

# Exhibit I

6 Patry on Copyright § 21:66

Patry on Copyright  
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William F. Patry

Chapter 21. Parties  
II. Defendants

References

§ 21:66. Requirements for vicarious liability

West's Key Number Digest

West's Key Number Digest, Copyrights and Intellectual Property **81**

West's Key Number Digest, Torts **131**

The categories into which cases are put (landlord-tenant, ballroom, master-servant) mask the central point, namely, that there is a spectrum of control and benefit.<sup>1</sup> At some point in the spectrum, liability ceases to be possible, and conversely at some point not only possible but appropriate. There are three requirements for imposing vicarious liability, all of which serve as points assisting the placement of particular activity on the spectrum of liability: first, there must be direct infringement by a third-party: One may not be vicariously liable for the acts of a third-party that are not infringing; second, the defendant must have the right to supervise the infringing conduct; and third, the defendant must have a financial interest in the conduct at issue.<sup>2</sup> None of the elements should be analyzed in isolation. Instead, courts should examine the totality of the relationship between the direct infringer and the alleged vicarious infringer—in particular, all relevant aspects that involve the direct infringement. This “totality of the relationship” approach was approved by Congress in the 1998 Digital Millennium Copyright Act (DMCA).<sup>3</sup>

The totality of the relationship includes not just the relative right to supervise and control, but also the relative financial benefit. By considering the two elements together, courts will gain a clearer picture of the alleged vicarious infringer's relationship with the direct infringer. For example, an Internet service that receives a small, flat fee from a large number of subscribers should not be automatically charged with a duty of monitoring the voluminous transfer of files or messages initiated by others unless it is aware that those transfers are infringing. This potential symbiotic relationship between supervision and financial benefit<sup>4</sup> explains Shapiro, Bernstein's statement that vicarious liability is appropriate when the right to supervise “coalesces” with an obvious and direct financial benefit.<sup>5</sup>

We shall now discuss each prong separately in order to give greater meaning to the totality analysis.

<sup>1</sup> Adobe Systems Inc. v. Canus Productions, Inc., 173 F. Supp. 2d 1044, 1053 (C.D. Cal. 2001).

<sup>2</sup> Ellison v. Robertson, 189 F. Supp. 2d 1051, 1060 (C.D. Cal. 2002), *aff'd in part, rev'd on other grounds*, 357 F.3d 1072 (9th Cir. 2004); Adobe Systems Inc. v. Canus Productions, Inc., 173 F. Supp. 2d 1044 (C.D. Cal. 2001); Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1375 (N.D. Cal. 1995); Singer v. Citibank N.A., 1993 WL 177801 (S.D. N.Y. 1993).

<sup>3</sup> See H.R. Rep. No. 551, pt. 1, 105th Cong. 2d Sess. 26 (1998).

<sup>4</sup> See Judge Posner's discussion in In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

<sup>5</sup> 316 F.2d at 307.

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