

EUCD: the Takedown Clause

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Abstract

Article 8(3) of the European Copyright Directive further weakens the legal position of Internet users and Internet Service Providers. Internet users' freedom of speech is threatened by copyright holders' new powers to compel Service Providers to "take down" users' webpages, which the Service Provider might do even when there is no copyright infringement, to avoid the cost of a lawsuit brought by the copyright holder.

Introduction

The European Copyright Directive (Directive 2001/29/EC, hereinafter referred to as the "EUCD") provides for new liability for Internet Service Providers ("ISPs"), under Article 8(3), which reads:

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.

Implementation¹ of these provisions is compulsory for EU Member States, and will adversely affect freedom of speech and the right to a fair trial. It is not clear that any conformant implementation of Article 8(3) (the "Takedown Clause"²) can avoid contravening the European Convention on Human Rights; in addition to impinging on the rights of the individual, the clause constitutes a tax on Internet usage by law-abiding citizens.

Background

Copyright is a legal concession granted by the State allowing a private entity to exclude others from particular uses of a work; in particular it allows the creator (or his agent), known as the "rightholder" to control the reproduction and distribution of the work in question. Such activities are generally subject to the authorisation of the rightholder, and contraventions are actionable in the courts as "copyright infringement".

The widespread availability of convenient high bandwidth Internet access (as opposed to availability of Internet access *per se*) has transformed the environment in which unauthorised

¹The UK Patent Office plans to introduce implementing legislation for the EUCD in the form of a statutory instrument. See <http://www.patent.gov.uk/copy/notices/update.htm>.

²The Takedown Clause derives its name from the familiar name of the same provision in the United States' Digital Millennium Copyright Act 1998

sharing of copyrighted works takes place³. Industrial-scale but nevertheless non-commercial unauthorised sharing between loosely collaborating groups of millions of individuals took place across the Internet throughout 2000 and 2001, through systems such as Napster. Attempts to stamp out these practices⁴ have succeeded in driving them underground, increasing the cost of further policing action. Such efforts have also encouraged even greater decentralisation of the unauthorised activity.

As a right to sue a particular party for his act of infringement, copyright is losing its efficacy and value due to the financial cost of pursuing a colossal number of individuals few of whom may have much cash, let alone possess the profits of a traditional industrial-scale piracy operation. There is a cost associated with each court action a rightholder might bring; decentralised large-scale infringement renders most if not all infringers unworthy of pursuit by means of traditional litigation.

Copyright, as a concept, is instead being exploited to new ends, as the justification for further protection for the rightholder. The Takedown Clause confers a new right based on copyright. It allows the rightholder take advantage of economies of scale, by pursuing a lesser number of richer defendants, on the basis of copyright infringement by third parties using their services.

A typical scenario is one in which an organisation (such as an ISP) provides Internet hosting services to another party. This provider will own and maintain a computer permanently connected to the Internet, and furnish the other party with a username and password whereby he may access the computer and modify the subset of its contents allocated to him, which may be accessible in read-only form to the generality of Internet users. The provider will retain the ability to modify or shut down any website created by the customer. The arrangements will normally be governed a contract of sale or employment. By some mechanism, a rightholder discovers that the customer is distributing material to which he objects, and that this is being done through a particular ISP. The rightholder then notifies the ISP that he wants the ISP to “take down” the content, i.e., render it inaccessible to the rest of the Internet.

Unfairness of the Takedown Clause

Article 8(3), the Takedown Clause, allows the rightholder to seek an injunction against the ISP if the ISP does not comply with its request. The Takedown Clause provides no guarantees that the customer indirectly accused of copyright infringement will have his case heard, let alone by an unbiased party, in a court of law, as a matter of public record—his case will be determined either by the ISP complying with the takedown request or in a court action between the ISP and the rightholder.

The Takedown Clause affords a rightholder a set of significant and unfair procedural advantages in a dispute with an alleged copyright infringer who is operating through an intermediary such as the customer of an Internet Service Provider, as outlined above (the term “alleged infringer” is used herein to refer specifically to the customer, though in some sense it could be claimed that the rightholder is alleging infringement on the part of the intermediary; the term “defendant” is avoided entirely, for similar reasons of ambiguity). The rightholder may be able to prevail in his aim of having the offending material removed from the Internet without even having to fight a court action. He may be able to thwart several infringers with a single

³particularly of *digital* works, which have the property that the marginal cost of reproduction is near-zero

⁴These practices, under United States law, were not even necessarily illegal in all cases

action if they are all customers of the same ISP, and were the case to reach a court, may recover much more in damages than he could from the actual infringers⁵.

This may seem to be an excellent remedy for the problems faced by the rightholder on the Internet, until one considers the following small matter: the rightholder may succeed in contriving to avoid fighting a court action *which he would have had no chance of winning*, and still achieve the desired outcome. This outcome may effectively involve silencing (at least temporarily) some individual or group. Such silencing may in fact be the rightholder's sole motivation (as opposed to enforcing his copyright)⁶ The standardised machinery for notification and takedown under the United States' DMCA⁷ is in practice also used for suppressing criticism, monopoly maintenance⁸, protection of intellectual property other than copyright such as trade secrets⁹ or just plain old public relations expediency.

By virtue of the Takedown Clause, the rightholder has the option of two venues other than a courtroom in which rightholder and customer face each other directly: the rightholder may complain indirectly via the ISP (backed by the threat of legal action against the ISP itself), and if not satisfied by the outcome naturally has recourse to carrying out this threat¹⁰. The Directive does not require that a rightholder complaining of a copyright infringement exhaust all possible legal avenues of redress as against the alleged infringer before proceeding (or threatening to proceed) against the intermediary ISP¹¹.

In neither of these additional venues is the customer guaranteed representation. Nor can we expect the ISP, acting under threat of a lawsuit, to behave impartially when weighing up whether to accede to the rightholder's demands. We can expect the opposite; it is a noble and rare spirit indeed who enters the courtroom with nothing to gain but victory on behalf of another. Stepping back to the *real* world, a customer whose case even finds its way to the ISP's corporate affairs or legal personnel is lucky. Not every intermediary is an Internet Service Provider company, steeped in the free-wheeling ways of the Internet; the decision as to whether a customer's website is removed from the Internet for alleged copyright infringement might be made summarily by some other functionary at the intermediary, for instance an educational administrator or a member of the intermediary's technical staff.

The ISP is likely to have a set of interests and values different from those of the alleged infringer, particularly as regards willness to conduct a court action in defence of the interests of the alleged infringer. The ISP may be unwilling to fight the action even if clear from the facts that the complainant would have no chance in the courts. No rational ISP would fight a court action itself, whatever the facts, when it would be cheaper merely to comply with the complainant's demands to take action against the alleged infringer.

The situation outlined above presents the complainant with a significant procedural advan-

⁵Furthermore, there is the crucial benefit of only having to pay for a single court action

⁶e.g., parody is a permitted defence to copyright infringement, and a rightholder might well want a non-copyright-infringing parody of one of his works removed from the Internet, especially if it made embarrassing revelations about his conduct.

⁷Digital Millennium Copyright Act 1998

⁸Microsoft Corporation threatened to sue the operators of the Slashdot website for permitting Slashdot contributors to republish and discuss a Microsoft-authored document detailing the company's technological efforts towards proprietarisation and subsequent monopolisation of a currently open technological interoperability standard.

⁹the @Home Internet Service Provider succeeded in having removed from other ISPs' systems an internal document detailing its dubious customer service policies which had been published by a disgruntled customer

¹⁰*stricto sensu* the Takedown Clause does not provide access to these two venues; they are both currently available, however the rightholder's position in each is now given firm legal foundations

¹¹Tantalisingly, the Directive doesn't require the converse, either.

tage. Merely by threatening to sue the ISP on the pretext of contributory copyright infringement, the complainant may be able to secure the cessation of the alleged infringer's conduct, even if the alleged infringer were willing and able to fight and win a court action brought against himself. Instead, the alleged infringer's ISP is called upon to exert a quasi-judicial function (determining for itself how to apply copyright law to the actions of the allegedly infringing customer).

The freedom of expression of an ISP's customers therefore becomes contingent on the ISP's willingness and ability to conduct court actions in their defence. If any pretext of copyright infringement on the part of a rightholder's online detractors can be found on an ISP's server, the rightholder is likely to be able to get the whole site taken down by means of a simple phonecall. The author himself managed to have an allegedly infringing webpage removed from an ISP's server in the United States by such means, long before the EUCD was enacted. The person who had placed the material online was not informed, consulted or given a chance to object or argue that the author's claims were invalid as a matter of law (which in retrospect they arguably were).

Much hinges on the relative bargaining strengths of the customer and the ISP. A rich customer is more likely to be able to secure a contractual obligation that the ISP will not cave in to pressure from a rightholder to silence him without a fight in court.

Takedown as Tax

The Takedown Clause imposes costs on ISPs and their customers, who will indirectly bear these costs in the form of higher subscription charges. There is for the ISP the administrative cost of dealing with liability for the actions of its customers, over whose activities the ISP has little control before the fact. A rightholder may be able to recover more money in damages from the ISP than from the customer, thus considered jointly the ISP and the customer are worse off. The cost of communicating one's views to the public are increased by the rightholder's new avenue of attack through the ISP. Customers must undertake not merely to ensure that their online material not infringe copyright; they must ensure that it cannot be easily misrepresented as so doing.

These costs are to be passed on to and borne by all customers of ISPs, irrespective of whether they are part of the minority involved in copyright infringement, and thus constitute a tax on Internet use for the benefit of the rightholder.

Questions

One must question why additional protection for rightholders is necessary¹². The effect of such additional protection, in practical terms, is to give a complainant who can assert copyright infringement a more intimidating legal argument to present during the initial contact with the ISP. In legal terms, the rightholder is placed in a much stronger position in the event that the ISP *should* decide to defend its customer in the courts.

Many ISPs (if not the generality of them) are prepared to delete customers' websites the moment a complaint is received. The contractual arrangements they have with the customer will normally give them free reign to do this, and absent any clear legal protection from

¹²Other provisions of the EUCD further increase the protection on top of the State-granted monopoly which is copyright

actions brought by third parties for the actions of their customer, there are very good reasons for attempting to impose such arrangements. The very act of dealing with a customer may consume substantial resources for an ISP¹³. The potential for injustice, where material lawfully distributed through the ISP by the customer is deleted on the receipt of an unwarranted complaint, is great, and arises from the unequal bargaining powers of customer and ISP. Where the customer has no redress against the ISP for such actions, there would seem to be little need for legislation increasing the pressure on the ISP, however this should not be taken as an argument that it does not matter whether the Takedown Clause is implemented. The context in which greater pressure on the ISP will be most significant is that of infringement by a well-heeled customer who has been able to contractually oblige the ISP not to interfere with his websites or activities.

Further, does the restriction on the customer's freedom of speech and inability to get his case heard contravene the European Convention on Human Rights?

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹⁴

If the question of whether an individual may be restrained from publishing lawful material on the Internet is a question of his civil rights, should the State-granted privileges of copyright and takedown be permitted to move the determination of this question out of the courtroom?

Ultimately, there is a balance to be struck between the needs of rightholders to prevent massive piracy and the right of an individual to communicate his views to the public. Technological developments may have rendered too expensive the just resolution of conflicts centred on this opposition by the traditional court process. What is the public policy basis for granting the advantage to one side (in the case of Article 8(3), the rightholder) instead of the other?

Implementation in UK law

The rightholder is being granted a valuable legal privilege. The Directive provides for no safeguards against the abuse of this privilege, but does not preclude their imposition. ISPs and Internet users are not being compensated for the additional costs they stand to bear.

The system of public justice in this area could be replaced by private ordering. The operation of the takedown system could disappear beneath a shroud of commercial confidentiality, and be carried out both partially and undirected by the public interest copyright is supposed to serve. Safeguards should aim to preserve the public ordering of justice and speech¹⁵, as well as fairness and equality before the Law.

Ideally, in the case of individual identifiable infringers, the rightholder should be required to exhaust all legal avenues against the alleged infringer before proceeding against the ISP. This leaves the Takedown Clause as applying in practice only to general infringement by an ISP's (or group of ISP's) customers¹⁶. The extent to which the rightholder needs or *deserves*

¹³This is not to say, however, that a business model in which are something public policy should support or accommodate

¹⁴European Convention on Human Rights, A6(1)

¹⁵public ordering of speech, though often undesirable in and of itself, being preferable to private ordering thereof

¹⁶e.g., actions brought for general infringement by a telecommunications provider "permitting" music to be played across its network to people waiting on the telephone, or for having thousands of Napster users amongst

all of the extra protection of a broad reading of Articles 6 and 8 is outside the scope of this paper. It would be perverse for a the rightholder to lose an infringement case against the customer, only to succeed in having the offending but legal content removed from the Internet by a quick phonecall to the ISP (who might be unwilling even to fight a court action it was likely to win). Nor should the rightholder be permitted a second bite at the cherry, suing the ISP in the hope that the it will not argue the customer's case as successfully as the customer did.

The rightholder must be prevented from escaping from the public record when infringement is contested, as would be the case currently. The rightholder should be obliged to inform the alleged infringer (or cause him to be informed¹⁷) of actions being pursued against him through the person of his ISP.

Leave from the Attorney General should be required to bring an action under the Takedown Clause, which otherwise allows rightholders to have removed from the Internet any material capable of being misconstrued as copyright-infringing. Where the real motivation is anti-competitive or public relations (etc.), rather than copyright protection, a requirement for public authority approval will have a powerful dissuasive effect on abuse.

The customer ought to be entitled to join the ISP in any case brought against it, and to redress for wrongful interference with his activities; such entitlements ought not to be alienable by contract.

Conclusion

The Takedown Clause restricts the freedom of expression of Internet users, making it contingent on their wealth. The mechanisms by which Internet users' behaviour is to be regulated are to be administered by private companies exercising a quasijudicial function under the threat of expensive legal action, potentially from both the rightholder and the customer.

The rightholder is to receive an often unneeded and unjustified helping hand against opponents and critics without any safeguards against abuse. A two-tier Internet is threatened, where poorer users no longer have the parity they currently enjoy with the richest of media companies. Copyright is being returned to its roots in censorship and monopoly protection for the established press.

The UK Government should undertake an implementation which preserves to as great an extent as permissible the ability of members of the public accused of copyright infringement to have their case dealt with justly and publicly. In future legislative activity, the Takedown Clause should be reversed: intermediaries who do not attempt to control what information passes through their systems ought to be protected from those seeking redress against the actions of third parties¹⁸; they should be permitted to function in a manner akin to "common carriers" such as telephone operators and the postal service.

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its customer base, whom it would be uneconomical to pursue individually. See *Telstra Corporation Limited v Australasian Performing Right Association Limited*, (1997) 191 CLR 140.

¹⁷There are privacy implications to allowing the rightholder to know the identity of the customer.

¹⁸A situation similar to the Takedown Clause exists as a result of the Defamation Act 1996

and the rest of the Midgley family.