MIDDLEMEN

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Meet the new boss, same as the old boss.1

The Internet was supposed to mean the death of middlemen.2 Intermediaries would fade into irrelevance, then extinction, with the advent of universal connectivity and many-to-many communication. The list of predicted victims was lengthy: record labels, newspapers, department stores, travel agents, stockbrokers, computer stores, and banks all confronted desuetude.3 Most commentators lauded the coming obsolescence as empowering consumers and achieving greater efficiency; a few bemoaned it.4 But disintermediation was inevitable.

Jacqueline Lipton’s article “Law of the Intermediated Information Exchange” shows how foolish that conclusion was.5 Tower Records and Borders bookstores folded, and newspapers struggle to survive. But music fans don’t buy directly from Universal Music or Sony Music—they get the latest Jay-Z or Muse tracks from Apple’s iTunes Music Store. College students surf Craigslist to find listings of apartments for rent. News junkies stay glued to Reddit, or Twitter. Kayak collects cheap flight reservations for us. And Google helps us find . . . everything. We simply swapped one set of middlemen for another.

Indeed, the fall in production and distribution costs driven by the Net has made intermediaries even more important. Users are confronted with a deluge of information. They badly need help processing, ordering, and selecting from it. We can obtain data, or DVDs, or deli sandwiches directly from the source, but how to choose which source?

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2. See Jessica Litman, Sharing and Stealing, 27 Hastings Comm. & Ent. L.J. 1, 7 (2004) (noting that “Ten, even five, years ago, it was conventional to talk about the Internet as a tool for disintermediation”).
5. 64 Fla. L. Rev. 1337 (2012).
The dramatic drop in information costs generated by networked computing has been a blessing, but not an unmixed one: we rely on a new crop of gatekeepers to help us make sense of it all. Moreover, the behemoths of pre-Internet intermediation have been replaced, in many cases, by monoliths. Amazon, Google, Facebook, YouTube, Craigslist—all possess dominant market share. This counterintuitive outcome means we may be more rather than less vulnerable to capture by middlemen. It costs nothing to leave Facebook, but where else on-line do all of your friends hang out? The combination of network effects, cognitive scarcity, and sheer inertia tends to lock us in. Middlemen are larger and more powerful than ever.

Thus, theories of disintermediation rapidly proved inaccurate, if not directly contradicted by an information environment dominated by attention scarcity and cognitive economics. And yet, legal scholarship on Internet law has been relatively slow to place intermediaries at center stage. Here, too, Lipton usefully re-orients us. Her recommendation for a theory of Internet law—that we ground it in the recognition that global, intermediated information exchange is what makes the field unique—helpfully challenges scholars. First, it moves us into the post-dotcom period, leaving behind hoary debates between cyber-exceptionalists and cyber-realists, or over whether there even is such a thing as “Internet law.” These battles of the late 1990s—eons ago, in Internet time—are now of historical interest only (if that).

Second, and more profoundly, Lipton’s framing of Internet law forces us to ask: what is an intermediary? Internet law has already done some work on this problem, but only indirectly. We have assessed statutory immunities for intermediaries; crafted thoughtful scholarship about when intermediaries ought to bear liability; and opined on

12. See, e.g., 17 U.S.C. § 512 (confering immunity upon service providers that take specified precautions); 47 U.S.C. § 230(c) (confering immunity from most tort liability on providers of interactive computer services); David S. Ardia, Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act, 43 Loy. L. Rev. 373 (2010).
13. See, e.g., Ronald J. Mann & Seth R. Belzley, The Promise of Internet Intermediary
litigation over when one intermediary can lawfully displace another.\textsuperscript{14} Scholars have confronted the inconsistent (if not incoherent) treatment of intermediaries under different doctrines.\textsuperscript{15} If YouTube knowingly hosts a video, uploaded by a user, that infringes copyright, they face liability, and statutory damages of up to $150,000.\textsuperscript{16} But if that video defames you, or contains nude images of you, YouTube is immune.\textsuperscript{17} The treatment of intermediaries thus far has tended to be stovepiped by the legal doctrine at issue, or has lumped middlemen together as a homogeneous caste, treating them alike.

Legal scholars have not yet concentrated with sufficient attention on the extraordinary range and diversity of functions that intermediaries play. Some middlemen handle money: PayPal. Some provide a platform for social interaction: Facebook. Some recommend: Yelp. And some sell us stuff: Amazon. But even functional categories may be too broad to be useful. Yelp and Google both help you discover what things (restaurants, or Web sites) are most relevant to your interests, as voted by your peers.\textsuperscript{18} But, they vary greatly in key aspects, such as their market power and competitive landscape (and, hence, value as a chokepoint for regulatory attention). Internet law needs, but lacks, methodologies for grouping intermediaries. Such analytical models will help us understand the various niches in the Internet ecosystem. They will also help policymakers engage in more tailored regulatory decisions. It may make sense to treat Facebook and Amazon differently, or alike. Ditto Google and Wolfram Alpha. In short, we need tools that help us categorize middlemen—to understand what makes them similar, or different, and to guide us in using law to alter their conduct.

Finally, there is the turtle problem.\textsuperscript{19} Sometimes Google is a speaker, sometimes a listener, and sometimes an intermediary. So am I, if I


\textsuperscript{15} Anita Bernstein, \textit{Real Remedies for Virtual Injuries}, 90 N.C. L. REV. 1457 (2012)

\textsuperscript{16} 17 U.S.C. §§ 512(c)(1)(A)(i); 504(c)(2).

\textsuperscript{17} 47 U.S.C. § 230(c)(1).


\textsuperscript{19} This is an old joke of uncertain provenance. It involves the claim that the Earth rests on the back of a giant tortoise. But what does the tortoise rest upon, a questioner asks? The answer comes: it’s turtles all the way down. See, e.g., Pradeep Mutalik, \textit{Numberplay: Turtles All the Way Down}, WORDPLAY: N.Y. TIMES (Oct. 10, 2011), http://wordplay.blogs.nytimes.com/2011/10/10/numberplay-turtles-all-the-way-down/.
operate an open wi-fi access point along with my normal Internet use. So, in all likelihood, are you. Thus, we need a role-based conception of intermediaries as well, to save us from the risk that it’s intermediaries all the way down, whereupon the project disappears into an infinite regression. An Internet law methodology based on intermediaries provides no guidance or constraint if every actor qualifies for the label. A given entity may be an endpoint (to borrow from the end-to-end design literature) at some times, and a middleman at others. It may have aspects of an intermediary, and aspects that are not. Internet law needs a nuanced framework to handle this duality, and to accommodate role-based analysis, to ensure that “intermediary” as a label retains descriptive value. In short, what we need is disaggregation, not disintermediation. Lipton’s project presses us to develop rough, working taxonomies of intermediaries.

Jacqueline Lipton’s article ensures that Internet law won’t get fooled again; instead, it will concentrate on intermediaries, whose power, ubiquity, and international character challenge legal regulation. Her approach hands Internet scholars a difficult, worthwhile set of challenges: to categorize intermediaries, to disaggregate their functions, and to map the results to legal doctrines and policy needs.

20. See AF Holdings LLC v. Doe, 105 U.S.P.Q.2d (BNA) 1490, 1496 (N.D. Cal. 2013) (rejecting copyright infringement liability for defendant who failed to secure wi-fi access point through which infringing works were downloaded).