

Cops, Robbers, and Search Engines: The Role of Criminal Law in Contributory Infringement Doctrine

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Online technologies have created a new litigation locus for intellectual property rights holders, one that targets intermediaries, not direct infringers. This unprecedented litigation strategy has put sudden pressure on the courts to evaluate the liability of indirect infringers. Without a developed body of precedent at their disposal, judges have resorted to analogies from the criminal law of accomplice liability to set the boundaries of contributory infringement. Does it make sense for intellectual property regulation to depend on the same principles that animate criminal law? This Article maintains that it would be a mistake to remake contributory infringement law in criminal law's image. Application of the rules of criminal accomplice liability to intellectual property disputes would dramatically alter the way contributory infringement claims are currently decided, upsetting the delicate balance between rights holders and downstream users. Criminal law's focus on moral culpability does not match the utilitarian theory behind infringement law. A better and more intuitive way to assess the liability of intermediaries for the infringing acts others is to apply causal principles. Although causation is not a part of criminal contributory liability doctrine, it is employed to determine contributory liability in a variety of civil contexts and appeals to our intuitive sense of when it is appropriate for one person to be responsible for the misdeeds of another.