"Three Strikes and You're ___?": Two Thoughts from State of the Net

by Andrew McDiarmid [1]
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The plenary panel at this week's State of the Net conference was a debate on if and when it is appropriate to cut off Internet access to repeated copyright infringers. Provocatively titled "Copyright Strikes: When Has a Pirate Graduated to Exile?," the panel was designed to raise hackles on each side of the debate. On one hand many object to the use of "pirate" to describe copyright infringers; on the other hand, proponents of graduated response policies insist that they do not amount to "exile" from the Internet. John Morris represented CDT on the panel, articulating the serious concerns about proportionality and due process [2] that expedited suspensions raise. You can watch the entire discussion on CDT's ustream channel [3].

I want to briefly raise two points the panel brought to mind. First, proponents of graduated response repeatedly insisted that account suspension would merely be an inconvenience, that people would be free to open other accounts. One panelist even seemed to equate suspension of Internet access to suspension of an e-mail account. This is a crucial distinction to maintain. Contrary to switching e-mail providers (which itself is not without hassles—updating contacts, maintaining old messages, etc.), in practice it is not always easy to switch access providers. In many places in the United States for example, people only have one choice of broadband provider, so any suspension would amount to a total disconnection. Even places with more competition often only have two or three providers, and it's easy to imagine someone running afoul of them all, which would be devastating. ISPs and policymakers must consider that there are serious and disproportionate consequences to suspending Internet access. These would only be made worse if disconnection was brought on by mistaken accusations [4].

Second, the debate at times pitted the entire system of graduated notices and suspension against the possibility of lawsuits for infringement, ignoring a potential third option. 'Instant lawsuit' and graduated responses leading to potential disconnection are not the only options. The problems CDT sees in the various proposed graduated response systems around the world don't stem from notice-forwarding, which we've supported [5], but from the possibility of some number of untried accusations leading to shutoff. The problem is the endpoint, not necessarily the series of notices leading up to it.

In addition, we have argued that a lawsuit between the copyright holder and infringer may be appropriate in some circumstances [5]. One can imagine a graduated response system where the ultimate deterrent is a lawsuit instead of suspension, and it's possible such a system would allay some of our concerns. Such a system would still allow those receiving notices the opportunity to appeal them or to change their behavior. And the ultimate punishment, while still a strong deterrent (one attendee even suggested that he would rather be suspended than sued), would bear greater relation to the offense.

The shape this debate will take in the US is still unknown, but policymakers and others negotiating these policies would do well to consider that there are less inflammatory options that would not raise the specter of "Internet exile."

- state of the net
- three strikes
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- International
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