Hudson Institute

POLICY MEMO

Filtering and Site Blocking: Necessary Reforms for the Digital Marketplace

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September 2021

Executive Summary

Business models and technology have changed dramatically since the 1990s; nowhere more so than online. Those changes, alongside some key judicial decisions, have distorted the operation of the US copyright law provision specifically designed to address online copyright infringement. Today, even a platform that knows that 80 percent of what it hosts are unlicensed copyrighted works, it can be shielded from accountability by the safe harbors in the Copyright Act. Copyright owners are left to send millions of takedown requests with little actual effect on piracy. This, along with other factors, led the US Copyright Office to conclude that the cooperative environment the law was meant to create has not and will not be realized without amending the law. And while dozens of other countries have successfully adopted measures to address online infringement from beyond their borders, the United States has not acted to implement similar procedures.

Restoring the balance needed to address online piracy effectively and provide an incentive for platforms to cooperate with copyright owners should include three key steps:

- Amending the law to reverse harmful judicial decisions, most significantly to restore the "red flag" test
- Requiring appropriate filtering out of infringements at the time of upload
- Codifying the authority of federal courts to order the blocking of foreign sites dedicated to infringing activities

The Copyright Office provided a roadmap for course-correction regarding misguided judicial decisions. And platforms already commonly use both filtering and site-blocking tools to protect their business models and reputation. The objections to using these same tools in the copyright

context ring hollow and should not prevent consideration of measured and appropriate rules to reduce copyright piracy.

Introduction

It has long been understood that copyright law evolves in response to new technology and other changes in the marketplace.[2] Some new technologies opened the door to new media for creative expression, such as photography, recorded sound, motion pictures, and computer programs. Other technologies created challenges to preventing infringement, such as photocopiers, cassette tapes, and camcorders. The advent of digital technology, followed by the computerized networking of the internet, presented and continues to present, both opportunity and threat.

Digital technology expanded creators' tools tremendously. Editing of music and video recordings was opened to new and fantastic tools. Photographers were freed from the time, expense, and constraints of film. Computer graphics and visual art became new media for creativity. And the reach of the internet facilitated the connection between those selling creative works and those who wanted them.

Unfortunately, these benefits have been mitigated by the harms of piracy that the same technologies have enabled. It is well established that digital media, unlike analog media, does not degrade by generation—a copy of a copy of a copy of a digital file is as perfect as the original. Readers under a certain age may take this for granted, but others will remember the faded photocopies and static-filled dubbings of the past.

The combination of digital media with the distribution network of the internet produced an environment in which perfect copies may be made and transmitted for virtually zero incremental cost to the infringer. The Napster "peer-to-peer" network was the first widely popular tool for mass infringement. At its height, some fifty million users were distributing files across that network every month, many if not all constituting copyright infringement.[3] Many, many others would follow.

Just as their predecessors had done, policymakers of the early internet era did their best to update copyright law and its enforcement tools to preserve their effectiveness. Perhaps the most notable feature of that era is the broad immunity from damages for internet platforms enacted in 1998.[4] Since that time, just as in the past, technology and market practices have continued to evolve. Yet, that safe harbor system remains frozen in place. This policy memo will examine the contemporary efficacy of the current law in light of changes since its enactment and recommend some ways in which the law might be updated to improve its effectiveness and balance. Specifically, this memo will consider the policy of requiring platforms to filter out infringements at the time of an attempted upload and consider site blocking as a tool to address foreign-based infringements.

The Framework: Copyright Law and Secondary Liability of Online Platforms

The liability of the users of online networks for the unauthorized distribution and reproduction of copyrighted works has never been seriously in doubt.[5] However, in many cases the identity of the infringer is concealed behind screen names. Even if those identities could be obtained through discovery or other legal processes, it is neither economical nor efficient for copyright owners to bring actions against each individual direct infringer.[6] A single action against the platform providing the means for the massive volume of infringement makes much more sense.

It is precisely for these sorts of efficiency reasons, among others, that US copyright jurisprudence has long recognized the liability of secondary infringers. Vicarious infringement occurs when a party has the right and ability to control the infringing activity and derives a direct financial benefit from it.[7] There is little doubt that a service provider has the right and ability to control infringements on its platform. The direct financial benefit depends on the specific facts, but infringements that draw customers and thereby potential or actual revenue have been found to satisfy that element.[8]

Contributory liability occurs when a party makes a material contribution to the infringement with knowledge of the infringing activity.[9] The platform itself is the material contribution. The knowledge can be either actual or constructive, and there has been extensive litigation over both.[10]

Early case law on the liability of platforms is split. While at least one court found such a platform to be strictly liable on the basis of direct infringement,[11] another found the platform to be a step removed from the infringing activity and withheld liability where the platform removed the infringing material upon being made aware of it.[12]

When these problems were presented to Congress in the 1990s there was no easy answer. Creators and copyright owners argued that it would be burdensome to saddle them with the requirement to scour the entire internet for infringements of their works. They argued further that the operators of the internet platforms on which these infringements occurred and would continue to occur were in the position as the lowest cost avoider to police their own services. Additionally, they pointed out that these platforms had a reverse incentive—that the presence of infringing material on their sites attracted customers; even if this was unintentional, the internet services were profiting from infringement on their networks.

The internet companies of the day presented their own perspective. They argued that even if they could discern which postings involved copyrighted works, they did not have knowledge of private licensing arrangements and they should not be held accountable for nuanced fair use evaluations. Additionally, they argued that copyright owners possessed that information and expertise, and so they were the lowest cost avoiders. In response to claims that they were tacitly or even actively welcoming infringements on their networks, the internet services argued that they were neutral platforms, and it was beyond their control what users might choose to post. Above all, the internet services sought certainty; they wanted a clear set of steps they could take to extricate themselves from what they viewed as a dispute between their users and copyright owners.

Congress balanced these perspectives and interests by enacting Section 512 of Title 17, which provided a set of four "safe harbors" from monetary damages available to qualifying service providers for potential liability arising from four core platform functions: conduit transmission of data, such as email; system caching of commonly visited websites; hosting of user-supplied content; and hyperlinking, including by providing search results.

Among the conditions for service providers to qualify for the safe harbors was a targeted notice-and-takedown system designed to remove infringing material from the service providers' networks expeditiously. The burden of identifying the infringements and sending the notices to the platforms was placed on copyright owners. Congress's overarching goal was a system that includes "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."[13]

Changing Circumstances in Technology, Business Models, and Legal Decisions

Since its enactment, evolving platform business models and controversial court decisions have distorted the envisioned balance of interests between service providers and copyright owners, resulting in a lack of the desired cooperation.

There has been substantial litigation and many controversial decisions that copyright owners cite as hampering the effective functioning of Section 512.[14] Perhaps the one most disruptive to the balanced operation of the system created by Section 512 was the Second Circuit's decision in *Viacom Int'l, Inc. v. YouTube, Inc*.[15]

That case arose from the conduct of YouTube's founders in welcoming infringing video uploads to and streaming from their platform. Viacom argued that YouTube's knowledge of infringing activity disqualified YouTube from the safe harbors because it met the statutory standard of "aware[ness] of facts or circumstances from which infringing activity is apparent"—known as the "red flag" test,[16] and YouTube nonetheless allowed infringing videos to remain on its platform. The evidence put forward in the litigation was damning:

- A study by YouTube's own employees "estimated that 75-80% of all YouTube streams contained copyrighted material."
- An independent study by Credit Suisse "estimated that more than 60% of YouTube's content was 'premium' copyrighted content—and that only 10% of the premium content was authorized."
- "YouTube founder Jawed Karim prepared a report in March 2006 which stated, '[a]s of today[,] episodes and clips of the following well-known shows can still be found [on YouTube]: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, [and] Dave Chap[p]elle."[17]

How did the corporate leadership of YouTube respond to this information? YouTube co-founder Steve Chen's internal company email could not have been clearer:

> but we should just keep that stuff on the site. i really don't see what will happen. what? someone from cnn sees it? he happens to be someone with power? he happens to want to take it down right away. he gets in touch with cnn legal. 2 weeks later, we get a cease & desist letter. we take the video down.[18]

There is no doubt that this completely contradicts the cooperative environment Congress sought to create. Chen openly displays a willingness to promote his platform with the availability of content they had reason to believe was infringing by taking advantage of the practical difficulties copyright owners face in identifying infringements and the absence of consequences for platforms that Section 512 provides.

Chen was not alone in exploiting the weakness of the notice-and-takedown system in Section 512. In an email response, "Karim agreed, indicating that 'the CNN space shuttle clip, I like. we can remove it once we're bigger and better known, but for now that clip is fine.'"[19]

The casual observer may expect that such evidence produced a verdict against YouTube, but it did not. Instead, the court interpreted the knowledge standard in Section 512 so narrowly that unless Viacom could prove, video by video, that YouTube leadership knew about it and believed it was infringing, it should be allowed on their platform. YouTube was protected by Section 512's safe harbor. The court disregarded the admission and endorsement of YouTube's founders that they were running a business model based on piracy.

Much ink has been spilled over whether this controversial decision was a correct reading and application of the statute.[20] Here, I pose a more fundamental question: should this be the law? Providing immunity from damages to a platform that is consciously and deliberately promoting itself through the availability of infringing activity on its own network cannot possibly be said to be fostering cooperation against infringement. Indeed, it demonstrates an instance in which the law is providing an excuse *not* to address infringement.

If the parties who negotiated the original text of Section 512 would have thought that a platform knowingly dominated by infringement would be able to enjoy the safe harbor, there would have been no deal. Yet, that is precisely what the Second Circuit held in the *YouTube* case. This should not be allowed to stand any longer.

This analysis is supported by a report issued by the Copyright Office.[21] At the request of Congress, the Copyright Office undertook a comprehensive review of every aspect of Section 512, a process that involved five years of public comments and hearings, followed by examination and evaluation by the staff of the Copyright Office.

The message to the Copyright Office from stakeholders and other interested parties was widely divergent. Professional creators of all sizes and across the spectrum of creative endeavors spoke of the futility of a time-consuming effort to identify infringements and send notices to platforms, only to see the same infringements reposted in short order.[22] Not surprisingly, the platform providers demurred, asserting that from their perspective, the system was working acceptably as an antipiracy tool.[23] The platforms and their allies also made the counterpoint that the notice system is sometimes abused, used not to prevent infringement but for viewpoint-related reasons.[24] Perhaps the only point of agreement was that virtually every commenter identified some way in which Section 512 needed reform.

In its analysis, the Copyright Office found numerous ways in which the balance of interests that Congress intended, necessary to maintain incentives to cooperate, had been "tilted askew."[25] That highly detailed report went well beyond the red-flag test, describing a litany of ways across a dozen aspects of the Section 512 system in which the statutory text no longer functions as intended.

In addition to controversial court holdings that have interpreted and applied Section 512 in a cramped way, as highlighted by copyright owners and discussed in the Copyright Office report, the evolution of platforms' business models has demonstrated that certain assumptions undergirding the approach of Section 512 are simply incorrect.

For example, we have seen that the presumption of service providers as "neutral platforms" created an opportunity for the less scrupulous operators to take advantage of the law. From a purely technological perspective, many platforms can make a claim of neutrality. But the posting, alteration, and viewing of copyrighted works is desired to attract viewers and the accompanying advertising revenue that has helped build certain platforms into some of the largest companies in the world. A platform provider need not curate; it can simply wait for its users to inevitably post infringements. Such platforms thus enjoy the benefit of hosting user-posted infringements while the platform remains in the shelter of the safe harbors. Claims of "neutrality" in such a circumstance ring hollow. This is fundamentally at odds with good policy and Congress's desire to promote cooperation to reduce infringement online.

While internet platforms continue to enjoy broad access to the safe harbors, copyright owners send millions of notices[26] to the same platform to remove the same works over and over, stuck in the well-documented "whack-a-mole" problem with the notice-and-takedown system.[27] These notices have accumulated into the billions, and are still without meaningful effect on the instances of infringement on key platforms enjoying the safe harbors.

Some maintain this system is working, but that contention can only be through a parochial view.[28] There is no public policy goal fulfilled by requiring copyright owners to send notices of infringement of the same work on the same platform, and even by the same poster, over and over and over again.

Current Law Now Favors Some Business Models

The ineffectiveness of the notice-and-takedown system has become a thumb on the scale of private negotiations. When copyright owners and internet platforms engage in licensing negotiations, all parties at the table understand three central realities in light of how the safe harbor provision has been interpreted and applied by courts:

- That even in the absence of a license, users will post infringements to the platform.
- The notice-and-takedown system is not an effective tool for removing infringements.
- The platform will enjoy the protection of the safe harbor, nonetheless.

When there is no effective enforcement of the law, licensing negotiations have the potential to take on the air of a protection racket. That is, the functioning and nonfunctioning aspects of the law give the platform all the leverage. If no deal is reached, the platform will continue to host and profit from the availability of pirated copyrighted works on its system. As a result, the platform can demand cut-rate royalties, leaving the copyright owner with a choice between getting crumbs or getting nothing at all. The imbalance is even more pronounced given the enormous market power of the dominant platforms.

YouTube's Content ID system illustrates this dynamic. Unlike in the early days of YouTube, much of the copyrighted works appearing on the platform are licensed. Indeed, YouTube and its parent company Google seek to highlight the payments to copyright owners and creators through that system.[29] But that is only half the equation; Google is not so transparent about the amount of money it generates for itself from those works, or the royalty rate it is paying to right holders.

Some creators have worked to fill in the blanks. By gathering available data and using it to calculate royalty rates, they have demonstrated a huge gap between the rates paid by mainstream services and YouTube's Content ID. For example, in the context of music, Apple Music paid copyright owners $0.00675 per stream and Spotify paid $0.00348 per stream, but YouTube's Content ID licensing rates were only $0.00022 per stream.[30] The result was that even though over half the music streamed online was played through YouTube, that company paid only 6.4% of the revenue musicians received for online streaming of their works. YouTube's claim about how much it has paid out to copyright owners is nothing to brag about. Instead, it highlights how the law has contributed to user-generated content platforms' advantage over curated services in negotiating leverage.

YouTube also hastens to point out how copyright owners clamor for access to Content ID,[31] as though that is a sign of its generosity. But again, one must consider the other alternatives to provide full context. In addition to the opportunity for at least *some* income to be derived from YouTube-hosted copies of their works, Content ID also provides an efficient filtering tool that allows copyright owners to calibrate carefully what will and will not be allowed onto the platform. And these conditions are applied automatically, at the time of attempted upload. Content ID obviates the need for copyright owners to monitor YouTube and to send individual notices for takedowns. Instead, unauthorized use of copyrighted works is addressed easily and efficiently.

The reality of Content ID demonstrates two key points: the current law allows hosting platforms to leverage licensing deals well below market rates, and front-end filtering of copyrighted material is both achievable and effective.

Critiques of Filtering Do Not Withstand Scrutiny

It is common sense that preventing infringement on the front end is more efficient than allowing everything to go online and then hunting for the bad. In the specific context of copyright policy, it has been equally clear for years, if not decades, that filtering infringements at the time of attempted upload is more effective and efficient than the after-the-fact approach of the notice-and-takedown system set forth in Section 512, which consumes resources of both copyright owners and platforms with little benefit. And virtually every platform already engages in filtering for a variety of purposes. Yet, there continues to be vociferous objections to filtering in the copyright context.[32]

One of the most common objections is that a filtering obligation as a condition of eligibility for the corresponding safe harbors will generate an incentive to overprotect copyright. The grain of truth here is that the very existence of the safe harbors is designed to be a tool through which an incentive is created for internet platforms to achieve the immunity from damages they desire. However, the prediction that it will lead to overprotection ignores or at least undervalues other factors.

First, it must be understood that many internet platforms, particularly social media and search engines, derive income from the availability of infringing content on their systems. Specifically, this infringing content attracts users, and platforms can monetize those users by collecting data about them and pushing paid advertisements onto them. That is not to say that every platform has a business model based on infringement, but it would be myopic to ignore the reality that even platforms with legitimate business models may still derive income from online piracy. Thus, any conversation about the balance of incentives must account for the existing business incentives to welcome or at least tolerate infringements. Even if it were true that a filtering obligation or condition could create an incentive to prevent some borderline infringement, that could well balance out when considered in the context of inherent business incentives.

A second objection to filtering infringement, albeit from the more extreme voices, is the claim that it constitutes "censorship."[33] The use of this epithet to describe copyright enforcement is both politically charged and highly misleading. The implication of "censorship" is a desire to suppress certain viewpoints. Of course, that is not the goal of copyright enforcement. Indeed, it is more insightful to juxtapose the two. Foreign political censorship is frequently subjective and enforced through self-serving government mechanisms. In contrast, copyright enforcement through filtering is viewpoint-neutral, based on the legal standards of the Copyright Act, which were enacted through democratic due process, and implemented not by the copyright owner but by the internet platform, which will have a balance of interests to consider. The use of the term censorship to describe copyright enforcement is political hyperbole.

It is also worth noting that objections to filtering appear to be selective. Internet service providers of all stripes have for years sought to filter out activity perceived as directly harmful to their own business models, such as malware and spam. One might be tempted to distinguish those from copyright enforcement by imagining them as uniformly bad activities. In truth, the line is far from clear. For example, it would be unrealistic to think that no candidate for public office has ever had his or her campaign emails—the innermost core of protected speech—blocked by filtering tools. The list of other perfectly lawful speech inhibited by spam filters is endless: holiday e-cards, party invitations, and COVID vaccine appointment notices are but a few examples. Who among us has not found a legitimate email caught in a spam filter?

This does not mean that spam filters are illegitimate or inappropriate. Rather, it means that companies do their best to fine-tune those filters in a way that will serve their business interests and protect their customers from illegal or disruptive activity. Similarly, many platforms have for years filtered out content that represents child pornography or promotes terrorism. While the relative harm from spam, terrorism, and copyright infringement is wildly different, all of them involve the need for careful line-drawing. The most palpable difference is that the platforms recognize the harm to their business model from spam and the harm to their reputation from hosting terrorist videos. It is apparent that the law needs to add a greater incentive for those platforms to deal with copyright infringement in a more cooperative way.

Regular critics of copyright enforcement have pointed to the abuse of the notice-and-takedown system where postings were removed based on a fraudulent copyright claim.[34] While the volume of such instances appears minuscule in comparison to the number of properly issued notices,[35] fraud and abuse of any law is a concern that should be taken seriously. It is curious, then, that many of the same people who criticize the notice-and-takedown system for such abuses also seek to prevent a filtering obligation. It would be far easier for the platform, in constructing its own filtering tools, to reject such obviously inappropriate requests than it is to find them in the mountain of Section 512 notices they currently receive.

The Need for Nuance

It would be a mistake to treat all internet platforms as the same; there are a variety of business models and a variety of approaches to dealing with piracy and other unlawful postings. We should also not make the mistake of assuming the platforms of the future will look like those of today. To the greatest extent possible, the law should seek technological neutrality.

For example, a public-facing hosting service, whether described as a user-generated content site, a cyberlocker, or a cloud service has the potential to become a source of market-destroying piracy.[36] Conversely, a closed and secure subscription service poses far less of a threat to copyright owners.[37] Working out a reasonable balance that produces an effective copyright system that also empowers legitimate, innovative business models may well involve consideration of broader copyright principles as well.

Historically, copyright policy has been attentive to the business incentives needed to encourage professional creators and to protect them from unfair competition. This made sense as those were the people whose investments of time and money depended on a promise of a potential return, and whose output was most likely to attract piracy. In many respects, that remains true today. Also, true today, more than ever, is that independent creators have access to audiences and opportunities to generate income. Thus, a properly calibrated system addressing online piracy should consider the legitimate interests of those creators who use internet platforms as their primary or exclusive method of reaching their audience.

Unfortunately, in public policy debates this perspective is too often put forward by organizations that lack agency—that speak for such users but who have little mandate or oversight over those whose views they purport to represent—and which staff themselves with directors, advisers, and employees known for having hostile views on effective copyright,[38] contributing to a one-sided approach that lacks credibility. Because of this dynamic, those sympathetic to copyright owners' perspectives have been conditioned to perceive user interests as mere "astroturf" cover for the platforms. In fact, users have a wide variety of interests, none of which are served by others purporting to speak for them.

Some users have taken advantage of the tools and reach of internet platforms to generate their own original works and enjoy income-generating fan support. Presumably, these user-creators have as much interest in effective copyright and royalty rates unfettered by legal favoritism as any other copyright owner. Many others create some form of derivate works, from fan fiction to mashups and remixes to commentary. Some of those may qualify as fair use; others may be infringing. Other users simply copy others' works, sometimes out of fan-based exuberance and sometimes out of sheer malice for the copyright owner. And many users may incorporate copyrighted works with little appreciation for the law or the potential harm to the copyright owner. These shades of gray are not accurately represented by the polemics too often heard in copyright policy debates, nor are they an excuse to keep an inefficient and malfunctioning system.

The rights of copyright owners must be respected and practicably enforceable, and the entire system should continue to promote the production and distribution of creative works. At the same time, a platform that complies with filtering obligations in good faith should not be punished for missing the mark on a close call.

A short policy memo cannot anticipate every scenario or address all the legal and policy issues. Ideally, there should be a good faith conversation among the various stakeholders, both large and small, to determine the best way to improve the system. Unfortunately, we remain stuck at the point of debating *whether* to even *try* to improve an obviously flawed system. Perhaps more than anything, this demonstrates that Section 512 has failed to produce an atmosphere of cooperation, as was its original intent. It also suggests that at least some participants in the policy debates view the matter as a zero-sum game. That should change, because the undeniable truth is that the internet sector and the creative sector are mutually intertwined and mutually beneficial.

Site Blocking: A Remedy Whose Time Has Come

Section 512 is directed at copyright piracy on domestic-based internet platforms.[39] Naturally, US law does not apply extraterritorially. Some countries have adopted Section 512-style systems[40] and some foreign-based platforms will engage in some degree of anti-piracy assistance voluntarily. Beyond that, foreign-based platforms are free to ignore notices of infringement. In the most egregious cases, they have been known to respond to copyright owners with defiant and even vulgar refusals to cooperate.[41]

The United States' efforts to improve foreign copyright protection and enforcement through trade tools, including free-trade agreements, have borne some fruit. However, there are only about twenty countries who have partnered with the US in modern free-trade agreements, and even some of those have failed to implement their obligations fully.[42] In the face of the intractability of foreign-based piracy problem, copyright owners and policymakers have looked for measures that could at least hinder foreign pirates' access to the US market and American consumers.

One source of legal relief has been found in the Federal Rules of Civil Procedure. Rule 65 authorizes courts to issue injunctions and restraining orders, including such orders that bind "persons who are in active concert or participation" with the parties to the litigation.[43] Some intellectual property owners, in enforcing both trademarks and copyrights, have been able to secure orders for American internet platforms to block connections from domains engaged in counterfeiting or piracy.[44]

A decade ago, there was an effort to enact a stand-alone federal court action for the specific purpose of authorizing federal courts to issue site-blocking orders.[45] The PROTECT IP Act[46] and the Stop Online Piracy Act[47] would have instructed courts to issue such orders against foreign-based websites that were "dedicated to infringing activities"[48] and directed at the US market.

As the name suggests, site blocking is when internet service providers simply do not allow their users to connect to a particular website. Versions of this tool have been used by internet companies since 1997, for example to filter spam email from known, malicious sources.[49] But when considered in the context of blocking access to sites "dedicated to infringing activities," some activists breathlessly declared it would "break the internet."[50]

For decades, internet exceptionalists have been using the "break the internet" assertion against every policy proposal they do not like, from copyright royalty rates to the net neutrality[51] debate to reform of the legal immunity in Section 230 of the Communications Decency Act.

In the context of site-blocking legislation, some opponents theorized[52] that a large volume of Americans would be so determined to obtain counterfeit products and pirated works that they would be willing (and technologically savvy enough) to employ technology that operated outside the security of the DNS system. Working through rogue servers, they would be able to circumvent DNS blocks implemented by reputable service providers and obtain illegal products. Such unsecure servers would also expose users to a variety of other malicious activity, and thus the “break the internet” claim.

This reasoning supposes that American consumers would subject themselves to increased risks of malware, identity theft, and worse, all for the privilege of gaining illicit access to counterfeit and pirated works. To say the least, this taxes credulity. The site-blocking opponents’ argument also, likely inadvertently, suggested that internet platforms derive a very significant number of users, and by implication revenue, from the allure of infringing activity.

This argument is also in direct contradiction to the internet companies’ own longtime claims that consumers would eschew piracy services if convenient, lawful options were made available. Today, there are exponentially more legal options than they were a decade ago. If it is true that consumers will be satisfied with such options, there is no basis to predict a mass exodus from the relative security of the domain name system.

Of course, there will always be the hardened pirates who are determined to seek out illegal options. Civil remedies of any stripe are unlikely to deter this minority. During the COVID-19 pandemic, we have seen both a spike in subscriptions to legitimate streaming sources[53] and a spike in streaming piracy,[54] suggesting both that most Americans will choose legal avenues as well as the continued existence of hardened pirates. But the existence of an intransigent minority is not a reason not to take measured steps that will protect both American consumers and businesses from the piracy and counterfeiting operations of foreign criminal syndicates.

Another claim that was raised against site-blocking legislation was that it will be ineffective; pirates will just pop up with new domain names.[55] It is worth noting that if they wanted to, domain registrars and registries could help prevent this. It is also the case that blocking orders can be dynamic or amended to address instances where the same operator has simply changed domain names. Nor is it good policy simply to give up when enforcement against criminal activity is complicated or difficult. But even to the extent that criminals succeed in reconstituting their online operations, there is obvious value in forcing them to jump from one domain to another, disrupting their ability to deceive consumers into believing such websites are in any way legitimate or safe.

Site-blocking legislation was also subjected to the epithet that blocking piracy equates to censorship. As discussed above, this is at best misleading and at worst intentionally inflammatory. In reality, the charge is even less applicable in this context because site-blocking orders could only come from federal courts after a fair and impartial judicial process.

In any event, we no longer need to base the conversation about the advisability of site blocking on predictions or conjecture. For while the United States has yet to adopt site-blocking legislation, over forty other countries around the world have done so.[56]

The results? Copyright owners have reported[57] and a study confirms[58] significant declines in piracy since the implementation of site blocking. More importantly, the internet has not “broken,” either in those countries or in any other as a consequence of site-blocking procedures. The opponents' speculation in the US policy debates has been repeatedly disproven, and yet the United States continues to lag other countries' efforts. It is well past time for a fact-based discussion of this important issue—how to deal with foreign-based, rogue websites.

Conclusion

Online piracy is a serious and growing threat to the American creative sector and the jobs and economic prosperity that sector generates. As the Copyright Office has concluded, the enforcement tools and cooperative environment meant to have been created by Section 512 is out of balance. The law is not serving its purpose, and in some ways, it is adding to the problem, favoring some business models over others and providing some platforms with an artificial, unearned advantage in private licensing negotiations.

As in the past, as the marketplace evolves, so must the law. This requires serious consideration of a restoration of a balanced approach that provides both the needed incentives for cooperation as well as the breathing room for new creativity and innovation. Two elements would improve the efficiency and effectiveness of copyright enforcement: modernizing Section 512 and adopting reasonable site-blocking procedures. Providing a targeted filtering obligation into the construct of Section 512, along with a correction of the misinterpretation and misapplication of the various elements of Section 512 identified by the Copyright Office, most notably the red flag test, would help restore needed balance and provide a greater likelihood of cooperation. Further, the codification of authority for court orders requiring site blocking of foreign-based, US-focused websites dedicated to infringement would provide a much-needed tool for addressing the worst pirates who are currently beyond effective enforcement.

Endnotes

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2 See generally Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 430-31 (1984).

3 Sascha Sega, "Napster's Effect on the Industry," ABC News (Jan. 7, 2006), https://abcnews.go.com/Technology/story?id=98865&page=1.

4 These immunities, known as "safe harbors," were part of the Digital Millennium Copyright Act (DMCA), and will be discussed in detail below. It is no coincidence that this occurred in the same time period as the enactment of broad immunity for internet platforms in Section 230 of the Communications Decency Act. While the particulars of each differ, they share a common underlying philosophy that is now being questioned by a broad, bipartisan set of voices across Congress and beyond.

5 That has not stopped some of those who routinely seek to weaken copyright to object to suits against those infringers and the damages judgments meted out by juries.

6 *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the S. Comm. on the Judiciary* (2003), https://www.judiciary.senate.gov/imo/media/doc/sherman_testimony_09_09_03.pdf (statement of Cary Sherman, president and general counsel, Recording Industry Association of America, which did launch a campaign of suits against some of the larger uploader infringers, but that was neither a comprehensive nor ultimately successful strategy).

7 Gershwin Publ'g Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971).

8 See, e.g., A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001).

9 Gershwin, 443 F.2d at 1162.

10 See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

11 Playboy v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993).

12 RTC v. Netcom, 907 F. Supp. 1361 (N.D. Cal. 1995).

13 S. Rep. No. 105-190, at 20 (1998).

14 Comments of the Motion Picture Association of America Inc. on U.S. Copyright Off. Section 512 Study, https://www.motionpictures.org/wp-content/uploads/2018/03/LF_Motion_Picture_Association_of_America_Inc_-_First_Round_Comments.pdf.

15 676 F.3d 19 (2d Cir. 2012).

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39 Section 512(j)(B)(ii) contemplates an injunction ordering a service provider "to block access to a specific, identified, online location outside the United States." Due to the narrowness of that provision, to the best of this author's knowledge, it has never been used.

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