The Impact of Trade Agreements on Innovation, Freedom of Expression and Privacy: Internet Service Providers' Safe Harbors and Liability

Introduction

Internet intermediaries (Internet service providers, or ISPs) host information on a vast array of subjects, from politics to health to financial matters to the ordinary issues of day-to-day life. They allow people to pass on that information to others who share their interests, regardless of their geographic location. The benefit of this to society, to individuals, and to business is massive. In order to maximize the economic, social and democratic potential of the Internet however, we need policies and legal frameworks that enhance freedom of expression and privacy online.

The reason for this may be subtle to most citizens of the world, for whom the Internet exists as something that lives on a device: a phone, a computer, or a tablet. But those devices must connect to the global network of content through ISPs whose own policies and procedures affect the experience that citizen has online. Right now, copyright maximalist forces including Hollywood and the recording industry are mobilizing in obscure venues like trade agreements to create policy regimes that, by aggressively regulating ISPs, will dramatically restrict the rights and powers of the citizens who use the global internet.

In particular, these forces are pushing to take the role of enforcement away from the courts and to force it onto the ISPs. But to allow people to hold opinions without interference, and to seek, receive and impart information, it is critical to have a policy infrastructure that does not make service providers into cops – that does not *impose liability* on Internet intermediaries for the acts of their users. Unfortunately the national and international trends are moving away from this long-held, innovation-enabling policy regime.[1]

These pro-innovation legal regimes were adopted in many countries around 2000. These regimes limit the liability of intermediaries for illegal or infringing content or behavior by third parties, unless they have actual knowledge or constructive notice of specific infringing activity or content which they must then address. These regimes are now under a great deal of

[1] Following the 1996 WIPO Internet Treaties (WCT and WPPT), the US passed a federal law known as the Digital Millennium Copyright Act (DMCA). DMCA Section 512 exempts online service providers that meet the criteria set forth in the safe harbor provisions from claims of copyright infringement made against them that result from the conduct of their users. These safe harbor provisions are designed to shelter service providers: If a service provider qualifies for the safe harbor exemption, usually through a notice and take down system, or a notice and notice system, only the infringing customer are liable for damages; the service provider is not.

pressure through litigation, proposed legislative reform, and voluntary agreements between copyright rightsholders and Internet intermediaries. Recent efforts by rightsholders to increase Internet intermediary liability include multilateral agreements, such as the proposed Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership Agreement (TPP), and attempts to impose new obligations on intermediaries to engage in ex-ante filtering or identification of potential copyright infringing content threaten citizens' fundamental rights.

For instance, the TPP's leaked chapter on intellectual property in the digital environment insists that signatories provide legal incentives for ISPs to privately enforce copyright protection rules at the price of a free and open Internet. Free expression is often time-sensitive—like reacting to recent news or promoting a candidate for election. Enforcement by intermediaries without judicial review open the door to abuse, allowing the claim of copyright to trump the courts and get immediate removal, before the merits are assessed. So-called "put back" procedures can mitigate the harm, but even a few days of downtime can strike a serious blow to freedom of expression.

ISP Liability and the Content Takedown System: the US DMCA

The US Digital Millennium Copyright Act (DMCA) notice and takedown regime[2] includes two critical procedural safeguards that were intended to protect against removal of citizens' lawful and non copyright-infringing expression:

- First, it permits Internet users whose content has been blocked or taken offline due to a copyright takedown notice to respond with a counter-notice. Counter-notices allow the Internet intermediary to put the content back without facing liability unless the copyright owner files a lawsuit in a specified time period;
- Second, the DMCA allows users to sue copyright holders if they make knowing misrepresentations in a takedown notice.

While far from perfect,[3] these provisions have provided important protection for online freedom of speech in a series of cases in the US, where intellectual property rightsholders have claimed that they do not have to consider fair use[4] or other applicable copyright exceptions before issuing a takedown notice.

Despite these important procedural protections, the DMCA notice and takedown regime has resulted in the removal of significant amounts of lawful expression.[5] Extra-judicial notice and

[2] For a deep dive in the US DMCA provisions, take a look at this EFF Bootcamp Handout: https://www.eff.org/files/fred-bootcamp-handout.pdf
[3] https://www.eff.org/deeplinks/dmca
[4] Fair use checklist at https://www.eff.org/files/corynne-bootcamp-handout.pdf
[5] See EFF Hall of Shame at https://www.eff.org/takedowns

takedown regimes are vulnerable to misuse for private party censorship. The DMCA framework has created a "heckler's veto"[6] where the cost of compliance means that most Internet intermediaries are not able to bear the costs of hosting critical or unpopular content. As commented by Wendy Seltzer[7]:

> *The public is harmed by the loss of speech via indirect chilling effect no less than if the government had wrongly ordered removal of lawful postings directly. Indeed, because DMCA takedown costs less to copyright claimants than a federal complaint and exposes claimants to few risks, it invites more frequent abuse or error than standard copyright law. I describe several of the error cases in detail. The indirect nature of the chill on speech should not shield the legal regime from challenge.*

Thus, Internet intermediaries—as a rational market actor—are incentivized to remove content upon receipt of a notice alleging copyright infringement in order to get the benefit of the safe harbor, rather than to expend resources to investigate whether the complaint is legitimate or whether use of the content would be considered fair use and not copyright infringement under US law. Internet intermediaries often do not have the legal resources to review takedown notices and are not well placed to make determinations about the legality of content. As a result, content can easily be taken down for a minimum of 14 days, even if the copyright complaint is baseless—essentially, two weeks of censorship for free. [8]

This has resulted in the removal of a significant amount of legal user-generated content, including political videos in the months leading up to elections. It has also created incentives for misuse of the takedown process to suppress competition and parodies.

Any System Must Take Into Account Human Rights and Economic Development

First, Internet service providers should have no liability where they act as mere conduits, transmitting packets across the Internet, with no selection or editorial control over the content transmitted. To hold otherwise, would open the door to unbounded liability for all Internet intermediaries, impeding investment and innovation in network capacity and services.

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[6] J M Urban and L Quilter, "Efficient Process or 'Chilling Effects'?: Takedown Notices under Section 512 of the Digital Millennium Copyright Act" (2006), *Santa Clara Computer & High Technology Law Journal* 621-693. This empirical research from a sample of "notice and take down" requests shows that almost **one third** of the notice and take down request are not even copyright related. Also, not every one of the remaining two-thirds complied with the Digital Millennium Copyright Act notice requirements.

[7] Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment 24 Harvard Journal of Law and Technology 171 (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577785

[8] https://www.eff.org/deeplinks/2012/05/good-citizenship-online-service-providers-lets-not-let-dailykos-takedown-be

Second, Internet intermediaries should not be required to monitor communications on their networks or to actively search for evidence of infringement. This principle is necessary to protect citizens' fundamental right to privacy and data protection, a human right that is foundational to the rights of freedom of expression and association.

The UN and the European Court of Justice Agree That Human Rights Are at Stake When ISPs Are Held Liable

We are not alone in seeing ISP liability as a threat to Internet freedom. Both the UN Special Rapporteur on Freedom of Opinion and Expression and the European Court of Justice agree. In addition, Article 19 of the Universal Declaration of Human Rights should still be the guiding light for any multilateral agreement. It declares:

> *Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*[9]*.*

TPP and ISP Liability: The TPP Puts Users' and Innovator's Rights at Risk

TPP Article 16.3 mandates a system of ISP liability that goes well beyond the US Digital Millennium Copyright Act (DMCA) standards and US case law. The TPP pushes a framework beyond ACTA[10] [11] and possibly the spirit of the DMCA, since it opens the doors for:

- "Three-strikes" policies and other laws that require Internet intermediaries to terminate their users' Internet access on repeat allegations of copyright infringement;
- Requirements for Internet intermediaries to filter all Internet communications for potentially copyright-infringing material;
- ISP obligations to block access to websites that allegedly infringe or facilitate copyright infringement;
- Efforts to force intermediaries to disclose the identities of their customers to IP rightsholders on an allegation of copyright infringement.

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[9] http://www.un.org/en/documents/udhr/index.shtml#a19
[10] https://www.eff.org/issues/acta
[11] For a detailed comparison between TPP and ACTA see http://infojustice.org/wp-content/uploads/2012/03/table-03222012.pdf

The TPP's insistence upon notice and takedown regimes comes at a steep price. They cost us a free and open Internet.

The TPP Side-Letter to Require Strict Takedown Procedures

If the copyright maximalists—including Hollywood and recording industry—have their way, the TPP will include a "side-letter," an agreement annexed to the TPP to bind the countries to strict procedures enabling copyright owners to insist material be removed from the Internet.

This strict notice and takedown regime is not new. In 2004, Chile rejected the same proposal in its bilateral trade agreement[12] with the US. Without the shackles of the proposed requirements, Chile then implemented a much more balanced takedown procedure in its 2010 Copyright Law, which provides greater protection to Internet users' expression and privacy than the DMCA's copyright safe harbor regime.

Instead of ensuring due process and judicial involvement in takedowns, the TPP proposal encourages the spread of models that have been proven inefficient[13] and have chilling unintended consequences[14], such as the HADOPI Law[15] in France.

These strict rules are not only bad public policy, but have the potential to impinge on national sovereignty by imposing, through a non-transparent process, significant changes in existing national law; for example, the Chilean judicial takedown system. Another example of a policy that could be overridden is the Canadian system where ISPs provide a conduit for notices, but not extrajudicial takedowns. Where a country has implemented a system more balanced than the DMCA, the TPP should not overrule the popular legislative process or bring a one-size-fits-all approach for substantive and procedural rules.

TPP Does Not Provide Balance for Users

The US Congress recognized the risk that copyright owners would use the notice and take down system – an extrajudicial tool - in a way that might run counter to the constitutionally mandated goal of the Copyright Act to promote the progress of knowledge and learning. As a balance against abuse, they created a cause of action against misuse of the takedown procedures. The misrepresentation claim is meant to "deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and Internet users." If a court determines that the copyright holder

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[12] http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta
[13] https://www.eff.org/deeplinks/2012/08/repeal-french-three-strikes-law
[14] https://www.eff.org/wp/unintended-consequences-under-dmca/
[15] https://www.eff.org/deeplinks/2012/08/repeal-french-three-strikes-law

unlawfully misrepresented its claim that the material was infringing, the copyright holder can become liable to the ISP or the user for any damages that resulted from the improper removal of the material.[16] Even so, under the DMCA, enforcement has been difficult and many abuses go without being remedied.[17] Yet, the TPP does not provide for such cause of action, indeed, no balance at all.

TPP's Safe Guards Are Not Safe

By introducing a series of ISP liability safeguards, the TPP may promote the actual extension of ISPs' secondary liability, something the entertainment and publishing industries dearly desire. In a 2011 testimonial on whether Malaysia should join the TPP, the International Intellectual Property Alliance (IIPA) made clear that approach,[18] seeking to bring new intermediary liability along with a strictly limited safe harbor.

Intermediary liability is not universally recognized. The Office of the US Trade Representative—the agency leading the TPP negotiations—has recognized that creating limitations on liability encourages countries to adopt intermediary liability in the first instance. Indeed, if countries want to get off of the US intellectual property blacklist (the Special 301 report[19]: a review of other countries' intellectual property laws and enforcement standards), the USTR suggests that adopting the TPP can solve their problems. Of the 11 negotiating TPP Countries, five are in the Special 301 list for 2012[20] (Chile, Brunei, Peru, Mexico, and Vietnam).

Alternatives to the US DMCA Takedown System

Countries like Canada and Chile have successfully implemented alternative systems to the US DMCA model:

- **CHILE:** In Chile, a court notification system was established to implement a "notice and take down" mechanism. The court has to give a brief merit clearance of the

[16] http://wakeforestlawreview.com/deterring-abuse-of-the-copyright-takedown-regime-by-taking-misrepresentation-claims-seriously and EFF support for https://www.eff.org/cases/online-policy-group-v-diebold

[17] An example is the Lenz case. In the 29-second clip, Lenz's young son is dancing in the family kitchen to "Let's Go Crazy," which is playing on a stereo in the background. Remarkably, Universal Music Publishing Group claimed that the video violated copyright law, and had the video yanked from YouTube. Lenz fought back with the help of EFF, filing a lawsuit asking the court to hold Universal accountable for YouTube to take down her fair use. In a key victory early in the case, the court held that content owners must consider fair use before sending copyright takedown notices. https://www.eff.org/cases/lenz-v-universal and https://www.eff.org/press/releases/dancing-baby-video-battle-back-court-tuesday

[18] http://www.iipa.com/pdf/IIPAMalaysiaFTARequesttoTestifyandTestimonyonly111010.pdf

[19] https://www.eff.org/deeplinks/2012/05/special-301-report-2012-ustrs-absurd-list-international-disappointments

[20] http://www.ustr.gov/sites/default/files/2012 Special 301 Report_0.pdf

request to avoid abuses. Also, a private notice was implemented in which the ISP's have to forward the notice to the actual content publishers. A private mechanism was discarded by the Chilean government and its national congress because of the lack of due process and certainty in the private "notice and take down" mechanism. Chilean Law 17.336, Article 85.

- **CANADA:** In Canada, in contrast to the US notice and take down system[21], copyright imposes no comparable obligation on online service providers. Instead, Bill C-11, which is the law since November 2012, contains a "notice and notice" regime; that means that "when an online service provider receives a notice that infringing content has been made available on its service, it must provide notice to the subscriber who is responsible for the posting of the relevant content". This was an organically developed system that was crystalized into law. Canadian online service providers had developed an informal "notice and notice" mechanism: if you sent them a notice of claimed infringement, they would generally respond by passing along that notice to the person who posted the purportedly infringing content. But even that action of passing along the message, not to mention any further possible action, is mostly up to the individual service provider. Under this Canadian law, online service providers enjoy the benefit of safe harbors completely independent of whether they abide by their "notice and notice" obligations. The only liability arising out of a failure to abide by these obligations (i.e., failing to pass along a notice or explaining why they were unable to do so) is liability for statutory damages between $5,000 - $10,000 (as set out in new Section 41.26(3)).

Where a country has implemented a system more balanced than the DMCA, the TPP should not overrule popular legislative process or bring a one-size-fits-all approach for substantive and procedural rules.

EFF's Position

We consider limitations on liability for Internet intermediaries necessary both for promoting innovation and investment in Internet technology, and for protection of citizens' fundamental rights, including the right to a private life and freedom of expression.

Imposing liability on Internet intermediaries for the actions of third parties on their networks and platforms provides the opposite incentives. It will encourage Internet intermediaries to

[21] For a comparison on US and Canadian system, see http://www.entertainmentmedialawsignal.com/2012/06/articles/copyright/online-infringement-canadian-notice-and-notice-vs-us-notice-and-takedown/

take overbroad action to reduce their exposure to potential liability, which will have detrimental consequences for citizens' fundamental rights and future Internet innovation. Internet intermediaries may be forced by fear of liability to monitor or surveil all communications passing through their networks and platforms, or to design their technologies to restrict their users from uploading certain sorts of content. This, in turn, would limit citizens' freedom of expression and violate their privacy.

We do not recommend that governments deputize Internet Intermediaries to enforce public policy objectives. By forcing intermediaries to become much more than service providers, many of these proposals attempt to take the law out of the hands of courts and judges. ISPs are not well equipped to make these decisions, and these proposals lack the due process rights that are so critical in the courtroom.

Nevertheless, to the extent that governments wish to condition the safe harbors on the ISPs actions, the intermediaries must abide by the due process standards that apply to governments. At a minimum, this includes:

- Transparency,
- Accountability,
- Accuracy,
- Precisely targeted measures that don't cause collateral damage,
- A timely and affordable means of redress, and
- Fairness and proportionality of cost distribution.

These six points are simply an attempt to mitigate the impacts of policies that inherently have chilling effects on freedom of expression. The most appropriate role for Internet intermediaries is limited to forwarding notices of alleged infringement to their customers, and then allowing the judicial system to determine the subsequent steps. This includes protecting the identity of the user and providing for claims against abuse and misrepresentations.

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