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2013

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Recommended Citation

Irina D. Manta, *A Horse is Not Always a Horse, of Course*, 65 Fla. L. Rev. Forum 50 (2013)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/638

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A HORSE IS NOT ALWAYS A HORSE, OF COURSE

Irina D. Manta^{*}

It was a pleasure to read Professor Jacqueline Lipton's piece *Law of the Intermediated Information Exchange*.¹ Her ambitious project is to provide a unifying theory of cyberlaw, at the heart of which lies her proposal to reframe the field as a law of the global intermediated information exchange.² Indeed, Lipton argues that what distinguishes cyberlaw from other areas is the fact that it is bound to concern itself with actions that cannot take place without one or several intermediaries, which include Internet Service Providers (ISPs) and search engines, among others.³ She believes that recognizing the central nature of these service providers would go a long way toward developing laws and doctrines that advance the goals of predictability and coherence.⁴

The importance of intermediaries in Internet matters has been recognized for some time.⁵ Lipton's insight is to make their role the central tenet of cyberlaw, using it to extricate the field from accusations such as Judge Frank Easterbrook's that cyberlaw scholars seek to promote the "law of the horse."⁶ At the same time, it is important to recognize that a focus on intermediaries provides not only a neutral architectural view of the virtual world but also makes certain substantive choices in how to construct the law more likely to take place than others. After all, as Lipton recognizes, just because intermediaries exist and provide simpler choke points does not mean that making them the focus of intervention will always prove optimal.⁷ Most recently, this became a hot-button issue in the context of the "six-strikes anti-piracy plan" to which a number of major ISPs agreed after pressure from the Motion Picture Association of America (MPAA) and Recording Industry Association of America (RIAA) and which provides for warnings followed by slow-downs or service interruptions for users accused of online copyright infringement.⁸ One of the risks, as many

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1. 64 FLA. L. REV. 1337 (2012).

2. *Id.* at 1338–39.

3. *Id.* at 1342–43.

4. *Id.* at 1346.

5. See, e.g., Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 105 (2010) ("Internet intermediaries govern online life.").

6. Lipton, *supra* note 1, at 1338 (internal quotation marks omitted).

7. She explains, for instance: "However, imposing legal responsibilities on intermediaries always comes at a cost. The more duties legally imposed on intermediaries, the more likely the result will be a chilling of online innovation." *Id.* at 1361.

8. See *AT&T Starts Six-Strikes Anti-Piracy Plan Next Month, Will Block Websites*,

have pointed out, is that innocent users will experience sanctions for behavior falsely detected as infringing given that intermediaries connect them just as much as they do infringers to the Internet. On a related note, Lipton also explains that “the drafters of SOPA [i.e., the Stop Online Piracy Act] have latched onto the reality that online service providers can be the most effective choke points in online interaction to interrupt the flow of infringing or harmful communications.”⁹ She cautions that only a more coherent theoretical framework could provide a proper balancing of interests in this area.¹⁰ One may wonder, however, if a significant focus on intermediaries will not inherently engender a mentality of attempting choking at the simplest choke point, whether other interests are at stake or not. Pieces of legislation like SOPA and private arrangements like the six-strikes plan seem to bear out that concern.¹¹

Meanwhile, Lipton’s discussion of jurisdiction and the difficulties of applying this concept to the virtual world struck me as sensible, but is an area where I do not foresee a greater focus on intermediaries resolving some of the quandaries before us. Even if ISPs are choke points, how can and should they resolve the fact that a piece of content posted in Country A could violate the laws of Country B? Short of installing highly restrictive filters at the choke points (for example, following the principle that content violative of any country’s laws should not be posted, or some lesser version thereof), our knowledge of the existence of the choke points does not lead the way out of the problem of legal diversity in a connected world. Rather, there are fundamental questions of fairness and efficiency separate from the existence of intermediaries that we have to resolve in this respect.

Last, it is worth considering that cyberlaw is not the only area of the law in which intermediaries play a key role, which raises some questions as to using the intermediary-heavy nature of the Internet as its main legal distinguishing feature. Unlike some of Lipton’s examples such as defamation or general copyright infringement, which only sometimes force the law to make decisions about intermediaries,¹² several illegal activities such as many forms of drug dealing are nearly impossible to conduct without a network of intermediaries. Nevertheless, law school classes and textbooks today do not regularly

TORRENTFREAK (Feb. 25, 2013), <https://torrentfreak.com/att-starts-six-strikes-anti-piracy-plan-next-month-will-block-websites-121012/>. For more details on how this scheme functions, see Chloe Albanesius, *ISPs to Start Rolling Out ‘Six Strikes’ Copyright Alert System*, PCMAG (Feb. 25, 2013, 2:33 PM), <http://www.pcmag.com/article2/0,2817,2415850,00.asp>.

9. Lipton, *supra* note 1, at 1356.

10. *Id.*

11. For a broader discussion of SOPA and related unpopular laws in the copyright arena, see Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. (forthcoming).

12. Lipton, *supra* note 1, at 1355.

make drug dealing a sole focus, unlike cyberlaw. Indeed, odds are that a proponent of “drug dealing law” would find himself face-to-face with a displeased Judge Easterbrook. To the extent that the virtual world seeks to avoid accusations of possessing an equine nature, it must be defined in not only descriptive but also normative terms. There is no escaping normative assumptions altogether, but their content must be acknowledged openly. Lipton’s piece encourages us to recognize the necessity of understanding the key role of information intermediaries, but our work remains cut out for us to color in the important lines that she has drawn.