [https://perma.cc/E8GJ-W8V]; *Universal Music Group and TikTok Announce New Licensing Agreement*, UNIVERSAL MUSIC GRP. (May 1, 2024), https://www.universalmusic.com/universal-music-group-and-tiktok-announce-new-licensing-agreement/ [https://perma.cc/WU7R-HVLQ].

[43] *See* Virginie Berger, *AI's Impact on Music in 2025: Licensing, Creativity and Industry Survival*, FORBES, https://www.forbes.com/sites/virginieberger/2024/12/30/ais-impact-on-music-in-2025-licensing-creativity-and-industry-survival/ [https://perma.cc/ZY4L-BZRB] (Jan. 3, 2025) (advocating for clear copyright protection mechanisms so that generative AI does not supplant human artists); Zach Williams, *States Target AI-Enabled Discrimination in 2025 Legislative Push*, BLOOMBERG L. (Jan. 3, 2025), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-government-news/X5FOCAKC000000?bna_news_filter=bloomberg-government-news#jcite [https://perma.cc/345B-APFX] (noting that by 2026, only five states may have passed AI legislation).

[44] *See* U.S. COPYRIGHT OFF., *supra* note 30 (receiving 10,370 public comments that requested clarification over AI).

ers, like UMG, want to impart larger responsibility on the tech developers and digital platforms to mitigate revenue losses and copyright infringement.[45] The artist response remains varied, as developments in AI technologies offer novel methods to innovate and infringe.[46] To resolve these questions, this Note argues that the doctrines of third-party liability under federal copyright law require elaboration, given their outdated efficacy against AI-generated content.[47]

Part I of this Note traces the history of copyright law and its development of third-party liability doctrines.[48] Part II evaluates the current flaws of these theories of third-party liability and looks to the European Union's (EU) legislative efforts to regulate large online platforms and AI developers.[49] Part III argues that vicarious liability is the most appropriate theory to impute responsibility onto social media platforms and suggests that vicarious liability, with their EU-compliance obligations, may assist these platforms and AI developers ascertain their liability as third parties.[50]

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[45] *See* UNIVERSAL MUSIC GRP., *supra* note 31 (declaring TikTok's negotiation tactics as obvious attempts to force UMG into a renewal agreement that impairs vulnerable artists and songwriters and undervalues their important contributions to music and their fans); *see also* Veltman, *supra* note 19 (reporting on UMG's public statement in response to "Heart on My Sleeve," an AI-generated impersonation of Drake and the Weekend, "Heart on My Sleeve"). UMG, whose label Drake and The Weeknd are under, shared a statement with NPR that expressed the collective concern of AI-generated content created without copyright owners' consent:

> The training of generative AI using our artists' music (which represents both a breach of our agreements and a violation of copyright law) as well as the availability of infringing content created with generative AI on DSPs [Demand Side Platforms], begs the question as to which side of history all stakeholders in the music ecosystem want to be on: the side of artists, fans and human creative expression, or on the side of deep fakes, fraud and denying artists their due compensation.

Veltman, *supra.* Moreover, independent labels have reported difficulties in renewing licensing agreements with TikTok. Kristin Robinson, *TikTok 'Walked Away' from Talks with Merlin. Now Indie Songs by Nirvana, Phoebe Bridgers & More May Leave the App*, BILLBOARD PRO (Oct. 1, 2024), https://www.billboard.com/pro/merlin-says-tiktok-walked-away-licensing-negotiations/ [https://perma.cc/J69K-3DX7]; *see* Jem Aswad, *Inside TikTok's Money Squeeze on Independent Labels: 'This Is a Classic Divide-and-Conquer Situation,'* VARIETY (Oct. 9, 2024), https://variety.com/2024/digital/news/inside-tiktok-money-squeeze-independent-labels-1236172240/ [https://perma.cc/K6G9-DBA8] (providing accounts from sources from independent labels disclosing that TikTok had offered rates on new licensing agreement drafts that were lower than precedent).

[46] *See supra* note 40 and accompanying text (discussing UMG artists' varied responses to UMG's catalog removal from TikTok); *see, e.g.*, Artists Rts. All., *supra* note 19 (letter signed by 256 artists cautioning against unfettered acceptance of generative AI).

[47] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 457–58 (1984) (Blackmun, J., dissenting) (opining on the Court's tendency to avoid "the hard issues when they arise in the area of copyright law" and the 1976 Copyright Act makes the congressional intent clear: Amending copyright legislation to become technologically neutral); *infra* Part I.B (providing the different theories of third-party copyright liability).

[48] *See infra* notes 51–157 and accompanying text.

[49] *See infra* notes 158–250 and accompanying text.

[50] *See infra* notes 251–293 and accompanying text.

I. A CAUSE AND EFFECT: EMERGING TECHNOLOGIES AND COPYRIGHT THIRD-PARTY LIABILITY

Copyright law operates within the tension between the protection of the copyright owner's exclusive rights and the public's interest in the free flow of ideas.[51] This delicate balance has been largely drawn through judicial interpretation, where courts have played a pivotal role in defining the contours of copyright legislation and protection in response to emerging technologies and cultural phenomena.[52]

AI-generated content threatens this delicate balance.[53] Generative AI's unparalleled ability to create, modify, and disseminate infringing works obfuscates traditional copyright doctrines.[54] As litigation surrounding AI-generated content continues to increase, copyright law must reconcile generative AI with existing doctrines of liability.[55] This Part of the Note discusses the U.S. Su-

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[51] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (explaining that copyright ownership is "a means by which an important public purpose may be achieved" and is "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired").

[52] *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005) (describing how copyright strives to achieve sufficient artistic protection without discouraging technological innovation); *Sony*, 464 U.S. at 431 (explaining that where "Congress has not plainly marked [a] course, [the Court] must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests"). When approaching copyright law's ambiguities, the Court must strike a balance between "[t]he limited scope of the copyright holder's statutory monopoly" with the "competing claims upon the public interest." *Sony*, 464 U.S. at 431–32. Copyright's primary object in awarding copyright "lie[s] in the general benefits derived by the public from the labors of authors." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).

[53] *See* J. Edward Moreno, *Boom in A.I. Prompts a Test of Copyright Law*, N.Y. TIMES (Dec. 30, 2023), https://www.nytimes.com/2023/12/30/business/media/copyright-law-ai-media.html [https://perma.cc/DWJ7-SLQD] (explaining that the AI industry may need to wait for definitive answers as to these questions of copyright infringement because the lawsuits presenting these questions are still being litigated at the trial court level, which could take years for a Federal District Court to rule on these matters); Appel et al., *supra* note 27 (discussing that generative AI has significant implications on existing copyright laws such as ownership over the generated output; whether infringement occurred when users prompt generative AI to copyrighted materials, without the owner's consent; or when AI developers upload unlicensed content to train their system); Williams, *supra* note 43 (only five states are prepared to pass AI legislation by 2026).

[54] *See* CHRISTOPHER ZIRPOLI, CONG. RSCH. SERV., LSB10922, GENERATIVE ARTIFICIAL INTELLIGENCE AND COPYRIGHT LAW 2–3 (Sept. 29, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10922 [https://perma.cc/6745-LG8V] (discussing that U.S. copyright law currently faces several challenges in addressing sufficiently the issues brought by AI-generated content, primarily due to the doctrines developed well before the advent of advanced digital technologies like AI).

[55] *See id.* at 1 (explaining that developments in AI will require courts to confront new questions regarding the application of copyright doctrines, such as authorship and fair use, to AI-generated content); Jim Holloway, Milton Cheng & Julia S. Dickenson, *Will Copyright Law Enable or Inhibit Generative AI?*, WORLD ECON. F. (Jan. 13, 2024), https://www.weforum.org/agenda/2024/01/cracking-the-code-generative-ai-and-intellectual-property/ [https://perma.cc/Z3GL-EB7A] (discussing that

preme Court's adaptions of copyright theories of third-party liability when faced with technological advances.[56]

Section A of this Part explores the history and development of copyright owners' exclusive rights against infringement.[57] Section B discusses copyright infringement that includes third-party involvement: contributory infringement, vicarious liability, and inducement.[58] Next, Section C examines the legislative efforts to create an effective scheme that removes infringing material from internet platforms.[59]

A. Copyright Owners' Exclusive Rights: What Is Protected and Why

Congress is empowered "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[60] Courts have the ability to interpret existing legislation in light of novel developments because of its technologically neutral nature—a trait Congress purposely wrote into their amendments to afford courts this flexibility.[61] Accordingly, courts have articulated or adapted doctrines to accommodate innovation while also preventing copyright law from stifling, or deterring, innovation.[62]

Copyright confers protection, in the form of exclusive rights, to fixed,[63] original works of authorship.[64] 17 U.S.C. § 102 prescribes categories of works

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while courts consider the application of traditional copyright principles to AI-generated works, Congress may amend legislation to clarify the scope of copyright in relation to AI-generated works).

[56] *See infra* notes 60–157 and accompanying text.

[57] *See infra* notes 60–101 and accompanying text.

[58] *See infra* notes 102–147 and accompanying text.

[59] *See infra* notes 148–157 and accompanying text.

[60] U.S. CONST. art. I, § 8, cl. 8; *see* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (explaining Congress's task to define "the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product").

[61] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (providing that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of [its] basic purpose": "to stimulate artistic creativity for the general public good"); *see also infra* notes 97–147 and accompanying text (providing instances where courts have construed copyright legislation to accommodate innovation).

[62] *See* H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 (explaining that copyright legislation "sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories").

[63] 17 U.S.C. § 101. Section 101 provides that:

> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

that the judiciary may interpret to include newly invented works such as computer programs.[65] Copyright infringement occurs when an individual violates one of the six exclusive rights prescribed under Title 17 of the *United States Code*.[66] One of the six exclusive rights is the derivative work right.[67] The derivative work must have modified the preexisting work to resemble a new, original work of authorship.[68] Copyright owners have the exclusive right to prepare or authorize a derivative work.[69] Derivative works include sequels, articles about movies, and other works that are subsequent uses of a preexisting work, such as AI-generated content.[70]

Id.; *see* Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874, 877 (3d Cir. 1982) (rejecting the defendant's interpretation of fixation because Congress desired a broad interpretation of the term to include "technological advances such as those represented by the electronic devices in this case").

[64] 17 U.S.C. § 102(a); *e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991) ("Originality requires only that the author make the selection or arrangement independently (*i.e.*, without copyright that selection or arrangement from another work), and that it display some minimal level of creativity."); *cf. infra* notes 92–93 and accompanying text (discussing the defense of de minimis use).

[65] 17 U.S.C. § 102(a); *e.g.*, H.R. REP. NO. 94-1476, at 53 (explaining that the seven listed categories "do not necessarily exhaust the scope of 'original works of authorship' that the bill is intended to protect"); *see, e.g.,* 17 U.S.C. § 101 (defining literary works as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects"). Computer works are considered literary works because their source code is expressed in "words, numbers, or other verbal or numerical symbols or indicia." 17 U.S.C. § 101; *see* Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015 (defining a "'computer program' [a]s a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result").

[66] *See* 17 U.S.C. § 501(a) (prescribing "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 . . . is an infringer of the copyright or right of the author").

[67] *See id.* § 106(2) (prescribing the derivative work right as one of the six exclusive rights a copyright owner holds).

[68] *Id.* § 101 (providing that derivative works are ultimately any "form in which a [copyrighted] work may be recast, transformed, or adapted").

[69] *See Copyright in Derivative Works and Compilations,* U.S. COPYRIGHT OFF. 1 (2020), https://www.copyright.gov/circs/circ14.pdf [https://perma.cc/H9VP-6MGM] (listing several examples of derivative works such as a movie based on a novel or play, a translation of a work written in one language to another, a drawn depiction of a photograph, and a collection of the top song recordings of 2004).

[70] *See* Complaint and Demand for Jury Trial, at 23, Getty Images (US), Inc. v. Stability AI, Inc., No. 1:23-cv-00135-JLH (D. Del. Feb. 3, 2023) (asserting that the defendant infringed upon the plaintiff's copyrights because the defendant reproduced the plaintiff's copyrighted works to create derivative works without the plaintiff's authorization); Shawn Helms & Jason Krieser, *Copyright Chaos: Legal Implications of Generative AI*, BLOOMBERG L. (Mar. 2023), https://www.bloomberglaw.com/external/document/XDDQ1PNK000000/copyrights-professional-perspective-copyright-chaos-legal-implic [https://perma.cc/2DMV-A52F] (explaining that all AI-generated literary and artistic content may be considered derivative because the content is generated from a dataset of preexisting works).

Policy considerations drive copyright law.[71] As an economic incentive, copyright rewards the author whose creativity produced a work *worthy* of copyright protection, which in turn, incentivizes the author to create more.[72] Further, there is an inherent justice to award copyright to an author's creation because the creation was a result of the author's labor.[73] Thus, the economic and labor rationales are key considerations when interpreting copyright doctrine and legislation.[74] Nevertheless, these economic and labor incentives for authors do not drive copyright alone.[75]

Courts interpret copyright doctrines with both the author's and the public's interests in mind.[76] The economic and labor policy rationales must be limited to ensure the public's right to access copyrighted works so that creativity sparks innovation within the public.[77] When creativity flourishes, society benefits, therefore copyright law cannot be too restrictive to disincentivize authors from creating new works nor too protective to prevent society from the benefit of new works.[78]

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[71] *See, e.g.*, United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (providing that conferring copyright ownership as a "reward to the author or artist serves to induce release to the public of the products of [their] creative genius").

[72] *See* Atilla Kasap, *Copyright and Creative Artificial Intelligence (AI) Systems: A Twenty-First Century Approach to Authorship of AI-Generated Works in the United States*, 19 WAKE FOREST J. BUS. & INTELL. PROP. L. 335, 361 (2019) (positing that copyright protection reflects binary policy considerations: authors' creative works benefit the general public and the authors' limited monopoly motivates their continued creativity before their works enter the public domain).

[73] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (expressing that copyright ownership is "intended to motivate the creative activity of authors and inventors by the provision of a special reward").

[74] *See id.* (explaining that Congress did not primarily design the limited monopoly privileges solely to confer a benefit to authors, but rather the limited privilege "is a means by which an important public purpose may be achieved").

[75] *See* Evan F. Fitts, *Inducement Liability for Copyright Infringement Is Born: The Supreme Court Attempts to Remedy the Law's Broken Leg with a Cast on the Arm* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 71 MO. L. REV. 767, 771 (2006) (highlighting that copyright considers two preeminent principles: to ensure an equitable return for an author's creative labor and to rouse artistic creativity for public benefit).

[76] *See* Twentieth Century Music Corp. v. Aiken*,* 422 U.S. 151, 156 (1975) (discussing that, although copyright's immediate effect secures an author's fair return for their creative labor, copyright's ultimate goal is to inspire artistic creativity for the overall public good); *see, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (emphasizing that the idea/expression dichotomy is a means by which copyright stimulates the innovation of science and art by granting authors the right and protection of their original expression, while still encouraging others to create freely upon the facts and ideas portrayed by a work).

[77] *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 526 (2023) ("Copyright thus trades off the benefits of incentives to create against the costs of restrictions on copying.").

[78] *See Sony*, 464 U.S. at 429 (discussing the necessity to weigh the balance between the competing interests of the public and of the authors and their works); Darrin Keith Henning, Note, *Intellectual Property—Copyright & Internet Law—"The Big Chill": The Supreme Court Adopts an Inducement Standard for Third-Party Copyright Infringement Liability, Leaving Innovation in the Cold* Metro-Goldwyn-Mayer Studio v. Grokster Ltd.*, 125 S. Ct. 2764 (2005)*, 29 U. ARK. LITTLE ROCK L. REV.

The creation of derivative works achieves copyright law's goals.[79] When an artist authorizes a derivative work, the author gains an economic reward, like licensing fees.[80] Further, the public benefits from derivative works because they foster creativity among the public to create more copyrightable works.[81] Authorized derivative works reward both creators—original and derivative—and uphold the existing balance copyright law aims to strike.[82]

The copyright owner may bring a copyright infringement claim when someone creates a derivative work without their authorization.[83] The elements of a copyright infringement claim include issues of fact: (1) the defendant copied from the plaintiff's copyrighted work, and (2) the defendant's copying must rise to the level of improper appropriation.[84]

"Copying" for the purpose of infringement does not necessitate copying the entire work nor is there a threshold amount.[85] Instead, either direct evidence of copying or circumstantial evidence establishes a reasonable inference

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165, 166 (2006) (arguing the vitality to strike an appropriate balance between safeguarding authors' works as an impetus to create and society's interest in accessing new technology and creative works).

[79] *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 696 (2d Cir. 1992) (explaining that copyright offers the protection of works to incentivize authors to create but limits its protection to avoid any potential "monopolistic stagnation"). Because of this delicate equilibrium, when courts apply copyright law, they "must always keep this symmetry in mind." *Id.*; *see also, e.g.*, Fitts, *supra* note 75, at 771 (noting that Congress's intent for copyright is to promote authors' innovations to benefit the public).

[80] *See Andy Warhol Found.*, 598 U.S. at 535 (describing how licenses achieve copyright's goal because these fees instill a monetary incentive to craft original works and their sale for any derivatives of the work are how creators make a living); *see, e.g.*, *supra* notes 20–21 and accompanying text (discussing that record labels lose revenue when unauthorized versions of their copyrighted songs overshadow the official version on TikTok); *cf. supra* note 45 and accompanying text (noting the reported challenges music labels face when renewing a favorable licensing agreement with TikTok).

[81] *See Aiken*, 422 U.S. at 156 (articulating that when an author's limited monopoly ends, the work's entrance into the public domain stimulates artistic creativity and increases innovation); *see, e.g.*, *supra* notes 3–12 and accompanying text (examples of different music-based TikTok trends).

[82] *See Sony*, 464 U.S. at 450 ("The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended [them] to have.").

[83] *See Aiken*, 422 U.S. at 154–55 (explaining that not every unauthorized use of a copyrighted work constitutes as infringement) (citing Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393–95 (1968)). To bring a copyright infringement claim, a plaintiff must assert that the unauthorized use violates one of the six exclusive rights listed under § 101, which includes the derivative work right. 17 U.S.C. § 106(2); *Aiken*, 422 U.S. at 155; *see* Helms & Kreiser, *supra* note 70 (contending that outputs from generative AI systems may constitute as derivative if the system was trained with preexisting copyrighted works).

[84] Arnstein v. Porter, 154 F.2d 464, 468–69 (2d Cir. 1946), *abrogated on other grounds, as recognized in* Heyman v. Com. & Indus. Ins. Co., 524 F.2d 1317, 1319 (2d Cir. 1975); *see also infra* notes 85–89 and accompanying text (supplying a brief explanation of the elements of a copyright infringement claim).

[85] Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

of copying to satisfy this element.[86] Direct evidence—such as the defendant's admission of copying—rarely appears in infringement claims.[87] To the contrary, circumstantial evidence includes indicia such as a defendant's access to the plaintiff's work and substantial similarity between the plaintiff and defendant's works.[88] If copying is established, a court will then consider the issue of improper appropriation by determining the level of similarity between the plaintiff's and defendant's works.[89]

The issue of improper appropriation reflects a prevailing principle in copyright that some instances of copying are permitted.[90] Likewise, the doctrines of de minimis use and fair use reflect this principle.[91] De minimis use relates to the constitutional requirement of originality, where copyright protections extend only to the "elements of a work that possess more than a de minimis quantum of creativity."[92] In other words, copyright law does not necessarily offer protection over an entire work, only the portions that have more than a de minimis amount of creativity.[93] Fair use—an affirmative defense authorized by statute—permits the unauthorized, yet limited use of copyrighted materials to those who transform the copyrighted work to promote the public interest.[94]

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[86] *See Arnstein*, 154 F.2d at 464 (providing that the defendant's copying may be established by the defendant's own admission or by circumstantial evidence, which is typically evidence of access).

[87] *See* Shani Shisha, *Commercializing Copyright*, 65 B.C. L. REV. 444, 460 (2024) (noting that infringement claims seldom have direct evidence of copying because infringers typically act without any eyewitnesses, nor do they admit to infringement).

[88] *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) ("[B]ecause direct evidence of copying is rarely available, the plaintiff can rely upon circumstantial evidence to prove this essential element, and the most important component of this sort of circumstantial evidence is proof of access."). Access may be satisfied through circumstantial evidence by proof of similarity that is "so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter precluded." *Id.* Access may also be satisfied through direct evidence, such as when "the work was sent directly to the defendant," or a reasonable possibility of access, such as when "the complaining work has been widely disseminated to the public." *Id.* Although, "the concept of 'access' is increasingly diluted in our digitally interconnected world." *See* Skidmore v. Zeppelin, 952 F.3d 1051, 1068 (9th Cir. 2020) (remarking that, due to the availability of online media, "from YouTube to subscription services like Netflix and Spotify, access may be established by a trivial showing that the work is available on demand").

[89] *Arnstein*, 154 F.2d at 472–73.

[90] *See id.* (providing that "there can be 'permissible copying,' copying which is not illicit") (footnote omitted).

[91] *See infra* notes 92–96 and accompanying text.

[92] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363–64 (1991) (offering that, "[a]s a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality").

[93] *Id.*; *cf.* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16191 (Mar. 16, 2023) (to be codified at 37 C.F.R. pt. 202) (providing that AI-generated content is not copyrightable because it does not meet the human authorship requirement).

[94] 17 U.S.C. § 107. The statute provides appropriate purposes that constitute fair use: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research," along with four factors that courts must consider determining whether a use was fair. *Id.*

Relevant for our purposes here, AI developers raise both arguments to defend against copyright infringement claims.[95] With de minimis use, developers argue that their AI-generated outputs do not meet the minimum threshold of creativity to qualify as infringement; with fair use, they reason that the use of publicly available copyrighted works to train their AI models should be a fair-use exception because using these works to train—without needing to negotiate with the copyright holders—expedites innovation.[96]

Moreover and undoubtedly so, technological developments ease an individual's ability to commit copyright infringement.[97] For example, the advent of the printing press revolutionized the dissemination and copying of written works.[98] A more recent example, the Internet, allows individuals to locate and access copyrighted works with little effort.[99] Because technological innova-

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[95] *See, e.g.*, Letter from Christopher Lehane, Vice President of Global Affairs, OpenAI, to Faisal D'Souza, Nat'l Coordination Off., Off. of Sci. & Tech. Pol'y 4 (Mar. 13, 2025), https://cdn.openai.com/global-affairs/ostp-rfi/ec680b75-d539-4653-b297-8bcf6e5f7686/openai-response-ostp-nsf-rfi-notice-request-for-information-on-the-development-of-an-artificial-intelligence-ai-action-plan.pdf [https://perma.cc/PC39-347J] (asserting that a fair-use exception would enact an effective intellectual property regime in the United States that guarantees the latitude to innovate without needlessly complying with laborious regulations); Response Letter from Google to the Nat'l Sci. Found. and Off. of Sci. & Tech. Pol'y's Request for Information on the Development of an Artificial Intelligence (AI) Action Plan 5 (Mar. 13, 2025), https://static.googleusercontent.com/media/publicpolicy.google/en//resources/response_us_ai_action_plan.pdf [https://perma.cc/GP3R-MU94] (same).

[96] *See* Kevin Madigan, *Mid-Year Review: AI Lawsuit Developments in 2024*, COPYRIGHT ALL. (July 25, 2024), https://copyrightalliance.org/ai-lawsuit-developments-2024/ [https://perma.cc/5ZGF-SNSB] (anticipating the likely difficulty plaintiffs will face litigating infringement claims against derivative outputs because of the commonly raised defenses like transformative fair use and de minimis copying). On February 11, 2025, in *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*, the U.S. District Court for the District of Delaware rejected the defendant's fair-use defense, effectively reversing its 2023 decision denying plaintiff summary judgment on direct copyright infringement and related defenses. *Cf.* No. 1:20-cv-00613-SB, slip op. at 2 (D. Del. Feb. 11, 2025) ("A smart man knows when he is right; a wise man knows when he is wrong. Wisdom does not always find me, so I try to embrace it when it does—even if it comes late, as it did here."). Significantly, even though this defendant—an AI-powered search engine—is a non-generative AI company, this opinion is one of the first, clear messages to tech companies that the fair-use defense may not be as viable as hoped. *Id.* at 19, 23; Aruni Soni, *Judge Rejects Fair-Use Defense in Westlaw AI Copyright Suit (3)*, BLOOMBERG L., https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%2000000193-b7ac-d85e-adfb-f7bcd74b0001 [https://perma.cc/3BBJ-CE2K] (Feb. 11, 2025) (reporting how this decision has already made waves in AI-derivative output infringement claims). Although, the court made sure to emphasize that its opinion was limited to its facts. *Thomson Reuters*, slip op. at 19 ("Because the AI landscape is changing rapidly, I note for readers that only non-generative AI is before me today.").

[97] *See* Henning, *supra* note 78, at 165 ("Technological innovation and copyrights are generally seen as being in conflict, with copyright pitted against progress."); *cf.* 17 U.S.C. § 102(a) (listing the categories of works that are protected under copyright and providing that copyright protection is available to "original works of authorship fixed in any tangible medium of expression, *now known or later developed*" (emphasis added)).

[98] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984).

[99] *See* Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1890 (2000) (discussing how the

tions offer such uses that facilitate copyright infringement with great ease, U.S. copyright law adapted new measures in response: doctrines of third-party liability[100] and the Digital Millennium Copyright Act (DMCA).[101]

B. Copyright Third-Party Liability Doctrines

As new methods for copyright infringement developed, it became increasingly burdensome and difficult for copyright owners to identify and litigate against each and every person for each and every act of infringement.[102] Accordingly, imposing liability on third parties became necessary to reduce the burden on copyright owners.[103] Although the Copyright Act does not explicitly impose liability upon third parties for their assistance or role in copyright infringement, third-party liability is a judge-made doctrine tacitly accepted by Congress.[104] The following subsections will discuss the three theories of third-party liability: contributory infringement, vicarious liability, and inducement.[105]

1. The Traditional Theories of Third-Party Liability: Contributory Infringement and Vicarious Liability

a. Contributory Infringement

A finding of contributory infringement requires that a third party have knowledge of the infringing activity and act in a manner that causes or materi-

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Internet challenges the copyright regime because it reproduces and distributes information at an accelerated speed previously unknown).

[100] *See infra* Part I.B (discussing the development of copyright's third-party liability doctrines).

[101] Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of Title 17 of the *United States Code*); *see* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 26–27 (2d Cir. 2012) (explaining that Congress enacted the DMCA to update federal copyright law in light of the digital age and that the DMCA's clarifications on liability were to exist simultaneously with existing copyright doctrines); *infra* Part I.C (discussing the DMCA).

[102] *See* UNIVERSAL MUSIC GRP., *supra* note 31 (likening the removal of infringing or problematic content to the digital equivalent of "Whack-a-Mole").

[103] *See* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (rationalizing that when a third party benefits from another's copyright infringement, the third party should be held liable).

[104] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434 (1984) (stating that the Copyright Act does not contain an express provision that renders someone liable for another's infringing activity). Nevertheless, the U.S. Supreme Court further reasoned that "the absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity." *Id.* at 435.

[105] *See* Charles W. Adams, *Indirect Infringement from a Tort Law Perspective*, 42 U. RICH. L. REV. 635, 636 (2008) (identifying copyright law's three doctrines of third-party liability: contributory infringement, vicarious liability, and inducing infringement).

ally contributes to copyright infringement.[106] In 1971, in *Gershwin Publishing Corporation v. Columbia Artists, Management, Inc.*, the U.S. Court of Appeals for the Second Circuit held that the defendant was a contributory infringer because the defendant both knew of and encouraged the continuous infringing activity.[107] The Second Circuit remarked that even though the defendant was aware that its artists—the primary infringers—included copyrighted works in their performances, the defendant continued to program and market these performances nonetheless.[108] Thus, the defendant contributed to the infringement and was contributorily liable to the primary infringers' acts.[109]

b. Vicarious Liability

Unlike contributory infringement, a finding of vicarious liability does not require the third party to have knowledge of the infringing activity.[110] Rather, vicarious liability requires that the third party have the right and ability to supervise the primary infringer and have a direct financial interest in the infringing activity.[111] In 1963, in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, the Second Circuit concluded that because the defendant received an unjust financial benefit from the infringing act, the court should impose vicarious liability on the defendant.[112] There, the primary infringer sold unauthorized copies of copyrighted works in defendant's storefronts.[113] The primary infringer and the defendant were in a licensing agreement in which the defendant—the licensor—retained the right to supervise its storefronts and the employees, and to

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[106] *See* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) ("[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer.").

[107] *See id.* (reasoning that the defendant's "liability was predicated upon 'the common law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor'" (quoting Screen Gems-Columbia Music, Inc. v. Mark-Fi Recs., Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966))).

[108] *See id.* at 1163 (holding that even though the defendant "had no formal power to control" the artists, the defendant was in a position to monitor and limit the artists' infringing acts).

[109] *See id.* at 1162 (providing that third parties may be held liable under contributory infringement if they "had knowledge, or reason to know, of the infringing nature").

[110] *See id.* at 1161–62 (explaining that copyright law allows a third party to be held liable even when they did not perform the infringing act or when they had no knowledge of the copyright infringement) (citing Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963)).

[111] *Compare Shapiro*, 316 F.2d at 307 (articulating vicarious liability), *with Gershwin*, 443 F.2d at 1162 (articulating contributory infringement).

[112] *See* 316 F.2d at 307 (reasoning that because the third party receives a financial benefit from the exploitation of copyrighted works, the third party should be held vicariously liable); *cf.* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (explaining that copyright ownership grants an author's fair return for their creative labor).

[113] *See Shapiro*, 316 F.2d at 306 (describing the complaint's allegations that the defendant was liable as a third-party infringer because the direct infringer sold bootleg records in the defendant's stores).

receive a share of the gross receipts from the licensee's sales.[114] Accordingly, the defendant had a financial interest in the infringing activity because whenever the primary infringer, the licensee, sold an unauthorized copy, the defendant received a portion of the profit.[115] The Second Circuit held that the defendant was vicariously liable because the defendant did not use its right to prevent copyright infringement and avoid liability but rather used its licensor rights to benefit from the infringement.[116]

2. An Evolution of Contributory Infringement: The *Sony* Standard

Although contributory infringement and vicarious liability are the traditional doctrines of third-party liability available as enforcement devices for copyright holders, modern technology has provided its users the ability to infringe copyrighted works on an unprecedented scale.[117] Moreover, third-party liability affects not only the copyright market, but also the tech market.[118] The potential liability for a user's infringing act as a tech developer influences what type of products enter the market.[119] In 1984, in *Sony Corporation of America v. Universal City Studios*, the U.S. Supreme Court attempted to articulate the applicability of the two traditional theories of third-party liability for infringing uses of modern technology.[120] There, the defendant manufactured and sold home video tape recorders (VTRs), and individuals used the VTRs to record the plaintiffs' copyrighted works broadcasted on television.[121] The plaintiffs

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[114] *See id.* at 308 (providing details of the direct infringer and defendant's licensor-licensee relationship).

[115] *See id.* (finding that the defendant had a "most definite financial interest" from the infringing activity because the defendant "reserv[ed] for itself a proportionate share of the gross receipts from" the sales of bootleg records).

[116] *See id.* (reasoning that the finding of vicarious liability "cannot be deemed unduly harsh or unfair" because the defendant had "the power to police carefully the [direct infringer's] conduct"). The U.S. Court of Appeals for the Second Circuit rationalized this judgement as "placing responsibility where it can and should be effectively exercised." *Id.*

[117] *See* Yen, *supra* note 99, at 1834 (asserting that the advent of the Internet enables anyone to duplicate and disseminate information at a scale not seen before).

[118] *See id.* at 1837 (explaining that, although the DMCA allows online service providers (OSPs) escape liability, OSPs are unsure whether they are actually liable for their subscribers' behavior); Henning, *supra* note 78, at 166 (explaining how an overprotective copyright framework curbs the flow of capital into technological development and innovation when innovators need the capital as an incentive).

[119] *See* Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1613 (2001) (providing that the legislature must keep copyright incentives adequately meaningful in order to prevent the innovation of new technologies).

[120] *See* 464 U.S. 417, 435 n.17 (1984) (acknowledging that the U.S. District Court for the Central District of California correctly observed that "the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn"); *see also id.* at 487 (Blackmun, J., dissenting) ("The doctrine of contributory copyright infringement . . . is not well defined.").

[121] *Id.* at 422 (majority opinion) (discussing the defendant's manufacture of the product and the product's capabilities).

asserted that the defendant was liable under the theories of vicarious liability and contributory infringement.[122] Under the theory of vicarious liability, the plaintiffs alleged that the defendant (1) had the ability to control the infringing act of the recording of copyrighted works and (2) received a financial benefit from the VTR's sales.[123] Under the theory of contributory infringement, the plaintiffs asserted that the defendant (1) knew that customers would use the VTRs to infringe copyright and (2) its manufacture and sale of VTRs substantially assisted infringement.[124]

The *Sony* Court refused to hold the defendant vicariously liable because the Court did not find that the defendant's knowledge that customers may use VTRs for infringing uses constitutes a position to control infringement.[125] The defendant did not have any direct contact or involvement with VTR's purchasers except at the time of the purchase.[126] Without precedent to support that a defendant's knowledge alone is sufficient to establish the ability to control or supervise infringing activity, the Court declined to extend the vicarious liability doctrine.[127]

Further, the Court rejected to find that the defendant was contributorily liable, and by doing so, the *Sony* Court's rationale altered the landscape of third-party liability.[128] The Court based its holding on the staple article doctrine,

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[122] *See id.* at 459 (Blackmun, J., dissenting) (noting that the district court held that the defendant was not liable under the theories of contributory infringement or vicarious liability).

[123] *See id.* at 439 (majority opinion) (explaining that an imposition of vicarious liability onto the defendant would stem from the defendant's knowledge that purchasers of their product could use it to make unauthorized duplicates of copyrighted works); Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (providing that vicarious liability requires that the third party had the right and ability to supervise the primary infringer and a direct financial interest in the infringing activity).

[124] *See Sony*, 464 U.S. at 436 (discussing the plaintiffs' argument that providing the capable technology to infringe and promoting such activities through advertisement suffice to establish liability). Citing *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911), the plaintiffs' argument rested on the premise that providing the "means" to execute an infringing activity and advertising and promoting those activities may satisfactorily establish copyright infringement liability. *Sony*, 464 U.S. at 436. The U.S. Supreme Court distinguished *Kalem* from *Sony* because the *Kalem* defendant not only provided the means to infringe, but also the copyrighted work itself, whereas the *Sony* defendant provided only the means to infringe. *Compare Sony*, 464 U.S. at 436 (manufacturing and selling VTRs without any copyrighted materials accompanying the VTR), *with Kalem*, 222 U.S. at 60 (hiring a man to read the supplied-copyrighted work, identify or describe specific portions to infringe upon, and then commit infringement to produce films ready for exhibition).

[125] *See Sony*, 464 U.S. at 439 (explaining that to find the defendant vicariously liable, such a finding would rest upon the singular fact that the defendant knew customers *might* use the VTR to make copies of copyrighted works).

[126] *Id.* at 438 (discussing that the only contact between the defendant and the purchasers was at the time of purchase).

[127] *See id.* at 439 (finding that defendant was not vicariously liable because there was no precedent in copyright law that imposed vicarious liability onto a defendant that merely held knowledge that its purchasers may use the product for copyright infringement).

[128] *Compare id.* at 456 (holding that defendant's sale of the product was not contributory infringement because the product is capable of substantial noninfringing uses), *with* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that the defendant was a contributory infringer because the defendant had knowledge of and materially contributed to

which originates from patent law.[129] The staple article doctrine provides that even when an article is capable of an infringing use, if the article is capable of lawful uses, the article's seller is not a contributory infringer.[130] Otherwise if the article's seller were to be a contributory infringer, such a conclusion would inhibit commerce.[131] Thus, the Court adopted the staple article doctrine into copyright law to consider whether an article is capable of substantial non-infringing uses to determine contributory liability.[132]

The Court instructed that an inquiry into every possible use is not necessary, but instead found that a creator does not infringe when their work has a significant number of non-infringing uses.[133] The Court then looked to the findings of the U.S. District Court for the Central District of California, which found that the VTRs could record noncopyrighted works or works authorized by their owner for copying.[134] Given that the plaintiffs also failed to show the

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the infringing act of another). *See* Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 122 (2010) (explaining that the *Sony* standard, whether a product is capable of substantial noninfringing use, is critiqued for its ambiguity, which renders its applicability problematic).

[129] *See Sony*, 464 U.S. at 442 (rationalizing the adoption of the staple article of commerce doctrine into copyright jurisprudence because it "strike[s] a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce").

[130] *See id.* at 441 (providing that the staple article doctrine is "a sale of an article which though adapted to an infringing use is also adapted to other and lawful uses, is not enough to make the seller a contributory infringer" (quoting Henry v. A.B. Dick Co., 224 U.S. 1, 48 (1912))).

[131] *See Sony*, 464 U.S. at 441 (explaining that if there was a rule that made a seller a contributory infringer when their product was capable of not only infringing uses but lawful as well, that would "block the wheels of commerce" (quoting *Henry*, 224 U.S. at 48)).

[132] *See Sony*, 464 U.S. at 442 (elucidating that the determinative question as to whether the defendant is a contributory infringer is whether the product is "capable of commercially significant noninfringing uses").

[133] *See id.* (clarifying that courts should resolve whether a product is capable of commercially significant noninfringing uses from the lower courts' finding of facts rather than engage in an exploration of every potential use of the product and determine whether each use constitutes infringement).

[134] *See id.* at 443–45 (discussing the lower court's findings). The U.S. District Court for the Central District of California found that the defendant's product could be used legally to record noncopyrighted works and copyrighted works whose owners have consented to the recording. *Id.* at 443. The defendant also introduced testimony from copyright owners that supported the product's use to record their works. *Id.* at 445. Fred Rogers, the copyright owner of *Mister Rogers' Neighborhood*, provided compelling testimony when he testified that the VTR was a worthy service to families because they now had the ability to record children's television programs to watch them at suitable times. *Id.* Here is Mr. Rogers' testimony in part:

> Some public stations, as well as commercial stations, program the "Neighborhood" at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times. I have always felt that with the advent of all of this new technology that allows people to tape the "Neighborhood" off-the-air, and I'm speaking for the "Neighborhood" because that's what I produce, that they then become much more active in the programming of their family's television life.

VTRs harmed any potential market or the value of copyrighted works, the Court ruled the VTRs had substantial non-infringing uses and rejected holding the defendant liable.[135]

3. A Modern Theory of Third-Party Liability: Inducement

In 2005, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, the Supreme Court embraced inducement as a new form of third-party liability to address new technologies that promote its infringing uses.[136] Inducement liability exists when there is evidence of the third party's intention to induce infringement and the third party takes affirmative steps to facilitate that infringement.[137] In *Grokster*, the defendants exhibited more than just mere knowledge about the infringing uses when designing and releasing a software that had instead the principal object to infringe copyrighted music.[138] The defendants' advertisements were explicit promotions of their software's capability to download copyrighted works at no cost to the user.[139] Additionally, the

Id. at n.27; *see* Christopher Shea, *Mr. Rogers and the VCR*, WALL ST. J. (Jan. 10, 2012), https://www.wsj.com/articles/BL-IMB-3030 [https://perma.cc/N5T9-C5MW] (calling Mr. Rogers an "unlikely hero" that preserved the right to use a videocassette recorder, or VTR, to record content).

[135] *Sony*, 464 U.S. at 450–51 (refusing to find the defendant a contributory infringer because the plaintiffs failed to establish their burden to challenge the noncommercial use). To sufficiently challenge a noncommercial use, a plaintiff must establish (1) "a demonstrable effect upon the potential market, or the value of, the copyrighted work" and (2) "a showing by a preponderance of the evidence" of "proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." *Id.* If there is no effect upon a potential market or value of the copyrighted work, then an injunction of the product's sale would not have any impact on an artist's incentive to create. *Id.* at 450. Instead, an injunction would "merely inhibit access to ideas without any countervailing benefit." *Id.* at 450–51; *see also id.* at 441 (discussing the staple article doctrine, which seeks to prevent an inhibition on commerce).

[136] *See* 545 U.S. 913, 936–37 (2005) (rationalizing the adoption of inducement as a theory of third-party liability in copyright law). *Compare id.* at 936 (citing *Sony*'s adoption of patent law's staple-article doctrine as inspiration to adopt the inducement rule for copyright), *with Sony*, 464 U.S. at 440 (explaining that when a defendant's alleged contributory infringement rests entirely upon the sale of an article of commerce to a purchaser that uses the article to infringe a patent, the staple-article doctrine protects the public's interest to obtain an article of commerce). *See* Rebecca Giblin, *A Bit Liable? A Guide to Navigating the U.S. Secondary Liability Patchwork*, 25 SANTA CLARA COMPUT. & HIGH TECH. L.J. 7, 15 (2009) (characterizing the Court's articulation of inducement liability in *Grokster* as "the newest addition to the secondary liability toolkit").

[137] *See Grokster*, 545 U.S. at 936–37 (establishing "that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties").

[138] *See id.* at 926 (determining from defendants' business models that their software's principal object was to enable users to download copyrighted music).

[139] *See id.* at 925–26 (providing that the defendants' advertisements strived to "attract users of a mind to infringe" and that the defendants' software was free for users to obtain). In *Grokster*, the defendants' potential advertisements marketed that their software was the free alternative to Napster, another file-sharing service that was notoriously used to infringe copyrighted music. *Id.* at 924–25. In 2000, in *A&M Records, Inc. v. Napster, Inc.*, the U.S. District Court for the Northern District of California granted the plaintiffs' motion for a preliminary injunction against the defendants. A & M Recs.,

defendants made no effort to combat its users' copyright infringement.[140] Thus, the Court held the defendants liable under the inducement doctrine because neither theories of contributory infringement or vicarious liability were applicable to the defendants' conduct.[141]

When the Court disregarded contributory infringement as the appropriate method to impute liability, the Court provided a distinction between the *Sony* and *Grokster* defendants.[142] The Court reasoned that the issue in *Sony* centered around the defendant's commercial distribution of a product capable of both lawful and infringing uses while knowing that some purchasers would use it for infringement.[143] In *Grokster*, however, the issue went beyond the distribution of such a product because the defendants' conduct demonstrates a purpose to cause and profit from its users' copyright infringing activity.[144] Because of this distinction, the Court reasoned that the *Sony* standard, whether a product is capable of substantial non-infringing uses, was inapplicable.[145] Accordingly, the Court held that the *Sony* standard applies only in situations where there is no evidence of active encouragement to facilitate a product's infringing uses.[146] Where there is

Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 927 (N.D. Cal. 2000), *aff'd in part*, *rev'd in part sub nom.* A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002), and *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002). Thereafter, the *Grokster* defendants viewed this as an opportunity to capture Napster's former user-market. *Grokster*, 545 U.S. at 925.

[140] *See Grokster*, 545 U.S. at 926–27 (finding no efforts by the defendants to filter copyrighted works, and rather than accept another company's offer to help monitor infringement on its networks, the defendants blocked Internet Protocol addresses of those it suspected were attempting such monitoring). Further, the Court found the defendants' emails that were sent to infringing users were insufficient because the emails were sent only after the defendants received threatening notices from copyright owners. *Id.* at 926. Moreover, the defendants never barred infringing users from their software. *Id.*

[141] *See id.* at 928–30 (determining that the existing theories of third-party liability—vicarious liability and contributory infringement—were inadequate to address the case at bar because of the concern that imposing liability on distributors of software with a potential for illicit use rather only on the infringers could deter the continued development of technologies with beneficial uses).

[142] *See id.* at 941 (concluding that the defendants' reliance on *Sony* was in error). The Court further provided that there was no instruction in *Sony* that required courts to disregard evidence of intent, if any such evidence existed, and that *Sony* never intended to foreclose common-law derived doctrines of fault-based liability. *Id.* at 934–35.

[143] *See id.* at 941 ("*Sony* dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course.").

[144] *Compare id.* at 929 (file-sharing software with the principal object to infringe copyrighted music), *with* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 422 (1984) (VTRs that could record copyrighted works with or without the copyright holder's authorization).

[145] *See Grokster*, 545 U.S. at 941 (rationalizing the distinction from *Sony* because there was no evidence in *Sony* that showed that the defendant's had the "patently illegal objective" to facilitate infringement); Helman, *supra* note 128, at 130 (explaining that "the important factor in *Sony* was not the manufacturer's intent, but rather *the character* of the product itself" (emphasis added)).

[146] *See Grokster*, 545 U.S. at 941 ("[*Sony*] struck a balance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the

evidence of active encouragement to facilitate a product's infringing uses, a court may impart third-party liability under the inducement theory.[147]

C. The Digital Millennium Copyright Act: Safe Harbors from Third-Party Liability in the Digital Age

Enacted in 1998, the Digital Millennium Copyright Act (DMCA) aimed to address copyright infringement within the burgeoning digital landscape of the internet, a landscape that did not yet include the complexities introduced by AI technologies and modern social media platforms, like TikTok.[148] The DMCA established a legal framework intended to protect copyright owners from infringement and online service providers[149] (OSPs) from liability.[150] Additionally, the DMCA establishes a process for copyright owners to notify OSPs of infringing content, and requires the OSP to remove or disable access to the content "expeditiously."[151]

Congress designed the DMCA's safe harbor provisions to shield OSPs from liability for their users' copyright infringements, provided that the OSPs comply with specific requirements.[152] These requirements include the prompt removal of

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imputation of fault and consequent secondary liability for the unlawful acts of others"); Helman, *supra* note 128, at 129 (discussing that *Grokster* created an exception to *Sony* in circumstances where the third party induces infringement).

[147] *See Grokster*, 545 U.S. at 936–37 (providing that a third party may be found liable under inducement when there is evidence of the third party's intention to induce infringement and the third party takes affirmative steps to facilitate infringement).

[148] Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of Title 17 of the *United States Code*); *see* 144 CONG. REC. S11887–88 (daily ed. Oct. 8, 1998) (statement of Sen. Ashcroft) (conveying his belief that the DMCA would safeguard copyright holders without constraining technological development); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 122 (2004) ("Congress enacted the DMCA in an attempt to update copyright law in light of perceived challenges presented by digital technology.").

[149] 17 U.S.C. § 512(k)(1)(A) (defining service providers as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received"); *id.* § 512(k)(1)(B) (defining service providers as "a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A)").

[150] *See* Yen, *supra* note 99, at 1881 (explaining that the DMCA encourages OSPs to cooperate with copyright owners by offering protection from potential copyright infringement liability); Liu, *supra* note 148, at 122 (providing that the DMCA provisions "supplement judge-made doctrines of third party liability by enacting detailed rules and safe harbors for [O]SPs and other internet intermediaries").

[151] 17 U.S.C. § 512(c)(1)(C); *see* Laura Zapata-Kim, Note, *Should YouTube's Content ID Be Liable for Misrepresentation Under the Digital Millennium Copyright Act?*, 57 B.C. L. REV. 1847, 1851 (2016) (explaining that before a copyright owner submits a takedown notice pursuant to the DMCA, copyright owners must believe, in good faith, that the alleged infringing content was unauthorized).

[152] *See* Helman, *supra* note 128, at 134 (discussing the requirements an OSP must meet for the DMCA's safe harbor provisions).

infringing content upon receipt of a valid takedown notice from copyright holders and require that OSPs have a policy to terminate repeat infringers.[153] Users who believe their content was wrongly removed can submit a counter-notice.[154] OSPs must then restore the content unless the copyright holder files a lawsuit within a specified timeframe.[155] The safe harbor provisions, contingent upon OSP compliance with notice-and-takedown procedures, have earned praise for offering a practical mechanism to address infringement.[156] Nevertheless, the notice-and-takedown procedures remain criticized for creating a culture of content removal without due consideration of legitimate uses.[157]

II. BALANCING INNOVATION AND LIABILITY: EXAMINING THE LEGISLATIVE AND JUDICIAL EFFORTS

The widespread use of specialized generative AI models adds a layer of complexity to copyright law.[158] These generative AI models facilitate the rapid creation of derivative content, which challenge the application of copyright enforcement legal mechanisms, such as the theories of third-party liability, as well as the bounds of innovative freedom.[159] Generative AI and copyright must reach a balance between fostering innovation and protecting copyright awards.[160] Accordingly, the use of generative AI demands a reevaluation of legal doctrines formulated before the AI era to consider whether these doctrines

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[153] *See* 17 U.S.C. § 512(i)(1)(A) (providing that "[t]he limitations on liability . . . shall apply to a service provider only if the service provider has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers").

[154] *See id.* § 512(g)(3) (listing the requirements for a valid counter-notice).

[155] *See id.* § 512(g)(2) (listing the steps an OSP should take upon receipt of a counter-notice).

[156] *See* Yen, *supra* note 99, at 1887 (explaining how the DMCA's safe harbor provisions provide content providers a concrete and inexpensive method to report any copyright infringement found on an OSP's platform).

[157] *See* Igor Slabykh, *The New Approaches to Digital Anti-Piracy in the Entertainment Industry*, 19 UIC REV. INTELL. PROP. L. 75, 82 (2019) (critiquing the DMCA's inability to satisfy both copyright owners and anti-copyright foundations, with owners disliking the DMCA's limitations and anti-copyright foundations disliking its scope of coverage); *supra* notes 91–96 and accompanying text (discussing the defenses of de minimis use and fair use).

[158] *See supra* notes 16–30 and accompanying text (discussing generally the implications of generative AI on copyright law).

[159] *See* Ginsburg, *supra* note 119, at 1636 (suggesting that the Copyright Office may be able to strike and ensure "the copyright 'balance' . . . does not lean too far to copyright owners at the expense of developers and users of new technology").

[160] *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (discussing Congress's task to define the scope of copyright protection requires an assessment of the incentives offered to authors to create and the public's "competing interest in the free flow of ideas, information, and commerce").

sufficiently address the current realities of digital content creation and distribution.[161] UMG's removal of its catalog from TikTok highlights the tensions between copyright holders and platforms that host users' AI-generated content and demonstrates the need for such frameworks that strike the appropriate balance.[162]

Because of the challenges posed by large OSPs specializing in social media services, like TikTok, and the advent of generative AI, federal copyright needs legal frameworks that are adaptable, forward-looking, and capable of balancing the interests of all those involved.[163] The ongoing disputes surrounding AI-generated content and legal uncertainties accentuate the need to reevaluate the theories of third-party liability under copyright.[164] This Part addresses such a need.[165] Section A of this Part describes TikTok's role in the creation of unauthorized derivative works and the DMCA's insufficiency to limit such a role.[166] Section B of this Part considers the different interpretations of vicarious liability within copyright law.[167] Section C of this Part examines contribu-

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[161] *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005) (explaining that copyright law administers the balance between artistic protection and technological innovation to prevent either from being discouraged in favor of the other); *see also supra* notes 22–30 and accompanying text (depicting some of the challenges copyright law faces to apply its doctrines to AI-generated content).

[162] *See* John Lobato, *Paying for the Sins of Their Users: Liability and Growing Uncertainty in a Digital Age:* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005)*, 29 HARV. J.L. & PUB. POL'Y 357, 369 (2005) (describing the hesitation copyright holders have toward emerging technology because they may threaten their copyrights' value); *supra* notes 32–41 and accompanying text (providing UMG's rationale for removing its musical catalog from TikTok's platform).

[163] *See* Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 405 (2003) (analogizing the balance of copyright law to a tax). To contextualize how copyright law should operate, the below tax analogy is helpful:

> Legal liability, then, would function like a tax. In many instances such a tax would be welfare-reducing in that higher prices discourage legal as well as illegal uses. But in some settings, discouraging both legal and illegal activity would yield a net welfare gain. This would be true where illegal behavior is sufficiently more harmful than legal behavior is beneficial; it would be true where the harms and benefits are comparable but illegal behavior is more sensitive to price; and it would be true where the benefits in terms of increased copyright incentives outweigh the harms associated with discouraging legitimate use.

Id.

[164] *See Copyright Office Releases Part 2 of Artificial Intelligence Report*, Issue No. 1060, U.S. COPYRIGHT OFF. (Jan. 29, 2025), https://www.copyright.gov/newsnet/2025/1060.html [https://perma.cc/8J5Y-RRXG] (announcing that in the forthcoming Part 3, the Copyright Office will discuss licensing and liability considerations, including the allocation of liability among parties); U.S. COPYRIGHT OFF., *supra* note 30 (showing 10,370 public comments); *cf.* Italie, *supra* note 29 (discussing George R.R. Martin and sixteen authors' suit against OpenAI); Hadero & Bauder, *supra* note 29 (discussing *The New York Times*' lawsuit against OpenAI and Microsoft).

[165] *See infra* notes 171–250 and accompanying text.

[166] *See infra* notes 171–182 and accompanying text.

[167] *See infra* notes 183–207 and accompanying text.

tory liability and the *Sony* standard of substantial noninfringing use.[168] Section D discusses the *Sony* standard and the inducement theory in the post-*Grokster* landscape.[169] Section E explores policy considerations and legislation from the European Union (EU) that established a uniform regulatory framework, imposing new obligations onto OSPs and AI developers.[170]

A. TikTok's Role in the Creation of Unauthorized Derivative Works

TikTok's platform activity often blurs the lines between lawful homage and potential copyright infringement, especially when they do not have the authorization of copyright holders.[171] TikTok's role in the unauthorized creation of derivative works exemplifies the challenge to impart third-party liability with respect to AI-generated content.[172] The platform's culture encourages the creation of trends and challenges, where users create their content based on a specific theme or sound clip.[173] Such trends and challenges often use segments of copyrighted music or performances, which creates unauthorized derivative works, if done without the copyright holder's permission.[174] Further, TikTok equips users with tools and features that simplify the creation of potential derivative works, such as videos featuring copyrighted music or adaptations of copyrighted material.[175] And, TikTok offers—and continuously develops—AI tools that will make it even easier to create infringing content.[176] Moreover, TikTok's algorithms may

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[168] *See infra* notes 208–215 and accompanying text.

[169] *See infra* notes 216–227 and accompanying text.

[170] *See infra* notes 228–250 and accompanying text.

[171] *See supra* notes 53–55 and accompanying text (discussing the legal landscape, or lack thereof, of generative AI).

[172] *See* Moreno, *supra* note 53 and accompanying text (illustrating the gap between technological advancements and the legal developments that sufficiently address the technological advancements). *But see* Williams Elecs., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874, 877 (3d Cir. 1982) (rejecting to adopt a narrow interpretation of the terms at issue because such interpretations would "severely limit the copyrightability of computer programs which Congress clearly intended to protect").

[173] *See supra* notes 3–15 and accompanying text (demonstrating the virality of various TikTok trends).

[174] *See supra* notes 18–21 and accompanying text (discussing how sped-up remixes profit their uploaders rather than the original work's copyright holders).

[175] *See TikTok What's Next 2025 Trend Report*, TIKTOK (Jan. 8, 2025), https://newsroom.tiktok.com/en-us/tiktok-whats-next-2025-trend-report-us [https://perma.cc/3A2Z-K6K2] (describing the different ways TikTok creators use AI); *Editing TikTok Videos and Photos*, TIKTOK, https://support.tiktok.com/en/using-tiktok/creating-videos/editing-tiktok-videos-and-photos [https://perma.cc/3JK4-NX8A] (describing the available advanced editing tools on TikTok).

[176] *See Supercharge Content Ideation with Symphony Assistant*, TIKTOK FOR BUS. (Feb. 13, 2024), https://www.tiktok.com/business/en-US/blog/tiktok-creative-assistant-smart-ai-tool [https://perma.cc/723B-2S5K] (advertising TikTok's AI assistant, TikTok Creative Assistant, which was designed to collaborate with creators and brands throughout their creative ventures on the platform); *Using Generative AI to Create TikTok Effects*, EFFECT HOUSE BY TIKTOK, https://effecthouse.tiktok.com/learn/guides/general/using-generative-ai-to-create-tiktok-effects [https://perma.cc/MAJ3-9GUD] (providing instructions and general information on how to use TikTok and third-party AI tools); Cain,

further complicate this issue by promoting certain content, which amplify the distribution of unauthorized derivative works.[177] TikTok's algorithm could *inadvertently* favor the dissemination of unauthorized derivative works.[178]

Another consideration, the DMCA, affords OSPs a safe harbor from monetary liability for its users' copyright infringement.[179] TikTok provides copyright holders the ability to file a Copyright Infringement Report and provides users the ability to file a Counter Notification Form.[180] Although, copyright holders find the notice-and-takedown process against each and every infringing video among one billion TikTok users onerous and inefficient.[181] Nev-

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supra note 41 (stating that TikTok is testing an "AI Song" feature that allows users to create songs using prompts).

[177] *See TikTok What's Next 2025 Trend Report*, *supra* note 175 (providing that "TikTok users are 1.4x more likely than users on other platforms to look forward to Generative AI in ads"); Emily Baker-White, *TikTok's Secret 'Heating' Button Can Make Anyone Go Viral*, FORBES, https://www.forbes.com/sites/emilybaker-white/2023/01/20/tiktoks-secret-heating-button-can-make-anyone-go-viral/?sh=31a6598c6bfd [https://perma.cc/C44C-DETR] (Jan. 20, 2023) (explaining that TikTok's algorithm predicts users' interest and TikTok's staff also hand-selects specific content to "supercharge" their distribution to benefit influencers and brands).

[178] *See* Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES, https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html [https://perma.cc/KT5Z-C7KA] (Dec. 6, 2021) (providing that one of TikTok's goals is creator monetization); *supra* notes 18–21 and accompanying text (viral sped-up remixes profit their uploaders); *cf.* Yen, *supra* note 99, at 1890 (discussing that copyright owners view infringers as threats to their economic interests because the Internet has enabled the exploitation of the owner's interests). In fact, on March 5, 2024, TikTok announced that an improved version of the beta Creativity Program would be released in the approaching weeks. *See Empowering Creators to Succeed on TikTok with Enhanced Resources and New Monetization Tools*, TIKTOK (Mar. 5, 2024), https://newsroom.tiktok.com/en-us/for-creators-future-format-summit [https://perma.cc/9S9Q-Q9QQ] ("We're excited to continue seeing creators find success using our monetization offerings to turn their passions into careers, unlock life-changing opportunities, and drive meaningful impact."). TikTok further provided in its announcement that since the release of the beta Creativity Program, "total creator revenue increas[ed] by over 250% within the last 6 months, and the number of creators making $50,000 each month nearly doubl[ed]." *Id.*

[179] *See* 17 U.S.C. § 512(i)(1)(A) (providing that an online service provider (OSP) is afforded the safe harbor provisions "if the service provider has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers"); *id.* § 512(g)(3) (providing the requirements for a valid counter-notice).

[180] *Id.* § 512(i)(1)(A), (g)(3); *see* Bill Rosenblatt, *What Removing Taylor Swift, Drake and More Means for TikTok—and Users*, FORBES, https://www.forbes.com/sites/billrosenblatt/2024/02/01/what-removing-taylor-swift-drake-and-more-means-for-tiktok-and-users/?sh=1c885d98320a [https://perma.cc/U3Q6-GSYG] (Feb. 4, 2024) (explaining TikTok's automated content recognition technology that identifies copyrighted music from a database and its video sound copyright check feature that helps to avoid copyright strikes). *See generally Copyright*, TIKTOK, https://support.tiktok.com/en/safety-hc/account-and-user-safety/copyright [https://perma.cc/PU9H-49L5] (instructing individuals on TikTok's copyright policies); *Intellectual Property Policy*, TIKTOK, https://www.tiktok.com/legal/page/global/copyright-policy/en [https://perma.cc/WKT3-75DW] (June 7, 2021) (instructing users on TikTok's intellectual property policies).

[181] *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) ("The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially

ertheless, the DMCA serves to complement the judge-made third-party liability doctrines, and thus, the safe harbor provisions do not excuse liability as third-party infringers.[182]

B. Vicarious Liability

Vicarious liability, which requires a third party to have the ability to control and financially benefit from it, could apply readily and clearly to platform operators and AI model and system developers.[183]

TikTok, like any social media OSP, financially benefits from user engagement driven by popular content, including music and music-based content.[184] When viral content uses copyrighted material, like those in UMG's catalog, it significantly boosts user engagement and, thereby, TikTok's advertising revenue and market value.[185] Thus, TikTok directly benefits financially from the presence and use of copyrighted material on its platform.[186]

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infringing material and adequately documenting infringement—squarely on the owners of the copyright."); Marisa Dellatto, *TikTok Hits 1 Billion Monthly Active Users*, FORBES, https://www.forbes.com/sites/marisadellatto/2021/09/27/tiktok-hits-1-billion-monthly-active-users/?sh=40f626f44b6e [https://perma.cc/R3MU-GWVS] (Sept. 27, 2021) (noting that TikTok reached one billion users faster than Facebook, Instagram, and YouTube); *see also* UNIVERSAL MUSIC GRP., *supra* note 31 (analogizing the notice-and-takedown process to "Whack-a-Mole").

[182] *See* 17 U.S.C. § 512(c)(1)(A)(i)–(iii) (offering an exception towards nonliability that is relative to contributory infringement); *id.* § 512(c)(1)(B) (offering an exception towards nonliability that is relative to vicarious liability); Yen, *supra* note 99, at 1882 (explaining that these provisions are general correspondences to the doctrines of contributory infringement and vicarious liability); Liu, *supra* note 148, at 122 (noting that the DMCA provisions "supplement judge-made doctrines of third party liability").

[183] *See* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) ("When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired, the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation."). *But see infra* notes 192–205 and accompanying text (discussing the different interpretations of the requirement that the defendant receives a direct financial benefit).

[184] *See TikTok's US Revenue Hits $16 Bln as Washington Threatens Ban, FT Reports*, REUTERS, https://www.reuters.com/technology/tiktoks-us-revenue-hits-16-bln-washington-threatens-ban-ft-reports-2024-03-15/ [https://perma.cc/4YTX-2Y8S] (Mar. 15, 2024) (discussing TikTok's 2023 revenue in the United States was around $16 billion); *Oxford Economics Reports: SMB's Use of TikTok Contributed $24.2 Billion to U.S. Economy in 2023*, TIKTOK, https://newsroom.tiktok.com/en-us/tiktok-economic-impact-report-2024-smb [https://perma.cc/3CQA-RXM7] (Apr. 4, 2024) (providing that in 2023, TikTok contributed $24.2 billion to the U.S. gross domestic product (GDP)); *supra* notes 4, 6, 18, 21 (discussing the commercial and financial impact on artists and license holders when videos of unauthorized works go viral on TikTok).

[185] *See* Aswad, *supra* note 45 (noting the significantly lower amount TikTok pays in royalties than music streaming platforms); *cf.* SPOTIFY, *supra* note 20 (paid $10 billion in royalties to musicians and copyright holders in one year); *supra* notes 31–36 and accompanying text (explaining UMG's frustration with TikTok's inadequate efforts to prevent copyright infringement because TikTok receives the unjust reward that UMG's artists should receive instead). *Compare* TIKTOK, *Oxford Economics Reports*, *supra* note 184 (contributing $24.2 billion to the U.S. GDP in 2023), *with* UNIVERSAL MUSIC GRP., *supra* note 31 (providing that TikTok contributes to only about 1% of UMG's entire

Moreover, digital platforms have significant control over the content published on their platforms through their terms of service, content moderation policies, and algorithmic promotion of content.[187] This level of control might suggest the platform's ability to supervise or prevent copyright infringement.[188] Yet, there are strict and broad interpretations of both elements; namely, the right and ability to supervise,[189] as well as the sufficiency of any direct financial benefit,[190] for vicarious liability to attach.[191]

The strict approach, illustrated by the U.S. District Court for the Southern District of New York in 1994, in *Artists Music, Inc. v. Reed Publishing (USA), Inc.*, requires that the third party has a direct financial interest in the infringement and that the third party's revenue has a causal connection with the infringement.[192] In *Artists Music*, because the third party's revenue—consisting of each exhibitor's rental fees, visitors' admission fees, and advertising—did not depend or rely on whether an exhibitor unauthorizedly played any musical works, the Second Circuit found that the third-party did not have a sufficiently direct financial interest.[193] The Second Circuit also held that vicarious liability requires that a defendant must have a realistic, practical ability to control the

revenue). *See generally* Juliet Chung & Raffaele Huang, *TikTok Parent ByteDance's Valuation Rises to About $300 Billion*, WALL ST. J. (Nov. 16, 2024), https://www.wsj.com/tech/tik-tok-byte-dance-value-9796a8d4 [https://perma.cc/T6Y6-PDTV] (reporting ByteDance's self-valuation of "about $300 billion").

[186] *See Shapiro*, 316 F.2d at 307 (reasoning that when the third party receives obvious and direct financial interest in the exploitation of copyrighted materials, liability should attach).

[187] *See supra* notes 177–178 and accompanying text (identifying certain qualities of TikTok's algorithm).

[188] *See supra* notes 111–116 and accompanying text (discussing the elements of vicarious liability).

[189] *See* Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328 (D. Mass. 1994) ("[C]ourts in these cases have not defined the precise terms of the test to be applied in determining whether a defendant had a 'right and ability to supervise' . . . ."); Giblin, *supra* note 136, at 39 (noting that there is a strict and broad approach to interpret the right and ability to supervise requirement).

[190] *See* Giblin, *supra* note 136, at 42–43 (discussing the three different approaches); Artists Music, Inc. v. Reed Publ'g (USA), Inc., No. 73163, 1994 WL 191643, at *6 (S.D.N.Y. May 17, 1994) (strict approach); *Polygram*, 855 F. Supp. at 1331 (broad approach); A & M Recs., Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 921 (N.D. Cal. 2000) (broader approach), *aff'd in part*, *rev'd in part sub nom.* A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002), and *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

[191] *See infra* notes 192–195 and accompanying text (discussing *Artists Music*); *infra* notes 196–200 and accompanying text (discussing *Polygram*); *infra* notes 201–205 and accompanying text (discussing *Napster*).

[192] *See* 1994 WL 191643, at *6 (rejecting the plaintiffs' argument that the defendant "could have easily policed the exhibitors for infringing conduct").

[193] *Id.*

direct infringer's actions.[194] If such control is technically possible but impractical, vicarious liability does not apply.[195]

Conversely, the more expansive approach places greater emphasis on the third party's general enforcement ability.[196] In 1994, in *Polygram International Publishing, Inc. v. Nevada/TIG, Inc.*, the U.S. District Court for the District Court of Massachusetts suggested, through dicta, that if the third party has any potential control over the direct infringer's actions and failed to make any effort to prevent infringement, vicarious liability may attach.[197] Further, the District Court of Massachusetts provided that the third party's financial interest is sufficiently established when such party anticipates commercial gain from the overall infringement operation and derives a substantial financial benefit therein.[198] The district court proffered the clarification that the analysis does not require a determination of the exact figure, but rather a determination of whether the derived benefit was "substantial enough to be considered significant."[199] Because the defendants expected commercial gain from the unauthorized musical performances and received over $44 million in revenue—from advertising, the exhibitors' flat rental fees, and admissions fees—therefore derived a significant financial benefit from the infringement.[200]

In 2000, in *A&M Records, Inc. v. Napster, Inc.*, the U.S. District Court for the Northern District of California illustrates a broader interpretation of the

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[194] *See id.* (concluding that defendant did not have the right and ability to supervise because they would have to undergo a complicated process and "hire several investigators with the expertise to identify music, to determine whether it was copyrighted, to determine whether the use was licensed, and finally to determine whether the use was a 'fair use'"); *see also supra* notes 90–96 and accompanying text (discussing fair use and its central role in infringement claims against AI developers).

[195] *See Artists Music*, 1994 WL 191643, at *6 (holding that the defendant had "no duty to perform such extensive and costly analysis unless it is obtaining a direct financial benefit from the infringement").

[196] *See* Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328 (D. Mass. 1994) (demonstrating that defendant had the right and ability to supervise because the defendant exercised contractual "control" over the infringers and the infringers were contractually bound to follow the rules and regulations that the defendant created (quoting H.R. REP. NO. 94-1476, at 159 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5775–76 ("To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit from the infringing performance."))).

[197] *See* 855 F. Supp. at 1324–25 (discussing that, if there was a finding of direct infringement, vicarious liability could be applied to hold defendant liable as a third party).

[198] *See id.* at 1331 (interpreting the legislative history to determine whether the third party's financial interest is sufficiently established when the third party "expects commercial gain from the operation and either direct or indirect benefit from the infringing performance" (quoting H.R. REP. NO. 94-1476, at 159–60)).

[199] *See Polygram*, 855 F. Supp. at 1319 (concluding that precedent does not require courts to assess the exact amount of financial benefit derived from the infringement); *supra* note 191 and accompanying text (noting the different approaches to determine whether a third-party infringer received a financial benefit to be held vicariously liable).

[200] *Polygram*, 855 F. Supp. at 1331–33.

third party's direct financial benefit.[201] Under this interpretation, a third party does not need to acquire revenue from the infringement to have a direct financial benefit.[202] Even though the defendant, Napster, generated no revenue, the court nevertheless found that there was a direct financial benefit because Napster was economically incentivized to tolerate infringement.[203] Specifically, Napster's service depended from its users to add songs without the copyright holder's authorization, skirting licensing fees, and held plans to generate revenue by monetizing its userbase.[204] With the continued infringement, more songs would become available for free for its users, and thus, Napster would attract more users, adding to its cache.[205]

Although these different interpretations exist, each element of vicarious liability has (relatively) set standards for third parties to realistically self-assess their own liability.[206] Moreover, compared to the other copyright third-party liability doctrines, vicarious liability does not require a convoluted assessment, nor does it incite as much legal uncertainty.[207]

C. Contributory Infringement and the Sony *Standard*

Contributory infringement—requiring knowledge and material contribution to the infringement—holds OSPs accountable when they are aware of infringing acts facilitated by their technologies but fail to take adequate steps to

[201] *Compare* 114 F. Supp. 2d 896, 921 (providing the broader approach, which does not require actual revenue), *aff'd in part*, *rev'd in part sub nom.* A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002), and *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002), *with* Artists Music, Inc. v. Reed Publ'g (USA), Inc., No. 73163, 1994 WL 191643, at *6 (S.D.N.Y. May 17, 1994) (demonstrating the strict approach, which requires the revenue to have a causal connection with the copyright infringement), *and Polygram*, 855 F. Supp. at 1331–33 (illustrating the broad approach, which requires an expectation of commercial gain and a financial benefit "substantial enough to be considered significant").

[202] *See Napster*, 114 F. Supp. 2d at 921 (providing that the financial benefit element is satisfied when the third party "has economic incentives for tolerating unlawful behavior," regardless of whether the third party actually profited from the infringement).

[203] *Id.* at 921–22.

[204] *See id.* at 921 (finding that the defendant had a significant financial interest even when there was no profit because the defendant hoped to profit from its users' infringement).

[205] *See id.* at 922 ("The ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster's financially-valuable user base.").

[206] *See supra* notes 192–205 and accompanying text (discussing the varying interpretations of the elements of vicarious liability—(1) the right and ability to supervise and (2) the defendant's receipt of a direct financial benefit).

[207] *See infra* notes 208–227 and accompanying text (noting the legal ambiguities surrounding contributory liability and inducement, particularly within the context of social media platforms and generative AI).

prevent such actions.[208] Given the overwhelming supply of content on OSP platforms like TikTok, the instances where the platform had knowledge of specific infringements and did not act are relevant.[209] But, the sheer quantity of user-generated content on platforms makes it challenging for TikTok to monitor and address every instance of infringement.[210] Further, the DMCA does not require OSPs to perform such surgical monitoring.[211] However, TikTok continues to develop nongenerative and generative AI tools to facilitate content creation, which may add weight to any material contribution to copyright infringement.[212]

Nevertheless, the *Sony* standard protects technologies with substantial non-infringing uses, allowing platforms like TikTok to operate and innovate without the constant threat of liability for users' actions.[213] The *Sony* standard encourages the development of technologies that have both beneficial and infringing uses because it assesses the technology itself rather than the behavior of users.[214] Although it supplies some clarity for OSPs on the legal use of their technologies, the *Sony* standard requires clearer instruction: how companies should measure "substantial" when determining whether a new product is capable of substantial noninfringing use before introducing it to the market.[215]

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[208] *See* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) ("[O]ne who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer.").

[209] *See* 17 U.S.C. § 512(c)(1)(iii) (requiring knowledge of the specific infringing activity). In 2012, in *Viacom International, Inc. v. YouTube, Inc.*, the U.S. Court of Appeals for the Second Circuit determined that specific knowledge is required to expeditiously remove the specific infringing material because "expeditious removal is possible only if the service provider knows with particularity which items to remove." 676 F.3d 19, 30 (2d Cir. 2012); *see* § 512(c)(1)(A)(iii) (instructing that "upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material").

[210] *See Viacom*, 676 F.3d at 30–31 (providing that "requir[ing] expeditious removal in the absence of specific knowledge or awareness would be to mandate an amorphous obligation to 'take commercially reasonable steps' in response to a generalized awareness of infringement" and would be irreconcilable with § 512(c)); *see also* Dellatto, *supra* note 181 (one billion TikTok users).

[211] Yen, *supra* note 99, at 1838 (explaining that the DMCA intentionally refrains from changing copyright's foundational legal principles).

[212] *See supra* notes 175–176 (discussing TikTok's different AI functionalities).

[213] *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005) ("[*Sony*] struck a balance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others."); Henning, *supra* note 78, at 166 (discussing that, "for the overall public good," it is necessary to find a balance between the author's and the public's competing interests in accessing new technology and creative works).

[214] *See Grokster*, 545 U.S. at 957 (Breyer, J., concurring) ("*Sony* thereby recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently."); Helman, *supra* note 128, at 121 (providing that the *Sony* standard was "widely viewed as a victory for technology and consumers and as the 'Magna Carta' of the technology age").

[215] *See* Helman, *supra* note 128, at 122 (noting that the "murky phrase 'substantial noninfringing use'" is criticized because it was "defined simply as 'commercially significant'" and "the precise

D. The Sony *Standard and Inducement in the Post-*Grokster *Landscape*

In 2005, in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, the U.S. Supreme Court marked a shift as it articulated inducement as a new theory of third-party liability.[216] Under this theory, the Court placed an emphasis on the intent behind the distribution of technology that facilitates copyright infringement.[217] In the post-*Grokster* era, companies have struggled to identify their responsibilities to prevent copyright infringement.[218] The distinction between providing a technology capable of both infringing and non-infringing uses (acceptable under the *Sony* standard), and actively encouraging infringement (unacceptable under *Grokster*'s articulation of inducement), has become blurred further with the use of generative AI and OSPs that heavily rely on user-created content.[219]

The ambiguity in these standards creates a precarious situation for tech developers.[220] The *Sony* standard offers a semblance of protection for innovation because it allows companies to develop and improve technologies with

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scope of the doctrine remains opaque, and its applicability problematic"); *cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) ("[I]n order to resolve this case we need not give precise content to the question of how much use is commercially significant.").

[216] *See* 545 U.S. at 957 (majority opinion) (adopting inducement as an available theory of third-party liability for copyright infringement; *supra* notes 136–147 and accompanying text (providing the U.S. Supreme Court's rationale behind making third-party liability under inducement available).

[217] *See Grokster*, 545 U.S. at 957 (rationalizing that, because *Sony* does not require "courts to ignore evidence of intent *if* there is such evidence," *Sony* does not preclude an inquiry of fault-based liability (emphasis added)). Rather than adopting a new doctrine of third-party liability, most expected that the Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* would clarify the *Sony* standard's application to resolve the circuit split. *See* Henning, *supra* note 78, at 195–96 (discussing the Court's failure to resolve the circuit split over the application of the safe-harbor doctrine in *Sony*).

[218] *See* Lobato, *supra* note 162, at 367–68 (remarking on the onslaught of uncertainty that the *Grokster* opinion unleashed onto tech developers, forcing them to pause innovation to consider any potential third party).

[219] *See* Helman, *supra* note 128, at 128 (explaining that, because innovators cannot correctly predict which jurisdiction future lawsuits may arise in, they must be mindful of the varying standards, such as the *Sony* standard, which became even more unclear, with imprecise definitions and boundaries). To understand the lingering confusion in the post-*Grokster* landscape, consider the following example of the inventor of a photocopier:

> The creator of a photocopier gives instructions on the operation of the machine, including instructions on how to make copies. At this point, has the creator induced users to infringe copyright by providing the mechanism, not monitoring users, and instructing them on the tools of infringement?

See Lobato, *supra* note 162, at 368 (illustrating that the answer remains unclear, post-*Grokster*, because "the paradox of development, however, is that copyrights are as essential to fostering the creation of new technology and products as they are to the protection of established ideas").

[220] *See* Helman, *supra* note 128, at 128 (remarking that the Court had the opportunity in *Grokster* to clarify the ambiguities surrounding third-party liability but instead reinforced the shift of the law to an unpredictable, open-ended standard, spurring legal uncertainty to a greater level).

productive uses.[221] Further, the inducement analysis puts a burden on companies to ensure that they are not promoting copyright infringement, which is a challenging task when AI systems can generate content that toes the line between derivative and original works.[222] In fact, in both concurrences in *Grokster*, Justices Ginsburg and Breyer highlight the *Sony* standard's remaining ambiguity, irrespective of the Court's induction of inducement as a viable theory to find third parties liable.[223] Therein, both Justices asserted their interpretation of the *Sony* standard and reached markedly different conclusions: Justice Ginsburg determined that the defendants were liable should *Sony* apply, whereas Justice Breyer determined that the defendants were not.[224]

Although post-*Grokster* inducement case law is minimal, inducement remains relevant, as it recognizes the active role OSPs play in encouraging its users to interact with copyrighted material without any copyright holder's consent.[225] Thus, if a platform encourages *explicitly* to its users to create content with copyrighted works or provides tools that facilitate the creation of unauthorized derivative works, inducement liability seems credible.[226] When platforms provide their users with generative AI models that can create infringing

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[221] *See Grokster*, 545 U.S. at 957 (Breyer, J., concurring) ("*Sony* . . . has provided entrepreneurs with needed assurance that they will be shielded from copyright liability as they bring valuable new technologies to market."); Henning, *supra* note 78, at 202 (explaining that, before *Grokster*, the tech industry relied on Sony when making business and development decisions).

[222] *See* Giblin, *supra* note 136, at 22 (discussing how courts have yet to rule with any authoritative findings on inducement, leaving litigants on both sides uncertain as to the standard of liability, which may result in a chilling effect on the research and development of potentially useful technologies); Henning, *supra* note 78, at 194 (explaining how the *Groskter* Court's adoption of inducement liability circumvented answering the critical question of the safe-harbor rule under *Sony* remains valid, and under what circumstances).

[223] *See Grokster*, 545 U.S. at 942 (Ginsburg, J., concurring) (concurring in judgement because the U.S. Court of Appeals for the Ninth Circuit's judgment was vacated in full); *id.* at 948–49 ("I would emphasize, should reconsider, on a fuller record, its interpretation of *Sony*'s product distribution holding."); *id.* at 949 (Breyer, J., concurring) (concurring in judgement because "the distributor of a dual-use technology may be liable for the infringing activities of third parties where he or she actively seeks to advance the infringement"); *id.* at 955 ("The real question here, I believe, is not whether the record evidence satisfies *Sony*. As I have interpreted the standard set forth in that case, it does.").

[224] *See id.* at 947 n.3 (Ginsburg, J., concurring) (demonstrating that a qualitative approach to measure the *Sony* standard is sufficient); *id.* at 948 ("In sum, when the record in this case was developed, there was evidence that [the defendants'] products were, and had been for some time, overwhelmingly used to infringe."); *id.* at 952 (Breyer, J., concurring) ("When measured against *Sony*'s underlying evidence and analysis, the evidence now before us shows that Grokster passes *Sony*'s test––that is, whether the company's product is capable of substantial or commercially significant noninfringing uses."). Justice Breyer considered that "[t]here may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry . . . developed for the [VTR]." *Id.* at 955. Even though such unforeseen uses were "unmentioned in *Sony*," Justice Breyer explained further that "the foreseeable development of such uses, when taken together with an estimated 10% noninfringing material, is sufficient to meet *Sony*'s standard." *Id.*

[225] *See* Giblin, *supra* note 136, at 21 ("Post-*Grokster* inducement case law remains sparse.").

[226] *See supra* notes 136–147 and accompanying text (discussing the Supreme Court's creation of inducement as a theory of third-party liability in copyright).

content, the platform's potential liability rests upon whether the provision of AI models or the promotion of AI-generated content amounts to an active encouragement and facilitation of infringing uses.[227]

E. European Union Legislation

While the United States continues its attempts to define any substantive AI legislative framework, tech innovators might turn to the EU for directive guidance.[228] The following subsections will discuss two pieces of EU legislation relevant to OSPs and AI developers: the Digital Services Act (DSA) and the AI Act.[229]

1. The Digital Services Act

In an effort to create a comprehensive liability framework necessary for today's online environment, the EU passed the DSA, intending to create a safer environment that protects users' fundamental rights and establishes an evened playing field for businesses.[230] Moreover, in passing the DSA, the EU also intended to establish legal certainty for digital service providers so not to stifle innovation—a sentiment mirrored in U.S. copyright legislation as well.[231]

The DSA imposes obligations onto all online intermediaries and platforms (OPs) in the EU, thus imposing a new, uniform standard of accountability.[232] The DSA established a notice-and-action mechanism, just as the DMCA

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[227] *See supra* notes 175–176 (providing different examples of TikTok's available AI tools); *supra* notes 136–147, 175–176 and accompanying text (examining the application of inducement on AI tools).

[228] *See Copyright Office Releases Part 2*, *supra* note 164 (announcing in January 2025 that the Copyright Office released of Part 2 of their Artificial Intelligence Report and providing that the third and final part is forthcoming). *But see* Olivia Rinaldi, *Vance Warns EU Against AI Overregulation at Summit in Paris*, CBS NEWS, https://www.cbsnews.com/news/vance-warns-eu-ai-overregulation-paris/ [https://perma.cc/8K2Y-GSDT] (Feb. 11, 2025) (encouraging other nations to "embrace a regulatory environment to encourage more AI development on the continent," a sentiment echoed by the Trump Administration and the President of France, Emmanuel Macron).

[229] *See infra* notes 230–250 and accompanying text.

[230] *The Digital Services Act Package*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package [https://perma.cc/E4ML-C93Z] (Oct. 4, 2024). As a part of their Digital Services Act Package, the EU also passed the Digital Markets Act to regulates "gatekeepers," which are large digital platforms that conduct core platform services like app stores or online search engines. *Id.*; *The Digital Markets Act*, EUR. COMM'N, https://digital-markets-act.ec.europa.eu/index_en [https://perma.cc/2FRB-FKHE].

[231] *See* Commission Regulation 2022/2065 (Digital Services Act), 2022 O.J. (L 277) 4 (EU) [hereinafter Digital Services Act] (emphasizing that the DSA's technology-neutral requirements were implemented to stimulate innovation, rather than to stifle it).

[232] *See id.* (asserting that uniform standards are necessary to prevent further fragmentation of the market and reduce legal uncertainty for innovators).

did in the United States.[233] The DSA, however, applies to all possible online liability—not just to potential copyright infringement—and mandates a consistent notice system to facilitate user-reporting of illegal conduct.[234]

Additionally and although the DSA prescribes obligations to every OP, the obligations differ depending on the OP's size.[235] While small or micro[236] OPs are exempt from certain obligations, Very Large Online Platforms (VLOPs) and Search Engines (VLOSEs) bear additional obligations.[237] In our reality where VLOPs and VLOSEs wield significant control over forty-five million users, the DSA is the EU's effort to mitigate societal risk by mandating compliance.[238] Because VLOPs and VLOSEs hold tremendous power over the market—in addition to the millions of users that flood their online services every month—the DSA recognizes that it must hold VLOPs and VLOSEs to a higher standard to achieve accountability within the EU.[239]

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[233] *See id.* art. 16 (defining the notice-and-action mechanism requirements that all online platforms (OPs) must fulfill); *id.* para. 50 ("It is important that all providers of hosting services, regardless of their size, put in place easily accessible and user-friendly notice and action mechanisms that facilitate the notification of specific items of information that the notifying party considers to be illegal content to the provider of hosting services concerned ('notice'), pursuant to which that provider can decide whether or not it agrees with that assessment and wishes to remove or disable access to that content ('action').").

[234] *See DSA: Making the Online World Safer*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/safer-online [https://perma.cc/P4DC-FWEB] (Oct. 4, 2024) (stating how the DSA establishes a consistent, user-friendly notice system on OPs for users to easily report illegal content online like hate speech or sale of counterfeit goods).

[235] *See DSA: Very Large Online Platforms and Search Engines*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops [https://perma.cc/XYK4-4MCK] (Oct. 8, 2024) (classifying platforms and search engines with over forty-five million users every month as Very Large Online Platforms (VLOPs) and Search Engines (VLOSEs)).

[236] *See* Digital Services Act, *supra* note 231, art. 29, para. 1 (providing that small or micro enterprises are defined in Commission Recommendation 2003/361); Commission Recommendation 2003/361, annex, art. 2, 2003 O.J. (L 124) 2 (defining small enterprises as enterprises that have fewer than fifty employees and whose total assets does not surpass ten million euros annually); *id.* art. 2, para. 3 (defining micro enterprises as enterprises that have fewer than ten employees and whose total assets does not surpass two million euros annually).

[237] *See* Who Does the Digital Services Act Apply To?, *Digital Services Act: Questions and Answers*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/faqs/digital-services-act-questions-and-answers [https://perma.cc/4S6E-NM5V] (July 16, 2024) (reasoning that small or micro-OPs are exempt from certain obligations because meeting the same obligations that VLOPs and VLOSEs must comply with might be overly burdensome for these smaller OPs).

[238] *See* Margot E. Kaminski & Meg Leta Jones, *Constructing AI Speech*, 133 YALE L.J.F. 1246, 1250–51 (2024) (discussing that the DSA reflects a shift in attitude that VLOPs and VLOSEs bear the responsibility to moderate content on their platforms and thus bear the responsibility to regulate their system risks); *see also supra* notes 171–178 and accompanying text (noting how TikTok's algorithm plays a role in the dissemination of infringing derivative material on the platform).

[239] *See Europe Fit for the Digital Age: New Online Rules for Platforms*, EUR. COMM'N, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act/europe-fit-digital-age-new-online-rules-platforms_en [https://perma.cc/NJ55-FHFZ] ("The Digital Services Act and Digital Market Acts set a high global benchmark for regulating digital services with clear obligations tailored to the importance of the online platforms."). In fact, TikTok, designated as a

2. The AI Act

The AI Act, which entered into force on August 1, 2024, becoming applicable on August 2, 2026, is the first comprehensive legal framework on AI.[240] Through this Act, the EU is the first major regulator to prescribe obligations upon AI models and systems,[241] and like the DSA, the obligations imposed depend on the classifications provided in the Act.[242]

The AI Act places different obligations depending on the AI system's level of risk: for example, although certain, unacceptable risk AI systems are prohibited,[243] high-risk AI systems must be assessed before entering the market

VLOP since April 2023, has been subject to three investigations due to potential DSA violations. European Commission Press Release IP/24/6487, Commission Opens Formal Proceedings Against TikTok on Election Risks Under the Digital Services Act (Dec. 16, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6487 [https://perma.cc/Y4WM-YZET]; *see also Supervision of the Designated Very Large Online Platforms and Search Engines Under DSA*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses#ecl-inpage-tiktok [https://perma.cc/F9ZV-CTLF] (Jan. 17, 2025) (listing DSA-enforcement actions against different VLOPs and VLOSEs). Most recently, in December 2024, the European Commission opened an investigation against TikTok to ascertain whether the VLOP fulfilled its obligations under the DSA to evaluate and mitigate risks related to the November 2024 presidential elections in Romania. European Commission Press Release IP/24/6487, *supra*.

[240] Regulation 2024/1689 (Artificial Intelligence Act), art. 113, 2024 O.J. (L 19.3.2025) 123 (EU) [hereinafter AI Act].

[241] *See id.* para. 97 (distinguishing general-purpose AI models from AI systems); *see also* Artificial Intelligence and Copyright, 88 Fed. Reg. 59942, 59948 (Aug. 30, 2023) (distinguishing AI models from AI systems). To help establish legal certainty, the AI Act explicitly provides that the definition of general-purpose AI models—as opposed to AI systems—should be based on the model's essential functional characteristics, particularly, "the generality and the capability to competently perform a wide range of distinct tasks." AI Act, *supra*, para 97. The Act further provides that general-purpose AI models "are typically trained on large amounts of data, through various methods, such as self-supervised, unsupervised or reinforcement learning," and that models may be further developed into new AI models. *Id.* Although generative AI models make up crucial components of AI systems, the models lack the other components that are necessary to comprise an AI system, such as a user interface. *Id.*; *see also id.* para. 100 (providing that a general-purpose AI model that forms a part of or is integrated with an AI system, and that such a system becomes a general-purpose AI system if it can serve multiple purposes). Because the Act places different obligations on models and systems, the Act further explicates that when a developer integrates their AI model into its own AI system, the model itself is still subject to the same regulations, in addition to the obligations the AI system must meet. *Id.* para. 97.

[242] *E.g.*, Jaume Duch Guillot, *EU AI Act: First Regulation on Artificial Intelligence*, EUR. PARL., DIRECTORATE GEN. FOR COMMC'N, https://www.europarl.europa.eu/pdfs/news/expert/2023/6/story/20230601STO93804/20230601STO93804_en.pdf [https://perma.cc/Y7ML-LKH2] (June 18, 2024); *see* AI Act, *supra* note 240, art. 5 (classifying prohibited AI systems); *id.* art. 6 (standards to classify high-risk AI systems); *id.* art. 51 (standards to classify general-purpose AI models as ones with systemic risk).

[243] *E.g.*, AI Act, *supra* note 240, para. 26 (characterizing the prohibition of the delineated, unacceptable AI practices as "necessary").

and are subject to ongoing assessment.[244] In addition to subjecting the high-risk AI systems to ongoing assessment, the AI Act imposes compliance-related obligations onto high-risk AI system-providers and developers.[245]

The AI Act also places obligations onto general-purpose AI models, which includes generative AI models.[246] Although classified separately from high-risk AI systems, the AI Act nevertheless prescribes transparency requirements onto general-purpose AI models, and reiterates compliance with EU copyright law.[247] General-purpose AI developers must publish detailed summaries of its training, including any copyrighted content used for training.[248] This requirement reflects the EU's efforts to protect copyright holders, as well as to establish a fair environment that compels legal responsibility.[249] Moreover, by differentiating legal responsibilities according to the level of risk posed or the general purpose held by an AI system or model, the AI Act promotes an equitable distribution of burden among copyright holders and third parties.[250]

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[244] *See High-Level Summary of the AI Act*, FUTURE OF LIFE INST., https://artificialintelligenceact.eu/high-level-summary/ [https://perma.cc/F3NL-BBNG] (delineating the different risk-classifications and providing examples of each AI system).

[245] AI Act, *supra* note 240, arts. 8–17; *see* FUTURE OF LIFE INST., *supra* note 244 (summarizing the requirements high-risk AI systems must follow listed in Articles 8–17 of the AI Act).

[246] *See* AI Act, *supra* note 240, paras. 97, 99 (explaining that general-purpose AI models, of which generative AI models are typical examples of, are now subject to certain requirements). The AI Act also prescribes different obligations between general-purpose AI models and general-purpose AI models with systemic risk. *See id.* art. 53, para. 1 (obligations of general-purpose AI models); *id.* art. 55, para. 1 (obligations of general-purpose AI models with systemic risk, in addition to those listed in Article 53); *see also id.* arts. 8–17 (obligations of high-risk AI systems). *Compare* Digital Services Act, *supra* note 231 (classifying OPs to assign obligations), *with* AI Act, *supra* (classifying AI systems and models to assign obligations).

[247] *See* AI Act, *supra* note 240, art. 50 (imposing transparency obligations onto general-purpose AI systems and other certain systems); *id.* art. 53, para. 1 (listing requirements surrounding the training of general-purpose AI models to prevent copyright infringement).

[248] *Id.* art. 53, para. 1(d); *see also id.* art. 53, para. 1(b)–(c) (reiterating that providers of general-purpose AI models, which includes providers of AI systems that will integrate a general-purpose model, must safeguard intellectual property and related rights).

[249] *See id.* para. 101 (noting the "particular role and responsibility" general-purpose AI models have in satisfying their legal obligations, as these models may act as the basis for a number of different downstream systems and thus are at the bottom of "the AI value chain"); *id.* para. 25 (characterizing the Act's exclusion of AI systems or models that were specifically developed for "scientific research and development" as necessary to support innovation and the "freedom of science"); *see also* Georgia Hall, *Wall Street Flags New AI Risks from Hallucinations, Criminal Use*, BLOOMBERG L. (Mar. 12, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/artificial-intelligence/BNA%20000001958a7adceea395da7bb5ae0003?bna_news_filter=artificial-intelligence [https://perma.cc/4W7K-28FB] (providing several bank executives' sentiments towards AI tools both internally developed or from outside providers and how the AI Act establishes clear rules about the acceptable behavior and compliance expectations for AI developers in the EU, which highlights how unclear the U.S. marketplace in comparison).

[250] *See* AI Act, *supra* note 240, para. 121 (emphasizing that the Act seeks "[a] balanced representation of interests involving all relevant stakeholders," so that compliance will promote growth, innovation, and competitiveness within the market); *see, e.g.*, *id.* para. 109 (articulating that general-purpose AI models should comply with those obligations that are "commensurate and proportionate to

III. PROPOSING A TRADITIONAL SOLUTION TO A MODERN PROBLEM: VICARIOUS LIABILITY

The DMCA's safe harbor provisions aim to shield OSPs from liability for user-generated copyright infringements, contingent upon their adherence to specific operational requirements like the expeditious removal of infringing content upon notice.[251] The public's access to generative AI systems, namely those AI systems with generative AI models, complicates this landscape.[252] Upon any user prompt, an AI system could generate infringing content *autonomously*—without any explicit designation from the user—which challenges the foundational premise of the DMCA, predicated largely on *deliberate* corporate or human acts.[253]

Further, the real-time creation and user interaction-driven nature of AI-generated content blur the line between the roles played by the creators who post on the platforms, and the platforms that house these posts, posing questions of responsibility and liability that the DMCA struggles to answer.[254] Moreover, the DMCA's notice-and-takedown mechanism, although a corner-

the type of model provider," so that smaller AI-models or start-ups do not face excessive cost to comply); *id.* para. 143 (suggesting to Member States to enact support measures for small and micro enterprises to help facilitate conformity with the Act and to permit medium-sized enterprises, as applicable under Commission Recommendation 2003/361, access to those same measures); *see also* Commission Recommendation 2003/361, *supra* note 236, annex, art. 2, para. 1 (providing that medium-sized enterprises are enterprises that have fewer than 250 employees and whose total assets does not surpass 43 million euros annually).

[251] Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of Title 17 of the *United States Code*; *see* 7 U.S.C. § 512(i)(1)(A) (stating that "[t]he limitations on liability . . . shall apply to a service provider only if the service provider has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers").

[252] *See* Project Veritas v. Schmidt, 72 F.4th 1043, 1075 (9th Cir. 2023) (Christen, J., dissenting) ("[I]n the age of the internet and generative artificial intelligence . . . . [t]oday, anyone can access and learn how to use AI-powered generative adversarial networks to create convincing audio or video 'deepfakes' that make people appear to say or do things they never actually did."), *reh'g en banc granted, opinion vacated*, 95 F.4th 1152 (9th Cir. 2024); *supra* note 29 (discussing generative AI's significant implications on existing copyright doctrines and providing examples); *see also supra* note 176 (discussing TikTok's different AI tools).

[253] *See* Katherine B. Forrest, *The Ethics and Challenges of Legal Personhood for AI*, 133 YALE L.J.F. 1175, 1203 (2024) (identifying the potential complications in imposing tort liability when an AI model can "drift" from its human developer's intentions and advances to the extent that it initiates actions unprompted, and thus untraceable to a human); *see also* Hall, *supra* note 249 (stating that banks have grown increasingly wary towards AI use and integration because the banks have found that the generative AI models output unreliable, inaccurate, or inaccurate data, which raises the risk of consumer and reputational harm).

[254] *See* Yen, *supra* note 99, at 1837 ("[T]he DMCA 'solution' to the problem of [OSP] liability was odd. Instead of directly addressing the question, Congress deliberately left the law—with all of its ambiguities—unchanged.").

stone of copyright-infringement monitoring online, appears increasingly inadequate, and inadept, to manage the sheer volume and speed of the distribution of infringing, derivative content.[255]

Given the DMCA's limitations to confront the unique challenges posed by the creation and dissemination AI-generated content online, third-party liability is the appropriate (and perhaps the only viable) measure for a copyright holder to impart responsibility on OSPs for their users' infringement.[256] Section A of this Part argues that vicarious liability is the fitting theory to attach liability onto OSPs.[257] Section B emphasizes the overall ambiguity that arises with contributory infringement and the murky—but necessary—*Sony* safe harbor.[258] Section C asserts that inducement is nonviable to impose liability onto OSPs given the realities of platform management and media integration.[259] Section D, considering the EU-imposed obligations and the similarities between the EU's policy rationales and U.S. copyright's, suggests to OSPs and generative AI developers to self-employ a vicarious liability analysis to measure any potential third-party liability.[260]

A. Vicarious Liability Can Confront AI-Generated Content and AI Technologies on Third-Party Platforms

Vicarious liability is the most fitting method to impute responsibility on OSPs for AI-generated content.[261] Vicarious liability holds entities responsible when they have the right and ability to control the infringer's actions and receive a direct financial benefit from the infringement.[262] OSPs not only host derivative music-based content, but also possess the capability to monitor, moderate, and influence the nature of content posted.[263] Moreover, the economic model of these platforms, which relies on user engagement metrics to drive advertising revenue, demonstrates the direct financial benefit derived from all forms of content, including that which is AI-generated and infring-

[255] *See* Lobato, *supra* note 162, at 370 (noting that Congress is better positioned to perform "the cost-benefit analysis required in such complex and competing matters" than the courts); *supra* notes 179–182 and accompanying text (addressing the DMCA's notice-and-takedown mechanism's inadequacy to combat the mass dissemination of infringing works).

[256] *See supra* Parts I.C and II.A (discussing the congressional intent behind the DMCA).

[257] *See infra* notes 261–268 and accompanying text.

[258] *See infra* notes 269–276 and accompanying text.

[259] *See infra* notes 277–282 and accompanying text.

[260] *See infra* notes 283–293 and accompanying text.

[261] *See supra* notes 183–207 and accompanying text (providing an overview of the legal landscape of copyright vicarious liability).

[262] *See supra* notes 111–116 (discussing the elements of vicarious liability).

[263] *See* Berger, *supra* note 43 (highlighting Spotify and YouTube's incorporation of AI tools to generate playlists and suggestions); Baker-White, *supra* note 177 (explaining TikTok's algorithm).

ing.[264] Where the platform's architecture and algorithms fundamentally shape (or even direct) user engagement and content dissemination, vicarious liability encourages platforms to implement and enforce copyright policies proactively, thus protecting authors' rights.[265]

Further, vicarious liability maintains the balance between copyright protection and innovation because it encourages platforms to develop nongenerative and generative AI technologies that effectuate the congressional intent behind copyright legislation rather than exploit the legislation's ambiguities.[266] Also, despite the varying elemental interpretations, a court may determine a social media platform's right and ability to control an infringing user's actions and its direct financial benefit in every interpretation.[267] Comparatively, the other doctrines of third-party liability present limitations when applied to AI-generated content.[268]

B. Contributory Infringement and the Sony *Standard: Like Finding a Needle in a Haystack*

Contributory infringement, which requires knowledge of and a material contribution to the infringing activity, can be challenging to establish with AI-generated content.[269] Contributory infringement relies on a platform's direct

[264] *See supra* notes 183–186 and accompanying text (noting TikTok's financial benefit from potential infringement); *supra* notes 192–205 and accompanying text (discussing how courts determine whether a defendant received a direct financial benefit from the infringing conduct of another); *see also* Yen, *supra* note 99, at 1890 (explaining that copyright law's importance has amplified because "content providers have gained new opportunities to profit from their works" while "those who make unauthorized use of copyrighted works can exploit those same opportunities"); *supra* notes 3–6, 18–21, 31–37, 176–178 and accompanying text (noting TikTok's financial incentive from the mass dissemination of users' content, including that which are infringing); *cf.* REUTERS, *supra* note 184 (providing TikTok's U.S. revenue in 2023, which was around $16 billion); Chung & Huang, *supra* note 185 (ByteDance's self-valuation of around $300 billion).

[265] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (expressing that copyright ownership is "intended to motivate the creative activity of authors and inventors by the provision of a special reward").

[266] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (discussing that although copyright's immediate effect secures an author's fair return for their creative labor, copyright's ultimate goal is to "stimulate artistic creativity for the general public good").

[267] *See supra* notes 187–205 and accompanying text (discussing the different approaches to determine whether a third party has the right and ability to supervise the direct infringer's actions or whether a third party received a direct financial benefit "substantial enough to be considered significant" (quoting Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328 (D. Mass. 1994))).

[268] *See* Henning, *supra* note 78, at 195–96 (illustrating the *Sony* standard and inducement); Helman, *supra* note 128, at 122, 128 (same); Lobato, *supra* note 162, at 367–68 (same); *infra* Parts III.B–C (examining contributory infringement and inducement).

[269] *See supra* notes 208–224 and accompanying text (discussing contributory infringement and the *Sony* standard).

knowledge of specific acts of infringement.[270] Yet infringement can occur in ways that are not immediately obvious or detectable by a platform, which complicates the knowledge requirement.[271] Additionally, the automated and vast nature of content generation and dissemination on platforms makes it impractical for OSPs to monitor and evaluate every piece of content for potential infringement.[272] Further, although the EU's DSA requires VLOPs and VLOSEs to establish a notice-and-action mechanism for users to report illicit conduct—which may mitigate any concerns as to the practicability of OSPs to monitor their platform—the *Sony* standard remains a frustrating wrinkle.[273] Like the DMCA, the *Sony* standard offers a safe harbor for tech developers, and thus OSPs.[274] When an OSP like TikTok disseminates AI-generated content or offers generative AI models to create content, the OSP may point to its products' substantial noninfringing uses.[275] Consequently, the contributory infringement doctrine struggles to effectively address the realities of algorithm-driven and AI-generated content creation and leaves copyright holders without adequate recourse.[276]

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[270] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 30 (2d Cir. 2012) (holding that specific knowledge is required to expeditiously remove the specific infringing material because "expeditious removal is possible only if the service provider knows with particularity which items to remove"); Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (articulating that a finding of contributory liability requires that the third party materially contributes to the unauthorized copying, with the knowledge that such copying was illicit).

[271] *See* 17 U.S.C. § 512(c) (requiring knowledge of the specific infringing activity); *Viacom*, 676 F.3d at 30 (same).

[272] *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007) ("The DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright."); *see also* UNIVERSAL MUSIC GRP., *supra* note 31 (comparing the removal process like "Whack-a-Mole," even though TikTok fulfills its DMCA-prescribed notice-and-takedown requirements); Dellatto, *supra* note 181 (noting TikTok reached one billion users faster than Facebook, Instagram, and YouTube).

[273] *Compare* Digital Services Act, *supra* note 231, art. 16 (DSA's notice-and-action mechanism), *with* 17 U.S.C. § 512(g) (DMCA's notice-and-takedown mechanism).

[274] *See supra* note 221 and accompanying text (noting the tech industry's reliance on *Sony*'s safe harbor). Similarly to the critiques made against the DMCA, see *supra* notes 179–182, 251–255 and accompanying text, this Note struggles to see any meaningful difference in result between the DMCA's notice-and-takedown mechanism and DSA's notice-and-action mechanism to combat the sheer amount of infringing works online. *Cf. supra* notes 106–109, 117–135 and accompanying text (providing an overview on the development of contributory liability in copyright infringement claims). Because a finding of contributory liability requires that the defendant materially contributes to the direct infringer's conduct, in addition to having knowledge of the infringing conduct, this Note still contends that contributory liability is an ineffective method to impose third-party liability onto OSPs. *See supra* notes 208–215, 266–273 and accompanying text (discussing contributory liability's comparative defects to vicarious liability in the current digital environment).

[275] *See supra* notes 208–221 and accompanying text (noting the legal uncertainty surrounding the *Sony* standard and its application to new technologies).

[276] *See* Helman, *supra* note 128, at 128 (expressing the remaining confusion among innovators as to the varying standards of liability that remain vague, with fluid boundaries); Lobato, *supra* note 162,

C. Inducement: Emerging Technologies Have Uses Other Than to Infringe

The inducement theory struggles similarly with the algorithm-driven processes that characterize content generation and distribution on certain platforms.[277] Notwithstanding the limited post-*Grokster* legal landscape, a fundamental challenge with inducement lies in the intent requirement that becomes difficult to demonstrate when dealing with AI models embedded within social media platforms.[278] The automated suggestions, algorithms, and tools provided by platforms like TikTok to enhance user engagement and content creation do not demonstrate an intent to promote copyright infringement.[279] These features aim to optimize user experience and engagement, making it difficult to establish intent to induce infringement without evidence of platform policies or actions specific to the promotion of copyright infringement.[280] Although UMG initially refused to renew its licensing agreement with TikTok based on TikTok's insufficient policies surrounding AI-generated content and copyright infringement, UMG reached a satisfactory licensing agreement with TikTok, just as other major music labels did prior.[281] Therefore, TikTok likely received authorization from the music labels by agreeing to the platform's development of AI functions that will create and edit content, thereby not constituting infringement.[282]

D. Vicarious Liability Distributes Burdens and Promotes Innovation

Further, because the EU holds similar policy rationales to U.S. copyright law, as exhibited in their DSA and AI Act, tech companies and developers can use their obligations from the EU and the elements of vicarious liability from

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at 370 ("The courts, while acting with the best of intentions, have only managed to create chaos, upsetting both copyright holders and market innovators.").

[277] *See supra* notes 225–227 and accompanying text (considering inducement within the context of AI-tools made available on OSPs).

[278] *See supra* notes 136–147 and accompanying text (discussing the U.S. Supreme Court's articulation of the inducement theory).

[279] *Cf.* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 926 (2005) (determining from the defendants' business models that the defendants' software's principal object was to enable users to download copyrighted music).

[280] *See supra* notes 171–178 and accompanying text (discussing TikTok's role in the dissemination of unauthorized derivative works, which includes the availability of generative AI tools on the platform).

[281] *See supra* note 42 (providing that UMG and TikTok reached a new agreement three months after UMG removed its catalog from the platform); *cf.* UNIVERSAL MUSIC GRP., *supra* note 31 (claiming that "appropriate compensation for artists and songwriters" and "protect[ion for] human artists from the harmful effects of AI" were critical issues to address); *TikTok Statement in Response to Universal Music Group*, *supra* note 36 (purporting that licensing agreements were renewed with other music labels, such as Warner Music Group, with relative ease, but failing to mention any labels' stance on AI). *But see* Robinson, *supra* note 45 (reporting that independent labels are facing difficulties in reaching licensing agreements with TikTok); Aswad, *supra* note 45 (same).

[282] *See* UNIVERSAL MUSIC GRP., *supra* note 31 (advocating for licensing agreements to include royalties for user-created derivative works and enforcement mechanisms for compliance).

the United States to monitor any potential third-party liability.[283] Both Acts reflect the EU's efforts to sufficiently and *timely* regulate the increasingly digitized environment faced with the rapid development of AI.[284] Thus, for AI developers and large OSPs to obtain legal certainty on the limits of their innovation in the United States, perhaps an understanding of the different applications of vicarious liability alongside their compliance with the DSA's and AI Act's obligations will facilitate this task.[285]

By making platforms accountable for preventing infringement, vicarious liability ensures a fair marketplace where creators receive compensation for the use of their work.[286] Because of its clearer interpretations, vicarious liability is the most appropriate method to attribute responsibility to social media platforms for AI-generated content.[287] Although the application of contributory infringement and inducement remain unclear to creators and hinders innovation, vicarious liability achieves the dual objectives of copyright law to protect creators' rights and foster innovation.[288] Vicarious liability benefits creators by

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[283] *See supra* notes 237–239, 247–250 and accompanying text (identifying the EU's regulatory approach that imposes legal responsibilities onto OPs and AI developers and arguing that such an approach promotes an equitable distribution of burden of content moderation).

[284] *See supra* notes 53–55 and accompanying text (noting the legal uncertainty that the tech industry faces while developing non-generative or generative AI models or systems); *supra* notes 232–237 and accompanying text (listing the obligations prescribed by the DSA); *supra* notes 243–250 and accompanying text (listing the obligations prescribed by the AI Act); *see, e.g.*, Skidmore v. Zeppelin, 952 F.3d 1051, 1068 (9th Cir. 2020) (discussing how a finding of access is easily met due to the rise of online subscription services and media); *cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984) ("Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."). *But cf.* Rinaldi, *supra* note 228 (providing that Vice President JD Vance criticized the DSA, and the "massive regulations" it imposed on internet platforms, and warned EU leaders that excessive regulation on the AI industry would "kill [the] industry just as it's taking off").

[285] *See* Kaminski & Jones, *supra* note 238, at 1262 (proposing that global entities may operate on "a DSA-style mix of due process and risk mitigation all over the world"); Hall, *supra* note 249 (emphasizing the importance for banks "to take a responsible approach [towards integrating AI tools] and really be applying controls so that [the banks] protect [themselves] from potential inaccuracies and hallucinations" since "[t]he outlook for the US and the US market is less clear [than the EU]."); *supra* Part II.E (discussing the EU's intention to set forth legal certainty for tech developers with the DSA and AI Act).

[286] *See* United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (providing that conferring copyright ownership as a "reward to the author or artist serves to induce release to the public of the products of [their] creative genius").

[287] *See* Forrest, *supra* note 253, at 1202 (acknowledging that U.S. tort principles may supply an initial framework for some circumstances in which AI has caused injury); *supra* notes 261–282 and accompanying text (asserting that contributory infringement and inducement are insufficient to combat copyright infringement occurring on OSPs).

[288] *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 957 (2005) (Breyer, J., concurring) (emphasizing that courts should interpret copyright laws to avoid any discouragement to innovate new technological advancements, "including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently"); *Sony*, 464 U.S. at 429 (expressing that defining the scope of copyright protection requires a balance between innovators and artists' incen-

holding platforms responsible when they have the ability to control infringing activity and benefit financially from it, even if the platform did not directly engage or have knowledge of a single infringing act.[289] Further, OSPs operating in the EU must comply with the DSA-mandated, user-friendly notice-and-action mechanism, which will facilitate an OSP's ability to supervise the creation and dissemination of any infringing work.[290]

Vicarious liability also serves the public interest by fostering a rich and diverse online ecosystem.[291] Platforms, now faced with strong incentivizes from the EU to comply with applicable copyright laws, will disseminate to the public a wider range of copyrighted content that was lawfully obtained.[292] Accordingly, vicarious liability supports the dissemination of creative works within the boundaries of the law and enriches the public domain without compromising copyright protection.[293]

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tives to create and "society's competing interest in the free flow of ideas, information, and commerce"). *But see, e.g.*, Henning, *supra* note 78, at 195–96 (criticizing the *Sony* standard and inducement because their applications remain unclear); Helman, *supra* note 128, at 122, 128 (same); Lobato, *supra* note 162, at 367–68 (same).

[289] *Compare* Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963) (holding that a third party may be held vicariously liable "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials"), *with* Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (holding that a third party may be a contributory infringer when it possesses knowledge of the infringement, yet still materially contributes to the infringing activity).

[290] *Compare* Digital Services Act, *supra* note 231, art. 16 (DSA's notice-and-action mechanism), *with* 17 U.S.C. § 512(g) (DMCA's notice-and-takedown mechanism).

[291] *See* Fitts, *supra* note 75 (noting that Congress's intent for copyright is to promote authors' innovations to benefit the public).

[292] *See supra* notes 71–82 and accompanying text (expounding U.S. copyright law's policy objectives that must balance the incentive for artists to create so that these creations enter the public domain for the public's benefit); *supra* Part II.E (providing a general discussion on the EU's DSA and AI Act and what obligations OPs and AI system developers are subject to under these Acts); *see, e.g.*, Benoit, *supra* note 29 (stating that, in addition to filing a complaint, the French authors and publishers reported Meta to the European Commission, contending that Meta's alleged infringement violates the EU's rules on AI); *Supervision of Designated VLOPs and VLOSEs Under DSA*, *supra* note 239 (listing DSA-enforcement investigations).

[293] *See, e.g.*, *supra* note 29 (listing various lawsuits against digital platforms that were filed by copyright holders who assert that these platforms infringed when they used the copyrighted works to train the AI model or system without a license or authorization). *Compare* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 535 (2023) (describing how licenses achieve copyright's goal because they "provide an economic incentive to create original works" and their sale for any derivatives of the work are how authors make a living), *and supra* notes 20–21 (discussing how sped-up remixes divert revenue from the song's license holders and instead generate revenue for its uploaders because sped-up remixes are unlicensed audio tracks), *with* Artists Rts. All., *supra* note 19 (contending that generative AI prevents artists from receiving fair compensation for their copyrighted works), *and supra* note 45 (providing instances where recording labels received difficulty from TikTok to reach a licensing agreement).

CONCLUSION

A current tension in copyright law arises from the burgeoning influence of digital platforms like TikTok and the unprecedented rise of AI-generated content. UMG's catalog withdrawal from TikTok serves not only as a manifestation of this tension but also as a prompt for legislative and judicial clarity in the United States. This Note argues that the DMCA offers little incentive for OSPs to mitigate user-infringement beyond its safe harbor provisions. Contributory infringement and inducement are also inadequate methods against copyright infringement because these doctrines lack brightline rules, and thus thresholds, for innovators to be held liable as third parties. This Note also discusses the EU's DSA and AI Act and contends that the obligations these Acts impose on online platforms promote innovation in a regulated environment that protects the interests of copyright holders.

This Note suggests that OSPs and generative AI developers may use their compliance obligations from the EU and the vicarious liability analysis to monitor their potential liability operating in the United States. Although inducement and contributory infringement's *Sony* standard are imprecise in application and interpretation, vicarious liability, having clearly articulated doctrinal elements, safeguards the interests of copyright holders, consumers, and creators, alike. Vicarious liability promotes a fairer distribution of legal responsibilities and encourages OSPs to engage proactively in copyright compliance efforts, without needing to confront the ambiguities that plague the other third-party liability doctrines. Vicarious liability strikes a balance that (sufficiently) confronts the challenges introduced by generative AI and OSPs that promote to their users generative AI or AI-generated content, and satisfies the competing, binary objectives of copyright law: to effectuate copyright protection to incentivize innovation.

SHARON CHOI