2024 Christopher A. Meyer Memorial Lecture

LOOKING FOR "THE PERSON WHO ACTUALLY PRESSES THE BUTTON": VOLITIONAL CONDUCT AND DIRECT COPYRIGHT LIABILITY

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Thirty years ago, a California district court required a copyright plaintiff to show "some element of volition or causation" as a basis for imposing direct liability on the operator of a website whose users had posted infringing content. Absent such a showing, the website operator was held not liable. This "volitional conduct" requirement has since become an indispensable part of the judicial apparatus for determining liability in cases involving websites and other automated electronic systems that are used for infringing purposes. Courts have applied the requirement in various inconsistent ways, including a 2022 Second Circuit decision, ABKCO v. Sagan, that reduced it to a bright-line test: it held that a defendant, who built the online system at issue, did not engage in the required volitional conduct and thus could not be directly liable, because he was not "the person who actually pressed the button" that caused infringing copies to be made. This article first reviews the unsuccessful petition for certiorari in ABKCO, and argues that the ABKCO "button test" dangerously oversimplifies the volitional conduct inquiry. The article next seeks to show, through a review of the most significant case law on the issue, that "volition" in this context is best understood to mean proximate cause – as Nimmer and several court opinions have posited -- rather than a mental state of willing or choosing by the defendant. Like fair use, proximate cause is a highly fact-specific common-law doctrine that resists reduction to bright-line rules, and the article notes the parallels between the (often ill-defined) use of "volition" in the automated-infringement context and the use of "transformative" in fair use analysis.

Against this background, the core of the article then explores the proximate causation requirement in traditional tort law, as well as the related doctrines of concurrent cause and intervening cause and draws on current New York pattern jury instructions to show how these concepts would apply in copyright infringement cases involving automated systems. The article argues that the designer or operator of such a system may be a but-for cause of downstream

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infringement, but the independent acts of the system's users are typically intervening causes that break the causal chain initiated by the system-builder. Both are "volitional," in the sense of willing or choosing to act as they do, but only the intervening cause is held liable, per traditional tort principles of causation. The article concludes with a brief discussion of the moral intuitions that historically underlie proximate cause, and the possible advantages of employing proximate cause analysis – rather than the vocabulary of "volitional conduct" – in future infringement cases involving AI, where the "person who actually presses the button" is not a person.

INTRODUCTION

Thanks very much for that introduction, it is truly an honor to be here, and to be among so many dear friends and colleagues. My topic tonight is **looking for "the person who actually presses the button," the volitional conduct requirement and direct copyright liability**. The phrase in quotes is from a 2008 Second Circuit decision called *Cartoon Network v. CSC Holdings*, often referred to as the Cablevision case, where the phrase was a shorthand way of characterizing the volitional conduct requirement, in a case involving automated technology that allowed users of a cable system to record television programs.[1] And the court in Cablevision took pains to limit the decision to those facts.[2]

But the reason I'm revisiting this phrase – "the person who actually presses the button" - is because it recently resurfaced in another Second Circuit case, *ABKCO v. Sagan*, from 2022, in what I believe to be a very confused and alarming way, on very *different* facts.[3] As applied in *ABKCO*, the "button test" as I'll call it, could reduce the scope of actionable volitional conduct to an absurd degree. And the U.S. Supreme Court denied *certiorari* on *ABKCO* in October 2023, so

[1] Cartoon Network v. CSC Holdings, 536 F.3d 121 (2d Cir. 2008).
[2] *Id.* at 139.
[3] 50 F. 4th 309 (2d Cir. 2022).

for the foreseeable future, we are stuck with that very unfortunate new spin on the button test. This talk is my modest proposal for undoing, or at least limiting, the damage to copyright law that the Second Circuit might have done with its new interpretation of volitional conduct.

Part II will first discuss *ABKCO* and its unsuccessful cert petition. Part III will discuss the flow of the caselaw on volitional conduct since the foundational case of RTC v. Netcom in 1995. I'll pay particular attention to *Cartoon Network*, and then turn to a little-known but very illuminating colloquy about the meaning of "volitional conduct" in dueling concurrences by two very esteemed Second Circuit judges with extensive copyright experience – which colloquy the court in *ABKCO* utterly ignored, to everyone's detriment. Part IV will then sketch out my own road map for getting out of the mess that I fear *ABKCO* has created. And be forewarned, it leads through the land of tort law, which has had 150 years or so to figure these things out, and we should not lightly disregard it. Part V will close with some thoughts about the relationship between moral responsibility and legal responsibility, and how traditional tort approaches to causation might help us think about a world of infringements carried out by AI, in which the "person who actually presses the button" is not a person.

I. ABKCO FACTS AND PROCEDURE

The plaintiffs in *ABKCO* were a group of music publishers.[4] The infringing works at issue were a large number of films and videos of concert performances by major recording artists of the 1960s and 1970s. They were bootleg recordings, not authorized by the artists or the publishers of the songs. Defendant William Sagan acquired the collection, and was aware of the license problem but he commercialized them anyway. Starting in 2006, acting through an entity he controlled, Mr. Sagan made the videos available for download, for a fee.[5] He personally selected which videos to include, and instructed his Chief Technology Officer – who was also his brother in law – to digitize them and post them for downloading. The CTO did so. Litigation ensued.[6]

The Southern District of New York granted partial summary judgment to plaintiffs on liability, holding that both Mr. Sagan and his entity were *directly* liable for the infringement.[7] The court then held a damages trial, at which the jury awarded $189,500 in damages.[8] The Second Circuit, in a unanimous decision by Judge Jacobs, affirmed the damages verdict, but in a very brief section of its opinion, *reversed* the District Court's finding that Mr. Sagan was directly liable.[9] The court cited the "volitional conduct" requirement that the Second Circuit had

[4] *Id.*
[5] *Id. at 313-314.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 322.

recognized in the Cablevision case, and held that Mr. Sagan's actions "could not give rise to direct liability" because he was not "the person who actually pressed the button."[10] Sagan's Chief Technology Officer stated in his deposition that:

> it was Sagan who instructed him as to 'which concerts to make available for download or not,' ... and made plans 'to start digitizing tape recordings with an eye towards making them available on a public website.'[11] But that passage involves only instructions and plans; there is no evidence that Sagan is the one who "actually presse[d] the button."[12]

I don't dispute that the courts recognize a volitional conduct requirement, or that the "button" standard satisfies it, but I do dispute the Second Circuit's apparent conclusion that the "button" standard is the only way to satisfy it.

II. ABKCO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The plaintiffs filed a cert petition in April 2023, raising the following question presented: "whether direct liability for copyright infringement is limited to the person who actually 'presses the button' to make the infringing copies."[13]

Anybody notice what's missing from the question presented – like, perhaps, the words "volitional conduct"? That was the legal issue that the Second Circuit got wrong, according to plaintiffs. So why don't they name it? Let's start by looking at how plaintiffs argued against the button test in their cert petition. First, the Copyright Act says in Section 106 that the copyright owner has the exclusive right to "do and to authorize" various acts – reproduction, distribution, etc.[14] And Mr. Sagan *authorized* his employee to make unauthorized copies and digitize the films and make them available; plaintiffs say that's direct infringement by the plain meaning of the statute.[15] They cite *Sony* in support of that position - there is language in Sony that says "authorizing the use of" a work is infringement:

> [A]n infringer is not merely one who uses a work without authorization of the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.[16]

But *Sony*, as defendants point out, was about *contributory* infringement, not direct infringement, and in fact, I would add, if you look at the legislative history of the word "authorize" in the statute, there isn't much—but what there *is*, is this:

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[10] *Id.*
[11] *Id.* (citations omitted).
[12] *Id.*
[13] [Cert petition] at i.
[14] 17 U.S.C. §106.
[15] [Cert petition] at 15.
[16] Sony Corp. of Am. Inc. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984).

> The exclusive rights . . . under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended 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.(emphasis added)[17]

The plaintiffs did not quote that italicized language in their cert petition, because they're trying to establish *direct* liability, but I found it interesting that the defendants didn't quote it either, because they were arguing that it was just a contributory infringement case.[18] Most importantly, the plaintiffs' cert petition identifies a circuit split between the *ABKCO* button test in the Second Circuit and three other cases, one from the Third Circuit, one from the Ninth Circuit, one from the First. Chronologically, they are *Columbia Pictures v. Aveco*,[19] *Lewis Galoob v. Nintendo*,[20] and *Society of the Holy Transfiguration Monastery v. Gregory*.[21]

These cases all pretty clearly say direct liability can attach to conduct that stops short of "actually pressing the button." In *Columbia v. Aveco*, from the 1980s, the defendant rented booths to patrons to watch videos on VCR machines. The patrons placed the tapes in the machines and operated the buttons, so the defendant did not "perform" the videos, but was still held directly liable. *Lewis Galoob*, from the 1990s, was a video game case, involving a "Game Genie" device that allowed users to alter certain aspects of the gameplay experience of copyrighted video games – speeding up the action, for example. In this context, the Ninth Circuit expressly stated that "infringement by authorization is a form of direct infringement."[22] The defendant prevailed on a fair use defense, however, so *Galoob* is of limited value on the "button" point.

But the most direct factual parallel with *ABKCO*, and the strongest argument for identifying a circuit split, is the First Circuit decision in *Soc'y of the Holy Transfiguration Monastery v. Archbishop Gregory*, one of the great captions of all time. *Archbishop Gregory* was much closer to the facts of *ABKCO*, and actually discussed a "volitional conduct" standard in so many words, unlike the other two cases. And the reason the plaintiff prevailed was that the defendant "performed several acts to *ensure* that copies of the works were available on his server and

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[17] H. Rep. 94-1476, 94th Cong., 2d Sess., at 61 (emphasis added).

[18] *See, e.g.*, [response to cert petition] at 3. And it's also interesting that the defendants, in their opposition to the cert petition, reframed the question presented to focus on the volitional conduct requirement, in so many words, and very pointedly did *not* quote the "press the button" language.

[19] Columbia Pictures, Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986).

[20] Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir.1992).

[21] Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory, 689 F.3d 29 (1st Cir. 2012).

[22] *Lewis Galoob Toys,* 964 F.2d at 970 (9th Cir.1992).

posted to his website".[23] What Archbishop Gregory *did* was to instruct his colleague, Father Peter, to post some infringing materials, so Archbishop Gregory wasn't actually the person who pressed the button, but he was still found directly liable.[24] But the First Circuit in *Archbishop Gregory* actually took no position on whether volitional conduct was even a requirement, just holding that if it *was* a requirement, the facts were sufficient to satisfy it.

The *ABKCO* cert petition finally mentions volitional conduct at page 25 but merely says, in essence, that the button test from *Cartoon Network* might be fine in a case involving a technology provider, but *not* in the very different context of *ABKCO*, where a person specifically instructs another person to infringe. That's an *Archbishop Gregory* case, the plaintiffs argue, and the court "need look no further to find a volitional act."[25]

In this belated mention of volitional conduct, the cert petition cites to Justice Scalia's dissent in Aereo,[26] which is the only Supreme Court recognition of a volitional conduct requirement in the copyright context. This dissent says something that I've found puzzling, namely that a defendant "may be held directly liable only if it has engaged in volitional conduct that violates the Act."[27]

So this dissent seems to be saying that the defendant's conduct not only has to be volitional, it has to be volitional and also infringing. But if we take out the word "volitional," so that the passage reads "has engaged in conduct that violates the Act," doesn't that, by itself, create a basis for direct liability? Isn't that what "strict liability" means? What exactly does "volitional" add here?

In light of the above, I would argue that there is another way to think about the words "volitional conduct" that has to do more broadly with the relationship between the defendant's conduct and the infringement. Pressing buttons qualifies, we know that, but is that the only relationship that is sufficiently volitional? Can just telling someone to push a button be enough? To answer those questions, let's turn the page on ABKCO and look at the flow of the case law on volitional conduct.[28]

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[23] *Archbishop Gregory,* 689 F.3d at 55 (1st Cir. 2012).
[24] *Id*.
[25] [cert petition] at 25.
[26] Am. Broad Cos. v. Aereo, Inc., 573 U.S. 431 (2014).
[27] *Id.* at 454 (2014) (Scalia J., dissenting)(emphasis added).
[28] Before turning to volitional conduct, I just want to bracket the whole issue of alter-ego liability, the so-called "corporate veil." It may well have been relevant in the *ABKCO* case, as defendants argued in their response to the cert petition, but doesn't help us understand the volitional conduct requirement, which is my goal with this presentation. I will only note that the "corporate veil" is of limited usefulness, at best, in the copyright context, with some courts going so far as to say "there is no corporate veil" in copyright cases. *Blue Nile Inc. v. Ideal Diamond Solutions, Inc.*, 2011 WL 3360664 (W.D. Wash. 2011)("Copyright infringement is a strict liability tort. Therefore there is no corporate veil and all individuals who participate are jointly and severally liable. *See Foreverendeavor Music, Inc., v. S.M.B., Inc.*, 701 F.Supp. 791, 793–4 (W.D.Wash.1988). '[I]t is well established that a corporate

III. DEVELOPMENT OF "VOLITIONAL CONDUCT" IN CASE LAW

There are too many cases to discuss them all, but I'll just be a guide on the tour bus and point out a few landmarks.[29]

A. Netcom[30]

In 1995, one score and nine years ago, before there was a DMCA, the Central District of California decided *Religious Technology Center v. Netcom*,which addressed a fact pattern that was novel at the time: an online service that allowed users to post content, to be viewed and downloaded by other users. The court found that the service provider was not liable for the infringements of its users, and in the process introduced the language of "volition" into this context:"although copyright is a strict liability statute, there should still be some element of volition or causation…"[31] The court did not define "volition or causation," other than to find that it was lacking in the case of Netcom.[32] After the DMCA passed, courts still continued to speak in terms of volition, often citing *Netcom*, as they still do to this day.

B. CoStar v. LoopNet[33]

CoStar v. LoopNet dealt with a wrinkle on the basic fact pattern, because the defendant had actually screened the content that users posted.[34] If the content was acceptable, an employee would click a button to make it visible on the site.[35] Was *that* sufficiently volitional? It's pushing a button, after all, and deciding what to post. But no, it wasn't.[36] The court held, over a strong dissent, that "there must be conduct by a person who *causes* in some meaningful way an infringement" (emphasis in original).[37] Seems they are looking for an *upstream* cause, and just pushing buttons does *not* qualify For the majority, the user of the system, not

officer will be liable as a joint tortfeasor with the corporation in a copyright infringement case where the officer was the dominant influence in the corporation, and determined the policies which resulted in infringement.' *Id.* (quoting *Sailor Music v. Mai Kai of Concord, Inc.*, 640 F.Supp. 629, 633 (D.N.H.1986)".

[29] The first two decades of volitional conduct cases are well summarized in Lackman, E. and Sholder, S., "The Role of Volition in Evaluating Direct Copyright Infringement Claims," *Bright Ideas,* Vol. 22, No. 3 at 3 (NYSBA, 2014). For an excellent analysis of the Cablevision case and certain post-Cablevision, pre-*ABKCO* developments, see Nimmer, D. "Volition in Violation of Copyright," 43 *Colum. J. L. & Arts* 1 (2019).

[30] Religious Technology Center v. Netcom, 907 F.Supp. 1361(N.D. Cal. 1995)

[31] *Id.* at 1369-1370.

[32] *Id*.

[33] CoStar Group v. LoopNet, Inc*.,* 373 F.3d 544 (4th Cir. 2004).

[34] *Id.* at 555-556.

[35] *Id.* at 556.

[36] I*d.*

[37] *Id.* at 549.

Loopnet, "begins the volitional process," and Loopnet thus did not "cause" the infringement in a "meaningful way."[38] The court also noted that Loopnet's screening actually reduced the amount of infringing content, so it "further[ed] the goals of the Copyright Act."[39]

C. *Quantum v. Sprint*[40]

The Fourth Circuit revisited the CoStar requirement of volition in Quantum v. Sprint, which involved RAM copies of software that were automatically copied into computers when the machines were booted up. Defendant said this copying was not volitional, under the CoStar v. Loopnet test, but the Fourth Circuit disagreed – CoStar was only about providing an online system "used by third parties" to infringe, and here the defendant's own employees were "instigating" the copying. This echoes the majority in CoStar saying that users "began the volitional process," looking to the point of origin for the copying, not necessarily focusing on the last hand to touch a button.[41]

D. *Perfect 10 v. GigaNews*[42]

One of the most extensive discussions of volitional conduct is in *Perfect 10 v. Giganews*, where the Ninth Circuit actually came out and explicitly defined volitional conduct: "In addition, direct infringement requires the plaintiff to show causation (also referred to as "volitional conduct") by the defendant.[43] So this goes all the way back to Netcom, which required "some element of volition or causation," and the Ninth Circuit is saying yep, that means "volition, a/k/a causation." Quoting Nimmer and Webster's dictionary, the court continued:

> We wish to emphasize that the word "volition" in this context does not really mean an "act of willing or choosing" or an "act of deciding," which is how the dictionary defines the term. … Rather, as used by the court in [Netcom] it "simply stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts.[44]

So, in this view, volition is not a mental state, or an attribute of a bodily movement – it equals proximate causation. How does that square with the button test in *Cartoon Network*? Surprisingly, very well. Let's take a look:

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[38] *Id.* at 559.
[39] *Id.* at 556.
[40] Quantum Sys. Integrators, Inc. v. Sprint, 338 Fed.Appx. 329 (4th Cir. 2009).
[41] *Id.* at 335–36.
[42] Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 857 (9th Cir. 2017).
[43] *Id.* at 666 (emphasis added).
[44] *Id.* (emphasis added).

E. Cartoon Network[45]

Cartoon Network, just to refresh your recollection, was about Cablevision's remote-storage DVRs, which allowed customers to press some buttons on a remote control, and record TV programs on a central server located at Cablevision's facility, rather than on a separate device in the customer's home.[46] The question was whether Cablevision was directly liable for these recordings.[47] Secondary liability and fair use were not raised in the case.[48]

The court began its discussion of direct liability by citing *Netcom*, and by citing *CoStar v. Loopnet* – both of which define volition as causation, as we have just seen. In the next paragraph, the court articulated the button test, which *ABKCO* later unfortunately turned into a bumper sticker:

> it seems clear—and we know of no case holding otherwise—that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine.[49]

It then proceeded to explain why it thought the District Court was in error to find Cablevision directly liable:

> The district court also emphasized Cablevision's "unfettered discretion in selecting the programming that it would make available for recording." This conduct is indeed more proximate to the creation of illegal copying than, say, operating an ISP or opening a copy shop. . . Nonetheless, we do not think it sufficiently proximate to the copying to displace the customer as the person who "makes" the copies.[50]

So we have "proximate" – do I hear "cause"? Yes, in the next paragraph:

> After all, the purpose of any causation-based liability doctrine is to identify the actor (or actors) whose "conduct has been so significant and important a cause that [he or she] should be legally responsible." W. Page Keeton et al., Prosser and Keeton on Torts [Citation omitted][51]

So, we should figure out what the proximate cause analysis is, right? And apply it in copyright cases? Not so fast.

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[45] Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).
[46] *Id.* at 124.
[47] *Id*.
[48] Id.
[49] *Id.* at 131.
[50] *Id.* at 132 (emphasis added).
[51] *Id.* (emphasis added).

F. BWP v. Polyvore: The Concurrences by Judge Newman and Judge Walker[52]

There's an otherwise-unremarkable Second Circuit ruling from 2019 called *BWP v. Polyvore*, which really throws some interesting shadows onto this whole discussion about volition and proximate cause.[53] It's a one-page *per curiam* decision about stripping metadata from photographs, the result is no surprise. It gets remanded for more fact-finding, but – what *is* quite remarkable – it was the occasion for very lengthy, thoughtful and *utterly irreconcilable* concurrences by Judge John Walker and Judge Jon O. Newman, two of the most senior and distinguished judges on the Second Circuit, with particularly deep experience in copyright cases. And they have this long colloquy specifically about the meaning of volitional conduct in copyright infringement.

ABKCO completely disregarded and ignored it, as if it never happened – instead, the *ABKCO* court just slapped on a bright-line rule about "who pushed the button" and said "next case!" But this colloquy between Judge Newman and Judge Walker is really worth reading carefully. On the basic issue, Judge Walker rejects the whole idea that the volitional conduct requirement should ever be understood as a proximate causation requirement. For Judge Walker,

> Therefore, although a volition analysis may under certain circumstances require an explicit causation analysis, and although applying only a causation analysis to particular facts may yield the same result as a volition analysis, volition is not the same thing as causation.[54]

Judge Walker writes this as though there is something called a "volitional analysis" but respectfully, I haven't ever seen a court do such a thing – when courts pause to think about volition, they conclude that it's the same thing as proximate cause, as the Ninth Circuit. did in *GigaNews*. Back to Judge Walker:

> When the district court in Netcom referred to "volition or causation" … I think it was positing two possibilities, not one. In any event, subsequent opinions in our circuit have clearly applied a volition requirement, not a causation requirement.[55]

And he cites *Cartoon Network*, *a/k/a* the Cablevision case, which as we just saw, is full of talk about "proximate" acts and causation, and which cites Prosser & Keeton. So has Judge Walker read Cablevision? Well yeah, he *wrote* Cablevision – as he does not fail to mention in this colloquy. So, he writes,

> [W]hy sow even more confusion by using the term [proximate cause] in the copyright context when the word volition will do? It therefore strikes

[52] BWP Media USA, Inc. v. Polyvore, Inc., 922 F.3d 42 (2d Cir. 2019).
[53] *Id.*
[54] *Id.* at 52.
[55] *Id.*

> me as ill-advised to import the confusing baggage of proximate causation into the discrete and specialized tort of copyright infringement where negligence is rarely (if at all) at issue.[56]

Now, in a few minutes I'll explain, as we dive into some tort law, why I respectfully think that proximate cause is not limited to negligence torts, and I would also say that what he calls the "baggage" of proximate cause is exactly what prevents courts from making terrible bright-line rules like the button test, so I see it as a feature, not a bug. But Judge Walker's bottom line is this:

> Absent a ruling from the Supreme Court endorsing a causation requirement, the only way to introduce such a requirement into our jurisprudence (either in addition to or in lieu of the volition requirement) would be through our *en banc* process.[57]

Judge Walker was not buying it. Judge Newman's concurrence disagreed. He began, "I set forth some views on the volitional conduct requirement and on certain aspects of Judge Walker's opinion for such value as they might have for courts considering similar issues in the future and perhaps for the parties in this case considering the possibility of settlement."[58] He continued:

> An initial issue posed by Netcom's "volition or causation" phrase is whether the words "volition" and "causation" are synonyms or alternatives. . . . Infringement is a tort, as this Court long ago recognized, . . . and no person may be held liable for any tort unless that person (alone or with others) has caused the injury for which a claim is made.[59]

"'Volition' in [*Netcom*] is best understood to mean a concept essentially reflecting tort law causation."[60] And this is the Jon O. Newman who wrote *American Geophysical v. Texaco*,[61] *Salinger v. Random House*,[62] *Leibovitz v. Paramount*[63] – my point being, he knows his copyright law. Judge Newman then put a fine point on it, basically saying that:

> [T]here is no reason to give "volition" a meaning separate from "causation." Although many decisions and some commentators have written extensively about what they call "volition," they are essentially

[56] *Id.* at 53.
[57] *Id.* at 52.
[58] *Id.* at 61.
[59] *Id.* at 62.
[60] *Id*.
[61] Amer. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994).
[62] Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987).
[63] Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1988).

> explaining a requirement of "causation," and it would be helpful to name the concept for what it is.[64]

Judge Newman and Judge Walker agreed that we don't need two terms when one will do, Occam's razor and all that. They reached opposite conclusions, though, about which of the two terms to use. And Judge Newman made a point of quoting Cablevision - which, again, Judge Walker wrote - saying:

> The Cartoon Network opinion explicitly identified and left open the question "whether one's contribution to the creation of an infringing copy may be so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy."[65]

And for Judge Newman, that is and always has been a proximate cause question.

IV. PROXIMATE CAUSE

I recognize that the debate is not over, but I do believe that Judge Newman has the better of the argument; it seems to me that the word "volition" has taken on a role in this context not unlike the word "transformative" in fair use, a word that doesn't mean what the dictionary says it means, and in the worst cases, like *ABKCO*, is a substitute for analysis. But "transformative" at least had the benefit of a good pedigree, being launched by a very thoughtful law review article by a leading copyright judge and being adopted in an equally thoughtful, landmark Supreme Court decision.[66] It didn't come out of three confusing and unexplained words -- "volition or causation" – in a district court decision.[67]

So I wonder what would it look like for a court to analyze proximate *cause*, in so many words, in a copyright infringement case, rather than spending another 30 years fumbling around about what "volition" means? Would it make any difference? I believe it would, and in particular, I believe it would reduce or eliminate the temptation for courts to invent and apply unfortunate bright-line rules like the button test.[68]

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[64] BWP v. Polyvore, supra, at 52.

[65] *Id.* at 65, quoting *Cartoon Network,* 336 F.3d at 133.

[66] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[67] *Netcom*, *supra note* 30, at 1369-1370. The Nimmer article on volition, *supra note* 29 at 30, laments that the *Netcom* decision has "effectively gained [the] exalted status" of the "supreme law of the land."

[68] For over a century, scholars of proximate cause have consistently expressed uneasiness with bright-line rules. *See, e.g.,* Jeremiah Smith, "Legal Cause in Actions in Tort," 25 Harv. L. Rev. 317 (1912)(decrying tendency to "propund[] rules which are demonstrably erroneous"); *see also* Bird v. St. Paul F.M. Ins. Co*.,* 224 N.Y. 47, 52 (1918)("Causation is not a chain but a net")(Cardozo, J).

To start with some terminology issues, I'll be referring here to "proximate cause," as the judges did in their colloquy, but Judge Walker correctly notes that the "tort cognoscenti" no longer use that term.[69] Since 2010, the drafters of the Restatement (Third) of Torts have called it "legal cause," not "proximate cause" – and they didn't just quietly change their vocabulary, they actively discouraged use of the older term, saying "the term proximate cause is a poor one to describe limits on the scope of liability."[70] In this regard, the Restatement followed Prosser & Keeton, who replaced the term "proximate cause" in 1984, in the fifth edition of their torts treatise, in favor of the term "responsible cause." They stated then that "responsible cause would be a more appropriate term" given the role of the concept in attaching liability.[71] And as far back as 1929, legal realist scholar Leon Green had called out the inaccuracy of the term "proximate cause," writing "the inquiry while stated in terms of *cause* is in fact whether the defendant should be held responsible."

The reasoning is instructive: the inquiry is not about which actor is most "proximate" in space or time to the resulting harm, but rather which actor will be held legally responsible -- as Prosser & Keeton now say, who is the "responsible cause."[72] Hence the terms "responsible cause" or "legal cause," now favored by the tort cognoscenti. I'm not one of those cognoscenti, so I'm still using the term proximate cause, as the jury instructions still do, at least in New York — but I think calling it "responsible cause" would be an improvement, because it would bring proximate cause back to its 19th-century roots in "common sense" about "making one man pay for another man's wrong." To quote Oliver Wendell Holmes on proximate cause,

> I assume that common-sense is opposed to making one man pay for another man's wrong, unless . . . he has induced the immediate wrong-doer to do acts of which the wrong . . . , was the natural consequence under the circumstances known to the defendant.[73]

And the Supreme Court continues to wax eloquent about it in similar terms. Proximate cause, says the Court, is best understood as a "shorthand for the *policy-based judgment* that not all factual causes contributing to an injury should be legally cognizable causes."[74]

As this might suggest, the law of proximate cause is not a realm of bright-line, formalist rules.[75] It is very context-dependent and at least somewhat

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[69] *Id.* at 53.
[70] Restatement (Third) of Torts, § 29 cmt. b (2010).
[71] Prosser & Keeton on the Law of Torts, § 42 at 273 (5th ed. 1984).
[72] Green, L., *Are There Dependable Rules of Causation?*, 77 U. Pa. L. Rev. 601, 605 (1929)(emphasis original).
[73] Oliver Wendell Holmes, Jr., *Agency II*, 5 Harv. L. Rev. 1, 14 (1891).
[74] CSX Transp., Inc. v. McBride, 564 U.S. 685, 701 (2011)(emphasis added).
[75] *See, e.g.,* Milks v. McIver, 264 N.Y. 267, 269 (1934)("What constitutes proximate cause is not a problem of philosophy. The law solves these problems pragmatically").

indeterminate. The Second Circuit, for example, quoting Prosser & Keeton, has said of proximate cause that "no other formula so nearly does the work of Aladdin's lamp,"[76] and the aforementioned Prof. Leon Green, as far back as the 1920s, in the Penn Law Review, called proximate cause the "joker in the game of poker" – it can mean whatever a court needs it to mean.[77]

Well, what does *that* remind me of – a squishy, highly fact-specific, 150 year-old common law test, that can mean anything the court wants it to mean – sounds a lot like fair use, doesn't it? And of course fair use has been criticized in recent years in exactly these terms, as nothing more than "billowing white goo"[78] and it just "means the right to hire a lawyer"[79] – I take the point, but as the Supreme Court says in *Campbell* about fair use, I think it is equally true that proximate cause is not to be simplified with bright-line rules.[80] And I think the button test in *ABKCO* is wrong for exactly the same reason that it's wrong to say copying the entirety of a work cannot be a fair use,[81] or that a commercial use is presumptively unfair.[82]

And it seems to me that "volitional conduct" perhaps even arose in the ISP cases in the 1990s for much the same reason that fair use arose in Justice Story's time – to preclude liability for acts that might have infringed under the letter of the law, but that the courts did not see fit to penalize, for reasons of public policy and, as Holmes said, common sense. Judge Walker's concurrence in *BWP v. Polyvore* describes the emergence of the volition requirement in these terms, as a way to avoid "an outcome that could be unfair."[83]

I don't want to push the analogy too far, but I do think it's best, as Judge Newman says, to name the concept of proximate cause for what it is. It is no less a policy judgment if we call it "volitional conduct," but it is perhaps a little easier for a court to forget that it's making a policy judgment when it does that.

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[76] *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 2176, n.8 (2d Cir. 2000); the Aladdin's lamp comparison appears to have originated in Green, L., *Proximate Cause in Texas Negligence Law*, 28 Tex. L. Rev. 471-472 (1950).

[77] Green, L., *supra* note 72, at 612.

[78] Litman, J., "Billowing White Goo" *(Symposium: Fair Use: 'Incredibly Shrinking' or Extraordinarily Expanding?)*, 31 Colum. J. L. & Arts 587 (2007-2008).

[79] Lessig, L., Free Culture: The Nature and Future of Creativity at 187 (Penguin, 2004).

[80] *Campbell*, 510 U.S. at 577.

[81] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006).

[82] *Campbell,* 510 U.S. at 581.

[83] BWP v. Polyvore, *supra* note 52, at 47.

So with that in mind, let's look at these *ABKCO* facts through the lens of tort law.[84] Basically, classical tort doctrine divides claims into three different fault levels: intentional torts, negligence torts, and strict liability torts:[85]

Intentional torts - plaintiff must show that defendant intended to do the act that caused the harm

> For example, battery: an intentional touching of the victim that is either injurious or offensive. If I'm riding the subway and the car is lurching around, and someone loses their balance and falls into me, it's not battery, no matter how badly I might be hurt - because it wasn't intentional.

Negligence torts - plaintiff must show that defendant negligently did the act that caused the harm

> For example, the classic slip and fall: defendant has a duty of care, breaches that duty of care, and the victim suffers harm as a result. So if a product spills in aisle 3 in a grocery store, the store doesn't clean it up promptly, a customer slips - if the store had a duty to maintain safe conditions for customers, and if the harm was reasonably foreseeable, that's negligence and the store is liable.

Strict liability torts - plaintiff must only show that defendant did the act that caused the harm; intent and negligence are irrelevant.

For example: copyright infringement, of course, as George Harrison famously found out,[86] but also, traditionally, torts involving harm from "dangerous instrumentalities" like working with dynamite, wild animals, etc. If a party engages in such a dangerous activity, they are liable for the resulting harm, no matter their intent, or how careful they are.[87]

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[84] It has been settled since at least 1869 that copyright infringement is a tort:
"Rights secured by copyright are property within the meaning of the law of copyright, and whoever invades that property beyond the privilege conceded to subsequent authors commits a tort, and is liable to an action." *Lawrence v. Dana,* 15 F. Cas. 26, 61 (C.C.D. Mass. 1869). As recently as 2019, even Judge Walker and Judge Newman agreed on that much, see discussion above, even as they disagreed about much else.

[85] *See, e.g.* FRANKLIN, M. A. AND RABIN, R. L., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS, chapters II, VII and XII (6th ed. 1996).

[86] *Bright Tunes Music Corp. v. Harrisongs Music. Ltd.,* 420 F. Supp. 177, 180 (S.D.N.Y. 1976)("Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet Lord is the very same song as He's So Fine with different words, and Harrison had access to He's So Fine. This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished").

[87] Strict liability was first applied in an English case, *Rylands v. Fletcher*, (1868) LR 3 HL 330**,** which involved a mill owner who built a reservoir on his land, and the water ended up flooding plaintiff's underground mine shaft.

Notice that *whatever* the fault level, the plaintiff *always* has to show causation – even with strict liability. If harm is caused by someone's wild animals, or dynamite, the court has to determine *who* was working with those dangerous instrumentalities. So that's why I respectfully take issue with Judge Walker's point that proximate cause is somehow only applicable to negligence torts.

And a final basic tort point: For any tort there may be a large number of but-for causes, but not every but-for cause is legally responsible. For example, in a case like *Netcom*, Cablevision, or any of the system-builder cases, providing the system is a but-for cause: if there were no system, the infringement would not have occurred. But that does not mean, as we've seen, that the provider of the system is legally responsible in all cases – because it is not, "without more," the proximate cause, as Judge Walker concluded in Cablevision.

Drawing the line between a but-for cause and a legally responsible cause is frequently a jury question.[88] The wording of jury instructions will vary from one jurisdiction to another, but to cite an example from New York, where *ABKCO* was decided, the pattern jury instructions say a party need only be a "substantial factor" in causing harm:

> An act or omission is regarded as a cause of an occurrence if it was a substantial factor in bringing about the occurrence . . . There may be more than one cause of an occurrence, but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.[89]

Under this standard, the person who actually presses the button may be a "substantial factor" in making a copy, and probably *is*, in many cases. But tort law says we can't stop there, because there may be concurrent tortfeasors, jointly and severally liable:

> There may be more than one cause of an injury. Where the independent . . . acts or omissions of two or more parties cause injury to another, each of those . . . acts or omissions is regarded as a cause of that injury provided that it was a substantial factor in bringing about that injury.[90]

By its very language, the "person who actually presses the button" test seems to bake in an assumption that there can only be one person, one button, that matters - the person who presses the button. That's just wrong, as a matter of tort law. And significantly for our purposes, if one actor is an active participant in what

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[88] "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it." *Milwaukee & St P. R. Co v Kellogg,* 94 U.S. 469, 474 (1876).

[89] N.Y. Pattern Jury Instructions, PJI 2:70 Proximate Cause—In General (December 2023 Update). The "substantial factor" language dates back at least as far as Jeremiah Smith, note 68 *supra,* at 309.

[90] *Id.,* PJI 2:71 Proximate Cause—Concurrent Causes.

the courts have called "concerted tortious conduct," that person is liable, even if they did not actually commit the act that injured the plaintiff.

For example, in a 1994 vehicle accident case, Plough v. Olmstead, Olmstead was the driver, co-defendant Arnold was a passenger in his car; a drunk driver pulled out in a car ahead of them. Arnold said "let's follow him and get the plate number," or words to that effect. A high-speed chase ensued, in which the driver of the other car was killed. Plaintiff sued both Olmstead and Arnold. Arnold moved for summary judgement, arguing that he could not have been responsible because he wasn't driving. The court denied the motion:

> The record contains evidence that Arnold was not merely a passive occupant in the Olmstead vehicle, but instead actively participated in the pursuit of decedent's vehicle as the pursuit escalated into a high-speed chase. Inasmuch as active participation in the concerted activity is a sufficient basis for the imposition of liability (see, Herman v Wesgate, 94 AD2d 938, 939), we are of the view that Arnold was not entitled to summary judgment.[91]

The passenger in *Plough v. Olmstead* could be a "substantial factor" even though he was not driving. And this has been settled law in copyright cases for at least half a century:

> Since infringement constitutes a tort, common law concepts of tort liability are relevant in fixing the scope of the statutory copyright remedy, and the basic common law doctrine that one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tortfeasor, is applicable in suits arising under the Copyright Act.[92]

If we were to apply this reasoning to Mr. Sagan and his brother-in-law in *ABKCO*, I am comfortable saying Mr. Sagan should be at least a joint tortfeasor.

Now, there's one final tort concept that I think explains a lot about how the case law on "volition" developed: intervening cause. Here's the New York pattern jury instruction:

> The defendant claims that (he, she) is not responsible for the plaintiff's injuries because the injuries were caused by (A, a third person). . . .If you find that a reasonably prudent person would not have foreseen an act of the kind committed by (A) as a probable consequence of the defendant's [act], then the defendant is not responsible for the plaintiff's injuries and plaintiff may not recover.[93]

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[91] Plough v. Olmstead, 210 AD2d 603 (3d Dept. 1994).

[92] Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966).

[93] N.Y. Pattern Jury Instructions, *supra* note 89, PJI 2:72 Proximate Cause – Intervening Causes.

And if there *is* an intervening cause, courts say that it *breaks the causal chain* from any upstream causes, however proximate they may have been. An early example is *Pittsburgh Reduction Co. v. Horton,*[94] a 1908 case from Arkansas. A ten-year-old boy, Charlie Copple, found unexploded blasting caps on a spur rail track near a bauxite mine. As the court related the facts, the mine "was near the public schoolhouse, and a large proportion of the school children of the neighborhood passed by its sheds, machine and toolhouses, and spur railroad tracks in going to and from school. … There was no enclosure around the sheds, machine and toolhouses, or spur track. There was a path along the spur track, which was habitually used by the children of the neighborhood in going to and from school. This was the condition of affairs at the time of the accident, and such condition was known to appellant company."

Charlie brought the devices home, not knowing what they were. His mother, knowing they were explosives of some kind but mistakenly believing them to be spent and thus harmless, allowed the boy to play with them for a week, and then to take them to school. He did so, resulting in serious injury to the plaintiff, a school friend of Charlie's. An action was filed against the mining company for having left the blasting caps where Charlie could find them. A jury found the company liable for negligence.

The verdict was reversed on appeal, with the Arkansas Supreme Court holding that the intervening actions of Charlie's parents broke the causal chain between the mining company's negligence and the plaintiff's injury:

> The evidence speaking on the question is undisputed, and, having determined that the intervening act of Charlie Copple's parents in permitting him to retain in his possession the caps broke the causal connection between the original wrongful act of appellants and the subsequent injury of the plaintiff, there is nothing to submit to the jury.[95]

Courts can consider many factors when deciding whether someone is an intervening cause, but the one necessary condition, the *sine qua non*, is that an intervening cause has to be *independent* of the upstream cause, as were Charlie's parents in *Pittsburgh Reduction*.

Assuming independence, the other factors to consider include:

- Foreseeability of the harm
- Passage of time between initial act and subsequent act
- Spatial distance between initial act and subsequent act
- Whether initial act was completed or is ongoing at time of intervening act, and
- What other acts or forces combined to bring about the harm.[96]

[94] 87 Ark. 576, 113 S.W. 647 (1908).
[95] *Id.* at 649.
[96] These are all from the annotations of the NY pattern jury instructions on intervening cause.

So how would the intervening cause doctrine apply in the copyright context, and how does it relate to volitional conduct? In a case like Cablevision or *Netcom*, you have the system builder, who is a but-for cause of the eventual infringement, and maybe even a substantial factor, a proximate cause. But you also have an end user, another but-for cause, who is *independent* of Cablevision, distant in time and space, the user at home who chooses what to record, pushes the proverbial button, and that person is an *intervening* cause that breaks the causal chain which Cablevision set into motion – by building the system. It's not that the user is volitional and Cablevision isn't; instead, in my view, it's just that the courts tend to find that the user's volitional conduct intervenes and supersedes Cablevision's volitional conduct.

Now, I don't think for a minute that the court in *Cablevision* was secretly thinking in proximate cause terms and hiding that fact – Judge Walker denies it – but the court was weighing the same policy and common-sense factors and groping its way to a result, in a very common-law fashion:

> Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor "makes" any copies when his machines are actually operated by his customers. …[97]

So the question of who "does" the copying, which the court couched mainly in volitional conduct terms, could, in my view, also be expressed in terms of whether the user was an intervening cause as a matter of tort law. We see the same causal sequence in *Archbishop Gregory* – yes, someone else presses the button, but that person is not an independent intervening cause. And in *Archbishop Gregory* the court – correctly in my view – rejected the idea that this separate button-pusher somehow broke the causal chain. In short, it's not about buttons, it's about the relationships among the various but-for causes. And it would be better, as Judge Newman says, to call it what it is.

CONCLUSION: MORAL INTUITIONS

To wrap up with just two quick points: in the course of preparing this talk I stumbled across a fascinating recent article in the University of Chicago Law Review called "Proximate Cause Explained" and thought it sounded like something I should read.[98] The lead author isn't a lawyer or law professor. Instead, he's a professor of moral philosophy, psychology and linguistics . He conducted empirical research on who is "responsible" for concurrent causes, in a moral sense. And as I read Cablevision, that's what the court is expressing with phrases

[97] *Cartoon Network,* 536 F.3d at 132 (emphasis added).

[98] Knobe, J. & Shapiro, S., Proximate Cause Explained: An Essay in Experimental Jurisprudence, 88 U. Chi. L. Rev. 165 (2021).

like "it seems incorrect to say" that Cablevision would be liable. This article delves into *why* it "seems incorrect" to say that.

The article describes a 2008 study in which survey respondents were asked to determine who would be morally responsible for the harm that resulted in the following fictional scenario, I'll paraphrase from the article:

> At the front desk of a university philosophy department there sits a large bowl of ball-point pens. The rule in the department is that staff members can take the pens, but faculty can't. Despite the rule, everyone routinely takes the pens, even though the department frequently sends out email reminders that the pens are not for faculty.
> There came a day when a staff member and a tenured professor both took pens from the bowl, simultaneously, leaving the bowl empty just before an important phone call came in and the desk person couldn't take down the message -- because there were no pens in the bowl.[99]

Who's responsible for the ensuing harm? Both pen-takers were equally proximate, in space and time, both were acting independently of each other – But respondents in the study overwhelmingly said the professor was to blame, was *responsible*, and the staff member was not. The authors of the article posit a general rule whereby people are far more likely to impose responsibility on a causal actor that has violated a rule or norm, as opposed to an equally "proximate" causal actor that has not: "in conjunctive cases, we found, the more wrongful an act is, the more it supersedes alternative factors."[100] And follow-up studies involving the same hypo about the bowl of pens have shown that even when the staff member takes the *last* pen from the bowl, the rule-breaking faculty member is still deemed responsible, by a wide margin.[101]

This explains my moral intuition in *ABKCO*: Mr. Sagan violated a rule or norm, and in my mind, he should be legally responsible for the consequences, even if he did not push the final button with his own hand. He set up the dominoes, and that should matter.[102] Moral intuition has a role to play here, just like Holmes said in 1891,[103] and we – and the courts -- shouldn't be embarrassed to admit it, or try to cover it up with tidy, objective-sounding euphemisms like volitional conduct.

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[99] Paraphrased from *id.* at 184.
[100] *Id.* at 205.
[101] Reuter, K. *et al.*, "The good, the bad and the timely: how temporal order and moral judgment influence causal selection," 5 FRONTIERS OF PSYCHOLOGY 9 (2014).
[102] "There should be no difference between the defendant's responsibility for forces which he actually sets in motion with his own hands and those which he should appreciate are likely to take effect upon the situation he produces." McLaughlin, J.A., *Proximate Cause*, 39 HARV. L. REV. 149, 179 (1925).
[103] Holmes, *supra* note 73.

A second moral intuition is prompted by the realization that the "person who actually presses the button" no longer needs to be a person, in our brave new world of AI. This being 2024, any copyright talk has to mention AI. So here goes: Just as generative AI can give us music and text and video with no "author," I worry that the "button" standard – like the server test -- could very easily give us a world of infringement with no direct infringers. We could soon see defendants arguing that an AI, not any human or juristic person, actually pressed the button in a given case, and furthermore, the AI selected which works to copy and how to disseminate them to the public – all the volitional acts were carried out by AI.

There's an Israeli historian, Noah Yuval Harari, who has been sounding the alarm recently with his observation that AI is not merely a tool, like a printing press or an atomic bomb, but it is an *agent*, meaning it has agency of its own, the ability to make "its" own decisions.[104] That starts to sound a lot like "volition" in the mental-state sense of the word.

So it wasn't a surprise when I recently encountered, on the website of a very savvy IP firm, a Q & A about copyright and AI that directly asked "If the output of a generative AI tool does infringe a third-party copyrighted work, who is the direct infringer?"[105] That's a great question. But I don't think we need to go down the rabbit hole of asking whether AI's can have "volition" for copyright purposes, in order to answer it. I think that volition, properly understood in the copyright context, is not a mental state but a legal conclusion about responsibility. And I think tort law gives us a very usable 150-year-old answer to this brand-new problem: namely, strict liability.

Copyright infringement is strict liability, of course, as we've discussed, and if we think about other classic strict liability fact patterns in tort cases – people working with dynamite, keeping wild animals, etc. – the courts never bothered to ask whether the dynamite had volition, or the wild animals; the *person* who keeps the wild animals, or chooses to work with the dynamite, is responsible for any harm they cause. And that liability does not – and in my mind, should not - stop with the "person who actually presses the button." And we've seen some awareness of this in connection with the debate about fully-autonomous, self-driving cars, whether the makers or owners of the vehicles should be held strictly liable.[106] And as far as I can determine, no court has yet entertained the question

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[104] Harari, Noah Y., "AI Will Take Over Human Systems From Within," interview with Nathan Gardels, NOEMA MAGAZINE, Oct. 9, 2024 (http://www.noemamag.com/ai-will-take-over-human-systems-from-within), accessed Dec. 12, 2024 ("The most important thing to realize about AI is that it's not a tool. It's an agent.")

[105] https://perkinscoie.com/insights/blog/known-unknowns-key-unanswered-questions-raised-generative-ai, accessed Dec. 12, 2024.

[106] *See generally*, Lemann, A. B., "Autonomous Vehicles, Technological Progress, and the Scope Problem in Products Liability," 12 Tort L. J,. 157 (2019); Duffy, Sophia H. and Hopkins, J. Patrick, "Sit, Stay, Drive: The Future of Autonomous Car Liability," 16 SMU Sci. & Tech. L. Rev. 453, 473 (2013) ("[W]ith the adoption of autonomous vehicles, it will

of whether the self-driving car acted volitionally. And that's a can of worms that I humbly suggest should stay unopened.

no longer be the driver society should fear, but rather the vehicle. As such, it is more appropriate to treat accidents involving autonomous vehicles with a strict liability standard like 'bad dogs, vicious bulls, and evil disposed mules'") (quoting *Lewis v. Amorous,* 59 S.E. 338, 340 (Ga. Ct. App. 1907).