

CDT Proposes Balanced Framework for Online Copyright Protection

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The ongoing debate about the legal and technical means to protect copyright in the digital age has significant long-term implications for the future of the Internet. CDT today released a paper that proposes a general framework for addressing the problem of online copyright infringement in a manner that reflects the needs of creators, the interests of consumers, and the open architecture of the Internet. CDT plans to use this framework as the basis for an ongoing dialog with affected stakeholders.

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1. CDT Proposes Balanced Framework for Online Copyright Protection, Consistent with Internet Values

The ongoing debate about the legal and technical means to protect copyright in the digital age has significant long-term implications for the future of the Internet. CDT today released a paper that proposes a general framework for addressing the problem of online copyright infringement in a manner that reflects the needs of creators, the interests of consumers, and the open architecture of the Internet. CDT plans to use this framework as the basis for an ongoing dialog with affected stakeholders.

CDT's paper argues that the Internet and digital technologies promise to greatly expand the "marketplace of ideas." They enable the delivery of new voice, video, and data content online to millions of Internet users worldwide. They also offer new and transformative uses of that content, which will promote expression, civic discourse, and economic opportunity.

Unfortunately, the technologies that can locate, deliver, and transform content are also being used for massive infringement of copyright. While some have questioned the extent of the commercial impact, CDT believes that widespread infringement is a real problem. Moreover, in the absence of any sound strategy to help combat piracy, the likely result is responses, including government action, that run counter to the open and decentralized nature of the Internet and could stifle innovation. Thus, while the digital copyright debate often has been contentious and shrill, CDT's paper argues that there is a strong shared interest in finding reasonable solutions to reduce piracy in ways that are consistent with Internet values.

Debate over digital copyright issues is likely to heat up after the Supreme Court - probably later this month - releases a decision in the *MGM v. Grokster* case concerning peer-to-peer services. CDT's paper is designed to help frame this post-*Grokster* debate.

The CDT paper, Protecting Copyright and Internet Values, is available at <http://www.cdt.org/copyright/20050607framing.pdf> [1]

CDT's March 2005 Policy Post on the Grokster case is available at

<http://www.cdt.org/publications/policyposts/2005/8> [2]

The Amicus Brief of CDT, DiMA, ITAA, and NetCoalition in the Grokster case is available at:

<http://www.cdt.org/copyright/20050124cdtdima.pdf> [3]

2. The Risks of Failing to Craft Balanced Solutions

CDT believes that stakeholders and policymakers risk several adverse outcomes if they fail to craft balanced solutions to the problem of widespread Internet piracy.

First, massive infringement may continue undeterred, chilling the development of valuable and expensive-to-create content.

Second, the government may respond to the piracy problem in ways that are in direct conflict with the innovation and openness that makes the Internet and other digital communications media so valuable. For example, government could seek to fight infringement through the imposition of burdensome technology mandates or by imposing broad liability on intermediaries or equipment makers - any of which could severely chill innovation and limit the choices available to consumers. Another possibility would be the imposition of blocking or filtering mandates on Internet service providers - for the first time turning ISPs into government gatekeepers responsible for what their customers do online.

Third, copyright holders may seek to limit content delivery to closed networks or consumer electronics boxes that do not connect to the Internet. This would ignore the demand for access to content as part of computer users' increasingly integrated, multi-media, and creative experience. It also could have the practical effect of actually fueling piracy by leaving peer-to-peer networks as the only way for consumers to get valued content on their computers.

CDT believes that content creators, technology companies, and consumers all have a strong shared interest in avoiding these outcomes.

3. A Balanced Approach To Address the Piracy Problem

CDT's paper argues that there is a path towards a balanced set of solutions to the piracy issue. The solutions will not eliminate piracy completely - likely an impossible task. Rather, the goal should be to make infringement unattractive, risky, and rare.

The solutions CDT envisions are based on a carrot-and-stick approach: distributing digital content in ways that will attract paying customers, while making infringement unenticing and demonstrating that bad activity will be punished. CDT's suggested approach has three prongs.

- Punishing bad actors, whether individual infringers or companies like Grokster that profit by actively encouraging infringement (but without seeking to control technologies). CDT believes that making infringement a dangerous activity that users recognize as illegal will encourage the vast majority of law-abiding citizens to choose lawful services. Similarly, severe but carefully targeted penalties against companies that intentionally encourage infringement or deceive consumers about what activities are lawful can deter bad business behavior without chilling innovation.
- Encouraging a marketplace of content-protective and consumer-friendly digital rights management ("DRM") tools to allow the deployment of new models for digital distribution of content. Apple's iTunes, the Napster subscription service, and other digital media offerings show how new systems can deliver content without inflexible technology mandates or regulatory restrictions. The policy goal should be the development of a robust content delivery market in which consumers have multiple choices, sufficient information, and in which issues relating to public affairs content and privacy are fairly addressed.

- Better public education by trusted voices, including speaking out against bad actors, to teach consumers that infringement is wrong and that illegal file-sharing is dangerous, unethical, and harmful to artists and creators. Reaching young consumers is particularly important. Consumers also need information about DRM, so they can make informed choices and ensure a well-functioning DRM marketplace.

CDT's paper goes on to list some of the specific steps that CDT has taken and plans to take, consistent with the general approach outlined above, to help make progress in the digital copyright debate.

4. Near-Term Spotlight on Broadcast Flag, Grokster Decision

In the near term, two specific issues are likely to refocus the attention of policymakers on the digital copyright questions discussed in CDT's paper: the "broadcast flag" and the Supreme Court's Grokster decision.

Last month, the U.S. Court of Appeals for the D.C. Circuit handed down a ruling overturning the Federal Communication Commission's controversial "broadcast flag" rules. The rules would have required that televisions, computers, and all other devices handling broadcast digital television programs obey certain content protection standards starting in July 2005. In the wake of the court's decision, content companies and some consumer electronics manufacturers are asking Congress to reinstate the flag rules through legislation.

For background on the broadcast flag, see the CDT Broadcast Flag Public Interest Primer: <http://www.cdt.org/copyright/031216broadcastflag.pdf> [4]

A Supreme Court decision in MGM v. Grokster is also expected shortly. In this case, content companies seek to hold peer-to-peer software developers liable for the widespread use of their products for illegal copying. The case raises the fundamental question of when one party can be held responsible for infringement by another ("secondary liability"), and will have major implications for developers and users of new speech-enabling technologies online. Regardless of how the Court rules, a vigorous policy debate is expected following the decision.

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