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HOW THREE STRIKES IS WORKING

03 May 2011

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A handful of countries have implemented some form of the controversial three-strikes policy, which cuts infringers' internet access. Here local lawyers report on the first few cases

ONE-MINUTE READ

So far only three large economies around the world have introduced a form of the so-called three-strikes system for online copyright infringement. This system cuts off the internet access of anyone found to be infringing copyright three times, usually with a delay of six months to a year between each warning. It is a controversial system, with many claiming it violates internet users' human rights and privacy of communication. New Zealand, France and South Korea have three strikes so far, but Ireland's biggest ISP introduced it voluntarily, and other countries are looking at similar systems, though without the ultimate punishment of removing internet access. A comparison between them reveals interesting attitudes to piracy, privacy and copyright.

QUESTIONS

1. What punishment is available for infringement of copyright online?
2. What are the copyright owner's responsibilities for communicating infringement?
3. What are the ISP's responsibilities?
4. What evidence is required and what can right owners and ISPs do to get it?
5. How has it been used in practice so far?

FRANCE

1. Punishment for copyright infringement

Online infringement of copyright is a criminal offence which is subject to a maximum term of imprisonment of three years and a maximum fine of €300,000 (up to €1.5 million when the infringer is a legal entity), as indeed are all acts of copyright infringement.

When the infringement of copyright is committed online, the infringer may also have its internet access suspended for a maximum of one year, whilst continuing to pay the cost of the subscription to the ISP. The infringer will also be prohibited from contracting with another ISP.

An internet subscriber must ensure that this access is not used to infringe copyright or related rights (*droits voisins*). Laws 2009-669 of June 12 2009 and 2009-1311 of October 28 2009 created an administrative body called the Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet (Hadopi) which is in charge of sending warning messages to subscribers of internet access used to commit online copyright infringement.

This system, known as the three-strikes process, works as follows:

- (1) Once notified by the relevant body (as explained under Question 2 below) or by the public prosecutor, Hadopi may decide to send an email message to the subscriber of the Internet access which is used to commit the infringing act, informing him of his duties under copyright laws and of the necessity to implement appropriate security measures. This warning also contains the date and time of the suspected infringement.
- (2) If, within six months following this notification, a new act of copyright infringement is identified using the same internet access, Hadopi may send a second notification by email and by registered mail. This second warning contains the same information as the first one.
- (3) If, within one year following this second notification, a further act of copyright infringement is identified and it appears that the internet subscriber has, without any legitimate reason, failed to implement the relevant security measures, Hadopi may send another registered letter to the subscriber informing him that these acts are liable to criminal sanctions. The subscriber has 15 days to provide Hadopi with his observations or to ask for a hearing with Hadopi. Hadopi can transmit the case to the public prosecutor who may decide to prosecute the subscriber for negligence in the implementation of the security measures. This offence is subject to a fine of €1,500 (which may be increased fivefold if the subscriber is a legal entity) and suspension of the internet access for a maximum of one month. Of course, in cases where the subscriber is the same person as the online copyright infringer, the public prosecutor will prosecute this person for online copyright infringement, as opposed to negligence in the

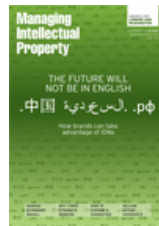


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May 2011

How to take advantage of IDNs

The internet is about to feel very different. Hundreds of thousands of websites are being set up using entirely Chinese, Cyrillic and Arabic scripts, among others. For luxury goods brands in particular, the right strategy now could turn a counterfeit headache into a marketing opportunity. By Fionn O'Raghallaigh

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SUPPLEMENTS

implementation of security measures.

2. Copyright owner's responsibilities

Hadopi may only be activated by the public prosecutor or by professional bodies such as those created for the defence of their members' interests, collection societies or the National Cinematographic Center.

When an act of infringement is suspected, the appointed agents of the relevant professional body will identify the subscriber of the internet access which was used to commit the suspected infringement by gathering the data necessary to identify the infringer and the infringement, such as the date and time when the act has been committed, the IP address of the subscriber, the peer-to-peer system used and the ISP providing the internet access.

3. ISP's responsibilities

ISPs must collaborate with Hadopi at different levels in order for the three-strikes process to be effective. They must:

- Provide Hadopi with the relevant information regarding their clients, as mentioned under Question 4 below;
- Send the warning messages prepared by Hadopi to the subscriber, in the name of Hadopi; and
- Implement the suspension, once informed by Hadopi of the existence of a court order suspending the subscriber's internet access.

4. Evidence and privacy

In order for a complaint to be accepted by Hadopi, the professional body filing the complaint must provide it with the information listed under Question 2 above. This information is obtained by an authorised agent of the body making the complaint, who is legally entitled to gather the information. The relevant professional bodies have been specifically authorised to provide this personal data to Hadopi, which can retain it for the duration of the procedure.

Hadopi is then entitled to obtain from the ISP the following information regarding the subscriber: name and surname, mail and email addresses, telephone number, the address of the telephone installation, the ISP with which the subscriber has subscribed and the file number.

5. In practice

The first set of warnings were sent by Hadopi to subscribers in October 2010. By the end of 2010, slightly fewer than 100,000 requests for identification had been sent to ISPs and 70,000 warnings had actually been sent to internet access subscribers.

Given the timeframe, we should shortly be seeing the second set of warnings, which are to be sent where a new act of infringement via the same internet access has been identified within six months of the initial warning.

With the goodwill and assistance of ISPs and with the ultimate sanction being handled by judges (as opposed to HADOPI, as initially planned), there can be little doubt that the three-strikes process will reduce online piracy and protect IP rights in France.



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IRELAND

1. Punishment for copyright infringement

The three-strikes policy or graduated response system is the subject of legislation in a number of countries (such as France) but no such legislation exists in Ireland. Whether copyright infringement occurs online or offline, a number of civil and criminal remedies are available. Civil remedies include injunctive relief, damages or an account of profits, search and seizure, delivery up and disclosure orders. By way of example, record companies have in the past settled with individual infringers at an average of €2,500 per case.

Nevertheless, Eircom, the largest Irish ISP, has agreed to implement a three-strikes policy that would lead to its subscribers being disconnected from its network following two previous warnings about illegal file sharing. In addition, Eircom agreed not to object to a Court order (which was granted) requiring it to block subscriber access to the Pirate Bay website. This agreement was reached in settlement of a legal action taken by a number of record companies against Eircom. The record companies agreed to obtain a similar agreement with other Irish ISPs or else issue proceedings against them. However, in recent legal proceedings instituted against UPC, the Irish courts held that Irish copyright law does not make provision for blocking, diverting or interrupting internet communications intent on breaching copyright. Instead, there is only a notice-and-take-down procedure.

2. Copyright owner's responsibilities

Under Section 40(3) of the Copyright and Related Act 2000, the provision of facilities for making available copies of a work does not of itself constitute an infringing act. However, if a copyright owner notifies a provider, such as an ISP, that its facilities are being used to infringe copyright and the provider fails to remove the infringing material as soon as practicable, then the provider is liable for infringement. It is for this reason that it is advisable for a copyright owner to put ISPs on notice of any copyright infringement.

3. ISP's responsibilities

Once an ISP is notified by a copyright owner that its facilities are being used to infringe copyright and fails to remove the infringing material, then it is liable for infringement. Defences are however available to ISPs such as under the EU E-Commerce Directive, which has been transposed into Irish law under the European Communities Regulations. Under the Regulations, ISPs have no duty to scrutinise the service provided for illegal material; no liability arises from infringement that occurs during the hosting of material or through caching of material; any liability will rest upon knowledge that the service contains illegal material and a failure to act expeditiously in removing or disable access to the material in question. In addition, no liability arises from infringement for mere conduit activities.

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4. Evidence and privacy

If a copyright infringement action is taken against an ISP, to succeed the copyright owner must furnish evidence that will satisfy the Court that the ISP's network is being used for the illegal copying of copyright material; and that, on being notified of this infringement, the ISP failed to act expeditiously. Various software programmes (such as DtecNet) exist to find out the IP address and what infringement of copyright material has taken place and these can be used in this regard.

However, if a copyright owner wants to pursue the ultimate infringer (the downloader or uploader), to do this, their identity must be revealed by the ISP, which are unlikely to reveal the information for data protection, confidentiality and contractual reasons. The copyright owner can institute court proceedings against the ISP requiring it to disclose the identity of particular subscribers proven to be involved in illegal file sharing on the ISP's network. In such instances, the copyright owner will seek a *Norwich Pharmacal* order named after the UK case (which has been approved in Ireland) that established the principle that an intermediary could be called upon to aid a rights holder in the identification of wrongdoers that are not otherwise identifiable.

However, the courts have held that the order should only be made where clear proof of wrongdoing exists and where what is really sought is the names and identity of wrongdoers rather than factual information concerning the commission of the wrong. However, the disclosure of such information under a *Norwich Pharmacal* order has been held by the courts not to breach data protection and postal and telecommunications legislation; or contractual obligations or the constitutional right to privacy.

5. In practice

Historically, copyright owners (principally record companies) issued court proceedings against ISPs seeking Norwich Pharmacal Orders. However, as the Norwich Pharmacal approach was proving time consuming and costly, copyright owners have changed strategy and instituted legal proceedings against ISPs seeking injunctive relief requiring them to bring infringement of their subscribers to an end. ISPs were no longer being asked to identify a particular wrongdoer so that copyright owners could pursue the infringer directly but to police its network and proactively monitor and prevent infringements.

There is no basis under law for awarding injunctive relief against an ISP in respect of online copyright infringement. Subject to the UPC case being appealed to the Supreme Court, it is evident that Ireland requires a legislative solution to deal with the issue of ISP liability for illegal file sharing because until the law is changed, an ISP cannot be compelled to implement a three-strikes policy or block a particular website at the request of a copyright owner.



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KOREA

1. Punishment for copyright infringement

When a copyright is infringed due to reproduction or transmission of works online, the copyright owner may request an internet service provider (ISP) to suspend the reproduction or transmission of the works. Further, the Ministry of Culture, Sports and Tourism may render an order to an ISP to issue warnings to infringers and to delete illegal reproductions, and the Korea Copyright Commission (KCC) is also able to recommend that the same measures be taken.

More specifically, the Ministry is able to order an ISP to (i) issue a warning to reproducers and transmitters; and (ii) delete or suspend transmission of illegal reproductions where a reproduction that infringes upon copyright (information that infringes upon copyright and a programme or information which incapacitates technical protection measures) is transmitted through an information and communications network. Further, where a reproducer or transmitter who has received warnings, transmits illegal reproductions on three separate occasions or more, the Ministry may issue an order to suspend an account for up to six months. Here, an account refers to an account with a right of utilisation which the ISP uses to identify and manage users (excluding accounts used exclusively for email) and only the services of a particular ISP that require login are suspended. The period of suspension starts at one month and increases as the number of suspensions increases.

Next, where a bulletin board (which provides commercial interests or user convenience) has been issued with three or more orders to delete illegal reproductions or stop transmission, the Ministry may issue an order to an ISP to suspend all or part of the service for up to six months.

In spite of its name, a bulletin board here means a computer programme or technical device upon which a user can post information for the purpose of disclosing it to the public, and it includes programmes or bulletin boards provided by peer-to-peer service providers, which are often used to transmit illegal reproductions online.

Meanwhile, where transmission of an illegal reproduction is found after an investigation of the information and communications network of an ISP, the KCC is able to make recommendations for separate corrective measures to be taken such as (i) a warning; (ii) deletion or suspension of transmission; and (iii) suspension of the account.

2. Copyright owner's responsibilities

A copyright holder only needs to prove that it is the rightful owner when requesting suspension of reproduction or transmission. Anyone that requests an ISP to suspend reproduction or transmission needs to submit a request form (approved by the Ministry) to the ISP by attaching any one of (i) a copy of the certificate of registration of copyright indicating that the person is the holder of the right or materials; or (ii) a copy of a work indicating the person's name or second name by which the person is well known.

3. ISP's responsibilities

If an ISP becomes aware of copyright infringement and prevents or suspends the relevant reproduction or transmission, the liability of the ISP for copyright infringement may be reduced or exempted, and if the ISP attempted to prevent or suspend reproduction or transmission but it was technically impossible, then it will be exempted from liability. However, if an ISP, aware of copyright infringement, transmits infringing materials itself, or does not take appropriate measures despite its knowledge of an infringing activity by another, then the ISP may be found liable for copyright infringement notwithstanding the provisions limiting its liability.

Meanwhile, a Supreme Court case held that even if an ISP has not received a direct request from a copyright holder, if the ISP had specific knowledge or could have known of the existence of the relevant work, and it had the technical and economic means to manage and control the work, then the ISP has an obligation to take appropriate measures including deletion or suspension of the work, and can be found liable for a joint tort together with the infringer for aiding an infringing act if the ISP violates such obligation (Supreme Court Judgment 2009Da80637, March 11 2010).

If an ISP does not comply with this order from the Ministry, the ISP may be punished by a fine of up to W10 million (\$9,170); and also fined up to W10 million for not notifying or posting the fact that an account will be suspended seven days before the suspension and that a bulletin board's services will be suspended 10 days before the suspension respectively.

4. Evidence and privacy

Although a right holder must provide the title and URL of the relevant work when requesting suspension of reproduction or transmission, the right holder is not required to provide the details of the infringer. Thus, privacy issues do not arise.

However, if a right holder requires the infringer's details in order to commence a civil or criminal lawsuit, the right holder can request them by completing a form for provision of information of the relevant user setting out the type of action, remedies sought, type of right infringed and facts alleging infringement, and by submitting it to the Mediation Department on Dispute Over Defamation of Character.

5. In practice

On November 9 2010, the Ministry enforced an order for the first time suspending 11 accounts belonging to a person who copied and transmitted illegal reproductions on three online services such as a webhard, despite having received three warnings from the Ministry between March and September 2010. In particular, according to the Ministry, the owners of the 11 suspended accounts were heavy up-loaders that continued to indiscriminately distribute an average of around 200 illegal reproductions (movies, music, software, games) per account despite having received the three warnings. The Ministry commented that the law will be enforced more aggressively in the future to crack down such heavy up-loaders.

In this regard, although it had been possible for anyone to provide special type of online services such as webhards and peer-to-peers by simply completing the business registration procedure, there is now an amendment bill before the National Assembly which will (i) require registration to be made to the KCC with the registration conforming to certain requirements (such as plans to execute technical protection measures under Article 104 of the Copyright Act and the material and human resources required); and (ii) allow the registration of an ISP to be cancelled at the request of the Ministry when the ISP is fined after having already been fine three or more times previously.



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NEW ZEALAND

1. Punishment for copyright infringement

From September 1 2011 New Zealand will adopt a new system for dealing with copyright infringements online. The system requires three levels of infringement notice to be sent to the alleged infringer.

The first time a rights owner identifies an infringement, a detection notice can be sent to the account holder. The notice expires nine months after it is issued. If there are no further infringements of the rights owner's rights during the period that the detection notice is valid then the matter comes to an end.

If the account is used to infringe the copyright of the same rights owner for a second time then a warning notice is sent to the account holder. The notice expires nine months after it is issued. The second infringement must occur at least 28 days after the detection notice issues but before that detection notice expires.

If the account is used to infringe the copyright of the same rights owner for a third time then an enforcement notice is sent to the account holder. The enforcement notice expires after 35 days. The third infringement must occur at least 28 days after the warning notice issues but before that warning notice expires.

A rights owner can take formal action once an enforcement notice has issued. The rights owner has one option: it can apply to the Copyright Tribunal for an order of damages of up to NZ\$15,000 (\$11,900). However, there is a provision that may come into force later if the fine system is not considered to be effective. That provision will allow a rights owner to apply to the District Court for an order suspending the account for up to six months.

The tribunal will take into account all evidence and the provisions do not require evidence to be by declaration or affidavit. However, it is expected that evidence will probably be filed in those forms. The matter will be determined on the papers and as a general rule a party cannot be represented by legal counsel, although there is no prohibition on an in-house counsel appearing as an employee representing their employer.

If the tribunal finds that the rights owner has followed the correct procedures, that there is an infringement and that the infringement occurred at the account identified then the Tribunal can make an award of damages in favour of the rights owner.

2. Copyright owner's responsibilities

A rights owner only needs to complete the appropriate level of infringement notice and provide it to the appropriate ISP. The ISP must then pass that notice on.

If a matter reaches the point where it will be considered by The Copyright Tribunal, then the rights owner may want to provide more detailed evidence to support its case.

3. ISP's responsibilities

The Act changes the definition of ISP for these provisions of the Act. An ISP is now referred to as an internet protocol address provider (IPAP). This change narrows the number of entities that are affected by these provisions. This should stop a school or workplace being identified as an ISP when clearly that is not what they are.

Within seven days of receiving a request from a rights owner the ISP notice must send the relevant infringement notice to the account holder.

4. Evidence and privacy

No formal evidence needs to be provided in support of an infringement notice. An account holder can challenge any of the infringement notices. Any challenge must set out why the account holder thinks that the infringement notice should be rejected. The account holder must take that step within fourteen days of the ISP issuing the notice. If the challenge is successful then the notice is withdrawn.

After the third notice is sent the rights owner can apply to The Copyright Tribunal for an order that the ISP release the contact details of the account holder. Until that time, the rights owner will not know the identity of the account holder.

If the matter proceeds to The Copyright Tribunal the evidence may be limited to the notices filed in the prescribed form. Under the Act, in any proceedings before the Copyright Tribunal an infringement notice is presumed to establish the rights of the rights owner and to establish that the infringing acts have occurred.

This provision was amended two days before the final reading of the bill. Previously an infringement notice was stated to be conclusive evidence of an infringement. While the burden is still on the account holder to establish that it has not infringed the burden is less than it was under the earlier form of the bill.

An account holder can submit evidence to establish that this presumption should not apply. It is likely the evidence will take the form of statutory declarations or affidavits. However, it appears that the tribunal can accept evidence in any form.

5. In practice

Undoubtedly copyright owners will use the system from September 1 2011. The system is likely to be effective against innocent infringers and so-called 'mum and dad' infringers who don't realise that they are breaching anyone's rights. It seems unlikely that a person who gets to the stage of receiving a third notice is behaving innocently, although, that depends on the rights owners only sending notices when there is an infringement.

However, questions remain over whether it will be effective against people who are technologically savvy or against criminals. Those groups will have the resources to mask their IP address and may be very difficult to track down.



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US

1. Punishment for copyright infringement

Under the US Copyright Act, an online (or offline) infringer's punishment may include, without any prior warning, an injunction against further infringement (subject to contempt sanctions), a monetary judgment and criminal penalties (ranging from a \$2,500 fine to 10 years imprisonment). A monetary judgment in a civil action may include: 1) court costs; 2) attorneys' fees; and either 3) actual damages and an accounting of profits; or 4) statutory damages ranging from \$750 to \$30,000 per work. If the copyright owner proves the infringement was wilful, the statutory damages award may be increased to as much as \$150,000 per work. On the other hand, if the defendant proves the infringement was innocent, the award may be decreased to as little as \$200 per work. An infringer is precluded from raising the innocent infringer defence if the work was published with a proper copyright notice (which is no longer required for protection under US copyright law). Aside from remedies available under the Act, an Internet Service Provider (ISP) may also terminate an online infringer's account under its terms of service.

2. Copyright owner's responsibilities

In the US, ISPs are eligible for so-called safe harbours under the Digital Millennium Copyright Act (DMCA) for certain actions taken by users of their service. One of these safe harbours applies to content uploaded at the direction of the user and requires, among other things, that an ISP take down or disable access to infringing content on its service upon receiving a proper notification of infringement. The elements of a proper notification, which are set forth in Section 512 of the US Copyright Act, include: a) identification of the copyrighted work that has been infringed; b) information reasonably sufficient to allow the ISP to locate the infringing material or activity; c) contact information for the person submitting the notification; d) a statement that there is a good faith basis for asserting that the use is not authorised; e) a statement, under penalty of perjury, that the person submitting the notification is authorised to act on behalf of the copyright owner; and f) an electronic or physical signature from the person submitting the notification.

Although the DMCA takedown mechanism is available to copyright owners, they do not have an affirmative obligation to file a notification of infringement or to otherwise communicate an online infringement to the infringer or the ISP prior to bringing a lawsuit. Nevertheless, the copyright owner may lose certain remedies if it fails to raise its claims in a timely matter. The statute of limitations for filing a civil claim under the US Copyright Act is three years, which most courts measure from the date the owner becomes aware, or reasonably could have been aware, of the infringement (some courts measure from the date of the infringement). The equitable defence of laches may also bar the claim, although US courts are generally reluctant to apply this defence to a claim that is raised within the statute of limitations. There are other equitable defences based in part on delay but they typically require some affirmative act to mislead the infringer about the propriety of his or her use of the work.

3. ISP's responsibilities

The DMCA provides that upon receiving a proper notification of infringement, the ISP must notify the alleged infringer that the material has been removed or disabled and provide the alleged infringer with the ability to file a counter notification. Under the DMCA, ISPs are also required to implement a policy that provides for the termination of a repeat infringer's account in appropriate circumstances. The open-ended language of the DMCA generally provides more flexibility to deal with repeat infringers than the so-called three-strikes laws adopted in other countries, although the question of which approach is preferable is clearly fertile ground for debate.

4. Evidence and privacy

A copyright owner must demonstrate that it owns the infringed work and that the infringer has violated its exclusive right to reproduce, distribute, display or perform or to prepare derivative works based upon the copyrighted work (US copyright law does not require proof of intent to infringe). In file-sharing cases, for example, copyright owners typically assert violations of the reproduction right and distribution right, which requires them to demonstrate that the alleged infringer actually copied the work (reproduction right) or that the work was distributed from the infringer's computer (distribution right). Some US courts have held that merely making a file available in a public folder can infringe the distribution right.

In file-sharing cases, the rights owner is usually aware of the IP address of the infringer at the time of the infringement but not his or her identity. To identify the infringer, the rights owner can bring a lawsuit against the alleged infringer as a John Doe defendant and subpoena the ISP to identify the infringer. Some of these lawsuits have generated controversy in the US for naming hundreds of Doe defendants in one lawsuit. These defendants may have divergent fact patterns that prevent them from being joined in a single case, and there are often serious questions about whether a court in one state can exercise jurisdiction over hundreds of defendants that reside in other states.

5. In practice

The practice in many copyright-reliant industries (such as music and film) is to identify copyright infringements and accumulate evidence for a case against the infringer by using a third-party investigator (for example, MediaSentry was the company used by the music industry during the height of its litigation against file sharers). Although various arguments have been made about the validity of using an investigator to consummate the act of infringement (meaning that the investigator downloads the file to establish distribution), courts have generally upheld the use of this evidence. US courts, however, have been more reluctant to allow the lawsuits against hundreds of unidentified defendants to move forward as a single case, although there is not yet a consensus amongst the courts.

At the moment, there appears to be resistance to a formal three-strikes policy in the US. Moving forward, however, US-based ISPs will continue to face pressure to do more to prevent online infringements. As a consequence, the relationship between copyright owners and ISPs will likely continue to evolve and market-based solutions may moot the need for legislated policy in this area.



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