

The Structure of Secondary Copyright Liability

Felix Wu

Benjamin N. Cardozo School of Law

Secondary copyright liability has largely been modeled after secondary patent liability. This makes no sense. Whereas most secondary patent infringers act in a way that targets a particular patent or group of related patents, secondary copyright infringement mostly arises in the context of technologies or services that work across all copyrighted works. Secondary copyright liability raises issues of platform liability in ways that secondary patent liability usually does not. The result is that the current rules of secondary copyright liability focus too much on mens rea and fault and not enough on avoiding both under- and over-deterrence. To shift toward the latter, we might think about adjusting secondary copyright liability in terms of both substance and remedies. On substance, we could limit secondary copyright liability to exact copies, but then require some level of reasonableness rather than merely the removal of known infringing works. On remedies, we could eliminate statutory damages for secondary infringement, but then make it easier to obtain disgorgement of profits directly attributable to infringement (e.g. ad revenue). Schemes like these have the potential to achieve better overall results than what we see under current law.