WAKE FOREST JOURNAL OF BUSINESS
AND INTELLECTUAL PROPERTY LAW

VOLUME 20 SUMMER 2020 NUMBER 3

THE PORTAL TO INTERMEDIARY LIABILITY: MERGING SECONDARY LIABILITY WITH EQUITY AND PRIVATE INTERNATIONAL LAW

Patrick Lin†

ABSTRACT **252**
I. INTRODUCTION **252**
II. THE NEED FOR A NEW DOCTRINE ON INTERMEDIARY LIABILITY **254**
III. THE NEW DOCTRINE **257**
A. AN EQUITABLE PEDIGREE 257
B. THE PORTAL QUESTION 257
C. DISCRETIONARY FACTOR: IS THERE PARTICULARIZATION? 258
IV. EXPLAINING THE EQUITABLE BASIS OF THE PORTAL QUESTION **258**
A. *GROKSTER* 259
B. *AEREO* 261
V. PARTICULARIZATION: BORROWING FROM PRIVATE INTERNATIONAL LAW **262**
A. A PRIVATE INTERNATIONAL LAW PEDIGREE 262
B. WHY "PARTICULARIZATION" IS APPROPRIATE 263

† © 2020 Patrick Lin, B.A., Williams College (2013); J.D., Sydney University (2017), LL.M., Columbia University (2020). From 2017 to 2019, the author practiced in civil litigation, specializing in contested wills and estates, at an Australian law firm. In late 2019, he began studying for the LL.M. at Columbia University and graduated in 2020 as a Harlan Fiske Stone Scholar. The author thanks Hillel Parness, Lecturer in Law, Kernochan Center for Law, Media and the Arts at Columbia Law School, from whose seminar this paper arose. The author is grateful to the editorial team of the *Wake Forest Journal of Business and Intellectual Property* for preparing this article for publication. Thanks also to Hideaki Kuwahara and Yueyi Chen for comments on previous drafts of this paper. Any mistakes are the author's.

VI. TESTING THE DOCTRINE AND EXPOSING COUNTERARGUMENTS 265
A. *M.A. v. Village Voice Media* 265
B. *Google v. Equustek* 268
VII. COUNTERARGUMENTS 270
A. Equity's Ambiguity 270
B. Particularization's Limits 271
VIII. REJOINDER AND CONCLUSION: EQUITY'S CONTINUING ROLE IN THE FUTURE 273

ABSTRACT

The idea that mere conduits of information should generally not be held responsible for the information they carry appears sensible. Accordingly, Safe Harbors immunize intermediaries from liability arising out of content posted by its users. Yet practice suggests that governments often hold intermediaries responsible, if not liable, for such content.

This article begins from the premise that, for law to keep its vitality and relevance, it should harmonize with global practice and public policy in a manner that gives deference to legal precedent. I propose a new doctrine which acts as a threshold question—a "portal"—to the applicability of the Safe Harbors. The portal question first asks whether granting Safe Harbor protection would be "unconscionable" under all circumstances. This question is buttressed by a second, discretionary question, which asks whether the content was "particularized" to an individual. I suggest that particularized content carries more of a private character and weighs in favor of applying the Safe Harbors, while non-particularized content generally carries more of a public character and weighs against applying the Safe Harbors.

This new doctrine gives courts an additional device to tackle the challenging and ever-evolving issues of the internet, such as where intermediaries deliberately turn a blind eye to content that corrupts community expectations of justice or where intermediaries adopt a technological architecture that inappropriately circumvents the law.

I. INTRODUCTION

Some principles lie dormant and operate silently but influentially.[1] Judging by the court's silence on terms such as "equity" and "unconscionability" in *MGM Studios, Inc. v. Grokster, Ltd.* ("Grokster"),[2] one might never consider how greatly those concepts had influenced the court. Similarly, considering the majority's silence on "volitional conduct" in *ABC., Inc. v Aereo*, *Inc.* ("Aereo"),[3] one might initially think that the majority did not contemplate its existence. Yet *Aereo* arguably ousts the operation of volitional conduct in direct copyright infringement,[4] thus partially overruling *Cartoon Network,*

[1] *See generally* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005).
[2] *See id.*
[3] *See generally* ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 451 (2014).
[4] Kyle A. Brown, Comment, *Up in the Aereo: Did the Supreme Court Just Eliminate the Volitional Conduct Requirement for Direct Copyright Infringement*, 46 SETON HALL L. REV. 243, 245 (2015).

LP, LLLP v. CSC Holdings, Inc ("Cartoon Network").[5] Drawing on equity's influential, but often silent, operation in the application and creation of copyright doctrine, I propose a new doctrine for internet intermediary liability.

Part II establishes the meaning of "internet intermediary" and explains why a new doctrine is necessary. Part III sets forth the new doctrine. Parts IV and V together explain how the new doctrine was established. In particular, Parts IV and V draw upon the underlying presence of equity in secondary liability for copyright infringement (Part IV) and the "targeting" concept from private international law (Part V). Part VI applies the new doctrine to two recent cases in order to demonstrate how it ameliorates not only the challenging relationship between private international law and emerging technology but also the otherwise obstructive effect of US safe harbor provisions.[6] However, no new design is perfect, and testing begets refinement. Accordingly, Part VII canvasses the possible counterarguments to the new doctrine. Finally, Part VIII offers a rejoinder and concludes that, despite its imperfections, this new doctrine both emphasizes equity's underlying presence in intellectual property doctrine and demonstrates how equity can be used to conscientiously immunize internet intermediaries.

Except for the brief remarks presented in Part II, I assume, as starting point for this article, the need to make contingent, or limit, the operation of section 230 of the Communications Decency Act and section 512 of the Digital Millennium Copyright Act ("CDA" and "DMCA" respectively, and together, the "Safe Harbors"). Although such topic might warrant more than the paragraphs proffered in Part II, it is neither within the scope of this article to analyze the textual nuances of, or exceptions within, the Safe Harbors nor is it appropriate to exhaustively debate whether the Safe Harbors should be limited. To the extent that equity might appear to be discussed as a distinct body of law, this article recognizes that US law merges equity and law and does not debate the merits of this unification.[7] Accordingly, the arguments

---

[5] Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 129 (2d Cir. 2008); *see also* Carrie Bodner, Note, *Master Copies, Unique Copies and Volitional Conduct: Cartoon Network's Implications for the Liability of Cyber Lockers,* 36 COLUM. J.L. & ARTS 491, 507 (2013); Brown, *supra* note 4.

[6] T. Randolph Beard, George S. Ford & Michael Stern, *Fixing Safe Harbor: An Economic Analysis (*Phoenix Center Policy Paper No. 52, 1 2017) ("*[D]e minimis* liability for platforms that engage in piracy promotes infringing platforms to the detriment of responsible ones").

[7] *See* T. LEIGH ANENSON, JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN US LAW 30 (2018) (addressing the decline of equity as a distinct discipline in the US). The "fusion fallacy" position argues against the substantive fusion of equity and law. *Id.* Whereas in some jurisdictions, such as New South Wales, Australia, equity remains distinct, in the US, it does not. *Id.* Equity in the US is most often discussed in

advanced here may be appreciated independent of any "fusion debate" and should be palatable to any reader, whether her predilection favors the distinctiveness or fusion of equity and law.[8]

II. THE NEED FOR A NEW DOCTRINE ON INTERMEDIARY LIABILITY

Internet intermediaries are companies that facilitate the use of, and activity over, the internet.[9] Examples include internet service providers, network operators, e-commerce websites, social media platforms, and search engines.[10] The Safe Harbors effectively immunize US-based intermediaries from liability for user-generated content.[11] Section 230 of the CDA delivers a bright-line rule that immunizes intermediaries, such as internet service providers, from liability for the content of its third-party users: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[12]

While section 230 of the CDA had defamation law in mind,[13] section 512 of the DMCA operates in the copyright context.[14] In summary, section 512 allows an internet-service provider to avoid secondary liability—vicarious or contributory infringement—for conduct falling within the categories of transitory digital network communications, system caching, information residing on systems or networks at direction of users, and information location tools.[15] Section

---

the context of remedies. *Id.* After the merger of equity and law, "law schools transitioned from teaching a course in equity to a course in remedies comprising both law and equity. *Id.* As a result, a considerable amount of equitable principles were lost in the transition" *Id.*

[8] *See* Simon Chesterman, *Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law'*, 24 J.L. AND SOC'Y 350, 351–55 (1997); *see also* Julie Maxton, *Some Effects of the Intermingling of Common Law and Equity,* 5 CANTERBURY L. REV. 299, 310 (1993*); see also* Leonard I Rotman, *The "Fusion" of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters,* 2 CJCCL 497–536 (2016);

[9] OECD, *The Economic and Social Role of Internet Intermediaries* 9 (Apr. 2010), https://www.oecd.org/internet/ieconomy/44949023.pdf.

[10] Rebecca MacKinnon et al., *Fostering Freedom Online: The Role of Internet Intermediaries* 7 (2014), http://repository.upenn.edu/cgcs_publications/21.

[11] *See, e.g.* Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[12] 47 U.S.C. § 230(c)(1).

[13] Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2030 (2018).

[14] 17 U.S.C. § 512 (2020).

[15] *Id.*

512 will only apply if the internet service provider satisfies certain conditions, including a takedown procedure.[16]

Notwithstanding the existence of the Safe Harbors, immunity does not necessarily reflect contemporary global practice.[17] In 2005, Chinese journalist Shi Tao used a Yahoo email account to send records of a Communist Party meeting during which Chinese authorities discussed ways of dealing with the anniversary of Tiananmen Square.[18] Yahoo disclosed Shi Tao's identity to the Chinese Communist Party, which led to his ten-year prison sentence, of which he ultimately served eight and a half.[19] Jerry Yang, the then CEO of Yahoo stated, "we have to comply with local law."[20] Yet only five years earlier, Jerry Yang vehemently sought to defy a French court's imposition of intermediary liability for the sale of Nazi memorabilia by internet auction on Yahoo.[21]

In the US, lawsuits have successfully challenged the applicability of the Safe Harbors. For example, in *BMG Rights Management (US) LLC v. Cox Communications Inc.*,[22] a 2018 Fourth Circuit case, BMG Rights, a music publishing company, sued Cox Communications, an internet service provider, for copyright infringement of over one-thousand musical compositions.[23] Cox Communications ("Cox") provided high-speed internet to some 4.5 million subscribers, some of whom used that service to download copyrighted material.[24] Cox sought to rely on the Safe Harbors (specifically, the DMCA), but was still found liable for contributory infringement.[25] In affirming the lower court's denial of

---

[16] 17 U.S.C. § 512(a), (b)(1), (c)(1), (d).

[17] *See generally* Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 82 BROOK. L. REV. 105, 122 (2016) (arguing that governments use online intermediaries as a sort of proxy for enacting policies regarding the use of information).

[18] JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET: ILLUSIONS OF A BORDERLESS WORLD 10 (2006); *see also* Shi Tao, *China frees journalist jailed over Yahoo emails*, THE GUARDIAN (Sept. 8, 2013), https://www.theguardian.com/world/2013/sep/08/shi-tao-china-frees-yahoo.

[19] *Id.*; *see also* Joseph Kahn, *Yahoo Helps Chinese to Prosecute Journalist*, N.Y. TIMES (Sept. 8, 2005), https://www.nytimes.com/2005/09/08/business/worldbusiness/yahoo-helped-chinese-to-prosecute-journalist.html.

[20] *Id.; see also* Bill Savadove*, We must obey law, Yahoo! chief says after man jailed,* SOUTH CHINA MORNING POST*,* (Sept. 11, 2005).

[21] *Id.* at 5; *see generally* Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1202 (9th Cir. 2006).

[22] BMG Rights Mgmt. (US) L.L.C. v. Cox Comm., Inc., 881 F.3d 293, 298 (4th Cir. 2018).

[23] *Id.*

[24] *Id.*

[25] CHRISTIAN M. DIPPON, ECONOMIC VALUE OF INTERNET INTERMEDIARIES AND THE ROLE OF LIABILITY PROTECTIONS 5 (2017), https://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf

CDA protection, the Fourth Circuit questioned whether Cox seriously implemented its repeat infringer policy at all.[26]

Similar trends persist in the EU.[27] In May 2014, the Court of Justice of the European Union ("CJEU") found that individuals have the right, under certain conditions, to ask search engines to remove links with personal information about them.[28] This is known as the "Right to be Forgotten" decision.[29]

More recently, in October 2019, the CJEU in *Eva Glawischning Piesczek v. Facebook Ireland Ltd.* interpreted Article 15 of the EU's e-commerce directive[30] as not precluding the option of an EU member state to order a "host provider" to remove content declared to be unlawful by that member state (Austria), even if such order would have the effect of a worldwide injunction.[31] Enforcement not only occurs through the extraterritorial application of foreign laws but also through self-regulation between intermediaries.[32] Content removal usually occurs when the impugned third-party content is obviously repugnant to public policy.[33] For example, in 2017, Cloudflare[34] withdrew its distributed denial-of-service[35] protection mechanisms previously provided to *The Daily Stormer*,[36] a US neo-Nazi commentary and message board website. Similarly, in 2018, Apple withdrew Tumblr[37]

---

[26] *BMG Rights Mgmt. (US) LLC,* 881 F.3d at 300 (finding that Cox did not implement its liberal 13-strike policy and noting that Cox Communications must have adopted and reasonably implemented … a policy that provides for the termination in appropriate circumstances of subscribers … who are repeat infringers).

[27] *The Right to Be Forgotten (Google v. Spain)*, ELECTRONIC PRIVACY INFORMATION CENTER (June 15, 2020), https://epic.org/privacy/right-to-be-forgotten/.

[28] *Id.*

[29] *Id.*

[30] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, art. 15(1).

[31] Case C-18/18, Eva Glawischnig-Piesczek v. Facebook Ireland Ltd., 2019 E.C.L.I. 458.

[32] Adi Robertson, *Why Banning Hate Sites is so Hard*, THE VERGE (Aug. 6, 2019), https://www.theverge.com/2019/8/6/20757267/8chan-offline-hate-sites-internet-problems-el-paso-texas-dayton-ohio-cloudflare.

[33] *Id.*

[34] *So what is Cloudflare*, CLOUDFLARE, https://www.cloudflare.com/learning/what-is-cloudflare/ (last visited June 28, 2020).

[35] Michelle Castillo, *Cloudfare CEO admits that removing neo-Nazi site because he's in a 'bad mood' is a slippery slope,* CNBC (Aug. 17, 2017), https://www.cnbc.com/2017/08/17/cloudflare-ceo-says-removing-the-daily-stormer-is-slippery-slope.html.

[36] Steven Johnson, *Why Cloudflare Let an Extremist Stronghold Burn,* WIRED (Jan. 16, 2018), https://wired.com/story/free-speech-issue-cloudflare/.

[37] *About,* Tumblr, https://www.tumblr.com/about (last visited June 28, 2020).

from its "App Store" because of the existence of child pornography on Tumblr.[38]

The above examples highlight how, Safe Harbors notwithstanding, intermediaries are increasingly assuming the role of nation-state law enforcers, whether by operation of law, extraterritorial court order, or self-regulation.[39] The need for legal innovation, therefore, is premised on the belief that, for law to keep its vitality and relevance, it should harmonize with global practice and public policy in a manner that gives deference to legal precedent.[40]

III. THE NEW DOCTRINE

A. An Equitable Pedigree

The new doctrine evokes fundamental fairness and flexibility from equity. By equity, I refer to the once distinct laws stemming from the Chancery Court which tempered the harshness of black-letter law.[41] Unconscionability is the fundamental and unifying principle by which equity acts.[42] Here, unconscionability means conduct so obviously unjust, repugnant, or overwhelmingly one-sided so as to render an unfair result that offends our basic notions of justice and morality.[43] The proposed doctrine contains one threshold question (the "portal") that determines whether the Safe Harbors should apply.

B. The Portal Question

Prior to granting an internet intermediary immunity under the Safe Harbors for user-generated content, courts should first consider whether applying the Safe Harbors would, in all circumstances, be unconscionable. The court should ask: would the intermediary be

---

[38] Alex Feerst, *Your Speech, Their Rules: Meet the People Who Guard the Internet*, ONEZERO (Feb. 27, 2019), https://onezero.medium.com/your-speech-their-rules-meet-the-people-who-guard-the-internet-ab58fe6b9231; *see also* Jon Porter, *Tumblr was removed from Apple's App Store over child pornography issues* THEVERGE (Nov. 20, 2018) https://www.theverge.com/2018/11/20/18104366/tumblr-ios-app-child-pornography-removed-from-app-store.

[39] Robertson, *supra* note 32.

[40] *See* Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1461 (2013).

[41] *See generally* P.W. Young, Clyde E Croft, Meg Smith, *On Equity,* (2009); J.D. Heydon, M.J. Leeming, P.G. Turner, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies*, (2014).

[42] Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, 419 (Austl.)*; see also* Legione v Hateley (1983) 152 CLR 406, 444 (Austl.); *see also* Baumgartner v Baumgartner (1987) 164 CLR 137, 148 (Austl.); Mark Pawlowski, *Unconscionability as a Unifying Concept in Equity*, 16 DENNING L. J. 79, 79 (2001).

[43] Pawlowski, *supra* note 41, at 80.

acting unconscionably by failing to take down the impugned content (or a similar question, adapted to the circumstances)?[44] A negative answer favors the application of the Safe Harbors while an affirmative answer does not support application of the Safe Harbors. To help the court determine this "portal" question, a further discretionary factor may be considered.

C. Discretionary Factor: Is There Particularization?

Particularization means that the impugned third-party content targets, or has its most substantial effects on, a particular person or entity.[45] In answering the portal question, courts should ask whether the content is "particularized" or whether it targets the world-at-large. Examples of particularized content include defamation, cyberbullying, and the unauthorized distribution of sexual images ("revenge porn"). Examples of content with an effect on the general public include the incitement of violence or content from terrorist or otherwise criminal organizations inducing broad response. Particularized content favors the application of the Safe Harbors while non-particularized content disfavors the application of Safe Harbors. The rationale behind this "public/private" distinction of the discretionary factor is the subject of Part V.

IV. EXPLAINING THE EQUITABLE BASIS OF THE PORTAL QUESTION

Equity runs silently but influentially in the development of copyright doctrine.[46] Secondary liability in copyright law often involves internet intermediaries[47] and therefore offers an appropriate reservoir from which to draw dormant equitable principles. In two innovative Supreme Court cases involving intermediary liability, the Court has, without expressly stating so, appeared to draw on equitable principles to preclude the otherwise unfair and repugnant results that would stem from a textual, black-letter application of the law.[48]

---

[44] *Id.*

[45] *See generally* Sarah E. Pugh, *Cloudy with a Chance of Abused Privacy Rights: Modifying Third-Party Fourth Amendment Standing Doctrine Post-Spokeo*, 66 AM. U. L. REV. 971, 986 (2017).

[46] Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. R. 1859, 1862 (2015).

[47] DIPPON, *supra* note 25.

[48] *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); *see* ABC Inc. v. Aereo, Inc., 573 U.S. 431 (2014).

A. *Grokster*

Grokster concerned the liability of a peer-to-peer file sharing software ("P2P") which adopted an innovative technological structure.[49] Unlike its predecessors, such as Napster[50] and Aimster,[51] Grokster did not have a central database server.[52] Instead, Grokster allocated "supernodes", which were randomly chosen computers that were connected to the P2P network at a certain time.[53] Once allocated as a supernode, a user's computer acted as an index server that collected information about shared files on other users' computers.[54] This system allowed one user to directly access files on another Grokster user's hard drive without Grokster acting as an intermediary database.[55] A user could simply type in a file name on her computer to initiate a search across all computers connected to the Grokster network and then download a copy of that file to her computer.[56]

By adopting a decentralized service and eschewing any relationship with its users once the software was downloaded, Grokster aimed to elude secondary liability for the P2P sharing of copyrighted materials.[57] A straightforward, black-letter application of secondary liability principles would likely have granted Grokster success.[58] In order to establish vicarious copyright infringement, a plaintiff would have to show: (i) that Grokster had a right and ability to control the distribution of files and (ii) derived a financial benefit from any copyright infringement that was occurring.[59] By design, Grokster was not vicariously liable for want of any direct financial benefit and right and ability to control.[60]

---

[49] *See Grokster, Ltd.,* 545 U.S. at 919.

[50] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

[51] *See in re* Aimster Litig., 334 F.3d 643, 643 (7th Cir. 2003).

[52] *See Grokster, Ltd.*, 545 U.S. at 919–20.

[53] *Id.* at 921.

[54] Chris Sprigman, *Why Grokster and Morpheus Won, Why Napster Lost, and What the Future of Peer-to-Peer File Sharing Looks Like Now*, FINDLAW (May 8, 2003), https://supreme.findlaw.com/legal-commentary/why-grokster-and-morpheus-won-why-napster-lost-and-what-the-future-of-peer-to-peer-file-sharing-looks-like-now.html#bio.

[55] Paul Ganley, *Surviving Grokster: Innovation and the Future of Peer-to-Peer*, 28 EUR. INTELL. PROP. REV. 1, 1 (2006).

[56] *Id.*

[57] *See Grokster Ltd.*, 545 U.S. at 914.

[58] JAMES BOYLE & JENNIFER JENKINS, INTELLECTUAL PROPERTY LAW & THE INFORMATION SOCIETY CASES AND MATERIALS 519–20 (1st ed. 2014).

[59] *See*, *e.g.*, Fonovisa v. Cherry Auction, Inc., 76 F.3d 259, 261–2 (9th Cir. 1996); Gershwin Pub. Corp. v. Columbia Artists Mgmt. Inc., 443 F.2d 1159, 1162–3 (2d Cir. 1971); Hard Rock Cafe v. Concession Serv., Inc., 955 F.2d 1143, 1150 (7th Cir. 1992).

[60] *Grokster*, *Ltd.,* 545 U.S. at 926.

By contrast, Napster[61] and Aimster,[62] similar P2Ps that were found to be infringing, had ongoing relationships with their users, which gave them the right and ability to disable their users' accounts.[63] Grokster also appeared to have sidestepped contributory liability, which requires that Grokster (i) materially contributed to and (ii) had knowledge of the copyright infringement.[64] However, it did not have actual knowledge of specific acts of infringement.[65] Grokster made no material contribution to users' conduct.[66] All it did was distribute software.[67] When users transferred files across the Grokster client, no information was mediated through any computers controlled by Grokster.[68]

By all indications, Grokster had apparently escaped secondary liability.[69] But the Supreme Court looked beyond technological design and focused on the fact that Grokster was invented for the overall purpose of enabling mass copying of music files and circumventing the law.[70] Borrowing from patent law,[71] the Supreme Court enlivened a dormant theory of third-party liability to create a new doctrine of inducement: "[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement . . . and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it."[72]

The Supreme Court found Grokster's exploiting a loophole to facilitate mass infringement to be so unconscionable, occasioning such an inequitable and unjust result on creators and copyright holders, that a new doctrine was justified.[73] In attempting to wipe its hands clean after its users downloaded the Grokster software, Grokster ironically barred itself from coming to equity with clean hands. Ignorance is not bliss; the Supreme Court refused to allow software that deliberately distanced itself from possible infringing activity to benefit from a potential lacuna in the law.

---

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

[62] *In re* Aimster Copyright Litig., 334 F.3d 643, 643 (7th Cir. 2003).

[63] *See id.* at 646–47; *Napster, Inc.*, 239 F.3d at 1012.

[64] *Napster, Inc.*, 239 F.3d at 1019 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

[65] *Grokster, Ltd.*, 545 U.S. at 937.

[66] *Id.* at 923–24.

[67] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (stating that material contribution "stems from the notion that one who directly contributes to another's infringement should be held accountable").

[68] *Grokster, Ltd.*, 545 U.S. at 919–20.

[69] MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1046 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (2004), *vacated*, 545 U.S. 913 (2005).

[70] *Grokster*, *Ltd.*, 545 U.S. at 935.

[71] *Id.* at 935–36.

[72] *Id.* at 930.

[73] *See id.* at 941.

B. ***Aereo***

In *Aereo*, a majority of the Supreme Court ignored an existing, well-accepted doctrine to bypass the harsh effects of the law.[74] Since *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,[75] courts have held that volitional conduct is required to maintain a claim of direct copyright infringement.[76] For example, in *Cartoon Network*,[77] the Second Circuit found that the defendant cable company, which stored television shows on its hard drives at the request of its customers, did not exercise any volitional conduct.[78] Rather, it was the users who exercised volition when they pressed "record" on their home units and initiated an automatic copying process.[79] Notwithstanding these precedents, the result in *Aereo* seemed to sidestep this position altogether.[80]

Aereo was a start-up that provided access to cable television by capturing and streaming over-the-air broadcasts on the internet.[81] Aereo ensured its operations would fit the copyright loopholes determined by *Cartoon Network*.[82] In short, Aereo used thousands of miniature TV antennas to pick up signals from local stations in order to deliver content to users' smart phones, tablets, and computers.[83] Aereo argued that this facilitated "one-to-one" transmissions—one antenna transmitted readily available data to one customer—and therefore was not a "public" performance.[84] Its evasion efforts were so obvious that, when Aereo was eventually brought before the Second Circuit, even Circuit Judge Chin in dissent referred to Aereo as an "over-engineered" "sham" seeking to "take advantage of a perceived loophole in the law."[85]

---

[74] *See* ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 443–44 (2014).

[75] Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1361 (N.D. Cal. 1995).

[76] *Id.* at 1370.

[77] Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008).

[78] *Id.* at 130–31.

[79] *See id.* at 131.

[80] ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 438, 451 (2014).

[81] *Id.* at 435.

[82] ABC, Inc. v. Aereo, Inc., 874 F. Supp. 2d 373, 395 (S.D.N.Y. 2012) (stating that "Aereo has made substantial investments of money and human capital in its system, all in reliance on the assumption that the Second Circuit meant what it said in *Cablevision* rather than what it did not say"), *aff'd sub nom.* WNET Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013), *rev'd sub nom.* ABC, Inc. v. Aereo, Inc., 573 U.S. 431 (2014).

[83] *Aereo, Inc.*, 573 U.S. at 436–37.

[84] *Id.* at 446.

[85] *Aereo, Inc.*, 712 F.3d at 697 (Chin, J., dissenting).

Perhaps the Supreme Court took notice of this dissent, because applying the volitional conduct rule would have compelled a result in favor of Aereo.[86] Volitional conduct would have dictated that it was the users, not Aereo, who exercised volition when those users selected what content to watch.[87] A user's request would initiate an automated process by which the broadcast was transmitted via a dedicated antenna specific to that user.[88] Ultimately, the majority did not address volitional conduct and found Aereo liable on the basis that it violated the public performance right by transmitting copyright television programs to its subscribers.[89]

The Court appeared to have been disinclined to endorse a technology that was designed for the specific purpose of circumventing the law and facilitating infringing activity. The Supreme Court found Aereo's exploitation of a loophole to facilitate the dissemination of copyright programs to be so unconscionable, occasioning such prejudice on creators, the entertainment industry, paying subscribers and copyright holders, that overruling an established doctrine was justified.[90]

V. PARTICULARIZATION: BORROWING FROM PRIVATE INTERNATIONAL LAW

The discretionary limb of the doctrine asks whether the third-party content is targeted at, or has its substantial effect on, a specific person or entity ("particularization"). If the answer is "yes," then a presumption arises favoring the application of the Safe Harbors. If not, then the next question is whether the content is targeted, or whether it has its substantial effect on the public-at-large. This discretionary factor finds its origin in the "targeting" test adopted in private international law for the purpose of determining personal jurisdiction.[91]

A. A Private International Law Pedigree

Given the borderless, aterritorial nature of the internet and the worldwide reach of intermediaries, private international law is a necessary companion to internet intermediary liability.[92] Private

[86] *See id.* at 703.
[87] *Id.*
[88] *Id.*
[89] ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 451 (2014).
[90] *Id.*
[91] Calder v. Jones, 465 U.S. 783, 788–89 (1984).
[92] David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996).

international law underlies this whole inquiry; it is the mortar (procedure) to the bricks (the substantive law, including secondary liability for intermediaries).[93]

Particularization is based on the seminal personal jurisdiction case *Calder v. Jones ("Calder")*,[94] which introduced the "effects" (also known as the "targeting") test.[95] *Calder* involved an allegedly libelous article, authored in Florida, about Jones, who resided in California.[96] The article was published in a magazine that had its largest circulation in California.[97] The California court asserted personal jurisdiction on the basis that California was where harm was suffered—where the "effects" were felt.[98]

Calder is often cited for the proposition that a forum court is capable of asserting personal jurisdiction over a non-resident defendant who commits an intentional act that expressly targets the forum state while knowing that harm is likely to be suffered in the forum state.[99] The "targeting" test also appears in EU private international jurisprudence.[100] In *Football Dataco Ltd v. Sportradar GmbH,*[101] the CJEU held that a U.K. court had personal jurisdiction over a non-resident defendant (a German sports broadcasting company) because the defendant knew that its data was likely to be accessed by people in the UK.[102]

B. Why "Particularization" is Appropriate

Particularized content affects only one person or entity and therefore carries more of a private character, enlivening remedies specific to the wrong occasioned.[103] For example, revenge porn is particularized

---

[93] DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET (Kluwer Law International B.V. ed., 2016) (stating that "private international law should be viewed as the mortar that surrounds the bricks")

[94] *See Calder,* 465 U.S. at 789.

[95] *Id.* at 788–89.

[96] *Id.* at 788.

[97] *Id.* at 784.

[98] *Id.* at 789.

[99] *Id.* at 791.

[100] *E.g.* Case C-173/11, Football Dataco Ltd. v. Sportradar GmbH, 2012 E.C.R. 642, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0173.

[101] *Id.*

[102] *Id.* at ¶ 42. The CJEU considered that the content (English and Scottish football league matches) was likely to interest U.K. audiences and that the football data was in English. *Id.*

[103] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). For example, Article III standing requires a party to show, *inter alia*, a particularized injury—one

because it is typically disseminated by the perpetrator to harm another person.[104] Allowing the Safe Harbors to operate in these circumstances is less objectionable because of the availability of alternative remedies.[105] Forty-six states, the District of Columbia ("D.C.") and one territory have laws addressing revenge porn.[106] In July 2019, New York criminalized[107] the unlawful dissemination or publication of an intimate image and created a private right of action,[108] which provides remedies like injunctive relief, punitive damages, compensatory damages and costs and attorneys' fees.[109] Other states have looked to common law doctrines such as defamation, invasion of privacy, intentional infliction of emotional distress, defamation, libel, harassment/stalking, and misappropriation to prosecute revenge porn.[110]

By contrast, information that may affect the public at large attracts higher stakes[111] and therefore disfavors Safe Harbor protection and favors of intervention. To the extent that intermediaries control the critical infrastructure of the internet and instantaneous everyday communications, they may be regarded as administering a public function in tandem with, or traditionally operated by, the state.[112] For example, in 2018, violence among two religious sects in Sri Lanka was fueled by social media posts.[113] The Sri Lankan government ordered its

---

which is individualized to the defendant—that is likely to be redressed by a favorable decision. *Id.*

[104] *See, e.g.*, People v. Mowring, 105 N.Y.S.3d 290, 295 (N.Y. Crim. Ct. 2019) (denying a motion to dismiss and upholding N.Y.C. Admin. Code § 10-180(b)(1) which prohibits the unauthorized disclosure of intimate images with intent to harm the depicted individual).

[105] *See infra* notes 105–13 and accompanying text.

[106] *46 States + DC + One Territory Now Have Revenge Porn Laws*, CYBER CIVIL RIGHTS INITIATIVE, https://www.cybercivilrights.org/revenge-porn-laws/ (last visited June 23, 2020).

[107] S.B. 1719C, 203d Leg., Reg. Sess. (N.Y. 2019) (codified at N.Y. PENAL LAW § 245.15 (LexisNexis 2019)).

[108] N.Y. PENAL LAW § 245.15.

[109] *Id.*

[110] Katherine Gabriel, *Feminist Revenge: Seeking Justice For Victims of Nonconsensual Pornography Through "Revenge Porn" Reform*, 44 VT. L. REV. 849, 853, 861–62, 865 (2020).

[111] *See infra* Part VI.

[112] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1934 (2019) (holding that, under the state-action doctrine, the operation of public access television channels on a cable system does not alone transform a private entity into a state actor). In Justice Kavanaugh's 5-4 majority opinion, he stated, "merely hosting speech by others is not a traditional, exclusive public function [reserved to the State] and does not alone transform private entities into state actors subject to First Amendment constraints." *Id.* at 1930.

[113] Amanda Taub & Max Fisher, *Where Countries are Tinderboxes and Facebook Is a Match*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/world/asia/facebook-sri-lanka-riots.html.

telecommunications companies (intermediaries) to temporarily block access to Facebook and other social media platforms.[114]

While I stop short of suggesting that intermediaries are analogous to states or even that they wholly perform a state-like function, it is undeniable that intermediaries have great influence in the global information exchange.[115] Intermediaries give access to, host, transmit, and index content among users throughout the world.[116] They provide infrastructure for the internet to work, such as data centers, content delivery networks, cloud computing technology, social media platforms, advertising, and e-commerce.[117] Accordingly, that immense influence arguably imposes upon internet intermediaries a positive responsibility to mitigate public harm where they have the ability to so do.

VI. TESTING THE DOCTRINE AND EXPOSING COUNTERARGUMENTS

The following two cases have been chosen as case studies for testing the doctrine. The first case exemplifies how the new doctrine interacts with a human sex trafficking case, which, while having particularized effects on one person, nonetheless, due to the very subject matter, implicates a greater public concern for the preservation of human rights. The second case grapples with a choice between recognizing a foreign judgment to the detriment of the Safe Harbors or applying the Safe Harbors while appearing to shun international comity.

A. *M.A. v. Village Voice Media*

In *M.A. v. Village Voice Media ("Village Voice"),*[118] Village Voice owned Backpage, which operated a website at the address Backpage.com.[119] Backpage.com was a classified advertising website that had become a marketplace for buying and selling sex.[120] The

---

[114] Michael Safi & Amantha Perera, *Sri Lanka blocks social media as deadly violence continues*, THE GUARDIAN (Mar. 7, 2018), https://www.theguardian.com/world/2018/mar/07/sri-lanka-blocks-social-media-as-deadly-violence-continues-buddhist-temple-anti-muslim-riots-kandy.

[115] The Economic and Social Role of Internet Intermediaries, OECD 1, 6 (Apr. 2010), https://www.oecd.org/internet/ieconomy/44949023.pdf.

[116] *Id.*

[117] *Id.*

[118] M.A. v. Vill. Voice Media Holdings, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

[119] *Id.* at 1043.

[120] Dan Whitcomb, *Exclusive: Report gives glimpse into murky world of U.S. prostitution in post-Backpage era*, REUTERS (Apr. 11, 2019), https://www.reuters.com/article/us-usa-prostitution-internet-exclusive/exclusive-report-gives-glimpse-into-murky-world-of-us-prostitution-in-post-backpage-era-idUSKCN1RN13E.

plaintiff, M.A., a minor, was trafficked by Latasha Jewell McFarland, who took nude photographs of M.A. and paid Backpage to incorporate these photographs into sex advertisements.[121] She utilized Backpage.com in order to solicit adult male customers to whom she transported M.A. for the purposes of paid sexual encounters.[122] M.A. sought to hold Backpage and Village Voice liable for aiding and abetting her trafficking and prostitution.[123]

M.A.'s attempts to circumvent the CDA were rejected.[124] The court found that Backpage was just like any other website that posted content that led to an innocent person's injury.[125] Aiding and abetting required that Backpage would have shared the abuser's specific intent to commit the sexual offenses, which it did not.[126] M.A. argued that Backpage was in the business of shrouding illegal sex services advertisements under the veil of legality.[127] Mere profit, however, was not enough to circumvent the CDA.[128] According to the court, to except Backpage from CDA based on how Backpage structured its website to increase profits would be to create a for-profit exception.[129]

The court found that Backpage is a website operator[130]—it did not do more than operate a website,.[131] It did not matter to the court that Backpage had different prostitution categories on its website.[132] Just because an "adult" category is created does not impose liability upon Backpage for ads posted in that category.[133] Backpage created the categories, but it was its users that created the content of the ads and selected the categories under which those ads would appear.[134] Backpage was merely a neutral conduit for that content.[135] Yet asserting liability on Backpage would not have been so groundbreaking—the Supreme Court had done so on other occasions,

[121] *Vill. Voice Media Holdings*, 809 F. Supp. 2d at 1043.
[122] *Id.* at 1044.
[123] *Id.* at 1053.
[124] *Id.* at 1048–50.
[125] *Id.* at 1058.
[126] *Id.* at 1054.
[127] *Id.* at 1044.
[128] *Id.* at 1050.
[129] *Id.*
[130] *Id.* at 1052.
[131] *Id.* at 1049.
[132] *See id.*
[133] *Id.*
[134] *Id.* at 1049–1050.
[135] *SESTA is flawed, but the debate over it is welcome*, THE ECONOMIST (Sept. 23, 2017), https://www.economist.com/leaders/2017/09/23/sesta-is-flawed-but-the-debate-over-it-is-welcome.

such as in *Grokster* and *Aereo*—where "mere conduits" were held liable.[136]

Applying the new doctrine to this case, the court would ask whether it was unconscionable for Backpage to have displayed the advertisements containing photographs of the plaintiff. Backpage had been widely accused of knowingly enabling users to post advertisements relating to prostitution and human trafficking involving minors.[137] It was popularly known as the largest hub for sex on the internet.[138] By many indications, Backpage.com was probably set up to be a sort of internet red light district designed to make illegal activity appear legal.[139] The adult section of Backpage's website accounted for 15% of Backpage's listings but over 90% of its profit.[140] Allowing the operators of Backpage to take refuge under the CDA would have effectively allowed those who catered to sexual predators to carry on their businesses.[141]

It would have been easy to find that it was unconscionable for Backpage to profit off advertisements relating to the trafficking of minors. A company that derived most of its profits from such advertisements would likely have knowledge or constructive knowledge of the nature of the activities it was advertising. In the circumstances, it was arguably unconscionable for a website to exist for the predominant purpose of advertising such morally repugnant activity that also constitutes serious contravention against the human rights of girls.[142] Yet a literal application of the discretionary factor would weigh in favor of applying the CDA. This case only concerns the interests of one person, M.A.[143] Based on the theory outlined in Part V above, private remedies should be available to M.A. Indeed, Latasha Jewell McFarland, the woman who procured M.A. for

---

[136] *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); ABC., Inc. v. Aereo, Inc., 573 U.S. 431 (2014).

[137] Charlie Savage & Timothy Williams, *U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution*, NEW YORK TIMES (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/us/politics/backpage-prostitution-classified.html.

[138] Christine Biederman, *Inside Backpage.com's Vicious Battle with the Feds*, WIRED (June 18, 2019), https://www.wired.com/story/inside-backpage-vicious-battle-feds/.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] Convention on the Elimination of All Forms of Discrimination Against Women, Art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13.

[143] Michelle Goldberg, *Village Voice Media: Sex Slaves in the Classified*, DAILY BEAST (Apr. 24, 2017), https://www.thedailybeast.com/village-voice-media-sex-slaves-in-the-classified.

prostitution, was indicted for sex trafficking.[144] Her sentence, which included five years' penal servitude,[145] involved some $16,000 in damages, including the future costs of counseling.[146] Perhaps it was for this reason that M.A. sought damages against a wealthier defendant—Backpage.

To hold Backpage accountable under the new doctrine would require overcoming the particularized nature of this case. Although this case, on its face, concerns the private interests of one plaintiff, M.A., it carries more of a public concern. The community has an interest in both terminating the exploitation of people through trafficking and ending the sexual exploitation of girls. The case instituted by M.A. is only one of many cases levied against Backpage regarding the exploitation of girls.[147] Although this advertisement concerning M.A. was particularized, there were many more like it—so many more that law enforcement officers were eventually compelled to seize and finally shut down Backpage's operations in 2018, some seven years after this case.[148] Under my unconscionability approach, it would have been open to the court to decline the application of the CDA on the basis that doing so would have effectively been complicit in allowing the subsistence of a platform for predators to pay for sex with minors.

B. *Google v. Equustek*

In *Google v. Equustek,* Equustek, a Canadian company that manufactured complex networking devices,[149] alleged that Datalink, one of its former distributors, had used Equustek's trade secrets to make and sell a counterfeit product.[150] In September 2012, Google refused Equustek's request to de-index Datalink websites from Google's search results.[151] After a Canadian court granted Equustek's request for injunctive relief against Datalink, Google blocked Datalink websites from appearing in its Canada-specific search results.[152] However,

[144] *See id.*
[145] *Id.*
[146] *Vill. Voice Media Holdings*, 809 F. Supp. 2d at 1043.
[147] Goldberg, *supra* note 142.
[148] Emily Witt, *After the Closure of Backpage, Increasingly Vulnerable Sex Workers Are Demanding Their Rights*, THE NEW YORKER (June 8, 2018), https://www.newyorker.com/news/dispatch/after-the-closure-of-backpage-increasingly-vulnerable-sex-workers-are-demanding-their-rights.
[149] Google Inc. v Equustek Sol. Inc., 2017 SCC 34 (Can.).
[150] *Id.*
[151] *Id.*
[152] Google Inc. v. Equustek Sol. Inc., 2014 BCSC 1063 (Can.).

Google did not remove Datalink websites from its search results globally.[153]

Equustek sought an order in Canada requiring Google to de-index Datalink websites from its global search results.[154] The Supreme Court of British Columbia so ordered, and the Supreme Court of Canada affirmed in 2017.[155] Google filed in the Northern District of California to argue that the Canadian Supreme Court order conflicts with the First Amendment and section 230 of the CDA.[156] The Northern District of California granted Google a preliminary injunction to prevent enforcement of the Canadian order in the United States.[157]

In applying the portal test to this case, we might first consider the strongest argument in favor of Equustek. Google's failure to remove Datalink websites is unconscionable to the extent that Google is complicit in propagating the alleged exploitation of Equustek's trade secrets. Cutting against Equustek, however, is the application of the particularization factor. The content sought to be de-indexed (website marketing products arising from the misappropriation of Equustek's trade secrets) would only harm only Equustek.[158]

Herein lies the new doctrine's shortcoming. The particularization factor is premised on the theory that individual harm should have specific avenues for redress. However, there is no trade secret specific legislation in Canada.[159] Trade secret violations are usually prosecuted through breach of confidence, breach of fiduciary duty, breach of contract, or copyright infringement.[160] There is not necessarily a clear path to an alternative remedy for particularized content.

This shortcoming aside, the application of the proposed doctrine would likely find in favor of applying the Safe Harbors, which comports with the California court's decision.[161] This is not a case where Google's non-action in failing to de-index Datalink websites would occasion such a great injustice on the public so as to offend basic notions of justice and morality.[162]

---

[153] *See id.*

[154] Google Inc. v. Equustek Sol. Inc., 2017 SCC 34 (Can.).

[155] *Id.*

[156] Google LLC v. Equustek Sol. Inc., No. 5:17-cv-04207-EJD, 2017 WL 5000834, at *2 (N.D. Ca. Nov. 2, 2017).

[157] *Id.* at *4.

[158] *Id.* at *3.

[159] Michael Crichton & Will Boyer, *Trade Secret Enforcement in Canada: How Rights Holders Can Secure Justice*, GROWLING WLG (Jan. 22, 2019), https://gowlingwlg.com/en/insights-resources/articles/2019/trade-secret-enforcement-in-canada/.

[160] *Id.*

[161] *See Equustek Sol. Inc.*, 2017 WL 5000834, at *4.

[162] *Id.*

VII. COUNTERARGUMENTS

Although many counterarguments are conceivable, two strands of objections have started to take shape: (a) equity's ambiguity and (b) particularization's limits.

A. Equity's Ambiguity

The application of the doctrine to *Village Voice*[163] demonstrates how unconscionability could be applied both ways with no clear mechanism for a bright line resolution[164]—advertising the trafficking of minors is unconscionable but it is equally unconscionable for Backpage, who did not make the content, to be liable for third-party activity.[165] Equity is so flexible and amorphous that it could allow results-oriented courts to over-regulate intermediaries and threaten the global public forum of ideas.[166]

Critics of my deriving equity from secondary copyright liability might also suggest that equity is an inappropriate basis for the expansion of secondary liability doctrine. Tort law offers a more intuitive repository from which to draw inspiration. After all, secondary liability came from tort liability.[167] Contributory liability is based on the tort principle of enterprise liability and imputed intent[168] while vicarious liability is based on the doctrine of *respondeat superior*.[169] Alternatively, the same critic might argue that economic principles, not equity, were more influential in cases such as *Aereo*[170] and *Grokster*.[171] The economist would argue that, in both cases, the Supreme Court—whether consciously or not—adopted a Coasean agenda,[172] believing that, in order to reach an economically efficient outcome, bargaining power should first vest in copyright holders.[173] Any product or new technology that seeks to whisk that initial bargaining power away from

[163] *See* discussion *supra* Part VI(a).
[164] *Id.*
[165] *Id.* at 1050.
[166] *See supra* notes 7–8 and accompanying text.
[167] Michael J. McCue, *Secondary Liability for Trademark and Copyright Infringement*, LEWIS AND ROCA LLP, https://www.lrrc.com/files/Uploads/Documents/M.%20McCue%20Utah%20Cyber%20Symposium%20SECONDARY%20LIABILITY%20Sept%2023.pdf (last visited June 22, 2020).
[168] *Id.*
[169] *Id.*
[170] ABC, Inc. v. Aereo, Inc., 573 U.S. 431 (2014).
[171] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
[172] *See* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1, 1 (1960).
[173] *See generally*, Lois F. Wasoff, *The Aereo Decision—Exploring the Implications*, WORLD INTELL. PROP. ORG. (Sept. 2014), https://www.wipo.int/wipo_magazine/en/2014/05/article_0003.html.

copyright holders threatens the bargaining process necessary to achieve the most effective economic allocation of resources.[174]

B. Particularization's Limits

The particularization test is grounded on two faulty premises. First, the analysis of *Google v. Equustek*[175] exposed the error in believing that avenues for redress are always available for individual harm, as demonstrated by the trade secret violations example in Canada.[176] In the United States, consider the example of cyberbullying. While many states, such as New York, offer specific anti-bullying laws and policies,[177] many do not.[178] For example, in 2013, two minor girls were charged with felonies for cyberbullying a 12-year-old girl, Rebecca Sedwick, who committed suicide.[179] The perpetrators were charged with a class-three felony under Florida law,[180] which is approximately as serious as stealing a car or driving under the influence.[181]

Similarly, in 2009, Lori Drew, a 50-year-old mother of a teenager, decided to make a fake Myspace profile in order to cyberbully her daughter's friend, Megan Meier.[182] Lori used that hoax profile to first gain Megan's affection before psychologically manipulating her.[183] The last message sent was that the world "would be a better place without you."[184] Megan, aged 13, hanged herself.[185] Without specific laws governing cyberbullying, Lori was prosecuted under the Computer Fraud and Abuse Act (the "CFAA").[186] For Lori to have violated the CFAA, the court had to be persuaded that she accessed a computer

[174] *See generally*, Jim Chappelow, *Pareto Principle,* INVESTOPEDIA (Aug. 29, 2014), https://www.investopedia.com/terms/p/paretoprinciple.asp.

[175] Google Inc. v Equustek Sol. Inc., 2017 SCC 34 (Can.).

[176] *Id.*

[177] N.Y. EDUC. LAW § 2801(a).

[178] Sameer Hinduja, Ph.D. & Justin W. Patchin, Ph.D., *State Bullying Laws*, CYBERBULLYING RESEARCH CTR., 1 https://cyberbullying.org/bullying-laws (last updated Nov. 2018).

[179] Steve Almasy et al., *Sheriff: Taunting post leads to arrests in Rebecca Sedwick bullying death*, CNN (Oct. 16, 2013, 8:53 AM), https://www.cnn.com/2013/10/15/justice/rebecca-sedwick-bullying-death-arrests/index.html.

[180] *Id*; *see also* FLA. STAT. § 784.048(3) (2019).

[181] *Compare* FLA. STAT. § 784.048(3) *with* FLA. STAT. § 775.083 (2019).

[182] Kim Zetter, *Judge Acquits Lori Drew in Cyberbullying Case, Overrules Jury*, WIRED (July 2, 2009, 3:04 PM), https://www.wired.com/2009/07/drew-court/.

[183] *Id.*

[184] Kim Zetter, *Lori Drew's Daughter 'Devastated' by Friend's Suicide but Doesn't Feel Responsible*, WIRED (Nov. 24, 2008) https://www.wired.com/2008/11/defendants-daug/.

[185] *See* United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

[186] *Id.*

without authorization or exceeded authorized access of a computer.[187] The court found that, while Lori's conduct in creating a hoax Myspace account may have breached Myspace's terms of use, it did not constitute unauthorized access within the meaning of the CFAA.[188] This result was hardly surprising and the Court arrived at the correct conclusion based on application of the law.[189] In this case, there was simply no purpose-built redress for the particularized harm in question.[190]

Second, critics may take issue with the particularization test's assumption that particularized content produces individualized harm, while publicly directed content brings public harm. Consequently, there should be greater motivation to protect the interests of many as opposed to the interest of one. Those critics would therefore find the particularization premise objectionable from many angles. For one, it is morally distasteful to suggest that the interests of any one person are subordinate to the interests of others, regardless of grouping. This objection was exemplified in the analysis of *Village Voice*,[191] where, although clearly concerning the interests of one person, M.A., that case was representative of a larger humanitarian problem of public interest. The problem was clearly so serious that it compelled federal authorities to later seize and shut down the intermediary.[192]

The opposite of the particularization presumption is equally, if not more compellingly, arguable: intermediaries should not be liable where the victims are unknown, speculative, or a vague class. How can an intermediary, or anyone, be liable if the alleged victims cannot even be exactly identified? On this view, the idea that the general public might be the victim of third-party content constitutes an irrational basis for ascribing liability to an intermediary whose greatest wrong was simply acting as a mere conduit of information. Accordingly, and contrary to my formulation of particularization, the fact that a victim is an identifiable person might actually give greater, not less, basis for holding intermediaries liable.

---

[187] *Id.* at 457.
[188] *See id.* at 467.
[189] *See id.*
[190] *See id.*
[191] *See* M.A. v. Vill. Voice Media Holdings, 809 F. Supp. 2d 104 (E.D. Mo. 2011).
[192] Michelle Goldberg, *Village Voice Media: Sex Slaves in the Classified*, DAILY BEAST (Apr. 24, 2017), https://www.thedailybeast.com/village-voice-media-sex-slaves-in-the-classified.

VIII. REJOINDER AND CONCLUSION: EQUITY'S CONTINUING ROLE IN THE FUTURE

The counterargument presented immediately above regarding particularization's "public/private" divide is compelling, and it exposes the greatest weakness of the doctrine. My rejoinder is to remind the critic that the basis for the particularization test is not primarily that large scale wrongs are more morally repugnant than wrongs to individuals, rather, it is chiefly based on the idea that internet intermediaries exert so much control on the critical infrastructure of the internet that they almost administer a state-like function.[193] Accepting that a state owes its duty first to the public interest would illustrate why the particularization tests helps distinguish those cases in which an internet intermediary—exerting such great control over the internet—would be conscience bound to exercise greater responsibility. On balance, however, I concede that this rejoinder does not furnish a complete rebuttal, and I do not yet have a clear solution. Further research needs to be done to resolve the question of how private versus public harm should be balanced.

In response to any suggestion that it was inappropriate to draw equity from *Grokster*[194] and *Aereo,*[195] and even other secondary copyright liability cases, equity has always operated quietly in the creation of copyright doctrine.[196] Equity features prominently in fair use,[197] and some may even insist that it is an invisible "fifth" fair use factor.[198] For example, in *Shepard Fairey v. Associated Press*, better known as the "Obama Hope Poster" case,[199] the artist who made the

[193] Michal Lavi, *Online Intermediaries: With Power Comes Responsibility*, JOLT DIGEST (May 11, 2018), https://jolt.law.harvard.edu/digest.

[194] *See generally* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[195] *See generally* ABC, Inc. v. Aereo, Inc., 573 U.S. 431 (2014).

[196] *See e.g.* NXIVM Corp. v. Ross Inst. 364 F.3d 471, 475 (2d Cir. 2004) (stating in *obiter* that the "propriety of the defendant's conduct" is to be given some weight); *see also* Fisher v. Dees, 794 F. 2d 432, 436–37 (9th Cir. 1986) (stating that the application of fair use is premised on "good faith" and "fair dealing" and involves the "propriety of the defendant's conduct"); *see also* Iowa State Univ. Res. Found. v. ABC, 621 F.2d 57, 60–61 (2d Cir. 1980); Shell v. City of Radford, 351 F.Supp. 2d 510 (W.D.Va. 2005); *see also* Shyamkrishna Balganesh, & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859 (2015); *see also* Lloyd L. Weinreb, Comment,, *Fair's Fair: A Comment on the Fair Use Doctrine,* 103 HARV. L .REV. 1137 (1990).

[197] Rich Stim, *Measuring Fair Use: The Four Factors*, STAN. U. LIBRARIES, https://fairuse.stanford.edu/overview/fair-use/four-factors/#the_fifth_fair_use_factor_are_you_good_or_bad (last visited June 29, 2020).

[198] *Id.*

[199] Randy Kennedy, *Shepard Fairey and The A.P. Settle Legal Dispute,* N.Y. Times (Jan. 12, 2011).

poster, Fairey, was accused of appropriating an Associated Press photograph taken by freelance photographer Mannie Garcia.[200] Throughout preliminary arguments, Associated Press argued that the defendant did not come to equity with "clean hands" (*one who seeks equity must do equity*) because he had tampered with evidence.[201] Accordingly, fair use was denied, and Shepard Fairey received a $25,000 penalty.[202]

Equity also subsists in copyright estoppel,[203] which is the idea that once a creator holds out his work as factual, whether or not it is actually factual, then that information should be treated as factual.[204] Facts themselves do not enjoy copyright protection by virtue of the idea/expression dichotomy.[205] In *Nash v. CBS ("Nash")*,[206] the author-plaintiff, Nash, had written books about the death of John Dillinger.[207] Nash's work challenged the popular understanding that John Dillinger had died during a police shootout.[208] Although Nash's "alternative" reconstruction of history had not won support among historians, CBS felt it was worthy of television production.[209]

Nash claimed that CBS infringed on his copyright by making a television show based on his books.[210] The court found that copyright subsisted in Nash's expression but not his ideas—which had been held out as historical facts.[211] Having represented his historical recount as factual, Nash was estopped from asserting otherwise.[212] Doing so would cause detriment to those who have relied on the "facts".[213] On a broader public policy level, if information held out as factual were copyrightable, then that reality would stunt the advancement of science because people would not be able to build on those facts.[214]

---

[200] Complaint at 1, Shepard Fairey v. Associated Press, (S.D.N.Y. Feb. 9, 2009) No. 09-01123; *see also id.*

[201] William W. Fisher III et al., *Reflections on the Hope Poster Case,* 25 Harv. J.L. & Tech. 244, n.100 (2012).

[202] David Ng, *Shepard Fairey sentenced to probation, fine in Obama 'Hope' case*, L.A. TIMES (Sept. 8, 2012), https://www.latimes.com/entertainment/arts/la-xpm-2012-sep-08-la-et-cm-shepard-fairey-20120908-story.html.

[203] *See generally* HGI Associates, Inc. v. Westmore Printing Co., 427 F.3d 867, 875 (11th Cir. 2005).

[204] *See* Houts v. Universal City Studios, Inc., 603 F. Supp. 26, 28 (C.D. Cal. 1984).

[205] *See, e.g. id.*

[206] Nash v CBS, Inc., 899 F. 2d 1537, 1538 (7th Cir. 1990).

[207] *Id.*

[208] *Id.*

[209] *Id.* at 1539.

[210] *Id.*

[211] *Id.* at 1541.

[212] *Id.*

[213] *Id.*

[214] *See generally, id.* at 1542.

While equity may appear to give rise to ambiguous situations, its flexibility is advantageous, even necessary, for dealing with the dynamic technology of the internet. The proposed doctrine applied to ambiguous situations such as *Village Voice*[215] constitutes only one example of how equity might shape law to suit the circumstances.[216] But equity is equally adaptable to potential secondary liability problems occasioned by other emerging technologies to which no legal problems have yet arisen.

For example, Kleros, a dispute resolution platform built on top of Ethereum[217] that uses blockchain technology to "arbitrate" disputes,[218] allows randomly selected "jurors" (who are ordinary people that use Ethereum) to determine blockchain disputes.[219] Jurors are financially incentivized to decide the outcome of the dispute based on consensus.[220] For example, a bilateral breach of contract dispute for goods sold over Ethereum may be submitted to Kleros, which will randomly appoint, say, five jurors. These jurors had previously paid a deposit to Kleros. If the vote comes out three to two in one party's favor, then the three jurors who decided with the majority will be rewarded with cryptocurrency. The two dissenting jurors will be penalized by losing their deposits.[221] It appears that Kleros provides no room for reason, due process, advocacy or even legal ethics. Rather, ethics is defined by consensus—what is right is what the majority chooses. At this point, no legal issue has been made before the courts.[222] However, it is not hard to see how this model may in the future lead to outcries of lack of due process. In an internet epoch where anonymity and decentralization are celebrated,[223] and where traditional notions of justice and fairness are progressively eschewed,[224] equity will fill the harsh gaps left by rapidly advancing internet technology.

I have proposed a new doctrine comprising of two successive limbs: (i) the portal question, which asks whether an internet intermediary, in refraining from removing content, would be acting unconscionably and (ii) whether the third-party content was particularized to a single person

[215] M.A. v. Vill. Voice Media Holdings, 809 F. Supp. 2d 1041 (E.D. Mo. 2011).

[216] *See* discussion *supra* Section V.

[217] *See What is Ethereum?,* ETHEREUM.ORG, https://ethereum.org/what-is-ethereum/ (last updated May 13, 2020). Ethereum is an open source, public, blockchain based computing platform and operating system. *Id.*

[218] CLÉMENT LESAEGE ET AL., KLEROS 1 (Short Paper v.1.0.7 2019), https://kleros.io/whitepaper_en.pdf.

[219] *Id.* at 5.

[220] *Id.* at 7.

[221] *Id.* at 4.

[222] *See id.*

[223] *Id.*

[224] *Id.*

or entity. A finding of particularization favors the application of Safe Harbors, while a lack of particularization (publicly directed content) disfavors the application of the Safe Harbors. However, this approach has several shortcomings. First, considering equity's ambiguity, it is doubtful that unconscionability is a suitable touchstone for a new doctrine. In rejoinder, I have suggested that equity's advantage for emerging technologies is its ambiguity. Second, borrowing from secondary copyright liability, tortious liability, or economic principles rather than the dormant equitable doctrine of unconscionability may have been more appropriate. In reply, I have canvassed the fundamental presence of equity in the creation copyright doctrine. Third, the particularization test is limited to the extent it espouses the notion that public harm warrants greater intervention than does individual harm. Wrongs committed against individuals over the internet do not always have clear redress (as in the case of cyberbullying and trade secrets);[225] the particularization test might preclude victims from seeking assistance from the only entity who might be able to help—the internet intermediary with the near-monopolistic power to manipulate the infrastructure of the internet.[226] This counterargument exposes the doctrine's greatest shortcoming, and it is necessary to conduct further research to resolve public/private harm associated with the particularization test. Shortcomings notwithstanding, I maintain that the new doctrine is a compelling prototype for embracing problems posed by the intersection of internet intermediaries, emerging technology, and private international law in a global economy.

[225] *See supra* notes 169–183 and accompanying text.
[226] *See* discussion *supra* Part VIII.