Notice and Takedown

“Judge & Jury ?” revisited

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Legal frameworks:

- Strict liability
- Common carrier
- Mere conduit
- Notice and take-down
- Digital Millennium Copyright Act (DMCA)
Notice & Take Down regimes

- Defamation
- Adoption
- Tobacco Adverts
- Illegal-to-possess Child Pornography
- Copyright ? Race Hate ?? Sedition ???
- ECommerce Directive
  - May 2000, 18 months to implementation
Possible solutions:

• Section 230 immunity (Zeran)
  – has loss of CDA unbalanced the USA law?
• Electronic Commerce Directive
  – envisages generic “notice-and-takedown”
  – will this just be the price of doing business?
• R4 regime
  – ISPs do not have to assess worth of notices
R4 - new idea based on DMCA

• Report
  – formal notification of unacceptable content

• Remove
  – immunity comes from acting in a reasonable time

• Respond
  – author can stand behind their actions

• Replace
  – ISP just does what it is told
R4 - some details

- Process does not iterate
- Replace may affect the quantum of damages!
- Industry would need to advise on timescales
- May be a need for pre-replacement
- Can one avoid Remove in non-urgent cases?
- There are issues to solve about anonymity
- People can go to the Court at any stage
Why self-regulation won’t cut it:

Any practical solution must ensure that the ISP gets immunity from existing laws for following rules [otherwise you have to keep an eye on those laws]

AND

those who invoke the process must face legal sanctions if they “cheat” [otherwise there is nothing to hold them back]
Why are ISPs special?

- **Scale**
  - millions of customers
  - tens of millions of articles

- **Immediate right of reply**
  - a “democratic medium”

- **Global competition**
  - customers will choose providers without apparently arbitrary “takedown” powers
Finally:
back to the frameworks:

✗ Strict liability
✓ Mere conduit
✗ Common carrier
✗ Notice and take-down
✓ Digital Millennium Copyright Act (DMCA)
   ♥ R4 variant