NOTE

A Gatekeeper Approach to Product Liability for Amazon

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ABSTRACT

Amazon has revolutionized consumer shopping by providing a marketplace platform that connects consumers to third-party producers selling millions of products. Amazon reaps tremendous financial benefits from the sale of third-party products over its platform but incurs very little responsibility when defective third-party products harm consumers. In recent cases, Amazon has routinely avoided strict product liability by structuring its business model such that it no longer meets legal definitions of "seller" or "distributor." Although plaintiffs and scholars argue that Amazon fits these definitions, the debate focuses too heavily on legal technicalities and fails to uphold commonly accepted policy goals behind traditional product liability: victim compensation, efficient cost spreading, and product safety. To accomplish these goals, this Note proposes that state legislatures adopt marketplace product liability, a novel framework holding Amazon and other online product marketplaces liable for injuries arising from defective third-party products. The proposed framework is justified as a form of gatekeeper liability and is modeled on the two-pronged approach to vicarious copyright infringement. Where a defective product sold by a third-party vendor through Amazon causes injury, Amazon should be liable to the injured consumer where Ama-

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zon (1) had the right and ability to control third-party vendor access to its platform and (2) received a direct financial benefit from the transaction between a consumer and third-party vendor for the third-party product.

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Introduction

In 2014, Albert Stokes was killed when the motorcycle helmet he purchased on Amazon's Marketplace flew off his head in a high-speed collision because of a defective chinstrap.[1] After Stokes's family sued Amazon and the helmet's manufacturer, Amazon settled for just $5,000.[2] Although the court found the manufacturer liable and ordered it to pay $1.9 million, the company failed to do so as of August 2018.[3] Tragically, Stokes's story is not unique; his helmet was just one of over 4,000 items sold by third-party vendors on Amazon that "[were] declared unsafe by federal agencies, [were] deceptively la-

1 Alexandra Berzon, Shane Shifflett & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, Wall St. J. (Aug. 23, 2019, 9:56 AM), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990 [https://perma.cc/4E87-M8MT]. Not only had the helmet been recalled, but also the product's listing on Amazon falsely indicated that the helmet was certified by the U.S. Department of Transportation. *See id.*

2 *Id.*

3 *Id.*

beled or [were] banned by federal regulators."[4] Although Amazon removed some of these goods after a media investigation, many of them reappeared on Amazon within just two weeks.[5]

Stokes's family was left undercompensated because the defective product was sold by a third-party as opposed to Amazon itself.[6] They are hardly alone. Many other plaintiffs injured by third-party products sold over Amazon's platform have been unable to recover at all because the third-party vendors were unreachable due to their relative anonymity.[7] For example, Heather Oberdorf was permanently blinded in her left eye when a defective dog collar—which she purchased from a third-party vendor through Amazon—snapped and caused a retractable leash to recoil into her eye.[8] Oberdorf was ultimately unable to recover from the third-party vendor because neither she nor Amazon could locate the vendor after it ceased operations on Amazon's platform shortly after her injury.[9] Furthermore, direct recovery from a defective product's seller is often practically impossible for an injured consumer—or even an insurance company—when a third-party vendor is located abroad and not subject to personal jurisdiction or service of process in the U.S. After insuring Luke Cain for flood damage caused by a defective faucet adapter he purchased from a third-party vendor through Amazon, State Farm was unable to recover from the third-party vendor because it was not subject to service of process in Wisconsin.[10]

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4 *Id.*

5 *Id.*

6 *Id.*

7 *See* Alexandra Berzon, *How Amazon Dodges Responsibility for Unsafe Products: The Case of the Hoverboard*, WALL ST. J. (Dec. 5, 2019, 11:27 AM), https://www.wsj.com/articles/how-amazon-dodges-responsibility-for-unsafe-products-the-case-of-the-hoverboard-11575563270 [https://perma.cc/EDC2-PZFM] (discussing how anonymity among third-party vendors on Amazon has led to cases where investigators could not determine who made or imported certain products purchased on the platform); *cf.* Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239, 268–69 (2005) (discussing the challenges of enforcing remedies against anonymous internet malfeasors).

8 *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

9 *See id.*

10 *See* State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 969 (W.D. Wis. 2019); *see also* Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *4 (D.N.J. July 24, 2018) (finding that Allstate was unable to recover from the third-party vendor for fire damages caused by a defective laptop battery because the foreign third-party vendor was not subject to service of process in the U.S.).

When the third-party vendor is not amenable to suit, one might think that Amazon[11] would be the next best logical path of recovery. Yet Amazon has nearly always escaped liability by arguing that it is not a "seller" that can be held liable under strict product liability because it never takes title to third-party products.[12] Because Amazon "sidestep[s] the liability that conventional retailers face," injured plaintiffs who cannot sue the responsible third-party vendors are therefore unable to recover for their damages.[13]

While Amazon makes consumer products cheaper and more accessible, its third-party sales pose obstacles to accountability and product safety. Consumers have little means to protect themselves against defective products, which leaves them more vulnerable when they purchase from anonymous or potentially insolvent third-party vendors. This problem is not merely academic—Amazon's third-party sales accounted for "nearly 60% of [its] physical merchandise sales in 2018," meaning there are sure to be more cases involving defective third-party products.[14] Amazon and other online product marketplaces have come to dominate the retail economy, and the resulting changes in consumer-producer relationships raise new questions about how well existing legal regimes can solve old problems in new contexts.[15]

This Note argues that state legislatures should adopt marketplace product liability, a new form of liability imposed on Amazon and other online product marketplaces for injuries arising from defective third-party products sold through their platforms. Under marketplace product liability, if a defective product sold by a third-party vendor through Amazon causes injury, Amazon would be liable where it (1) has the right and ability to control third-party vendor access to its platform and (2) receives a direct financial benefit from the transac-

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11 For the purposes of this Note, "Amazon" refers to both the company that owns and operates the marketplace—Amazon.com, Inc.—and the platform through which the company, third-party vendors, and consumers interact to list, offer for sale, and purchase products—The Amazon Marketplace. This Note's analysis and proposed solution apply equally to other similar online product marketplaces, such as Wish or Alibaba.

12 *See* discussion *infra* Part I.

13 Colin Lechter, *How Amazon Escapes Liability for The Riskiest Products on Its Site*, VERGE (Jan. 28, 2020, 8:00 AM), https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party [https://perma.cc/RTA5-P847].

14 *See* Berzon et al., *supra* note 1.

15 *Cf.* Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 143 (2020) ("[U]nderstanding a firm's liability boundaries has become more pressing because businesses increasingly rely on call centers, online third-party sellers, sales agents, . . . and many other external providers that may harm third parties.").

tion between the consumer and third-party vendor.[16] Marketplace product liability—as a form of "gatekeeper liability"—relies on Amazon's control over third-party vendor access to its platform, rather than control over third-party vendor manufacturing or distribution processes. This proposal departs from traditional vicarious liability found in tort law—which requires some degree of underlying fault on Amazon's part—and is instead modeled after the framework for vicarious copyright infringement.

Marketplace product liability ensures that victims injured by defective third-party products have recourse by allowing recovery from Amazon when the victims cannot reach the responsible vendors. Exposing Amazon to liability for third-party product injuries would incentivize Amazon to exercise its gatekeeping control over access to its platform. In so doing, Amazon will increase its monitoring of third-party vendors and likely only provide access to solvent third-party vendors who agree to indemnify it. This would impose the costs of liability on the third-party vendors themselves, thereby incentivizing them to sell safer goods. Thus, marketplace product liability will both enhance a consumer's opportunity of direct recovery and uphold the goals of traditional strict product liability: victim compensation, efficient cost spreading, and product safety.

Part I of this Note explores the history and policy goals of traditional product liability doctrine and how Amazon has structured its business to avoid this liability. Part II explains the inadequacy of current doctrine, argues why Amazon and other online marketplaces should be held responsible as gatekeepers, and compares how other intermediaries are currently held liable as gatekeepers. Finally, Part III argues that state legislatures should adopt marketplace product liability to incentivize Amazon to exercise its gatekeeping function in line with the goals of traditional product liability.

I. The Origins of Strict Product Liability

The doctrine of strict product liability was born out of influential state court decisions in the early twentieth century. Then–Judge Cardozo paved the way for modern product liability as early as 1916 in *MacPherson v. Buick Motor Co.*,[17] in which he extended the tradi-

16 This proposed framework requires that the plaintiff first successfully prove the elements of strict product liability against the third-party vendor. The elements of strict product liability vary by jurisdiction. For a general guide, see Restatement (Second) of Torts § 402 A (Am. L. Inst. 1965).

17 111 N.E. 1050 (N.Y. 1916).

tional concepts of warranty and liability to noninherently dangerous products in two ways. First, Cardozo held that a product need not be an inherently dangerous product—like poison or explosives—for a manufacturer to be liable as long as the product could cause injury in the course of its normal use.[18] Second, Cardozo eliminated the traditional requirement of privity by extending the manufacturer's liability to all injured persons—as opposed to only the purchaser—where the manufacturer had constructive knowledge that the product is used by nonpurchasers.[19]

Decades later, California Supreme Court Justice Traynor vigorously approved of Cardozo's expanded approach in his concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*,[20] which went beyond *MacPherson* to propose a novel theory of liability. In *Escola*, a waitress was injured by an exploding soda bottle which, like all of the defendant's bottles, had passed a thorough testing process to ensure that it could withstand the pressure created by the soda inside.[21] While the majority affirmed the defendant's liability under a theory of *res ipsa loquitur*,[22] Justice Traynor's concurrence urged the court to embrace strict product liability.[23] Traynor observed that changes in the marketplace and new relationships between consumers, manufacturers, and products should compel the court to adopt a new approach that went beyond traditional negligence principles.[24] The advent of mass production and specialized, complex manufacturing processes, Traynor argued, left consumers far less familiar with manufactured products than they were with artisanal goods.[25] Although consumers could evaluate the reputation of the manufacturer or trademark itself, they had no reasonable means or knowledge to investigate the product or evaluate its safety, which left them to simply accept products "on faith."[26] In contrast, the manufacturers' superior knowledge of the product and manufacturing process gave them a far greater ability to evaluate and mitigate product dangers.[27] Traynor thus argued that liability should

18 *See id.* at 1053.

19 *Id.*

20 150 P.2d 436 (Cal. 1944).

21 *Id.* at 437, 440.

22 *See id.* at 440.

23 *See id.* at 440–41 (Traynor, J., concurring).

24 *Id.* at 440–43.

25 *Id.* at 443.

26 *Id.*

27 *Id.* at 440–41. Traynor also analogized to food safety law, which imposed criminal sanctions for the production, packaging, sale, or distribution of food that causes injury without any requirement to show fault. *See id.* at 442.

rest with product manufacturers as the lowest-cost avoiders of harm and the entities in the best position to spread the costs of accidents.[28]

Traynor later implemented his vision by applying strict product liability directly to manufacturers and retailers in a legion of subsequent opinions, including *Greenman v. Yuba Power Products, Inc.*[29] and *Vandermark v. Ford Motor Co.*[30] He continued to argue that entities involved in the manufacture and sale of a product were better equipped to protect consumers than the consumers themselves: "Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship."[31] Traynor's opinions in *Escola*, *Greenman*, and *Vandermark* were very influential and inspired other states to adopt strict product liability principles.[32] Over time, courts have expanded the doctrine to impose liability on entities throughout a product's chain of distribution to effectuate its essential goals of victim compensation, efficient cost spreading, and enhanced product safety.[33]

A. Modern Overreliance on the Traditional "Seller" Requirement

The debate over whether Amazon is subject to strict product liability centers around a legal system that assumes products reach consumers through a traditional supply chain built on buyer-seller

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28 *See id.* at 440–41. Traynor noted that manufacturers understood their position and would attempt to enhance their reputation by inspecting and testing their own products and remediating consumer dissatisfaction through replacements or refunds. *See id.* at 443.

29 377 P.2d 897, 900–01 (Cal. 1963) (en bank) (holding manufacturers strictly liable for injuries due to product defects because manufacturers should bear the cost of injury, rather than consumers who are "powerless to protect themselves").

30 391 P.2d 168, 171 (Cal. 1964) (en bank) (holding that strict product liability applies to retailers because "[t]hey are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products" and "may be the only member of that enterprise reasonably available to the injured plaintiff").

31 *Id*. at 172. This development signaled a shift in some of Traynor's original thinking in *Escola*, where he noted that "there is greater reason to impose liability on the manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test." *Escola*, 150 P.2d at 443–44 (Traynor, J., concurring).

32 *See, e.g.*, John W. Wade, *Chief Justice Traynor and Strict Tort Liability for Products*, 2 HOFSTRA L. REV. 455, 459 (1974) ("*Greenman* . . . produced a rapid judicial revolution. . . . And it has been followed by state after state . . . . The transition to the strict liability rule has not only been complete, it has also taken place in an unprecedentedly short time."). *See generally* RESTATEMENT (SECOND) OF TORTS § 402 A (AM. L. INST. 1965) (reflecting many of the principles that Traynor advanced).

33 *See, e.g.*, Sukljian v. Charles Ross & Son Co., 503 N.E.2d 1358, 1360 (N.Y. 1986). *See generally* RESTATEMENT (SECOND) OF TORTS § 402 A cmt. f (AM. L. INST. 1965).

relationships. Amazon, however, has transformed the way consumers and producers interact.[34] Amazon and other online product marketplaces reduce transaction costs by creating platforms where consumers and third-party vendors can more easily conduct business.[35] While consumers can often purchase products from Amazon directly, it relies heavily on third-party vendors who sell over its platform to improve the product variety available to consumers.[36] Amazon reaps tremendous earnings from third-party vendors by charging a commission on sales of third-party products and providing various services.[37] These services range from consumer-facing features like the Early Reviewer Program, which prompts early buyers to review a seller's product, to Amazon's full-service inventory and logistics program, Fulfillment by Amazon.[38]

Amazon has generally succeeded in avoiding product liability actions related to products sold by third-party vendors. Amazon consistently argues that it is not the "seller" of third-party goods sold over its platform.[39] The definition of a "seller" is one "who sells or contracts to

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34 *See* Allison Schrager, *We Wouldn't Have Ecommerce Without Amazon*, QUARTZ (Oct. 22, 2019), https://qz.com/1688548/amazons-control-of-e-commerce-has-changed-the-way-we-live/ [https://perma.cc/Q2T8-R4KN].

35 *Cf.* Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 144 (2019). This Note does not discuss any theory of liability related to other online marketplaces, including those for home-sharing or ride-sharing, whether or not those marketplaces offer products for sale. For a discussion of liability and regulation of other kinds of online marketplaces, see *id.* at 147–51.

36 *See id.* at 144; Hilary Milnes, *Amazon is Chasing Growth and Shifting Resources to Third-Party Sellers*, DIGIDAY (Jan. 31, 2019), https://digiday.com/marketing/amazon-chasing-growth-shifting-resources-third-party-sellers/ [https://perma.cc/V5LG-9X3Y] (noting that Amazon's third-party sales over the marketplace nearly double the value of its own direct sales even though third-party sales only make up about 40% of all product units sold). Other online product marketplaces use a similar business model. *See* Sam Hollis, *How Wish Grew to Over $1 Billion in Revenue by Inverting Amazon's Strategy*, JILT (Feb. 11, 2020), https://jilt.com/blog/wish-growth/ [https://perma.cc/3MDQ-6DBJ] (discussing how Wish built its business model by focusing on third-party sales).

37 *See Selling on Amazon Fee Schedule*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/help.html?itemID=200336920&ldGoogle [https://perma.cc/R5NZ-YN6D]; *Amazon Third-Party Seller Services Sales*, MARKETPLACE PULSE (2021), https://www.marketplacepulse.com/stats/amazon/amazon-third-party-seller-services-sales-106 [https://perma.cc/UEY3-YN5R] (reporting that Amazon earned $80.44 billion in fees for services offered to third-party sellers in 2020).

38 *See* Milnes, *supra* note 36; *Fulfillment by Amazon: Save Time and Help Your Business Grow with FBA*, AMAZON, https://sell.amazon.com/fulfillment-by-amazon.html [https://perma.cc/4SR8-7BJW].

39 *See, e.g.*, Oberdorf v. Amazon.com Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

sell goods; a vendor."[40] Crucial to Amazon's argument is that a "sale" requires "[t]he transfer of property or title for a price."[41] Because Amazon never retains title to third-party products, courts often agree that it is not a "seller" and therefore refuse to impose product liability in lawsuits related to defective third-party products.[42] Amazon's contentions that it is not a seller have been its main defense to defeat product liability claims.[43]

Although some states' strict product liability regimes focus on whether an entity is within the chain of distribution, courts often still require a transfer or receipt title to qualify as an entity within that chain.[44] For example, New York subjects "manufacturer[s], retailer[s] or distributor[s]" to strict product liability if they are "within the distribution chain."[45] Interpreting New York law, the district court in *Eberhart v. Amazon.com, Inc.*[46] found that "the failure to take title to a product places that entity on the outside" of the chain of distribution.[47] Because Amazon never retained title to the defective coffeemaker that shattered and injured the plaintiff, Amazon could not "be considered a 'distributor' subject to strict liability."[48] Instead, the court reasoned that "Amazon is better characterized as a provider of services" and that none of its three key services—"(1) maintaining an online marketplace, (2) warehousing and shipping goods, and (3) processing payments"—subjected it to strict product liability.[49]

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40 *Seller*, BLACK'S LAW DICTIONARY (11th ed. 2019).

41 *Sale*, BLACK'S LAW DICTIONARY (11th ed. 2019).

42 *See* Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 141 (4th Cir. 2019) (holding that despite Amazon's great control over the transaction and interface with the consumer, a transfer of title is necessary to be characterized as a "seller" under Maryland law).

43 *See, e.g.*, Fox v. Amazon.com, Inc., 930 F.3d 415, 422 (6th Cir. 2019); State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 969 (W.D. Wis. 2019). While Amazon routinely argues that § 230 of the Communications Decency Act immunizes it from product liability claims as an online platform, courts have rejected this, reasoning that § 230 does not apply to the content of product listings or warnings. *See, e.g.*, *Oberdorf*, 930 F.3d at 153; *Erie Ins.*, 925 F.3d at 139–40; McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 536–40 (D. Md. 2016).

44 *Erie Ins.*, 925 F.3d at 141 ("[A] manufacturer, distributor, dealer, and retailer who own—*i.e.*, have title to—the products during the chain of distribution are sellers, whereas . . . [those] who do not take title to property during the course of a distribution but rather render services to facilitate that distribution or sale, are not sellers."); Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018).

45 *Eberhart*, 325 F. Supp. 3d at 397 (quoting Finerty v. Abex Corp., 51 N.E.3d 555, 559 (N.Y. 2016)).

46 325 F. Supp. 3d 393 (S.D.N.Y. 2018).

47 *Id.* at 398.

48 *Id.*

49 *Id.* at 399.

Other states use a broader definition of "seller" that extends beyond obtaining title for the purposes of their product liability law. For example, the Sixth Circuit observed that Tennessee's definition of "seller" is quite broad because the state legislature intended to provide product liability protection whether or not an actual sale occurred.[50] Instead of looking solely for a sale, Tennessee law also looks to the degree of control the defendant exercised "over a product in connection with its sale."[51] Despite this broader definition, the court found Amazon not liable for fire damage arising from a defective third-party product because Amazon did not exercise sufficient control over the sale.[52] Even where state law adopts a broad definition of a seller and explicitly imposes product liability on nonseller entities—including distributors, lessors, and bailors—courts have found that Amazon does not exercise enough control over the sale to be held liable.[53]

Only a small handful of courts have held Amazon liable for a third-party product defect under strict product liability. In *Oberdorf v. Amazon.com Inc.*,[54] a Third Circuit panel characterized Amazon as a "seller" of a third-party product subject to strict product liability under Pennsylvania law.[55] The *Oberdorf* panel looked to four factors prescribed by the Pennsylvania Supreme Court to determine whether Amazon was a "seller" of the defective dog leash that injured the

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50 *See* Fox v. Amazon.com, Inc., 930 F.3d 415, 423 (6th Cir. 2019) (citing Baker v. Promark Prods. W., Inc., 692 S.W.2d 844, 847 (Tenn. 1985); Winningham v. Ciba-Geigy Corp., No. 97-5777, 1998 WL 432472, at *3 (6th Cir. 1998)).

51 *Id.* at 425.

52 *Id.*

53 *See, e.g.*, *id.* at 422, 425 (citing TENN. CODE ANN. § 29-28-105(a) (1978)) (finding that under Tennessee law, "seller" includes lessors, bailors, retailers, wholesalers, and distributors, but declining to classify Amazon as any kind of "seller" because it lacks sufficient control over the transaction); Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 143 (4th Cir. 2019) (rejecting Erie's characterizations that Amazon is an "entrustee" or "distributor" because acquisition of title is still necessary for such characterization under Maryland law); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *7–8 (D.N.J. July 24, 2018) (finding that Amazon "never exercised control over the product sufficient to make it a 'product seller' under [New Jersey law]"); *see also* Amy Elizabeth Shehan, Note, *Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 GA. L. REV. 1215, 1225–26 (2019) (arguing that Amazon lacks sufficient control to be considered a "seller"). *But see* Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP. FIN. & COM. L. 259, 264–70 (2020) (arguing that Amazon exercises control over third-party products and that it should be considered a "seller" subject to strict product liability).

54 930 F.3d 136 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

55 *See id.* at 148–50.

plaintiff and found that all weighed strongly in favor of imposing strict product liability on Amazon.[56] First, Amazon was "the only member of the marketing chain available" for recovery.[57] Second, the imposition of strict product liability would incentivize Amazon to exert control over third-party vendors to enhance product safety.[58] Third, Amazon was "in a better position than the consumer to prevent the circulation of defective products."[59] Fourth, Amazon was well equipped to distribute the cost of victim compensation because it already required third-party vendors to agree to indemnify Amazon before selling over its platform.[60] Because all four factors weighed in favor of imposing strict product liability, the panel held that transfer of title is not required to be a seller under Pennsylvania law.[61] Instead, it said that "strict liability in Pennsylvania is properly extended to anyone who enters into the business of supplying human beings with products which may endanger the safety of their persons and property."[62]

Although the panel remanded the plaintiff's strict product liability claim,[63] the Third Circuit vacated the panel's opinion for reconsideration en banc.[64] Additionally, the en banc court certified the question of Amazon's liability in cases like this to the Pennsylvania Supreme Court.[65] It is therefore still unclear whether the court will ultimately apply strict liability standards to Amazon's third-party

56 *See id.* at 143–44 (citing Musser v. Vilsmeier Auction Co., Inc., 562 A.2d 279 (Pa. 1989)).

57 *Id.* at 144–45 (quoting *Musser*, 562 A.2d at 282).

58 *See id.* at 145–46.

59 *Id.* at 146–47 (quoting *Musser*, 562 A.2d at 282).

60 *See id.* at 147–48.

61 *See id.* at 148, 150.

62 *Id.* at 148 (internal quotation marks omitted) (quoting Hoffman v. Loos & Dilworth, Inc., 452 A.2d 1349, 1353 (Pa. Super. Ct. 1982)).

63 *See id.* at 153. The panel also held, contrary to Amazon's arguments, that the plaintiff's claims were not barred by § 230 of the Communications Decency Act. *See id.*

64 *See* Oberdorf v. Amazon.com Inc., 936 F.3d 182, 182–83 (3d Cir. 2019) (granting petition for rehearing en banc and vacating the panel opinion entered on July 3, 2019); *see also* Jeannie O'Sullivan, *3rd Circ. Calls Amazon '8,000-lb. Gorilla' In Seller Liability Row*, Law360 (Feb. 19, 2020, 6:48 PM), https://www.law360.com/articles/1245262/3rd-circ-calls-amazon-8-000-lb-gorilla-in-seller-liability-row [https://perma.cc/CE4V-FHJG].

65 *See* Oberdorf v. Amazon.com Inc., 818 F. App'x 138, 142 (3d Cir. 2020) (en banc) (certifying question of law to the Pennsylvania Supreme Court); Oberdorf v. Amazon.com, Inc., 237 A.3d 394 (Pa. 2020) (per curiam) (granting the petition for certification). The question certified was: "Under Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?" *Oberdorf*, 818 F. App'x at 143.

products, but the panel opinion catalyzed the debate over Amazon's product liability by splitting from the Fourth and Sixth Circuits.[66]

Some federal district courts have found Amazon liable under traditional strict product liability, but only because the relevant state law was uniquely broad. For example, in *State Farm Fire & Casualty Co. v. Amazon.com, Inc.*,[67] a federal district court considered whether Amazon was the "seller" of a defective bathtub faucet adapter that caused a flood under Wisconsin law.[68] The defective product's manufacturer was unknown and therefore not subject to service of process in Wisconsin.[69] Wisconsin's product liability statute indicated that "in the absence of the manufacturer, the entity responsible for getting the defective product into Wisconsin is liable."[70] The court—relying on the statute's language and purpose—held Amazon strictly liable for the damage caused by the defective product.[71] The court reasoned that Amazon's lack of title to the product was "a mere technicality" because Amazon was an "integral," rather than "peripheral," part of the chain of distribution.[72] Similarly, in *Gartner v. Amazon.com, Inc.*,[73] a federal district court—applying Texas law—held Amazon strictly lia-

66 *Compare* Eric Goldman, *Amazon May Be Liable for Marketplace Items*–Oberdorf v. Amazon, TECH. & MKTG. L. BLOG (July 8, 2019), https://blog.ericgoldman.org/archives/2019/07/amazon-may-be-liable-for-marketplace-items-oberdorf-v-amazon.htm [https://perma.cc/6VGA-6BGM] (arguing that the *Oberdorf* panel misinterpreted Pennsylvania law and that Amazon should not be required to police third-party vendors), *with* Gus Hurwitz, *The Third Circuit's* Oberdorf v. Amazon *Opinion Offers a Good Approach to Reining in the Worst Abuses of Section 230*, TRUTH ON MKT. (July 15, 2019), https://truthonthemarket.com/2019/07/15/the-third-circuits-oberdorf-v-amazon-opinion-offers-a-good-approach-to-reining-in-the-worst-abuses-of-section-230/ [https://perma.cc/6GXT-ADJP] (arguing that § 230 of the Communications Decency Act was never intended to provide online platforms a "shield" against responsibility for any harm connected with their services), *and* Kate Klonick (@Klonick), TWITTER (July 5, 2019, 1:23 PM), https://twitter.com/Klonick/status/1147194195502870529 [https://perma.cc/8PM4-HCGS] (characterizing the *Oberdorf* panel opinion as a "[brilliant] way of . . . holding tech responsible for harms they perpetuate"). Even though Goldman, Hurwitz, and Klonick are largely concerned with the *Oberdorf* panel opinion's effect on the strength of § 230 immunity, the opinion certainly enhances risk exposure for Amazon and third-party vendors. *See* Sarah K. Rathke, *Supply Chain Decision: Online Marketplaces at Risk Due to Federal Court Ruling in* Oberdorf v. Amazon.com Inc., NAT'L L. REV. (July 22, 2019), https://www.natlawreview.com/article/supply-chain-decision-online-marketplaces-risk-due-to-federal-court-ruling-oberdorf [https://perma.cc/SJC4-GF3B] (suggesting that online product marketplaces like Amazon "develop vetting processes to determine if third-party vendors are in good standing and amenable to the legal process").

67 390 F. Supp. 3d 964 (W.D. Wis. 2019).

68 *Id.* at 966.

69 *Id.* at 969.

70 *Id.* at 970.

71 *See id.* at 974.

72 *Id.* at 972–73.

73 433 F. Supp. 3d 1034 (S.D. Tex. 2020).

ble for a defective television remote control sold by a third-party vendor.[74] Like *State Farm*, however, *Gartner* relied on Texas's broad definition of "seller," which focuses on "whether the entity, as a part of its regular business, distributed or placed a product into the stream of commerce."[75] The court also looked to Texas Supreme Court decisions to find that under Texas law, "a seller does not need to actually sell the product" to be liable for its defect.[76] Instead, "introducing the product in the stream of commerce is enough," meaning Amazon's status as a service provider did not preclude it from facing product liability as a seller.[77] Although *State Farm* and *Gartner* may provide some hope for injured plaintiffs, broad conceptions of product liability that decouple the title requirement from "seller" status are uncommon and still do not guarantee product liability for Amazon.[78] Thus, the *State Farm* and *Gartner* decisions will probably only have a limited effect on product liability claims against Amazon in other jurisdictions.[79]

Perhaps the farthest-reaching decision holding Amazon liable for a third-party product defect is *Bolger v. Amazon.com, LLC*,[80] a California state court decision. The *Bolger* court arguably had more room to hold Amazon liable than a federal court given California courts' policy-based approach to novel situations in product liability.[81] After finding that Amazon played a substantial role in the underlying trans-

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74 *See id.* at 1044.

75 *Id.* at 1044 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3) (West 2013)).

76 *Id.* at 1041 (citing Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d. 608, 613 (Tex. 1996)); *see* Sean M. Bender, Note, *Product Liability's Amazon Problem*, 5 J.L. & TECH. TEX. (forthcoming 2021) (manuscript at 24), https://ssrn.com/abstract=3628921 [https://perma.cc/K7Y4-UPFN].

77 *Gartner*, 433 F. Supp. 3d at 1041–42 (citing *Firestone Steel Prods.*, 927 S.W.2d. at 613; Fresh Coat, Inc. v. K-2, Inc., 318 S.W.3d 893, 899 (Tex. 2010)).

78 *See, e.g.*, Fox v. Amazon.com, Inc., 930 F.3d 415, 425 (6th Cir. 2019) (finding that despite Tennessee's relatively broad product liability statute, Amazon was not subject to product liability because it did not exercise sufficient control over the product); *see also State Farm*, 390 F. Supp. 3d at 970 (contrasting broad definitions of "sale" in other Wisconsin statutes with narrow definitions observed in Ohio and Tennessee statutes).

79 *See* Bender, *supra* note 76, at 26. The Fifth Circuit recently certified the question in *Gartner* to the Supreme Court of Texas asking: "Under Texas products-liability law, is Amazon a 'seller' of third-party products sold on Amazon's website when Amazon does not hold title to the product but controls the process of the transaction and delivery through Amazon's Fulfillment by Amazon program?" McMillan v. Amazon.com, Inc., 983 F.3d 194, 203 (5th Cir. 2020).

80 267 Cal. Rptr. 3d 601, 609 (Cal. Ct. App. 2020).

81 *See id.* at 613 ("To determine whether the doctrine of strict products liability should be applied in a situation that has not been considered by previous precedents, California courts primarily look to the purposes of the doctrine.") (citing O'Neil v. Crane Co., 266 P.3d 987 (Cal. 2012)).

action, the court held Amazon liable, explicitly basing its holding on the policy goals of victim compensation, cost spreading, and product safety.[82] Yet although *Bolger* may be advantageous to plaintiffs in California, it too will have only limited authority—if any—in cases in any other state.

The current debate over strict product liability for Amazon's third-party products largely fails to address the goals of traditional product liability and mostly centers around technical arguments. Amazon has developed a business model that "disrupts the traditional supply chain," allowing it to avoid liability premised on traditional legal concepts like title, control, or the chain of distribution.[83] Amazon's strategy of removing these cases to federal court limits the ability of state law to evolve to uphold product liability's goals over outdated technicalities.[84] This leaves many plaintiffs without an avenue for recovery from product injuries, creating unjust and anomalous results, especially given strict product liability's widespread acceptance since Justice Traynor's insights.[85] Lawmakers and courts should be concerned that Amazon can so easily evade strict liability and undermine its policy goals of victim compensation, efficient cost spreading, and enhanced product safety.

B. Pursuing Strict Liability's Policy Goals

Legal rules should seek to uphold the policy goals of strict product liability rather than focus on legal technicalities to preserve a traditional concept of the consumer marketplace. Just as "[t]he manufacturer's obligation to the consumer must keep pace with the changing relationship between them,"[86] Amazon's obligation to the consumer should keep pace with the changing relationship between it and its consumers. Justice Traynor's insights on the changing industrial economy of his day mirror today's changing online economy. The marketplace for goods has changed dramatically as it has shifted online, creating a burgeoning, multibillion-dollar industry for the sale of consumer goods sold by third-parties through online product market-

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82 *See id.* at 617–18 (citing Vandermark v. Ford Motor Co., 391 P.2d 168 (Cal. 1964)).

83 Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring).

84 *See id.* at 145 ("To be sure, Amazon's strategy of removing nearly every products liability case to federal court has . . . arguably stunted the development of state law.").

85 *See* Wade, *supra* note 32, at 459; RESTATEMENT (SECOND) OF TORTS § 402 A (AM. L. INST. 1965).

86 Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring).

places.[87] Like the industrial shift, this online shift leaves consumers further separated from manufacturers and retailers who make and display the products they buy, meaning that today's consumers continue to purchase products "on faith."[88] With Amazon providing access to millions of products from any number of sources, consumers have far less incentive to shop in physical stores or even visit a specific retailer's website, lest they endure a lack of variety surpassed online on an "Amazonian" scale.[89] Consumers may easily be unaware if the items they purchase through Amazon are sold by third-party vendors or by Amazon itself, suggesting just how much consumers trust Amazon when purchasing goods through its platform.[90] Furthermore, Amazon is well equipped to absorb and spread the cost of injuries when they occur.[91] Legal rules to incentivize higher product quality, facilitate cost spreading, and ensure adequate recovery are just as necessary today as they were at the peak of the industrial revolution. These

87 *See* Fareeha Ali, *What are the Top Online Marketplaces?*, DIG. COM. 360 (July 9, 2020), https://www.digitalcommerce360.com/article/infographic-top-online-marketplaces/ [https://perma.cc/X8YQ-SGLD] (highlighting that more than $2 trillion was spent on online product marketplaces in 2019 globally, with more than $500 billion spent domestically).

88 *Escola*, 150 P.2d at 443 (Traynor, J., concurring); *see* Schrager, *supra* note 34 ("For most of human existence, . . . shopping usually involved leaving the house, seeing and touching the goods on offer, and having a conversation with a stranger. Now you can get almost anything . . . with a single click.").

89 Even this might be an understatement. Although the Amazon rainforest boasts immense biodiversity—including over 400 reptile species, 430 mammal species, 1,000 amphibians, 1,300 birds, 5,600 fish, and 40,000 plant species—in 2016, the Amazon Marketplace hosted over 5.5 million distinct health care products, 6.8 million office products, 19.8 million computers, 64 million home & kitchen products, and 82 million cell phones & accessories, among millions of other products. *See* Rhett A. Butler, *Animals of the Amazon Rainforest*, MONGABAY (April 1, 2019), https://rainforests.mongabay.com/amazon/amazon_wildlife.html [https://perma.cc/RXZ6-FWNL]; *How Many Products Does Amazon Carry?*, 360PI, https://0ca36445185fb449d582-f6ffa6baf5dd4144ff990b4132ba0c4d.ssl.cf1.rackcdn.com/IG_360piAmazon_9.13.16.pdf [https://perma.cc/E9AV-TC72].

90 *See, e.g.*, Fox v. Amazon.com, Inc., 930 F.3d 415, 418 (6th Cir. 2019) (explaining that the plaintiff believed Amazon "owned the hoverboard, and that she purchased the hoverboard from [Amazon]"); Allstate N.J. Ins. Co. v. Amazon.com, Inc., No. 17-2738 (FLW) (LHG), 2018 WL 3546197, at *1 (D.N.J. July 24, 2018) (discussing the plaintiff's impression that she bought the defective product from Amazon and the fact that Amazon's name appeared on the packaging materials and on the plaintiff's credit card statement); Bolger v. Amazon.com, LLC, 267 Cal. Rptr. 3d 601, 609 (Cal. Ct. App. 2020) (highlighting that the plaintiff had no contact with the third-party vendor or "anyone other than Amazon" and "believed Amazon sold her the [defective] battery").

91 *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 147 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019) (finding that Amazon already has the contractual tools to indemnify itself through third-party vendors or adjust commissions to redistribute the cost of injuries).

goals can be further achieved by premising Amazon's liability on the source of its control: access to its marketplace platform.[92]

II. Holding Amazon Liable as a Gatekeeper

"[T]he law lags behind technology" when it comes to holding Amazon accountable for injuries to individual consumers who purchase third-party products.[93] In other markets facilitated by online intermediaries—such as internet service, ride sharing, and home sharing—commentators have insisted upon greater responsibility for intermediaries acting as "gatekeepers" to lucrative or essential services.[94] Because gatekeeping intermediaries are well equipped to control and prevent various harms at reasonable costs, gatekeeper theory underpins various forms of indirect liability, including vicarious copyright infringement.[95] Applying gatekeeper theory through marketplace product liability would help improve Amazon's accountability for third-party products. Because marketplace product liability

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92 *But see* Shehan, *supra* note 53, at 1226–27. Shehan argues that the policy goals behind strict product liability are not advanced by imposing it upon online product marketplaces for two reasons. *See id.* First, Shehan argues that they have no direct control over the manufacturing or distribution processes of third-party vendors such that it can prohibit dangerous products from reaching consumers over its platform. *See id.* Second, Shehan posits that corrective justice rationale is not served because the marketplace does not create the dangerous condition of the product's defect. *See id.* This Note argues to the contrary. Briefly, controlling access to the platform and utilizing preexisting indemnity clauses provide Amazon sufficient means to enhance product safety and reduce the number of defective third-party products that reach consumers. Additionally, the proposed marketplace product liability framework aligns with traditional product liability doctrine as a theory of strict liability, meaning it is just as irrelevant whether the marketplace caused a product's dangerous condition as it is irrelevant whether a traditional manufacturer, retailer, or distributor caused it; they are all strictly liable for the resulting injury.

93 Milo & Gabby, LLC v. Amazon.com, 144 F. Supp. 3d 1251, 1253 (W.D. Wash. 2015), *aff'd*, 693 F. App'x 897 (Fed. Cir. 2017) ("Amazon enables and fosters a market place reaching millions of customers, where anyone can sell anything, while at the same time taking little responsibility for 'offering to sell' or 'selling' the products."). Large intermediary companies' responsibilities to consumers are being actively reevaluated and developed in multiple legal fields. *See, e.g.*, Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019) (holding that consumers who purchase apps on Apple's App Store are direct purchasers from Apple, not from app developers alone, enabling consumers to sue Apple for antitrust violations). *See generally* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 Va. L. Rev. 467 (2020) (evaluating how policymakers have enlisted large firms controlling core markets for enforcement against smaller wrongdoers).

94 *See* Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 Cornell L. Rev. 901, 903 (2002); Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 Wm. & Mary L. Rev. 239, 265 (2005) ("[T]he idea that in some cases misconduct can be sanctioned most effectively through the indirect imposition of responsibility on intermediaries is . . . not new.").

95 *See* Ke Steven Wan, *Monopolistic Gatekeepers' Vicarious Liability for Copyright Infringement*, 23 Regent U. L. Rev. 65, 67–68 (2010).

would impose strict liability, it is important to consider the value of imposing a no-fault theory of liability on Amazon instead of traditional fault-based liability.[96]

A. The Inadequacy of Fault-Based Liability for Amazon

Subjecting Amazon to a no-fault theory of liability furthers the same policy rationales that justify applying traditional strict product liability to manufacturers, distributors, and retailers.[97] Strict liability is often justified where the defendant benefits from a certain activity but faces little to no cost or harm associated with that activity, which is instead borne by some other victim.[98] Under traditional product liability, "sellers" within the chain of distribution are held strictly liable where they receive a direct financial benefit from the sale of a defective product and that product causes injury to some victim.[99] Even if Amazon is outside the traditional chain of distribution, Amazon directly benefits from the sale of third-party products over its platform by receiving a commission for each product sold, including defective products.[100] Therefore, applying a no-fault theory of liability to Ama-

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96 Gatekeeper theory is typically applied through forms of strict liability, and marketplace product liability would follow that trend. *Cf.* Hamdani, *supra* note 94, at 904–05, 913 (arguing against pure strict liability for online intermediaries despite its common support). One might also ask whether direct regulation of wrongdoers is preferable to a liability-based regime. Without engaging in a full discussion on the issue, this Note asserts that marketplace product liability is preferable to direct regulation of third-party vendors because victims of defective third-party products detect the harm most easily and Amazon can deter or mitigate the potential for defective products most effectively. *See infra* Section II.B; Ke Steven Wan, *Gatekeeper Liability Versus Regulation of Wrongdoers*, 34 OHIO N. U. L. REV. 483, 487 (2008) ("Gatekeeper liability is generally superior to regulation when (1) victims have information about harm done and (2) gatekeepers can deter misconduct at acceptable costs . . . . When gatekeepers can deter misconduct effectively, moving in the direction of gatekeeper liability is desirable.").

97 Marketplace product liability would not require any Amazon or other online product marketplaces to meet any specific characterization to be liable for product defects; it would instead focus on their control over access to their own platforms and the financial benefit they receive from the sale of third-party products. *See infra* Part III.

98 *See* Hamdani, *supra* note 94, at 913, 917.

99 *See* RESTATEMENT (SECOND) OF TORTS § 402 A (AM. L. INST. 1965); *cf.* State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 973 (W.D. Wis. 2019) ("In strict product liability actions, the 'act' to which the seller's responsibility attaches is not an act of negligence. If indeed it is an act at all, it is simply the act of placing or maintaining a defective product in the stream of commerce." (internal quotation marks omitted) (quoting Fuchsgruber v. Custom Accessories, Inc., 628 N.W.2d 833, 841 (Wis. 2001))).

100 *See Selling on Amazon Fee Schedule*, *supra* note 37 ("Sellers pay a Referral Fee on each item sold. . . . For all products, Amazon deducts the applicable referral fee percentage calculated on the total sales price . . . ."). Other online product marketplaces have a similar commission-based fee structure. *See, e.g.*, *Policy Overview: Fees and Payments*, WISH, https://merchant.wish.com/policy/fees_and_payments [https://perma.cc/F35X-XT5V].

zon corrects for the social cost associated with its financial gain from facilitating the sale of a defective product.[101]

Strict liability is also more appropriate than a fault-based system for Amazon because it enables Amazon to decide the optimal means of avoiding harm. Strict liability forces defendants to internalize social harm, incentivizing them to "adjust the scope of their activity to the optimal level."[102] For gatekeepers, this harm-reducing activity involves detecting and thwarting potential wrongdoers through an optimal level of monitoring.[103] In contrast, under fault-based regimes, courts focus on the intermediary's negligence and determine a "due level" of gatekeeper monitoring, which could lead to inefficient over- or underdeterrence of harm.[104] Inquiring into Amazon's actual fault leads to judicial speculation as to how much control a marketplace *should* have over third-party vendors. The fault inquiry also requires courts to ask how Amazon's business should be structured, which is beyond their expertise or purview. In contrast, strict liability reduces courts' administrative costs because they need only find injury and causation to impose liability, regardless of Amazon's fault.[105]

Finally, the need for strict liability is even more pronounced for Amazon because fault-based liability has proven to be an inadequate avenue to accomplish the goals of victim compensation, efficient cost spreading, and enhanced product safety. Most negligence claims for defective third-party products have failed against Amazon because it is difficult to show that Amazon is directly responsible for a defective product that it did not manufacture or design.[106] As is often the case, an injured plaintiff may be without recovery if the third-party vendor

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101 *Cf.* Hamdani, *supra* note 94, at 917.

102 *Id.* at 913 & n.43.

103 Assaf Hamdani, *Gatekeeper Liability*, 77 S. CAL. L. REV. 53, 83–84 (2003).

104 *Id.* at 84–85.

105 *See id.* at 83–84; Hamdani, *supra* note 94, at 914.

106 *See, e.g.*, Eberhart v. Amazon.com, Inc., 325 F. Supp. 3d 393, 400 (S.D.N.Y. 2018) (finding that Amazon owed no duty to the plaintiff because it "did not manufacture, sell, or otherwise distribute" the third-party coffeemaker that shattered and caused plaintiff severe nerve damage); Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 782 (N.D. Ill. 2019) (finding that Amazon owed no duty to plaintiffs injured by a defective third-party hoverboard and, even if Amazon did owe a duty, plaintiffs failed to provide evidence that the defect was present at the time of sale such that Amazon could have detected it). Evaluating third-party product listings on marketplaces for negligent failure to warn likely runs afoul of § 230 of the Communications Decency Act of 1996, which immunizes online platforms from liability for publishing information provided by third parties. 47 U.S.C. § 230(c)(1); *see also* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 153 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019); *Eberhart*, 325 F. Supp. 3d at 400 n.5.

cannot be reached.[107] Because fault-based liability—under current doctrine—is unlikely to succeed against Amazon, it has less incentive to pressure third-party vendors to address defective products and improve safety.[108] Therefore, a gatekeeper liability regime that imposes strict liability on Amazon for third-party product sales would be more effective in achieving traditional product liability's policy goals than relying on negligence theories.

B. Amazon's Control Over Third-Party Vendor Access to the Platform

Gatekeeper liability—as a theory of indirect liability—imposes a duty upon "private 'gatekeepers' to prevent misconduct by withholding support" from wrongdoers to enforce certain policy goals.[109] A gatekeeper is a party who "sell[s] a product or provide[s] a service that is necessary for clients wishing to enter a particular market or engage in certain activities."[110] A gatekeeper's control over access to the necessary product or service serves as the "gate" it "keeps."[111] As with indirect liability generally, the gatekeeper is held liable for harm to consumers posed by a third party in connection with the third party's use of the gatekeeper's product or service.[112] To protect themselves from liability, gatekeepers can increase the opportunity cost of noncompliance or misuse of their essential products or services by withholding access from misusers, thereby foreclosing certain advantageous or profitable activity.[113]

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107 *See, e.g.*, *Oberdorf*, 930 F.3d at 142 (finding that the third-party vendor, The Furry Gang, could not be located by the plaintiff or Amazon); Fox v. Amazon.com, Inc., 930 F.3d 415, 421 n.4 (6th Cir. 2019) (noting that the plaintiffs only obtained a default judgment against the third-party vendor of the hoverboard that set fire to their house); State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 969 (W.D. Wis. 2019) (noting that the third-party vendor of a defective faucet adaptor was not subject to service of process in Wisconsin).

108 *See* Ryan Bullard, Note, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. 181, 230–31 (2019).

109 Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 54 (1986).

110 Hamdani, *supra* note 103, at 58; *see also* Kraakman, *supra* note 109, at 53 (describing gatekeepers as "private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers"); Wan, *supra* note 96, at 488–89 (generalizing Hamdani and Kraakman's definitions as "any party who provides a necessary product or service without which clients cannot accomplish a transaction or enter a market").

111 Kraakman, *supra* note 109, at 54.

112 *See generally* Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 228–33 (2006) ("Indirect liability is said to attach in instances where the law holds one party liable because of a wrong committed by another.").

113 *See* Kraakman, *supra* note 109, at 59.

Amazon serves as an intermediary between third-party vendors and consumers of third-party products and holds absolute control over third-party vendors' access to its platform. By imposing specific terms and conditions on access to Amazon's sales platform, Amazon acts as a gatekeeper over the platform on which 2.3 million active third-party vendors rely to reach consumers.[114] Thus, Amazon is in a unique position as a gatekeeper to incentivize third-party vendors to improve product safety and mitigate harm to consumers.

Imposing gatekeeper liability on an intermediary is generally successful in reducing harm where (1) direct enforcement is inadequate to prevent harm, (2) private incentives are inadequate to ensure proper gatekeeping, (3) the intermediary can "prevent misconduct reliably," and (4) liability incentivizes the intermediary to deter misconduct at a reasonable cost.[115] Based on these criteria, imposing gatekeeper liability on Amazon for injuries arising from third-party products sold through its platform is desirable and would be effective at reducing societal harms.

First, third-party vendors' relative anonymity and ability to evade jurisdiction or sanction makes direct enforcement through traditional product liability actions against the third-party vendors inadequate to ensure product safety.[116] There is no avenue to incentivize third-party vendors to enhance product safety where—as is often the case—third-party vendors can escape a U.S. court's jurisdiction or are unable to pay damages.[117] Therefore, Amazon should be compelled to exercise its gatekeeping function and withhold access to its marketplace platform in order to deter third-party vendors from selling defective products.

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114 *See Amazon Services Business Solutions Agreement*, AMAZON SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US [https://perma.cc/743N-WTJR] [hereinafter *Amazon BSA*]; *Number of Sellers on Amazon Marketplace*, MARKETPLACE PULSE (Feb. 15, 2021), https://www.marketplacepulse.com/amazon/number-of-sellers [https://perma.cc/Y3NL-U8TV]; *see also* Edelman & Stemler, *supra* note 35, at 144.

115 Kraakman, *supra* note 109, at 61; *see also* Wan, *supra* note 95, at 67. Wan argues that monopolistic gatekeepers are best at deterring misconduct at an acceptable cost, *id.*, but this Note argues that an online product marketplace need not be monopolistic in order for gatekeeper liability to be acceptable or effective.

116 *See* Kraakman, *supra* note 109, at 56; *see also, e.g.*, State Farm Fire & Cas. Co. v. Amazon.com, Inc., 390 F. Supp. 3d 964, 969 (W.D. Wis. 2019) (finding the third-party vendor unamenable to service of process in Wisconsin).

117 *See* Bullard, *supra* note 108, at 224–26 (collecting cases); *cf.* Lichtman & Posner, *supra* note 112, at 229 (explaining that economic theory suggests that indirect liability is unnecessary where direct wrongdoers are reachable and can redistribute costs).

Second, private incentives are too weak to induce Amazon to withhold access to third-party vendors who sell products that injure consumers. When a gatekeeper enjoys benefits from a transaction but can externalize the harmful effects, the gatekeeper is not incentivized to restrict access to wrongdoers. This is precisely the case with Amazon, which receives direct financial benefits from sales of defective third-party goods through commission-like fees but currently faces no liability for injuries related to those goods.[118] While Amazon might face pressure from the victims of third-party product injuries to enhance product safety, consumer efforts to hold Amazon accountable have been largely unsuccessful under traditional strict product liability.[119] Thus, private forces currently have little power to shape Amazon's gatekeeping incentives.

The third and fourth criteria are highly related: gatekeeper liability is only successful where the gatekeeper can "prevent misconduct reliably" and at a reasonable cost.[120] First, Amazon can prevent misconduct reliably because it already exercises significant control over third-party access to its platform through contracts with third-party vendors and the handling of third-party listings.[121] Under current practices, third-party vendors must assent to Amazon's terms to sell on its marketplace platform.[122] Additionally, Amazon reserves the right to withhold all services—including access to the platform—or take other control measures at its discretion and at any time.[123] Given Amazon's

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118 *See Selling on Amazon Fee Schedule*, *supra* note 37.

119 *See supra* Section I.A; *see also* Kraakman, *supra* note 109, at 61–62 ("[T]he performance of private gatekeeping incentives depends upon the market interface between gatekeepers and the potential victims of misconduct. Such an interface exists whenever victims might contract with gatekeepers directly or, equally important, whenever victims can indirectly shape gatekeeper incentives by transacting with regulatory targets." (footnote omitted)).

120 Kraakman, *supra* note 109, at 61; *see* Hamdani, *supra* note 103, at 61, 99 (extending Kraakman's final two criterion to argue that intermediaries "should face liability only if they can both (1) distinguish law-breaking from law-abiding clients at a reasonably low cost, and (2) cheaply prevent wrongdoing").

121 This argument is different than saying that Amazon exercises enough control over the sale of third-party products to be held strictly liable as a "seller," which has been largely rejected by courts. *See supra* Section II.A. Control over third-party vendors' access to the platform occurs before any sales are made.

122 *See* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 141 (3d Cir. 2019) *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019); *Amazon BSA*, *supra* note 114.

123 *See Oberdorf*, 930 F.3d at 142 ("Amazon may at any time cease providing any or all of the Services at its sole discretion and without notice, including suspending, prohibiting, or removing any listing. . . . Amazon can require vendors to stop or cancel orders of any product. If Amazon determines that a vendor's actions or performance may result in risks to Amazon or third parties, it may in its sole discretion withhold any payments to the vendor."); *Amazon BSA*, *supra* note 114 (retaining the right to terminate services at § 3).

high degree of bargaining power and discretion to exclude third-party vendors, it can take easy, low-cost steps to exclude third-party vendors who could endanger consumers yet remain anonymous, out of the reach of injured plaintiffs, or otherwise judgment proof.

Because all four criteria are satisfied, applying gatekeeper theory to Amazon and other online product marketplaces will likely succeed as a theoretical justification to impose a liability rule designed to deter the sale of defective third-party products. Having established the theoretical foundation, the next step is to determine what that rule should look like and how liability will be triggered. Looking at other forms of applied gatekeeper theory provides helpful models for marketplace product liability. In particular, this Note's proposed statute for marketplace product liability draws from the two-pronged framework of vicarious copyright infringement.

C. Using the Model of Vicarious Copyright Infringement

Clear criteria are necessary to create an effective legal rule imposing liability on Amazon for injuries arising from third-party product defects. Vicarious copyright infringement provides a model of applied gatekeeper theory that can guide marketplace product liability. Vicarious copyright infringement claims involve a copyright holder, a direct infringer, and an intermediary service provider—often a gatekeeper—sued as a vicarious infringer.[124] Vicarious copyright infringement "arises when [an intermediary] (1) has the right and ability to supervise the direct infringement and (2) receives 'direct financial interests' in the infringement."[125] As a form of applied gatekeeper theory, vicarious copyright infringement doctrine ensures that intermediaries in a position to benefit from harm are incentivized to help enforce the goals of copyright law.[126]

The vicarious copyright infringement test is characterized by two prongs—a "control" prong and a "direct financial benefit" prong[127]—that developed from situations in which an intermediary controlled the physical premises where an infringement took place. The doctrine

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124 *See, e.g.*, Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 305–06 (2d Cir. 1963).

125 Wan, *supra* note 95, at 75 (quoting *Shapiro*, 316 F.2d at 306–07).

126 *Cf. Shapiro*, 316 F.2d at 307 ("When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired—the purposes of copyright law may be best effectuated by the imposition of liability upon the beneficiary of that exploitation." (citation omitted)).

127 *See* Wan, *supra* note 95, at 75–77.

arose in early twentieth century cases where dance hall proprietors hired bands to attract audiences of dancers.[128] The bands sometimes played copyrighted songs during their performances, leading copyright holders to sue the dance halls for infringement.[129] Even though it was the bands who directly infringed by selecting and performing copyrighted music—and not the proprietors[130]—courts reasoned that the band performances provided proprietors with "enhanced income" by attracting patrons who paid for entry.[131] Additionally, courts found that the dance halls had control over the bands regardless of whether the band members were employees or independent contractors, or whether "the proprietor ha[d] knowledge of the compositions to be played or any control over their selection."[132] Because the dance hall proprietors had control over the bands and received a direct financial benefit from the infringing performances, courts held that copyright holders could sue proprietors as the vicarious infringers.[133] This two-prong test also applies to other scenarios involving the control of physical premises and financial gain, including swap meets[134] and trade shows.[135] The Supreme Court recently acknowledged—with seeming approval—the two-pronged test of vicarious copyright liability,[136] and it has often been used to analyze copyright infringement

128 *See Shapiro*, 316 F.2d at 307–08 (synthesizing precedents from other circuit and district courts holding dance hall operators vicariously liable for the direct copyright infringement by hired bands on their premises); *see also* Mary Ann Schulman, Comment, *Internet Copyright Infringement Liability: Is an Online Access Provider More Like A Landlord or a Dance Hall Operator?*, 27 GOLDEN GATE U. L. REV. 555, 576–77 (1997).

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

130 *See id.*

131 *Shapiro*, 316 F.2d at 307.

132 *Id.*; *see also Dreamland*, 36 F.2d at 355 (finding proprietor liable for the copyright violations of a hired orchestra even though the proprietor had no control over the musicians or their song selections and the orchestra was "employed under a contract that would ordinarily make it an independent contractor").

133 *See Shapiro*, 316 F.2d at 307–08; *Dreamland*, 36 F.2d at 355.

134 *See, e.g.*, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262–64 (9th Cir. 1996) (finding a swap meet operator vicariously liable for copyright infringement where the operator controlled vendor activity on its premises and profited from vendor sales of counterfeit music recordings).

135 *See, e.g.*, Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328–33 (D. Mass. 1994); Artists Music, Inc. v. Reed Publ'g (USA), Inc., No. 93 CIV. 3428(JFK), 1994 WL 191643, at *5–6 (S.D.N.Y. May 17, 1994).

136 *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("One . . . infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it."). Although the Court acknowledged that MGM asserted vicarious copyright infringement, it declined to fully analyze that issue because it resolved case under

involving technology companies providing intermediary services over the internet.[137]

The direct financial benefit prong focuses on an intermediary's financial gain from another's infringing transaction or use. In early physical-premises cases, the direct financial benefit requirement was satisfied where infringing "activities provide[d] the proprietor with a source of customers and enhanced income."[138] Some courts interpret this prong broadly, finding direct financial benefit when infringement merely "enhance[s] the attractiveness of the venue to potential customers."[139] While this broader theory is sometimes applied in internet-based infringement cases,[140] courts generally require a closer relationship between an internet-based intermediary's financial benefit and the infringement itself.[141] Courts find no direct financial benefit—in either physical-premises or internet cases—where the intermediary charges third parties a flat service fee unrelated to the amount of user activity.[142] Additionally, an intermediary service provider's financial benefit need not be "substantial" or reach a minimum threshold to satisfy the direct financial benefit prong.[143]

The second prong—whether intermediaries exercise control over the infringer—is more complicated. Scholars have distinguished two types of control relevant to the second prong: actual control and legal

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contributory copyright infringement theory. *See id.* at 930 n.9 (citing *Shapiro*, 316 F.2d at 308; *Dreamland*, 36 F.2d at 355).

137 *See, e.g.*, Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 657, 672–74 (9th Cir. 2017); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp 1361, 1375–78 (N.D. Cal. 1995).

138 *Shapiro*, 316 F.2d at 307.

139 *Fonovisa*, 76 F.3d at 263.

140 *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) (citing *Fonovisa*, 76 F.3d at 263–64). Napster was a peer-to-peer file sharing service accused of vicariously infringing copyrighted music shared through its proprietary software, MusicShare. *Id.* at 1011. Because Napster's revenue growth was dependent on attracting more users, and users used Napster's service because they could download infringed music, the court found that Napster "financially benefit[ed] from the availability of protected works on its system." *Id.* at 1023.

141 *See, e.g.*, *Giganews*, 847 F.3d at 674 (rejecting Perfect 10's broad theory of direct financial benefit and finding that it failed to show that customers used Giganews's services specifically because they could access Perfect 10's copyright-protected photos).

142 *See Netcom*, 907 F. Supp at 1376–77 (holding that an ISP charging users a flat fee for services does not provide the ISP with direct financial benefit from infringement); Artists Music, Inc. v. Reed Publ'g (USA), Inc., No. 93 CIV. 3428(JFK), 1994 WL 191643, at *6 (S.D.N.Y. May 17, 1994) (finding that plaintiffs failed to show that a trade show operator gained direct financial benefit from exhibitors' performance of protected music where the operator charged exhibitors a flat rental fee based on the size of their booth). *See generally* Wan, *supra* note 95, at 74–75 (discussing *Netcom* and *Artists Music* as examples of cases where intermediaries received no direct financial benefit and thus defeated vicarious copyright infringement claims).

143 *Giganews*, 847 F.3d at 673.

control.[144] Actual control requires that the intermediary "be practically able to distinguish between infringing and noninfringing conduct."[145] Legal control, on the other hand, merely requires a contractual relationship empowering the intermediary to restrict the third-party's conduct, whether or not that conduct is infringing or noninfringing.[146] Essentially, an intermediary has legal control if it has the "technical ability to control the infringement," which is an easier burden for a plaintiff to prove.[147]

In reality, the theoretical distinction between actual and legal control is not as strong as the case law would suggest.[148] In physical-premises cases, courts often find vicarious copyright infringement where the intermediary was able to exercise actual control over the direct infringer.[149] Understandably, however, the ability to exercise actual control requires a contractual relationship giving the intermediary broad legal control, and courts have also found vicarious copyright infringement in physical premises cases based only on an intermediary's legal control.[150] This is especially true where the intermediary retained a broad right to exclude potential direct infringers at will, regardless of whether it could effectively distinguish and prevent only infringing activity.[151] This focus on legal control comports with the early dance hall cases, which held proprietors liable "whether or not

144 Hamdani, *supra* note 103, at 101; *see* Wan, *supra* note 95, at 75.

145 Hamdani, *supra* note 103, at 101; *see* Wan, *supra* note 95, at 75.

146 *See* Wan, *supra* note 95, at 75.

147 Hamdani, *supra* note 103, at 101 ("[Legal control], therefore, finds control in any relationship in which the third party has technical control (by facilitating access to a product or activity, for example), even when effectively exercising such control (distinguishing between infringing and noninfringing conduct and preventing only the former) is impractical.").

148 *See* Wan, *supra* note 95, at 75–76.

149 *Compare* Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1328 (D. Mass. 1994) (finding that where the trade show operator issued regulations alerting exhibitors of their responsibility to obtain licenses to play copyrighted music and hired employees to ensure compliance, the operator was vicariously liable for exhibitors' infringement because the operator demonstrated "authority and control" over exhibitors), *with* Artists Music, Inc. v. Reed Publ'g (USA), Inc., No. 93 CIV. 3428(JFK), 1994 WL 191643, at *5–6 (S.D.N.Y. May 17, 1994) (finding that the trade show operator was not in a good position to prevent direct infringement where it merely rented space to exhibitors and charged a flat admission fee to attendees); *see also* Wan, *supra* note 95, at 70–73.

150 *See, e.g.*, *Polygram Int'l*, 855 F. Supp. at 1329 ("[The trade show operator] not only rented space to the exhibitors, it also: (1) exercised a pervasive and continuing control over the exhibitors that was . . . in accordance with a contract . . . .").

151 *See, e.g.*, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262–63 (9th Cir. 1996) (finding control easily satisfied where a swap meet operator "had the right to terminate vendors for any reason whatsoever and *through that right* had the ability to control the activities of vendors on the premises" (emphasis added)); *see also* Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 306, 308 (2d Cir. 1963) (finding that the control prong was satisfied against a

the proprietor ha[d] . . . any control over [the bands'] selection [of infringing compositions]."[152] Accordingly, courts' analyses of the right and ability to control center on the strength and breadth of the intermediary's legal control over potential infringers, which is most powerful when it has the right to terminate potentially infringing activity altogether.

Analysis of an intermediary's legal control is also well developed in the internet cases, where intermediaries often are practically unable to directly monitor hundreds of thousands of users to distinguish infringing from noninfringing content.[153] Although a contractual relationship between an internet intermediary and a potentially infringing user alone is insufficient, the control prong is satisfied where the intermediary has a contractual right to engage in activity that could actually control infringement itself.[154] For example, the right to cut off a user's ability to conduct infringing transactions does not satisfy the control requirement because it does not stop the infringement itself.[155] However, "[t]he ability to block infringers' access to a particular environment for any reason whatsoever is evidence of the right and ability to [control]."[156] Similar to the physical-premises cases, an intermediary's right to completely exclude users from an internet platform satisfies the control prong because complete exclusion would inherently stop infringing activity.[157]

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phonograph record concessionaire where it retained "unreviewable discretion" to fire employees and "retained the ultimate right of supervision over the conduct of the record concession").

152 *Shapiro*, 316 F.2d at 307.

153 *Cf., e.g.*, Perfect 10, Inc. v. Giganews, Inc., 847 F.3d 657, 664, 671 (9th Cir. 2017) (finding no liability where the intermediary's only options to remove the protected images were "onerous and unreasonably complicated" and there were no "simple measures" available to do so). While the case was analyzed under a theory of contributory liability, it shows the difficulty of exercising actual control in the internet context. *Id.* at 671, 674.

154 *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007) (rejecting Perfect 10's vicarious liability claim against Google because Perfect 10 failed to show that Google had "contracts with third-party websites that empower[ed] Google to stop or limit them from reproducing, displaying, and distributing infringing copies of Perfect 10's images on the Internet").

155 Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 803, 806 (finding that although Visa had a contractual right to refuse lucrative services to infringing websites, it did not enable Visa to actually control infringement itself).

156 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001) (citing *Fonovisa*, 76 F.3d at 262).

157 *See id.* (finding the control prong satisfied against Napster where it retained an explicit right to refuse service to subscriber accounts for any reason, including suspected unlawful activity); *cf. Perfect 10 v. Amazon*, 508 F.3d at 1173 (citing *Fonovisa*, 76 F.3d at 263) (distinguishing Google's contracts with third-party websites from a contract allowing the swap meet operators to exclude vendors from its premises).

The two-pronged test for vicarious copyright infringement is a tailored legal rule that successfully implements gatekeeper theory and should guide marketplace product liability for Amazon and other online product marketplaces. Just like third-party vendors, direct infringers are often anonymous, difficult to locate, or too numerous to pursue individually,[158] making it practically impossible for copyright holders to sue those directly liable for harm.[159] Thus, vicarious copyright infringement provides plaintiffs a means of recovery and a method to enforce the underlying goals of copyright law. Additionally, the two-pronged approach demonstrates how liability can be narrowly tailored to prevent overbearing burdens on gatekeepers to seek out direct infringers while still effectuating those goals. The direct financial benefit prong ensures that courts impose liability only where gatekeepers are inadequately incentivized to undertake gatekeeping measures on their own because they profit from additional transactions. For example, internet service providers ("ISPs"), search engines, and online marketplaces all benefit from the distribution of copyright-infringed material without internalizing the harms, which creates a counterincentive to gatekeeping against direct infringers. The control prong ensures that courts impose liability only where misconduct can be prevented reliably because the prong requires a strong legal right and practical ability to control the infringer. Additionally, because the model is not based on fault, there is no court-defined level of reasonable control, meaning each gatekeeper determines for itself the most efficient methods to mitigate the harm caused by third parties. Thus, vicarious copyright infringement's two-prong test is a good model to guide marketplace product liability and its application to Amazon for third-party product injuries.

III. Adopting Marketplace Product Liability

Amazon is a gatekeeper to its own marketplace platform and should be incentivized to guard against the sale of defective and dangerous third-party products. To do so, state legislatures should adopt

158 *See* Hamdani, *supra* note 94, at 910; *cf.* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 929–30 (2005) ("When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.").

159 Although copyright holders tend to be injured repeatedly by multiple actors and a victim of a third-party product defect is likely to be injured just once by a single (perhaps unknown) entity, they face the same underlying problem: the practical inability to recover directly from the source of harm.

the following model statute language to impose marketplace product liability and hold Amazon liable for third-party product defects:[160]

> An Online Product Marketplace ("OPM") shall be liable for injuries and damages arising from a defective third-party product where the OPM
>
> (1) possesses the right and ability to control the third-party vendor's access to its platform; and
>
> (2) received a direct financial benefit from the transaction between the injured party and third-party vendor.

Under marketplace product liability, Amazon would only be held liable where a third-party vendor is strictly liable under traditional product liability for a defective product sold over its platform. This proposed framework is based on the two-pronged test of vicarious liability for copyright infringement, and case law employing that test should guide its implementation. Courts should interpret the control prong to require strong legal control over third-party access to the platform, which would be satisfied where Amazon retains an absolute discretionary right to exclude third-party vendors. Courts should interpret the second prong narrowly to require that a financial benefit be incurred directly from the sale of the defective product that caused the plaintiff's injury.[161]

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160 State legislatures are likely the best institutions to effectuate this proposed framework. In contrast to copyright law, product liability is almost exclusively the province of state law. Amazon frequently removes these cases to federal court, and the *Erie* doctrine requires federal courts sitting in diversity to "take state law as [they] find it 'or, if necessary, predict how the state's highest court would rule on an unsettled issue.'" Erie Ins. Co. v. Amazon.com, Inc., 925 F.3d 135, 145 (4th Cir. 2019) (Motz, J., concurring) (quoting Askew v. HRFC, LLC, 810 F.3d 263, 266 (4th Cir. 2016)); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938). Of course, certification to the highest state court is a possible avenue for rethinking how traditional product liability applies to Amazon. *See, e.g.*, Oberdorf v. Amazon.com Inc., 818 F. App'x 138, 142 (3d Cir. 2020) (en banc) (certifying question of law to the Pennsylvania Supreme Court); *see also* Bender, *supra* note 76, at 39–43 (arguing for greater use of certification to enhance the development of product liability law as applied to Amazon and third-party vendors). Still, federal courts have suggested that certification is only appropriate where "the reviewing court finds itself genuinely uncertain about a question of state law . . . ." Tidler v. Eli Lily & Co., 851 F.2d 418, 426 (D.C. Cir. 1988). Existing product liability laws are likely not ambiguous enough to allow for judicial imposition of this Note's proposal, even through the certification process. Instead, state legislative action is the most efficient method to enact the two-pronged framework of marketplace product liability.

161 *Cf.* Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp 1361, 1376–77 (N.D. Cal. 1995) (rejecting a flat fee as evidence of an ISP's direct financial benefit from infringement); Hamdani, *supra* note 94, at 917–18 (arguing that because ISPs typically charge flat fees, ISPs receive no marginal benefit for additional content posted by users—infringing or not—so strict liability should not be applied to ISPs for indirect copyright infringement).

Both of these prongs are likely satisfied as to Amazon because it retains absolute control over third-party access to its platform,[162] and it receives a commission from the sale of each third-party product over its platform.[163] Interpreting both prongs narrowly ensures that marketplace product liability is not overly broad and that it avoids the technical roadblocks of traditional strict product liability that have come to thwart victim compensation, efficient cost spreading, and incentives to improve product safety.[164] Under marketplace product liability, it does not matter whether Amazon has a certain level of control over the sale, manufacture, or distribution of a third-party product. Instead, marketplace product liability only concerns control over the third-party vendor's *access* to the marketplace platform and relies on Amazon's gatekeeping function to change the incentives behind the vendors' behavior.

A. Promoting Victim Compensation, Efficient Cost Spreading, and Product Safety

Marketplace product liability for Amazon will effectuate victim compensation, efficient cost spreading, and enhanced product safety. First, marketplace product liability provides victims a path to compensation for their injuries even where they cannot reach the third-party vendor. Second, it will incentivize Amazon to efficiently spread the costs of injuries arising from third-party product defects by including indemnity clauses in contracts with third-party vendors.[165] Finally, exposing third-party vendors to the risks of an indemnity action and removal from the platform will incentivize them to enhance the safety of their products.

Amazon is generally best positioned to achieve these goals by enforcing indemnity clauses against third-party vendors. Because marketplace product liability holds Amazon liable without determining its fault, Amazon distributing costs to third-party vendors is not an unjust result. There is no culpable act on Amazon's part that requires correction or penalty through liability. Amazon and many other online marketplaces already require third-party vendors to agree to indemnification clauses as a condition of access to the marketplace

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162 *See Amazon BSA*, *supra* note 114; *see also* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

163 *See Selling on Amazon Fee Schedule*, *supra* note 37.

164 *See supra* Section I.A–.B.

165 While this assumes that Amazon has greater bargaining power than third-party vendors, this assumption is likely valid given the current prevalence of indemnity clauses in third-party vending contracts. *See Amazon BSA*, *supra* note 114.

platform, and marketplace product liability will incentivize Amazon to enforce these agreements as its main cost-avoidance mechanism.[166] To ensure that indemnity is available, Amazon would likely exercise its gatekeeping role to exclude third-party vendors from its platform unless the third-party vendor is (1) sufficiently solvent to pay damages resulting from a product liability suit, and (2) reachable and amenable to suit in a forum where Amazon can enforce the indemnity clause.

These simple, efficient tools would allow Amazon to prevent misconduct reliably and at a reasonable cost. To ensure third-party vendors are sufficiently solvent, Amazon can require third-party vendors to provide proof of liability insurance adequate to cover a product liability claim, which is a right it already reserves.[167] Determining amenability to suit would also be left to Amazon but need not only include amenability to U.S. jurisdiction. If amenable domestically, the third-party vendor is probably in the best position to compensate injured plaintiffs because the plaintiff can likely sue the vendor directly under traditional strict product liability.[168] If Amazon wishes to contract with third-party vendors that are not subject to domestic suit, Amazon would be in the best position to demand and enforce an indemnity clause against the third-party vendor, or else be forced to bear any potential liability itself. Amazon would only bear the cost of liability if it failed to take appropriate precautions in contracting with the third-party vendor. As long as Amazon can successfully enforce an indemnity claim, the ultimate risk of liability falls on the third-party vendor as the least-cost avoider of product defects. To avoid the threat of

166 *See, e.g.*, *Amazon BSA*, *supra* note 114 (including an indemnity clause at § 6); *see also Oberdorf*, 930 F.3d at 142 ("Amazon requires that its [third-party] vendors release it and agree to indemnify, defend, and hold it harmless against any claim, loss, damage, settlement, cost, expense, or other liability."). Indemnity is not the exclusive cost-avoidance mechanism. Amazon could choose to increase its commissions on third-party products to cover its risk of liability or acquire liability insurance. Because Amazon can simply take advantage of preexisting indemnity clauses, however, indemnification is probably the most likely means by which it would shift liability to third-party vendors.

167 *See Amazon BSA*, *supra* note 114 (including a right to require insurance at § 9); *see also* Garber v. Amazon.com, Inc., 380 F. Supp. 3d 766, 772–73 (N.D. Ill. 2019) (citing *Amazon BSA*, *supra* note 114).

168 Even where the third-party vendor is reachable, a plaintiff will not have an opportunity for double recovery by asserting strict product liability against the third-party vendor and marketplace product liability against Amazon. There remains only one indivisible injury, meaning Amazon and the third-party vendor should be held jointly and severally liable for the injury. *See* DAVID M. HOLLIDAY, AMERICAN LAW OF PRODUCTS LIABILITY § 52:1 (3d ed. 2020). Even if the plaintiff settled with the third-party vendor and sued Amazon separately under marketplace product liability, Amazon could enforce an indemnity clause against the third-party vendor. Therefore, third-party vendors would have no incentive to settle and provide plaintiffs with double damages, because the vendor would incur double costs.

indemnity actions, third-party vendors would be incentivized to enhance product safety.

Some might argue that holding Amazon strictly liable will cause Amazon to overdeter third-party vendors by restricting platform access to vendors who pose little risk of harm. Under this view, overdeterrence could unnecessarily harm third-party vendors and limit consumer choice by restricting the number of third-party products on Amazon. Yet Amazon has an economic incentive to avoid overdeterrence because it receives a commission on each third-party product sold. Additionally, monitoring third-party vendors for solvency and amenability is likely inexpensive, and Amazon need not continuously monitor third-party product listings for safety concerns.[169] Consumers bear the costs of "detecting" product defects when they are injured, just as they do under traditional product liability. Marketplace product liability simply provides another avenue for the consumer to shift those costs to Amazon, and Amazon can use indemnification to further shift those costs to the appropriate third-party vendor. Therefore, marketplace product liability would not create an overdeterrence problem, but instead would incentivize Amazon to exercise its gatekeeping functions to provide for an efficient cost shifting mechanism that provides an optimal level of deterrence against defective products.

B. Applying Marketplace Product Liability in Fox v. Amazon.com, Inc.

How might marketplace product liability have changed the result of a case like *Fox v. Amazon.com, Inc.*?[170] The Fox family, whose home caught fire due to a defective hoverboard battery, would have still sued both the third-party hoverboard vendor and Amazon.[171] The family would have sued the vendor under traditional strict product liability and Amazon under marketplace product liability because the family purchased the hoverboard from a third-party vendor through Amazon's platform.[172] Because the vendor could not be located for

169 This argument assumes that the costs of monitoring solvency and amenability to suit are marginal. Such monitoring likely requires little more than paperwork review, but a fuller discussion of monitoring costs requires empirical research. Either way, Amazon can shift these costs to the third-party vendor through indemnification.

170 930 F.3d 415 (6th Cir. 2019).

171 *See id.* at 421.

172 *See id.* at 418–19.

suit,[173] however, the family's real opportunity for recovery would lie with Amazon under marketplace product liability.

To establish marketplace liability, the plaintiffs would need to prove that Amazon (1) exercised control over the third-party vendor's access to its platform and (2) received a direct financial benefit from the transaction. First, under the control prong, a court would need to determine whether Amazon had the right and ability to control the vendor's access to its marketplace platform. Because Amazon's terms of service allow Amazon to terminate any service at its discretion—including listing its products and facilitating transactions over the Amazon Marketplace[174]—the court would likely find that the control prong is satisfied. Second, the court would likely find that Amazon received a direct financial benefit from the sale of the defective hoverboard because Amazon collects a contingency fee from the sale of each third-party product.[175] Therefore, both prongs of marketplace product liability would be satisfied, and Amazon would be held liable for the fire damages.

If Amazon located and sued the hoverboard vendor, Amazon would be able to recover its costs by enforcing the indemnity clause the vendor agreed to before accessing Amazon's platform.[176] If not, however, it would be left paying the full amount of the Fox family's damages itself. To avoid paying damages in future cases, Amazon would likely change its practices to ensure that only third-party vendors who satisfy preexisting solvency and amenability requirements are allowed access to Amazon's platform to sell products.[177] By holding vendors to these standards, Amazon will help increase the safety standards of third-party products sold on its platform.

Conclusion

The policy goals of traditional product liability are just as relevant and important today as they were 100 years ago. While both consumers and Amazon benefit greatly from third-party product sales, Amazon routinely avoids liability when consumers are injured by third-party products but cannot recover from the vendor. State legislatures should adopt marketplace product liability so that Amazon would be

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173 *See id.* at 421 n.4; Berzon, *supra* note 7.

174 *See Amazon BSA*, *supra* note 114; *see also* Oberdorf v. Amazon.com Inc., 930 F.3d 136, 142 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019).

175 *See Selling on Amazon Fee Schedule*, *supra* note 37.

176 *See Amazon BSA*, *supra* note 114 (including an indemnity clause at § 6).

177 *See id.* (including a right to require insurance at § 9).

liable for injuries arising from a defective third-party product where Amazon (1) had the right and ability to control the third-party vendor's access to its platform and (2) received a direct financial benefit from the transaction between a consumer and third-party vendor. This framework ensures that injured victims have recourse for their injuries. Applying marketplace product liability also takes advantage of Amazon's powerful gatekeeping role by incentivizing it to hold third-party vendors accountable for defective products through indemnification. Much like traditional product liability, Amazon's power to seek indemnification would shift the costs of product injuries to the least-cost avoider and incentivize third-party vendors to make their products safer. "Seller" or not, Amazon should be enlisted to help protect consumers from the physical risks that persist in the online economy.