



To: Defense counsel in RIAA and MPAA individual file sharing suits
From: Chris Conley and Anne Kelson, EFF Legal Interns
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Re: Parental Liability for Copyright Infringement by Minor Children

ISSUE PRESENTED

May parents whose children share copyrighted music files on the Internet be held liable for the behavior of their children, either through indirect copyright infringement doctrines or through a state statute establishing parental liability for tortious actions of their children? And, what are some of the procedural requirements governing actions against minors in federal court?

SUMMARY

Plaintiffs, usually record companies, may attempt to bring claims against the parents of children who allegedly infringe copyright via either indirect copyright liability or state parental liability statutes. This memorandum is intended to summarize some of the legal principles governing such claims.¹

A claim of indirect copyright infringement may be premised on the theory of vicarious liability, which requires the right and ability to control the infringing action and a financial interest in the infringement, or contributory infringement, which requires knowledge of and participation in the infringement; each of these elements may be challenged by a parent. Claims based on state parental liability statutes will depend on the precise statute being considered, but in many states the statute may not apply to actions based on copyright infringement or may be preempted by the Copyright Act based on either express or conflict preemption.

BACKGROUND

In 2003, the Recording Industry Association of America (RIAA) and its member record companies began bringing suits against individuals' accused of copyright infringement for allegedly using various file-sharing applications and services to exchange copyrighted music on the Internet.² In many of these instances, suit has been brought against either a minor child or her parents based on the allegedly infringing activities of the child, where the parents did not directly participate in the activities.³ These claims raise the issues of whether parents might be held liable under existing law if their minor children have in fact engaged in copyright infringing activities, and how minors may be sued directly.

¹ **Nothing herein is intended as legal advice. Defendants are encouraged to engage their own counsel before relying on anything contained here.**

² See Andrew C. Humes, *The Day the Music Died: The RIAA Sues its Consumers*, 38 Ind.L.Rev. 239 (2005).

³ See *id.*

DISCUSSION

A plaintiff record company could attempt to place liability upon a parent for the alleged infringing activities of her child under two distinct approaches. First, the record company could directly file suit against the parent for indirect copyright infringement under the doctrines of vicarious liability or contributory infringement. Second, the record company could file suit against the minor child and then attempt to satisfy any judgment from that claim through state parental liability statutes. These two possibilities are addressed in turn.

I. Indirect Liability for Copyright Infringement

There are two distinct doctrines under which a person who is not a direct infringer may nonetheless be held liable for the infringing acts of others: vicarious liability and contributory infringement.⁴ Vicarious copyright liability may lie when the defendant has both the right and ability to control the infringing activity and a direct financial interest in the exploitation of copyrighted materials.⁵ Contributory copyright infringement requires that the defendant knows of and “induces, causes or materially contributes to the infringing conduct of another.”⁶ Each of these factors presents interesting questions in the context of parental liability for copyright infringement by their minor children.

A. Vicarious Liability: Control and Financial Benefit

The first element of vicarious copyright liability is the ability to control the actions of the direct infringer. In some cases, legal authority over the infringing actor has been treated as dispositive on the element of control. For example, in *Fonovisa v. Cherry Auction*,⁷ the Ninth Circuit held that the operator of a swap meet, who had a contractual right to exclude a vendor for any reason, possessed the control required to establish vicarious liability. And in *Davis v. E. I. DuPont de Nemours & Co*, a district court held that the sponsor of a television program “was under a duty to exercise its [contractual right to review scripts] so as to insure against copyright violation.”⁸

However, other courts have held that legal authority alone is not sufficient to establish the control element of vicarious copyright liability, particularly where the exercise of that authority is impracticable. In *Adobe Systems Inc. v. Canus Productions, Inc.*, a California district court found that *Fonovisa* rested on an inference of a practical ability to control ongoing infringing activity, and that a larger-scale trade show with minimal infringing activity did not demonstrate the level of actual control necessary to

⁴ Any claim of indirect infringement also requires proof of direct infringement as a necessary element, though the direct infringer is not a necessary party to the claim. *See, e.g.*, *A&M Records v. Napster*, 239 F.3d 1004, 1013 (9th Cir. 2001).

⁵ *See Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

⁶ *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

⁷ 76 F.3d 259, 262 (9th Cir. 1996).

⁸ 240 F.Supp. 612, 632 (S.D.N.Y. 1965).

impart vicarious liability.⁹ Similarly, in *Bevan v. Columbia Broadcasting System, Inc.*, the court held that a contractual right to request alteration of the script prior to filming did not suffice to establish the control necessary for a finding of vicarious liability.¹⁰ In his leading copyright law treatise, Professor Paul Goldstein characterizes the control required for vicarious liability as “the practical, rather than the strictly legal, ability to control the activities of the direct infringer.”¹¹

In addition to control, vicarious liability requires that the defendant receive a financial benefit from the infringing activity. In order to satisfy this element, there must be a “causal relationship between the infringing activity and any financial benefit a defendant reaps.”¹² Thus, where a university student group showed a copyrighted film on campus, the university was not vicariously liable for copyright infringement because it received no financial benefit from the performance.¹³ And where a company charged a flat fee to host a web site that contained copyrighted images, the hosting company was not vicariously liable because its profits did not depend on the traffic generated by the alleged infringement.¹⁴

In the context of parental liability for the alleged copyright infringement of a child, both of these factors may affect the outcome of any particular case. In order to prevail, the plaintiff will be required to demonstrate that the legal authority that a parent holds over a child suffices to meet the control element of vicarious copyright liability, or that the parent had the legal and practical ability to prevent the alleged copyright infringement. In the latter case, the parent’s computer expertise and other factual considerations may be determinative. The plaintiff will also be required to demonstrate that the parent derived a financial benefit of some kind from the minor’s alleged infringement, a potentially daunting obstacle in typical file-sharing cases.

B. Contributory Infringement: Material Contribution and Knowledge

A defendant who is not a direct infringer may also be held liable if he knowingly “induces, causes or materially contributes to” the infringement.¹⁵

General Principles. Some courts have held that the element of material contribution may be met by providing the “site and facilities” for infringing activity.¹⁶ For example, in *Fonovisa*, the court held that the operator of a swap meet could be a contributory copyright infringer where the meet operator provided “space, utilities,

⁹ 173 F.Supp.2d 1044 (C.D.Cal. 2001). *See also* *Artists Music, Inc. v. Reed Publishing (USA), Inc.*, 1994 WL 191643 (S.D.N.Y. 1994) (ability to police exhibition “at great expense” does not suffice to impose vicarious liability).

¹⁰ 329 F.Supp. 601, 610 (S.D.N.Y. 1965).

¹¹ Paul Goldstein, *GOLDSTEIN ON COPYRIGHT* § 6:22 (Aspen 2005).

¹² *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004).

¹³ *See Roy Export Establishment Co. v. Trustees of Columbia University*, 344 F.Supp. 1350 (S.D.N.Y. 1972).

¹⁴ *See Marobie-FL, Inc. v. National Association of Fire Equipment Distributors and Northwest Nexus, Inc.*, 983 F.Supp. 1167 (N.D.Ill. 1997).

¹⁵ *Gershwin*, 443 F.2d at 1162.

¹⁶ 76 F.3d at 264. *See also Columbia Pictures Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir. 1986).

parking, advertising, plumbing, and customers” to the direct infringers.¹⁷ Likewise, in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, a California district court held that “providing a service that allows for the automatic distribution of all Usenet postings, infringing or noninfringing,” was sufficient to meet the material contribution element of contributory infringement.¹⁸

The assistance provided to the infringer, however, must be directly related to the alleged infringing activities.¹⁹ Thus, in *Perfect 10, Inc. v. Visa International Service Association*, a California district court held that the defendant could not be held liable for providing credit card processing services to a website allegedly engaging in copyright infringement, because those services “do[] not directly assist the allegedly infringing [activity].”²⁰ And in *Demetriades v. Kaufmann*, a New York court held that the sale of an unimproved lot, subsequently used for the construction of an allegedly infringing house, did not constitute material contribution to infringing activity.²¹

Contributory infringement also requires that the defendant have knowledge of the direct infringement. The applicable knowledge standard is generally recognized as an objective one: “Know, or have reason to know.”²² Therefore, a video rental store that rented out rooms with videocassette players could be held liable even without proof of actual knowledge of the playback of copyrighted materials in those rooms.²³ In *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, the court held that advertisers and distributors could be held liable under a theory of contributory infringement if they should have known of the infringement by indications such as a product priced far below market price.²⁴ General knowledge of the possibility of copyright infringement, however, is not sufficient to bring liability. Thus, in *Adobe v. Canus*, the receipt of a letter referring to “possible sales of [infringing] products” at a computer show was not sufficient to establish knowledge of subsequent infringing activity at the show.²⁵

In addition, the Supreme Court has declined to allow contributory infringement liability based on constructive knowledge of potential infringement when the material provided has substantial non-infringing uses. Thus, in *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court created a safe harbor for manufacturers of videocassette recorders that could be used for time-shifting of recorded programs.²⁶ However, this protection has not been extended where the defendant willfully blinded

¹⁷ See 76 F.3d at 264.

¹⁸ 907 F.Supp. 1361, 1375 (N.D. Cal. 1995).

¹⁹ See 3 NIMMER ON COPYRIGHT § 12.04[A][2][a] (2004) (“the ... assistance must bear some direct relationship to the infringing acts.”).

²⁰ 2004 WL 1773349, *3-4.

²¹ 690 F.Supp. 289, 291-93 (S.D.N.Y. 1988).

²² See *Gershwin*, 443 F.2d at 1162.

²³ See *Aveco*, 800 F.2d at 62 (3rd Cir.1986).

²⁴ 256 F.Supp. 390, 404-05 (S.D.N.Y. 1966).

²⁵ See *Adobe v. Canus*, 173 F.Supp.2d at 1056 (internal quotation marks omitted).

²⁶ 464 U.S. 417, 427 (1984). A recent Supreme Court decision has held that this safe harbor exists only if the defendant has not acted to induce users of the product to infringe upon copyright. See *Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005).

himself from knowledge of infringing activity; according to one court of appeals, “Willful blindness is knowledge, in copyright law.”²⁷

Inducement. In a June 2005 ruling, the Supreme Court recognized a distinct form of contributory infringement liability known as “inducement.” According to the Court, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement is liable for the resulting acts of infringement by third parties.”²⁸ While it is unlikely that a parent would actively promote or foster infringement on the part of their minor children, this theory might be available to copyright owners in a circumstance where a parent were to actively encourage his children to infringe copyright.

Case-specific Application. The application of contributory infringement principles in parental liability cases is likely to be case-specific. The element of material contribution may depend on the exact nature of the support provided by the parents. Likewise, assuming that the parent does not have actual knowledge of the alleged direct infringement, a plaintiff will have to demonstrate that the parent “ha[d] reason to know” of the infringing activities.²⁹ The precise nature of the support provided, the parent’s computer expertise, and the broad range of non-infringing uses of computers and Internet service, are all possible factors in a court’s decision to impose liability.

Capitol Records, Inc. v. Foster, is the first clear ruling on a secondary liability theory against the parents of file-sharers.³⁰ Plaintiff claimed that by “using the very same family computer” that the defendant’s daughter had used during the alleged infringement, defendant had vicariously and contributorily infringed.³¹ Plaintiff pointed to the visible presence of an icon for Kazaa, a file-sharing program, on the “family computer” during the time of the alleged infringement as evidence that defendant had knowledge of and substantially participated in the alleged infringement.³² The court dismissed the claim, holding that “merely supplying means to accomplish infringing activity cannot give rise to imposition of liability for contributory copyright infringement.”³³ Additionally, the court concluded that plaintiffs had questionable motivation in pursuing copyright infringement claims against defendants, particularly since it appeared that plaintiffs “initiated the secondary infringement claims to press [defendant] into settlement after they had ceased to believe she was a direct or ‘primary’

²⁷ See *In re Aimster Copyright Litigation*, 334 F.3d 643, 650. Cf. *Adobe v. Canus*, 173 F.Supp.2d at 1056 (“[T]he scale of the infringing activity in *Fonovisa* made it clearly implausible that the defendant was not aware of the activity.”).

²⁸ See *MGM v. Grokster*, 125 S.Ct. at 2770.

²⁹ *Gershwin*, 443 F.2d at 1162.

³⁰ *Capitol Records, Inc. v. Foster*, No. 041569, 2007 WL 1028532 (W.D. Okla. Feb. 6, 2007)

³¹ Plaintiff’s Motion to Reconsider, p. 2, available at:

http://www.ilrweb.com/view/LRPDF.asp?filename=capitol_foster_070221MotReconsider.

³² See *id.*

³³ *Capitol Records, Inc. v. Foster*, No. 041569, 2007 WL 1028532, at * 3 (W.D. Okla. Feb. 6, 2007)

infringer.”³⁴ Consequently, the court determined that the defendants were prevailing parties and granted attorneys’ fees under §505 of the Copyright Act.³⁵

II. State Parental Liability

In addition to indirect liability through copyright law, copyright owners may attempt to hold parents liable based on state law assigning liability to parents for the tortious actions of their minor children. The law in any given state should be assessed to determine if it is applicable to an action based on copyright infringement, and, if so, if it is preempted by the Copyright Act.

A. State Parental Liability Statutes

State common law generally precludes the collection of judgments against “assets in which the judgment debtor has no interest,” which includes the assets of the parent of a minor child.³⁶ Many states, however, have enacted statutes that “create liability based on damage the child has done to ‘property.’”³⁷ These statutes differ in several aspects that are relevant to claims based on copyright infringement. First, the statute may apply only to damage to *physical* property, rendering it inapplicable to cases of copyright infringement.³⁸

Second, state statutes have varying scienter requirements: some states require only “willful conduct” on the part of the minor, others require that the harm itself be willful, and still others require “willful and malicious” activity for parental liability.³⁹ These state statutory scienter requirements may be distinct from the “willfulness” inquiry in a typical copyright case—willfulness in copyright is a matter of remedial enhancement, not a question of scienter for liability. In states where malice or intent to cause harm may be required, the plaintiff must prove these further elements to establish parental liability for alleged copyright infringement. For example, in *Leonard v. O’Neil*, a New York court held that a minor did not “‘maliciously or unlawfully’ damage or destroy [her neighbor’s car] by taking the car without authorization for several days, during which period the car was vandalized.”⁴⁰

³⁴ *Capitol Records, Inc. v. Foster*, No. 041569, 2007 WL 1028532, at * 4 (W.D. Okla. Feb. 6, 2007)

³⁵ *Capitol Records, Inc. v. Foster*, No. 041569, 2007 WL 1028532, at * 6 (W.D. Okla. Feb. 6, 2007)

³⁶ *Bass v. Bass*, 528 N.Y.S.2d 558, 561 (1st Dep’t 1998). See also Andrew C. Gratz, *Increasing the Price of Parenthood: When Should Parents be Held Civilly Liable for the Torts of Their Children?*, 39 *Hou.L.Rev.* 169 (2002).

³⁷ See Mark Zuckerman and Devon Bush, *Re: Parental liability for copyright infringement by child*, available at http://www.eff.org/IP/P2P/parental_liability.pdf, at n.35 and accompanying text (Oct. 2003).

³⁸ See *id.*

³⁹ Compare Cal. Civil Code §1714.1(a) (requiring “willful misconduct”), N.Y. Gen. Oblig. §3-112 (requiring “willful[], malicious[], or unlawful[]” damage to property) and Tex.Fam.Code §41.001(b) (requiring “willful and malicious” damage to property). See also Fred von Lohmann, *Memorandum* (April 2003) (available at http://www.eff.org/IP/P2P/p2p_bankruptcy_memo.pdf) (discussing the requirement of willfulness in the context of bankruptcy).

⁴⁰ 608 N.Y.S.2d 618, 620 (N.Y.Just.Ct. 1994).

Assuming that the statute is applicable to damage to intangible property, and that the conduct of the child meets the applicable statutory requirements, the actual extent of damages that may be assessed against the parent may also be statutorily prescribed. If a statutory cap on monetary liability exists, the court will need to decide whether it is to be applied to each instance of copyright infringement individually or as an overall cap on liability for the entire course of infringement.

The California Court of Appeals identified this question in *Thrifty-Tel, Inc. v. Bezenek*.⁴¹ In *Thrifty-Tel*, the parents were held liable under California's parental liability statute for multiple instances in which their sons and the sons' friends hacked into the phone company network in order to make long-distance phone calls without cost.⁴² Without resolving the issue, the Court of Appeals identified three possible interpretations of language in the California parental liability statute capping parental liability at \$10,000 for "each tort": treating each individual instance in which the sons and friends improperly used the access code as a separate tort for purposes of applying the statutory cap on parental liability, treating each session of hacking as a separate tort, or treating the entire course of action as a single tort for purposes of cap application.⁴³ In a claim of copyright infringement, the difference is dramatic: treating the entire course of file-sharing as a single tort for the purposes of parental liability would strictly cap the total liability to the parents, while treating each song as a separate tort for purposes of capping damages would in many cases render the cap inapplicable to copyright infringement actions.

A comparison of selected jurisdictions may be useful in understanding the variation in state law regarding parental liability for property damage inflicted by a minor child.

In California, parents are "jointly and severally liable ... for any damages" up to \$25,000 "resulting from the willful misconduct" of the child.⁴⁴ This statute has been applied to damage to intangible property, but has collected a sequence of tortious actions into a single tort for the purposes of applying the cap on parental liability.⁴⁵ There is some precedent that suggests that California law might limit recovery to actual rather than statutory damages.⁴⁶

In New York, parents are liable when their children "willfully, maliciously or unlawfully" damage property, which appears to allow a broader range of activities to be ascribed to the parent.⁴⁷ However, the damages may not exceed \$5,000 per violation. Furthermore, damages may be mitigated based on the parents' financial status (to a minimum of \$500) or based on diligent supervision.⁴⁸

⁴¹ 54 Cal.Rptr.2d 468 (1996).

⁴² *See id.*

⁴³ *See id.* at n.13, Cal. Civil Code § 1714.1.

⁴⁴ Cal. Civil Code § 1714.1.

⁴⁵ *See Kessler*, 19 Cal.Rptr.2d at 642.

⁴⁶ *See id.*; Zuckerman & Bush, *supra* note 30, at n.42 and accompanying text.

⁴⁷ N.Y. Gen. Oblig. § 3-112.

⁴⁸ *See id.*

In Texas, parents are only liable for property damage when a child “willfully and maliciously” causes harm to the property of another.⁴⁹ In the case of music download, proving that the harm was malicious may be difficult. Texas also has a statutory cap of \$25,000 per incident.⁵⁰

B. Preemption Analysis

Even if state law provides that parents are liable for the tortious actions of their minor children, and that law is applicable to a claim for copyright infringement under the specific facts of the case, the application of state law to copyright actions may be barred by the doctrine of preemption. A court may hold that an action brought under state parental liability law is expressly preempted by § 301 of the Copyright Act; alternately, such an action may be barred by conflict preemption in light of copyright’s secondary liability doctrines.

Explicit preemption within the domain of the Copyright Act is governed by § 301, which bars all claims based on state-granted rights “that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106”⁵¹ The general test for explicit preemption is the extra-element test: “Under this analytical device, if the state claim requires an ‘extra element,’ beyond those required for copyright infringement, then it is not ‘equivalent,’ and therefore not preempted.”⁵² This extra element must “change the nature of the claim so that it is *qualitatively* different from a copyright infringement claim.”⁵³ Therefore, courts have held that a claim based on contract law satisfies the extra-element test and is not preempted by the Copyright Act.⁵⁴ However, courts have ruled that claims that add only an element relating to the defendant’s state of mind do not satisfy the extra-element test and are therefore preempted by § 301.⁵⁵ In any event, it would appear that any claim based on a state parental liability act would have to be explicitly founded on an underlying violation of the rights enumerated in the Copyright Act, which may be grounds for preemption separate and apart from an “extra element” analysis.

Alternately, a court may view the scope of those against whom damages may be collected as distinct from the issue of infringement liability and thus not explicitly preempted by § 301. For example, the Eleventh Circuit has held that a common law

⁴⁹ Tex.Fam.Code § 41.001(b).

⁵⁰ *See id.*

⁵¹ 17 U.S.C. §301. The Copyright Act does not apply to sound recordings fixed before February 15, 1972, and thus explicit preemption would not apply to state law claims for such recordings.

⁵² *Ritchie v. Williams*, 395 F.3d 283, 288 (6th Cir. 2005) (quoting *Wrench v. Taco Bell Corp.*, 256 F.3d 446, 454 (6th Cir. 2001)).

⁵³ *Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2nd Cir. 1992). *Cf. Goldstein, supra* note 10, at 15:11 (“To save a state right from preemption, the extra element must relate to the economic scope of the right.”).

⁵⁴ *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996); *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 456 (6th Cir. 2001)

⁵⁵ *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc.*, 501 F.Supp. 848, 853 (S.D.N.Y. 2004) (tortious interference with contract claim preempted by § 301 of Copyright Act when only extra elements were awareness of existence of contract and intent to interfere with contract).

indemnity claim by a defendant in a copyright suit was not expressly barred by the Copyright Act.⁵⁶

Even if not expressly preempted pursuant to Section 301, a claim based on a state parental liability statute may still be precluded due to conflict or field preemption.⁵⁷ A court could hold that the Congressional intent, as developed in the judge-made jurisprudence of contributory infringement and vicarious liability, to establish indirect copyright liability conflicts with any state law creating alternate forms of indirect liability, and is thus preempted by the doctrine of conflict preemption under the Supremacy Clause.⁵⁸

III Direct Suits Against Minors

Recently record companies have begun to sue minors directly. For example, in *Priority Records L.L.C. v. Chan* plaintiff filed suit against a minor after dismissing a prior suit against her mother.⁵⁹

A. Federal Law on Legal Representation of Minors

Generally when minors appear in court a guardian, such as a parent, must represent them. In RIAA actions, however, often both the parent and child are named as defendants. If so, and/or if there is a risk of secondary liability, the parent may face a conflict of interest in representing the child.

When a minor's general representative either refuses to act or has a conflict of interest in representing the minor, the court may appoint a guardian ad litem.⁶⁰ In addition, Federal Rule of Civil Procedure 17(c) provides that a minor who lacks a formally appointed representative may be represented by a guardian ad litem.⁶¹ In the federal courts, a guardian ad litem is generally entitled to reasonable fees for services and

⁵⁶ Cf. *Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001) (state common law indemnity claim not preempted by § 301).

⁵⁷ See *id.*

⁵⁸ See *id.* at 1287-88 (“If the [plaintiffs] had brought any type of copyright claim against Luster, [field preemption] may have precluded the suit.”); see generally Mark Lemley, Beyond Preemption: The Law and Policy of Intellectual Property Licensing, 87 Cal. L. Rev. 111 (1999).

⁵⁹ *Priority Records L.L.C. v. Chan*, 2005 U.S. Dist. LEXIS 20360, at *7 (E.D. Mich. May 19, 2005); *Priority Records L.L.C. v. Chan*, 2006 U.S. Dist. LEXIS 17044 at *1 (E.D. Mich. 2006).

⁶⁰ *Chrissy F. v. Miss. Dep’t of Pub. Welfare*, 883 F.2d 25, 27 (5th Cir. 1989); 18 James Wm. Moore et al., Moore’s Federal Practice § 1570 (3 ed. 2006).

⁶¹ *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co. of New York*, 27 F. Supp. 485, 486 (S.D. N.Y. 1939) (“The power to appoint a guardian ad litem for an infant or incompetent under Rule 17(c) is confined to cases where the infant or incompetent is ‘not otherwise represented’ in the action”).

is paid out of the amount recovered.⁶² The costs of a guardian ad litem may be charged to the parties as the court orders.⁶³

B. Default Judgments Against Minors

In both federal and state courts, default judgments against minors may not be entered unless a guardian represents the minor.⁶⁴ Any notice to a minor who is without the protection of a guardian fails to meet the requirements of due process.⁶⁵ Therefore, the court may disaffirm or vacate a judgment taken against a minor if a guardian or guardian ad litem did not represent the minor.⁶⁶

⁶² *United States v. Equitable Trust Co.*, 283 U.S. 738 (1931)

⁶³ 18 Moore's §54.102[2][c]. See *Ky. Ass'n for Retarded Citizens v. Conn.*, 674 F.2d 582, 585-86 (6th Cir. 1982) (holding that taxing of costs of a guardian ad litem against both parties was proper).

⁶⁴ Fed. R. Civ. P. 55(b)(2)

⁶⁵ 18 Moore's § 55.40[1]

⁶⁶ *In re Charles T.*, 102 Cal App. 4th 869, 876 (2002); *Keane v. Penha*, 76 Cal. App. 2d 693, 696 (1946).