

## Copyright and the Internet: Getting the Balance Right

*Alden F. Abbott*

The ability to create without undue fear that one's creation will be appropriated by others without consent is a fundamental freedom, whether that creation is tangible or intellectual in nature. Overly burdensome rules limiting legitimate rights to use and transmit ideas limit freedom. Balancing these two freedoms has long been a challenge in the law, and the explosive growth of the Internet has made that job much harder. The sale of counterfeit goods, including tangible items, such as branded clothing and pharmaceuticals—as well as the illegal sale of digital goods, such as music and Hollywood movies—has proliferated on the Internet. Such activity is a form of theft, and the federal government has a legitimate role in preventing it.

The unauthorized downloading of copyrighted writings, designs, artwork, music, and films lowers revenue streams for artists and reduces their incentives to create new works, and limits their ability to enjoy the fruits of their labors. A key question for policymakers is how to best protect the creators of intellectual property without harming growth and innovation in Internet services or vital protections for free speech.

### Copyright Issues

Federal copyright-law protection extends to literary, musical, and artistic “original works of authorship.”<sup>84</sup> U.S. law gives the copyright owner the exclusive rights to reproduce, sell, rent, lease, distribute, display, and publicly perform the copyrighted work, and to prepare derivative works based upon the work.<sup>85</sup>

Thanks to the Internet, both the legitimate and illegitimate distribution of such works has become far easier. A 2013 U.S. Department of Commerce task force report on copyright in the digital economy noted that the Internet “has given consumers unprecedented tools to reproduce, alter and immediately transmit perfect digital copies of copyrighted works around the world, and has led to the rise of services designed to provide these tools.”<sup>86</sup> Those tools include, for example, peer-to-peer (P2P) file-sharing services and mobile apps designed to foster infringement. Many websites that provide pirated content—including, for example, online video-streaming sites—are located outside the United States.

Copyright infringement “has resulted in billions of dollars in losses to the U.S. economy—including reduced income for creators and other participants in copyright-intensive industries.”<sup>87</sup> Those losses are felt by the full spectrum of content industries, including music, motion pictures, television, visual arts, and software.<sup>88</sup>

Current federal law provides a variety of tools to combat such infringement. Both the Department of Justice (DOJ) and Department of Homeland Security (DHS) are authorized to take civil and criminal enforcement actions against infringers, including seizing property used in connection with infringement. However, jurisdictional limitations that restrict seizures to Internet domain names registered with a U.S. registry limit the effectiveness of these efforts. Criminal enforcement may also have an international dimension, with DOJ investigations assisted by foreign law enforcers.<sup>89</sup>

Copyright holders have a number of litigation tools to defend their interests. The first tool involves lawsuits against “primary infringers”—parties who directly violate others' copyrights. Suits against individual file sharers have proven rather ineffective, however, given the large number of such direct infringers and the difficulty in identifying them and bringing them to court. Direct infringement suits against ISPs are difficult, since infringement requires “some element of volition or causation,” and ISPs typically are not directly complicit in copyright pirates' decisions to place materials online.

The second tool involves lawsuits against “secondary infringers”—parties who facilitate direct infringers' violations of copyrights. In recent years, claims of secondary liability against online intermediaries have become increasingly important. Such claims have been brought successfully against P2P file-sharing services, such as Napster and Grokster, and against other types of online services, including video-hosting sites, BitTorrent sites, Usenet.com (a worldwide discussion board), and “cyberlockers” (which allow users to store and share large files).<sup>90</sup>

In addition, the Digital Millennium Copyright Act (DMCA)<sup>91</sup> establishes various extrajudicial tools to combat infringement.<sup>92</sup> Although it creates liability-free “safe harbors” for ISPs when engaged in specified activities (serving as a mere conduit to

transmit content, or providing caching, hosting, or information tools), the DMCA requires ISPs, in turn, to block or remove infringing content for which they have received a valid notice or are otherwise aware. A “put-back” mechanism empowers ISPs to restore content that was removed by mistake or due to misidentification. This structure has generated a widely used extrajudicial tool—“notice and takedown”—for curbing infringement.

### Potential New Tools

A variety of new potential tools have been proposed to augment these existing copyright enforcement mechanisms.<sup>93</sup> These include website blocking (directing ISPs to block access to websites dedicated to piracy), content filtering (screening incoming network traffic for signs of infringement), “following the money” (requiring payment processors and online advertisers to cut off funding of infringers), and restrictions on the types of links that search engines are allowed to display.

Many of these approaches were proposed in 2011 in the Stop Online Piracy Now (SOPA) and Protect Intellectual Piracy Act (PIPA) bills. But the proposed legislations raised a number of concerns. For instance, requiring search engines to omit links to rogue sites undercuts the role of search firms as trusted intermediaries in conveying information to users. Arguably, such limits would violate constitutional protections of freedom of speech. Even if constitutionally permissible, such a mandate would represent a step on a classic slippery slope of government interference that has no clear stopping point.<sup>94</sup>

Ill-considered mandates could also compromise security by blocking “resolution” of IP addresses by servers in the U.S., causing users (and their browsers) to rely instead on less secure servers elsewhere to access blocked sites.<sup>95</sup>

Some approaches do not require state action for implementation. For example, in 2011 a coalition of major ISPs and industry associations agreed to a voluntary “Copyright Alert System,” which establishes a process for handling repeat infringing activity by online users of P2P file-sharing networks, short

of account termination. This agreement, which is being implemented by the Center for Copyright Information (CCI), began operating in 2013.<sup>96</sup> Specifically, the CCI administers an alert system under which ISP subscribers are notified when they initially access infringing materials, and are subjected to a series of graduated sanctions from warnings to ISP service downgrades of varying severity if they persist in their behavior (disputes under this system are subject to independent review and arbitration).<sup>97</sup>

There are other ways in which private, voluntary efforts can alleviate infringement problems. For instance, new technologies allow websites that contain licensed content to be marked and highlighted for consumers, enabling them to better identify legal services that are available online, and diminishing incentives to access infringing materials.<sup>98</sup> In addition, services that make online content more easily available to consumers can significantly reduce demand for pirated materials. These services, the biggest of which is iTunes, are quite successful in the music world, and video-download services, such as Apple TV and Amazon Video, are growing rapidly among movie watchers.

### Conclusion

A variety of approaches—many of which are private, voluntary initiatives requiring no new laws or regulations—have been deployed to combat online copyright infringement, and new ones are being developed. While these efforts have not eliminated infringement, which remains a substantial problem,<sup>99</sup> they are having some success.

There is no “silver bullet.” Curtailing online infringement will require a combination of litigation tools, technology, enhanced private-sector initiatives, public education, and continuing development of readily accessible and legally available content offerings.<sup>100</sup> As the Internet continues to develop, the best approach to protecting copyright in the online environment is to rely on existing legal tools, enhanced cooperation among Internet stakeholders, and business innovations that lessen incentives to infringe.

## Endnotes

84. U.S. Copyright Office, "Copyright Basics," *Circular 1* (May 2012), <http://www.copyright.gov/circs/circ01.pdf> (accessed May 4, 2015).
85. *Ibid.*
86. U.S. Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy," July 2013.
87. *Ibid.*, p. 39.
88. *Ibid.*, p. 40.
89. For example, in January 2012, the DOJ indicted two corporations and seven individuals for running an organized criminal enterprise responsible for worldwide online piracy (causing over half a billion dollars in potential damages), through the cyberlocker service Megaupload and other related sites.
90. U.S. Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy," p. 49.
91. Public Law 105-304, 112 Stat. 2860 (1998).
92. U.S. Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy," pp. 52-61.
93. *Ibid.*, pp. 61-74.
94. See, for instance, James L. Gattuso, "Online Piracy and SOPA: Beware of Unintended Consequences," Heritage Foundation *WebMemo* No. 3438, December 11, 2011, [http://thf\\_media.s3.amazonaws.com/2011/pdf/wm3438.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/wm3438.pdf), and James Gattuso and Paul Rosenzweig, "Free Speech: An Unintended Victim of Protect IP and SOPA?" *The Daily Signal*, January 18, 2012, <http://dailysignal.com/2012/01/18/free-speech-an-unintended-victim-of-protect-ip-and-sopa/>.
95. Paul Rosenzweig, "Online Piracy and Internet Security: Congress Asks the Right Question but Offers the Wrong Answers," Heritage Foundation *WebMemo* No. 3459, January 17, 2012, [http://thf\\_media.s3.amazonaws.com/2012/pdf/wm3459.pdf](http://thf_media.s3.amazonaws.com/2012/pdf/wm3459.pdf).
96. U.S. Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy," p. 72.
97. Center for Copyright Information, "The Copyright Alert System," <http://www.copyrightinformation.org/the-copyright-alert-system/> (accessed May 4, 2015).
98. U.S. Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy," pp. 74-76.
99. David Price, "NetNames Piracy Analysis: Sizing the Piracy Universe," September 2013, <https://copyrightalliance.org/sites/default/files/2013-netnames-piracy.pdf> (accessed May 4, 2015).
100. U.S. Department of Commerce Internet Policy Task Force, "Copyright Policy, Creativity, and Innovation in the Digital Economy," p. 76.