

A New Framework for Intermediary Liability: Copyright, Causation and Control on the Internet

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Globally, intermediary liability law is a mess. The basis on which third parties are liable for the actions of individuals online is confusing and, viewed as a whole, largely incoherent. Copyright owners have sought to instill a sense of moral urgency around the protection of copyright goods that implicates everyone in their enforcement mission. They have argued that an intermediary's capacity to do something about wrongdoing amounts to a normative position that they therefore ought to do it. As courts have attempted to extend the law to reach new and disruptive intermediaries online, concepts designed to limit the scope of liability to only those at fault have begun to lose their meaning. For example, in Australia, Canada and Europe, courts have focused heavily on the question of whether an intermediary can be said to be 'passive' or 'active' in bringing about copyright infringement. This distinction becomes unhelpful when courts extend liability to otherwise passive intermediaries on the basis that they ought to have done something to stop infringement which they knew was occurring. In these instances, complicated reasoning makes the very fact of remaining 'passive' an active choice.

The legal inquiry that looks to the role that intermediaries play in the wrongful acts of others is not unique to copyright law. In tort law, too, courts occasionally look beyond immediate injurers to background actors 'whose carelessness is alleged to have set the stage for the injury' (Goldberg and Zipursky, 2014, 23). Existing, long-established principles in tort jurisprudence have long helped courts to work through and articulate the boundaries of liability.

Tort law has largely dealt with the issue of intermediary liability by closely examining the actual role that the intermediary has played in causing the relevant harm. It is only where the intermediary has played a causally significant role in establishing the circumstances that are likely to directly lead to the harm suffered by the plaintiff that the intermediary will be held responsible. Causation principles, I argue, are likely to be more effective at identifying when an intermediary will have a responsibility to act than the more common distinctions based on intention, passivity, or knowledge.

I argue that much of the uncertainty at the heart of intermediary liability law stems from the merger of concepts of capacity and responsibility. Our current laws lack clear mechanisms for disentangling these concepts and distinguishing those intermediaries that are closely involved in their users' wrongful acts from those that are not. My work offers an alternative framework for understanding and evaluating how online intermediaries ought to respond to wrongdoing by their users, and where the law should appropriately draw the boundaries of copyright liability online.

Goldberg, J. and Zipursky, B., 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 17.