MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT

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ABSTRACT

Recent cases have reignited debate on vicarious liability for gatekeepers providing essential services such as electronic payment processing services. Generally speaking, gatekeeper liability is undesirable when a gatekeeper lacks the right and ability to control infringement. A monopolistic gatekeeper of an essential service, however, is able to exclude infringers from its service network, which may act as an effective deterrence. Thus, although a monopolistic gatekeeper is not able to control infringement directly, it can deter infringers by threat of exclusion. This Article sets forth different prongs for vicarious liability based on three types of relationships: that of employers to their employees, that of premises providers to their tenants, and that of monopolistic providers of essential services to their users. Taking Baidu, *Tiffany v. eBay*, and *Perfect 10 v. Visa* as examples, this Article discusses the desirability of monopolistic gatekeepers' vicarious liability for copyright infringement and explores the rationales for it, such as deterrence and corrective justice. This Article also proposes a liability regime for monopolistic gatekeepers to balance their risk with the need to prevent infringement.

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I. INTRODUCTION

The Internet has provided new opportunities for wrongdoers and has consequently introduced new challenges for law enforcement. Frustrated by the relative anonymity of subscribers, plaintiffs and law enforcers have increasingly sought to hold internet service providers ("ISPs") liable for the misconduct of their subscribers. In 1998, the Digital Millennium Copyright Act ("DMCA") incorporated a series of affirmative defenses, or "safe harbors," for ISPs that might otherwise be found vicariously liable for subscriber infringements.[1]

Baidu, the largest search engine in China, uses an auction-based, pay-for-performance ("P4P") system, which allows its customers to bid for the best placement of their links among Baidu's search results.[2] Under Chinese law, Baidu is eligible for "safe harbors" as long as it complies with a notice-and-takedown procedure.[3] In *Perfect 10 v. Visa*,

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[1] Digital Millennium Copyright Act, Pub. L. No. 105-304, §§ 1, 201–03, 112 Stat. 2860, 2877–81 (1998) (codified at 17 U.S.C. § 512 (2006)).

[2] *Baidu, Inc. (BIDU.O) Company Profile*, REUTERS.COM, http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=BIDU.O (last visited Nov. 2, 2010).

[3] Xìnxī Wǎngluò Chuánbò Quán Bǎohù Tiáolì (信息网络传播权保护条例) [Regulation on Protection of the Right to Network Dissemination of Information]

credit card companies that charged website fees for processing the websites' sales of infringing materials were not held vicariously liable.[4] The dissent, however, argued that the plaintiffs had stated a valid claim of vicarious infringement.[5] In *Tiffany v. eBay*,[6] although eBay derived a direct financial benefit from the sale of counterfeit goods by charging sellers fees, eBay was not found vicariously liable.[7]

Recent cases have reignited debate on vicarious liability for gatekeepers providing essential services such as electronic payment processing.[8] Gatekeeper liability is generally desirable when gatekeepers can deter infringement at acceptable costs. In all other cases, efforts to expand gatekeeper liability should weigh gatekeeping costs against the effectiveness of preventing misconduct. Generally speaking, gatekeeper liability should not attach when a gatekeeper lacks the right and ability to control infringement. A monopolistic gatekeeper of an essential service, however, is able to exclude infringers from its service network, which may act as an effective deterrece. Thus, although a monopolistic gatekeeper is not able to control infringement directly, it can deter infringers by threat of exclusion. Taking Baidu, *Tiffany v. eBay*,[9] and *Perfect 10 v. Visa*[10] as examples, this Article discusses the desirability of holding monopolistic gatekeepers vicariously liable for copyright infringement and explores the rationales for doing so.

This Article aims to add three contributions to the analysis of gatekeeper liability. First, this Article argues that a monopolistic gatekeeper can deter infringers by threat of exclusion despite its limited ability to monitor infringers' activity. Unlike a dance hall proprietor,[11] a monopolistic provider of an essential service lacks the ability to exercise physical control over infringers' activity, as the activity does not occur on

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(promulgated by the St. Council, May 18, 2006, effective July 1, 2006), arts. 22–23 (China), *translated in* China Internet Project, *Order No. 468 of the State Council, PRC*, CHINA IT LAW, http://www.chinaitlaw.org/?p1=regulations&p2=060717003346 (last visited Nov. 3, 2010) [hereinafter *Chinese Regulation*].

[4] Perfect 10, Inc. v. Visa Int'l Serv., Assoc., 494 F.3d 788, 792–93, 802 (9th Cir. 2007).

[5] *Id.* at 810 (Kozinski, J., dissenting).

[6] Tiffany (NJ), Inc. v. eBay, Inc., 576 F. Supp. 2d 463 (S.D.N.Y. 2008)

[7] *Id.* at 494–95, 501.

[8] *See, e.g.,* Bryan V. Swatt et al., Comment, Perfect 10 v. Visa, Mastercard, et al: *A Full Frontal Assault on Copyright Enforcement in Digital Media or a Slippery Slope Diverted?*, 8 CHI.-KENT J. INTELL. PROP. 85, 92, 94–95 (2008), *available at* http://jip.kentlaw.edu/art/volume%208/8%20Chi-Kent%20J%20Intell%20Prop%2085.pdf.

[9] 576 F. Supp. 2d 463.

[10] 494 F.3d 788.

[11] *E.g.*, Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929) (holding a dance hall proprietor vicariously liable for copyright infringement by its orchestra, even though the orchestra was an independent contractor).

its premises. If it has market power in the relevant market, however, it can exclude infringers from its service network. Because the monopolistic gatekeeper lacks the ability to supervise, the rationale for vicarious liability cannot be deterrence but corrective justice, which requires the direct financial benefit prong to be interpreted narrowly.

Second, this Article develops Jules Coleman's theory of corrective justice[12] and applies it to cases in which the third party derives no tangible gains from infringement. Coleman's theory only covers tangible gains and provides no justification for applying vicarious liability in routine negligence cases in which the defendant derived no tangible gains.[13] Nevertheless, when the third party knowingly contributes to the infringement with intent to infringe, it gains a sense of superiority, which renders it unjustly enriched morally. Thus, this Article argues that the "intent to infringe" requirement justifies corrective justice although the third party derives no tangible gains.

Finally, this Article proposes a liability regime for monopolistic gatekeepers to balance their risk with the need to prevent infringement. Under the proposed regime, the monopolistic gatekeeper may be allowed to pay nominal damages at an infringer's first offense. If the same infringer commits the infringement a second time, the monopolistic gatekeeper can be ordered to pay full damages. The adverse effects of vicarious liability may be mitigated in this way.

This Article proceeds in five parts. Part II reviews vicarious liability cases in general and discusses the justifications for vicarious liability. Part III analyzes the two prongs of vicarious liability: control and direct financial benefit. Part IV sets forth different prongs for vicarious liability, based on three types of relationships: that of employers to their employees, that of premises providers to their tenants, and that of monopolistic providers of essential services to their users. This Part also discusses the rationales of deterrence and corrective justice present in each of these relationships. Part V explores the desirability of vicarious liability for monopolistic gatekeepers, taking Baidu as an example. Part VI proposes a liability regime for such gatekeepers, using credit card companies as an example.

II. EXAMINATION OF VICARIOUS LIABILITY CASES

Before discussing the different interpretations of vicarious liability, it is necessary to determine the justification for it. Commentators

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12 Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 423 (1982).

13 *See id.*; *see also* Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits. Part II*, 2 LAW & PHIL. 5, 12 (1983) (noting that some tort claims are rooted in principles other than corrective justice).

provide several rationales for vicarious liability, including enterprise liability, loss spreading, and deterrence.[14] Vicarious liability is justified in an employment context because an employer can control what is done on the job and how it is done.[15] Alfred Yen notes that "[m]odern decisions, when explaining policy justifications for vicarious liability[,] . . . commonly refer to risk allocation."[16] He opposes vicarious liability for ISPs because it may force them to monitor their subscribers too closely and create social losses by suppressing non-infringing activities.[17] Yen argues:

> In the vast majority of cases, the existence of liability depends on a showing that the defendant is at fault. This means that contributory liability and inducement will govern most third-party copyright liability cases, with vicarious liability limited to those cases [in which] agency principles such as respondeat superior would impose strict liability on defendants.[18]

Such a limited application of vicarious liability is unwarranted, however. Professor Yen's arguments may be true for courts adopting the legal control test. Courts adopting an actual control test, however, do not necessarily base their decisions on risk allocation. Rather, they are more likely to be guided by deterrence, which refers to deterring infringement.[19]

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14 *See, e.g.,* Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 295–96 (1999); Steven P. Croley, *Vicarious Liability in Tort: On the Sources and Limits of Employee Reasonableness,* 69 S. CAL. L. REV. 1705, 1707–08 (1996); Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1756 n.91 (1996); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1246–47 (1984); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 3–4 (1994).

15 *E.g.,* Zimprich v. Broekel, 519 N.W.2d 588, 590–91 (N.D. 1994).

16 Alfred C. Yen, *Third-Party Copyright Liability After* Grokster, 91 MINN. L. REV. 184, 219 (2006) (quoting *Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994)).

17 *Id.* at 213–14.

18 *Id.* at 239.

19 *Cf.* Beckerman-Rodau, *supra* note 14, at 295–96 (arguing in the context of employer-employee vicarious liability that the reason behind the control requirement is vicarious liability will only deter those defendants who have control over the direct tortfeasors); Schwartz, *supra* note 14, at 1756 (arguing that the deterrence rationale only applies to employer-employee vicarious liability if the employer has the actual ability to penalize the employee); Sykes, *supra* note 14, at 1246–47 (arguing that vicarious liability causes principals to internalize costs inflicted by insolvent agents, thereby deterring them from making inefficient decisions); Thompson, *supra* note 14, at 14 (arguing that deterrence-based rationales for piercing the corporate veil are stronger when applied to officers or to shareholders with managerial functions than when applied to shareholders with less control over the corporation).

In *Shapiro, Bernstein & Co. v. H. L. Green Co.*,[20] the court laid out the modern prongs of copyright vicarious liability, holding that "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials[,] . . . the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation."[21] The decision was unlikely to have been based on deterrence because the court held that the case at hand "lie[s] closer on the spectrum to the employer-employee model than to the landlord-tenant model."[22]

Gershwin Publishing Corp. v. Columbia Artists Management, Inc.[23] is an early example of a copyright case that found vicarious liability based on deterrence in an actual control context.[24] Copyrighted music was performed without authorization at a concert promoted by Columbia Artists Management, Inc. ("CAMI").[25] CAMI had "act[ed] as manager for [the] concert artists" and created local organizations that promoted the artists in smaller communities.[26] Once the concert arrangement was made, CAMI received the titles of the music to be performed and printed the concert programs.[27] The court noted that in past cases, "a person who ha[d] promoted or induced the infringing acts of the performer ha[d] been held jointly and severally liable as a 'vicarious' infringer, even though he ha[d] no actual knowledge that copyright monopoly [was] being impaired."[28] The court assumed that CAMI was able to deter infringement at low costs because of its promotion of the infringement:

> Although CAMI had no formal power to control either the local association or the artists for whom it served as agent, it is clear that the local association depended upon CAMI for direction in matters such as this, that CAMI was in a position to police the infringing conduct of its artists, and that it derived substantial financial benefit from the actions of the primary infringers.[29]

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[20] 316 F.2d 304 (2d Cir. 1963).

[21] *Id.* at 307.

[22] *Id.* at 308.

[23] 443 F.2d 1159 (2d Cir. 1971)

[24] *See id.* at 1162–63. *But see* Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 WASH. L. REV. 1005, 1017 (2000) (arguing that *Gershwin* is a case adopting legal control).

[25] *Gershwin*, 443 F.2d at 1160.

[26] *Id.*

[27] *Id.* at 1161.

[28] *Id.* at 1162 (citing Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963); Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929)).

[29] *Id.* at 1163.

Thus although the relationship between CAMI and the direct infringers did not resemble the employer-employee model, the court held CAMI vicariously liable.[30] In so holding, the court noted that in the past it had "found [that] the policies of the copyright law *would be best effectuated*" by holding premises providers liable for infringement that they had the power to police and from which they financially benefitted, indicating that its decision was based on deterrence.[31]

In *Artists Music Inc. v. Reed Publishing (USA) Inc.*,[32] Reed rented trade-show booth space to 134 exhibitors for a flat rental.[33] Reed also collected admission fees from attendees at the trade show.[34] During the show, some exhibitors used music as part of their show without obtaining copyright owners' permission.[35] The copyright owner claimed that Reed should be held vicariously liable for the exhibitors' infringement.[36] The court found "that the relationship between trade show sponsors and trade show exhibitors is the legal and functional equivalent of the relationship between landlords and tenants."[37] As for the issue of supervision, the court believed that Reed "had no right and ability to supervise and control the actions of the exhibitors."[38] Although the plaintiffs argued that Reed could have policed the exhibitors, the court rejected the plaintiffs' argument because Reed was not in a good position to prevent the 134 exhibitors' copyright infringement.[39] The court noted that "Reed would have had to 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.'"[40]

By contrast, the court in *Polygram International Publishing Inc. v. Nevada/TIG, Inc.*[41] indicated that it would have held the trade show operator liable but for a defect in the plaintiffs' pleadings.[42] In *Polygram*,

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30 *Id.*

31 *Id.* at 1162 (emphasis added) (citing *Shapiro, Bernstein & Co.*, 316 F.2d 304, 307 (2d. Cir. 1963)).

32 31 U.S.P.Q.2d 1623 (S.D.N.Y. 1994).

33 *Id.* at 1624.

34 *Id.*

35 *Id.*

36 *See id.* at 1625.

37 *Id.* at 1626.

38 *Id.*

39 *Id.* at 1627; Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1849–50 (2000).

40 *Artists Music*, 31 U.S.P.Q.2d at 1627.

41 855 F. Supp. 1314 (D. Mass. 1994).

42 *Id.* at 1325, 1329, 1333. The court held that the copyright infringement claim failed because the plaintiffs failed to allege that the exhibitors directly infringed the

Interface rented booth space to over 2,000 trade show exhibitors for rental fees.[43] Interface stated in its rules and regulations for the trade show that it was the exhibitors' responsibility to obtain copyright license for any music played at the event.[44] The plaintiffs sued Interface, alleging that it was vicariously liable for unauthorized use of their music by the exhibitors.[45]

The difference between *Artists Music*[46] and *Polygram*[47] is that Interface exercised actual control over the trade show exhibitors by providing the rules and regulations and arranging for employees to ensure its compliance. For example, the employees were available to address issues such as exhibitors encroaching on each others' space or blocking the aisle at the show.[48] The court in *Polygram* stated that it would have held Interface vicariously liable because the actual control made Interface well positioned to prevent the unauthorized use of music.[49]

Fonovisa, Inc. v. Cherry Auction, Inc.,[50] however, is a seminal case of expansive interpretation of vicarious liability rather than a case adopting deterrence.[51] Cherry Auction operated a swap meet where customers purchased merchandise from individual vendors.[52] It rented booth space to vendors for a daily rental fee, supplied parking and advertising for the swap meet, and reserved the right to exclude any vendor for any reason.[53] The plaintiffs claimed that Cherry Auction should be held vicariously liable for sale of counterfeit recordings by independent vendors.[54] The court found that Fonovisa had stated a claim for vicarious liability based on Cherry Auction's right to terminate vendors for any reason.[55]

Fonovisa is distinguished from *Polygram*, in which the trade show operator was required to monitor a limited amount of music played by

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plaintiffs' copyrights—a necessary element for holding the tradeshow vicariously liable. *Id*. at 1318, 1323.

[43] *Id.* at 1319.

[44] *Id.*

[45] *Id.* at 1320.

[46] 31 U.S.P.Q.2d 1623 (S.D.N.Y. 1994).

[47] 855 F. Supp. 1314.

[48] *Id.* at 1328–29.

[49] *Id.* at 1329.

[50] 76 F.3d 259 (9th Cir. 1996).

[51] *See id.* at 263.

[52] *Id.* at 261.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 263-64.

exhibitors.[56] Although Cherry Auction conducted general advertising and promoted the swap meet,[57] this case is also different from *Gershwin*, in which the defendant CAMI obtained the titles of the music to be performed and printed the concert programs.[58] While CAMI could police the music to be performed at low costs,[59] Cherry Auction's general advertising did not enable it to deter copyright infringement, because Cherry Auction had a larger number of vendors and merchandise to monitor.[60] The ability to control materials on the Internet may become stronger with the development of information technology. For example, the online music peer-to-peer file sharing service Napster also has a huge number of music files to monitor, but it has been held to be able to detect infringing files cost effectively because of its technology.[61]

Perfect 10, Inc. v. Cybernet Ventures, Inc.,[62] is another case in which expansive interpretation of vicarious liability is applied.[63] Cybernet "ran an age[-]verification service called 'Adult Check' through which it permitted access to and collected payments for pornographic websites."[64] The plaintiff sought a preliminary injunction, claiming that Cybernet was vicariously liable for the unlicensed use of celebrity images on the websites of the service's subscribers.[65] The court found that Cybernet monitored the participating websites for image quality and compliance with Cybernet's policies.[66] The court held that Perfect 10 had a strong likelihood of success for its vicarious copyright infringement claims against Cybernet because Cybernet was able to exclude infringers from its service and used passwords to control customer access.[67] Despite its monitoring program to ensure image quality, however, Cybernet did not have the ability to remove or block access to infringing materials because

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56 *See Polygram*, 855 F. Supp. 1314, 1317 (D. Mass. 1994).

57 *See Fonovisa*, 76 F.3d 259, 261 (9th Cir. 1996).

58 Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1161 (2d Cir. 1971).

59 *Id.* at 1163.

60 *Fonovisa*, 76 F.3d at 261 (noting that the "Sheriff's Department [had] raided the Cherry Auction swap meet and seized more than 38,000 counterfeit recordings" in 1991). Although the court found that Cherry Auction had control over its vendors, it did so on the basis of legal control. *Id.* at 263.

61 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011, 1020 n.5, 1023 (9th Cir. 2001).

62 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

63 Yen, *supra* note 16, at 207–08.

64 Jennifer Bretan, *Harboring Doubts About the Efficacy of § 512 Immunity Under the DMCA*, 18 BERKELEY TECH. L.J. 43, 61 (2003) (citing *Cybernet*, 213 F. Supp. 2d at 1158).

65 *Cybernet*, 213 F. Supp. 2d at 1152–53, 1162.

66 *Id.* at 1173.

67 *Id.* at 1157, 1171, 1173–74.

each underlying website was responsible for its own content.[68] The court held that Cybernet's mere ability to deny its age-verification services to offending websites would likely be considered enough control to satisfy the control prong of vicarious liability.[69] Thus, the *Cybernet* decision may generate an incredible chilling effect.

Religious Technology Center v. Netcom On-Line Communication Services, Inc.[70] may be the first case to consider ISP vicarious liability for copyright infringement. In *Religious Technology Center*, a subscriber submitted numerous infringing postings to a bulletin-board service, which accessed the Internet through the ISP Netcom.[71] The plaintiffs made allegations against Netcom of vicarious liability for unauthorized use of their works by the subscriber.[72] The court accepted the plaintiffs' evidence that Netcom was able to delete specific postings as well as suspend the accounts of subscribers who engaged in commercial advertising, posted obscene materials, and made off-topic postings.[73] The court found that Netcom might have the ability to control infringements because Netcom's sanction over the abusive conduct allowed it to deter copyright infringement cost effectively.[74] The court, however, found no vicarious liability because Netcom did not receive a direct financial benefit by charging a flat monthly fee.[75]

A&M Records, Inc. v. Napster, Inc.[76] is another important case. The court held in this case that Napster was likely to be found vicariously liable for copyright infringement.[77] Napster used a process called "peer-to-peer" file sharing to enable its users to transmit MP3 files among themselves.[78] It maintained a "collective directory" of files on its server, although the contents of the MP3 files were kept in the computers of the users who submitted them.[79] The court held that Napster was likely to be found vicariously liable because it had the ability to monitor the names of "infringing material[s] listed on its search indices."[80] Unlike CAMI, which promoted the infringement, Napster did not explicitly

68 *Id.* at 1158.
69 *Id.* at 1173–74.
70 907 F. Supp. 1361 (N.D. Cal. 1995).
71 *Id.* at 1365–66.
72 *Id.* at 1367.
73 *Id.* at 1376.
74 *See id*.
75 *Id.* at 1377.
76 239 F.3d 1004 (9th Cir. 2001).
77 *Id.* at 1024.
78 *Id.* at 1011.
79 *Id.* at 1012.
80 *Id.* at 1024.

participate in any guidance of direct infringers.[81] But the court held that Napster could be liable because of its ability to monitor file names and deter copyright infringement at low costs.[82]

III. THE TWO PRONGS OF VICARIOUS LIABILITY

A. The Control Prong

The deterrence rationale makes it possible to impose vicarious liability on gatekeepers in the absence of an employer-employee relationship, but it does not instruct courts as to when they should impose such liability on gatekeepers. As noted above, vicarious liability arises when a third party (1) has the right and ability to supervise the direct infringement and (2) receives "direct financial interests" in the infringement.[83]

Courts have developed two competing standards regarding the control prong: actual control and legal control. Actual control "requires third parties to be practically able to distinguish between infringing and non-infringing conduct."[84] This approach "requires more than the potential right to cease all activities undifferentiated from the infringement, the right to terminate other activities, or the effective ability to terminate only after infringement is evident."[85] Legal control, however, requires no more than the contractual ability to restrict all activities.[86] Assaf Hamdani explains the legal control approach:

> Under one approach, this "control" element merely requires that the third party possess the technical ability to control the infringement. This approach, therefore, finds control in any relationship in which the third party has technical control (by facilitating access to a product or activity, for example), even when effectively exercising such control (distinguishing between infringing and non[-]infringing conduct and preventing only the former) is impractical.[87]

Under the deterrence rationale, the control prong should be interpreted narrowly as control at acceptable costs, which is the middle

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81 *See id.* at 1011–12.

82 *See id.* at 1023–24.

83 Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 306–07 (2d Cir. 1963) (holding that a company leasing space is vicariously liable for a record department selling bootleg records). One court noted the differences between contributory liability and vicarious liability: "[J]ust as benefit and control are the signposts of vicarious liability, so are knowledge and participation the touchstones of contributory infringement." Demetriades v. Kaufmann, 690 F. Supp. 289, 293 (S.D.N.Y. 1988).

84 Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 101 (2003).

85 Wright, *supra* note 24, at 1013; *see* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996).

86 *See, e.g., Shapiro, Bernstein & Co.*, 316 F.2d at 306–07.

87 Hamdani, *supra* note 84, at 101.

ground between actual control and legal control.[88] This should not require evidence of ongoing or prior control; instead, a position of potential prevention at low costs should be adequate to satisfy the control prong.[89] In the case of ISP liability, it would require the ability to distinguish between infringing subscribers or materials and non-infringing ones at low costs. If an ISP is able to deter misconduct at low costs, it will not act overzealously in preventing infringement even if it derives no direct financial benefit from additional items posted online. Over-deterrence harms the ISP's reputation, whereas deterring infringement often reasonably improves its status and produces indirect financial benefits such as a larger user base, as more materials on an ISP's network generally attract more end users.[90] Conversely, because of the severe sanctions for copyright infringement,[91] ISPs would not under-deter infringement to satisfy those who prefer to have access to illegal materials.

B. The Direct Financial Benefit Prong

The second prong, financial benefit, is interpreted narrowly by some courts. In *Artists Music*, for example, the court found that "Reed leased space to the exhibitors in exchange for a fixed fee based on the size of the booth. Reed's revenues from the [s]how did not in any way depend on whether . . . the exhibitors played any music whatsoever."[92] The court rejected the plaintiffs' claim "that the music created an ambiance necessary to the success of the [s]how," and held that the plaintiffs had not shown that the defendant had received any financial benefit from the infringing performances.[93]

In contrast, some courts do not set a high hurdle for the financial benefit requirement. In *Polygram*, the court found that music may be used "'to communicate with attendees' at the show," and that "when music assists in this communication, it provides a financial benefit to the show of a kind that satisfies the financial benefit prong of the test for

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[88] *See generally* Wright, *supra* note 24, at 1013–18 (discussing the difference between legal and actual control).

[89] *See* Demetriades v. Kaufmann, 690 F. Supp. 289, 292–93 (S.D.N.Y. 1988) (noting that meaningful evidence of control is needed to find vicarious liability); Wright, *supra* note 24, at 1013–14 (discussing *Demetriades*, 690 F. Supp. at 291–92).

[90] *See* Alex Veiga, *Anti-Piracy Technology Could Hurt YouTube's Rebel Reputation*, USA TODAY (Oct. 12, 2006, 10:36 PM), http://www.usatoday.com/tech/news/2006-10-12-antipiracy-video_x.htm?csp=34.

[91] *See* 17 U.S.C. §§ 502–06, 509 (2006).

[92] Artists Music Inc. v. Reed Publ'g (USA) Inc., 31 U.S.P.Q.2d 1623, 1627 (S.D.N.Y. 1994).

[93] *Id.*

vicarious liability."[94] The *Polygram* court accepted the argument that was rejected in *Artists Music,* that is, that the music enhanced the success of the show.[95]

Assaf Hamdani argues that the over-deterrence effect of vicarious liability can be mitigated if courts interpret the direct financial benefit prong narrowly.[96] He notes that "ISPs [that] capture a benefit for any additional item posted on their network are better positioned to self-assess the cost and the benefits of monitoring than other third parties," and that these ISPs "will not engage in excessive monitoring."[97]

His argument holds true in the dance hall scenario, in which the dance hall proprietor only needs to verify a limited number of songs.[98] On the Internet, however, ISPs continually receive a large number of notices from copyright owners and cannot easily distinguish infringing uses from non-infringing ones.[99] They are not able to verify each copyright notice given that they have to act expeditiously to remove a large amount of infringing materials.[100] Thus, even if they capture a benefit for any additional items posted on their networks, they are likely to sacrifice direct financial benefits to avoid severe liability for copyright infringement. For example, suppose an ISP receives $1 for any additional item posted online, but may face $750 in statutory damages for any infringing item.[101] The ISP would probably rather remove legitimate items without verification because it has to remove a large number of infringing items expeditiously to maintain its safe harbors. A direct financial benefit only provides ISPs with an incentive to deter infringement reasonably, but does not offer any guarantee against over-deterrence. Because over-deterrence is caused by high monitoring costs, it can be prevented only when courts interpret the control prong as

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[94] Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc., 855 F. Supp. 1314, 1332 (D. Mass. 1994).

[95] *Id.* at 1332; *accord* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263 (9th Cir. 1996); Yen, *supra* note 39, at 1851.

[96] Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 947 (2002) ("[T]he financial gain requirement seeks to ensure that third parties, though positioned to monitor against infringements, will not engage in excessive monitoring because they do not internalize the social cost of their monitoring activities.").

[97] *Id.*

[98] *See, e.g.*, Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929).

[99] David Abrams, *More Chilling than the DMCA—Automated Takedowns*, CHILLING EFFECTS (Mar. 17, 2010), http://www.chillingeffects.org/weather.cgi?WeatherID=634.

[100] 17 U.S.C. § 512(c) (2006).

[101] *See* 17 U.S.C. § 504(c)(1) (2006) (allowing copyright holders the option of collecting statutory damages of $750 to $30,000 per infringement).

limiting vicarious liability to cases in which the defendant can control infringement at low costs.

IV. MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY

A. Baidu

The Internet is developing rapidly in China. China has the largest population of Internet users in the world,[102] and the high rate of online copyright infringement in China has become a global problem. One commentator has noted that "[p]iracy went from being a small local enterprise to a major export industry[,] with Chinese-made pirated copies of U.S. films, recordings, and computer programs showing up as far afield as Canada and Eastern Europe."[103] As more and more lawsuits were brought against ISPs for secondary copyright infringement,[104] the Chinese government adopted legislation that provides ISPs with "safe harbors" from damages for the misconduct of their subscribers.[105] This legislation incorporates a "Notice and Take Down" procedure, which is similar to that of the DMCA.[106] Prior to the adoption of "safe harbors," ISPs in China may have been jointly liable for the misconduct of subscribers, including copyright infringement and defamation, under general tort principles.[107] The new legislation adds a series of affirmative defenses without changing the substantive standards of tort law with respect to ISPs.[108]

There are three major statutes or regulations concerning ISP liability in China: Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Laws (amended in 2006)

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[102] Guy Dixon, *China Becomes World's Biggest Internet Population*, V3.CO.UK (Mar. 14, 2008), http://www.vnunet.com/vnunet/news/2212086/chinese-become-internet.

[103] Greg Mastel, *China and the World Trade Organization: Moving Forward Without Sliding Backward*, 31 LAW & POL'Y INT'L BUS. 981, 989 (2000).

[104] *See* Yiman Zhang, Comment, *Establishing Secondary Liability with a Higher Degree of Culpability: Redefining Chinese Internet Copyright Law to Encourage Technology Development*, 16 PAC. RIM L. & POL'Y J. 257, 281 (2007) (arguing for a safe-harbor provision in Chinese law because of exposure of ISPs to expansive liability; regulations were adopted before this comment was published).

[105] Zuìgāo Rénmín Fǎyuàn Guānyú Shěnlǐ Shèjí Jìsuànjī Wǎngluò Zhùzuòquán Jiūfēn Ànjiàn Shìyòng Fǎlǜ Ruògān Wèntí De Jiěshì (最高人民法院关于审理涉及计算机网络 著作权纠纷案件适用法律若干问题的解释) [Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Laws] (promulgated by the Sup. People's Ct., Dec. 22, 2003, effective Dec. 22, 2003, amended Dec. 8, 2006) (China), *translated in* China Internet Project, CHINA IT LAW, http://www.chinaitlaw.org/?p1=print&p2=060115231838 (last visited Nov. 13, 2010) [hereinafter *Chinese Interpretations*].

[106] *Id.*; *cf.* 17 U.S.C. § 512(c) (2006).

[107] *See Chinese Interpretations*, *supra* note 105.

[108] *See id.*

("Interpretations"),[109] the Measures on Administrative Protection of Internet Copyright,[110] and the Regulation on Protection of the Right to Network Dissemination of Information.[111] Chinese law regarding ISP liability mirrors Section 512 of the DMCA.

The Regulations provide four safe harbors for ISPs, similar to those in Section 512 of the DMCA: (1) transitory digital network communications, (2) system caching, (3) information storage, and (4) search or linkage service.[112] The conditions for those safe harbors, however, are a little different from those under Section 512. For example, to be eligible for the information storage safe harbor, the Regulations require ISPs to receive no economic interests directly from the work.[113] To qualify for the search or linkage service safe harbor, however, there is no such requirement.[114] In other words, vicarious liability seems to apply to the information storage service rather than the search or linkage service. Under Section 512 of the DMCA, the conditions for the two safe harbors are essentially the same, as both require an ISP to receive no direct financial benefit from infringement.[115]

One possible reason for the difference between the two safe harbors in China is that Baidu, the largest search engine in China, uses an auction-based, P4P services system, which "enable[s] its customers to bid for priority placement of their links in keyword search results."[116] At the end of 2009, Baidu had over 223,000 customers advertising with it.[117] It

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[109] *Id.*

[110] Hù Lián Wǎng Zhù Zuò Quán Xíng Zhèng Bǎo Hù Bàn Fǎ (互联网著作权行政保护办法) [Measures on Administrative Protection of Internet Copyright] (jointly released by the Nat'l Copyright Admin. of China and the Ministry of Info. Indus. on Apr. 30, 2005) (China), *translated in* China Internet Project, CHINA IT LAW, http://www.chinaitlaw.org/?p1=print&p2=051006180113 (last visited Nov. 3, 2010).

[111] *Chinese Regulation*, *supra* note 3, at art. 1.

[112] *Id.* at arts. 20–23.

[113] *Id.* at art. 22.

[114] *See id.* at art. 23.

[115] 17 U.S.C. § 512(c), (d) (2006).

[116] *Baidu, Inc. (BIDU.O) Company Profile*, *supra* note 2.

> Baidu focuses on providing customers with targeted marketing solutions. It generates revenues from online marketing services. The Company's P4P platform enables its customers to reach users who search for information related to their products or services. Customers may use automated online tools to create text-based descriptions of their Web pages and bid on keywords that trigger the display of their Web page information and link. Baidu's P4P platform features an automated online sign-up process that allows customers to activate their accounts at any time. The P4P platform is an online marketplace that introduces Internet search users to customers who bid for priority placement in the search results.

Id.

[117] *Id.*

is reported that over 80 percent of Baidu's revenue derives from the P4P service.[118]

Under Baidu's pay-per-click model, it can earn more revenue if more infringing websites bid for priority placement in the keyword search results and if they receive more clicks as a result. If one condition for the search service safe harbor is receiving no direct financial benefit from infringement, this condition may have an adverse effect on Baidu and deprive it of the safe harbor. One commentator argues that Baidu should not be protected by the safe harbor if it uses P4P, because Baidu monitors advertisers' web pages and stores those in its database.[119] It is doubtful that is the reason to hold Baidu liable, however; although Baidu verifies its advertisers' qualifications,[120] it does not *constantly* monitor their web pages or store them on its server.[121] Nevertheless, even if Baidu does not store the web pages, it can be held vicariously liable if it exercises control over advertisers' websites.[122]

Baidu's ability to control the infringement of advertisers' websites can be demonstrated by its control over the placement and the presentation of the advertising hyperlinks. It places sponsored links at the top with a pale grey background, the P4P hyperlinks above the organic search results, and all other advertising hyperlinks to the right side of the organic results.[123] The P4P hyperlinks usually appear in the same color and font as organic search results, with a small notice containing the word "promotion" at the end of the result.[124] Before

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[118] Wang Xing, *Baidu Says Sorry for False Search Results*, CHINA DAILY (Nov. 19, 2008, 09:45 AM), http://www.chinadaily.com.cn/bizchina/2008-11/19/content_7219057.htm. Baidu's business model, however, has been undergoing a crisis recently after China Central Television exposed Baidu as having displayed sites promoting false medical information among its paid sites. *Id.*

[119] Huang Wushuang (黄武双), Lun Shou Suo Yin Xing Fu Wu Ti Gong Shang Qin Quan Ze Ren de Cheng Dan—Dui Xian Xing Zhu Liu Guan Dian de Zhi Yi (论搜索引擎网络服务提供商侵权责任的承担—对现行主流观点的质疑) [Internet Search Engine Service Providers' Burden of Tort Liability—Questioning Current Norms], 5 ZHI SHI CHAN QUÁN 16, 22 (2007) (China).

[120] Zhang Liming, *Baidu Advertisers Will Conduct a Comprehensive Review of Qualifications*, SINA.COM (Nov. 21, 2008, 3:33 AM), http://tech.sina.com.cn/i/2008-1121/03 332593617.shtml.

[121] *See Baidu, Inc. (BIDU.O) Company Profile*, *supra* note 2.

[122] *See* Regina Nelson Eng, *A Likelihood of Infringement: The Purchase and Sale of Trademarks as AdWords,* 18 ALB. L.J. SCI. & TECH. 493, 527–29 (2008) (arguing that Google should be held vicariously liable for advertisers' trademark infringement because it "exercises joint control over the advertisement").

[123] *Paid Search—Where Your Ad Is Displayed and What It Looks Like*, BAIDU.COM, http://is.baidu.com/ad_displayed.html (last visited Nov. 4, 2010); *see also* C. Custer, *Censorship and Search: Baidu and the Chinese Dilemma*, CHINAGEEKS.ORG (July 1, 2010), http://chinageeks.org/2010/07/censorship-and-search-baidu-and-the-chinese-dilemma.

[124] Custer, *supra* note 123; BAIDU.COM, *supra* note 123.

placing advertising hyperlinks online, Baidu reviews the advertisements to ensure that they comply with relevant Chinese laws and regulations.[125] Although Baidu is unable to take down infringing materials from advertisers' websites, it can remove websites from search results.

While it can be argued that Baidu's relationship to its advertisers is similar to that between television stations and their advertisers, the search engine-advertiser relationship more closely resembles the flea market owner-vendor relationship than the television station-advertiser relationship. For one, television stations usually broadcast the same commercial for a certain period of time. If there is any change to the content of the commercial, advertisers need to notify the television station about it. On the Internet, however, advertisers are able to change the content of their websites without the consent of the search engine. Unlike the centralized television station, what the search engine provides is the space to host advertisers' hyperlinks. Renting online space to advertisers as part of the keyword service constitutes a "hosting service" or a "service provider."[126] Vicarious liability might apply to such a service under both Section 512 of the DMCA and the Chinese law.[127]

Government Employees Insurance Co. v. Google, Inc.[128] ("GEICO") is among the few cases discussing a search engine's vicarious liability for advertisers' trademark infringement. In this case, Google and codefendant Overture sold advertising that appeared in response to predetermined search terms.[129] Advertisers paid for keywords, and their advertising links were listed as sponsored links in addition to the organic search results.[130] Although GEICO did not claim that Overture had a principal-agent relationship with the advertisers as is required for typical vicarious liability, the court found that GEICO had stated a claim against Overture because Overture and the advertisers "'exercise[d] joint

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[125] Christian Arno, *Eight Tips for Understanding Baidu SEO*, ECONSULTANCY.COM (Sept. 2, 2010, 1:09 PM), http://econsultancy.com/us/blog/6497-eight-tips-to-understanding-baidu-seo; Surojit Chatterjee, *Google, China Govt. Censorship Spat Seen Benefiting Baidu*, INTERNATIONAL BUSINESS TIMES (July 1, 2010, 11:04 AM), http://www.ibtimes.com/articles/32058/20100701/google-china-govt-censorship-spat-seen-benefiting-baidu.htm.

[126] *Cf.* Noam Shemtov, *Mission Impossible? Search Engines' Ongoing Search for a Viable Global Keyword Policy*, J. INTERNET L., Sept. 2009, at 3, 11 (noting that sites that use sponsored advertisements constitute "hosting service[s]" under the law of the European Union, but also noting that the law in the United States is different). *But cf.* 17 U.S.C. § 512(k)(1)(B) (2006) (defining "service provider," a term equivalent to the European definition of "hosting service," as "a provider of online services or network access, or the operator of facilities therefor").

[127] 17 U.S.C. § 512(a)(2) (2006); *Chinese Regulation*, *supra* note 3, at arts. 15, 18.

[128] 330 F. Supp. 2d 700 (E.D. Va. 2004).

[129] *Id.* at 702.

[130] *Id.*

ownership and control over the infringing product.'"[131] The court also held that advertisers were permitted to purchase the trademark "GEICO" from Google as a keyword, but that they were not allowed to use "GEICO" in their ad heading or text.[132]

B. Tiffany v. eBay

In addition to the keyword cases, courts have also considered the secondary liability of online auction sites. In *Tiffany (NJ) Inc. v. eBay, Inc.*,[133] Tiffany alleged that eBay had displayed a large number of counterfeit silver jewelry items for sale on its website.[134] Although it was individual sellers, not eBay, who had listed and sold the counterfeit Tiffany items, Tiffany argued that eBay was aware of the problem and had an obligation to monitor and control the illegal activities of its sellers.[135] eBay claimed that it was Tiffany's duty to monitor such sales and that it had expeditiously removed such listings whenever it was notified of their existence.[136] The court held that eBay was not contributorily liable for sellers' trademark infringement.[137]

How can *GEICO*[138] be reconciled with *Tiffany*?[139] One possible answer may be that it is easier to monitor advertising than the sale of counterfeit goods. While a search engine can verify advertising by examining advertisers' identities or their license agreements with the trademark owner, an online auction site may have difficulty in distinguishing counterfeit goods from authentic ones. It is also impractical to require sellers to provide sales receipts because many items have been sold on the second-hand market. Thus, it is more desirable to impose vicarious liability on Google than on eBay.

C. Perfect 10 v. Amazon *and* Perfect 10 v. Visa

This section discusses two related cases, *Perfect 10, Inc. v. Amazon.com, Inc.*[140] ("*Perfect 10 v. Amazon*") and *Perfect 10, Inc. v. Visa International Service, Ass'n.*[141] ("*Perfect 10 v. Visa*"). In the former case,

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[131] *Id.* at 705 (quoting Hard Rock Caf[é] Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1150 (7th Cir. 1992)).

[132] *Judge Clarifies Google AdWords Ruling in the US*, OUT-LAW.COM (Dec. 8, 2005), http://www.out-law.com/page-6003.

[133] 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

[134] *Id.* at 469.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 705 (E.D. Va. 2004).

[139] *Tiffany*, 576 F. Supp. 2d at 469.

[140] 487 F.3d 701 (9th Cir. 2007).

[141] 494 F.3d 788 (9th Cir. 2007).

the adult entertainment company Perfect 10 sued both Amazon and Google for contributory infringement relating to third-party websites that infringed upon its pornographic images.[142] In the latter case, Perfect 10 sued the credit card company Visa on similar grounds.[143]

Perfect 10 v. Amazon[144] is another one of the few cases discussing a search engine's vicarious liability for copyright infringement. Perfect 10 owns copyrighted images of nude models.[145] Subscribers must pay a membership fee to log into the system and view the images.[146] Some websites published Perfect 10's images on the Internet without authorization, and these sites were automatically indexed by Google.[147] Perfect 10 thus brought a copyright infringement suit against Google.[148] Ultimately holding Google not liable, the court found that the "control" element of vicarious liability consisted of two prongs: (1) whether the defendant had "the legal right to stop or limit the direct infringement" and (2) whether the defendant had the practical ability to stop the direct infringement.[149] A contract with a third-party website would have given Google the legal right to prevent infringement by the third-party websites.[150] Because "Perfect 10 ha[d] not shown that Google ha[d] contracts with third-party websites that empower[ed] Google to stop or limit them from reproducing, displaying, and distributing infringing copies of Perfect 10's images on the Internet," the court held that the control element was not satisfied.[151] The dissent in *Perfect 10 v. Visa* also noted that to be held vicariously liable, the "defendant must have a formal contractual or principal-agent relationship with the infringer. It is that contract or relationship that forms the predicate for vicarious liability."[152]

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[142] *Amazon*, 487 F.3d at 710.

[143] *Visa*, 494 F.3d at 792.

[144] *Amazon*, 487 F.3d at 710.

[145] *Id.* at 713.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.* at 730 (citing Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005)).

[150] *Id.* The mere existence of a contractual relationship, however, does not always warrant a finding of control. *See* Banff Ltd. v. Ltd., Inc., 869 F. Supp. 1103, 1109 (S.D.N.Y. 1994) (citing Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., 316 F.2d 304, 308 (2d Cir. 1963)); Wright, *supra* note 24, at 1014.

[151] *Amazon*, 487 F.3d at 730–31.

[152] Perfect 10, Inc. v. Visa Int'l Serv., Ass'n, 494 F.3d 788, 822 n.23 (9th Cir. 2007) (Kozinski, J., dissenting).

Although Google's AdSense agreement[153] states that "Google reserves 'the right to monitor and terminate partnerships with entities that violate others' copyright[s],'"[154] the court held that "Google's right to terminate an AdSense partnership does not give Google the right to stop direct infringement by third-party websites."[155] The dissent in *Perfect 10 v. Visa* further explained that exclusion from AdSense would reduce the infringing sites' incomes, but would not affect the operation of the sites themselves.[156] Thus, the AdSense agreement does not give Google a right to control infringement on merchants' websites.

But can the legal right to control infringement be found only in a contract? Although respondeat superior requires a contractual relationship (in the form of an employee-employer relationship) in an employment context,[157] such a requirement may be unreasonable in other contexts. Suppose that content-identification technology is sophisticated enough to detect copyright infringement on third-party websites. Can lawmakers require search engines to filter infringing websites in the absence of contracts between search engines and third-party websites? If deterrence is the rationale for vicarious liability, a contractual relationship would not be an essential requirement.[158]

Because "Google cannot stop any of the third-party websites from reproducing, displaying, and distributing unauthorized copies of Perfect 10's images," the *Perfect 10 v. Amazon* court did not find Google to be vicariously liable.[159] The dissent in *Perfect 10 v. Visa*, however, argued that the court has "never required an 'absolute right to stop [the infringing] activity' as a predicate for vicarious liability; it's enough if defendants have the 'practical ability' to do so."[160] In other words, one

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[153] The current Google AdSense agreement is available at https://www.google.com/adsense/static/en_US/Terms.html

[154] *Amazon*, 487 F.3d 701, 730 (quoting Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 858 (C.D. Cal. 2006)).

[155] *Id.* AdSense is an advertising system, whereby "Google pays participating merchants to host third-party ads on their websites." *Visa*, 494 F.3d at 820 (Kozinski, J., dissenting).

[156] *Visa*, 494 F.3d at 820 (Kozinski, J., dissenting).

[157] RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b, § 7.07 cmt. f (2005) (noting that an employer is liable for the actions of an employee, which entails a contractual relationship).

[158] *See* Frederic Reynold, Note, *Negligent Agency Workers: Can There Be Vicarious Liability?*, 34 INDUS. L.J. 270, 272 (2005) ("[W]he[n] one is concerned with the question of vicarious liability in tort, the contractual relationship between the parties is not a crucial consideration.").

[159] *Amazon*, 487 F.3d at 731.

[160] *Visa*, 494 F.3d at 818 (Kozinski, J., dissenting) (quoting *id.* at 804; *Amazon*, 487 F.3d at 729, 731). The dissent notes that "'[p]ractical ability,' the standard announced in *Amazon*, is a capacious concept, far broader than 'absolute right to stop,'" which is the

prong of vicarious liability should be the ability to reduce infringement significantly rather than the right to eliminate infringement altogether. As Google is able to remove infringing websites from search results, it can significantly decrease their exposure and thus reduce copyright infringement.

In *Perfect 10, Inc. v. Visa*, various unrelated websites had stolen Perfect 10's images and illegally sold them online.[161] The sale of infringing content was usually carried out using credit cards processed by companies such as Visa, which then charged merchants fees in these transactions.[162] Perfect 10 then brought a copyright infringement action against Visa.[163] The court found that Perfect 10 had not stated a claim of vicarious liability upon which relief could be granted,[164] but Judge Kozinski delivered an insightful dissenting opinion.[165]

The majority recognized that Visa's refusal to process credit card payments for those images would reduce the number of infringing sales, but held that this effect would be "the result of indirect economic pressure rather than an affirmative exercise of contractual rights."[166]

Deterrence, however, refers to deterring the actual infringement either directly or indirectly. Indirect economic pressure can also serve as a powerful deterrence. As the dissent pointed out, "[p]hysical control over the infringing activity is one way to stop infringers, but it's certainly not the only way. Withdrawing crucial services, such as financial support, can be just as effective, and sometimes more effective, than technical measures that can often be circumvented."[167]

The majority may have feared that a ruling against Visa would result in too many parties being swept into vicarious infringement suits.[168] Even though many providers of essential services, such as "software operators, network technicians, or even utility companies,"[169] could limit infringement, not all of them derive a direct financial benefit from infringement. For example, because a software operator's revenue does not grow with the increasing use of the software, it does not derive a direct financial benefit from infringement. Thus, even if all

standard adopted by the majority in *Visa*. *Id.* at 818 n.15; *see also* Noel D. Humphreys, *Are Landlords Liable for Online Infringement by Tenants?*, N.J. LAW., Dec. 2008, at 37–38.

[161] Visa, 494 F.3d at 793.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 792–93, 810.

[165] *Id.* at 810, 824–25 (Kozinski, J., dissenting).

[166] *Id.* at 805.

[167] *Id.* at 821 (Kozinski, J., dissenting).

[168] *See id.* at 805 n.17.

[169] *Id.*

monopolistic provider of an essential service could be held vicariously liable, it would not be fair to do so.

The majority also held that Perfect 10 "conflate[d] the power to stop profiteering with the right and ability to control infringement."[170] Again, the aim of vicarious liability is not to eliminate infringement, but to reduce it significantly. Without the power to make a profit, the number of infringing websites would greatly diminish. Thus, the power to stop profiteering from infringement is consistent with the right and ability to control infringement.

The dissent noted that the availability of alternative ways of doing business does not matter, as alternatives were also available in *Fonovisa*[171] or *Napster*[172] in which vicarious liability was found.[173] This may not be the complete picture, however. *Perfect 10 v. Visa* is different from *Fonovisa*[174] or *Napster*[175] because in those cases, the infringement occurred on the third party's premises or networks and could have been deterred by the third party.[176] Visa cannot be held liable on that basis. Instead, Visa should be held vicariously liable not because of its ability to control third-party conduct, but because of its market power and the impracticability of alternative payment methods such as check or cash. As the *Perfect 10 v. Visa* dissent noted, "[H]ow many consumers would be willing to send a check or money order to a far-off jurisdiction in the hope that days or weeks later they will be allowed to download some saucy pictures?"[177]

The tests for vicarious liability may be different, depending on three distinct types of relationships: the employer-employee relationship, the relationship of premises providers (such as swap-meet operators) to their tenants, and the relationship of monopolistic providers of essential services (such as credit card processing) to their users. The following table illustrates this point:

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[170] *Id.* at 805–06.

[171] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996).

[172] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[173] *Visa*, 494 F.3d at 817 (Kozinski, J., dissenting).

[174] *Fonovisa*, 76 F.3d at 259.

[175] *Napster*, 239 F.3d at 1004.

[176] *Visa*, 494 F.3d at 817 (Kozinski, J., dissenting) (arguing that the defendants in *Fonovisa, Napster,* and *Grokster* had the ability to deter infringement by barring infringers from their premises or networks).

[177] *Id.* at 818.

Relationship	Test	Rationale
Employer-employee	Right and ability to supervise employees + Direct financial benefit from infringement	Dominant justification: deterrence Supplemental justification: corrective justice
Premises provider	Right and ability to deter infringement + Direct or indirect financial benefit from infringement	Deterrence
Monopolistic provider of an essential service	Right and ability to exclude infringers + Market power + Direct financial benefit from infringement	Corrective justice

Vicarious liability is traditionally applied in the employer-employee relationship when the employee is either following the employer's instructions or otherwise acting within the employee's job description.[178] Employers can control what is done and how it is done, and they are expected to take cost-justified precautions as well as to train and supervise their employees.[179] When discussing vicarious liability, commentators typically focus on causation rather than financial benefits.[180] Ernest Weinrib notes:

> [Because] corrective justice is the normative relationship of sufferer and doer, respondeat superior fits into corrective justice only if the employer can, in some sense, be regarded as a doer of the harm. Corrective justice requires us to think that the employee at fault is so closely associated with the employer that responsibility for the former's acts can be imputed to the latter.[181]

Weinrib's theory of corrective justice focuses on correlativity, emphasizing causation,[182] whereas Jules Coleman's theory concentrates

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[178] RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2005).

[179] *Id.*

[180] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 186 (1995); Catharine Pierce Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. CAL. L. REV. 1769, 1774 (1996).

[181] WEINRIB, *supra* note 180, at 186.

[182] *See* Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 26 (1995) (noting that correlativity may emphasize causation, responsibility, or the position of the cheapest cost-avoider); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 350–51 (2002) ("The idea that correlativity informs the injustice, as well as its rectification, is a central insight of the corrective justice approach to the theory of liability.").

on wrongful gains and losses.[183] Coleman notes that "[o]ne way in which Ernie Weinrib's theory differs from mine is that in his account the object of rectification is the 'wrong,' whereas in my account it is the 'wrongful loss.'"[184] Combining these theories provides two separate justifications for vicarious liability in the employer-employee context: the employer should be held liable because (1) it could have deterred the "wrong," or (2) it benefits financially from the "wrongful loss" of another.

Generally, vicarious liability in the employer-employee context can be justified by deterrence because most wrongs can be prevented through more careful hiring and training.[185] Even if the employer is unable to control the risk fully, however, courts can nonetheless find vicarious liability based on corrective justice if the employer derives a direct financial benefit from infringement.

In the premises provider scenario, although the premises provider cannot control direct infringers, it can exercise physical control over the activity on its premises either by surveillance or by architecture, the latter of which refers to a physical feature or to code in cyberspace in a human-built environment.[186] For example, speed bumps act as an architectural constraint on speeding.[187] Similarly, an ISP can use content-identification technology to filter copyright-infringing materials on its network.[188] Architecture is "automated, immediate, and plastic."[189] It is self-enforcing and curtails the discretion afforded by law.[190] Unless people can circumvent the architecture, they are unlikely to commit infringement.[191] Architecture, then, may be more cost effective means on policing and enforcing than the law.[192] Therefore, premises providers may have both the right and the ability to deter infringement, even if they are unable to control infringers directly.

Unlike a premises provider, a provider of an essential service lacks the ability to exercise physical control over direct infringers' activity because the activity does not occur on its premises. If it has market

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[183] Coleman, *supra* note 13, at 10–14; Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 350 (1992).

[184] Coleman, *supra* note 182, at 26.

[185] RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2005).

[186] Ke Steven Wan, *Gatekeeper Liability Versus Regulation of Wrongdoers*, 34 OHIO N.U. L. REV. 483, 486 (2008).

[187] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 92 (1999).

[188] Sunil Vyas, *Google Intro[duce]s YouTube Video Identification*, EARTHTIMES (Oct. 16, 2007), http://www.earthtimes.org/articles/show/124974.html.

[189] James Grimmelmann, Note, *Regulation by Software*, 114 YALE L.J. 1719, 1729 (2005) (describing the three characteristics of software).

[190] *Id.* at 1729–30.

[191] *See id.* at 1730.

[192] *Id.* at 1729.

power in the relevant market, however, it can exclude infringers from its service network, which may be an effective deterrence. Thus, a monopolistic provider of an essential service has the right and ability to deter direct infringers, even though it lacks the ability to deter infringement directly. Market power is the monopolistic "power to control prices or exclude competition."[193] Commentators have discussed the market power of credit card joint ventures.[194] Despite the competition between credit card companies, they can exercise market power by making collective decisions, including the decision to exclude a single producer.[195] Thus, they have monopolistic status in the relevant market.

As for the financial benefit prong of vicarious liability when the third party is a premises provider, even indirect financial benefit may result in a finding of vicarious liability.[196] If the infringement occurs on the third party's premises, the third party arguably has a duty to monitor.[197] Based on the deterrence rationale, the test should weigh the costs and benefits associated with vicarious liability. For example, if content-identification technology significantly reduces the monitoring cost, ISP vicarious liability would not result in serious over-deterrence. The financial benefit prong can be interpreted broadly such that the benefit does not have to be directly derived from infringement or "financial" in nature. It will be satisfied whenever the infringing material acts as a draw for customers.

When the third party is a monopolistic gatekeeper lacking the ability to control infringement, the rationale for vicarious liability should be corrective justice rather than deterrence. Vicarious liability should be found only in the presence of direct financial benefit. One commentator argues that vicarious liability "is consistent with deterrence and compensation, but inconsistent with corrective justice."[198] According to

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[193] Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. REV. 1321, 1399 (2008) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (discussing monopoly power)).

[194] *See* Dennis W. Carlton & Alan S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643, 645 (1995); Levitin, *supra* note 193, at 1399.

[195] Carlton & Frankel, *supra* note 194, at 653–55. In 2003, the Second Circuit found sufficient evidence to conclude that Visa and MasterCard possessed market power in the payment card network services market because they controlled forty-seven percent and twenty-six percent of payment card network market share, respectively. United States v. Visa U.S.A., Inc., 344 F.3d 229, 240 (2d Cir. 2003).

[196] *E.g.*, Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc., 855 F. Supp. 1314, 1331 (D. Mass. 1994).

[197] *See* Hamdani, *supra* note 96, at 947.

[198] Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 351 (2007) (referring to the respondeat superior form of vicarious liability). *But see* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625,

Aristotle, corrective justice applies when one party receives more (or less) than his rightful share because the other party is causing him injury.[199] It corrects moral imbalances between parties,[200] but applying it in this context is problematic because there are no moral imbalances between the plaintiff and the third party.[201]

There are, however, two kinds of corrective justice: correcting fault and correcting wrongful gains.[202] If the third party derives a direct financial benefit from infringement, the third party should be held liable for the direct infringer's wrongdoing. It should not matter whether the third party is at fault or has intent to infringe. The purpose of the direct financial benefit prong is probably to justify corrective justice.[203]

Under Coleman's theory of corrective justice, wrongful gains and losses are limited to financial gains and losses.[204] Because the defendant may not necessarily derive financial gains as a result of the plaintiff's financial losses in a negligence case, Coleman's theory does not provide justification for routine negligence cases.[205] "Corrective justice requires that one who is unjustly enriched at the expense of another is morally

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674 n.219 (1992) ("[T]he employer's vicarious liability is based on the employer's own corrective justice responsibility for injuries that are tortiously inflicted in pursuance of the employer's objectives.").

[199] *See* ARISTOTLE, THE NICOMACHEAN ETHICS, Book V at 85–86 (David Ross trans., Oxford Univ. Press 2009) (n.d.); *see also* Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot*?, 47 WASH. & LEE L. REV. 347, 362 (1990).

[200] *See* Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 476–77 (2005); Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 193 (2004) (arguing that some scholars view tort liability as "a vehicle for reestablishing the moral balance between the parties").

[201] *See* Robinette, *supra* note 198, at 351.

[202] *See* Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2370 (1990).

[203] *See id.* at 2358–59 ("The central issue in a tort case is not whether the defendant is at fault but whether the defendant can fairly be held financially responsible for the plaintiff's injuries."). If the liability test were based on deterrence, as in the scenario of the premises provider, the financial benefit would not have to come directly from the infringement.

[204] Coleman, *supra* note 13, at 6 ("[C]orrective . . . justice is concerned with wrongful gains and losses. Rectification is, on this view, a matter of justice when it is necessary to protect a distribution of holdings (or entitlements) from distortions [that] arise from unjust enrichments or wrongful losses."); Wells *supra* note 202, at 2358–59, 2370–71 ("The central issue in a tort case is not whether the defendant is at fault but whether the defendant can fairly be held financially responsible for the plaintiff's injuries.").

[205] Coleman, *supra* note 13, at 10–11 ("Negligent motoring may or may not result in an accident. Whether it does or not, individuals who drive negligently often secure a wrongful gain in doing so . . . . This . . . wrongful gain is not, *ex hypothesi*, the result of anyone else's wrongful loss."); Wells, *supra* note 202, at 2370.

obligated to restore the victim to his former position."[206] It is for this reason that the corrective justice theory is appropriate in the premises-provider context.

Corrective justice should not be confused with unjust enrichment. Direct financial benefit renders one unjustly enriched economically, whereas intent to infringe renders one unjustly enriched socially. Unjust enrichment, or wrongful gains, can be tangible or intangible.[207] When one exercises his freedom excessively, he may intrude upon others' liberty and demean it.[208] Such intangible gains are more prevalent than tangible ones and exist in almost all infringements.[209] If Coleman's theory covers intangible gains, it can justify vicarious liability in traditional negligence cases in which the defendant derives no financial gains from infringement, because when the defendant gains a sense of superiority as a result of the plaintiff's loss of a sense of equality, liability should be imposed on the defendant to restore this imbalance.

Notably, both the direct infringer and the third party may derive intangible gains from the infringement. When the third party contributes to the infringement with intent to infringe, it gains a sense of superiority.[210] Without intent to infringe, the third party does not gain

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[206] Richard Ausness, *Conspiracy Theories: Is There a Place for Civil Conspiracy in Products Liability Litigation?,* 74 TENN. L. REV. 383, 412 (2007); *accord* ARISTOTLE, THE NICOMACHEAN ETHICS, Book V at 154–55 (J.E.C. Welldon trans., Prometheus Books 1987) (n.d.); Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U. L. REV. 577, 602–05 (1998) ("Gains and losses may be tangible or intangible. . . . An intangible gain may arise from any unauthorized or excessive exercise of freedom."); Coleman, *supra* note 12, at 423 ("The principle of corrective justice requires the annulments of both wrongful gains and losses."); Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 886 (2005) ("Once the injurer has caused unjust harm to the victim, the injurer must compensate the victim . . . to restore him to the pre-existing state. The injurer has realized a corresponding gain in normative, but usually not factual, terms; her gain is a gain in comparison to what she is due or entitled. Under this view, 'because the plaintiff has lost what the defendant has gained, a single liability links the particular person who gained to the particular person who lost.'") (quoting WEINRIB, *supra* note 180, at 63.).

[207] Calnan, *supra* note 206, at 603; *see also* WEINRIB, *supra* note 180, at 116 (distinguishing between factual and normative gains and losses).

[208] *See* WEINRIB, *supra* note 180, at 115–16.

[209] *See id.* at 116.

[210] *See id.* at 118. Weinrib argues that there is an unjust gain by a defendant who makes a temporary unauthorized use of the plaintiff's property, even though he returns it unimpaired. Even though the use is non-consumptive (that is, it does not damage the plaintiff's interest), the defendant unjustly gains by saving the cost of renting the property; in a sense giving him a sense of superiority over the plaintiff whose property he appropriated. *Id.* By extension, the same principal applies to unauthorized use of intellectual property, which is inherently non-consumptive (that is, use by one does not deprive another), but by engaging in unauthorized use, the defendant benefits by saving the cost of paying for it. If a third party intentionally contributes to the unauthorized use,

a sense of superiority even if it contributes to the infringement. The "intent to infringe" requirement is thus necessary to justify corrective justice. Coleman notes that "[a]nnulling moral wrongs is a matter of retributive justice, not corrective justice."[211] The proposed rule would be consistent with this statement because the third party would not be held vicariously liable unless the plaintiff suffers losses; liability would not be created by the mere existence of a moral wrong, but only by a moral or financial loss.

Knowledge of infringement, however, may be insufficient to establish intangible third-party gain. If the third party has actual knowledge of the infringement and contributes to it, intent to infringe may be inferred from its contribution, but if the third party only has constructive knowledge of the infringement, courts should not find intent to infringe without further evidence of its inducement. The inducement rule set forth in *Grokster* is justified by corrective justice.[212]

V. THE DESIRABILITY OF MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY

Having discussed Google's vicarious liability for trademark infringement in *GEICO*,[213] this Part uses Baidu as an example to assess the desirability of holding monopolistic gatekeepers vicariously liable for copyright infringement. While some think that dynamic and robust competition exists in the search engine industry,[214] Oren Bracha and Frank Pasquale argue that search engines resemble a natural monopoly.[215] Bracha and Pasquale consider several factors, including the search engine algorithm, which is similar to high-cost infrastructure; the network effects that enable the search engine to improve with each additional user; the licensing costs for a database of searchable materials, which newcomers may not be able to afford; and consumer habits that make users reluctant to switch to alternative search engines.[216]

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it has a similar unjust gain, even if it is merely an intangible sense of superiority over the plaintiff.

211 Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 442 (1992).

212 *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) (adopting the rule that "one who distributes a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties").

213 *See supra* Part IV.

214 *See, e.g.*, Amit Singhal, Op-Ed., *Competition in an Instant*, WALL ST. J., Sept. 17, 2010, at A19.

215 Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1180 (2008).

216 *Id.* at 1181–82.

Gatekeeper liability is generally desirable if a gatekeeper can deter infringement at low costs. Baidu verifies advertisers' identities and the content of their advertisements.[217] It charges advertisers for ads, so if it has to pay for violations by advertisers, it can raise its prices, seek indemnity from the advertisers, or exclude them from its advertising system accordingly.[218] Because of Baidu's market power, excluded advertisers may not be able to find a suitable alternative. Thus, Baidu is able to deter infringing advertisers through the threat of exclusion.

The Baidu-advertiser relationship does not resemble the ISP-subscriber relationship, however. In the ISP-subscriber relationship, subscribers are usually anonymous and judgment-proof,[219] such that an ISP can hardly impose effective sanctions on them. The resulting under-deterrence of subscribers makes it undesirable to impose vicarious liability on the ISP given that it is not yet well positioned to monitor copyright infringement.

Just as an accounting firm is not in a good position to prevent corporate fraud, Baidu may not be well positioned to monitor copyright infringement on advertisers' websites at present. The Baidu-advertiser relationship, however, should be distinguished from the accounting firm-corporation relationship. Although the Big Four accounting firms have significant market share,[220] a fraudulent corporation should have little difficulty in finding a smaller accounting firm after being excluded from the Big Four system. Thus, it is unappealing to expand vicarious liability to the accounting firm or its equivalence in the online gatekeeping world.

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[217] Liming, *supra* note 120.

[218] One commentator notes that it is difficult or even impossible to pursue infringement claims against the individual advertiser because many advertisers are privately registered or are located in foreign countries. *See* Eng, *supra* note 122, at 531–32.

[219] *See Joel Tenenbaum to Appeal 90% Reduced File-Sharing Penalty*, TORRENTFREAK (Aug. 26, 2010), http://torrentfreak.com/joel-tenenbaum-to-appeal-90-reduced-file-sharing-penalty-100826/. Joel Tenenbaum was one of the few file-sharing defendants sued by the recording industry whose case resulted in a judgment. Even though the judge reduced the jury's original award of $675,000 to only $67,500, Tenenbaum stated he did not have the resources to pay even the lower amount, which would still force him into bankruptcy. *Id.*

[220] Baidu's share in the Chinese search market was sixty-four percent, compared to Google's approximately thirty-one percent in the first quarter of 2010. Chris Oliver, *Baidu's China Market Share Up, as Google's Sinks*, MARKETWATCH (Apr. 27, 2010, 12:39 AM), http://www.marketwatch.com/story/baidus-china-market-share-up-as-googlessinks2010-04-27. In contrast, as of 2005 the Big Four accounting firms (Deloitte & Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers) combined audited more than seventy-eight percent of U.S. public companies, a combined market share that is only fourteen percent larger than that of Baidu alone. Robert Bloom & David C. Schirm, *Consolidation and Competition in Public Accounting: An Analysis of the GAO Report*, CPA J., June 2005, at 22.

In addition, imposing vicarious liability on Baidu's P4P system will not have a chilling effect on its organic search service. Despite some loss of revenue, Baidu can continue its organic search service, which still qualifies for safe-harbor protection.[221]

VI. PROPOSED LIABILITY REGIME FOR MONOPOLISTIC GATEKEEPERS

This Part discusses the proposed liability regime for monopolistic gatekeepers using credit card companies as an example. One commentator has proposed a conditioned immunity regime for credit card companies, which is similar to the notice-and-takedown procedure for ISPs:[222]

> One solution would be to require the credit card companies to forward an infringement notice to an accused member along with a warning that their payment service would be terminated unless they reply with a counter notice. If a counter notice is not forthcoming, service would be terminated. If the credit card company receives a counter notice, however, the copyright owner would then have to sue the direct infringer. The credit card companies would only terminate service once the material is ruled infringing by a court of law. If the copyright owner is unable to serve process or enforce a judgment because the alleged infringer is located abroad, they could then inform the credit card company, who would then terminate the service.[223]

An even better solution, however, would be to hold credit card companies vicariously liable. To mitigate the adverse effects of imposing such liability on credit card companies, the company should be allowed to pay nominal damages at a merchant's first offense. If the same merchant commits copyright infringement a second time, the credit card company can be ordered to pay full damages. One possible consequence of the proposed regime is that credit card companies would adopt a policy whereby a merchant would be excluded from the credit card processing network once it commits copyright infringement. The proposed regime properly balances the credit card company's risk with the need to prevent copyright infringement.

VII. CONCLUSION

A provider of an essential service is generally considered to be an unsuitable candidate for vicarious liability because it lacks the ability to supervise its users. Taking Baidu, *Tiffany v. eBay*,[224] and *Perfect 10 v.*

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[221] *Chinese Regulation*, *supra* note 3, at art. 23; *see also* 17 U.S.C. § 512(d) (2006).

[222] 17 U.S.C. § 512(c) (2006).

[223] *David Haskel, A Good Value Chain Gone Bad: Indirect Copyright Liability in* Perfect 10 v. Visa, 23 BERKELEY TECH. L.J. 405, 435 (2008).

[224] 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

Visa[225] as examples,[226] this conclusion may change, however, if the provider has gained monopolistic status in the relevant market.

Monopolistic gatekeepers should be held vicariously liable because they can deter infringers by threat of exclusion.[227] The direct financial benefit prong of the test for vicarious liability should be interpreted narrowly, however, because the rationale for vicarious liability is corrective justice, not unjust enrichment. Finally, any possible adverse effects of vicarious liability may be mitigated by imposing only nominal penalties with regard to first-time infringers.[228]

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[225] 494 F.3d 788 (9th Cir. 2007).

[226] *See supra* Part IV.

[227] *See supra* Part V.

[228] *See supra* Part VI.