

LOOKING BACK ONE YEAR AFTER *PROFITING FROM FREE*: **A POST-SCRIPT**

One year ago, Andrew Keen's *Profiting From Free: The Scourge of Online Piracy and How Industry Can Help*, sponsored by ICOMP, took an in-depth look at how digital content is distributed and monetised—and often stolen—online. It examined the key business models that sustain online content infringement, discussed a variety of recent EU anti-piracy laws, and assessed the effectiveness of several voluntary industry-led initiatives to combat online content theft.

Mr Keen's paper has proven to be an invaluable resource for content creators, policy-makers, and online businesses alike. But one year is a long time on the Internet, and much has changed since the paper's publication. This post-script surveys developments in this space since the paper's publication and brings the *Profiting from Free* paper back up to date.

Recent EU Policy and Political Developments

A New EU Commission Arrives With a Focus on Copyright

On 1 November 2014, new leadership took office at the European Commission. The new Commission President, Jean-Claude Juncker, has made the strengthening of Europe's digital economy a first-order priority. As a consequence, IP issues are likely to rank high on the Commission's agenda, lending new impetus to initiatives designed to tackle the economic and social costs of online piracy. The Commission's new leadership structure reflects this priority:

- Six Vice-Presidents now sit atop individual issue dossiers; Andrus Ansip, in charge of the Digital Single Market, and Jyrki Katainen, who is responsible for Jobs, Growth, Investment and Competitiveness, are likely to have significant influence on IP policy.
- At the Commissioner level, Günther Oettinger, responsible for Digital Economy & Society, Věra Jourová, who heads the DG for Justice, Consumers and Gender Equality, and Margrethe Vestager, who leads the Competition portfolio, will undoubtedly grapple with a range of IP-related matters.

This structure promises to imbue reforms across a broad range of areas with a renewed focus on digital and economic growth, increasing the visibility of IP issues and bringing renewed attention to online content protection.

Indeed, even before the leadership change, there were signs that the Commission was focusing on IP enforcement issues. In July 2014, the Commission released a major new Action Plan to address EU-based (particularly commercial-scale) infringements of IP.¹ Among other measures, the Action Plan includes arrangements for stakeholder dialogues to identify opportunities for online advertising agencies and payment service providers to cut off revenue to persistently infringing websites. Anti-infringement efforts under the Action Plan are expected to continue under the new Commission.

New "Snippet Tax" Laws

The new Commissioners are already floating new IP policy proposals. On 29 October, Commissioner Oettinger announced a preliminary proposal to reform pan-European copyright laws. The proposal includes a

¹ More details on the Action Plan are available at http://europa.eu/rapid/press-release_IP-14-760_en.htm.

requirement that would, if enacted, require search engines to pay a fee for displaying copyrighted materials on their sites—sometimes referred to, somewhat misleadingly, as a “snippet tax”. When introducing the proposal, Commissioner Oettinger focused his attention specifically on the dominant search engine in Europe, saying “If Google takes intellectual property from the EU and makes use of it, the EU can protect this property and demand that Google pay for it.”²

This is not Europe’s first proposal for such a “snippet tax”. Germany introduced such a law in March 2013 through the *Ancillary Copyright Law*, or ACL. In essence, the ACL prohibits search engines from aggregating and using “snippets” of content without permission from the respective rights holder. This prohibition was intended to enable news organisations to mandate payments from search engines in return for the use of snippets of their content. On 30 October 2014, Spain followed Germany’s lead and, among other amendments to its copyright laws, enacted a similar “snippet tax”.

Even as some European policymakers embrace “snippet taxes”, the German law has so far failed to achieve its objective. Rather, the law has illuminated how Google’s market power in search raises major challenges for policymakers seeking to address these issues. Google reacted to the enactment of the German ACL by asking German content publishers to explicitly opt-in to Google’s use of snippets without charge—or else Google would simply exclude their content from its search results.

Google’s dominance in search, which reaches over 90% of all searches in some European markets, has made this threat doubly effective. The scale of Google’s search business means both that Google’s referrals represent a high percentage of total referrals for affected publishers and that publishers have no alternative source of traffic to replace Google’s referrals.

As a result, Google’s ultimatum put German publishers in a difficult position. They could either waive their new right to compensation for Google’s use of snippets under the ACL, or they could refuse to waive their rights and suffer a massive loss of traffic to their websites and associated revenue.

When affected publishers, as part of the German news industry group VG Media, initially rejected Google’s threat, Google responded by removing snippets of their content. In the face of this “major economic pressure” by Google, VG Media’s members recently capitulated, and Google continues to use snippets of their content without charge. Indeed, Axel Springer, Germany’s largest news publisher, saw its traffic from Google fall by 40% for the two-week period in which Google refused to list its snippets, and saw traffic from Google News plummet a whopping 80%.³ As Springer Chief Executive Mathias Doepfner noted, his company would have “shot ourselves out of the market” if it had insisted on payment in the face of Google’s overwhelming power in search.⁴

The U.S. Government Also Focused on Content Protection

Events in the EU have not taken place in a vacuum: U.S. policymakers have also focused on these issues over the last year. In July 2013, the U.S. Department of Commerce’s Internet Policy Task Force (Task Force), led by the United States Patent and Trademark Office (USPTO) and National Telecommunications and Information Administration (NTIA), issued a green paper on *Copyright Policy, Creativity and Innovation in the Digital*

² See Oettinger floats proposal for EU-wide ‘Google-tax’ (29 Oct. 2014), at:

<http://www.euractiv.com/sections/innovation-enterprise/oettinger-floats-proposal-eu-wide-google-tax-309568>.

³ See Harro Ten Wolde and Eric Auchard, *Germany’s top publisher bows to Google in new licensing row*, REUTERS (5 Nov. 2014), at <http://www.reuters.com/article/2014/11/05/us-google-axel-sprngr-idUSKBN0IP1YT20141105>.

⁴ *Id.*



Economy.⁵ Much of the paper was dedicated to a section considering how to keep rights “meaningful in the online environment,” including through international initiatives.

The USPTO has subsequently hosted a series of roundtable stakeholder hearings on online content protection issues. Recent meetings have focused on best practices for submission and processing of takedown notices relating to infringing materials. These meetings demonstrate continuing U.S. Government support for voluntary industry initiatives designed to meet the challenges of online piracy.

Recent Industry Actions

A cross-section of industry groups and policymakers has continued anti-piracy efforts over the last year.

Offering Legal Alternatives

Content creators have proven willing to adapt to face the rise of online piracy. Rapid investments in new legal content delivery mechanisms have improved customer access to legal content. This effort has been remarkably successful. In November 2014, Recording Industry Association of America (RIAA) Chairman & CEO Cary Sherman announced that over 60% of all music industry revenue is now drawn from online sales, showing how content businesses can still prosper in the online era.⁶

Implementing Existing Voluntary Schemes

Industry groups have also solidified voluntary initiatives that have made further progress at dissuading infringement. Many ISPs, for instance, now participate in the Copyright Alert System (CAS). The CAS—an initiative discussed in the *Profiting From Free* paper—was officially implemented in early 2013. Since then, hundreds of thousands of subscribers have been notified of possible infringement on their accounts, representing substantial progress in anti-piracy education. Content industry associations appear pleased with the scheme’s progress to date. The RIAA reported in November 2014 that initial feedback on the program has been positive, although formal metrics for measuring the success of the program are still being developed.

Establishing New Voluntary Schemes

Fresh schemes have also been launched across Europe in the last year. In July 2014, UK ISPs and representatives of content industries, including the British Phonographic Industry and the Motion Picture Association, established a new UK-wide voluntary scheme named *Creative Content UK*. The initiative combines a consumer-targeted education campaign with a “subscriber alerts” programme. In the subscriber alerts programme, participating ISPs will advise their subscribers when their accounts have been used to infringe IP. The scheme is supported by a mix of private and public funding sources, including commitments from the UK Government.

Another effort, the *Good Practice Principles* (Principles), launched in December 2013 by the Digital Trading Standards Group, seeks to address piracy from another angle by setting out standards for online advertisers that are designed to “strangle” funding sources for online infringers. The Principles clarify how online advertisers can contribute to the fight against online piracy. For example, online advertisers that sign the Principles must react appropriately when notified that their terms of service are being breached by online

⁵ A link to the paper is available here: <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

⁶ See *RIAA Blog* (Nov. 2014), at: https://www.riaa.com/newsitem.php?content_selector=newsandviews&id=B6D2A187-624C-2A95-F8D2-70D07F0B10FA.

pirate websites, including by potentially withdrawing support for such websites. The Principles include monitoring and compliance audit provisions.

Similar “follow the money” efforts have sprung up elsewhere in Europe too. Italy’s advertising industry (represented by IAB Italy) and content industry (FPM and FAPAV) recently established a memorandum of understanding to combat online piracy by choking off ad revenues to consistently infringing websites. Discussions of similar approaches have taken place in Germany and Finland.⁷

Cooperation between industry and law enforcement has also advanced. In September 2013, the City of London launched a new IP crimes enforcement unit, the Police Intellectual Property Crime Unit (PIPCU). Since that time, working in close cooperation with content creators and industry, PIPCU has suspended more than 2,000 UK domain names and investigated more than £28 million worth of IP crimes.

The Anti-Piracy “Google Gap”

Despite the developments described above, some in industry continue to believe that Google, given its market power in search and other online sectors, remains a major impediment to combatting online infringement more effectively. For example, a UK report, published by Mike Weatherley MP, the IP adviser to David Cameron, titled *Search Engines and Piracy*,⁸ explicitly recognizes the “gatekeeper” role played by search engines and suggests new anti-piracy measures they could take to remedy online piracy. As the overwhelmingly dominant search engine in Europe, Google remains the leading “point of entry” to infringing content for many EU consumers. Accordingly, elements in the content industry have argued that Google should do more to address piracy in step with other segments of industry.

In 2013, Google published a report entitled *How Google Fights Piracy*, in which Google claimed to downgrade search result links to websites that are persistently associated with successful take-down actions. In October 2014, Google updated this report and claimed to present new evidence of its efforts.⁹ Google also claimed to have established new ad formats that “guide” users to legal content; developed an improved “demotion” algorithm to knock infringing sites down search rankings; and removed additional terms associated with piracy from its autocomplete function.

The response to Google’s most recent announcement has been mixed.¹⁰ On the one hand, some rights holders have greeted Google’s update with cautious optimism. The MPAA, for instance, said that “[e]veryone shares a responsibility to help curb unlawful conduct online, and we are glad to see Google acknowledging its role in facilitating access to stolen content via search... We look forward to examining the results of Google’s algorithm changes to see if they reduce the appearance in search results of stolen content and the sites that profit from it.”

⁷ See Section 5, *Follow the Money: Financial Options To Assist In The Battle Against Online Piracy*, Mike Weatherley MP, available at: http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf.

⁸ A link to the paper is available at <http://www.mikeweatherleymp.com/2014/05/29/google-must-take-lead-in-the-fight-against-piracy/>.

⁹ A link to the new paper is available here: <http://googlepublicpolicy.blogspot.co.uk/2014/10/continued-progress-on-fighting-piracy.html>.

¹⁰ See CBC News, “Google Thwarts Piracy With Search Algorithm Changes,” 20 October, 2014, available at: <http://ca.bukvar.mk/news/?newsid=k18>.

On the other hand, Google’s new ad formats are not free re-directions towards legal sources of content, but rather require rights holders to *pay Google* for referrals to legal content. Many see this as a not-so-subtle form of extortion that seeks to capitalise on Google’s market power. The British Phonographic Industry undoubtedly echoed the views of many rights holders when it criticised the new ad formats, saying “[t]here should be no cost when it comes to serving consumers with results for legal services.”¹¹

It should also be noted that some of Google’s claims in the report are not new—Google’s so-called “demotion algorithm,” for example, was touted in Google’s 2013 report as well. Shortly thereafter, the RIAA tested the algorithm, but found it to be ineffective: it reported that well-known pirate sites were still topping Google’s search results.¹² At that time, the RIAA criticised Google, noting that “there has been little movement toward finding tools that have the impact of actually reducing theft and damage.”¹³ For example, Google warns Chrome users of malicious sites, but does not use that feature when users go to sites that are dedicated to infringing IP. This observation remains true a year later.

Conclusion

Over the past year, policymakers and industry efforts have galvanised the fight against online piracy. A multi-pronged approach, including increased enforcement, educational campaigns, industry measures, and attacks on infringing funding sources, has given momentum to the fight against online content theft.

Despite these gains, more needs to be done. As illustrated by the experiences of the German news publishers, Google’s actions do not always align with the interests of content creators, and Google is not afraid to use its market power to advance its own interests irrespective of their impact on rights holders. In the past year, Google has done little to change its practices in this regard. Time will tell if the next year brings a different story.

¹¹ See Five Site, “Google Changes To Fight Piracy By Highlighting Legal Websites,” October 21, 2014, available at: <https://www.fivesite.com/article/228/google-changes-to-fight-piracy-by-highlighting-legal-websites>.

¹² See comments by Cary Sherman, on behalf of the RIAA, to the U.S. House of Representatives Committee on the Judiciary, Sub-Committee on Courts, IP and the Internet, September 18, 2013, available at: http://judiciary.house.gov/_files/hearings/113th/09182013_02/091813%20Testimony%20of%20Cary%20Sherman.pdf.

¹³ *Id.*