

# Online Intermediaries as Copyright Cops: Is “Three Strikes” Dying?

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# Odd events in the copyright wars : Rise of the copybots

RANT

## How copyright enforcement robots killed the Hugo Awards [UPDATED FURTHER]

Annalee Newitz

Last night, robots shut down the live broadcast of one of science fiction's most prestigious award ceremonies. No, you're not reading a science fiction story. In the middle of the annual Hugo Awards event at Worldcon, which thousands of people tuned into via video streaming service Ustream, the feed cut off — just as Neil Gaiman was giving an acceptance speech for his *Doctor Who* script, "The Doctor's Wife." Where Gaiman's face had been were the words, "Worldcon banned due to copyright infringement." What the hell?

Jumping onto Twitter, people who had been watching the livestream began asking what was going on. How could an award ceremony have anything to do with copyright infringement?

SEP 3, 2012 10:25 AM

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Published on 5 Jun 2012 by NASATElevision

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## NASA LANDS CAR-SIZE ROVER BESIDE MARTIAN MOUNTAIN

NASATElevision



This video contains content from Scripps Local News, who has blocked it on copyright grounds. Sorry about that.

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MOTHER BOARD

YouTube down under DMCA notice from Scripps News Service  
See also : Dancing Baby case (*EFF v Universal*)

# Google's bumper NTD postbag

Google regularly receives requests from [copyright owners](#) and [reporting organizations](#) that represent them to remove search results that link to material that allegedly infringes copyrights. Each request names specific URLs to be removed, and we list the domain portions of URLs requested to be removed under [specified domains](#).

## URLs requested to be removed from Search per week



This data consists of the copyright removal notices received for Search since 2011, with **some omissions**

[What's not included?](#)

## Copyright removal requests received for Search in the past month

<b>7,581,550</b>	URLs Requested to be Removed
<b>30,804</b>	Specified Domains
<b>2,228</b>	Copyright Owners
<b>1,444</b>	Reporting Organizations

“In the past month alone, we received about 1.2 million requests made on behalf of more than 1,000 copyright owners to remove search results. These requests targeted some 24,000 different websites.”

# How did we get here?

*It's the economy stupid!*

- Online intermediaries (OIs) eg ISPs, hosts play a vital role in Internet economy in providing access to, hosting and distributing content.
- Newer intermediaries providing new functionality eg search, aggregation, social networking, distribution of legitimate © and user-generated content, also have key roles

Meanwhile in another part of the economy..

- *The copyright and P2P wars* and the content industry's search for solutions
- What role – if any - should OIs have here? Private bodies.
- In particular should they be compelled to take part in imposing sanctions on alleged infringers (“graduated response”)?
- Do we need or want OIs to become copyright cops?
- If so, what are the implications for society and the e-economy?

# The Millennium Compromise

## The original policy issues c 96-2000

- OIs – originally ISPs - seen as the natural gatekeepers to the Internet
- Seen as most effective actors to control distribution of illegal and harmful content (obscenity and defamatory content as well as copyright)

## BUT

- Lack of effective *practical* and *legal* control – volume of material, dynamic nature
- *Inequity* - “shooting the messenger”
- Consequences of *unlimited liability* – effect on fledgling online industry and digital society?

**CONSEQUENCE:** development of global safe harbors or immunity regimes c 1998-2000 on

# The rise of notice and take down

- **US DMCA** – (copyright only) - Divides OIs into mere conduits, hosts, caching intermediaries, and “linking tools” eg search engines.
- “Safe harbor” given from liability to hosts if they took down expediently on notice (NTD)
- Seen as good balance between interests of OIs, rightsholders and public interest
- Concerns about chilling effect of NTD on free speech (cf CDA – total immunity re publication torts)
- **EC E-Commerce Directive, arts 12-15**
- “Horizontal effect” - not just ( c ) content – no “linking” harbour
- NTD regime re hosting. Liability can arise on “*actual knowledge*” of “illegal activity or information” OR “*awareness of facts and circumstances*”
- Art 15 – no general obligation to monitor to be placed on ISSPs

# NTD fail : The P2P wars

- Notice and take down fails utterly, as the chokepoints - torrent sites etc - don't host the infringing files – users do
  - Shutting down Napster caused the rise of decentralised P2P  
Pyrrhic victory of *Grokster* – shutting it down stopped nothing
  - Exacerbated further by BitTorrent – open protocol – and ease of server / data portability
  - *So eg Pirate Bay* (torrent site) lost in Swedish courts, 2009, but has continued to function mostly since (next : the Cloud!  
Cf MegaUpload)
- => New strategies: Sue users; sue torrent sites; sue ISPs??
- -> mixed results in courts and elsewhere - > the rise of graduated response laws



# Suing users

- Unpopular with customers; apparent errors, disproportionate penal damages. Deterrent? Too random.
- RIAA said in 2008 would end volume litigation
- In EU/UK, also issues of how to obtain identity of filesharer from ISP
- IP rights need balanced with privacy (DP) rights - *Promusicae, Bonnier* in ECJ
- Time-consuming , costly and “speculative extortion”? – see recent UK ACS, *Goldeneye v Telefonica* cases
- Pre-judging damages in threatening letters more or less banned

# Sue torrent sites and/or ISPs

- Back to ISPs as “chokepoints”
- Aim: sue **ISPs** as contributing to, authorising, etc filesharing and **then** get injunction ordering them to block access to torrent etc sites
- Some big EU successes – eg Italian Supreme Court ordered Pirate bay blocked by all Italian ISPs; but cf rejected by Norway in Telenor case, 2009; Irish Courts decided no power to order blocking, *EMI v UPC* 2010; *Roadshow v iiNet* – ISP found not liable in Australia
- Content lobby looking to move from post factum NTD to *ex ante* filtering or blocking

# How to get from NTD to *ex ante* filtering?

- Note in both DMCA and EU even where safe harbor offered by NTD, injunctive relief remained available (art 14(2) ECD)
- -> Injunctions become site of attempts to secure proactive filtering or blocking of websites in recent ECJ cases, notwithstanding art 15
- Controversy over nature of “knowledge” and “awareness” esp re likes of YouTube, eBay – less “innocent” than traditional ISPs at time of Millennium Compromise
- *Google France C-236-8/08; L’Oreal v eBay C-324/09*
- *SABAM v Scarlet C-70/10 9 and SABAM v Netlog C 360/10*
- In all 4 ECJ resists *ex ante* blanket filtering, monitoring & blocking
- Complete confusion at national level - see Communication 2012 as part of ECD review/EC Digital Agenda – follow up questionnaire.
- Will we see changes to ECD to please © lobby where ECJ has resisted?

# “Graduated response”

- Seeking ISP co-operation (by legislation, by court order, by voluntary co-operation) in some or all of–
  - *Identifying* users from IP addresses harvested by rightsholders
  - Passing on allegations of infringement (warnings, strikes) to identified filesharers (“*notice and notice*”)
  - Imposing *sanctions* on identified filesharers, usually on some threshold eg “three strikes” (Fr)
  - Sanctions can include traffic slowing, restricted access to certain sites, monitoring (DPI), *disconnection* (also fines in court)
  - ISPs may also be asked to *block access* for all to certain sites eg torrent download sites, “cyber-lockers” = hosts of infringing content often in non-compliant jurisdictions
- Imposed by law, France (HADOPI), UK (Digital Economy Act) , NZ, S Korea; voluntary schemes Ireland, US (“six strikes”)

# “Graduated response” - advantages

- Alleged that all other approaches have failed
- Speedy and cheap for © industries compared to suing (some) users in court (esp in EU given DPD constraints)
- Better PR for © industries than suing own customers
- Deterrent, as more chance of “being caught” than in volume litigation
- Educational, as user typically gets several warnings before sanction
- Evasion possible, but doesn’t need to stop all filesharing – just enough (see DEA judicial review)

# “Graduated response” – legal problems

- *Due process* : disconnection/sanctions without *prior* court process/independent oversight. HADOPI 2 demands supervision by judge; UK DEA does not.
- *Error*: harvesting IP addresses, and matching them to ISP subscribers both very error prone (mobile networks almost impossible?)
- “*Collective punishment*” : IP address only identifies *subscriber*, not actual filesharer – should parent be liable for kids (or kids for parents??). Visitors?
- Liability of domestic users for *open wi fi* ? What “reasonable steps” can be demanded eg of the old?
- *Public open wi fi* - Libraries, universities, community? Also businesses eg hotels, cafes using open wi fi as draw. Open cities. Loss of social utility.

# “Graduated response” – human rights problems

## *Fundamental rights and graduated response*

- *Privacy* - Monitoring of all traffic to/from users, “Deep packet inspection” (DPI) = blanket surveillance, lawful under EU DP law? Refused in *Sabam v Scarlet*.
- *Freedom of expression/information* – Right to access Net? For education/work/e-government? Depends if sanction involves blacklist for *all* ISPs?
  - *Website blocking*: especially worrying; threshold of evidence required ?, “dual purpose” sites like YouTube, cloud sites, etc.
- General issue of proportionality.
- Most these arguments (and more) rejected by UK DEA judicial review court – but would ECJ? (no ref allowed from appeal)

# My WIPO suggestions (May 2011)

- *Legislative* rather than *voluntary* schemes for graduated response – transparency, debate , human rights oversight
- Harmonised global rules (CoE?) on human rts safeguards to be observed in any GR regime imposed by law
- Impose “notice and notice” *first* before proceeding to “notice(s) and disconnection” etc
- Website and content blocking and blanket monitoring in particular should both be subject to stringent scrutiny *as presumptively in breach of fundamental freedoms*
- **Try alternative business models first to restore content industries!**



# The fall of graduated response: *Costs too much*



1,000,000 emails sent - 99,000 registered letters

134 cases examined for prosecution

Reported cost of 12 million Euros

1 fine, 10 threatened account disconnections (1 wrong guy)

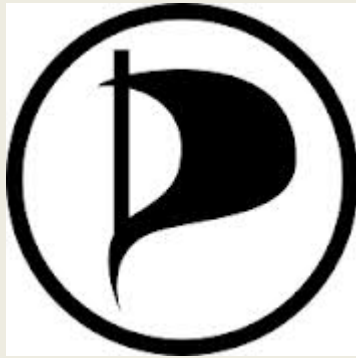
French culture minister Aurélie Filippetti: *“unwieldy, uneconomic and ultimately ineffective”*

# The fall of graduated response: *doesn't work*

*Effectiveness* -: jury still out

- Cf French HADOPI report – 1 m emails for one fine/ 1 disconnection - though better value if look at it as “education” not punishment? Most infringers stop at 1 letter, and downloading is falling
- NZ – RIANZ claim 3 strikes halved downloading Aug-Sept 11 – but it stayed same for months thereafter
- Extremely *avoidable* – in IViR study  $\frac{3}{4}$  of downloaders claimed unaffected by blocking of Pirate Bay in NL – proxies etc

# The fall of graduated response: *public hatred*



# The fall of graduated response: *Isn't needed*

- October 2012 – IViR study for Netherlands 2012 - downloading *illegally* came in 3<sup>rd</sup> for acquisition of content, after physical copies and *legal digital acquisition – mostly streaming for free*
  - Not apparently connected to sanctions/legal responses –cf Pirate Bay qu but because *legal alternatives available*
  - “Alternate business models” – lawful online streaming services coming of age – eg YT, Spotify, Pandora, last.fm
  - Streaming has overtaken (*legal*) downloading in leading markets in 2012 (US, UK, Sweden, Korea) rest likely to follow; US 4 x more streaming than downloading
  - Anecdotal evidence of youth streaming rather than *illegal* downloading too - – mobile users, want music everywhere
- > Graduated response becomes irrelevant, unpopular, ineffective, and expensive.

# So why does © industry still want graduated response?

- *Multi country licensing , unlimited use scares the content industry* – cf the delay in licensing properties to iTunes
  - EU – 27 country markets – “Simplifying panEuropean licensing” is top item in Digital Agenda score card
  - UK : Hargreaves Digital Exchange ?
- *Making money. From free to freemium?*
  - Do online streaming services simply shift problem of getting paid from content industry to intermediaries?
  - Spotify does well in Sweden, less so elsewhere
  - .. But 80% of UK users said would pay market rate for monthly legal P2P. IViR study replicates in 2012 for c 2/3 users.
  - Revenue sharing – YT “tolerated use” – bundling -  
Kickstarter
- Leap of faith needed – or compulsory licensing??