

NBER Economics of Digitization Research Program

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Feasibility of Alternative Dispute Resolution for internet-related copyright disputes

The massive diffusion of digital works has led to illegal downloads on a large scale. Software companies, book publishers, video producers are reluctant to follow the example of the music industry, which tried to respond to massive copyright infringement with massive lawsuits.

In the United States, 17,587 lawsuits have been initiated by the Recording Industry Association of America.¹ Results have shown that this judicial strategy is not efficient.

Right holders have then turned to courts to obtain filtering and blocking measures against Internet Service Providers. In November 2011, the European Court of Justice clearly ruled against the implementation of monitoring tools which would identify files containing works over which intellectual property rights are claimed, and which would block the exchange of copyrighted files.

It is long and expensive for rights holders to sue all internet users who download illegal content. At the same time, courts are not favorable to the use of filtering systems to track down the sharing of this content (as such systems are likely to violate fundamental rights, in particular freedom of speech). If there is no curative or preventive manner to address it, the initial problem remains: How to solve the issue of massive online copyright infringement?

It is not the first time in the internet history that rights holders suffer from online intellectual property infringement on a large scale. In the middle of the 90s, trademark holders began facing the new phenomenon of cybersquatting – the fraudulent registration by third parties of domain names similar to their trademarks. It was hard to identify who was the domain name holder, expensive to launch a lawsuit (as the registrant was often in a foreign country), and unlikely to get a rapid judicial transfer decision.

Nevertheless, a system was created bottom up to fight against what was the first online phenomenon of massive intellectual property infringement: The Uniform Domain Name Dispute Resolution Policy (UDRP) was designed to offer rights holders a possibility to quickly have disputed domain names transferred to them, for very limited fees. This system satisfies trademark owners, who have used it than 30,000 times since the end of 1999.²

¹ EFF, *Phase Two: Mass John Doe Lawsuits*, Sept. 2008, www.eff.org/wp/riaa-v-people-years-later#3; A. Bridy, *Is Online Copyright Enforcement Scalable?*, *Vanderbilt Journal of Entertainment & Technology Law* 13, no. 4 (2011): p. 695-737.

² According to the count made by D. Simon, *An Empirical Analysis of Fair Use Decisions under the Uniform Domain Name Dispute Resolution Policy*, *Boston College Law Review* 53, no. 1 (2012), note 60. According to WIPO Arbitration and Mediation Center's A. Nappey, internal sources give the following figures: 36,443 cases argued in on August 8, 2011, and 28,270 decisions rendered (personal communication with the author, October 11, 2011).

UDRP is the first form of online alternative dispute resolution. Interestingly, it remains *unique*. Though one can see a parallel between yesterday online trademark infringement and today online copyright infringement, which are both global and massive phenomena, there is no research on the possible design of a scheme for out-of-court settlement of disputes through electronic channels (as of today, only Prof. Lemley and Reese have together argued that this kind of system, limited to the USA, could be designed for resolving peer-to-peer copyright disputes³).

Can there be an appropriate system of online dispute resolution, which would prove efficient, and would lower the costs of the fight against copyright infringement? The proposed study would address:

- The possibility of replicating or adapting UDRP to internet-related copyright disputes
- Its legal issues
- An economic analysis of such a system

The grant would be used for summer support, and translation.

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³ M. Lemley and A. Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, *Cardozo Arts and Entertainment Law Journal* 23, no. 1 (2005): p. 1-20.