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PERSPECTIVE

## The song remains the same: Exceptionalists against the application of the law

By Neil Turkewitz

Since the 2012 coordinated protests against the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA), many internet companies and the organizations that represent them have frequently used similar rhetoric to argue that just about any constraint on the operation of internet-based platforms and services would trample fundamental freedoms. Notwithstanding the dramatic public narrative, internet intermediaries have actually made considerable progress over the last five years toward self-restraint, becoming more cooperative and accountable internet actors. But there is still much work to done.

On the bright side, ad networks and advertisers have implemented procedures designed to keep ads off of pirate sites. For instance, ISPs and rightholders have joined forces to educate internet users about the need to act responsibly, including contacting users directly when they are involved in distributing infringing content. Access providers in various jurisdictions, either pursuant to voluntary agreements or through government orders, have worked to block access to pirate sites, and some domain name registries have entered into agreements with “trusted notifiers” to expedite resolution of piracy complaints. Financial institutions have refused to provide services to such sites, and governments, including our own, have taken criminal actions against inveterate offenders and have seized



New York Times

Protesters against the SOPA and PIPA anti-piracy legislation in New York, on Jan. 18, 2012.

domains through such programs as Operation in our Sites. Even search engines have taken some initial steps to reduce access to infringing content, most notably by demoting search results linking to pirate sites.

voluntary actions are welcome, conflicts between competing, fundamental interests persist. It is at these edges that the oversimplifications and pseudo-populism of the SOPA/PIPA uprising are particularly counterproductive.

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While no single measure on its own will eliminate infringement, and much remains to be done, taken together these efforts begin to restore the common sense application of law to the internet in ways that should enhance economic prosperity and cultural production.

But a globally interconnected system of free enterprise must operationalize the rule of law through continuous evolution, as technology, culture and the law itself evolve. And while such

*Google v. Equustek*, a case recently argued before the Supreme Court of Canada, brings these issues into stark relief. Equustek is a Canadian company that designs, manufactures and provides automation services for systems integration. Equustek obtained an order against companies and individuals operating several websites offering products that infringed Equustek’s intellectual property rights. But the infringement continued even after the order was issued, and eventually

Equustek sought (and won) an order against Google to prevent it from returning search results to the infringing sites. Google is ... well, you know who they are. Part of the Alphabet.

In *Equustek*, once it became clear that the relief ordered against the direct infringers would have little practical effect without employing some technical limits on how the infringing sites were accessed, the court saw fit to issue its narrow, limited order against Google (even though it was not a party to the case, nor the source of the infringing products). An appellate court upheld the order because it agreed with the lower court that Equustek would otherwise effectively be denied a remedy, and that the order was appropriate and proportional (that is, not overly burdensome to Google). Google appealed to the Supreme Court of Canada.

As the questions posed by the Supreme Court of Canada during argument made clear, Canadian courts have traditionally had broad equitable power to order third parties to take action to prevent harm, and based on the questions posed, the court appeared to find little novel in the order granted against Google. Google saw it differently. Not only did it challenge the Canadian courts’ jurisdiction to issue the order, but it raised the spectre of pervasive censorship — the same rhetoric employed in the SOPA/PIPA debates, and the traditional refuge of what may properly be referred to as “internet exceptionalism.”

Only this time, the spectre isn’t being raised to thwart new legis-

lation aimed at internet companies; it's being used to evade a straightforward effort to subject them to the same law as everyone else. Too frequently, theories of internet governance are framed in absolutes with any restraint on conduct being understood as a restraint on all conduct. Seen from this perspective, even a valid, narrow judicial constraint on internet platforms is seen, and labeled, as a restriction on free expression, inexorably opening the floodgates to orders targeting legitimate free speech. But while such claims may have some rhetorical appeal in political theaters, they haven't fared well in courtrooms where judges insist on more nuance and detail.

I'm not unsympathetic to Google's concerns. As a player with a global footprint, Google is legitimately concerned that it could be forced to comply with the sometimes oppressive and often contradictory laws of countries around the world. But that doesn't make it — or any other internet company — unique. Global businesses have always had to comply with the rules of the territories in which they do business.

This may be more complicated online, of course. There will be (and have been) cases in which taking action to comply with the laws of one country would place a company in violation of the laws of another. But principles of comity exist to address the problem of competing demands from sovereign governments. And it's hard to see any conflicting issues of national sovereignty here. As the appellate court wrote: "In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation.... The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected."

The direct implication of the "internet exceptionalist" position is that governments lack the ability to impose orders that protect its citizens against illegal conduct when such conduct takes place via the internet. But simply because the internet might be everywhere and nowhere doesn't mean that it isn't still susceptible to the application of national laws. Governments neither will nor should accept the notion that

their authority is limited to conduct of the last century. The internet isn't that exceptional.

And notice that the "internet exceptionalist" view unilaterally prioritizes one set of rights (free expression) over another (property rights). But property rights don't become irrelevant just because the internet makes distribution of infringing content easier. In fact, the opposite is true: precisely because infringement is easier and more prevalent on the internet, effective judicial protection of intellectual property rights is more important. But the internet does create special problems for effective enforcement of rights, and this is where the rubber meets the road.

Reaching resolution of the complicated issues affecting freedom of speech, as well as commerce, in a manner that adequately balances the interests of all parties requires mature and thoughtful dialogue, not slogans and absolutism. It requires, above all, a balancing of the equities.

Internet companies can count on support from the creative community in fighting against

actual threats to free speech. But challenging this particular order doesn't help to illuminate these actual threats or to build broader political communities to raise awareness and to fight against them. Our mutual goal should be to achieve a technological neutrality that ignores the means by which conduct is performed (or content is delivered), and that applies the law equally, and without intemperate rhetoric, both online and off.

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