Opting Out of the Internet in the United States and the European Union: Fair Use, Safe Harbors, and International Law

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Abstract:

This presentation will analyze the legal and human rights implications of efforts by copyright owners such to "opt out" of the Internet in general, and out of Web 2.0 sites in particular. Its thesis is that courts and legislatures should reject the argument by copyright owners that absent a license agreement respecting a copyrighted work, technology and Internet companies should be forced to monitor for and technologically filter out any quotations or clips on their sites unless a copyright owner affirmatively "opts in" to being included on a given site. Instead of this type of an "opt-in" framework, judges and policymakers should permit Internet companies to respond to allegations of infringement by removing offending copies from their sites, and should require copyright owners to identify the location of specific infringing copies on the Internet with adequate detail to enable Internet companies to investigate allegations of infringement. This "opt out" framework will better preserve technological innovation and the human right to free expression than would an "opt in" system, which would establish copyright holders and Internet companies as more intrusive censors of Internet users' speech. The presentation will briefly describe the development of "Web 2.0" services such as YouTube and Wikipedia, and the complex intellectual property issues that they engender. It will then summarize the case law in the U.S. on opting out of the Internet, from the early cases in which courts struggled with the possibility that copyright law would chill the development of online services, to the more recent judicial consensus shielding online intermediaries from liability as long as they do not purposefully disregard opt-outs that identify specific infringing content, in cases such as *Perfect 10 v. Google* (9th Cir. 2007), *Perfect 10 v. Visa* (9th Cir. 2007), and *Parker v. Google* (3d Cir. 2007). My contribution to the advancement of IP scholarship will consist in showing that European courts have erected a similar knowledge-based opt-out framework for online intermediaries such as Internet service providers, creators of peer-to-peer file sharing software, and user-generated content platforms, although some recent cases such as the Google News case in Belgium have bucked this trend. Many European courts base their rulings on the European Community's Electronic Commerce Directive of 1990, which provides that storing or "hosting" information provided by users does not give rise to monetary liability if an Internet company does not control the user and either does not have actual knowledge of infringement or expeditiously removes the infringing material upon becoming aware of its presence on the site. The developing consensus of the European courts resembles the celebrated ruling in *Kelly v. Arriba Soft* (9th Cir. 2003) that reproducing copyrighted work in order to improve access to information over the Internet constitutes a fair use, and that respecting clear opt-outs is evidence of a lack of intent to disregard the copyrights of others. Moreover, the presentation will address, and rebut, the common objection that international copyright treaties, and specifically the minimum level of copyright protection required by the Berne Convention and GATT TRIPs agreement, preclude the establishment of an opt-out regime for copyright disputes. Finally, it will discuss the implications of these findings for currently pending cases that will define the future of Web and Web 2.0 services such as digital libraries and online video sites.