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From: Matt Perryman S 9(2)(a)
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To: trademarks
Subject: Submission on Enforcement in the Digital Environment

Submission on Enforcement in the Digital Environment

I've been using the Internet for quite a long time. Over the last 20 years, I've seen trends come and go, I've seen technologies change and improve, and I've seen our entire world transformed by this new medium. The Internet has allowed an unprecedented degree of communication for people around the world, and it has become an integral part of our daily lives.

One of the key principles, a principle that has allowed this to take place at all, is the idea of an open and free Internet. No one owns the Internet. No one regulates it, no one controls what can or cannot be said, heard, or seen. No one tells you what you can or cannot do online.

This is troublesome to certain established interests, who rely on artificially-enforced scarcity of information to maintain the profitability of their business models. The Internet, with high-bandwidth connections and its principles of free and open communications, all but eliminates that scarcity. It has been argued that these industries, namely the so-called creative or content industries, are losing revenues as a direct result of file-sharing activities enabled by the open and unregulated Internet, and consequently we must enable legal remedies to stop this criminal action.

These premises are asserted continually; and yet, there is rarely any critical analysis of these premises to determine if they are correct. I submit the following points:

1. The content industries have not actually lost revenues at all, let alone due to online file-sharing activity. In fact, both the movie and music industries have shown positive growth over the last few years, up to and including 2009 - a recession year. The fact that physical sales of CDs have dropped is true - and an utterly dishonest statistic when you consider that iTunes has just celebrated its one-billionth download.

References: http://www.guardian.co.uk/technology/blog/2010/mar/12/demise-music-industry-facts
http://torrentfreak.com/damned-pirates-hollywood-sets-10-billion-box-office-record-091211

2. The content industries rely on the unproven assumption that one downloaded file is equal to one lost sale, a premise that disintegrates under even a cursory examination. Indeed, the music industry's own statistics show that file-sharers are the most likely to buy music.

Reference: http://torrentfreak.com/pirates-are-the-music-industrys-most-valuable-customers-100122

Numerous creative innovators - from musicians to authors - have exploited free downloads to their advantage and have still been able to maintain a profitable business, showing that not only is file-sharing not a net harm, but it can also be used to positive ends.

Reference: "Content" by Cory Doctorow
http://craphound.com/content/download/

3. Copyright laws are fundamentally broken in the first place, and exist only at the behest of content industries. This leads us to a moral tautology: file-sharing (or "piracy") is wrong because it's illegal - and it's only illegal because the content industries have lobbied to make it so. Real statistics on actual

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authors and musicians have shown only a negligible increase in revenues due to extended copyright laws; in other words, existing copyright statutes, and the trend towards more restrictive copyright laws, is a pure rent-seeking activity that benefits a select few at the expense of society at large.

Reference: "Against Intellectual Monopoly" by Boldrin & Levine
http://levine.sscnet.ucla.edu/general/intellectual/againstfinal.htm

As further proof, intellectual property associations, representing the movie and music industries among others, have been lobbying against the use of Open Source software in developing nations, claiming that it restricts their ability to do business and equating it with piracy.

While these industries may be able to dupe the unsuspecting public by equating file-sharing with theft, this activity lays bare their true intentions. Equating open source software to piracy is not only dishonest and immoral, but it clearly demonstrates that these groups are not seeking anything but maintenance of their business models at the behest of the world's governments.

Reference: http://arstechnica.com/open-source/news/2010/02/big-content-condemns-foreign-governments-that-endorse-foss.ars

4. It's important to separate the content industries and trade associations from the actual creators of content. The industries themselves are distributors and promoters, and we must be very clear on this point: ***these industries create nothing themselves***. They have built their business model around distribution, and more importantly, on the long-term ownership of copyrighted works. Emerging Internet technologies have made them superfluous.

To paraphrase Boldrin & Levine, if these companies did not already exist today, no one would be demanding their creation. They no longer contribute or promote innovation as they could have in the past.

It's widely known that musicians make the majority of their money from live performances and merchandising. According to numerous artists within the industry, once all costs are factored in, an artist only stands to make a relative pittance on CD sales.

Reference: http://www.salon.com/technology/feature/2000/06/14/love/

If piracy is in fact "killing music", then it's only killing the distributors - and in light of digital distribution technologies, this is irrelevant.

Boldrin & Levine make the point that this copyright monopoly reduces both innovation and the availability of older works, which may remain in copyright and yet stay out of print because it's not competitive for the copyright owner to produce said work. This does not increase innovation nor benefit society by any stretch of imagination.

5. In light of the above points, it is blatantly obvious that the ACTA treaty is nothing more than an initiative pushed by content industries and their interest groups to maintain their effective monopolies on intellectual properties and copyrighted works. Indeed, the USTR has effectively admitted that ACTA is an attempt at US policy-laundering, at the behest of the creative industries, and the EU has agreed.

References: http://www.wired.com/threatlevel/2009/12/feds-fear-acta-scrutiny/
http://www.wired.com/threatlevel/2009/11/america-catering-to-hollywood/
http://www.wired.com/threatlevel/2009/11/policy-laundering

This is quite simply unacceptable in a democratic society.

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If these industries cannot offer a competitive product, in terms of price and features, then they have no business operating. We as a society are not obliged to maintain their way of doing business - certainly not to the exclusion of our civil rights.

Quite the contrary, they seek to criminalize and broadly demonize the Internet and related technologies, with the ultimate outcome being the destruction of the openness and free exchange of ideas that has made the Internet what it is. They would have us destroy the greatest boon to free expression of humanity in all of history in order to maintain a failing business model.

Under what circumstances has that become desirable, let alone moral?

I say this to establish an ethical basis for my subsequent responses to the questions raised in the MED's invitation, namely that the threat of piracy is overblown and fundamentally dishonest, and that those entities seeking to strengthen copyright laws are in reality only seeking to maintain their stranglehold on information.

As a producer of creative works, I have not only allowed my works to be shared on peer-to-peer networks, but I have encouraged it. The first book I wrote was intentionally distributed on the infamous website The Pirate Bay, uploaded by myself, as a marketing tool and as a convenient means of dispersing said book. All works I produce are released under Creative Commons licenses, which allow and encourage free distribution. Even works that I may sell in hardcopy format will always be made available absolutely free of charge online. This is a model used with success by other authors such as Cory Doctorow, Charles Stross, Peter Watts, and the entire Baen online library, among countless others.

The reason for this is simple: as a creator, I stand to gain far more by free exposure and widespread visibility than I do by clamping down on my work and hiding it away under archaic copyright laws. Phrased differently, I've adapted to the opportunities provided by the Internet and digital distribution routes, instead of stamping my feet and complaining until someone made laws that enforced my preferred way of doing business. The reality is that a true innovator will find a way to be compensated for his works, and the Internet is the ultimate opportunity for innovation.

At least, provided it remains free and the tools of digital distribution aren't made into tools of criminality.

With respect to the questions raised by the MED:

* ISPs absolutely should be granted a safe harbour, in the exact same way that the postal service is granted a safe harbour for any dangerous goods that it may transport. The carrier is under no compulsion to examine each and every article that it may transport or deliver; that would not only be financially and logistically unwieldy, but it would be a gross violation of privacy.

There's no punchline to that point. ISPs should not be liable for activity on their networks, end of story. It's a cost imposed on the consumers for no tangible benefit; if the owners of intellectual property are so concerned about their losses, then they can foot the bill for enforcement. It's not the onus of the ISPs to enforce their business models - nor is it on the customers to pay for it.

Even disregarding the financial cost and logistical difficulties, such enforcement mandates are no challenge to a technically-savvy user. Such laws will only increase the use of encrypted connections, such as Tor and VPN services, as it's been demonstrated time and again that legislation is always several years behind the technology. The end result will be laws that increase the costs of Internet service, provide a legal tool to discourage free speech and innovation (as with the frivolous use of the DMCA takedown notices in the US), and at the same time provide no effect at all on file-sharing.

That goes a step beyond useless and into regressive.

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* On obtaining the identity of an infringing user, the burden of proof should always be on the rights-holder, and the standard of proof should be set high.

As a reference, I point to http://dmca.cs.washington.edu Readers will note the ease at which the experimenters were able to fool rights-holders by intentionally spoofing their detection methods, resulting in such absurdities as a networked printer being accused of accusation.

Similar gaffes have resulted from the RIAA's now-defunct campaign of lawsuits against individual file-sharers, whereby people that did not even own computers were sued by their legal machine.

Mere accusation is simply not sufficient, as we can see. The rights-holders should absolutely not have a legal means of expediting this process, not so long as that degree of uncertainty remains in their detection methods. Again, the public is not subject to their whims.

* The ACTA treaty should have no say on the circumvention of Technological Protection Measures. As with the above points, the legislation will always be several steps behind the technology; it's not only short-sighted but actively damaging to limit such technologies.

The simple reason is that this is a slippery slope, and again something that can be used for nefarious purposes. You simply cannot outlaw an entire category of software tools without severe curtailment of civil liberties - and that curtailment is not acceptable in a democratic society. The protection of a few monopolists is not a valid reason to levy a punishment against society at large.

In summary, these are my suggestions:

* Privacy and civil rights of individual citizens should be the utmost priority in any discussion of copyright and/or intellectual property reform, taking precedence over any other considerations.

* Efforts to strengthen or otherwise "improve" copyright and IP laws should be rejected categorically, as these efforts only serve the interests of entrenched monopolies, not the public. Stronger copyright and IP laws serve to reduce innovation and reduce the number of available creative works, not increase them.

* ISPs and their consumers should be under no impetus to pro-actively protect the business models of content industries (even if phrased as "protecting the interests of rights-holders"). We didn't ask the people that built our highways to subsidize the manufacturers of horse-drawn buggies.

* Non-commercial file-sharing should not be criminalized, as there is no demonstrable harm that results from this activity. Likewise any penalizing provisions should be rejected.

* Provisions against circumvention of so-called Technological Protection Measures should be rejected, as this introduces an unnecessarily restrictive curtailment of civil liberties.

* Copyright law and intellectual property law in the broadest scope do indeed need reform in light of emerging digital technologies. However, that reform should be undertaken for the benefit of the public and society at large, by reducing the restrictiveness of said laws and shortening (in some cases, dramatically) their terms.

* To reiterate, copyright and IP law are not rent-seeking instruments of corporate interests. Copyright and IP law are intended to promote innovation and creativity, not to discourage it as the ACTA treaty would do.

* The ACTA treaty and any similar measures should be debated and discussed publicly, not hidden away in secret negotiations.

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The interests of the public and the creative industries alike can be met by recognizing the potential and endless opportunities offered by the Internet and its related technologies. Short of dismantling the entire system world-wide, "piracy" is never going away. We can either understand that and adapt to it, or we can continue an ineffectual crusade to stomp out the "problem".

Thank you for the opportunity for this discussion.

Matthew Perryman

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