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Take Down Or Stay Down: Digital Piracy And Trade Negotiation

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As the renegotiation of the North American Free Trade Agreement reaches a critical juncture, difficult trade-offs are being considered. An area of discussion that involves exceptionally difficult trade-offs concerns measures to combat digital piracy. The difficulties arise because there are legitimate interests and objectives on all sides. In this article, I will discuss the fault line between the policies advocated by internet industry/consumer technology groups and those advocated by content industries. My goal is simply to convince the reader that there is a need for creative policymaking to bridge the gaps between competing approaches.

Digital piracy is reportedly on the move. According to a representative of the Motion Picture Association of America, "Online piracy is the most significant threat to the [U.S. film] industry generally and [its] exports more significantly." A Frontier Economics report estimated that digital piracy in film alone cost content producers a total of $160 billion in 2015. The problem goes beyond film to such industries as music, gaming and book publishing, although the growing popularity of commercial music-streaming platforms has moderated the issue for the music industry to some extent.

Law enforcement agencies, of course, have a key role to play in combating this form of high-tech theft, but they cannot do the job alone. Private entities must also be, and have been, part of the effort. Internet intermediaries in particular — including internet service providers, search engines, hosting services, social networks, online forums and online platforms — need to continue to play a constructive role in addressing the problem.

Back when the internet was in its infancy, in 1998, Congress passed the Digital Millennium Copyright Act, which established what is known as "notice-and-takedown." Under the DMCA, if someone uploads a work to an internet platform, the owner of the work may send a notice of copyright infringement to an internet intermediary, pointing to a specific violation and identifying the Internet address of the allegedly infringing material. Once the intermediary receives the notice, it must take down the material and inform the entity that posted the material of its action. If the entity that posted the material believes it has a legal right not to be subject to takedown, it may file a counter-notification. Based on the counter-notification, the status quo ante is restored unless the intermediary is ordered by a court to remove the material from the internet. By following these and other "safe harbor" procedures under the DMCA, the intermediary is shielded from copyright infringement liability for unknowingly displaying,

transmitting or storing copyright-infringing content.

Internet industry/consumer technology groups tend to favor the incorporation of the DMCA safe harbors into trade agreements like NAFTA. They believe the DMCA has worked well and has enabled the internet to grow while, at the same time, protecting the rights of content producers. For example, hundreds of millions of takedown requests are sent to Google each year, and they are processed very quickly. Technology groups maintain that the imposition of regulatory measures aimed at increasing the responsibility and liability of intermediaries would impede digital trade.

Content industries, on the other hand, tend to favor what is known as "notice and stay-down," which requires a more proactive approach from the intermediary. Under this alternative, when the intermediary receives a notice of copyright infringement, it must search out and delete all copies of the material in question and block it from being uploaded again. Content industries believe this is necessary to address the fact that copyright-infringing material can be transferred easily from website to website, thereby putting the content producer in the position of trying to "whack-a-mole" and being forever a step behind the infringer. A report by the EU Parliament in 2015 identified this as a significant problem, and "notice and stay-down" would, by imposing a greater enforcement requirement on the intermediary, certainly address it. The advocates of this approach also tend to support stronger measures on the liability of intermediaries for copyright infringement on the internet, although they have not as yet coalesced around any particular liability proposal.

Content industries are looking to the NAFTA negotiations to impart momentum to their cause, because, in their view, the Trans-Pacific Partnership Agreement (also known as "TPP"), which the United States recently pulled away from, did not fully acknowledge and confront the scope of the problem. They tend not to favor the incorporation of the DMCA safe harbors into trade agreements.

While it is certainly true that "notice and stay-down" would help to reduce the copyright infringement problem, it would also have an impact in some situations where there is, and will be, no actionable infringement. Person A may be an infringer with respect to a particular work while Person B may have a valid defense to infringement of that same work, but a stay-down action following a complaint about Person A's online activities would apply both to Person A and Person B. Moreover, "notice and stay-down" may impose on intermediaries the cost of acquiring new technology — technology to enable them to scrub their websites of infringing material — which only the most profitable of them would be able to absorb.

It is not a simple matter to identify the best policy when there are valid, competing concerns that support different approaches, and each approach has an unquantified, and virtually unquantifiable, error rate associated with it. In other words, it seems to be a choice between under-enforcement and over-enforcement of copyright protection on the internet. Is that all we can say? Must we simply throw up our hands and support whichever policy resonates more with our personal interests and preferences?

Perhaps this is a situation that calls on the government to smooth out the edges of the policy dispute by becoming more proactive itself. What if the government got more into the effort to facilitate compliance by private parties *after* the initial "notice and takedown"? There is a wide range of activities that could be considered, including supplying infringement-locating technology to smaller intermediaries, making information about "notice and takedown" actions easier to access, and perhaps even providing some kind of expedited forum for determining whether an intermediary needs to take action beyond the initial takedown.

A robust, free-wheeling internet is a development of which all of the NAFTA countries can be proud. Indeed, all of our trading partners around the world contribute to, and benefit from, this information thoroughfare. At the same time, however, we need to be more cognizant of the magnitude of the copyright infringement problem on the internet, and we need to craft new methods for confronting the problem that do not unduly impede digital trade.

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