

## *Knowing How to Know: Secondary Liability for Speech*

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Under the rules of evidence, we generally treat hearsay as unreliable when offered for the truth of the fact it asserts. Unless an exception applies that makes the assertion tend to be more reliable, we generally do not allow a witness to say, "Bob told me that the light was red" to prove that the light was, indeed, red. The theory underlying this restriction is that because Bob is not before us in the courtroom, we do not have the opportunity to test Bob's recollection of the events in question and therefore cannot conclude that the witness, in fact, "knows" that the light was red. But in questions of secondary liability for speech, we often condition that liability on hearsay-like evidence. In defamation law, for example, a distributor can be liable for defamatory material in publications he distributes if he "knows" or "has reason to know" that the publication is defamatory. In copyright law, a party can become secondarily liable for infringement if he materially contributes to the infringement and has "knowledge" of the specific infringing acts. And given that an intermediary isn't typically required to engage in policing activity to detect such violations of the law *ex ante*, it seems necessary that to "know" of such activity, he must be told of it by a third party *ex post* - most likely, the putative plaintiff, who may not be a reliable source of information as to whether the speech in question is truly unlawful. Hence, a witness may not claim to "know" that the light is red because Bob told her so, but she may be deemed to "know" that the material she is distributing is unlawful based on Bob's report. But what does it mean to "know" that a particular instance of third-party speech is defamatory or infringing - in other words, to know a speech act's legal status? Given that speech's status as unlawful or lawful is not a state of nature but can be declared only pursuant to a court's judgment, can an intermediary ever be said to "know" that speech that it is hosting or distributing is infringing? Or does "knowledge" mean something different in this context, perhaps a prediction about the likelihood of successful litigation? This paper attempts to rethink theories of secondary liability for speech by unpacking what it means to "know" that speech is unlawful. What, for example, can we gain from an epistemological approach to this kind of knowledge - of what it means to "know" in the first place? How might thinking on the distinction between questions of fact and questions of law inform this inquiry? And do hearsay rules - which arguably are at root about reliability and the search for truth - provide any parallel?

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