Should ISPs Enforce Copyright? Dwayne Winseck Interviews Robin Mansell

Dwayne Winseck, professor at the School of Journalism and Communication at Carleton University in Ottawa, Canada, explains the informal arrangement in Canada related to ISP enfocement of copyrights and interviews LSE's Robin Mansell about the very different UK situation.

Should Internet Service Providers (ISPs) be *legally* required to block access to websites that facilitate illegal downloading and file sharing sites or cut off the Internet connections of those who use such sites?

In Canada, the answer is no, and recently proposed legislation expected to be re-introduced soon, Bill C-32, the *Copyright Modernization Act*, would not change this state of affairs, despite all the other flaws that it might have (see here for an earlier post on the proposed new law).

That's not the case in a growing number of countries, notably the United Kingdom, New Zealand, France, South Korea, Australia, Sweden and Taiwan. Indeed, after pushing hard for the past decade to get stronger, broader and longer copyright laws passed, as well as using digital rights management to lock content to specific devices, in 2008 the IFPI (International Federation of Phonographic Industries) and the RIAA (Recorded Industry Association of America) turned to giving first priority to the idea that ISPs should be legally required to block 'rogue websites' and adopt "three strikes you're out measures" that cut off the accounts of Internet users accused repeatedly of illicitly downloading and sharing copyright protected content online.

While not formally required by law to do so, Canadian ISPs such as Bell, Rogers, Shaw, Cogeco, Telus, Quebecor, etc. have agreements with the recorded music industries and other "copyright industries" to disable access to illicit sites. Moreover, the Terms of Service/Acceptable Use Policies explicitly state that they reserve the right to do just this.

Exactly what the conditions are, and how often they are use, well, who knows? The arrangements, as I just said, are *informal* – something of a blackhole rather than an open Internet, essentially.

As Rogers Acceptable User Agreement explicitly states, for example:

"Rogers reserves the right to move, remove or refuse to post any content, in whole or in part, that it, in its sole discretion, decides . . . violates the privacy rights or intellectual property rights of others" ("Unlawful and Inappropriate Content" clause". (also see Bell's Acceptable User Policy, p. 1)

So, it is not that Canada is some kind of "free Internet" zone, but rather one where there terms are set privately by ISPs (our major TMI conglomerates) and the "content industries". This seems like a really bad idea to me.

The UK adopted an even worse approach, however, by giving such measures the force of law when it passed the *Digital Economy Act* in 2010, a law that was sped through Parliament in near-record time (i.e. 2 hours debate) after incredible levels of lobbying from the music, film and broadcasting industries (see here). Two major ISPs in the UK, however, BT and TalkTalk, have fought these measures tooth and nail, but have suffered a series of defeats in the courts.

I recently spoke with Professor Robin Mansell, who took part in these proceedings as an expert witness on behalf of BT and TalkTalk. Her experience sheds much light on the potential impact of these measures on the evolution of the Internet and Internet users.

Although the Court of Appeals rejected BT and TalkTalk's challenge to the *Digital Economy Act* in June, several

other developments in the UK since May have kept the issues on a high boil and still unresolved:

1. The Hargreaves Report published in May was scathing of the lack of evidence underlying the development of copyright policies, and how "lobbynomics" rather than evidence has been driving the policy agenda (for an earlier blog post on the report, see here);
2. Another High Court decision in July required BT and other ISPs to block access to the site Newzbin;
3. The Government decided to adopt all of the proposals in the Hargreaves Report in August;
4. The measures in the *Digital Economy Act* requiring ISPs to block illegal file-sharing sites were put on hold in August after a report by the British telecom and media regulator, Ofcom, found that the measures would be unworkable (also here).

Dwayne: What implications does the most recent court set-back have for principles of open networks/network neutrality, copyright, privacy and user created content (UCC)?

Robin: The central issue in this case was whether the 'graduated response', or 'three strikes you are out', strategy being lobbied for by the creative industries to curtail online P2P file-sharing that infringes copyright is a disproportionate response to file-sharing practices that are ubiquitous. Another issue was also whether the implementation of the measures by ISPs (with a court order) is likely to have a chilling effect on the way people use the Internet.

From the copyright industry point of view, the central issue was whether the government and ISPs would support their argument that this strategy is essential to their ability to stem the losses they are experiencing in the music, film and broadcast programming sectors which they attribute to infringing downloading by individual users – and more importantly to enable them to recover the lost revenues, or at least some of them. The creative industries players argued that it was essential for ISPs to play an active role in stemming the tide of copyright infringement.

The bigger issue of course is whether P2P file sharing is simply indicative of one of many ways in which Internet users are finding creative ways of producing and sharing online content in a 'remix' culture where the norms and standards for good behaviour online have changed enormously and with little evident regard amongst some Internet users for existing copyright provisions. In the face of these changes, the incumbent creative industry companies are seeking ways of extending their control over the use of copyrighted digital information in many ways, just one of which is stronger enforcement of copyright legislation which currently makes it illegal to copy even for non-commercial purposes of private use and creates a narrow window for licensing for educational use.

BT/TalkTalk framed the issues mainly in terms of the threat to their own business interests in terms of reputational and financial costs if they are required to divulge the names of their subscribers to the creative industry firms (albeit with a court order) when they are accused of infringing copyright.

We framed the issues in four ways:

1. the disproportionality of the DEA response in light of changing social norms and behaviours online which means that there is little if any evidence that the threat of punishment will change online behaviour;
2. the disproportionality of the response because it sets a wide net that is very likely to encompass those who use ISP subscribers' access to the Internet (family, friends, users at work, in public places, etc.) for purposes of which the subscribers themselves have no knowledge;
3. the lack of disinterested evidence on industry losses and revenue recovery since all the quantitative evidence is based on creative industry data or on studies which are flawed in terms of methodology; and
4. the implications for trust and privacy when Internet users are being monitored for this purpose.

In this specific case, the arguments did not tip over into debates about network neutrality, but they easily could have. The techniques that are used to monitor subscriber online activity go in the direction of the same deep packet inspection techniques that also enable ISPs to discriminate among different types of Internet traffic.

However in this case, they were only being asked to provide subscriber information based on the monitoring

performed by firms hired by the copyright industry firms themselves to monitor spikes in volume and the sites from which downloading occurs. This doesn't go directly to what ISPs themselves are doing or not doing with respect to monitoring types of traffic, so technically isn't about network neutrality. The ultimate effect, however, is not all that dissimilar.

Dwayne: The Court dismissed the challenge to the *Digital Economy Act*, finding that it was entirely within the purview of the UK Parliament to pass laws of this kind and to strike the balance between the competing interests ir the way that it did. You described this as a total loss. Can you explain why and what the implications might be?

Professor Mansell: I think I said this because the Government claimed that the DEA is aimed at balancing legitimate uses of the Internet and freedom of expression against the costs of implementing technical sanctions against Internet users, assuming authorisation by the courts.

The Court accepted our argument about the ambiguity of the results of empirical studies of online user intentions and behaviours with respect to copyright infringement. It also accepted the argument that Internet users may take steps to avoid legal liability resulting in a chilling effect on the development of the Internet. But, it did not accept that such an effect would exceed the benefits of enhanced copyright protection.

Ultimately, it left it to Parliament to decide the appropriate weighing of the interests of the creative industries and Internet users, which the Government claims has already been done in the legislation. So we go round and round … the DEA enforcement legislation goes ahead and the copyright legislation it is designed to enforce stays in place – a 'total loss' (for now till the next round).

Meanwhile the creative industries as we know are experimenting with all sorts of new business models in their bid to change the way they raise revenues through the provision of digital content. Perhaps the shear pressure of mass Internet user activity and infringing downloading will eventually give rise to fairer models – we can wait for this to happen, but it is a shame that the rights of these users are likely to be infringed and some will be punished for behaviour that one day may be seen as entirely appropriate and even welcomed!

We argued, that in light of uncertainty about the direction of change in social norms and behaviour online, legislation that seeks to suppress P2P file-sharing by bringing legal actions against individual infringers is likely to disrupt, or alter the course of, Internet development in ways that cannot be assumed to be benign. The evidence favours the interests of the rights holders and the interests of those engaging in infringing file-sharing are downplayed or excluded. This cannot be said to be a proportionate response to the incidence of infringing file-sharing.

Since the judicial review, an independent report commissioned by the Prime Minister (The Hargreaves Report) has emphasised the need for change favouring better access to orphaned works subject to copyright and copying for private and research purposes and greater emphasis on the impact of legislation on non-rights holders and consumers. But, it still says that the DEA provisions for the 'graduated response/three strikes you are out' should go ahead until such time as there may be evidence that it is not working. Again, the harms will already have occurred even if evidence shows that the measures are not working the way the industry claims they will and Internet users continue their infringing downloading activity.

Dwayne: Last question, Robin. Do you think that the recent moves by the UK government to adopt the Hargreaves Report in whole and to put aside ISP blocking requirements change the picture?

Professor Mansell: There is a difference between the provisions in the DEA to go after individual file sharers through the 'Graduated Response' tactic, which is going ahead, and the concerns expressed by ministers as to whether they can get ISPs to take down the big enabling sites. My understanding is that is the issue under discussion.

Some of the other Hargreaves recommendations may well start to go ahead – we will see how quickly, but they do not go to the specific issue of using ISPs to help bring charges against individuals.

This post is an exceprt from a longer interview by Dwayne Winseck, which first appeared on the Mediamorphosis blog on 14 September and where the full text of the interview can be found.