



MONOPOLISTIC GATEKEEPERS' VICARIOUS LIABILITY FOR COPYRIGHT INFRINGEMENT


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- Why Vicarious Liability for Gatekeepers?

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- 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?
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Provider of essential facility

- Baidu - monopoly?
 - Visa - monopoly?
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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

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- **DIFFERENT VICARIOUS LIABILITY TESTS**
 - Employer-employee relationship
 - Premise provider
 - Monopolistic provider of essential facility

Relationship	Test	Rationale
Employer/employee	Right and ability to supervise employees + Direct financial benefit from infringement	Dominant justification--deterrence, supplementary justification--corrective justice
Premise provider	Right and ability to deter <i>infringement</i> + Direct or indirect financial benefit from infringement	Deterrence
Monopolistic provider of essential facility	Right and ability to exclude <i>infringers</i> + Market power + Direct financial benefit from infringement	Corrective justice

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- THE CONTROL PRONG OF VICARIOUS LIABILITY
 - Control infringers or infringement?

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- THE DIRECT FINANCIAL BENEFIT PRONG OF VICARIOUS LIABILITY
 - Interpreted narrowly or broadly?

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- 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