Cory Doctorow

Re: Statutory Review of the Copyright Act

December 10, 2018

To the members of the Standing Committee on Industry, Science and Technology,

I am a bestselling Canadian science fiction author whose work has been published around the world in many languages and adapted for audio, stage, audiovisual and other formats. I am the author of dozens of books, including novels for adults, novels for young adults, middle grades books, picture books, collections of essays, and book-length nonfiction books.

I am also very involved in copyright debates. I served as an NGO delegate to WIPO; helped found an internet policy nonprofit in the UK called the Open Rights Group; and work on copyright in several academic capacities: as a Visiting Professor of Practice at the University of North Carolina's Library and Information Science School; as a Visiting Professor of Computer Science at the UK's Open University; and as a Research Affiliate at MIT's Media Lab.

Globally, the direction of travel for copyright and internet regulation has tilted away from a free, fair and open internet and towards the narrow concerns of the entertainment industry.

I would like to call your attention to some international developments in this regard, to point out the deficiencies in these approaches and discuss ways that Canada can do better.

My remarks concern liability regimes, site-blocking, and TPMs.

Liability regimes

The European Directive on Copyright in the Single Market seeks a radical shift in intermediary liability for all but the smallest online platforms. Article 13 of the Directive establishes that platforms have a duty to prevent any infringing material from being made available by their users, even momentarily. While some proponents of Article 13 say that they do not intend for this regime to be a mandate to use automated filtering to censor material that appears to infringe, that is the inevitable outcome.

It's inconceivable that human reviewers could watch all 300 hours of video that Youtube receives *every minute.* Even if such a workforce could be located, it would pale in comparison to the workforce that would have to evaluate all of Twitter, Facebook and Instagram.

This is not a matter of whether the platforms won't or can't spend the money to staffhuman censor-board: it takes an instant to take a photo and upload it to Instagram (potentially without any human intervention) and it takes minutes, hours or days to evaluate the copyright status of everything shown in that image. It's easy to see that the platforms could put all humans presently alive to work evaluating copyright and still fail to account for all that material.

So it's filters, and filters are not good at evaluating the copyright status of works. Youtube's Content ID filter – considered the gold standard for copyright filtering – routinely mistakes silence, birdsong, and pianists' own performances of public domain compositions for copyrighted works. Content ID does a simple job: comparing the soundtracks of videos to a corpus of copyrighted work submitted by a small, trusted group of rightholders.

Article 13 contemplates that no rightsholder's work will ever be made public without permission, from an individual photographer to an amateur poet, all the way up to Universal Music Group and Electronic Arts.

A filter fit for this purpose will cost much more than the USD100,000,000 that Youtube reportedly spent on Content ID, and will have to perform comparisons on a corpus of blocked works orders of magnitude larger than the one Content ID evaluates.

What's more, Article 13 provides no penalties for falsely claiming copyright in works that don't belong to you, whether through sloppiness or as an underhanded attempt to censor the internet (US police departments have used bogus copyright claims to censor bodycam video of police beatings).

Thus Article 13 creates an internet where anyone can add anything to a crowdsourced database of unutterable words, unviewable images, unplayable sounds and videos. There are no checks to see whether these works are indeed copyrighted, and, if they are, whether they have been claimed by their legitimate rightsholder or by a troll or crook looking to suppress or monetize someone else's work.

Some drafts of Article 13 propose a human review system to address these problems. This will not be adequate. The kinds of judgments necessary to evaluate fair dealing claims, claims of primacy in creation, etc, are fact-intensive claims that courts struggle with, sometimes spending years to sort them out. A corporate arbitrator asked to sort through the millions of messes created by a black-box algorithm with a hair-trigger will not make anyone happy, especially not people whose timely, politically sensitive communications (say, about an upcoming election) have been rendered irrelevant by the delay before their works are cleared.

The notional rubric for Article 13 is to increase the remuneration enjoyed by entertainment companies and creators. But by adding hundreds of millions of dollars in compliance costs to the criteria for operating a platform, Article 13 will ensure that only the large, US-based Big Tech giants can afford to sustain themselves, while smaller players must either remain small or go under – as soon as they grow to a scale where they must add filters, they will have to find huge amounts of capital to comply with Article 13, putting them at a permanent disadvantage to the Googles and Facebooks of the world, who grew without this encumbrance.

It's elementary economics that markets with fewer buyers are worse for sellers. As Article 13 cements the dominance of Google et al, the entertainment companies will be

more dependent on them, with fewer chances to play one company off against another in the hopes of increasing their revenues. If we want to rebalance the distribution of entertainment revenues, giving more power to the dominant player – the tech intermediaries – is no way to do it.

Instead, if we judge there to be a real problem here, we can create a blanket license regime, administered by a next-generation collecting society with the transparency of an open source project and the analytical nous of Google. We can set a rate for creative works that is judged fair by entertainment giants and creators, and we can set a portion of those revenues aside to go directly to creators, inalienable through contract. Such a system would *encourage* competition from smaller players (whose royalty payouts would be proportionally lower) and would be a *guaranteed* way to shift money from Big Tech to entertainment companies and (more importantly) to creators, who might otherwise see any gains moved to the entertainment companies' shareholders.

Site-blocking

Australia has just provided a well-timed object lessons into the dangers of site-blocking regimes. The Copyright Amendment (Online Infringement) Bill 2018 seeks to overcome deficiencies in the Copyright Amendment (Online Infringement) Bill 2015,

and any neutral observer can see how it will likely give rise to future Copyright Amendment (Online Infringement) Bills 20XX and beyond.

In 2015, Australia amended its copyright law to allow rightsholders to seek blocking orders that the country's ISPs would have to enforce. These orders targeted sites whose "purpose" was facilitating infringement. When it was passed, opponents pointed out that the vast majority of copyright infringement took place on mulitpurpose platforms, such as Youtube, where a few thousand infringing videos were embedded within billions of noninfringing videos. They also warned that Australia's widespread VPN usage would make it trivial to circumvent these orders. An Australian who searched for something that turned out to be blocked could just switch on their VPN and unblock it.

Rightsholders assured the public that the 2015 proposal was sufficient and no further measures would be necessary. Then, in 2018, the Copyright Act was vastly extended, along lines predicted by the 2015 opponents.

The new Australian law allows rightsholders to secure blocking orders for sites whose "primary effect" is infringement (a term that is dangerously undefined, but which might stretch to cover many multi-use platforms, such as cloud drives, video-hosting platforms, etc). It also allows rightsholders to get orders against search engines, requiring them to manipulate search-results to block mentions of the blocked sites.

Finally, it allows rightsholders to get blocking orders for services that "facilitate access" to blocked sites.

Once again, all of these measures can be circumvented by VPNs, so infringers will not have to change anything about what they do in order to bypass them.

However, the change *does* make it harder for the public to understand what is being blocked and why. By blocking search-engine results, the new amendment makes it nearly impossible to discover that a site has been blocked, and thus to challenge an improper blocking order.

What's more, the process for obtaining blocking orders is a one-sided kangaroo court, in which a rightsholder presents the case for blocking, without a representative from the potentially blocked site being present to argue on their behalf (ISPs can, but need not, send lawyers to argue against the blocks).

This is a recipe for disaster: a non-adversarial process for obtaining censorship orders that are nearly impossible for the public to discover and debate.

And still, there will be more to come: though rightsholders assured lawmakers that they will not seek bans on VPNs, the fact that all of this can be bypassed by VPN means that

the proponents of these measures will be disappointed and will need to seek further measures to accomplish their ends.

What else could they do? Repeated studies of the Australian market have found that infringement in Australia is in proportion to the premium that Australians are asked to pay relative to other high-income countries, and to the long delays for new releases in Australia. Infringement drops when entertainment companies offer Australians timely access to audiovisual materials at a fair price. The fact that these companies can eke out some marginal gains in Australia by convincing the national legislature to subordinate good internet policy to their shareholders' needs does not mean that the legislature is wise to do so.

TPMs

Global anti-circumvention laws, from DMCA 1201 (USA) to Article 6 (EUCD) to Bill C-32 (Canada) have given firms a way assert control over their competitors, customers and competition through a system of private law, with disastrous consequences.

These overbroad rules prohibit circumvention of TPMs, even to accomplish lawful ends. Thus, any manufacturer who wants to constrain an otherwise lawful course of action (say, to prevent competitors to offer competing App Stores for the Iphone; or rival ink

cartidges for a printer) need only deploy a TPM that blocks the undesirable course of action. That way, competitors are prohibited from offering interoperable products that allow uses that customers want, but which manufacturers do not. Indeed, the criminal sanctions for providing such a tool make it a jailable crime for citizens to use their property in ways that suit them, rather than arranging their affairs to please the shareholders of the manufacturers of their gadgets.

Even worse: the loose, overbroad anti-circumvention rules have been used to silence and even imprison security researchers who identify and disclose defects in products where a TPM has been thus deployed. There is a lively debate about when and how security researchers should make such disclosures, but it's facially bad policy to make firms custodians of who may utter true facts about defects in their products.

As firms have proven out the viability of TPMs as a way to assert these controls over customers, competitors and critics, the use of TPMs has proliferated, jumping into products ranging from cars to tractors to voting machines to pacemakers to artificial pancreases to 3D printers to home security systems to baby monitors and beyond.

Thankfully, there is an easy fix for this, one that preserves copyright while driving a stake through the idea of using copyright to effect a system of private law: simply

restrict the protections for TPMs to circumvention in service of a copyright infringement. That way, all circumventions that abet an offense under copyright law remain prohibited, but all otherwise lawful conduct is permitted.

Thank you,

Cory Doctorow