

The Law of Inducement

Felix Wu

Inducement as a form of secondary liability has been receiving greater attention across intellectual property law, in patent law, copyright, and trademark, as well as in the law of intermediary liability for speech torts. Despite its intuitive appeal as a category of liability, however, its contours and theoretical underpinnings remain somewhat murky. To a greater or lesser degree, inducement is generally understood to hinge on intent. But given the usual utilitarian justifications for intellectual property law, liability that depends almost entirely on intent seems a strange choice. I suggest that the better approach is to focus instead on the deterrent effect of liability. Inducement liability is appropriate when defendants engage in specific acts or practices that the law wishes to deter because those acts promote infringing over non-infringing uses. Currently, such acts are usually interpreted as evidence of wrongful intent, but there seems to be little to be gained in detouring the analysis through considerations of intent. What matters most is not what intermediaries think, but what they do. Inducement liability should be structured accordingly.