

LAW AS INTERMEDIARY

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INTRODUCTION

The notion of the intermediary¹ in content-related industries is well-established, and has been well-studied.² Intermediaries have long played a substantial role in creating and distributing content. They come in many shapes, sizes, and varieties, with myriad purposes, designs, and justifications. They appear as librarians, deciding which books to order, as well as which books to keep behind the counter. They appear as book publishers, deciding which books will be published, as well as which will be publicized, and which sold from the cheap bin at the discount bookstore. They appear as radio station programmers who decide which new singles will be played, and which will never be heard. They appear as television broadcasters who decide which sitcoms to continue, and which to cancel, and as news journalists and editors

1. A note on terminology: There are a variety of terms related to intermediaries, many of which are apparently derived from the banking industry, where the notion of the intermediary was more fully developed during the 1960s, and the apparent demise of the intermediary role for banks when individuals began to invest directly in stocks and bonds, as opposed to depositing their funds in the bank as intermediary, which then invested the saved funds, pocketing any profits above those it was required to pay the depositor in interest. See, e.g., Patric H. Hendershott, *Financial Disintermediation in a Macroeconomic Framework*, 26 J. FIN. 843, 843 (1971). As the ability and willingness of individuals to invest in the relevant financial goods increased, the banks were said to be “disintermediated.” This term has been taken over into the debate regarding content intermediaries, along with the terms “intermediated” and “reintermediated.” While “disintermediated” seems useful in that there is no synonymous term available to describe the removal of an intermediary from the chain of supply, “intermediated” in the context of content distribution is redundant with the term “mediated.” Intermediaries in the content distribution arena do not intermediate content, they mediate it. “Intermediate” adds little if anything in terms of meaning to separate its use from being pure jargon. There is a point at which jargon obscures, and the addition of terms redundant to those that express more simply the action being taken reaches that point. I will thus avoid the terms “intermediation” and “reintermediation” in favor of the terms “mediation,” and while I see a purpose to the term “disintermediation,” as that is not my topic here that term will be avoided as well.

2. See, e.g., Ian R. Kerr, *Spirits in the Material World: Intelligent Agents as Intermediaries in Electronic Commerce*, 22 DALHOUSIE L.J. 190 (1999); Elizabeth Garrett, *Political Intermediaries and the Internet “Revolution,”* 34 LOY. L.A. L. REV. 1055 (2001); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998); Ethel Auster, *Intermediaries in Information Transfer: The Library Experience*, 6 PROGRESS IN THE COMM. SCI. 199 (1985); John T. McNelly, *Intermediary Communicators in the International Flow of News*, 36 JOURNALISM Q. 23 (1959); Nina Wakeford, Research Note, *Working With New Media’s Cultural Intermediaries: The Development of Collaborative Projects at INCITE*, 6 INFO., COMM. AND SOC’Y 229 (2003); Rod MacLeish, *Television and Politics: The Passing of the Intermediary*, 21 TELEVISION Q. 68 (1984); Charles Firestone, *Digital Culture and Civil Society: A New Role for Intermediaries?*, 22 INTERMEDIA 26 (1994).

who decide which stories to report and which to bury. Most recently, they have appeared as search engines, guiding us to the information we seek based on the criteria we apply—or perhaps even should have applied—in trying to find it. Regardless, however, of the type and purpose of the intermediary, they all share one hallmark: their juxtaposition in relation to information content and its receiver. That is, they are not quite creators of content, but they are not the “end-users” of that content either.

The primary descriptive thesis of this Article is fairly straightforward: Along with libraries and librarians, radio and television station owners, newspaper and book publishers, Web search engines and directories, law also mediates cultural and information goods and content. Law is interposed between—or perhaps among—producers of such content or meaning and its receivers, users, reusers, and consumers. In other words, law is an intermediary. That law plays this role may seem generally uncontroversial, at least at first glance, though it has gone largely unsaid in the literature regarding intermediaries.³ This is not to say that law is discounted in discussions of intermediaries. Quite the contrary is true. Law is seen in a variety of ways: as providing the framework within which intermediaries operate—such as by setting standards for defamation law applicable to newspapers;⁴ as restricting intermediaries,⁵ or pointing the way to their appropriate actions;⁶ as empowering intermediaries by allowing them special privileges⁷ perhaps not available to other non- or unrecognized intermediaries (such as the reporter shield laws recently held inapplicable to bloggers, even those that fancy themselves “journalists”).⁸ But even with these acknowledgments of law’s relevance to content and its distribution, law itself is generally not regarded as an intermediary. This Article will show that law is indeed an intermediary.

The most apparent objection to this line of reasoning is that law is not, in fact, an entity or an organization; in other words, law has no volition. It

3. See generally Symposium, *W(h)ither the Middleman: The Role and Future of Intermediaries in the Internet Age*, 2006 MICH. ST. L. REV. 1 (2006).

4. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

5. In the United States, for example, radio and television broadcasters must obtain licenses from the Federal Communications Commission before they can begin broadcasting. See 47 U.S.C. § 301 (2002).

6. See, e.g., The Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2000) (providing a safe haven against liability to Internet Service Providers who meet its requirements).

7. See, e.g., N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992) (special provisions relating to persons employed by, or connected with, news media).

8. See *Apple Computer, Inc. v. Does*, No. 1-04-CV-032178, 2005 WL 578641, at *7 (Cal. Super. Ct., Mar. 11, 2000).

cannot want, or make decisions, or prefer this content to that. It cannot—as an entity—mediate anything. This objection poses no significant obstacle to the establishment of the claim made here. Intermediaries, as we shall see, do not always have volition, and, in any event, it is not a requirement of an entity that is an intermediary that it exercise its own volition.

The recognition that law is an intermediary is an important one. I am making the case here not that law is an intermediary in the metaphorical sense, the way that “code is law” was argued by Lessig.⁹ Lessig did not believe that code was agreed upon by legislative representatives and reviewed by the judiciary. In contrast, I am making the argument that law *is* an intermediary, a *real* intermediary, and an important one, at that. Recognizing this fact will help us to tease out the effects of the intermediary law in ways that considering law as metaphorical intermediary may miss, and will also help us focus on policymaking that affects content creation and distribution.

We will begin by looking briefly at intermediaries, identifying effects that intermediaries have on content, and considering whether law might have similar effects on content production and distribution. We will then move to considering law as an intermediary, developing a taxonomy that describes how law interacts with content creation and distribution. From this point forward, it should be established that law is an intermediary, and so we will turn next to discussing the implications of this realization, both in terms of theory and in the real world. Our final task will then be to consider law’s future as an intermediary. Specifically, we will ask the question, will law continue to be an intermediary? What we will ultimately see is that, while law as intermediary will be affected by many of the same challenges that confront non-law intermediaries today, when it comes to content and content creation, law is likely¹⁰ to continue to play an intermediary role across time, regardless of technological innovations that are developed in the meantime. The role may change; in fact it likely will change. But law is likely to be there,

9. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999). The acknowledgment that a particular realization or perspective is primarily metaphorical should not be read to indicate that the argument is therefore less important or less forceful. When it comes to reason and understanding, metaphors are king. Articulating the ways in which metaphors are used is an essential element not only of learning, but also of how we understand our world and “new” things that we discover or are exposed to in it. See JACK BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998); see also DAVID SCHON, DISPLACEMENT OF CONCEPTS (1963).

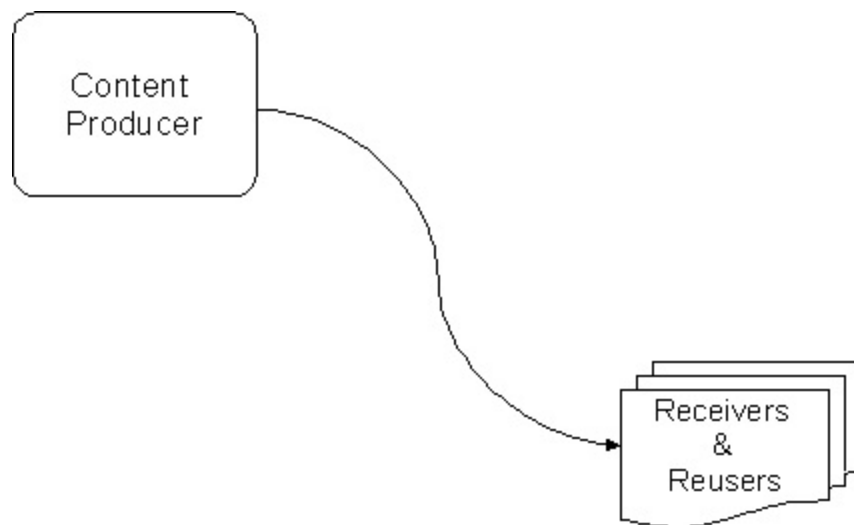
10. My choice of terminology here – “is likely” – reflects my “anti-determinist” stance on technology and on law; the future is the result of our choices, and it is unlikely to be “determined” in the real sense by the nature of law, or of technology, or even of this earth or the individuals that live upon it. This makes prediction less certain, but acknowledges the conditional nature of life and events.

standing between, behind, and next to content in the future, and mediating its delivery to those who ultimately receive it.

I. INTERMEDIARIES

In a world without intermediaries, receivers would receive content directly from content producers. Figure 1, the first of a number of figures that will help us consider the ways in which content reaches receivers and what happens to that content along the way, shows the direct path that content would take from producer to receiver absent intermediary intervention.

FIGURE 1. CONTENT BEING ACCESSED DIRECTLY BY RECEIVERS AND REUSERS, WITHOUT THE INVOLVEMENT OF AN INTERMEDIARY.



With nothing else in the way, only individual perceptions, knowledge, and experience would color our perceptions of the content. Of course, we know that this picture is not just overly simplistic; it is entirely unrealistic in a world in which there are many content producers, many receivers, and limited amounts of time on the part of both. Thus, we recognize that some kind of aid or mechanism to distribute content to receivers is necessary. The exact shape and type of that mechanism is not determined simply by the need for its existence, but results from the nature of the society in which it is found, its technology, its culture, and its law, among other factors. As we then, of necessity, turn away from a model of direct content distribution to a model of

indirect content distribution, we insert into the picture the subject of this Symposium and this Article: the intermediary.

As we take this first turn, it may be helpful to start—though I tend to be skeptical of starting at this point¹¹—by defining this important term: intermediary. The *Oxford English Dictionary* defines the noun “intermediary” as, variously, “One who acts between others; an intermediate agent; a go-between, middleman, mediator . . . Something acting between persons or things, a medium, means; also *abstr.* Action as a medium, mediation, agency (*of* something) . . . Something intermediate between others; an intermediate form or stage.”¹² The key to each of these definitions appears to be something or someone in the middle of some others (either some other things or some other people).¹³

It is additionally helpful here to consider that the discussion of intermediaries in the context of this Symposium has focused primarily on issues surrounding intermediaries of cultural and information goods¹⁴—that is, not necessarily the producers of cultural goods themselves, but rather those through whom we gain access to those cultural and information goods. If we thus look “between” the producers of cultural and information goods and the ultimate (or downstream) receivers and users of those goods, we find our intermediaries (as shown in Figure 2).

In what ways, then, do intermediaries interact with or affect content that is developed by others? There are a number of ways. An intermediary may “stand” between content—or content creator—and receiver, acting as a gatekeeper. The gatekeeping function is probably the most discussed, but being an intermediary entails activities broader than simply making decisions based on market conditions of whether to pass content on to receivers, and it does not always involve an “in-between” position for the intermediary. It may be useful to consider intermediaries in terms of content receivers: What information finally reaches receivers from that which or has been or might be made available by content creators? In other words, where content exists or might be created, under what circumstances does another person or entity

11. This hesitancy results from the notion that there is nothing inherent or natural about language that requires that words have certain definitions. Therefore, using language and created definitions as the starting point for discussion has potentially significant and oftentimes unseen drawbacks. See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999). We do, however, need a starting point for discussion, and it is with the acknowledgment of the arbitrariness of our starting point that we proceed.

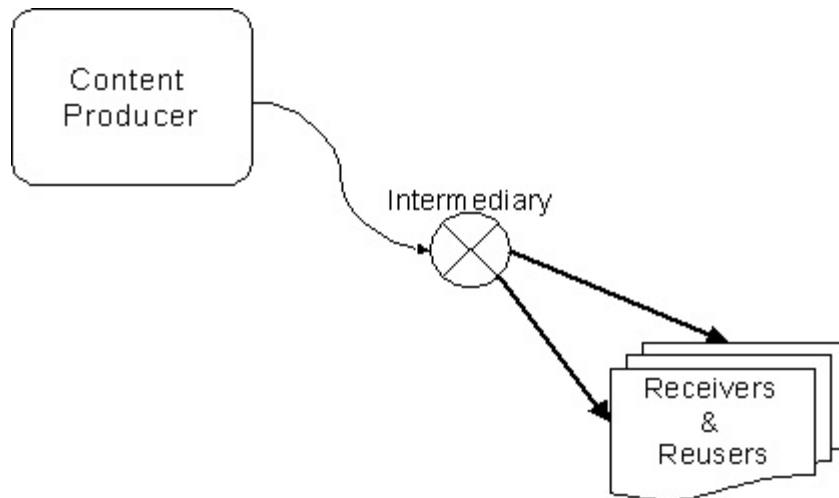
12. OXFORD ENGLISH DICTIONARY 405 (2d ed. 1978).

13. See Figure 2 below for another overly simplistic depiction of this relationship.

14. See generally Symposium, *W(h)ither the Middleman: The Role and Future of Intermediaries in the Internet Age*, 2006 MICH. ST. L. REV. 1 (2006).

affect whether potential receivers can or do actually receive the content, and in what form?

FIGURE 2: THE PLACEMENT OF AN INTERMEDIARY BETWEEN CONTENT PRODUCER AND RECIEVERS/REUSERS.



From this perspective, we can see that intermediaries, in their gatekeeping role, may stop particular expression from being brought to the market. This might happen where a book or a music CD needs to be changed before a retail distributor is willing to release it. In the case of theatrical films, oftentimes cuts are made in movies due to practical concerns such as length; as to CDs, some retailers may require versions with ostensibly offensive lyrics removed. In this way, the substance of the cultural or content good is changed, and the good is not received in its original form. The intermediary here has a stopping effect: The content producer cannot say this thing in this way, and if he or she does, the intermediary will not pass the content on to the receivers.¹⁵

15. Keep in mind that even this simplistic picture does not require that there be only one intermediary. Interplays among intermediaries are part and parcel of the content distribution game, but to that extent it is only important to realize that even should the content distributor decide to distribute through intermediaries who do not have the stopping effect, so long as one intermediary has this effect the content will change for at least a portion of the market. Should the content producer decide to bypass this intermediary because of the stopping effect, obviously that effect will be entirely absent when the good reaches the entire market.

Another gatekeeping function may result in a requirement that the content producer say a specific thing in addition to saying what the content producer desired to say. The additional content may be added to the original content itself, or it may be a labeling of the content. But, in any event, the content is again changed, and the gatekeeper refuses to pass the content along unless the required content is added. This might occur in the U.S. where an intermediary such as a movie theater requires that film producers explicitly include the Motion Picture Association of America rating on the advertising for the film and on the film itself, and perhaps even on trailers shown in theaters for upcoming films.¹⁶ Another example might involve the situation in which distributors of posters require that the photographers who produced the original content allow them to put the distributor's mark or name on them. In both of these situations, as well as in others, the intermediary requires the addition of content alongside the original content, thus apparently forcing the content producer to say more than what might have been said otherwise.

A final gatekeeping function involves silencing¹⁷ content entirely. Where an intermediary refuses to pass along content to receivers, the content is—at least potentially—silenced. This may happen where an intermediary disagrees with particular content, as when a television station refuses to show a paid political advertisement based on its message,¹⁸ or when a newspaper refuses to run a story because it is unhappy about the message that might be sent to receivers who see that content.

There is one more effect that intermediaries can have on content that we will consider here: the anti-silencing effect. This effect does not fit strictly within the boundaries of the gatekeeping role. The anti-silencing effect is one in which the intermediary is directly responsible for the content producer bringing into being content that the producer otherwise would not have created. This effect may result where the producer has agreed to create the content, but then later is unwilling to do so, and has to be encouraged or coerced into doing so by the intermediary. This has occurred in the past, for example, when rock bands have entered into contracts to record a certain number of releases with a certain record label, but the relationship between the band and the music label has soured. If the musicians no longer wish to

16. Such labeling may also have an accreditation effect, where the label is well-recognized by the public.

17. Remember here we are discussing silencing not in its entirety; where one intermediary refuses to distribute content, thus silencing it, and another may step in to fill that void. That said, the content producer is essentially silenced as to receivers who for one reason or another do not have access to the alternative intermediary.

18. See, e.g., Andrew Scott, '*A Monstrous and Unjustifiable Infringement*': *Political Expression and the Broadcasting Ban on Advocacy Advertising*, 66 MOD. L. REV. 224 (2003).

write and record the musical release, the label might insist based on the terms of the contract. The band is then forced to not be silent, but rather to create new songs and record them, bringing into existence content that, absent the intermediary's intervention, would not have come into existence. Where the anti-silencing effect is seen, the producer wished, for one reason or another, to stay silent, but the intermediary was able to force the producer to create.

We have seen that we can conceive of the effect of intermediaries on what receivers receive (or do not receive) in two broad categories: gatekeeping functions and non-gatekeeping functions. The effects that result from the gatekeeping function of intermediaries include the stopping effect, the silencing effect, and the forcing effect. In the non-gatekeeping function, intermediaries may have an anti-silencing effect. Our conception of intermediaries in their gatekeeping and non-gatekeeping roles allows us to tease out some of the effects that intermediaries have on content before it reaches the receivers (including stopping it before it reaches receivers). These effects may change content or even bring it into being. This allows us to see that intermediaries do have an effect on content in many cases, and that the effect observed can further be used to identify new intermediaries.

II. LAW AS INTERMEDIARY

Now that we have reached this point and have seen some of the basic effects of intermediaries on content, and how those effects fit together with content, producer, and receiver, we can emphasize again the hallmark of the intermediary: Intermediaries are juxtaposed with content and its receiver; they are not quite creators of content, but they are not the "end-users" of that content either. What the discussion above shows is that even without being creators, intermediaries invariably affect content. Our next step, then, is to compare law's affect on content with the non-law intermediary's affect on content. If we can find in law's effects on content the four intermediary effects noted above, we can conclude that law, too, is an intermediary. It is to this task that we now turn, looking to legal situations to provide us with examples of the kinds of effects noted above.

A. You Can't Say That! At Least Not in That Way, or Not at This Time

It is a platitude that copyright protects only particular expression, and not the idea behind that expression.¹⁹ One of the modern additions to copyright

19. See Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV.

law appears to fly in the face of this alleged dichotomy in the creation of cultural goods, that is, the notion that once an original work is created, further derivative works based on that original must be authorized by the holder of the original's rights.²⁰ That is to say, suppose two years ago you wrote a book with a set of characters called "The Cretins," and I then write what is clearly a follow-up book that uses the same characters, location, and storylines. Let us assume that in your story, all of the characters are quite bad, so far as to even possibly be considered evil. In my story, I have rehabilitated them somewhat, showing more depth, and indicating overall that people are people, with good sides and bad sides. My story, though, is not a critique of yours, nor does it point out any holes in your original work. It simply builds on and continues it, growing the characters in line with that building. If I were to do this, most experts would likely agree that I have violated your copyright, and would be guilty of infringement. Production and distribution of my story could be stopped unless I had your permission.²¹

Now let us assume that in place of using your characters and continuing on from your story lines, I instead create new characters, characters that are somewhat like yours, but that have different names, different descriptions, and different histories. I also use none of the events you wrote into your story, but create my own. In the end, I tell the same story I would have had I used your story as my starting point. The idea is the same, my articulation of it nearly the same, except for the omission of the bits from your story. Under copyright law, I would no longer be infringing your rights. Instead, my work would be a work of independent creation, an original work in its own right, and would be permitted.

What this shows us is the circumstances under which I may be permitted to make a certain point, to tell a certain story, to reach a certain conclusion in the creation of content. I can tell that story one way, using characters that

321 (1989); Edward C. Wilde, *Replacing the Idea/Expression Metaphor with a Market-Based Analysis in Copyright Infringement Actions*, 16 WHITTIER L. REV. 793 (1995); Amaury Cruz, Comment, *What's the Big Idea Behind the Idea-Expression Dichotomy?—Modern Ramifications of the Tree of Porphyry in Copyright Law*, 18 FLA. ST. U. L. REV. 221 (1990).

20. See 17 U.S.C. § 103(a) (2000); see also Copyright, Designs, and Patents Act, 1988, c. 48 § 21 (Eng.).

21. Of course, if I play with the confines of law as intermediary, I may be able to go around this requirement. For a good example, see the fair use elements of *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1267-72 (11th Cir. 2001), wherein extensive use of elements of *Gone with the Wind* was made by author Alice Randall in writing *The Wind Done Gone*, and the use was upheld by the Eleventh Circuit Court of Appeals as a transformative use as parody. See also Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 (2003); Joseph M. Beck, *Copyright and the First Amendment: After the Wind Done Gone*, 5 VAND. J. ENT. L. & PRAC. 5 (2003).

have not been used before, and story lines that do not follow those that have come before, but I may not tell it that other way. I may not tell it using the expression of another person that is protected by copyright law. The law tells me here—You can say this, but not in this way—and stops me from creating content that violates these rules.²²

B. Want to Say This? You'd Better Say This, Too

Mr. Keene, a member of the California State Senate, wanted to show three films in the United States. The films were produced in Canada and were titled *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid from Heaven*.²³ The U.S. Department of Justice had reviewed the films, and, under authority provided to it by the Foreign Agents Registration Act of 1938, had declared the films “propaganda” and required them to carry a label when distributed in the United States. While Mr. Keene wished to show the films, he did not want to be associated with showing propaganda. In issuing its decision upholding the labeling requirement, the U.S. Supreme Court noted that Mr. Keene “would have to take affirmative steps at each film showing to prevent public formation of an association between ‘political propaganda’ and his reputation.”²⁴ The law imposed content here, and that content changed the message being distributed to receivers. In other words, Mr. Keene wished to speak through showing the films, but was told by the law that if he wanted to do so, he had better say something in addition to what he had already hoped to say. He had the option to stay quiet completely, but he did not have the option to say what he wanted to without the addition of law’s required content.

In 2001, the European Union put into place Directive 2001/37/EC of the European Parliament and of the Council,²⁵ regulating tobacco sales. Part of the Directive requires that warnings be placed on cigarette packages, in quite large print in relation to the rest of the packaging.²⁶ Suitable primary warnings include: “Smoking kills” and “Smoking seriously harms you and others around you.”²⁷ Secondary warnings, also required, include: “Smokers die

22. If the first book were written such that it is no longer protected by copyright, then the timing of the old writing would allow for its use in the new.

23. *Meese v. Keene*, 481 U.S. 465, 468 (1987).

24. *Id.* at 476.

25. Directive 2001/37/EC of the European Parliament and of the Council, of 5 June 2001, on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, 2001 O.J. (L 194) 26.

26. *See id.* at art. 5, 29-30.

27. *Id.* at 30.

younger” and “Smoking is highly addictive, don’t start.”²⁸ These regulations have been implemented in the EU countries.²⁹ Every cigarette package sold in these countries must contain the required warning.

The packaging of a product such as cigarettes conveys a message, one that product manufacturers expend significant resources to develop.³⁰ Yet, here the law requires that even when this content is developed, it is not allowed to reach its intended audience unless the content also includes the required warnings. Product developers have no desire to make these statements about their products, and certainly do not wish to include them with other content on the packaging itself. They wish to speak, to advertise their products, but they do not wish to make these statements. This is not, however, an option: If the content is to reach the public, it can do so only with law’s required content included.

C. Shhh, Don’t Talk About This

The English Royal family has long held a fascination for a variety of people around the world. From stories that focus on royal weddings,³¹ to Princess Diana’s demise while being chased by paparazzi,³² to the attack on one of the Queen’s prized Corgis by one of Princess Anne’s Bull Terriers,³³ the Royals provide an ongoing host of content for the tabloids both in the United Kingdom and abroad. It should thus have been no surprise that, when in 2004 allegations were raised by a former royal family staff person that a member of the royal family had been found in bed with a person of the same sex, the tabloids jumped at the story.³⁴ In response, the royal family sought legal protection in the courts. Asking a court to hold that the story was

28. *Id.* at Annex I, 33.

29. *See, e.g.*, The Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations, 2002, S.I. 3041 (U.K.), available at <http://www.opsi.gov.uk/si/si2002/20023041.htm>.

30. The U.S. Federal Trade Commission’s Cigarette Report for 2003 indicated that major cigarette manufacturers spent \$15.15 billion on advertising in 2003. F.T.C., CIGARETTE REPORT FOR 2003 2 (2005), available at <http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf>.

31. *See* Dennis Barker, *The Royal Wedding: The Royals as Soap Opera Look Likely to Run and Run/Media Perceptions of the Andrew-Fergie Circus*, THE GUARDIAN (London), July 22, 1986.

32. *See* Toby Rose, *The Diana Paparazzi One Year On*, THE EVENING STANDARD (London), Sept. 2, 1998, at 51.

33. *See* Mark Oliver, *Princess’s Bull Terrier Fatally Mauls Royal Corgi*, THE GUARDIAN (London), Dec. 24, 2003, at 6.

34. *See, e.g.*, Danielle Demetriou, *Newspaper Challenges Court Injunction Against Story on Royal Family*, THE INDEP. (London), Nov. 5, 2003, at 1.

defamatory, the royal family asked that its publication be prohibited. The court acceded, and issued a gag order halting publication of the story.³⁵ Under the order, speakers and distributors in the UK were prohibited from distributing—and receivers were prevented from receiving—this information. It was, in essence, silenced.³⁶

D. You'd Better Make Some Kind of Noise

In 1952, musical composer Johnathon Cage wrote the work *4' 33"*.³⁷ It is a musical composition in which no music is played. An instrumentalist comes onto the stage, sits, and raises and lowers her instrument. At the time it was first performed, the work produced a scandal. It was music without music. Cage's design—simply stated, to have people listen to the world around them—was achieved, though not without controversy.³⁸

In 2002, Mike Batt, a modern pop music composer with a UK “classical crossover” band known as the Planets, released a music compact disc entitled *Classical Graffiti*. In determining the order of the songs for the release, Batt decided he needed something between two tracks that—while they fit properly on the release—were too distinct to run one after the other. He included on the disk sixty seconds of silence, titling it “A One Minute Silence” and crediting John Cage as co-author. Upon release of the work, the John Cage Trust contacted Batt, alleging violation of copyright.³⁹ That is, they claimed that Batt's work utilizing silence infringed Cage's copyright on silence. In the resulting media-storm, Batt—himself a dedicated fan of Cage's work—made a rather large donation to the Trust so as to settle the dispute. But the Trust's

35. See *Battle to Overturn Injunction*, DAILY MAIL (London), Nov. 3, 2003, at 22.

36. Not that the silencing was necessarily effective. See *What the Papers are Saying*, DAILY MAIL (London), Nov. 10, 2003, at 4 (reporting that the allegations were being published all over the world).

37. JOHN CAGE, *4' 33"* (1952); see also JOHN CAGE, *SILENCE: LECTURES AND WRITINGS* (1st Wesleyan pbk. ed. 1973).

38. See, e.g., *Listen Hard: Silence is Golden*, ECONOMIST, Aug. 31, 2002, at 67. At the 1953 premiere of “4' 33””, given by David Tudor in Woodstock, New York, at the Maverick Concert Hall—a rough, wooden structure open at one end to the woods—there were the sounds of a breeze, then the first drops of a light rain on the roof and finally, the composer said many years later, “the voices of disturbed listeners, some of whom may be said to still be walking out.” *Id.*; see also Richard Taruskin, *No Ear for Music: The Scary Purity of John Cage*, 208 THE NEW REPUBLIC, Mar. 15, 1993, at 26.

39. See David Lister, *Big Noises at Odds Over the Sound of Silence*, THE INDEP. (London), June 21, 2002, at 1.

claim, based in law, was rather straightforward: Batt could not include silence on his CD in the way that he did without violating Cage's copyright.⁴⁰

In 2005, Judith Miller, a reporter with the *New York Times*, was sent to jail by a U.S. federal judge in New York for refusing to identify her source for information that made the name of a CIA operative, Valerie Plame, public in the press. Miller refused to comply based on her journalistic values relating to freedom of the press, her desire to protect her source and to keep her promise in that regard, and to maintain her credibility with new sources should she promise confidentiality in the future. The court did not accept her justification for refusing to divulge her sources. In relation to the Plame affair, Miller wished to stay silent. The Court ordered her to speak.⁴¹

* * *

From the above, we can see that law interacts with information content, changing it in a variety of ways before it reaches the receiver. Law affects content. Particular content, laid out in particular methods of expression, for example, might be stopped entirely. This effect might be like the effect of a book editor who requires changes from an author. The idea may be good, but the particular execution of it—the words used—just do not cut it. Likewise, law might prohibit the use of particular expression because that expression is copyrighted, or obscene, or perhaps even blasphemous or indecent. When it does so, law is an intermediary.

We will next consider each of law's intermediary effects based on the examples used above. In keeping with the methodology adopted here, we will consider law's intermediary role by looking to the affect law has on the content before it reaches—if it ever does reach—the receiver. This, then, is the effect of the law as intermediary in each particular case.

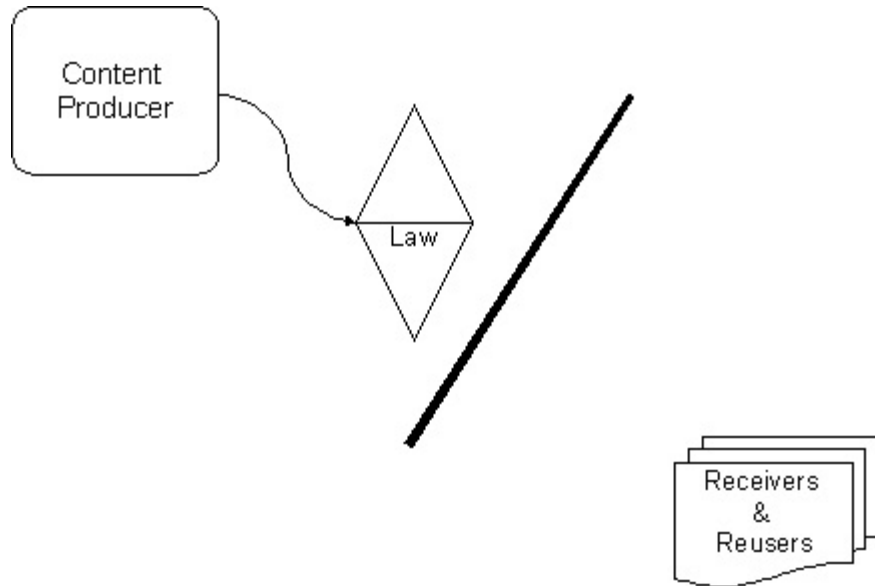
The story of the books above is an example of law as intermediary's "stopping" effect. The "stopping function" is law's way of saying, "You may not express this thing in this way." This is the effect not of a single-point intermediary, such as a search engine or a publisher, but of a distributed net that runs between the content and the intended receiver, as shown in Figure

40. This example crosses the boundaries between the anti-silencing effect and the stopping effect; it is not entirely clear that the Cage Trust claims copyright on silence per se. Instead, they disputed the way in which Batt utilized both the silence and Cage's name, which seemed to indicate copying. While this point might be argued, the example is maintained here for rhetorical effect: Batt wished to remain silent. The Cage Trust said if that was the case, he needed to pay the Trust appropriately.

41. See Lorne Manly, *A Reporter Jailed: Woman in the News; A Difficult Moment, Long Anticipated*; Judith Miller, N.Y. TIMES, July 7, 2005, at A16; Peter Johnson & Mark Memmott, 'Time' Reporter to Testify; 'N.Y. Times' Reporter Jailed, USA TODAY, July 7, 2005, at 51A; Editorial, *Leading by Example*, N.Y. TIMES, Aug. 8, 2005, at A14.

3. When compared with Figures 1 and 2 (above), it is difficult to argue that law has no intermediary effect on content. Figure 3 looks much more like the mediated Figure 2 than it does the unmediated Figure 1.

FIGURE 3: THE STOPPING EFFECT



In Figure 3, the content does not flow directly through to receivers, but rather stops due to law's effect. When it acts to stop content that would otherwise reach receivers, law is an intermediary.

Law's forcing effect is seen in the next grouping. Law often requires that certain content—sometimes specific, sometimes not—be included when other content is distributed. This changes the content, if only by the inclusion of the additional material, and makes what reaches the receivers different from what would have reached them had law as intermediary not intervened. That the films noted above could only be shown with a notice because they had been labeled as propaganda shows law's forcing effect.⁴² The putative exhibitor of the films in the U.S. fought hard against the requirement that the notice be included with the films, indicating that he believed that it was in some way changing the content of the film or its message.⁴³ At a minimum, the inclusion of the additional content—the propaganda label—was seen by the

42. See *Meese v. Keene*, 481 U.S. 465 (1987).

43. *Id.*

proposed exhibitor as influencing the viewers' perceptions of the films, and of him as exhibitor.

The E.U.'s warnings regarding the dangers of cigarettes are further examples of law as intermediary's forcing effect. These warnings are not content that the advertising creators would want to include if they were not required. In fact, the warnings essentially tell advertising receivers that the government thinks the products being advertised are in many ways dangerous or "bad" for them. Content producers are thus forced by law to include—before their content can be distributed—messages contrary to those they would likely desire to include.

Further examples of content subject to law as intermediary's forcing effect exist as well, though not all are as coercive or contrary to the content creator's purposes as the cigarette and film labeling requirements noted above. Note that the forced content would still not likely have been included by the content producer absent law's requirements. These further examples include the requirement under the U.K. distance-sellers law that websites that sell products specifically list the rights of consumers under the law, including the unconditional right to return products.⁴⁴ Food content and geographic origin labeling requirements in the E.U. are yet another example.⁴⁵ Again, some content producers may not want to list the content of food, or indicate that the content was produced in a particular country, while others may be less opposed to such labeling. In any event, law as intermediary requires it, and in so doing changes the content.

But the forcing effect goes beyond labeling relating to sales and commerce. Political advertising rules in the U.S. require that sponsors of political advertising disclose the source of the advertisement in question.⁴⁶ This may have a more direct effect on the meaning of the message than the cigarette-related requirements above, the latter many times leaning more to the effectiveness of the content for purposes of selling goods than to whether the original content is believed or not. When it comes to political advertising, many receivers will exercise an immediate source bias as to political advertising, and based on the advertisement's source will believe or disbelieve not based on the message, but instead based on the source. This is undoubtedly a forcing effect that follows from law as intermediary.

Law's effect here is hardly different, however, from that noted above for non-law intermediaries. For example, the film rating achieved by a particular movie is something that many producers and distributors pay attention to.

44. The Consumer Protection (Distance Selling) Regulations, 2000, S.I. 2334 (U.K.), available at <http://www.opsi.gov.uk/si/si2000/20002334.htm>.

45. See, e.g., 21 C.F.R. 101 (2005).

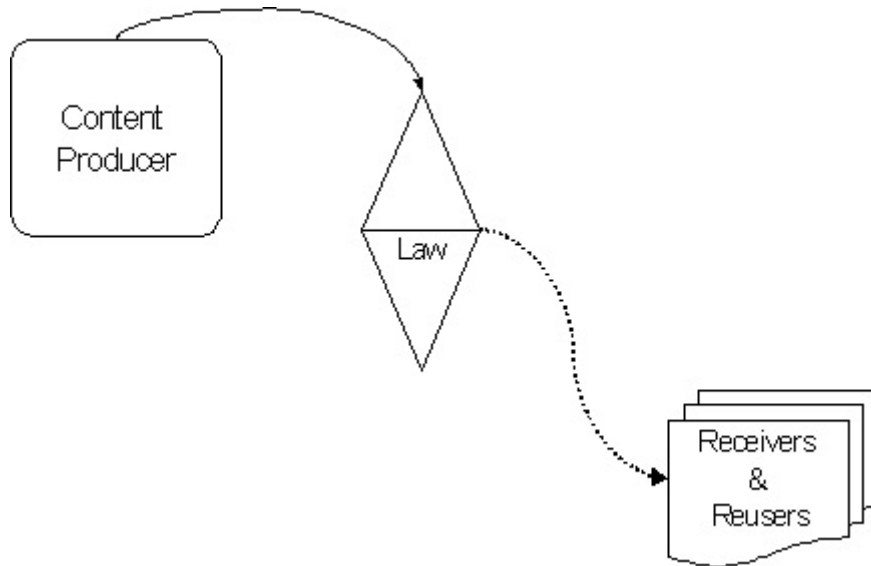
46. See 2 U.S.C. §§ 431-442 (2000 & Supp. II 2002).

They want to be able to advertise a certain film to a certain audience, and having the label attached to the film—and being required to make sure the film fits within the guidelines for a particular rating—is an important part of the content of the communication to consumers of the availability of the film. Attaching the film rating to the advertising changes the content, if only by addition of the rating to advertising and publicity about the film. This changes receivers' perceptions of that content. That filmmakers may also change the content of the film in order to achieve a particular rating is not directly required by the forcing effect, but may be a side-effect.⁴⁷ In forcing a change in content between creation and reception, the content is subject to the intermediary forcing effect.

Film labeling, cigarette advertising and packaging labeling, food labeling, and political advertising all show us the forcing effect of law as intermediary. Content is produced, but when law steps between the content and its receivers—or even between an intermediary and the receivers—the content changes.

47. In this way, we can see that intermediary effects are not exclusive; in order to successfully market a film in the United States, filmmakers must obtain a rating, and they must include that rating when advertising and publicizing the film. This is the intermediary forcing effect of the ratings system in the United States. Ratings may also, however, stop a particular filmmaker from expressing in the way he or she desires; violent content or indecent language may be added to avoid a "G" rating, which is seen as a death knell for non-animated movies. In contrast, sexual or explicit violence may be cut to avoid an "over 18 only" rating. This is, in effect, a stopping effect, as it relates to the ability to get particular content to receivers, where that content is stopped from reaching the receiver because of the actions of the intermediary.

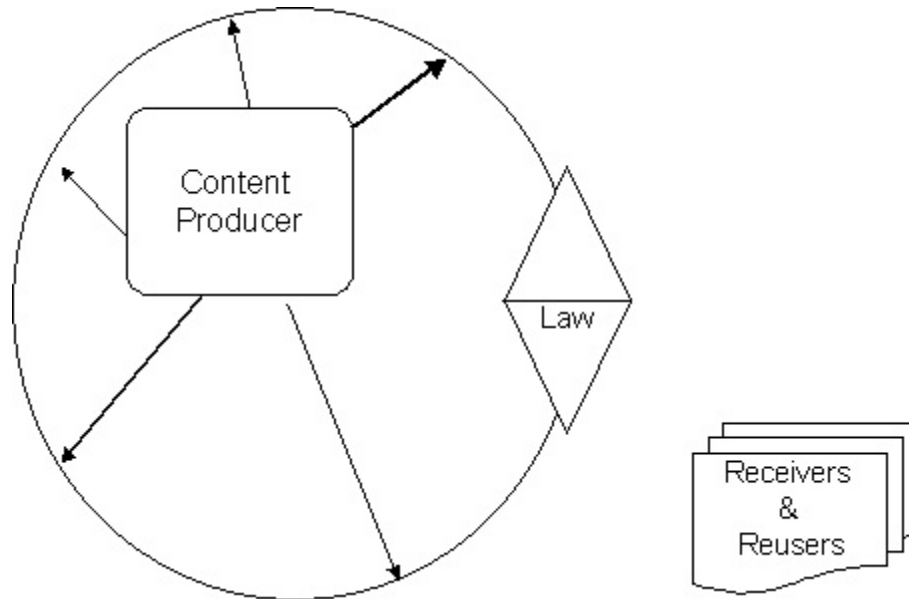
FIGURE 4: LAW AS INTERMEDIARY'S FORCING EFFECT, ALTERING IN SOME WAY THE ULTIMATE PRESENTATION OR MEANING OF THE CONTENT.



This change is illustrated in Figure 4, which shows that the content itself is changed when law has this intermediary effect. The content is somehow different, either in form or in substance, than it was before law's intervention. There is little to suggest that the effect that law has here is unique to law, or substantially different from that of non-law intermediaries, but it is another example of law as intermediary.

The silencing effect is another of law's intermediary effects. This effect is exemplified by the story of one who wishes to speak about a certain set of facts or events but is precluded from doing so by a gag order issued by the court, as noted above in relation to the story about the Royal Family scandal. The silencing effect differs from the stopping effect in that the latter is essentially a determination that "you cannot say this thing in this way." Other ways of communicating the same idea are allowed, so long as they do not run afoul of the rule. In contrast, the silencing effect allows no content to be communicated to receivers regarding a particular thing. In other words, law's intermediary silencing effect says, "You cannot say anything at all about this thing."

FIGURE 5: LAW AS INTERMEDIARY'S SILENCING EFFECT.



The difference between the two types of effects is shown in Figure 5, which, unlike Figure 3's illustration of the stopping effect, indicates that law as intermediary acts to stop the content, regardless of the manner in which it is expressed. In Figure 3, there was room to go around law's constraint by re-articulating the content to law's satisfaction. That space does not exist where the silencing effect is in play, and the content is precluded by law from reaching receivers.⁴⁸

In addition to gag orders, rules about trade secrets and privacy may also be implicated in law's silencing effect. To the extent that privacy rules forbid the communication of information to receivers, they have this effect. The silencing effect, then, is one in which law as intermediary places a barrier between content creator and receiver or wholly encapsulates the content, such that the content cannot reach the receiver.

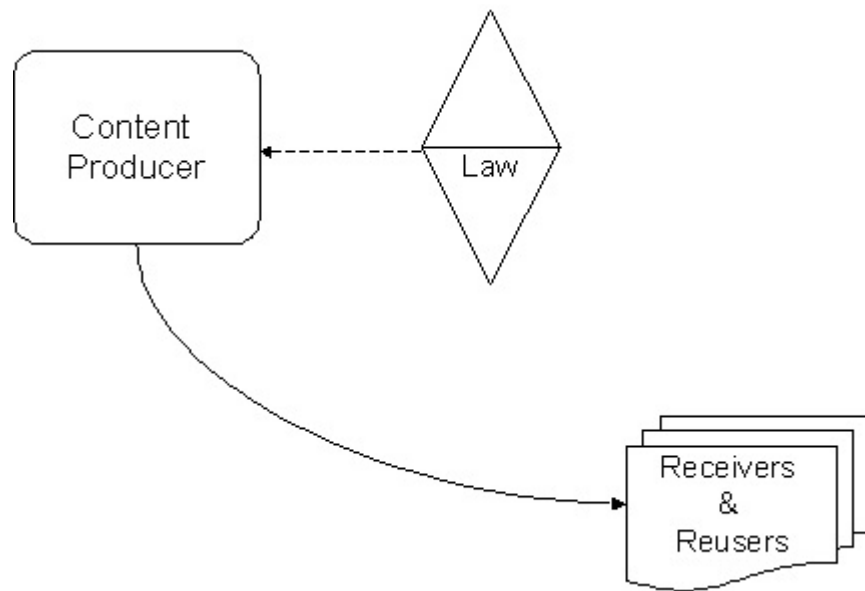
We have one final effect that law as intermediary can have on content to consider before moving on to think about the importance of our observations, and the future of law as intermediary: the anti-silencing effect. As to anti-

48. This conclusion does not require that law be perfectly effective in its aims. We are concerned here with the effects law has when it acts as an intermediary, and, as no intermediaries are likely to be able to perfectly enforce their desires on content, we should not hold law as intermediary to a higher standard.

silencing, Mike Batt's "silence" example used above may be an anomaly, but it makes the point nicely that law acts in myriad ways when mediating content. It gives us an example of a time when law prohibits someone from being silent, or, more specifically in this example, using silence as content. But Judith Miller's compelled speech example also illustrates that law as intermediary's effect here is not limited to trite disputes over the dramatic or musical value of silence, but extends to real-world situations involving the role of journalists and sources in the judicial fact-finding role.

That practical effect of the anti-silencing effect is just as pronounced in the United Kingdom.⁴⁹ In the United States, where the right against self-incrimination is quite strong, where no incrimination would result from testimony given in an official proceeding, there is no right to stay silent.⁵⁰ The law, as intermediary, forces content from the producers in the same way that record producers may force a music artist to write and record new songs. Law, as shown in Figure 6, again acts as an intermediary in ways similar to those that non-law intermediaries do.

FIGURE 6: LAW AS INTERMEDIARY SHOWING THE ANTI-SILENCING EFFECT.



49. See, e.g., Health and Safety at Work etc. Act, 1974, c. 37 § 20 (Eng.) (providing authority to compel witness statements).

50. See, e.g., 28 U.S.C. § 1826 (2000) (allowing for a finding of contempt and confinement where witnesses refuse to testify).

III. SOME PRELIMINARY THOUGHTS ON LAW AS INTERMEDIARY

Hopefully the discussion above has made a forceful case for the descriptive claim made at the start of this Article: Law is an intermediary, as much so—if not more, as we shall see—as other, more traditional intermediaries. It has many of the same effects as these intermediaries, and, while it may not have volition, this is common of many intermediaries, such as libraries, which gain volition only from the actors that inhabit them. This minor objection overcome, we can now consider the effects of law as intermediary. In other words, why does it matter that law is an intermediary? What effects, especially real-world effects, result from this understanding of law? Is this different from free-speech analysis, or is it just another way of looking at the same issues and reaching the same conclusions, but using different words?

The answer, in short, is that thinking about law as an intermediary helps us to consider not whether law has the authority to undertake a particular regulation or scheme, which is most often the focus of analysis under the various provisions relating to freedom of expression, but what the effects of law's deciding to do so have on the content that reaches the eyes and ears of information goods-receivers. It helps us to see that, while we think about intermediaries, and the role that they play and may play in the future—especially given technological changes that are potentially altering the intermediary playing field—we should also be thinking about how law will affect content in the future, and how it will respond to challenges put to it in its intermediary role. We will see next that our understanding of law as intermediary allows us to consider law as a Super Intermediary.

IV. LAW AS A SUPER INTERMEDIARY

We noted above that intermediaries affect content in a variety of ways, hedging our bets, though, on the effectiveness of any one intermediary in fully determining whether content reaches receivers in a particular form. This is because, despite the variety of effects that intermediaries can have on content, content producers often have the choice of whether to deal with a particular intermediary. If one radio or television station will not show a particular program, the producer can offer it to others. If one newspaper will not report a particular story, perhaps another will, or perhaps the story's proponent can bypass the traditional media altogether and tell her story via a site on the World Wide Web.⁵¹

51. This last example is the story of disintermediation: Rather than relying on large, well-known media outlets that can then exercise their gatekeeping power, storytellers and

Law, however, is not so readily bypassed. Because law is the only game in town when it comes to its provisions, where law has a particular effect, there are only two things a content producer can do to “get around” it: bypass the law, and in so doing, violate it and risk punishment, or change the content so as to avoid law’s effect, if possible.⁵² This latter effect can be seen, for example, in a case involving copyright where the content producer re-drafts portions which offend the law by reproducing existing, copyrighted expression. The new content no longer runs head first into the law’s stopping effect because it has changed to meet law’s requirements.

This is different from an end run that allows the content to be distributed and received but does so despite law’s prohibition; such an end run is illegal.⁵³ An end run allows for the avoidance of law’s intermediary effect not by finding a new intermediary, or changing the content to meet law’s requirement, but rather by ignoring the intermediary—a tack that is decidedly against the rules when it comes to law as intermediary. But wait; law makes the rules. And that is exactly the point. Law as intermediary both has intermediary effects *and* makes it illegal to “improperly”—as defined by law—avoid those effects. Law is a Super Intermediary, one that can only be legally avoided on its own terms. Other intermediaries may be avoided without violating the law, but not the law as intermediary itself. There, only by meeting law’s terms can its intermediary effects be avoided.

So what powers does law as Super Intermediary have? The power to control content as an intermediary that is not simply backed up by law, but *is* law. The power to stop content, to force it, silence it, or stop content producers from being silent is well-established in law, though it may be limited. We know that this is the case; it is well-proven in free speech cases and scholarship.⁵⁴ But when we step aside from considering law’s potential infringement on expression, and instead look at the effects of law on information content production where law’s provisions are legitimate,⁵⁵ we see

receivers can connect directly via the Internet. This descriptive account, however, does not tell us how the two will find each other. It is this wrinkle that likely introduces new, but different, intermediaries such as Internet search engines. Intermediaries are not gone in this story, but they are changed.

52. This avoids the sticky question of seeking to change the law, which is another possible path for a content producer to take.

53. Offering that same content from outside a particular jurisdiction, even if it finds its way back into that jurisdiction, raises separate issues—issues that test law as intermediary’s effectiveness, but do not undo its role as intermediary.

54. See, e.g., Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438 (1983); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L.L. REV. 1 (1998).

55. As measured by human rights and constitutional norms.

law's power as intermediary is in the fact that it is the law. And where law acts as an intermediary, in the examples and cases described above, it acts as a Super Intermediary. This Super Intermediary position gives law, as we have seen, certain strengths, but law as intermediary also suffers from certain weaknesses. These become clearer and more relevant as we move on in our discussion to considering law's future as intermediary, returning to the theme of this Symposium.

V. THE FUTURE OF LAW AS AN INTERMEDIARY: DISINTERMEDIATION, THE CHALLENGE OF RELEVANCE, AND THE RELEVANCE OF CHALLENGE

Disintermediation is a topic of scholarship in relation to content, its production and distribution,⁵⁶ and this Symposium was—to a degree—focused on its effects in terms of information distribution and reception.⁵⁷ Does disintermediation pose any real challenges to law as intermediary's future? Can law as intermediary be disintermediated? There are two perspectives that may help us to consider this question to its conclusion: the challenge of relevance and the relevance of challenge.

Taking up first the challenge of relevance, we look to how this challenge influences law's role as intermediary. Norms have always played an important role in obedience to the law. In fact, there is an argument that there is little else to law's command than the threat of sanction and norms of obedience. Where norms are not in place, obedience hinges on the threat of sanction. Where technology allows people to believe that law cannot catch them, where people are not held back by norms of obedience, only enforcement remains. When technology provides individuals with the perception that enforcement is lacking, unlikely, or even impossible, law becomes arguably irrelevant. Where law serves as an intermediary, its irrelevance removes it from its intermediary role. But things are not so simple with a Super Intermediary.

Let us consider our traditional intermediaries again. If a library or a search engine becomes ineffective, no longer providing access to content that receivers want, it can simply be set aside by content producers and receivers alike. A new intermediary might step in with a better or more efficient method of mediating content, or receivers and producers might actually be able to connect directly without mediation of content through an intermediary.

56. See, e.g., Robert Gellman, *Disintermediation and the Internet*, 13 *GOV'T INFO. Q.* 1 (1996).

57. See generally Symposium, *W(h)ither the Middleman: The Role and Future of Intermediaries in the Internet Age*, 2006 *MICH. ST. L. REV.* 1 (2006).

But in any event, the original intermediary that fails to adapt is likely to have less relevance to information production and distribution.

Unlike libraries or search engines, though, there is no alternative intermediary when it comes to law. Law either acts as intermediary, or it does not. The effect which results from law becoming irrelevant, and thus ineffective, is more complex. Law cannot simply be ignored. Where law is no longer effective or relevant at mediating content, it stays in place until actively removed by an authority with power to remove or declare it no longer applicable. This is a function of law as Super Intermediary; even when functioning as an intermediary, law is still law, and whether we view that in a realist, critical, or in some other way, it stays until removed. Thus, whereas content production, distribution, and reception can obviate directly the need for non-law intermediaries, they must go through a political or legal process to obviate law as intermediary. Even where no longer relevant, law remains in place, mediating content. The one way in which law as intermediary may lose power due directly to relevance is the unlikely situation in which certain content mediated by law is no longer produced at all. Of course, in these circumstances, law would no longer be relevant. Should production and distribution start anew, however, so long as law has not changed, law would automatically assert its intermediary power, and would once again—by definition—be relevant to that content.

Thus, law is challenged by the notion of relevance, but reacts to it differently from the way in which non-law intermediaries react. Where non-law intermediaries may disappear entirely, law must actively decide to stop imposing itself, even in the absence of content to which its provisions apply. This is not likely to change in the future.

Within the context of disintermediation and the challenge of relevance, the relevance of challenge is also striking. Law is constantly challenged; by technology, by developing norms, by natural conditions, by architecture, by perception, and by a host of other ongoing and fluid elements that make up the world's societies. Yet, law continues. In considering the challenge of relevance, we acknowledge that the development of distributed and interconnected computing, especially through the Internet and the World Wide Web, threatens law's intermediary role for many of the same reasons that it is said to threaten the role of other intermediaries, but with different effect.

In what way are the challenges of today viewed—at least in the public consciousness—as primarily driven by technological change, differentiated by these challenges of the past? In other words, are today's challenges perhaps no more relevant to law, in either its sovereign role or its intermediary role, from those of the past?

To answer this question thoroughly would require more space than this Article allows, and would, in fact, be a different article entirely. Law will adjust to new technological necessities, though it will not always do so with the speed and agility that some would desire. When it does adjust, though technology will have changed, it will continue to act as intermediary to content produced and sought to be distributed. What receivers receive will be affected by law's provisions, either due to the additional content that law's stamp requires—labels on cigarette advertising—or as changed content, altered as content producers work to fit their content through law's gate. Law will also force content into existence; a time when law does not require compulsory speech at official proceedings seems unlikely. The challenges raised to law as intermediary are not entirely different from those raised in the past; how law adjusts, and the speed at which it does so, shows that these technological challenges are no less relevant than past challenges arising from changing norms and societal understandings. Law as intermediary is relevant to technological change; technological change is relevant to law as intermediary.

CONCLUSION

At its foundation, this Article makes two positive claims: first, that law is an intermediary and, second, that law is likely to continue to play its intermediary role for some time into the future. The first point helps us to view law in a new light, one that shows the importance of the effect of law on content distribution and reception beyond the more basic question of whether law's information content-based restrictions are acceptable, given constitutional and human rights constraints. The second point—building on the first—allows us to think not just about where law as intermediary may go in the future, but to consider more deeply the effects of that regulation on how speech is eventually perceived by its receivers. We can see through this lens that law has some of the same effects on content as other intermediaries, and that these go beyond the “allowed” or “not allowed” labels.

Law influences content, both as to its substance and as to its perception. Certain content may need to be articulated in different terms to pass through law's gate. Other content may simply be stopped altogether and never reach its intended receivers. Further content may have something added, something the original creator or producer did not intend to have added, but that is added nonetheless. And some potential content producers may be forced to create content where they did not wish to do so, bringing into existence content that otherwise would have gone uncreated and undistributed.

Exactly how law will continue to play out its role as intermediary remains to be seen, but it likely will continue to play some role in that regard.

The role may shift, especially as to the silencing effect, but the extent of this shift remains to be seen. Law's effect as intermediary is strengthened by its role as rulemaker, to which its intermediary role is really simply an adjunct function. The two roles can be considered separately, but not without the acknowledgment that they are truly intertwined. In that regard, there is more work to be done in applying communicative and even banking theory to the notion of law as intermediary. What additional light theories from these areas can shed on the nature of law and its effect on our understanding of society's use of cultural and information content will be left to the future.