

Keeping pirates at bay

By Helen Disney and Meir Pugatch
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Charting a course on online content that navigates users' and creators' rights may be hard, but there should be no doubt that we cannot let pirates determine the rules.

At first glance Sweden's Pirate Bay trial can seem like show business. The founders of the downloading site have managed, with great skill, to channel the cheeky spirit of Captain Jack Sparrow and the huge media coverage of this landmark trial has consequently focused more on their various tricks and much less on the underlying problem that the site represents: online piracy.

But the illegal downloading of any type of content on the web – and the wider issue of how to handle intellectual property protection in a digital world – has become a serious economic problem. Sites such as Pirate Bay have created a temptation that is almost impossible to resist: the cost-free downloading of almost any type of content. The scale of the problem is so big that illegal downloading has become an acceptable norm.

The economic consequences of sites such as the Pirate Bay, which attempt to find loopholes in the existing intellectual-property system, will be dire – and even more so in a downturn. The knowledge economy is based on a trade-off in which the investments and time put into the creation of new content allow their owners to sell it for a price, not least in order to recover their own costs. But when this side of the equation is not respected then the entire rationale of the system is lost.

The debate here is not really about price, however. There is no evidence to suggest that if a company reduces the price of its album by 50% it also halves the volume of illegal downloading. The question is deeper – it is about resisting the natural temptation to free-ride on other people's work, especially when the cost is nil.

Dithering at the crossroad

So what can policymakers do? The European Commission had planned to take a comprehensive and robust approach involving internet service providers (ISPs) more closely in the monitoring of online file-sharing, with two initiatives due out in the first half of 2009 that would have forced a more restrictive EU-wide approach to free and illegal downloading. Those proposals included a mandate for ISPs "to suspend or cut access to the web for those who illegally file-share", the so-called 'three strikes' model proposed by France.

However, in the face of intense lobbying from both industry, which favours tough enforcement measures, and activists who defend what they see as consumers' rights to access the internet, the Commission recently backed away, putting its proposals on ice until the end of its current mandate. Now, the Commission will only present issue papers that might be used by the next Commission after it is sworn in at the end of 2009 or in 2010. Other initiatives to curb online piracy were envisaged in the review of the e-commerce directive but the expected stakeholder questionnaire and report on piracy have also been halted.

In member states, especially France and Britain, the debate has been fierce. In January the British government published an interim report on the state of Britain's digital economy, marking a shift in government thinking on intellectual property and the internet. Specifically, it emphasised the need to develop "new methods of legitimate access", stating that "counter-piracy measures and effective rights enforcement are important element, but only one element and insufficient on their own". Similarly, David Lammy, the UK's new minister for intellectual property, has publicly stated that he will not seek the right to pursue file-sharers and illegal down-loaders through further legislation. This is in marked contrast to his predecessor, David Triesman, who only 18 months ago stated quite clearly that "if we can't get voluntary arrangements, we will legislate".

In France, meanwhile, the National Assembly – backed by President Nicolas Sarkozy – is taking a harder, more top-down line by finalising a legislative package that will create a new government agency to take action against alleged illegal downloading.

For the time being, the EU as a whole appears to be lingering uncertainly at a crossroads in terms of its intellectual and practical approach towards the protection and enforcement of online content and intellectual-property rights. Such questions are likely to be discussed at ContraFake 2009, a high-level conference on counterfeiting and piracy that will take place next month in Brussels. One can only hope that it will spur the EU – and the European Commission in particular – to be more pro-active.

The balance to be struck

As these fierce debates go forward in national governments and at an EU level, it will be vital to make sure a balance is struck between the desires and rights of consumers (for example, the hotly contested 'right' to internet access), the need for privacy and the role of governments and companies. Proposals being bandied about including the idea of an 'internet tax' to cover the costs of monitoring online activity and to compensate rights-holders. Such a tax would be a horribly blunt and damaging instrument, one that would fail to recognise the economic and social implications of the digital age. Instead there is a need for much stronger collaboration – between governments, content creators, ISPs and the public – to provide a systemic solution to illegal downloading. Future strategies should not only focus on the technical and technological aspects, but should also place emphasis on education (respect for intellectual-property rights) and new commercial models for the use of online content that may be more attractive to users. New music sites such as Last FM and Spotify, for example, are already attracting huge consumer and media interest.

Whatever happens to Sweden's notorious modern pirates as their trial comes to a close, we need to ask itself the broader question: Do we want to follow the rules of engagement of Captain Jack Sparrow, or are we trying to follow a different path which respects other people's efforts and innovations and ultimately seeks to reward them?

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