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**Volition Has No Role to Play in Determining  
Copyright Infringements**

by

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## **Introduction and Summary**

Historically, and consistently, direct copyright infringement has been understood to be a strict liability tort. Unfortunately, some recent lower court decisions addressing infringement of copyrighted content on online platforms could be read, wrongly, to require copyright owners to prove "volitional conduct" by alleged infringers. Yet the Copyright Act nowhere contains any such volitional conduct requirement and the U.S. Supreme Court has never recognized such requirement in direct infringement cases. Lamentably, any uncertainty regarding a potential volitional conduct requirement makes it more difficult to ensure accountability by online platforms for mass infringement taking place on user-upload websites.

The principle that volition (or intent) has no role to play in determining whether copyright infringement has occurred is long-standing and well established in both English and American jurisprudence. Here is an excerpt from Eaton S. Drone's *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States*, first published in 1879:

To constitute piracy, it is not necessary that there shall have been on the part of the wrong-doer an intention to pirate. His motives in taking the whole or a part of

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the copyrighted work may have been unobjectionable, or even commendable; the purpose for which such matter is used may, in his view be harmless. In applying the law, the thing done and its effect and not the intention it is done, are the controlling considerations.

\* \* \*

Ignorance will not avail as a defence of piracy. Whether he who appropriates the whole or a part of another's work was aware that it was protected by copyright, or whether he knew what would be the legal consequences of his act, is wholly immaterial. The theory of the law in this respect is, that whoever avails himself of the labors of another must do so at his own risk, and must be held responsible for his acts without regard to the extent of his knowledge or ignorance. [Pages 401 and 403].

And this from an earlier well-known copyright authority, George Ticknor Curtis, in his *A Treatise on the Law of Copyrights*, first published in 1847:

With regard to each of these forms of infringement, it is to be observed, that the question of intention does not enter directly into the determination of the question of piracy. The exclusive privilege, which the law secures to authors, may be equally violated, whether the work complained of was written with or without the *animus furandi*—the intention to take what belongs to another, and thereby to do an injury. [Page 238].

Both of these Nineteenth Century treatises are considered authoritative. And their point regarding intent was explicitly reaffirmed by the Supreme Court in *Buck v. Jewel-LaSalle Realty Co.* (1931), where Justice Brandeis stated: "Intention to infringe is not essential under the act." And the point stands today.

To increase platform accountability for online infringement, both the courts and Congress need to ensure that there are clear, strict liability rules regarding direct copyright infringement. Attention, deservedly, has been placed on refining statutory safe harbors from legal liability in order to ensure online platforms take more responsibility for infringing activities on their sites. But even when online platforms are ineligible for safe harbor treatment, copyright owners still have the burden of proving direct copyright infringement. This *Perspectives from FSF Scholars* paper therefore focuses on direct infringement in the context of online platform accountability.

Apparent confusion has arisen regarding the liability principles and legal requirements for establishing direct copyright infringement claims involving online services. In addressing the issue of platform accountability, Congress therefore ought to bring a clear understanding of direct copyright infringement as a strict liability tort. Section 501(a) of the Copyright Act provides the owners of creative works, including movies and sound recordings, a civil cause of action when anyone reproduces, displays, or publicly performs their works without authorization. Copyright infringement – or what often is called "direct" infringement – is a strict liability tort,

which means that a person is liable when his or her actions cause another person damages, even if the person did not intend to do so or did not act negligently.

A principled basis for a strict liability rule with regard to direct copyright infringement claims is firmly grounded in natural rights philosophy upon which the Founders relied when they included the Copyright Clause in the Constitution of 1787. In this regard, copyrights are unique types of private property rights, and copyright owners have rights to be protected in the use and enjoyment of works created through their own labors. It is wrongful – and harmful – when their rights are invaded or undermined. Copyright owners face heavy risks of suffering injury in their use and enjoyment of those rights by virtue of the unauthorized use of their works, regardless of whether or not the unauthorized use is considered volitional. And in many instances, including the online context, would-be infringers have readily accessible means for appropriating the value of copyrighted works by unauthorized use. Thus, strict liability protects the rights of copyright owners from those heavy risks of harm. Additionally, and aside from the philosophical grounding in natural rights theory, consistent historical practice accords with adopting strict liability for direct copyright infringement. Going back to the Copyright Act of 1790, the prevailing rule has been that copyright infringement claims are not predicated on a copyright owner proving intent or negligence by an infringer.

The so-called "volitional conduct" requirement, which is now creating confusion in some lower court direct infringement cases involving online services, is traceable to a 1995 U.S. District Court decision in *Religious Technology Center v. Netcom On-Line Communication Services*. In that decision, the District Court stated: "Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party." The 1995 *Netcom* decision's unique contextual use of the terms "volition" and "causation" was pregnant with ambiguities, and it has become a continuing source of discussion by legal scholars. Indeed, a casual or out-of-context reading of the *Netcom* decision and some later court decisions may create the impression, misguided in our view, that a direct infringement claim requires proving intent or negligence on the part of the infringer.

The Copyright Act nowhere contains an express "volitional conduct" requirement and the Supreme Court has never directly suggested such a requirement. A careful reading of decisions by lower courts shows apparent consensus on a couple of points. First, lower court decisions do not regard the "volitional conduct" requirement as a knowledge or negligence requirement for establishing liability for direct copyright infringement. This is in keeping with the understanding that direct copyright infringement is a strict liability tort under the Copyright Act.

Second, lower court decisions appear to treat the volitional conduct requirement as having to do with the connection between the alleged conduct and actual infringement under the law. In other words, the alleged infringer must have acted in some way so as to *cause* the violation. Indeed, a rule of strict liability is entirely compatible with a requirement that "proximate cause" be established. Volitional conduct is only relevant, at most, to a determination of infringement liability if it is understood to mean no more than a proximate causal connection between the alleged conduct and the actual infringement. As the District Court in the 1995 *Netcom* decision recognized: "Where the infringing subscriber is clearly directly liable for the same act, it [would]

not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement [was] nothing more than setting up and operating a system that is necessary for the functioning of the Internet."

Unfortunately, the somewhat confusing meaning of the volitional conduct requirement has factored into at least one federal court making dubious apparent extrapolations from the volitional conduct requirement. A 2017 decision by the Ninth Circuit Court of Appeals in *Perfect 10, Inc. v. Giganews, Inc.* appeared to hold that an online platform owner does not engage in volitional conduct if the unauthorized display, distribution, or reproduction of a copyright work merely involves a platform's automatic process. In *Perfect 10*, the court also appears to imply that, under the volitional conduct requirement, only a single party – either the online platform service provider or the individual user of that platform – can engage in direct copyright infringement in a given instance.

But neither of those apparent extrapolations is required by a reasoned application of the volitional conduct requirement. Auto-process immunity for online platforms and single direct infringer liability, if ever accepted as rules, would significantly reduce platform accountability rather than increase it. Both such extrapolations are likely contrary to the Supreme Court's reasoning in copyright decisions such as *American Broadcasting Cos., Inc. v. Aereo, Inc.* (2014) and *New York Times Co. v. Tasini* (2001).

In addressing platform accountability, neither the courts nor Congress ought not to succumb to confusion surrounding volitional conduct but instead ought to preserve a clear understanding of direct copyright infringement as a strict liability tort. If the courts fail to preserve such a clear understanding, then Congress should amend the Copyright Act to avoid erroneous or unexpected judicial interpretations of the law. In any event, given the confusion that may already have been created, Congress should consider bringing more precision to the Copyright Act by making clear that suggestions of any volitional requirement are not allowed to undermine strict liability for direct infringements that occur online.

Indeed, Congress has an obligation, under the Constitution's Copyright Clause, to secure the exclusive rights of copyright owners in their works. That obligation applies with particular force to mass online infringement taking place today, and it should prompt Congress to pursue greater platform accountability. In seeking to hold platforms accountable for infringing activities on their websites, Congress ought to preserve strict liability and ensure legal clarity regarding requirements for direct copyright infringement. And, by no means, should Congress incorporate any volitional requirement into the law regarding copyright infringement.

Making online platforms more accountable for the high volumes of online copyright infringement on their user-upload sites requires reexamination of existing statutory safe harbors from liability. In such reexamination, Congress must preserve strict liability and clear standards for direct infringements.

## Copyright Infringement: A Strict Liability Tort

Section 501(b) of the Copyright Act provides the owner of a copyrighted work a civil right of action when another person infringes any of his or her exclusive rights in that work.<sup>1</sup> If the owner of a copyrighted sound recording, movie, or other creative work can prove that another person without authorization, reproduced their work, prepared a derivative work based on the copyrighted work, distributed copies of the work for public sale, or publicly performed a copyrighted movie or sound recording, federal copyright law provides the owner remedies, including statutory damage awards as well as awards of attorney fees and costs.

Copyright infringement – or what often is called "direct" infringement – is a strict liability tort. Under the doctrine of strict liability, a person is liable when his or her actions cause another person damages, even if the person who is liable did not intend to do so or did not act negligently. Section 501(a) of the Copyright Act makes plain that "[a]nyone who violates any of the exclusive rights of the copyright owner... is an infringer of the copyright."<sup>2</sup> Thus, in the case of direct copyright infringement, the owner of a creative work need not prove that a person intentionally or willfully infringed his or her copyright in order to establish that a direct infringement occurred. In other words, the subjective intent of the alleged infringer is immaterial for purposes of proving liability. Under Section 504, proof of intent is considered only as a basis for increasing or reducing – but not eliminating – damage awards.<sup>3</sup>

There is a principled basis for a rule of strict liability in direct copyright infringement claims. Copyrights are a unique type of private property rights, and copyright owners deserve to be protected in the use and enjoyment of their creative works. Copyright owners face heavy risks of being damaged in their use and enjoyment of those rights by the unauthorized use of their works. Strict liability protects the rights of copyright owners from those heavy risks of harm. And in many instances, would-be infringers have readily accessible means for appropriating the value of copyrighted works by unauthorized use. In the online context, such appropriation of value and harm to the copyright owner can occur when their content is uploaded to online platforms for streaming or downloading by individual users. The fact that copyright owners are likely to suffer the same types or amounts of losses regardless of whether infringing activities were intended also supports a rule of strict liability.

Additionally, the notion that volition (or intent) has no role to play in determining whether copyright infringement has occurred is long-standing and well-established in both English and American jurisprudence. According to Eaton S. Drone's, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States*, first published in 1879:

To constitute piracy, it is not necessary that there shall have been on the part of the wrong-doer an intention to pirate. His motives in taking the whole or a part of the copyrighted work may have been unobjectionable, or even commendable; the purpose for which such matter is used may, in his view be harmless. In applying the law, the thing done and its effect and not the intention it is done, are the controlling considerations.

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Ignorance will not avail as a defence of piracy. Whether he who appropriates the whole or a part of another's work was aware that it was protected by copyright, or whether he knew what would be the legal consequences of his act, is wholly immaterial. The theory of the law in this respect is, that whoever avails himself of the labors of another must do so at his own risk, and must be held responsible for his acts without regard to the extent of his knowledge or ignorance.<sup>4</sup> [Pages 401 and 403].

And this from an earlier well-known copyright authority, George Ticknor Curtis, in his *Treatise on the Law of Copyrights*, first published in 1847:

With regard to each of these forms of infringement, it is to be observed, that the question of intention does not enter directly into the determination of the question of piracy. The exclusive privilege, which the law secures to authors, may be equally violated, whether the work complained of was written with or without the *animus furandi*—the intention to take what belongs to another, and thereby to do an injury.<sup>5</sup>

Both of these Nineteenth Century treatises are considered authoritative. Their point that proof of intent is not required to establish a copyright infringement claim also was expressed by well-known Nineteenth Century lower court decisions such as *Folsom v. Marsh* (1841) and *Lawrence v. Dana* (1846).<sup>6</sup> And as the Supreme Court recognized in *Buck v. Jewel-LaSalle Realty Co.* (1931): "Intention to infringe is not essential under the act."<sup>7</sup>

Going back to the Copyright Act of 1790, the general rule has been that civil claims for direct infringement are not predicated on a copyright owner proving intent or negligence by an infringer. The 1790 Act allowed a limited exception in cases involving vendors who innocently sold infringing goods. But the Copyright Act of 1909 eliminated even that limited exception.<sup>8</sup> And subsequent Congresses have declined to pass legislative proposals that would have overturned or further qualified the rule of strict liability for copyright infringement.<sup>9</sup>

In addition to direct infringement, courts recognize two types of indirect or secondary liability for copyright infringement: contributory liability and vicarious liability. A person infringes a copyrighted work contributorily by intentionally inducing or encouraging another person to commit direct infringement. Unlike direct liability, contributory liability requires a knowledge or intent element. That is, to establish contributory liability, a copyright owner must prove that another person had knowledge of infringing activity by a third party and materially contributed to the activity. And a person infringes vicariously by profiting from another person's direct infringement while declining to limit or stop it. Thus, to establish vicarious liability, a copyright owner must prove that another person had the right and ability to supervise or control the infringing activity and also realized a direct financial benefit from it. But vicarious liability does *not* include a knowledge or intent element. This paper only addresses direct copyright infringement. (Free State Foundation President Randolph May and I trace several general aspects of the historical development of civil liability for infringement in our *Perspectives from FSF*

Scholars paper, "Modernizing Civil Copyright Enforcement: The Need for Notice-and-Takedown Reforms and Small Claims Relief."<sup>10</sup>)

### **The "Volitional Conduct" Requirement for Direct Infringement Claims**

A degree of apparent confusion has arisen in copyright jurisprudence regarding whether a showing of "volition" or "causation" is necessary to establish liability for direct infringement. This apparent confusion stems from a 1995 U.S. District Court case, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*<sup>11</sup> At issue in *Netcom* was whether an Internet Service Provider (ISP) and an operator of an online bulletin board were liable for direct infringement when individual users of their respective services posted copyrighted content on the bulletin board. In deciding that neither the ISP nor the bulletin board operator were liable for direct infringement, the District Court stated: "Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."<sup>12</sup>

By way of explaining its reasoning for requiring such "volition or causation," the District Court in *Netcom* apparently sought to avoid a reading of the law that would subject to liability for direct infringement online service providers who merely store copyrighted content uploaded by individual users: "Where the infringing subscriber is clearly directly liable for the same act, it [would] not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement [was] nothing more than setting up and operating a system that is necessary for the functioning of the Internet."<sup>13</sup>

The 1995 *Netcom* decision's unique contextual use of the terms "volition" and "causation" was pregnant with ambiguities. The Copyright Act nowhere contains an express "volitional conduct" requirement. And the Supreme Court has not directly suggested a volitional or causation requirement in direct copyright infringement. However, since the *Netcom* decision, the "volition or causation" requirement – also called the "volitional conduct" requirement – has been analyzed by lower courts in cases involving direct infringement claims.<sup>14</sup>

Lower courts appear to have reached consensus on a couple of points. First, lower court decisions do not regard the "volitional conduct" requirement as a knowledge or intent element needed to establish liability for direct copyright infringement.<sup>15</sup> This is in keeping with the understanding that direct copyright infringement is a strict liability tort under the Copyright Act.

Second, lower court decisions appear to treat the volitional conduct requirement as having to do with establishing a connection between an alleged direct infringer's conduct and a violation of the law.<sup>16</sup> It is in this sense that volitional conduct is regarded as having to do with causation: the alleged infringer must have acted in some way so as to "cause" the violation. As at least some courts have recognized, this sense of "causation" is unique to the copyright context. Such meaning is distinct from the traditional understanding of "legal causation" or "but-for" causation, which has to do with whether a tortfeasor's actions caused damages or whether a person would have sustained damages but-for the tortfeasor's actions. In other words, courts in direct infringement cases applying the volitional conduct requirement, in fact, have examined whether an alleged infringer's conduct constituted a copyright violation – and *not* whether an alleged

infringer's conduct caused the copyright owner damages. To do the latter would be ahistorical and inconsistent with the philosophical basis upon which the Founders secured copyright protection.

### **Dubious Extrapolation from the "Volitional Conduct" Requirement: Online Service Providers Using Automatic Response Processes Receive Legal Immunity**

Despite the apparent consensus among lower courts on those primary points, a 2017 decision by the U.S. Court of Appeals for the Ninth Circuit in *Perfect 10, Inc. v. Giganews, Inc.* appears to have made two dubious extrapolations from the volitional conduct requirement when the conduct at issue involves content posted on an online service platform without the authorization of the copyright owner.<sup>17</sup>

The Ninth Circuit's first apparent extrapolation from the volitional conduct requirement in *Perfect 10* is that an online platform does not engage in volitional conduct if the unauthorized display, distribution, or reproduction of a copyright work merely involves a platform's automatic process response to an individual user's upload decision. Regarding the Usenet server owner in that case, for example, the Ninth Circuit concluded "there was no direct infringement of Perfect 10's distribution rights because Perfect 10 failed to show that the distribution does not happen automatically."<sup>18</sup> The Ninth Circuit also rejected similar claims made against the ISP in that case: "Again, there is no indication that the distribution does not happen automatically."<sup>19</sup> According to the Ninth Circuit, the copyright owner's claims that its reproduction rights were directly infringed by the Usenet server owner in that case likewise failed because it "provide[d] no evidence showing Giganews exercised control (other than by general operation of a Usenet service); selected any material for upload, download, transmission, or storage; or instigated any copying, storage, or distribution."<sup>20</sup>

To be sure, the Ninth Circuit's decision in *Perfect 10* is not especially clear concerning the extent to which automatic processes insulate an online platform from liability. But one possible reading of its decision is that any general use of automatic uploading, storage, copying, and transmission process responding to user decisions renders an online platform's conduct non-volitional and thus effectively immune from liability for direct infringement. At the very least, the *Perfect 10* decision appears to place undue reliance on the use of an automatic process in analyzing whether there was volitional conduct or proximate cause establishing direct infringement.

Importantly, Supreme Court jurisprudence nowhere accepts the idea that an online platform's unauthorized reproduction, distribution, display, or performance of copyrighted content through the use of an automatic process response to a user's upload, download, or other decision precludes liability for direct infringement. Indeed, such an idea is contrary to the reasoning of the Supreme Court in copyright decisions.

In *American Broadcasting Cos., Inc. v. Aereo, Inc.* (2014),<sup>21</sup> the Supreme Court upheld direct infringement claims against a commercial service that provided individual customers access to copyrighted content on broadcast TV channels. The service received the over-the-air TV broadcast signals via thousands of small antennas at a warehouse and then transmitted the content to its customers via the Internet. The Court acknowledged that: "Aereo's system remains

inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program."<sup>22</sup> Yet the Court expressly rejected the dissent's position that such an automatic response to the subscriber's content selection meant that the subscriber and not the service transmitted the infringing performance to the subscriber's own computer equipment.<sup>23</sup>

The Court also expressly rejected the dissent's analogy of Aereo's service to a "copy shop." It recognized that Aereo's customers could choose programs they wished to view, and that "a click on a website...activates machinery that intercepts and reroutes [television signals] to Aereo's subscribers over the Internet."<sup>24</sup> But it concluded that the service system's automatic response to a subscriber's click choice did not thereby defeat the direct infringement claims.<sup>25</sup>

Notably, the Court declared: "In other cases involving different kinds of service or technology providers, a user's involvement in the operation of the provider's equipment and selection of the content transmitted may well bear on whether the provider performs within the meaning of the Act."<sup>26</sup> Thus, liability depends on the particular services and user conduct in individual cases. Certainly, the Court in *Aereo* nowhere accepted any bright-line rule that such automatic processes cannot be "proximate" causes of direct infringement.

Also, in *New York Times Co. v. Tasini* (2001), the Court upheld direct copyright infringements by print and electronic publishers that, without authorization, stored copies of articles by freelance authors in databases that were individually accessible and searchable by individual subscribers to the publishers' services.<sup>27</sup> As the Court recognized: "Such a storage and retrieval system effectively overrides the Authors' exclusive right to control the individual reproduction and distribution of each Article."<sup>28</sup> Although access to infringing content depended on LEXIS/NEXIS subscribers "accessing the system through a computer," "search[ing] for articles by author, subject date, publication, headline, key term, words in a text, or other criteria," and "view[ing], print[ing], or downloading[ing] each of the articles yielded by the search," the Court concluded it was "clear" that the publishers infringed at least some of the exclusive rights of the authors so as to be liable.<sup>29</sup> Furthermore, the Court found that "the fact that a third party can manipulate a database to produce a noninfringing document does not mean the database is not infringing."<sup>30</sup>

Additionally, safe harbor provisions set forth in Section 512 of the Digital Millennium Copyright Act of 1998 ("DMCA") create a strong inference that platform conduct involving automatic processes were never intended to be categorically immunized from liability for copyright infringement. Section 512 lists categories of automatic functions for which online service providers can receive immunity from direct copyright infringement. Section 512(b) limits liability for "intermediate and temporary storage of material on a system or network," if the "storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network" and if other statutory requirements for protecting copyrights are satisfied.

Safe harbor under Section 512(b) would be pointless if online platforms relying on automated processes were already immune from liability. Furthermore, if conduct involving "automatic

processes" cannot constitute direct infringement, Section 512's notice-and-takedown provision and its repeat infringers policy would serve little purpose. Online platforms would already be immunized from liability.

### **Dubious Extrapolation from the "Volitional Conduct" Requirement: Only One Party Can Be Liable for Direct Infringement in a Given Claim**

The Ninth Circuit's second apparent extrapolation from the volitional conduct requirement is that only a single party – either the online platform service provider or the individual user of that platform – can engage in direct copyright infringement in a given instance. In *Perfect 10*, the Ninth Circuit acknowledged record evidence that the online platform service hosted copyrighted images and thereby made them accessible to users through its platform. However, it concluded that the online platform was merely a passive host. According to the Ninth Circuit: "The evidence does not demonstrate that Giganews -- as opposed to the user who called up the images -- caused the images to be displayed."<sup>31</sup>

However, any implicit rule that direct infringement can only be caused by one actor and not by multiple actors is contrary to the Supreme Court's reasoning in copyright decisions. In *Aereo*, the Court stated that under Section 101 of the Copyright Act, "both the broadcaster and the viewer of a television program 'perform,' because they both show the program's images and make audible the program's sounds."<sup>32</sup> The so-called "Transmit Clause" contained in Section 101 provides that a work is publicly performed or displayed when it is "transmit[ted]... to the public, by means of any device or process."<sup>33</sup> According to the Court in *Aereo*, under the Transmit Clause, a service acting like a cable TV system "itself performs, even if when doing so, it simply enhances viewers' ability to receive broadcast television signals."<sup>34</sup> By that reasoning, an online platform that enhances or improves a user's ability to access copyrighted content may have acted so as to cause direct infringement and be liable along with the user or other parties.

### **The Courts and Congress Should Preserve Clear and Strict Liability Rules for Direct Copyright Infringement on Online Platforms**

Congress has an obligation, under the Article I, Section 8 Copyrights Clause, to secure the exclusive rights of copyright owners in their works. Fulfilling that obligation requires Congress to address the high volumes of online infringement taking place on popular user-upload platforms and the resulting heavy losses sustained by copyright owners. Greater accountability is particularly needed for online platforms that act like publishers in creating, editing, and promoting content as a means of attracting viewers and generating ad revenues.

Refining the safe harbors provided under Section 512 of the DMCA is one imperative for ensuring platform accountability for mass infringement. Section 512 provides legal immunity to online service providers in certain circumstances. However, as Free State Foundation President Randolph May and I have previously explained, Section 512 is geared to dial-up Internet era technologies and user habits.<sup>35</sup> Consequently, existing law fails to adequately protect copyright owners from infringing activity on the Internet. Moreover, although Section 512's safe harbors likely were intended to apply to online service providers actions when they act as non-publishers, today's popular online platforms that enable user-uploads also perform publisher-like functions

in curating and pushing content for increased visibility and rely on posted content for ad revenues. Congress therefor needs to make refining Section 512's safe harbors a priority.

Yet even when an online platform that hosts infringing content on its website is not eligible for safe harbor immunity under Section 512, liability does not automatically follow. As Section 512(l) provides: "The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense."<sup>36</sup> Absent safe harbor eligibility, a copyright owner still bears the burden of proving that the provider committed copyright infringement under Section 501(a) of the Copyright Act. Accordingly, preserving strict liability and ensuring legal clarity regarding requirements for proving direct copyright infringement taking place online is another imperative for ensuring platform accountability.

Section 501(a) of the Copyright Act makes plain that anyone who violates any exclusive rights in copyrighted works is an infringer. As described earlier, the statute contains no intent or negligence elements. This is firmly grounded in jurisprudence dating to our nation's founding and the philosophical basis for the Constitution's inclusion of the Copyright Clause. Since then, copyright infringement claims have never been predicated on proving intent or negligence by an infringer. Moreover, strict liability constitutes sound policy because it protects copyright owners from heavy and easily realized damages caused by would-be infringers that misappropriate their creative works without payment of compensation.

Any "volitional conduct" requirement for direct infringement that involves online services, suggested in some late lower court cases, is highly problematical if only for the confusion it creates. As applied by lower courts, the volitional conduct requirement apparently has to do with whether a party's actions actually caused or amounted to an infringement. If it is understood in this limited proximate cause sense, and no more, then it may be compatible with a strict liability rule. In principle, this sense of "causation" is not inconsistent with strict liability. Nor is strict liability inconsistent with the purpose of the "volitional conduct" requirement if the purpose is avoiding open-ended liability by online service platforms that perform roles that, in specific instances, are too minimal and passive to have directly caused infringements. To the extent the courts have sown confusion by inserting idiosyncratic understandings of "volition" into the law regarding direct infringement, the courts ought to reduce such confusion by more clearly articulating the rule of strict liability in future direct infringement cases. In doing so, the courts ought to consider jettisoning volitional terminology from direct infringement analysis.

Importantly, neither the courts nor Congress should reduce copyright protections – and act inconsistently with consistent historical practice – by inserting any intent or negligence-based requirements into the law regarding copyright infringement. If the courts fail to preserve such a clear understanding, then Congress should amend the Copyright Act to make explicit that volition has no role to play regarding copyright infringement claims. Additionally, neither the courts nor Congress should adopt the idea that an online platform's unauthorized reproduction, distribution, display, or performance of copyrighted content through the use of an automatic process that responds to a user's decision precludes liability for direct infringement. Nor should the courts or Congress adopt the idea that only a single party can be a direct infringer in a given

instance. Both ideas are dubious apparent extrapolations from a volitional conduct requirement that itself is at least questionable. Neither a rule of auto-process immunity for online platforms nor a rule of single direct infringer liability finds support in the Copyright Act or in Supreme Court jurisprudence.

## **Conclusion**

Historically, direct copyright infringement has been understood to be a strict liability tort. Yet apparent confusion has arisen regarding the liability principles and legal requirements for establishing direct copyright infringement claims involving online services. Such confusion has to do with the "volitional conduct" requirement recognized by some lower court decisions. The Copyright Act nowhere contains an express "volitional conduct" requirement and the Supreme Court has never directly addressed it. Uncertainty regarding volitional conduct requirement makes it more difficult to ensure accountability by online platforms for mass infringement taking place on user-upload websites.

However, read closely, lower court decisions do not regard the "volitional conduct" requirement as a knowledge or negligence requirement for establishing liability for direct copyright infringement. Also, lower court decisions appear to treat the volitional conduct requirement as having to do with the connection between the alleged conduct and actual infringement under the law.

In fulfilling its constitutional obligation to secure the exclusive rights of copyright owners in their creative works, Congress ought to address mass infringement taking place on user-upload online platforms. To increase platform accountability for online infringements, Congress should reject any notion of volition in order to preserve clear and strict liability rules regarding direct copyright infringement. The courts also have a judicial duty to properly apply the Copyright Act and to thus preserve a clear understanding of copyright as a strict liability tort.

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## **Further Reading**

Randolph J. May, "[Trade Agreements Should Not Export Ineffective Copyright Laws](#)," *FSF Blog* (August 8, 2019).

Seth L. Cooper, "[Trade Agreements Should Include Stronger Online Copyright Protections](#)," *Perspectives from FSF Scholars*, Vol. 14, No. 12 (April 25, 2019).

Seth L. Cooper, "[IP Enforcement Coordinator's Report Spotlights Copyright Protection Progress](#)," *FSF Blog* (March 6, 2019).

Seth L. Cooper, "[IP Commission Recommends Steps to Protect America From](#)

[International IP Theft](#)," *FSF Blog* (March 1, 2019).

Randolph J. May and Seth L. Cooper, "[Modernizing International Agreements to Combat Copyright Infringement](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 42 (November 16, 2018).

Randolph J. May and Seth L. Cooper, "[Modernizing Civil Copyright Enforcement for the Digital Age: The Need for Notice-and-Takedown Reforms and Small Claims Relief](#)," *Perspectives from FSF Scholars*, Vol. 13, No. 8 (February 28, 2018).

Randolph J. May and Seth L. Cooper, "[Music MegaStars Sing the Right Note on Copyright Reform](#)," *Perspectives from FSF Scholars*, Vol. 12, No. 20 (June 23, 2016).

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<sup>1</sup> 17 U.S.C. § 501(b). *See also* 17 U.S.C. § 106.

<sup>2</sup> 17 U.S.C. § 501(a).

<sup>3</sup> *See* 17 U.S.C. § 504.

<sup>4</sup> Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (1879), at 401, 403.

<sup>5</sup> George Ticknor Curtis, *A Treatise on the Law of Copyrights* (1847), at 238.

<sup>6</sup> 9 F. Cas. 342 (1841); 15 F. Cas. 26 (C.C.D. Mass. 1869).

<sup>7</sup> 283 U.S. 191, 198 (1931).

<sup>8</sup> *See* Alan Latman and William S. Tager, "Liability of Innocent Infringers of Copyrights," U.S. Copyright Office, Study No. 25 (January 1958), at 141.

<sup>9</sup> *See* Latman and Tager, "Liability of Innocent Infringers of Copyrights," at 149-152.

<sup>10</sup> *See* Randolph J. May and Seth L. Cooper, "Modernizing Civil Copyright Enforcement: The Need for Notice-and-Takedown Reforms and Small Claims Relief," *Perspectives from FSF Scholars*, Vol. 13, No. 8 (February 28, 2018), at:

[https://freestatefoundation.org/images/Modernizing\\_Civil\\_Copyright\\_Enforcement\\_for\\_the\\_Digital\\_Age\\_Economy\\_022818.pdf](https://freestatefoundation.org/images/Modernizing_Civil_Copyright_Enforcement_for_the_Digital_Age_Economy_022818.pdf).

<sup>11</sup> 907 F.Supp. 1361, 1375 (N.D. Cal. 1995).

<sup>12</sup> *Id.* at 1370.

<sup>13</sup> *Id.* at 1372.

<sup>14</sup> According to the late Justice Scalia, "every Court of Appeals to have considered an automated-service provider's direct liability for copyright infringement has adopted the [volitional-conduct] rule." *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 453 (Scalia, J., dissenting). For federal circuit court of appeals' decisions applying the requirement, *see, e.g., VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 731-732 (9th Cir. 2019); *BWP Media USA, Inc. v. T & S Software Associates, Inc.*, 852 F.3d 436, 439-444 (5th Cir. 2017); *Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 387 (3d Cir. 2016); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004). *See also Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 912 (D.C. Cir. 2018) (recognizing other circuits have adopted the volitional conduct requirement but declining to adopt or to reject it).

<sup>15</sup> *See, e.g., Perfect 10, Inc. v. Giganews, Inc.*, *See, e.g.*, 657, 666 (9th Cir. 2017), cert denied 138 S.Ct. 504 (2017).

<sup>16</sup> *See, e.g.*, 657 F.3d at 666.

<sup>17</sup> 847 F.3d 657.

<sup>18</sup> 847 F.3d at 669.

<sup>19</sup> *Id.* at 669.

<sup>20</sup> *Id.* at 670.

<sup>21</sup> 573 U.S. 431.

<sup>22</sup> *Id.* at 443.

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<sup>23</sup> *See id.* at 443.

<sup>24</sup> *Id.* at 444.

<sup>25</sup> *Id.* at 444.

<sup>26</sup> *Id.* at 444.

<sup>27</sup> 533 U.S. 483.

<sup>28</sup> *Id.* at 503-504.

<sup>29</sup> *Id.* at 490, 498.

<sup>30</sup> *Id.* at 504.

<sup>31</sup> 847 F.3d at 668.

<sup>32</sup> 573 U.S. at 441.

<sup>33</sup> 17 U.S.C. § 101.

<sup>34</sup> *Id.* at 442.

<sup>35</sup> *See, e.g.*, May and Cooper, "Modernizing Civil Copyright Enforcement," *Perspectives from FSF Scholars*, Vol. 13, No. 8.

<sup>36</sup> 17 U.S.C. § 512(l).