

Will Judicial Judgment Change Cyberspace?

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(PhysOrg.com) -- The struggle of American courts to control the explosion of intellectual property rights violations on some of the most traveled highways of cyberspace poses a legal challenge to the judicial system with implications that could threaten the survival of Web sites clicked on by the average Internet user every day, a University at Buffalo Law School expert on online intellectual property issues said today.

The struggle of American courts to control the explosion of [intellectual property](#) rights violations on some of the most traveled highways of cyberspace poses a legal challenge to the judicial system with implications that could threaten the survival of Web sites clicked on by the average Internet user every day, a University at Buffalo Law School expert on online intellectual property issues said today.

A disturbing trend in these complicated copyright and [trademark](#) cases is a judicial tendency to borrow precedents from criminal law, explains Mark Bartholomew, UB associate professor of law, whose new research, "Cops, Robbers and Search Engines: The Questionable Role of Criminal Law in Contributory Infringement Doctrine," is forthcoming in the Brigham Young University Law Review.

"The problem is that what makes sense for liability in criminal law does not necessarily make sense in the world of intellectual property," says Bartholomew. "It turns out that the rules of criminal law are based on very different theoretical justifications than the rules of intellectual property law."

Much of the issue revolves around what is known as "contributory infringement law," a legal principle that deals with someone or an organization that helps someone else commit an act of copyright or trademark infringement. This can occur either by encouraging infringers, renting out commercial space where they could sell illegal material, or

providing money or technological expertise to illegally copy something from cyberspace.

"Technically speaking, none of these entities would be guilty of infringement because they did not do the illegal copying themselves," Bartholomew says. "But under the doctrine of contributory infringement, they can be held liable and suffer the same legal penalties as the direct infringer, the person who did the copying."

And the idea of "contributory infringement" is much more common than the legal term would indicate. Mainstream search engines such as Google, Internet auction houses such as eBay and credit card companies such as Visa have all faced major litigation accusing them or their employees of knowing others were using their services to illegally copy information, and holding them responsible for the infringement of others. Colleges and universities who provide the computer infrastructure that allows students to post and illegally download digital files of copyrighted works also have been charged under these contributory infringement laws.

"Think of any major Web site you use that allows people to post content or search the Internet," Bartholomew says. "Chances are that Web site has had to think long and hard about potential liability for contributory infringement."

The problem comes when American judges look to use the legal grounds used to punish those convicted of criminal laws for those charged with violating [intellectual property rights](#), according to Bartholomew. Remaking contributory infringement law in criminal law's image would be "a mistake," he says. Criminal law is used to punish morally inappropriate behavior, Bartholomew says. "To act immorally, you have to know what you are doing, and it is that guilty mental state that criminal law tries to detect and punish."

But intellectual property law is fueled by what Bartholomew calls an "instrumental" principle. "It seeks to generate the greatest number of expressive or inventive works in society as possible, not to punish those who violate some sort of moral code." In general terms, modern intellectual property law doesn't care if you knew what you were doing was right or wrong. Instead, it is concerned with what the aggregate effects are of your actions on the larger society. In other words, intellectual property law asks whether your conduct will result in less creative work being shared with the world, Bartholomew says.

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"It therefore makes sense for contributory infringement law to focus more on the material-contribution side of the equation and less on the mental state of accused individuals," he says. "The two legal doctrines are trying to accomplish two different things."

Bartholomew's legal recommendations have major implications for virtually everyone who uses these electronic platforms - "the millions of individuals who engage in intellectual property infringement every day," as he describes it -- as well as the giant companies who have become the bellwethers for cyberspace commerce.

"The courts are struggling with whether or not to hold these Internet giants accountable. And this is a decision with big implications for all of us," says Bartholomew. "If search engines and Web sites displaying user-generated content find themselves responsible for greater policing of their own sites to root out infringement, that will cost a lot of money.

"If the standard for contributory infringement is set low enough, Internet intermediaries would have to allocate millions to hire staff to scan their own Web sites for infringing activity. Some of them are already doing this. If the standard is too low and the costs of policing the Web too onerous, this could even threaten the survival of the Web sites that we use everyday. And if the standard is too unpredictable, investment in innovative digital technology may be chilled from concern over the paralyzing costs of defending contributory infringement suits."

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