Internet Payment Blockades: SOPA and PIPA in Disguise? Or Worse?

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Annemarie Bridy, *Internet Payment Blockades*, **Fla. L. Rev** (forthcoming), available at SSRN.

The law of intermediary liability in intellectual property reflects a constant struggle for balance. On the one hand, rights owners frustrated by the game of whack-a-mole have good reason to look for more efficient ways to stanch the flow of infringement. While this concern is not a new one, the global reach and decentralization of the Internet have exacerbated it. On the flipside, consumers, technology developers, and others fret about the impact of broad liability: it can impede speech, limit competition, and impose a drag on economic sectors with only a peripheral relationship to infringement. As the Supreme Court put it thirty years ago in the seminal *Sony* case, the law must seek a "balance between a [rights] holder's legitimate demand for effective – not merely symbolic – protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce."

For the most part, the battle of these competing interests has played out in litigation, legislation, and deals involving online intermediaries whose services are used to infringe. The Digital Millennium Copyright Act's notice-and-takedown procedures, the peer-to-peer copyright battles, keyword advertising suits, and lawsuits against websites like eBay are giving shape to the relative rights and responsibilities of IP owners and intermediaries.

While few would defend the existing structure as perfect, it has a number of features – such as the (usual) requirement of actual knowledge – that are designed to minimize IP enforcement's collateral effects. More generally, except in the case of inducement, the obligation to stop infringement has been limited to those with a close technological relationship to it – parties that may not have initiated the infringing act, but have the tools to stop it surgically, with minimal collateral effects.

These standards of secondary liability, however, have not satisfied rights-holders. In addition to substantive objections to the rules, IP owners point out that many online intermediaries lie beyond the reach of United States courts. In the last several years, they have tried to widen the net of responsibility to include not just technological intermediaries, but also payment intermediaries that process Internet transactions.

The efforts began in the courts, which held that absent evidence of collusion or inducement, financial intermediaries were too far removed from infringement to justify liability against them. Attention then turned to the legislature, which showed initial enthusiasm but backed down in response to a wave of protest that reflected both substantive and procedural objections to PIPA, SOPA, and related legislation.

In this article, Annemarie Bridy (who has written insightfully about the lead-up to, and fallout from, the PIPA and SOPA debacle) explores the latest front in this battle over responsibility for online enforcement: "voluntary" Internet payment blockades.

The picture she paints is not pretty. If SOPA and PIPA raised transparency concerns, and if the prospect of broad liability cast a pall over financial intermediaries' engagement in "substantially unrelated areas of commerce," the latest chapter will make the winners of earlier battles wonder what they fought for.

As Bridy explains, in the wake of the SOPA and PIPA collapse, rights-holders enlisted the executive branch to pressure payment intermediaries to "voluntarily" take on obligations that mirrored those in the failed legislation. Under the agreement, financial intermediaries commit to a "notice-and-terminate protocol," in which merchants selling infringing products are cut off from access to payment services.

Even if the agreement were truly voluntary, it would raise troubling questions of substance and process. The notice-and-takedown system does not appear to require any inquiry into the relative volume of infringing and non-infringing sales by the offending merchant. The agreement, moreover, arose out of a closed and non-transparent process, as evidenced by the government's failure to produce a single document in response to a FOIA request about negotiations. Equally distressing, the "voluntary," non-mandated and non-contractual nature of the agreement means that no court will adjudicate its meaning and scope.

Bridy makes a persuasive case that this form of "private ordering" is really regulation in disguise. After years on the defensive, and in the shadow of prospective regulation, the payment intermediaries acceded to pressure and joined the ranks of intellectual property enforcers. Without transparency in either design or implementation, the public has no way to know whether this quasi-regulatory system reflects any of the balance that's so critical in the Internet context – between freedom and responsibility, and between infringing and non-infringing use.

I found Bridy's article engaging, informative, and disturbing. She does a terrific job of introducing readers to the past and present of payment blockades. She lays the historical foundation, from initial case law through PIPA and SOPA, and offers a clear, simple, and informative explanation of how the best practices protocol works. And her critique is powerful. For those of us focused primarily on developments in litigation, legislation, and formal administrative law, the article offers a sobering reminder of the limitations of these formal fora, and the doggedness and resourcefulness of rights-holder advocates.

The article left me eager for more details about the agreement's content and effects – will it impede access to websites offering plenty of non-infringing stuff? Where are the incentives for financial intermediaries in that scenario? Market forces may well substitute for legal doctrine and lead payment intermediaries to avoid cutting off legitimate trade. But investigation is expensive, and it may prove expedient to terminate in the questionable case.

Ultimately, whether this system will cause more harm than good is an empirical – and probably untestable – question. It may well be that, with a narrowly tailored notice-and-terminate system, payment intermediaries offer an efficient way to reduce rampant counterfeiting and infringement. But Bridy's article gives us reason to question the jump to that conclusion, especially in a process as muddy as this one.

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