MONOPOLISTIC GATEKEEPERS’ VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT

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Why Vicarious Liability for Gatekeepers?
Two Prongs of Vicarious Liability

1) Right and ability to control infringement
2) Direct financial benefit
Vicarious liability:

- Employer-employee relationship
- Premise provider
- Provider of essential facility--suitable candidate for vicarious liability?
Provider of essential facility

- Baidu - monopoly?
- Visa - monopoly?
Baidu

- The Difference Between the Two Safe Harbors in China:
  - Information storage—an ISP must not receive direct financial benefit from infringement.
  - Search or linkage service—no such requirement.
Baidu

- Baidu uses the auction-based, pay-for-performance (P4P) services system, which “enable[s] its customers to bid for priority placement of their links in keyword search results.”
Visa

- Perfect 10, Inc. v. Visa
  1. Dissent
- **Different Vicarious Liability Tests**
  - Employer-employee relationship
  - Premise provider
  - Monopolistic provider of essential facility
<table>
<thead>
<tr>
<th>Relationship</th>
<th>Test</th>
<th>Rationale</th>
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<td>Employer/employee</td>
<td>Right and ability to supervise employees + Direct financial benefit from infringement</td>
<td>Dominant justification--deterrence, supplementary justification--corrective justice</td>
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<tr>
<td>Premise provider</td>
<td>Right and ability to deter <em>infringement</em> + Direct or indirect financial benefit from infringement</td>
<td>Deterrence</td>
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<td>Monopolistic provider of essential facility</td>
<td>Right and ability to exclude <em>infringers</em> + Market power + Direct financial benefit from infringement</td>
<td>Corrective justice</td>
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THE CONTROL PRONG OF VICARIOUS LIABILITY

Control infringers or infringement?
THE DIRECT FINANCIAL BENEFIT PRONG OF VICARIOUS LIABILITY

Interpreted narrowly or broadly?
THE DESIRABILITY OF IMPOSING VICARIOUS LIABILITY ON Baidu

- Baidu/advertiser relationship
- C.f. ISP/subscriber relationship
- C.f. Accounting firm/corporation relationship
Proposed liability regime for monopolistic gatekeepers