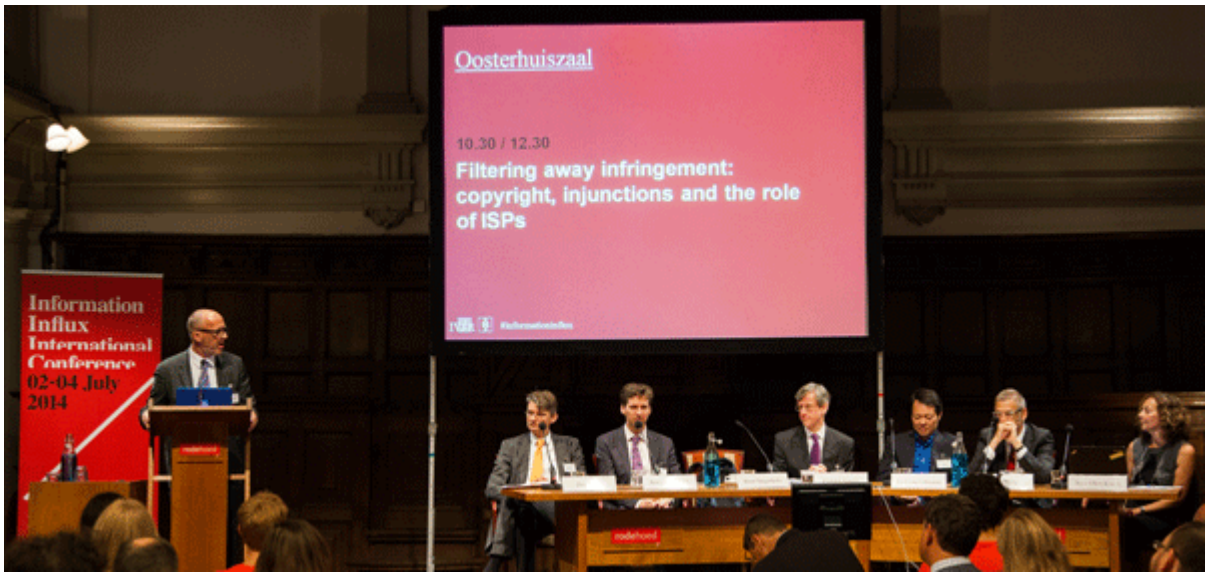
Kluwer Copyright Blog

Filtering away infringement: copyright, injunctions & the role of ISPs

Christina Angelopoulos (CIPIL, University of Cambridge) · Wednesday, July 23rd, 2014



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On 2-4 July 2014 Information Influx, the 25th anniversary conference of the Institute for Information Law (IViR) was held in Amsterdam.

As part of the conference, on the morning of Thursday, 3 July a panel entitled **Filtering away Infringement: Copyright, Injunctions and the Role of ISPs** was held. The panel was set up as a mini mock trial of a topic that has been especially controversial in the area of online copyright infringement in recent years, particularly in Europe: that of injunctive orders imposed on internet intermediaries for the purposes of copyright enforcement.

Questions and issues

The past few years have witnessed a number of European court decisions ordering online intermediaries to block or filter the content of the websites and networks in order to prevent or stop copyright infringements committed by their users. This is a natural result of the liability rules of the E-Commerce Directive, which offer immunity to internet intermediaries against claims for monetary relief, but remain silent on the topic of injunctions.

In this context, questions have been raised concerning the appropriate standard for injunctive relief against innocent intermediaries, the permissible range of such injunctions, the relationship between injunctive relief and liability, as well as the possible need to extend harmonisation and/or immunity to this liability-adjacent area. In addition, issues of proportionality and correct balancing with other competing rights and interests have been highlighted by recent CJEU case law. The underlying key question – can technology solve this problem and, if so, should technology be allowed to determine law? – remains unanswered.

It was this question that the panel was taxed with investigating and to this end injunctive relief against innocent intermediaries was put on trial – an unconventional procedure in the tradition of most legal systems perhaps, in view of the lack of specific case concretising the issue, but one intended to foster a lively dissection examining all sides of this tricky question.

The panel began with a half-hour debate between opposing legal counsel, each instructed to adopt and defend an extreme view of the issue.

Counsel for the accused

Counsel for the accused (that is to say, for injunctions) put up a strong defence: the main thrust of the argument concentrated on the idea that good faith intermediaries have a legal and moral obligation to attempt to stop piracy. Such reasonable intermediaries, it was asserted, must therefore take reasonable measures to terminate copyright infringements on their networks and websites.

Certainly, the primary focus should be on bad faith intermediaries, such as the Pirate Bay, that encourage piracy, but locating and shutting these down is not always possible. On the other hand, good faith intermediaries, such as Google, may not intentionally encourage piracy, but they do facilitate it and likely benefit financially from it. It was conceded that countervailing fundamental rights, whether the right to freedom of expression and information or the privacy and data protection of users or the freedom of intermediaries themselves to conduct a business, might raise legitimate obstacles, but, it was emphasised, this only means that a fair balance must be struck.

In this context, a “notice-and-take-down” regime is not enough; “notice-stay-down” is required, meaning that some kind of blocking and filtering is necessary. Technical measures might not be a panacea, but their adoption can at least push piracy underground, making it less accessible to the average user. People must understand, the defence attorney concluded, that buying goods on a black market is not ok, before the real market collapses.

Prosecuting counsel

Prosecuting counsel countered by observing that “reasonability” is not a technically or legally useful criterion to determine which, if any, measures intermediaries can be forced to adopt.

He agreed that a fair balance must be struck, but pointed out that that is easier said than done: complex problems often cannot simply be solved by adopting the middle position. Measures enabling that are unlikely to exist or be technically feasible. If they do, they risk collateral damage in interfering with competing fundamental rights. Thus, the more sophisticated content-based filtering systems are either impossible or too expensive to implement and will infringe fundamental rights.

Simple DNS or IP address blocking has a more limited impact on fundamental rights, but is

completely useless and will only result in driving end-users to develop and use proxies or other decentralised technologies. Both measures are likely to damage respect for the rule of law, respect for copyright and the internet itself.

The moral case for ISP filtering, counsel stated, is based on the idea that they benefit from copyright infringement, yet their revenue is the same regardless of whether users are downloading infringing or non-infringing content. And while there are intermediaries whose business model is based on deliberately facilitating copyright infringement, those are rare cases and should be dealt with separately.

The real solution, the prosecutor concluded, is not force intermediaries to solve the copyright infringement problem, but to educate the public on copyright and to offer consumers competitive legal options: right-holders can and must learn to compete with "free".

Expert Witnesses

The debate was followed by presentations by Expert Witnesses, offering their specialised insights into the topic. Among others, the following points were made:

– Currently in European law there is no obligation for intermediaries to **proactively monitor** their networks and websites. On the other hand, reactive duties may be imposed on them. The field in between these extreme cases lacks clarify. More legal guidance de lege ferenda is accordingly needed.

– To this end, judges and legislators can find pertinent examples in **older laws regulating the liability of specific actors**, whether the liability of old steam engines for fires caused by sparks or the liability of traditional publishers and newspapers for copyright infringements and other wrongdoing. There is plenty of legal precedent that would allow for setting up a special system deliberately designed to handle the issue of internet intermediary liability.

– Copyright provides rightholders with exclusive rights and a legal remedy against those who violate those rights (direct infringers). This liability may be extended to certain indirect actors through **secondary liability norms**, depending on the rules of each jurisdiction. But traditionally, no obligation has been imposed of all innocent bystanders to expend reasonable effort to protect the interests of the copyright holder. If an intermediary has violated no legal rights, directly or indirectly, the reasonability of measures taken against it becomes difficult to define.

– A general shift can be observed in recent years from a **system of prosecution** and enforcement of copyright to a **system of prevention**. This might be more efficient from a costs perspective, but it results in a lack of sufficient judicial review. In view of the complex nature of copyright law, relying on mathematical algorithms for enforcement will inevitably lead to errors, further heightening the need for proper review. A shift from a prosecution to a prevention system might be warranted in high-risk situations, such as child pornography, or more obvious cases, such, as trademark law (see L'Oréal v eBay), but is not as easily justifiable with regard to copyright. A similar trend exists towards the privatisation of the enforcement system, which can likewise be problematic, particularly in the case of intermediaries that exercise excessive control over both content and users.

– The imposition of injunctions is **a disruption to the intermediary market**, as different intermediaries are subjected to different injunctions, distorting healthy competition.

– Users must be in a position to defend themselves with **easily accessible and cheap legal remedies**. Indeed, the more we expect intermediaries to be proactive in the enforcement of copyright, the more such mechanisms must be strengthened. The opinion was offered that, in the current regime of the Enforcement Directive the interests of the defendants seem to be insufficiently protected.

– The pertinent question is not only what is to be done, but **who may decide what can be done**. Who has the institutional competence to identify the correct answers to these issues? The opinion was offered that the courts are not well-positioned to undertake this role, particularly in view of the technical complexity and financial burdens involved. Until greater legal clarity can be achieved, it must be hoped that they will refuse to take over the role of the legislator simply because the latter has not yet provided an adequate response.

– It was also noted that **encryption defeats filtering**, while, in the post-Snowden era, the use of encryption is rising rapidly, complicating the issue. Consideration should be given to whether limits should or can be placed on who may use encryption.

– Finally, thought must be given to the likely reactions of infringers to the imposition of blocking and filtering measures on intermediaries. It was predicted that piratical entreprises will be tempted to move their operations onto **sites too big to block**, such as Twitter or facebook, moving the arms race between infringers and rightholders to the next level.

A verdict

At the end of the session a verdict was handed down by the panel's judge.

The Honourable Justice noted that under Art. 11 of the Enforcement Directive and Art. 8(3) of the Copyright Directive, "*Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.*" Given this framework, in cases where the conditions apply, the hard question becomes whether the court has the jurisdiction to make the injunctive order. This, at its heart, is a question of proportionality.

The learned judge observed that up until recently the understanding prevalent in the EU was that injunctions ordered against intermediaries may only apply measures that are specific, in the sense of being targeted. This is important as regards proportionality, as it only requires intermediaries to take exactly the same steps to enforce copyright that they already take with regard to other instances of wrongdoing, such as child pornography.

As a result, no new methods of blocking need to be invented and costs are kept low. At the same time, efficacy is also low: blocking measures are easy to circumvent. Nevertheless, the evidence shows (see e.g. EMI Records v BSB) that such orders are not entirely without effect: if nothing else, they succeed in deterring the lazy and less technically sophisticated, in reducing temptation and encouraging people to abide by the law.

The applicants are encumbered with paying the costs of gathering the evidence and making the application before the court, while the cost of implementation is placed on the service provider. Due process requirements are implemented in the form of the possibility for intermediaries to apply to the court for a change of circumstances that allows the order to be amended. Users must also be given *locus standi*.

The recent decision of the CJEU in UPC Telekabel Wien may have upset this balance, but it is as yet too early to draw firm conclusions. At the moment, His Honour concluded, no adequate alternatives are discernable: more detailed, prescriptive legislation presents an attractive solution, but it might not be feasible, while more criminal enforcement raises problems of its own. The economic analysis of the issue is still in its infancy and further research is needed before a convincing case can be made to significantly alter the current model.

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Panel Session at: Information Influx, international conference, Institute for Information Law (IViR), Amsterdam, 2-4 July 2014

Panel members:

• prof. Bernt Hugenholtz (Institute for Information Law) (moderator)
• prof. Dirk Visser (University of Leiden)
• Remy Chavannes (Brinkhof)
• Fred von Lohmann (Google)
• Sir Richard Arnold (High Court UK)
• prof. Niva Elkin-Koren (University of Haifa)
• prof. Reto Hilty (Max Planck Institute)

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