

The Burden of Online Misdeeds: Who Should Be Responsible?

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On Jan. 18, the Internet had its first general strike. Dozens of websites shut down in protest of two bills making their way through Congress – the Stop Online Piracy Act and PROTECT IP Act. The bills’ supporters argued that they provided essential tools to force intellectual property infringement off the Internet, but opponents feared that those same tools could be used to quash speech and suppress innovation. Millions of people signed petitions or contacted their representatives to comment.

Following the protest, several sponsors withdrew their support, and both bills were pulled from the legislative agenda. However, while both bills have receded from consideration for now, the structural problems of our intellectual property regime that prompted their introduction remain in place. Congress will undoubtedly see similar bills again.

Digital technology enables a profusion of novel works and technologies because it allows people to create and distribute things all by themselves. What were endeavors demanding the work of dozens can now be done by a single person sitting on a couch. This creates tremendous value for society. Those now-dead structural impediments to innovation, however, were also structural impediments to infringement. Every day online, people carry out millions of acts that could, potentially, constitute an infringement of someone’s intellectual property. Reviewing and evaluating that torrent of possibly infringing material would be a titanic undertaking – quite likely an impossible one – and not a project that anyone is enthusiastic to take on.

This is, at root, the problem that the two copyright enforcement bills and their predecessors sought to address: Where should the legal and logistical burden of preventing infringement fall? Historically, the allocation of that burden has been a struggle between the distributors of online content, the intermediaries – Internet service providers, search engines, etc. – that enable that

distribution, and the content owners whose rights could be infringed by it.

The law is consistent in assigning responsibility for online content to the one that makes it available, but this is a responsibility that online creators and distributors are often ill-equipped to assume. Intellectual property law is widely misunderstood, and laymen trying in good faith to comply with the law often get things very wrong. For example, one “folk copyright” notion in recent circulation is the idea that posting copyrighted content online is permissible as long as the poster disclaims ownership of the posted matter. This is, needless to say, not the law. Extending the power to publish to people without ample resources means extending it to people without access to good legal advice.

Also, the above assumes good faith on the poster’s part, which is not universally the case. Deliberate piracy is easy to undertake, and difficult to suppress. A lawsuit is expensive even when the defendant is identifiable and wrongdoing clear, and in the real world matters are rarely that simple. Online material may be hosted anywhere in the world, and it is often difficult to determine who is responsible for a given piece.

As a result, an ongoing theme in Internet regulation is the effort to impose responsibility for wrongdoing on online intermediaries. Multiple rounds of this argument have given rise to several interlocking structures for allocating the burden of online misdeeds.

Section 230 of the Communications Decency Act, which covers matters other than intellectual property, offers broad immunity to online intermediaries for acts committed by third-parties. Intermediaries’ responsibilities regarding intellectual property, meanwhile, are governed by the Anticybersquatting Consumer Protection Act, which insulates domain name registrars from most liability for third-party trademark infringement, and the Digital Millennium

Copyright Act, which establishes a “safe harbor” regime immunizing intermediaries from liability if they remove allegedly infringing content when they receive a properly framed complaint. Most intermediaries follow takedown requests when received. The DMCA regime has its problems – most notably, there are few consequences for submitting an unjustified takedown request, which makes it a powerful tool for silencing online speech – but it generally balances content owners’ interests with the burdens on intermediaries and on uploaders of challenged material.

Policymakers have long hoped that problematic activity online could be handled with some sort of technical solution. When Congress enacted the Communications Decency Act in 1996, one of its explicit purposes was to “remove disincentives for the development ... of blocking and filtering technologies.” Developments in this realm, however, have disappointed. Again, intellectual property is complicated; where human beings are hard pressed to make the right calls, software is unlikely to do much better. Tools like YouTube’s ContentID, which identifies uploaded videos that appear to be similar to protected material, have made some progress, but are subject to errors and abuse. As with the DMCA takedown regime, there is often minimal downside to submitting unsubstantiated copyright claims and suppressing online activity permitted by law.

Unfortunately, while existing regimes have granted content owners powers that are sometimes excessive, they have not granted powers adequate to the problems they addressed. Most significantly, dedicated copiers can easily use servers outside U.S. jurisdiction; DMCA takedown requests can make illicit material harder to find, but not suppress it entirely. Thus, proposed copyright enforcement bills sought to push responsibility onto new categories of intermediaries, such as payment processors, advertising services and domain name registries, allowing content owners to make it more difficult to reach challenged content or to profit from challenged content.

Interestingly, the bills also gave the U.S. attorney general substantial powers to obstruct the operations of allegedly infringing sites. Prior to the bills, the government was at most a minor player in the allocation of responsibility for online misdeeds.

Bringing in the government as a major player potentially leverages the government’s resources to reduce the burdens on the private entities involved, but there are obvious free speech concerns that arise from any grant to a government agency of broad powers to obstruct communications.

Thus, while there is some reason to believe that the Stop Online Piracy and PROTECT IP Acts might have been at least moderately effective – targeting payment processors has been a highly effective tactic when aimed at, for example, Wikileaks – the potential for abuses of the proposed systems brought together a massive coalition of opponents.

Content owners will continue to advocate for more entities to bear responsibility for stopping infringing activity, quite probably through mechanisms similar to those in the copyright enforcement bills. As long as those powers are so easily abused, however, there will continue to be vigorous opposition to that extension. Any proposed expansion of the tools available for content owners to draft third-parties into their efforts to defend their property should be balanced by stronger sanctions against the misuse of those tools. Putting real teeth behind the counternotice provisions of the DMCA and similar future laws could help give content owners tools to prevent genuine harm to their interests without granting them the ability to trivially harass.

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