



European Parliament event on “Self-”regulation on the Internet

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Ten myths about privatised law enforcement online

Much of the support from certain parts of industry and from the political world for privatised policing and law enforcement on the Internet is based on misunderstandings. I will use this short presentation to list and quickly dispel just ten of these myths.

1. This is a narrow, isolated issue of EU concern

The coercion of Internet companies into policing roles is the subject of an avalanche of different initiatives worldwide. The policy is not only under discussion in a variety of initiatives by the European Commission, it is also being pushed in the Organisation for Economic Development, the Trans-Pacific Partnership and in the Anti-Counterfeiting Trade Agreement. Most recently, that bastion of democratic values, the Russian Federation, made a proposal for privatised law enforcement online in the context of the World Intellectual Property Organisation (WIPO) – a proposal that was welcomed by the International Federation of the Phonographic Industry. In other news from Russia last week, Reporters without Borders issued severe criticism of the government for anti-democratic interferences with online media.

2. “Notice and action” creates no jurisdictional issues

The European Commission’s proposal to encourage extra-judicial actions by financial, advertising, search and other intermediaries will hand over control of EU free speech to foreign companies. All major international payment services, search and advertising networks – MasterCard, Visa, PayPal, Google, Yahoo, Microsoft are American. Already today, any complaint made to Google under the US Digital Millennium Copyright Act (DMCA) will result in the website being de-indexed worldwide by Google – without any judicial intervention.

3. ISPs are too evil to be trusted with copyright and so good they can be trusted with freedom of speech

The copyright industry has consistently argued that Internet intermediaries are essentially parasites that have benefited from online breaches of copyright rules in order to enrich themselves. As they cannot, according to the rhetoric, be trusted to act in a diligent way, they need to be forced, by law or coercion, to police online communications. These “parasitic” companies apparently cannot be trusted to act appropriately and honestly, so the only solution is to put them in charge of our freedom of communications, our privacy and our democracy.

4. Intermediaries are in a perfectly balanced position to make rulings on illegality

There is an odd assumption that the interests of all Internet intermediaries are now, and forever will be, entirely static and balanced. Therefore, they can be given or forced into policing and punishment obligations. This assumption is false. In reality, businesses make decisions based on business priorities.

When Wikileaks was accused in the media by high-level American politicians of being a terrorist organization, Visa, MasterCard, Paypal, Amazon and others feared reputational damage if they continued to provide services to the organisation. As a result, even though no formal charges of illegal behavior were ever made against Wikileaks, their web hosting, their domain name and donations via payment companies were all blocked or removed.

5. Intermediaries will devote enough resources to policing to avoid unending problems

There are countless examples of legal content being blocked, deleted or made unavailable as a result of vigilante action by Internet intermediaries. Two short examples show the dangers to free speech of their arbitrary decisions.

The fact that Yahoo! was providing a member of the board for the Internet Watch Foundation did not save Flickr from having its entire service blocked by several British ISPs. The blocking came as a result of an informal ruling from the UK hotline that an image uploaded by one of Flickr's 51 million users was likely to be illegal.

The German Gesellschaft zur Verfolgung von Urheberrechtsverletzungen (Society for prosecution of copyright infringement) persuaded video-hosting website Vimeo to delete four videos which were uploaded in full respect of copyright and for which the complainant neither had, nor claimed to have, any rights.

6. There is no risk of unintended consequences for copyright interests

Many proposals for online policing are made by copyright interests without any concern or understanding of the risk of unintended consequences – even for their own interests. Two examples demonstrate this clearly. In 2005, the Belgian ISPs agreed to stop providing direct access to up to ten online forums, so called “Usenet groups” – to be identified by IFPI – every week. These lists became public and ultimately became a surprising and generous gift from IFPI to anyone who wanted find out the best places from which to download unauthorised music. Eventually, IFPI decided to stop supporting illegal access to content and now no longer makes use of the agreement. It is not clear if IFPI ever provided compensation to the artists whose content was downloaded as a result of this policy mistake.

A few weeks ago, a judicial blocking order was made to require certain large ISPs in Belgium to block thepiratebay.org. Within hours depiraatenbaai.be was set up as a very simple workaround for the block – attracting significant amounts of media attention, advertising the fact that The Pirate Bay exists, that copyright is protected by a law that is not fit for purpose and is enforced by courts that do not understand the Internet at the request of organisations that understand the Internet even less.

7. There is no risk of unintended consequences for the online market

The European Union has repeatedly made strong statements in favour of network and search neutrality – intermediaries should not interfere with online traffic for their own interests. However, intermediaries are being increasingly asked to – and coerced into - interferences with traffic for the interests of other businesses. Telling intermediaries that they must interfere with traffic for the benefit of others but not for their own benefit is a blatant and untenable contradiction that risks ultimately threatening the online ecosystem.

8. This approach is legal

Both in Europe and globally, there are numerous restrictions on the right of states to directly or indirectly limit the right to communication outside the rule of law. These include:

- the 2003 Inter-institutional agreement between the European Parliament, Commission and Council;
- the European Convention on Human Rights;
- the European Charter of Fundamental Rights and;
- the International Convention on Civil and Political Rights.

9. There will be no wider damage to European economic interests

There are two major threats that are created by the promotion of extra-judicial policing by Internet intermediaries. Firstly, China operates the world's most effective protectionism system, based to a considerable extent on informal arrangements with online operators – can it really be in our best interests to “normalize” and promote this model?

Secondly, the danger to net and search neutrality creates the likelihood of anti-competitive behaviour by operators, both in the EU and internationally, undermining incentives for innovation and increasing barriers to entry to the online marketplace.

10. We have given these major dangers enough consideration

A currently classified document to be published next year by a respected international organisation argues that policymakers need to understand the role of Internet intermediaries in economic processes when designing new rules about Internet intermediaries. If policymakers do not yet understand the nature of the complex role of Internet intermediaries, it is far too early to make far-reaching policies that bring such major societal and economic risks.

Why on earth are we gambling the future of the democratic value of the Internet?

Why on earth are we gambling the future of the economic value of the Internet?

Why on earth are we making policy based on guesses, half-truths and myths?