Copyright “Enforcement” Policies Could Have Broad Impact

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1. CDT weighs in on copyright enforcement debates

Recent debates in copyright policy have tended to focus, at least nominally, on strategies for enforcing existing copyright law, rather than on possible changes to copyright’s substantive rights and prohibitions. For instance, the only major copyright legislation passed in the last few years, the PRO-IP Act of 2008, created the Intellectual Property Enforcement Coordinator (IPEC) within the White House and charged the office with improving the coordination and efficiency of federal enforcement efforts. The controversial Anti-Counterfeiting Trade Agreement (ACTA) currently under negotiation aims to improve cross-border enforcement – although CDT and other advocates question the agreement’s success at avoiding substantive policy. And internationally, efforts to crack down on online copyright infringement have begun to focus on enlisting ISPs as enforcers through “three strikes” or “graduated response” polices.

As laid out in our 2005 paper, “Protecting Copyright and Internet Values: A Balanced Path Forward,” CDT generally supports the vigorous enforcement of existing copyright laws. There is no substitute for bringing enforcement cases against bad actors – both individuals who infringe copyright and companies that actively encourage infringement. At the same time, copyright enforcement must take account of its impact on lawful technologies and providers of multipurpose online services. Policies that expand the scope of secondary liability; expand the remedies and damages available to rightsholders (which can already be quite extreme); or impose new enforcement obligations on intermediaries could be detrimental to the development of innovative technologies and the free and open communication they can foster.
Copyright law already affords rightsholders a range of powerful enforcement tools. These tools include the following:

- Rightsholders can bring lawsuits against infringers. Criminal prosecutions are possible as well.
- Rightsholders can bring secondary liability lawsuits against companies that actively induce infringement.
- Rightsholders can recover from $750 to $150,000 in statutory damages per work infringed, without having to make any showing regarding actual damages suffered. This threat gives rightsholders considerable leverage in settlement or cease-and-desist discussions with actual or potential defendants.
- The “notice-and-takedown” provisions of the Digital Millennium Copyright Act (DMCA) enable rightsholders to demand the removal by online content hosts of any infringing material.
- The anticircumvention provisions of the DMCA give the force of law to any technological

protection measures that individual rightsholders choose to deploy.
- The 2005 Family Entertainment and Copyright Act created tough new penalties for using camcorders in movie theaters and for infringement involving pre-release works.
- The PRO-IP Act expanded certain remedies for infringement, including civil forfeiture of any property used to commit or facilitate copyright violations.

These tools need to be paired with the continued development of lawful options obtaining content online. There also may be a role for public education to reinforce the message that infringement is unlawful and unethical. Taken together, such steps should be able to make infringement relatively unattractive to most people. Some infringement will continue to occur, however, and should not be taken as a sign that enforcement tools are too weak. Policies aimed at the unrealistic goal of eradicating all infringement will be unsuccessful and ultimately harm free expression and online innovation – because the technologies that enable large scale infringement are the very same ones that are creating an exploding array of new opportunities for free expression, collaboration, civic discourse, and e-commerce.

The newly created IPEC recently invited public comments to inform the development of a federal Joint Strategic Plan for improving federal IP enforcement. In our comments, CDT argued for a narrow focus on improving federal coordination surrounding the enforcement of existing copyright laws. The comments first explain the potential risk to legitimate businesses from overzealous enforcement, arguing for a narrow focus on bad actors. Additionally, the comments lay out the threats to existing U.S. policy toward online intermediaries, as well as to free expression and privacy, from policies that would place ISPs in the new role of copyright enforcer.

CDT's Comments to the IPEC [1]
"Protecting Copyright and Internet Values: A Balanced Path Forward" [2]

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2. Copyright enforcement should focus on bad actors

Copyright enforcement in the information age can affect a wide range of entities and behaviors. The potential impact for innovating companies in the Internet and information technology sectors is particularly serious. Inevitably, new digital technologies make copies and/or enable users to do so. As a consequence, they often raise novel questions of copyright law that lead to business disputes and lawsuits.

Copyright enforcement policies therefore implicate legitimate innovative companies, not just bad actors. The copyright enforcement tools listed above are often brandished against upstart companies in business disputes. Strengthening such tools can significantly increase the leverage of copyright interests in negotiating and trying to obtain settlements, even where it is highly unclear that the law is on their side.

This risk is far from abstract or theoretical. In CDT's comments to the IPEC, we provided a long list of technologies that have been the subject of copyright challenges, from VCRs to mp3 players to inkjet print cartridges to YouTube. Our point was not that copyright disputes involving new technologies should always be resolved in favor of the technology providers and against the copyright holders. Reasonable people can disagree about the optimal legal outcomes from case to case. But it should be clear that mechanisms for enforcing copyright are often brought to bear against technologies that may well be lawful, resulting in substantial uncertainty and delay in the rollout of new or competitive products.

The key lesson is that efforts to improve copyright enforcement need to be careful to avoid tipping the scales in commercial disputes between legitimate businesses over unsettled copyright questions. The U.S. should reject steps that would have such an effect. Rather, efforts should focus squarely and exclusively on enforcing current law against bad actors and clear-cut cases.

In formulating the Joint Strategic Plan, the IPEC can maintain this focus in three ways. First, the Plan should concentrate on improving federal enforcement efforts – efforts that target true criminal behavior – rather than making controversial recommendations regarding civil enforcement. The Plan should particularly avoid recommendations that could affect the scope of civil liability. Second, each

proposed action or recommendation should be subject to rigorous cost-benefit analysis, so that significant costs are not imposed to achieve only short-term or illusory benefits. Third, if the Plan delves into legislative recommendations relating to civil copyright laws and private copyright litigation – which CDT strongly believes it should not do – it should include measures to protect legitimate companies from being subject to the same tough enforcement tools as true piracy rings. One example of such a measure would be reforming statutory damages as proposed by Representatives Boucher, Doolittle, and Lofgren in 2007.

3. Enforcement efforts should not call for a new network-policing role for Internet intermediaries.

It is critical to the continued growth and success of the Internet that copyright enforcement not undermine longstanding U.S. policy toward Internet intermediaries. In Section 230 of the Communications Act and the safe-harbor provisions of the DMCA, Congress expressly rejected the notion that ISPs should be held responsible for policing user behavior. This deliberate policy choice allows ISPs to focus on empowering communications by and among users without monitoring, supervising, or playing any other kind of "gatekeeping" role with respect to such communications. This policy has yielded significant benefits, creating an Internet environment that fosters a tremendous amount of innovation, speech, collaboration, civic engagement, and economic growth. Copyright enforcement policy should not take the myopic approach of endorsing a strategy that is inconsistent with this broader policy.

Requiring or encouraging ISPs to assume a new network-policing role would also conflict with U.S. foreign policy regarding Internet freedom. As Secretary of State Clinton explained in January, promoting Internet freedom in foreign countries is now a major U.S. foreign policy goal. The United States intends to urge other countries to allow the provision of Internet access as an open communications platform without centralized supervision or monitoring. It would be difficult if not impossible to square this policy, calling on companies to resist government calls for censorship and surveillance, with a U.S. Government mandate that ISPs police the content of Internet communications for purposes of ferreting out copyright infringement.

This is not to say that there is no room for cooperation between ISPs and copyright holders. Voluntary notice forwarding, for example, does not put the ISP in an enforcement role and can be an effective way to alert users that their online behavior is drawing suspicion. Given the potential for very large statutory damages, such warning notices may be quite effective in prompting recipients to cease infringement.

Policies to enlist ISPs more broadly, however, raise significant concerns. CDT believes federal enforcement efforts should steer clear of two kinds of policies in particular. First, so-called "three strikes" or "graduated response" policies that contemplate suspending or terminating alleged infringers' Internet access raise serious constitutional concerns regarding proportionality, due process, and free speech. Quite simply, Internet access has become too essential a part of everyday life for disconnection to be considered a fair punishment for ordinary copyright infringement.

Second, the government should not endorse automatic filtering policies that call on ISPs to install technical systems that purport to identify and block transmissions of copyrighted material. The use of filters will almost certainly have an adverse impact on users' First Amendment rights. Filters likely will block some lawful, protected speech, in part because the complex factual balancing that must accompany determinations of fair use is not suited to automation. In addition, constant monitoring of subscribers' Internet connections raises serious privacy concerns. This could have a chilling effect on the use of the Internet for any number beneficial purposes and would compromise speakers' ability to remain anonymous, a valuable aspect of online free expression.

In addition to the costs to free expression and privacy, either approach would burden ISPs with significant and escalating costs – especially since they would likely result in an ongoing arms race with regard to piracy tactics.

CDT op-ed on "three strikes" policies [3]

4. Looking ahead

The IPEC received over 1,500 comments regarding the development of the Joint Strategic Plan. When complete, the Plan will be submitted to Congress, and the IPEC will report annually on its implementation. The PRO-IP Act also requires the IPEC to revise the Plan every three years.

Separately, the draft ACTA text was recently made public for the first time after over two years of negotiations. Release of the text is certain to spur substantive debate, as the agreement – and in particular the Internet section – is controversial. As written, the draft would export strong enforcement provisions of U.S. copyright law, without requiring counterbalancing limitations such as fair use and liability protections for makers of products with significant non-infringing uses.

Negotiators have said they hope to conclude ACTA before the end of 2010. CDT will continue to engage with policymakers and other advocates as these documents come together in order to promote a balanced approach to copyright enforcement that leaves room for innovation and free expression online.

Full list of IPEC public comments [4]
Official ACTA draft [5]
CDT blog post on ACTA draft text [6]

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