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## NOTE

### CENTRAL BANK AND INTELLECTUAL PROPERTY

Is there a legal basis for imposing secondary liability for violations of federal intellectual property rights? A federal statute authorizes secondary liability for patent infringement,<sup>1</sup> but all that undergirds secondary copyright and trademark liability is a mix of federal common law and liberally construed statutory silence.<sup>2</sup> Consider the Supreme Court's recent, unanimous decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,<sup>3</sup> which approved of secondary copyright liability despite acknowledging that "[t]he Copyright Act does not expressly render anyone liable for infringement committed by another."<sup>4</sup> Likewise, in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*,<sup>5</sup> the Court endorsed secondary liability for trademark infringement without locating a basis for it in the trademark statute.<sup>6</sup> The modern resurgence of textualism has supposedly rendered such implied causes of action an endangered species,<sup>7</sup> but these holdings suggest that secondary intellectual property liability is impervious to textualism.

Another decision suggests statutory text matters. In 1994, the Court held in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*<sup>8</sup> that a party cannot be liable for aiding and abetting the violation of a federal statute if there is no statutory authority for such liability.<sup>9</sup> *Central Bank* involved a securities statute. Yet its reasoning is of such breadth that courts have extracted from it a general rule: "[S]tatutory silence on the subject of secondary liability means there is none."<sup>10</sup> This rule clashes with cases like *Grokster* and *Inwood*, but courts and commentators have mostly overlooked the conflict.<sup>11</sup>

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<sup>1</sup> See 35 U.S.C. § 271(b)–(c), (f) (2006).

<sup>2</sup> See John T. Cross, *Contributory Infringement and Related Theories of Secondary Liability for Trademark Infringement*, 80 IOWA L. REV. 101 (1994); Jay Dratler, Jr., *Common-Sense (Federal) Common Law Adrift in a Statutory Sea, or Why Grokster Was a Unanimous Decision*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 413 (2006).

<sup>3</sup> 545 U.S. 913 (2005).

<sup>4</sup> *Id.* at 930 (alteration in original) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984)) (internal quotation marks omitted).

<sup>5</sup> 456 U.S. 844 (1982).

<sup>6</sup> *Id.* at 853–54.

<sup>7</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (“[I]mplied causes of action are disfavored . . . .”); *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001). See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

<sup>8</sup> 511 U.S. 164 (1994).

<sup>9</sup> *Id.* at 191. The Supreme Court reaffirmed *Central Bank* in 2008. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768–69 (2008).

<sup>10</sup> *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc).

<sup>11</sup> One court and one commentator have analyzed secondary intellectual property liability in light of *Central Bank*. See *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1429–

Should intellectual property be exempt from *Central Bank*'s rule? Or is this clash an unwitting doctrinal tension that courts will (and should) smooth out once they realize it exists?

This Note argues that *Central Bank* should apply to intellectual property, and it assesses what impact *Central Bank* would have if so applied. Part I examines *Central Bank*'s reasoning and how courts have fashioned from it a general rule governing secondary liability under federal statutes. Part II explains why *Central Bank*'s rule should apply to intellectual property. Considerations of predictability, the separation of powers, and relative institutional competencies all support the *Central Bank* approach. Particular attributes of intellectual property (such as its importance to technological development) magnify the force of these considerations, making it especially appropriate to subject intellectual property to *Central Bank*'s global rule. Part III applies *Central Bank* to the four main types of federal intellectual property violations: patent, copyright, and trademark infringement; and trademark dilution. This Note concludes that *Central Bank* (1) does not affect contributory patent liability, (2) helps identify a statutory basis for contributory copyright liability that *Grokster* failed to see, (3) erodes the basis for contributory trademark infringement liability, thereby suggesting that *Inwood* should be overturned, and (4) precludes recognizing a cause of action for contributory trademark dilution.

A brief note on terminology. There are two types of secondary intellectual property liability. The first — “vicarious liability” (akin to respondeat superior) — is unaffected by *Central Bank*.<sup>12</sup> This Note, therefore, focuses solely on the second type — “contributory liability” — which is essentially the intellectual property label for civil aiding and abetting liability.<sup>13</sup> This type of liability has two elements: scienter (knowledge or intent) plus contribution (assistance or inducement).<sup>14</sup> A party is contributorily liable (or aids and abets) when he,

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33 (3d Cir. 1994); John T. Cross, *Contributory and Vicarious Liability for Trademark Dilution*, 80 OR. L. REV. 625, 669–75 (2001). Both discussions are thoughtful, but limited to trademark law.

<sup>12</sup> This point is borne out by two unanimous Supreme Court decisions post-*Central Bank* that endorsed implied vicarious liability without raising a *Central Bank* objection. See *Meyer v. Holley*, 537 U.S. 280 (2003); *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588 (2001); see also *Alvarado v. Morgan Stanley Dean Witter, Inc.*, 448 F. Supp. 2d 333, 338–39 (D.P.R. 2006) (reasoning that *Wharf* demonstrates that *Central Bank* does not affect vicarious liability). Lower courts make the point more explicitly. See, e.g., *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008); *Alvarado*, 448 F. Supp. 2d at 337 (collecting cases).

<sup>13</sup> See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (linking civil aiding and abetting with contributory copyright infringement); *AT&T*, 42 F.3d at 1432 (same with contributory trademark infringement); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 727 (D. Utah 1973) (same with contributory patent infringement); Charles W. Adams, *Indirect Infringement from a Tort Law Perspective*, 42 U. RICH. L. REV. 635 (2008).

<sup>14</sup> See *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231, 1244–45 (11th Cir. 2007) (contributory trademark liability); *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494

she, or it *knowingly contributes to* or *intentionally induces* another's infringement of an intellectual property right (or another's tort). There are different versions of contributory liability,<sup>15</sup> but the variations are irrelevant to the *Central Bank* analysis. So this Note uses "contributory liability" as an umbrella term for the family of intellectual property doctrines that share these two elements. Finally, this Note uses "secondary liability" interchangeably with both aiding and abetting liability and contributory liability.

## I. CENTRAL BANK

### A. The Central Bank Decision

*Central Bank* held that parties cannot be liable for aiding and abetting a violation of section 10(b) of the Securities Exchange Act of 1934<sup>16</sup> because the statute does not provide for such liability.<sup>17</sup> A simple holding, yet the Court's reasoning is expansive enough to affect secondary liability under other federal statutes. Six points warrant highlighting.

1. *The statute's text controls the availability of secondary liability.*

— The Court's analysis began and ended with the text of section 10(b): "Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."<sup>18</sup>

2. *If the statute is silent, there is no aiding and abetting liability.*

— The Court assumed that Congress knows how to provide for aiding and abetting liability in a statute when it wants to: "If . . . Congress intended to impose aiding and abetting liability, . . . it would have used the words 'aid' and 'abet' in the statutory text."<sup>19</sup> To buttress this point, the Court surveyed other statutes to see how they address aiding and abetting liability — most of the surveyed statutes were not securi-

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F.3d 788, 795 (9th Cir. 2007) (contributory copyright liability); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc on this issue) (contributory patent liability); RESTATEMENT (SECOND) OF TORTS §§ 876(b), 877(a) (1977) (civil aiding and abetting liability). *Compare* *Demetriades v. Kaufmann*, 690 F. Supp. 289, 293 (S.D.N.Y. 1988) ("[K]nowledge and participation [are] the touchstones of contributory infringement."), *with* Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 274 (2005) ("The fundamental basis for aiding and abetting liability is that the defendant *both* (1) knows of the primary actor's wrongful conduct; and (2) substantially assists or encourages the primary wrongdoer to so act.")

<sup>15</sup> See *Adams*, *supra* note 13, at 636.

<sup>16</sup> 15 U.S.C. § 78j (2006).

<sup>17</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 177; *cf.* *Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) (noting Congress's familiarity with the legal terms "aid" and "abet," as well as their equivalents).

ties laws, implying that the Court was making a general point about secondary liability under federal statutes.<sup>20</sup> The Court concluded that Congress *purposely* authorizes civil aiding and abetting liability only in certain statutes.<sup>21</sup> Therefore, when a civil statute is silent about secondary liability, Congress deliberately omitted it.

3. *Policy considerations are irrelevant.* — After emphasizing that statutory text is all that matters for determining whether secondary liability exists under section 10(b), the Court went out of its way to reject other methods of wringing meaning from the statute. To start, it berated the use of policy concerns to “override our interpretation of the text and structure of the Act.”<sup>22</sup> “The issue . . . is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.”<sup>23</sup>

4. *There is no general presumption of civil aiding and abetting liability.* — The Court also rejected the argument that section 10(b) incorporates a common law tort presumption of aiding and abetting liability.<sup>24</sup> The Court framed this rejection as a general rule for all statutes: “[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”<sup>25</sup>

5. *A long history of incorrect judicial interpretation in favor of secondary liability can be overridden.* — A difficult question in *Central Bank* was what deference to give to a longstanding, oft-used, and virtually uniform judicial construction of section 10(b) in favor of aiding and abetting liability. The Court itself had twice reserved the question of whether there was aiding and abetting liability under section 10(b).<sup>26</sup> But all eleven federal circuits that had addressed the question had upheld such liability,<sup>27</sup> and hundreds of court and admin-

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<sup>20</sup> *Cent. Bank*, 511 U.S. at 176–77, 182–85. The Court even dwelled on 18 U.S.C. § 2 (2006) — which authorizes aiding and abetting liability for every federal criminal violation — thereby suggesting that *Central Bank* sets out a general approach to secondary liability for all federal statutes, civil and criminal. See *Cent. Bank*, 511 U.S. at 176, 181–82.

<sup>21</sup> See *Cent. Bank*, 511 U.S. at 182. Unlike in criminal law, there is no general civil aiding and abetting statute. See *id.*

<sup>22</sup> *Id.* at 188 (citing *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991)).

<sup>23</sup> *Id.* at 177.

<sup>24</sup> See *id.* at 180–84. Justice Stevens’s dissent argued fervently that the 1934 Act incorporated such a traditional common law background principle. See *id.* at 195–96 (Stevens, J., dissenting); cf. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (“[W]hen Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.”).

<sup>25</sup> *Cent. Bank*, 511 U.S. at 182 (citing *Elec. Lab. Supply Co. v. Cullen*, 977 F.2d 798, 805–06 (3d Cir. 1992)).

<sup>26</sup> *Id.* at 166–67, 186 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379 n.5 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191 n.7 (1976)).

<sup>27</sup> *Id.* at 192 & n.1 (Stevens, J., dissenting).

istrative agency decisions had imposed such liability for decades.<sup>28</sup> Justice Stevens argued powerfully in dissent that the statutory construction was settled, and that reversing it disregarded both the Court's traditional heightened emphasis on stare decisis for statutory interpretations and its general reluctance to unsettle the law.<sup>29</sup> The majority was unimpressed. Settled or not, the lower courts' interpretation ventured beyond the statutory text,<sup>30</sup> and so it was discarded.

6. *Congress does not ratify a judicial interpretation reading secondary liability into a statute when it amends that statute without reversing the judicial interpretation.* — Finally, the Court ruled that Congress had not acquiesced in the lower courts' construction of section 10(b) when it amended the 1934 Act without abolishing that construction.<sup>31</sup> The Court explained that it may infer congressional acquiescence in a judicial interpretation of a statutory provision only when Congress reenacts the exact statutory language at issue without change (the "reenactment rule").<sup>32</sup> Modification of some part of a statute does not signal congressional intent to adopt a judicial construction reading secondary liability into a provision not reenacted.<sup>33</sup>

To summarize: despite contrary policy considerations, a longstanding judicial construction, and meanings deciphered from nongermane statutory amendments, *Central Bank* barred secondary liability for violating section 10(b) because the statute was silent on the matter.

### B. Central Bank's Influence

*Central Bank's* holding is not limited to section 10(b) or the securities laws. The opinion's reasoning is "undeniably broad,"<sup>34</sup> and "nothing in its holding turns on particular features of [securities] laws."<sup>35</sup> As the Ninth Circuit explained when rejecting an argument to limit *Central Bank* to the securities laws: "[I]t is the Supreme Court's approach to interpreting the statute, not the actual statute itself, that is significant. Thus, the fact that the [C]ourt was interpreting a different act of Congress — the Securities Exchange Act — is inconsequential."<sup>36</sup>

Acknowledging the decision's breadth, courts have used *Central Bank* to ascertain the availability of secondary liability under at least

<sup>28</sup> *Id.* at 192.

<sup>29</sup> *Id.* at 196 & n.6, 201.

<sup>30</sup> *See id.* at 177 (majority opinion).

<sup>31</sup> *Id.* at 186.

<sup>32</sup> *Id.* at 185. *See generally* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 290–91 (2d ed. 2006) (discussing the reenactment rule).

<sup>33</sup> *See Cent. Bank*, 511 U.S. at 185–86.

<sup>34</sup> *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1430 (3d Cir. 1994).

<sup>35</sup> *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc).

<sup>36</sup> *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1006 n.1 (9th Cir. 2006).

seventeen federal statutes besides the 1934 Act. Their diverse names demonstrate *Central Bank's* reach: the Age Discrimination in Employment Act of 1967<sup>37</sup> (ADEA), the Alien Tort Claims Act<sup>38</sup> (ATCA), the Antiterrorism Act of 1990<sup>39</sup> (ATA), the Commodity Exchange Act<sup>40</sup> (CEA), the Contraband Cigarette Trafficking Act<sup>41</sup> (CCTA), the Electronic Communications Privacy Act<sup>42</sup> (ECPA), the Employee Retirement Income Security Act of 1974<sup>43</sup> (ERISA), the False Claims Act<sup>44</sup> (FCA), the Investment Advisors Act of 1940<sup>45</sup> (IAA), the Investment Company Act of 1940<sup>46</sup> (ICA), the Lanham Act,<sup>47</sup> the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act<sup>48</sup> (RICO), the Sherman Act,<sup>49</sup> the Stored Wire and Electronic Communications and Transactional Records Access Act<sup>50</sup> (SECTRA), the Telephone Consumer Protection Act<sup>51</sup> (TCPA), the Torture Victim Protection Act of 1991<sup>52</sup> (TVPA), and the Truth in Lending Act<sup>53</sup> (TI-

<sup>37</sup> 29 U.S.C. §§ 621–634 (2006); see *Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1114–15 (C.D. Cal. 2002).

<sup>38</sup> 28 U.S.C. § 1350 (2006); see, e.g., *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring); *id.* at 288 n.5 (Hall, J., concurring).

<sup>39</sup> 18 U.S.C. §§ 2331–2339D (2006); see, e.g., *Boim*, 549 F.3d at 689–90.

<sup>40</sup> 7 U.S.C. §§ 1–25 (2006); see *Damato v. Hermanson*, 153 F.3d 464, 471–72 (7th Cir. 1998).

<sup>41</sup> 18 U.S.C. §§ 2341–2346; see *City of New York v. Milhelm Attea & Bros.*, No. 06-CV-3620 (CBA), 2009 U.S. Dist. LEXIS 19351, at \*7–19 (E.D.N.Y. Mar. 11, 2009).

<sup>42</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.); see, e.g., *Doe v. GTE Corp.*, 347 F.3d 655, 658–59 (7th Cir. 2003).

<sup>43</sup> Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.); see *Colleton Reg'l Hosp. v. MRS Med. Review Sys., Inc.*, 866 F. Supp. 896, 901–03 (D.S.C. 1994); see also *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175 (1994) (interpreting *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), as barring aiding and abetting liability for nonfiduciaries under section 502(a) of ERISA).

<sup>44</sup> 31 U.S.C. §§ 3729–3731 (2006); see *Mruz v. Caring, Inc.*, 991 F. Supp. 701, 709 (D.N.J. 1998).

<sup>45</sup> 15 U.S.C. §§ 80b-1 to -21 (2006); see *SEC v. Bolla*, 550 F. Supp. 2d 54, 58–63 (D.D.C. 2008).

<sup>46</sup> 15 U.S.C. §§ 80a-1 to -64; see, e.g., *McLachlan v. Simon*, 31 F. Supp. 2d 731, 739 n.7 (N.D. Cal. 1998), *aff'd in part, vacated in part on other grounds sub nom. Navellier v. Sletten*, 262 F.3d 923 (9th Cir. 2001).

<sup>47</sup> Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.); see *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1429–33 (3d Cir. 1994).

<sup>48</sup> 18 U.S.C. §§ 1961–1968 (2006); see, e.g., *Pa. Ass'n of Edwards Heirs v. Righenour*, 235 F.3d 839, 843–44 (3d Cir. 2000).

<sup>49</sup> 15 U.S.C. §§ 1–7; see *MCI Telecomms. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 129–31 (D.N.J. 1995).

<sup>50</sup> 18 U.S.C. §§ 2701–2712; see *Jones v. Global Info. Group, Inc.*, No. 3:06-00246-JDM, 2009 U.S. Dist. LEXIS 23879, at \*5–7 (W.D. Ky. Mar. 25, 2009).

<sup>51</sup> 47 U.S.C. § 227 (2006); see *Balt.-Wash. Tel. Co. v. Hot Leads Co.*, 584 F. Supp. 2d 736, 745–46 (D. Md. 2008).

<sup>52</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)); see, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1172–74 (C.D. Cal. 2005).

<sup>53</sup> 15 U.S.C. §§ 1601–1667f; see *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 432–44 (S.D.N.Y. 2003).

LA). Of these statutes, courts have upheld secondary liability under four,<sup>54</sup> rejected it under eleven,<sup>55</sup> and reached conflicting outcomes under the ATCA<sup>56</sup> and the civil liability provisions of RICO — although the vast majority have rejected secondary civil RICO liability.<sup>57</sup> Other opinions have suggested without deciding that *Central Bank* bars secondary liability under additional statutes.<sup>58</sup>

Most importantly, all these decisions hinge on statutory text. The cases rejecting secondary liability do so because the statute is silent; those upholding it do so because the statute sings.<sup>59</sup> Consider the Seventh Circuit's 2008 en banc decision in *Boim v. Holy Land Foundation for Relief and Development*.<sup>60</sup> Writing for the majority, Judge Posner affirmed a three-judge panel's finding of aiding and abetting

<sup>54</sup> See, e.g., *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689–90 (7th Cir. 2008) (en banc) (ATA); *Damato v. Hermanson*, 153 F.3d 464, 471–72 (7th Cir. 1998) (CEA); *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1429–33 (3d Cir. 1994) (Lanham Act); *Mujica*, 381 F. Supp. 2d at 1172–74 (TVPA).

<sup>55</sup> See, e.g., *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1006 (9th Cir. 2006) (§§ 2702 and 2707 of the ECPA); *Doe v. GTE Corp.*, 347 F.3d 655, 658–59 (7th Cir. 2003) (§§ 2511 and 2520 of the ECPA); *Jones*, 2009 U.S. Dist. LEXIS 23879, at \*5–7 (SECTRA); *City of New York v. Milhelm Attea & Bros.*, No. 06-CV-3620 (CBA), 2009 U.S. Dist. LEXIS 19351, at \*7–19 (E.D.N.Y. Mar. 11, 2009) (CCTA); *Hot Leads*, 584 F. Supp. 2d at 745–46 (TCPA); *SEC v. Bolla*, 550 F. Supp. 2d 54, 58–63 (D.D.C. 2008) (§ 209(e) of the IAA); *Currency Conversion Fee*, 265 F. Supp. 2d at 432–44 (TILA); *Wynn v. Nat'l Broad. Co.*, 234 F. Supp. 2d 1067, 1114–15 (C.D. Cal. 2002) (ADEA); *McLachlan v. Simon*, 31 F. Supp. 2d 731, 739 n.7 (N.D. Cal. 1998) (§ 36 of the ICA), *aff'd in part, vacated in part on other grounds sub nom.* *Navellier v. Sletten*, 262 F.3d 923 (9th Cir. 2001); *Mruz v. Caring, Inc.*, 991 F. Supp. 701, 709 (D.N.J. 1998) (§ 3730(h) of the FCA); *MCI Telecomms. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 129–31 (D.N.J. 1995) (§ 2 of the Sherman Act); *Colleton Reg'l Hosp. v. MRS Med. Review Sys., Inc.*, 866 F. Supp. 896, 901–03 (D.S.C. 1994) (§ 502(a) of ERISA). *Mruz v. Caring, Inc.*, 991 F. Supp. 701, involved conspiracy liability, not aiding and abetting liability. *Central Bank* applies the same to both, see *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837 (2d Cir. 1998), so *Mruz* means there is no aiding and abetting liability under section 3730(h) of the FCA.

<sup>56</sup> Compare, e.g., *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 282 (2d Cir. 2007) (Katzmann, J., concurring) (upholding aiding and abetting liability under the ATCA), *with* *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (rejecting it).

<sup>57</sup> Compare, e.g., *Pa. Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 843–44 (3d Cir. 2000) (rejecting civil RICO aiding and abetting), *and* *Cobbs v. Sheahan*, 385 F. Supp. 2d 731, 738–39 (N.D. Ill. 2005) (collecting cases rejecting it), *with*, e.g., *Young v. Wells Fargo & Co.*, No. 4:08-cv-507 RP-CFB, 2009 U.S. Dist. LEXIS 100419, at \*55–58 (S.D. Iowa Oct. 27, 2009) (collecting cases upholding it). Courts disagree because aiding and abetting liability under civil RICO was well established pre-*Central Bank*. A few courts have stuck with those precedents, see, e.g., *In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1267 (S.D. Fla. 2001), but most find that *Central Bank* abrogated them just as it overturned many section 10(b) precedents, see e.g., *King v. Deutsche Bank AG*, No. CV 04-1029-HU, 2005 U.S. Dist. LEXIS 11317, at \*80–81 & \*80 n.12 (D. Or. Mar. 8, 2005) (gathering civil RICO precedents displaced by *Central Bank*).

<sup>58</sup> See, e.g., *Khulumani*, 504 F.3d at 317 (Korman, J., concurring in part and dissenting in part) (42 U.S.C. § 1983 (2006)); *Shell Oil Co.*, 128 F.T.C. 749 (1999) (§ 5 of the Federal Trade Commission Act, 15 U.S.C. § 45).

<sup>59</sup> See cases cited *supra* notes 54–58. The one exception, *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1429–33, is discussed *infra* pp. 748–49.

<sup>60</sup> 549 F.3d 685 (7th Cir. 2008) (en banc).

liability under the ATA. He did so, however, only after eschewing the panel's reasoning that the ATA impliedly authorizes secondary liability.<sup>61</sup> The court instead adopted the panel's alternative reasoning that the statute's *text* provides for aiding and abetting liability, albeit in a roundabout fashion via a "chain of incorporations by reference."<sup>62</sup> *Boim* shows that a statute need not shout its authorization of secondary liability; a whisper is enough. But it cannot be mute, as Judge Posner clarified when he boiled *Central Bank* down to a simple slogan: "[S]tatutory silence on the subject of secondary liability means there is none."<sup>63</sup>

## II. WHY *CENTRAL BANK* SHOULD APPLY TO INTELLECTUAL PROPERTY

The sweeping application of *Central Bank* to federal statutes implies that it presumptively covers federal intellectual property statutes, too. Moreover, the *Central Bank* rule *should* apply to all federal statutes. It promotes predictability, prevents judicial overreaching, and comports with the relative competencies of the different government branches. Besides these general justifications, particular aspects of intellectual property make it especially appropriate to apply *Central Bank* to intellectual property. (One court has already applied *Central Bank* to the trademark statute.<sup>64</sup>) Consider first the general reasons.

*Central Bank* enhances predictability in two ways. First, it establishes a general rule of statutory interpretation that could apply to all federal statutes. Consistent rules of statutory interpretation — regardless of their content — enable litigants and Congress to predict more reliably how courts will construe statutes.<sup>65</sup> This increased predictability reduces wasteful litigation costs by discouraging claims based on statutory interpretations that will be rejected; it also reduces wasteful legislation costs by informing Congress up front what language to put in a statute so that it will not have to amend the statute later.

Second, the specific content of the *Central Bank* rule increases predictability. Civil aiding and abetting liability is applied with notorious inconsistency.<sup>66</sup> That uncertainty swells when courts can read liability into a statute. No clear rules govern implied causes of action,<sup>67</sup> so

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<sup>61</sup> See *id.* at 688–90.

<sup>62</sup> *Id.* at 690 (citing 18 U.S.C. §§ 2332–2333 (2006)).

<sup>63</sup> *Id.* at 689.

<sup>64</sup> See *AT&T*, 42 F.3d at 1429–33.

<sup>65</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994).

<sup>66</sup> See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188–89 (1994).

<sup>67</sup> See *Spicer v. Chi. Bd. of Options Exch., Inc.*, 977 F.2d 255, 257–58 (7th Cir. 1992).



courts can tweak implied secondary liability doctrines to achieve results they desire in particular cases.<sup>68</sup> The resulting uncertainty raises the cost of conduct that is lawful but skirts the borderlines of legality.<sup>69</sup> *Central Bank*'s textualist focus does not erase uncertainty — statutes can be unpredictable in application, and as *Boim* shows, they may require close study to determine if they are actually mute — but it does provide fairer notice to litigants of what conduct is lawful by cabining judicial discretion to conjure secondary liability from silent statutes.<sup>70</sup>

Constitutional considerations also support *Central Bank*. Critics commonly argue that implied causes of action violate the separation of powers.<sup>71</sup> Most implied causes of action give private plaintiffs a right to sue defendants for conduct that Congress has statutorily forbidden. Proponents argue that empowering these private plaintiffs increases the enforceability of the statute against conduct Congress has already prohibited, thereby furthering Congress's intent.<sup>72</sup> Yet statutes are often the result of congressional compromise;<sup>73</sup> added enforceability may therefore upset Congress's desired level of enforcement.<sup>74</sup> Judicially invented secondary liability increases enforceability — plaintiffs have more targets to sue (primary *and* secondary violators) — so it may rewrite Congress's legislative bargain in that way.

Even more suspect, implied secondary liability (unlike most implied causes of action) augments the scope of conduct prohibited by a statute.<sup>75</sup> Determining what conduct is unlawful is (and should be) a legislative task.<sup>76</sup> Judicial expansion of the scope of federal statutes shatters legislative compromises, and it is essentially an exercise of

<sup>68</sup> Such tailoring occurred in *Grokster*. See *infra* pp. 743–44.

<sup>69</sup> See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984).

<sup>70</sup> Cf. Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009) (arguing that one justification for textualism is the fairer notice it provides to individuals regulated by a statute).

<sup>71</sup> See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.3.3 (5th ed. 2007).

<sup>72</sup> See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 432–33 (1964).

<sup>73</sup> See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983).

<sup>74</sup> See Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 882–84 (1996); cf. *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (“[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”).

<sup>75</sup> For example, assume there is no express secondary copyright liability. The copyright statute would forbid the unauthorized downloading of copyrighted songs, but it would not bar knowingly selling programs that facilitate such downloading. Were a judge to read secondary liability into the statute, though, such conduct would be illegal.

<sup>76</sup> See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177–78 (1994) (“We cannot amend the statute to create liability for acts that are not themselves [unlawful] within the meaning of the statute.”). See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (arguing for the moral superiority of legislative to judicial lawmaking).

federal common law.<sup>77</sup> *Central Bank* rightly rejects this judicial usurpation of legislative power.

The separation of powers argument squares with a concern about relative institutional competencies. Institutions differ in their abilities, and their comparative advantages should inform how they conduct legal tasks like statutory interpretation.<sup>78</sup> A complete institutional comparison of the legislature and judiciary is beyond the scope of this Note,<sup>79</sup> but a few points particularly salient to secondary liability rules merit mention, and they commend the legislature as the institution better situated to design such rules.

Creating any liability rule involves balancing countervailing policy considerations. Secondary liability rules are inherently more complex than ordinary tort rules because instead of just the two interested parties found in normal tort situations (the perpetrator and the victim), there are always at least three (the perpetrator, the enabler, and the victim). Each may have its own interests to consider and balance against those of the others.

Congress is usually better than courts at balancing complex policy concerns. There are two primary reasons: Congress (1) has a greater capacity than courts to gather relevant facts and (2) can issue more comprehensive rules than can courts. The most critical facts for sculpting liability rules are “legislative facts” — “recurrent patterns of behavior on which policy must be based.”<sup>80</sup> Congress can assemble such facts by calling wide-ranging hearings backed by subpoena powers, drawing upon support staff and expert agencies for research, and consulting informally with experts on any subject. Courts, by contrast, are limited by the adversary system, by the rules of evidence, and by the fact that they can hear from only the parties before them.<sup>81</sup> These constraints make courts good at impartially finding “adjudicative facts” — “the events that have transpired between the parties to a lawsuit”<sup>82</sup> — but such facts are insufficient to create an optimal liability rule for a large swath of cases. Indeed, courts are especially poor fact-gatherers in secondary liability cases because primary violators may not even be parties to a suit: when a large company sells a product that enables numerous small-scale perpetrators to commit a tort, the

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<sup>77</sup> See Easterbrook, *supra* note 73, at 544–51.

<sup>78</sup> See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

<sup>79</sup> For a rich discussion, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006).

<sup>80</sup> DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 45 (1977). See generally FED. R. EVID. 201 advisory committee’s note (discussing adjudicative and legislative facts).

<sup>81</sup> HOROWITZ, *supra* note 80, at 47–49.

<sup>82</sup> *Id.* at 45.

victim might sue only the large company because pursuing the perpetrators is prohibitively costly and time-consuming.<sup>83</sup>

Even if courts could amass facts as well as Congress can, the scope of the rulings courts can issue is constitutionally limited to the specific issues before them (no advisory opinions<sup>84</sup>) and functionally limited by a lack of manpower and time (decisions must issue quickly). Congress, by contrast, can legislate broadly under Article I and is not constrained by time limits or resources (except insofar as there is political pressure for speedy resolution and small government) in crafting complex remedial schemes for torts. *Central Bank* comports with these institutional considerations by leaving secondary liability rulemaking to the legislature, the branch best situated to craft such rules.<sup>85</sup>

Particular attributes of intellectual property amplify the force of these general arguments. In terms of predictability, current doctrines of contributory copyright and trademark liability (which, unlike contributory patent liability, are not tied to statutes) are confusing, notwithstanding *Inwood* and *Grokster*.<sup>86</sup> Secondary copyright liability is especially incoherent, as *Grokster*'s endorsement of nonstatutory secondary liability is at odds with the axiom that there is no federal common law of copyright.<sup>87</sup> *Central Bank*'s textual approach would alleviate these problems by limiting secondary liability to its statutory scope.

Predictability concerns are especially pressing because intellectual property cases often involve cutting-edge technology.<sup>88</sup> New technologies create novel factual scenarios; novel facts entail greater uncertainty over the applicability of secondary liability rules.<sup>89</sup> When judges are allowed to impose implied secondary liability, some may extend that liability to cover conduct that they think Congress would have proscribed had it conceived of the new technology when drafting the

<sup>83</sup> See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–30 (2005).

<sup>84</sup> See CHEMERINSKY, *supra* note 71, at § 2.2.

<sup>85</sup> See *The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 370 (1994).

<sup>86</sup> See Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1417–19 (2006).

<sup>87</sup> See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 654–62 (1834); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (“The remedies for infringement ‘are only those prescribed by Congress.’” (quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889))).

<sup>88</sup> See, e.g., *Grokster*, 545 U.S. at 919–21 (secondary copyright liability and peer-to-peer file sharing software); *Playboy Enters. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1022–23 (9th Cir. 2004) (secondary trademark liability and search engines); *i4i Ltd. P’ship v. Microsoft Corp.*, No. 6:07CV113, 2009 U.S. Dist. LEXIS 70104, at \*4–7 (E.D. Tex. Aug. 11, 2009) (secondary patent liability and word processing features); see also Eric Goldman, *Technology & Marketing Law Blog*, [http://blog.ericgoldman.org/archives/derivative\\_liability](http://blog.ericgoldman.org/archives/derivative_liability) (last visited Nov. 22, 2009) (compiling technology cases involving secondary liability).

<sup>89</sup> See Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1846–49 (2009).

governing statute; other judges may be more restrained. The uncertainty surrounding secondary liability in cases involving new technologies only adds to the already significant uncertainty of applying secondary intellectual property liability rules.

All of this legal uncertainty deters innovation.<sup>90</sup> Companies deciding whether to invest in research and development have to account for the greater likelihood of litigation costs and adverse legal judgments. Such added costs are especially detrimental to small, start-up companies (which are often at the forefront of innovation), as they are less able to afford the risk of severe liabilities.<sup>91</sup> The enhanced predictability of the *Central Bank* rule would mitigate these problems. Applying it may therefore spur technological growth.

From an institutional competency perspective, courts are hard-pressed in technology cases to craft appropriate liability rules.<sup>92</sup> Uses of new technologies are often unknown at first,<sup>93</sup> so a court is unlikely to have all the facts necessary to assess accurately a new technology's threat (or boon). Fact-gathering problems are compounded in secondary liability cases involving new technologies because primary violators are often absent — the technology's distributor is sued while the users go scot-free.<sup>94</sup> Lacking evidence, a court may give short shrift to a technology's lawful and beneficial uses and impose secondary liability that stymies innovation (or it may give such uses too much credence and not impose secondary liability when it should). *Central Bank* avoids these institutional capacity concerns by leaving the legislating of liability laws to the legislature.

Nor are there compelling reasons against applying *Central Bank* to intellectual property. The justifications for contributory liability are all policy-based: economic explanations of why secondary liability is cheaper than direct liability (in some cases),<sup>95</sup> and moral reasoning that those who help cause tortious actions should be held accountable.<sup>96</sup> Congress is better at weighing such considerations. Leaving these decisions to Congress is also politically realistic: Congress has often re-

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<sup>90</sup> See Jacqueline D. Lipton, *Secondary Liability and the Fragmentation of Digital Copyright Law* 14–19 (Case Research Paper Series in Legal Studies, Working Paper No. 09-5, 2009), available at <http://ssrn.com/abstract=1345355>.

<sup>91</sup> See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

<sup>92</sup> See *Sony*, 464 U.S. at 431; *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1360–61 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975); Tim Wu, *The Copyright Paradox*, 2005 SUP. CT. REV. 229, 251–55.

<sup>93</sup> See Depoorter, *supra* note 89, at 1846.

<sup>94</sup> See, e.g., cases cited *supra* note 88.

<sup>95</sup> See William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement: Napster and Beyond*, J. ECON. PERSP., Spring 2003, at 113, 114–15, 120–23.

<sup>96</sup> See Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L.J. 247, 247 (2008).

sponded when courts have refused to extend intellectual property liability beyond its statutory bounds.<sup>97</sup>

In sum, there are good general reasons for the *Central Bank* rule, and they grow even stronger in the intellectual property context.

### III. APPLYING *CENTRAL BANK* TO INTELLECTUAL PROPERTY

This Part analyzes what effect *Central Bank* would have if applied to the four predominant types of federal intellectual property violations: patent infringement, copyright infringement, trademark infringement, and trademark dilution. This Part also sheds light on the *Central Bank* inquiry generally because these four violations chart the spectrum of different secondary liability regimes to which *Central Bank* may apply: (1) explicit statutory authorization (patent infringement); (2) obscured statutory basis (copyright infringement); (3) statutory silence but established doctrinal authority (trademark infringement); and (4) statutory silence without established doctrinal authority (trademark dilution).

#### A. *Contributory Patent Liability* (*Explicit Statutory Basis*)

The easiest case under *Central Bank* is contributory patent liability. This theory of liability emerged in the nineteenth century from common law tort principles.<sup>98</sup> When doubt arose regarding its viability in the mid-twentieth century,<sup>99</sup> Congress enacted a new patent statute in 1952,<sup>100</sup> which codified two versions of contributory patent infringement at 35 U.S.C. § 271(b) and (c).<sup>101</sup> These provisions confirm that Congress knows how to authorize contributory intellectual property liability explicitly.

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<sup>97</sup> See, e.g., Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730 (amending the trademark dilution statute in response to the Court's narrow statutory interpretation in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003)); *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1750-51 (2007) (describing the passage of 35 U.S.C. § 271(f) (2006) to countermand the Court's refusal to extend contributory patent liability beyond its statutory scope in *DeepSouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972)); Brief of Amici Curiae Sixty Intellectual Property and Technology Law Professors et al. in Support of Respondents at 25-27, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), available at <http://news.findlaw.com/hdocs/docs/mpaa/iptechprofso30105brf.pdf> (recounting congressional responses to judicially followed statutory limits on copyright liability).

<sup>98</sup> See Charles W. Adams, *A Brief History of Indirect Liability for Patent Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 369, 371-76 (2006).

<sup>99</sup> See *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680, 683-84 (1944); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 668-69 (1944).

<sup>100</sup> See Act of July 19, 1952, ch. 950, 66 Stat. 792 (codified as amended in scattered sections of 35 U.S.C.).

<sup>101</sup> *Id.* § 271(b)-(c), 66 Stat. at 811 (codified as amended at 35 U.S.C. § 271(b)-(c)).

Applying *Central Bank* here is straightforward. Because a statute authorizes contributory patent liability, it is permissible to impose such liability (so long as the imposition does not exceed the statutory scope). Patent thus presents the easy case at one end of the *Central Bank* spectrum: an explicit provision of contributory liability.

*B. Contributory Copyright Liability  
(Obscured Statutory Basis)*

Contributory copyright liability is trickier. In *Grokster*, the Court acknowledged that “[t]he Copyright Act does not expressly render anyone liable for infringement committed by another.”<sup>102</sup> The Court nonetheless brushed aside the lack of statutory authority by declaring that “these doctrines of secondary liability emerged from common law principles and are well established in the law.”<sup>103</sup> Freed from statutory confines, the Court opted to import a version of contributory liability from patent law.<sup>104</sup> (Before *Grokster*, contributory copyright liability law emphasized that the enabler had to contribute *knowingly*; *Grokster* adopted the patent version of contributory liability that punished *intentional* contribution.) The Court had previously borrowed patent doctrines to apply to copyright law,<sup>105</sup> but there was no special reason to think it would do so in *Grokster*, so the outcome was somewhat surprising.<sup>106</sup>

Two related questions emerge. Why did the *Grokster* Court not care about a statutory basis? The Court seemed motivated primarily by policy concerns: the “powerful” facts that (1) the defendants were bad actors who profited by intentionally inducing users of their technology to download copyrighted songs, and (2) without secondary liability, the music companies would probably go unrecompensed because the perpetrators were too poor and too numerous to chase through litigation.<sup>107</sup> The Court, therefore, wanted a secondary liability rule to cover the defendants in this situation. Patent law happened to have such a rule; the Court pounced on it. *Grokster*’s reasoning exemplifies what is wrong with the current doctrine of secondary copyright liabili-

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<sup>102</sup> *Grokster*, 545 U.S. at 930 (alteration in original) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984)) (internal quotation marks omitted). The Court made the same assertion in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417. See Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CAL. L. REV. 941, 976–83 (2007). This Note discusses only *Grokster* because it is more recent, but the analysis is similar for *Sony*.

<sup>103</sup> *Grokster*, 545 U.S. at 930 (citing, inter alia, *Sony*, 464 U.S. at 486 (Blackmun, J., dissenting); *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911)).

<sup>104</sup> *Id.* at 936–37.

<sup>105</sup> See *Sony*, 464 U.S. at 439–42.

<sup>106</sup> See Timothy R. Holbrook, *The Intent Element of Induced Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 399, 399 (2006).

<sup>107</sup> See *Grokster*, 545 U.S. at 929–30; Wu, *supra* note 92, at 229–41.

ty: it is nonstatutory, policy-driven, unpredictable, and often manipulated by courts in a result-oriented fashion.

Why did *Grokster* not consider *Central Bank*? Perhaps because neither party (nor any of the fifty-plus amici) raised a serious *Central Bank* argument in its brief or at oral argument.<sup>108</sup> Instead, the parties (and amici) flooded the Court with policy arguments — all sorts of analyses explaining why this or that rule would optimally calibrate secondary intellectual property liability to both protect copyright holders and leave leeway for companies developing new technologies.<sup>109</sup> The Court ran with the parties' policy-based approach.

Had the Court applied *Central Bank*, it could still have imposed contributory liability because — contrary to what *Grokster* said — the statute governing copyright law (the 1976 Copyright Act<sup>110</sup>) does provide for contributory liability. Prior to the 1976 Act, copyright holders had the exclusive right only to *do* certain acts (for example, copy, distribute, or perform works).<sup>111</sup> The 1976 Act added the exclusive right “to authorize” these acts.<sup>112</sup> Copyright infringement is the violation of any exclusive right of a copyright holder.<sup>113</sup> Thus, individuals who “authorize” others to engage in infringing acts are themselves (secondarily) liable for those infringements. For whatever reason, most courts (including the Supreme Court) have neglected the “authorize” clause.<sup>114</sup>

A few vigilant courts and commentators have identified the “authorize” clause as the statutory basis for contributory copyright liability.<sup>115</sup> However, they have failed to analyze precisely what the term

<sup>108</sup> The defendants did cite *Central Bank* twice, but only as subsidiary support for other positions. See Brief for Respondents at 26, 39, *Grokster*, 545 U.S. 913 (No. 04-480), available at <http://news.findlaw.com/hdocs/docs/mpaa/respondents3105brf.pdf>. One amicus brief cited *Central Bank* for the proposition that “secondary liability under statutory causes of action must be narrowly construed,” but it did not argue that without a statutory basis, there could not be any secondary copyright liability. Brief of Amici Curiae the Consumer Elecs. Ass’n et al. in Support of Affirmance at 15, *Grokster*, 545 U.S. 913 (No. 04-480), available at <http://news.findlaw.com/hdocs/docs/mpaa/ceao30105brf.pdf>.

<sup>109</sup> See Jonathan Band, *Expert Report: The Grokster Playlist*, 10 Electronic Com. & L. Rep. (BNA) 334, (Mar. 30, 2005), available at <http://www.policybandwidth.com/doc/JBand-GroksterPlaylist.pdf> (summarizing *Grokster* amicus briefs).

<sup>110</sup> Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

<sup>111</sup> See 17 U.S.C. § 1 (1976), repealed by Pub. L. No. 94-553, 90 Stat. 2541.

<sup>112</sup> 17 U.S.C. § 106 (2006); see Menell & Nimmer, *supra* note 102, at 994–95.

<sup>113</sup> 17 U.S.C. § 501(a) (2006).

<sup>114</sup> See Aden Allen, Note, *What’s in a Copyright? The Forgotten Right “To Authorize,”* 9 COLUM. SCI. & TECH. L. REV. 87 (2008).

<sup>115</sup> See, e.g., Venegas-Hernández v. Asociación de Compositores y Editores de Música Latinoamericana, 424 F.3d 50, 57–58 (1st Cir. 2005); Subafilms, Ltd. v. MGM-Pathe Commc’ns Co., 24 F.3d 1088, 1093 (9th Cir. 1994) (en banc); see also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04[A], [D] (2006).

“authorize” means. Most define “authorize” by looking only at the clause’s legislative history (one committee report, in particular),<sup>116</sup> which leads them to find that the “authorize” clause codified the judicial doctrine of contributory liability.<sup>117</sup> Given the well-rehearsed critiques of using legislative history (especially committee reports) to construe statutes,<sup>118</sup> this rationale may be unpersuasive. In any event, examination of the text and structure of the copyright statute, which should precede recourse to legislative history, is the better approach.

The Supreme Court has explained that “[a]lthough the word ‘authorize’ sometimes means simply ‘to permit,’ it ordinarily denotes affirmative enabling action.”<sup>119</sup> Under the “ordinary” definition of “authorize,” *Grokster* reached the right conclusion — it adopted liability for *intentional* contributions (an intentional contribution necessarily affirms that the infringement it enables should occur). This definition leaves out a large chunk of contributory liability: *knowing* contributions. Simply knowing that one’s actions will make an infringement occur does not mean that one affirms that the infringement should occur. Under the rarer (but tenable) definition of “authorize” as “permit,” there could be liability for mere knowing contributions, but there is no apparent reason to adopt that disfavored definition. So the “authorize” clause justifies *Grokster* and liability for intentional contributions, but not necessarily liability for knowing contributions.

The copyright statute’s structure fills the gap. Consider the Digital Millennium Copyright Act<sup>120</sup> (DMCA), which amended the 1976 Act. The DMCA was passed to shield internet intermediaries from liability for copyright infringements by their users.<sup>121</sup> Some of the safe harbor

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<sup>116</sup> See, e.g., sources cited *supra* note 115. A House report explains that Congress added the words “to authorize” “to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.” H.R. REP. NO. 94-1476, at 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674. Some commentators also look to foreign law. See, e.g., Allen, *supra* note 114. The United Kingdom codified secondary liability by adding the right “to authorize” to its copyright statute in 1911. See Ysolde Gendreau, *Authorization Revisited*, 48 J. COPYRIGHT SOC’Y U.S.A. 341, 343 (2001). That Act may have been the inspiration behind Congress’s choice of the same language in the 1976 Act; insofar as it was, the United Kingdom’s pre-1976 interpretation of “to authorize” may shed light on what Congress meant by the term.

<sup>117</sup> See *ITSI T.V. Prods., Inc. v. Cal. Auth. of Racing Fairs*, 785 F. Supp. 854, 860–61 (E.D. Cal. 1992), *aff’d in part, rev’d in part on other grounds sub nom.* *ITSI TV Prods., Inc. v. Agric. Ass’ns*, 3 F.3d 1289 (9th Cir. 1993).

<sup>118</sup> See, e.g., Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 32–36 (Amy Gutmann ed., 1997).

<sup>119</sup> *County of Washington v. Gunther*, 452 U.S. 161, 169 (1981) (citing dictionaries).

<sup>120</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

<sup>121</sup> See *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003).



provisions kick in, however, only if the intermediary does not “know” that its users are infringing copyrights.<sup>122</sup> These provisions imply that knowledgeable intermediaries *are* liable for their contributions to infringements — otherwise the knowledge limitation on the safe harbor would be superfluous.<sup>123</sup> The structure of the copyright statute thus requires secondary liability for mere knowing participation.

These statutory bases enable a reassessment of *Grokster* and contributory copyright liability in light of *Central Bank*. When the Court declared in *Grokster* that it could impose secondary copyright liability because it was “well established in the law,” it cited the portions of two sources that discuss the “authorize” clause (or its legislative history) as a basis for contributory liability.<sup>124</sup> *Grokster*’s holding can thus be understood as implicitly relying on the “authorize” clause of the 1976 Act for statutory authority (*Grokster*’s policy-based reasoning and prescription of patent law should be ignored as dicta). That clause justifies liability for intentional contributions. Liability for knowing contributions has a structural derivation. As *Boim* illustrates, these whispered authorizations are enough for *Central Bank*. Grounding secondary copyright liability in these textual and structural bases thus harmonizes *Central Bank* with *Grokster* (at least its holding) and with the rest of contributory copyright liability. It also makes copyright law more internally consistent by reconciling secondary copyright liability with the principle that copyright protections are solely statutory.<sup>125</sup>

### C. Contributory Trademark Infringement Liability (No Statutory Basis, but Precedential Support)

Like contributory copyright liability, contributory trademark infringement liability is well established in case law, but lacks a clear statutory foundation. The one modern Supreme Court case on the subject is *Inwood*, in which the Court recognized a cause of action for contributory trademark infringement.<sup>126</sup> *Inwood*, however, provided no reasoning for adopting contributory liability; instead, the Court relied entirely on bare citation to two precedents: its 1924 decision in

<sup>122</sup> See 17 U.S.C. § 512(c)(1)(A)(i)–(ii), (d)(1)(A)–(B) (2006).

<sup>123</sup> Other provisions in the copyright statute create similar inferences. See, e.g., *id.* § 111(a)(3) (shielding passive telecommunications carriers from contributory liability). The DMCA is also the only law that expressly acknowledges contributory copyright liability. See *id.* § 1201(c)(2) (declaring that one of the DMCA’s sections does not “enlarge or diminish . . . contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof”).

<sup>124</sup> *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930–31 (2005) (citing, *inter alia*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 486 (1984) (Blackmun, J., dissenting); 3 NIMMER & NIMMER, *supra* note 115, § 12.04[A]).

<sup>125</sup> See cases cited *supra* note 87 and accompanying text.

<sup>126</sup> See *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 853–54 (1982).

*William R. Warner & Co. v. Eli Lilly & Co.*<sup>127</sup> — the one prior Court decision to endorse contributory trademark infringement — and *Coca-Cola Co. v. Snow Crest Beverages, Inc.*,<sup>128</sup> a leading lower court opinion from March of 1946.<sup>129</sup> Although *Inwood* purported to construe the Lanham Act<sup>130</sup> (the federal statute governing trademark law), the opinion pinpointed no statutory basis for contributory liability.<sup>131</sup>

Close scrutiny reveals *Inwood*'s flimsiness. Two points dispatch the precedents it cites. First, *William R. Warner* was a federal common law decision upended by *Erie*.<sup>132</sup> Second, the Lanham Act was not enacted until July of 1946. Decisions issued before then, including *William R. Warner* and *Snow Crest Beverages*, were superseded by that statute.<sup>133</sup> *Inwood*'s reliance on these early cases thus seems misplaced. Shorn of this precedential support, *Inwood* offers no reason to endorse contributory liability. *Central Bank* completes *Inwood*'s dismantling: the Lanham Act is silent about secondary liability.<sup>134</sup> *Inwood* thus commits the very error *Central Bank* condemned: divining secondary liability from a mute statute. Unlike with copyright, however, there is no hidden statutory lifeboat to rescue contributory trademark infringement liability.

*Central Bank* forecloses any arguments that might resuscitate *Inwood*. That contributory liability is a generally recognized tort principle does not mean that Congress incorporated it into the Lanham Act.<sup>135</sup> Nor does the fact that there may be good policy arguments for imposing contributory trademark infringement liability,<sup>136</sup> or that its validity is settled by precedent,<sup>137</sup> or that Congress has often amended the Lanham Act without rejecting the judicial construction imposing

<sup>127</sup> 265 U.S. 526 (1924).

<sup>128</sup> 64 F. Supp. 980 (D. Mass. 1946), *aff'd*, 162 F.2d 280 (1st Cir. 1947).

<sup>129</sup> See *Inwood*, 456 U.S. at 854 (citing *William R. Warner*, 265 U.S. 526; *Coca-Cola*, 64 F. Supp. 980).

<sup>130</sup> Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

<sup>131</sup> See *Inwood*, 456 U.S. at 853–54. Presumably, *Inwood* implicitly construed the Lanham Act's two direct liability provisions, 15 U.S.C. §§ 1114, 1125 (2006). See *Brownstone Publ'g, LLC v. AT&T, Inc.*, No. 1:07-cv-1630-SEB-JMS, 2009 U.S. Dist. LEXIS 25485, at \*14 (S.D. Ind. Mar. 24, 2009).

<sup>132</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see *Cross*, *supra* note 2, at 101 n.3.

<sup>133</sup> See *Cross*, *supra* note 2, at 101 n.3; *cf.* *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 170–73 (1995) (rejecting an argument premised on pre-Lanham Act precedents because that statute superseded them). Neither the Lanham Act's text nor its legislative history betray any hint that the 1946 Congress meant to codify contributory liability. See *Cross*, *supra* note 2, at 109–21.

<sup>134</sup> See *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231, 1245 (11th Cir. 2007).

<sup>135</sup> See *Elec. Lab. Supply Co. v. Cullen*, 977 F.2d 798, 805–08 (3d Cir. 1992); *Cross*, *supra* note 2, at 117–19; see also *supra* section I.A.4, p. 733. But see *Adams*, *supra* note 13, at 648–49 (arguing that intellectual property statutes incorporate common law tort principles).

<sup>136</sup> See *supra* section I.A.3, p. 733.

<sup>137</sup> See *supra* section I.A.5, pp. 733–34.

contributory liability.<sup>138</sup> Furthermore, both the express language of the patent statute and the opaque (but extant) language of the copyright statute prove that Congress knows how to legislate secondary liability in the intellectual property realm when it so chooses. Indeed, Congress revised both the patent and copyright statutes specifically to codify contributory liability. By contrast, the Lanham Act does not provide for contributory trademark liability, and none of the many amendments to the Act (including at least nine in the fifteen years since *Central Bank*<sup>139</sup>) have added such a cause of action. The statutory silence is deafening. There is no legitimate basis for *Inwood* or contributory trademark infringement liability.

Dicta from the Third Circuit's 1994 opinion in *AT&T Co. v. Winback & Conserve Program, Inc.*<sup>140</sup> question this conclusion. In *AT&T*, the Third Circuit applied *Central Bank* to the Lanham Act. (*AT&T* is the sole case, so far, to apply *Central Bank* to an intellectual property statute.) Although *AT&T* involved only a *vicarious* trademark infringement claim,<sup>141</sup> the opinion stated in dicta that *contributory* trademark infringement survived *Central Bank*.<sup>142</sup>

Yet *AT&T*'s rationale for preserving contributory liability has since been rejected. *AT&T* was decided only a few months after *Central Bank*. At that time, the Third Circuit was unsure of *Central Bank*'s scope. It opted in *AT&T* to construe *Central Bank* narrowly, reasoning that *Central Bank* was not meant "to overrule settled constructions of

<sup>138</sup> See *supra* section I.A.6, p. 734. Laws amending the Lanham Act are collected at Roland Vogl, Stanford Law School: US Intellectual Property Law, <http://www.law.stanford.edu/program/centers/tlflaw/us/ip> (last visited Nov. 22, 2009). The one substantial revision of trademark law post-*Inwood* — the Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 — did not save contributory trademark infringement liability via the reenactment rule because it did not *reenact* either of the provisions that *Inwood* presumably construed, 15 U.S.C. §§ 1114, 1125 (2006). The 1988 Act did *revise* § 1114. See Pub. L. No. 100-667, § 127, 102 Stat. at 3943-44. The revision apparently sought to "codify the interpretation [§ 1114] has been given by the courts." S. REP. NO. 100-515, at 40 (1988), *reprinted in* 1988 U.S.C.A.N. 5577, 5603. But the revision (and Senate Report explaining its purpose) focused entirely on the proper scope of *direct* liability. Nothing in the text (or legislative history) of the 1988 Act suggests that it codified contributory liability.

<sup>139</sup> See Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730; Madrid Protocol Implementation Act, Pub. L. No. 107-273, secs. 13401-13402, 116 Stat. 1758, 1913 (2002); Trademark Amendments Act of 1999, Pub. L. No. 106-43, 113 Stat. 218; Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, 113 Stat. 1501 app. I, at 1501A-545 to -552 (1999); Patent and Trademark Fee Fairness Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 app. I, at 1501A-554 to -555; Patent and Trademark Office Efficiency Act, Pub. L. No. 106-113, 113 Stat. 1501 app. I, at 1501A-572 to -591 (1999); Trademark Law Treaty Implementation Act, Pub. L. No. 105-330, 112 Stat. 3064 (1998); Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386; Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996).

<sup>140</sup> 42 F.3d 1421 (3d Cir. 1994).

<sup>141</sup> *Central Bank* does not affect vicarious liability. See *supra* note 12 and accompanying text.

<sup>142</sup> See *AT&T*, 42 F.3d at 1432.

other statutes that relied on common law doctrines to determine the scope of liability.”<sup>143</sup> Since *AT&T*, the federal courts have changed tack and applied *Central Bank* widely.<sup>144</sup> Indeed, the Third Circuit itself cast aside *AT&T*’s narrow reading of *Central Bank* when it concluded a few years later that *Central Bank* abrogated longstanding decisions that upheld civil aiding and abetting liability under RICO.<sup>145</sup> This progression post-*AT&T* renders *AT&T*’s reasoning unpersuasive.

How then to reconcile *Central Bank* and *Inwood*? There is no way to retain both the general rule that statutory silence bars secondary liability and the nonstatutory doctrine of contributory trademark infringement. Nor is there any apparent reason to exempt the Lanham Act from *Central Bank*’s global rule, without exempting section 10(b), or civil RICO, or any of the other statutes mentioned above. Therefore, one decision should succumb.<sup>146</sup> But which?

*Inwood* is the better burial candidate. First, and most importantly, *Inwood* looks wrongly decided. The Lanham Act’s silence on secondary liability, coupled with the fact that Congress amended *both* the copyright and patent statutes but *not* the trademark statute to provide for contributory liability, indicates that Congress does not intend there to be contributory trademark infringement liability. Second, *Inwood* provided no reason for embracing contributory liability. It relied entirely on bare citation to outdated precedents. Poorly reasoned decisions receive less stare decisis protection;<sup>147</sup> unreasoned decisions should receive none. Third, *Central Bank* was decided more than a decade after *Inwood*, so it can be viewed as abrogating *Inwood*. Finally, although statutory decisions usually receive greater stare decisis protection,<sup>148</sup> they are not immune from being overruled.<sup>149</sup> Statutory precedents are especially vulnerable when based on faulty or nonexistent reasoning, or when a sea change in a juridical approach renders them inconsistent with modern jurisprudence.<sup>150</sup> *Central Bank* effected such a shift by establishing a new text-based approach to ascer-

<sup>143</sup> *Id.* (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 169 (1994)).

<sup>144</sup> See *supra* section I.B, pp. 734–37.

<sup>145</sup> See *Pa. Ass’n of Edwards Heirs v. Rightenour*, 235 F.3d 839, 843–44 (3d Cir. 2000); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3d Cir. 1998); see also *supra* note 57.

<sup>146</sup> See *Tate v. Showboat Marina Casino P’ship*, 431 F.3d 580, 583 (7th Cir. 2005) (“[W]hen two decisions are inconsistent, one of them should give way.”).

<sup>147</sup> See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

<sup>148</sup> See *Pearson v. Callahan*, 129 S. Ct. 808, 816–17 (2009); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

<sup>149</sup> See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 695 (1978).

<sup>150</sup> See *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480–81 (1989). But see *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1961 (2008) (refusing to reexamine “well-established prior law” simply because it was crafted when the Court was less textualist than it is now).

taining the availability of secondary liability under federal statutes. Whatever support *Inwood* receives from being a statutory precedent is dwarfed by the reasons to inter it.

Thus, *Inwood* should be overruled, and *Central Bank* should foreclose federal contributory trademark infringement liability. Such steps would improve the law for all the reasons stated in Part II without drastically affecting trademark holders (who could still bring contributory trademark infringement claims under state law<sup>151</sup>). Of course, lower courts cannot shun a Supreme Court precedent, even when its reasoning is repudiated by a later Court decision.<sup>152</sup> Instead, either the Supreme Court or Congress must clarify the matter. In the meantime, lower courts should hesitate to extend contributory trademark liability to settings beyond those in *Inwood*.<sup>153</sup>

#### *D. Contributory Trademark Dilution Liability (No Statutory Basis or Precedential Support)*

Trademark dilution appears to be the easy case at the far end of the *Central Bank* spectrum (opposite patent infringement). Congress added a cause of action for trademark dilution to the Lanham Act in 1996<sup>154</sup> and amended it in 2006.<sup>155</sup> Neither Act authorized contributory trademark dilution liability.<sup>156</sup> Thus far, no court has found a party liable for contributory trademark dilution or recognized it as a valid claim.<sup>157</sup> A handful of courts have, however, considered such a theory of liability by analogy to contributory trademark infringement.<sup>158</sup> Commentators have urged its adoption.<sup>159</sup>

<sup>151</sup> See Cross, *supra* note 2, at 102.

<sup>152</sup> See *Rodriguez de Quijas*, 490 U.S. at 484.

<sup>153</sup> For example, *Inwood*'s holding addressed contributory liability for only manufacturers and product distributors. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 853–54 (1982). Courts should limit it to such parties. *Contra* *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1432 (3d Cir. 1994).

<sup>154</sup> Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996).

<sup>155</sup> Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730.

<sup>156</sup> See 15 U.S.C. § 1125(c) (2006).

<sup>157</sup> See DAVID S. WELKOWITZ, TRADEMARK DILUTION 285 (2002). Some district courts have permitted contributory dilution claims to survive motions to dismiss, thereby implying that such claims are valid. See *Google Inc. v. Am. Blind & Wallpaper Factory Inc.*, 74 U.S.P.Q.2d (BNA) 1385, 1394 & n.28 (N.D. Cal. 2005); *Steinway, Inc. v. Ashley*, No. 01 Civ. 9703 (GEL), 2002 U.S. Dist. LEXIS 1372, at \*7 (S.D.N.Y. Jan. 29, 2002); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 167 F. Supp. 2d 1114, 1123 n.9 (C.D. Cal. 2001). A federal court has also allowed a *state* law contributory dilution claim to survive a motion for summary judgment. See *Kegan v. Apple Computer*, 42 U.S.P.Q.2d (BNA) 1053 (N.D. Ill. 1996).

<sup>158</sup> See, e.g., *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999), *aff'd* 175 F.R.D. 640 (C.D. Cal. 1997); *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 526 (S.D.N.Y. 2008).

<sup>159</sup> See, e.g., 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:21.75 (4th ed. 2009); WELKOWITZ, *supra* note 157, at 116–17, 284–86.

*Central Bank* nixes that idea.<sup>160</sup> Unlike contributory copyright and patent infringement, contributory trademark dilution lacks statutory support.<sup>161</sup> Unlike even contributory trademark infringement, contributory trademark dilution lacks precedential support. Plus, both dilution statutes were enacted after *Central Bank*. Congress was thus on notice when it passed them that it needed to provide expressly for secondary liability; it chose not to do so.<sup>162</sup> Thus, without further indication by Congress, *Central Bank* should prevent litigants from bringing contributory trademark dilution claims under federal law.

#### CONCLUSION

*Central Bank* teaches that parties are not civilly liable for aiding and abetting violations of federal statutes unless the statute at issue expressly authorizes such liability. Although courts have applied this rule to all sorts of federal statutes, they have thus far exempted intellectual property laws. This Note seeks to show why such an exception is error. Bringing intellectual property within *Central Bank*'s fold boosts the predictability of secondary intellectual property liability and comports with the separation of powers and relative institutional competencies. These benefits redound to legislators, litigants, and innovative companies that develop novel technologies but are unable to afford great legal risk in bringing new products to market.

Applying *Central Bank* to intellectual property requires few changes in current doctrine. Patent law already chimes with *Central Bank*. Copyright law is consistent in outcome (contributory copyright liability is permitted), but the rationale for allowing contributory liability must be shifted from the policy reasons of *Grokster* to the words and structure of the copyright statute. As for trademark law, there is no statutory basis for contributory liability for trademark infringement or dilution. Because courts do not recognize a cause of action for contributory trademark dilution, *Central Bank* maintains the status quo. The only major doctrinal change *Central Bank* entails is that the Court's decision to embrace contributory trademark infringement liability in *Inwood* should be expunged.

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<sup>160</sup> See Cross, *supra* note 11, at 664–76.

<sup>161</sup> See *id.* at 664.

<sup>162</sup> See *id.* at 674.