

RESPONSE

Aiming at copyright infringers and hitting the digital economy

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The underlying architecture of the Internet has made copyright enforcement difficult. It has supported the creation of open and peer-to-peer (P2P) networks for file sharing that move away from conventional broadcasting networks that create intermediaries, such as radio stations, with powerful editorial roles. This has threatened contemporary business models, and led to technical and legal initiatives aimed at protecting copyright and intellectual property rights generally.

These initiatives have included promotion of Digital Rights Management (DRM) technology, and the passage of legislation, such as the US Digital Millennium Copyright Act of 1998, which sought to criminalize the circumvention of copyright protection. At the same time, the Act limited the liability of Internet service providers (ISPs) for copyright infringement by their users. In 2009, a ‘Three Strikes’ policy in France, and the Digital Economy Bill in Britain, took these legislative efforts further by putting ISPs into a critical intermediary role in policing copyright infringement. Will these policies achieve their objectives of copyright protection? Will these initiatives have unintended consequences for the vitality of the Internet itself – the network of networks of an emerging digital economy?

The Three Strikes policy (Graduated Response Law, or Hadopi Bill) was adopted in 2009 by the French legislature. The aim was to enforce copyright by disconnecting Internet users found guilty of unlawful peer-to-peer file sharing of copyright material. Even users who did not themselves infringe copyright, but whose insecure Internet connections enabled others to use their computers unlawfully to share copyright material, could be disconnected. Libraries, universities, coffee shops and Internet cafes and households were at jeopardy. The measure has been contested primarily on the grounds of due process, as early versions of the legislation did not involve the courts. Later versions have introduced streamlined judicial proceedings to overcome objections.

Similarly, the Digital Economy Bill was introduced in Britain in 2009 and adopted in 2010. It included measures that would put ISPs into the role of monitoring users in order to identify those engaged in unlawful file sharing and to create the mechanisms to notify offenders, but also to ‘implement technical measures against serious repeat infringers’, potentially disconnecting these users from the Internet (Ofcom, 2010a). Opponents argued that the Bill was an attempt to protect existing creative industries, particularly the music and film industries, whose old business models were no longer

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viable in a network economy. Proponents argued that opposition to this initiative was tantamount to support for the theft of intellectual property – online piracy.

The motive of proponents of the Digital Economy Bill and similar initiatives to shore up copyright in the online world is understandable, but the logic of the mechanism is arguable. Proponents want to protect the cultural industries within their own borders that depend on the sale of creative content. Digital content creation is viewed as a major new industry in a networked world. However, there are a number of ways in which this protectionist effort can pose serious risks to the future of the Internet.

First, it is very likely that these initiatives will not achieve their intended objectives, and possibly not even be in the interest of the creative industries, such as the music labels. Birgitte Andersen has challenged the basic logic of the UK Digital Economy Bill, arguing that access to music online plays an important role in marketing and stimulating the sale of music and building the audiences of artists. Matthew David (2010) has also made a strong case that past efforts to criminalize file sharing have not worked and that they can deflect attention from more valuable efforts to identify and pursue new business models that are more fitting for the network age, a point developed by Andersen as well.

Secondly, and most significantly, the measure could have unintended negative consequences for the vitality of the Internet – the network of technologies, practices and people that are key to the digital economy. The Internet is not built on a house of cards, but it is nested in an ecology of policies and practices that make it difficult for legislators to change one key element and not have repercussions throughout the larger ecology (Dutton *et al.*, 2010).

Specifically, the strategy of copyright defenders could have indirect consequences on freedom of expression and access to the Internet. This stems from the copyright protection measures putting the communication regulator in the position of creating mechanisms to identify those who are violating restrictions on unlawful file sharing. Governments are moving from a position of not regulating Internet content, to assuming responsibilities for Internet content regulation. They are passing these responsibilities on to regulators, who pass these responsibilities on to the ISPs, who then are able to bring violators to the attention of the regulatory authority. By putting ISPs into the role of monitoring users and disconnecting repeated offenders, the initiatives change the role of the ISP – moving it towards a more traditional communication intermediary, such as a broadcaster, rather than the provider of an end-to-end network.

Several governments have been regulating Internet content via ISPs. China has used this approach, for example, to monitor chat rooms and forums. However, once ISPs are put in the position of monitoring and potentially regulating Internet content, by either blocking content or disconnecting users, they become editors, and therefore open to many of the same legal instruments as other edited media, such as the press. This can subject ISPs to even greater risks, such as being held responsible for defamation. In such ways, as governments push ISPs into a new role as intermediaries, they are on a slippery slope that could have a chilling effect on both ISPs and Internet users.

This could have implications for the digital economy as a whole that are more significant than any particular economic gains made by the music or other creative industries. The digital economy in Britain and other nations is not simply an economy of production, but also an economy that benefits from use of the Internet (Boston Consulting Group, 2010). For example, prior to the widespread diffusion of the Internet, the liberalization of telecommunications was fostered by the realization that use of telecommunications was more important to the economic development of nations

than the industry and government revenues that would be lost by the regulated telecommunications companies (Baer, 1996). Competition lowered costs to residential and business users, and thereby increased the use of telecommunications in ways that spurred economic development across the economy as a whole.

This same dynamic is central to the networked, digital economy fostered by the Internet. As Andersen puts it, the Digital Economy Bill could 'disconnect' Britain's network economy. Already, Internet diffusion has reached a virtual plateau in Britain, with 71% of Britons online, leaving more than a quarter off the Internet (Ofcom, 2010b). The UK government realizes the significance of access to the Internet in supporting efforts to erase the digital divide, increase participation and enhance digital media literacy. In 2009, 74% of Internet users in Britain believed they had saved money buying something online, and 17% said they had found a job through the Internet (Dutton *et al.*, 2009). Commerce is a major activity of Internet users in Britain, with over three-quarters saying that it is easier to order products online, that they have a wider choice of goods, and that prices are lower online (Dutton *et al.*, 2009). These illustrate some of the potential economic benefits of Internet use.

Finally, there is a rights argument that governments need to consider in their responses to the Internet (Dutton *et al.*, 2010). As the Internet becomes increasingly central to everyday life and work, enduring controversies over human rights and responsibilities, from freedom of expression to privacy, are being moved into the online world. This is illustrated by the rise of the Pirate Party, which stemmed from concerns over Internet regulation.

The first Pirate Party was the Swedish Piratpartiet, founded in 2006. Inspired by this Swedish initiative, other Pirate Parties have sprung up in at least 33 countries. During the European Parliamentary elections of 2009, the Swedish Pirate Party received 7.13% of the vote, and in the same year, the German Pirate Party received 2.0% of the vote in the federal election. These national parties cooperate through Privacy Party International. According to the UK Pirate Party's web site (2010), their main interests are: (1) ending excessive online surveillance, profiling, tracking and monitoring on individuals performed by government and big businesses; (2) ensuring that all members of society have real freedom of speech and real freedom to enjoy and participate in humanity's shared culture; and (3) reforming copyright and patent laws to legalize non-commercial file sharing and reduce excessive copyright protection, and to prevent the use of patents to stifle innovation or manipulate prices.

However, rights arguments have not been left only to emerging issue-based parties. In South America, the Argentine Congress has resisted the introduction of new legislation that would have strengthened penalties for criminal violations of intellectual property rights (Aguerre and Mastrini, 2009). In 2009, the Brazilian government presented a draft for a new Copyright Bill that would legalize music mash-ups as well as the copying of copyrighted material for private use. A Free and Open Source Software Policy (FOSS) was initiated by the South African government in order to lower barriers for adopting ICTs and improve access to knowledge (Schonwetter *et al.*, 2009).

Given the increasing centrality of the Internet, and the range of actors with economic and social stakes in the regulation of intellectual property, both within Britain and across the world, policy is unlikely to be settled by the UK's Digital Economy Bill. It is more likely that this legislation, along with similar initiatives in other nations, and the counter-measures they stimulate, signals the beginning of a new stage in the politics of intellectual property policy that will grow in coming years.

Moreover, this debate is but one aspect of a larger debate over Internet governance and regulation, namely, the appropriate regulatory models to apply to the Internet.

Traditional regulatory models for broadcasting, for common carriers, such as the post and telecommunications, and for the press cannot be imposed on the Internet without serious risks to its vitality. This regulatory debate emerged in the 1980s with the trials of videotext (de Sola Pool, 1983). The debate subsided with the failure of videotext and the fledgling status of the Internet, still considered an upstart innovation. It is increasingly clear that the Internet is becoming a key technological and social underpinning of everyday life and work, creating a need to re-start debate. Just what sort of regulatory model will maintain and enhance the vitality of this network of networks without risk to the digital economy and freedom of expression in a network society?

As this article goes to press, a judicial review of the Digital Economy Act has been granted, creating the potential for the implementation of this act to be delayed, or for the bill to be sent back to the Government for reconsideration. However, the Government has continued to press ahead with implementation.

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