How IPR enforcement is undermining consumer sovereignty

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ABSTRACT

The enforcement of intellectual property rights is a major priority for developed countries, both in their domestic policies and in their approach to multilateral trade negotiations. The United States in particular is known for strongly advocating for punitive penalties for copyright infringement, which have resulted in ruinously high damages awards for non-commercial infringement. Other countries are being encouraged to adopt similar laws and Malaysia is amongst those that have acceded to this. In parallel to the expansion of civil damages awards, intellectual property infringement is increasingly being characterised as a criminal offence, with the result that enforcement resources are being diverted from the private to the public purse. The privatisation of penal enforcement through intermediaries such as Internet Service Providers is especially concerning.

The over-zealous enforcement of patent rights by customs authorities has also placed lives at risk. The prospect of such laws becoming mainstream was one of the factors that led to an overwhelming revolt against a planned Anti-Counterfeiting Trade Agreement, and its consequent rejection by the European Parliament, mirroring the rejection of the SOPA and PIPA copyright laws in the United States.

This presentation asserts that although copyright and patent infringement are wrong, the detriments that these activities pose to consumers are now far outweighed by the dangers of overly strict enforcement of copyright and patent laws. Governments have been too ready to serve rights-holder special interest groups, and that it is incumbent upon consumer groups to lead the charge for reform, to ensure a better balance between consumer and rights-holder interests.

Keywords: intellectual property, copyright, damages, criminal law, consumer protection

Introduction

Intellectual property rights are important. They ensure that creators and inventors receive recognition for their work, and allow them to share in the rewards of its commercialisation, by limiting (without completely excluding) the public's freedom to use it without permission or payment.

But whilst intellectual property (IP) owners have rights, consumers have rights too. The Universal Declaration of Human Rights provides them with a right to privacy, a right to freedom of opinion and expression, a right to education, a right to health, and a right to freely participate in the cultural life of the community.

These human rights have been recognised under both national and international law as limitations on intellectual property rights (IPRs). For example, domestically they are the basis for the legal right to copy and share knowledge and culture under the “fair use” or “fair dealing” copyright

1 Portions of this paper are drawn from the author's articles “Copyright enforcement is killing people” (January 2013) published on Digital News Asia at http://www.digitalnewsasia.com/.
doctrines. Internationally, the Doha Declaration on TRIPS and Public Health of 2001 limited the extent to which pharmaceutical patents could be used to limit a country's ability to address pressing public health needs.

Likewise, not only the substantive content of IP rights but also the manner in which they are enforced should be limited by human rights considerations. But too often, this has not been the case, as IP enforcement regimes both domestically, and under multilateral agreements, have transgressed these rights.

This paper will outline some of the worst transgressions, and suggest that the consumer movement has a role in reasserting its sovereignty over the use of IP for personal and private uses by consumers, thereby delineating a line which IP enforcement measures should not be allowed to cross.

### Damages and criminal penalties

Of all the IP enforcement measures, most familiar are civil damages and criminal penalties. Since at least 1997, these have been on an markedly upward trend.

Under American copyright law, copyright owners can seek an award of statutory damages against an infringer, even when they can't prove that they actually suffered any loss. Since the No Electronic Theft Act of 1997, this amounts to up to $30,000, or if the infringement is shown to have been wilful as high as $150,000, for each and every work in which copyright was infringed.

Since a “work” in this case can be just a single song, sharing an album's worth of songs online can render a defendant liable to astronomical sums, such as the $1.92 million judgment that single mother Jammie Thomas-Rasset faced in 2009 for sharing 24 songs. Through a series of appeals the damages award has fluctuated up and down, and it currently stands at “only” $222,000. Similarly, Joel Tenenbaum who shared 31 songs faces a $675,000 award.

Regrettably the United States is not alone in adopting such high statutory penalties. Last year, Malaysia quietly adopted its own statutory damages penalties for copyright infringement. For sharing the same number of songs that Jammie or Joel did, Malaysians could be liable to half a million ringgit in statutory damages, in addition to any actual damages or profits that the plaintiff could prove.

Even the judges called upon to mete out these penalties acknowledge that something is seriously wrong. In Joel's case, Judge Nancy Gertner wrote:

> As this Court has previously noted, it is very, very concerned that there is a deep potential for injustice in the Copyright Act as it is currently written. It urges—no, implores—Congress to amend the statute to reflect the realities of file sharing. There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood.

In some cases, the disproportionate nature of IP enforcement proceedings has even driven defendants to suicide. Most famously, in January this year, Aaron Swartz committed suicide one month before his trial on charges which placed him at risk of up to 35 years in jail and fines running

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into the millions. He had been charged with offences related to the downloading of 4.8 million academic articles – the majority of them already paid for by public research funding – from behind the paywall of the JSTOR repository, so that they could be accessed by all.\(^6\)

Tragically, Aaron was not the first casualty of an out-of-control IP enforcement regime, or even the first in the past year. In April 2012 Greg Ham, saxophonist for the Australian rock group Men at Work was found dead at his home, having sunk into a deep depression following a copyright court judgment against him. The court had ruled in 2010 that a short flute riff Greg had improvised in the Men at Work hit *Land Down Under* had actually been lifted from a 1934 Australian nursery rhyme, *Kookaburra Sits in the Old Gum Tree*.\(^7\)

On one level, the cases aren't really comparable: Greg's case was a civil lawsuit over musical quotation (a practice common to composers from Mozart to Dylan), Aaron's was a criminal prosecution over the reproduction of journal articles, and based on a cybercrime law rather than a copyright law. Even so, each case turned on the characterisation of the sharing of information and culture as “theft” – a metaphor that the new generation of consumers roundly rejects.

In line with this, the classes of IP infringements that are being treated as criminal are expanding. At one time, the only criminal penalties that were applied in most countries' copyright laws were in respect of the mass distribution of copyright materials for profit. But the United States has been pushing to extend criminality to acts that do not involve financial gain. For example, under the US-Australia Free Trade Agreement of 2005, Australia was required to extend criminal penalties to cases of “significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain”. It was also required to criminalise the act of trafficking in devices that can be used to circumvent Technological Protection Mechanisms (TPMs) applied to copyright works, such as software used to make backups of DVDs.

The same changes are now included in the text proposed for the Trans-Pacific Partnership Agreement currently between eleven countries, based on a leaked draft of April 2011 put forward by the United States.

Furthermore, the United States does not hesitate to demand the extradition of foreigners under the criminal provisions of its copyright law, even if they have no connection to the United States other than having infringed a US-held copyright. English\(^8\) and Australian\(^9\) defendants have both discovered this the hard way.

Foreign websites that are legal overseas have also found their domain names cancelled, simply on the basis that they *would* be illegal if they were located in the United States.\(^10\) The SOPA and PIPA bills that were introduced in the United States last year would have threatened to introduce a much more systematic system for the blocking of foreign domains, though thankfully a massive worldwide outcry resulted in these bills being withdrawn.\(^11\)

**Self-help and intermediaries**

Apart from fines and criminal penalties, IP enforcement is also taking place through third-party intermediaries such as Internet service providers and payment providers. This is equally or even

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\(^6\) See [http://www.huffingtonpost.com/2013/01/12/aaron-swartz-suicide_n_2462819.html](http://www.huffingtonpost.com/2013/01/12/aaron-swartz-suicide_n_2462819.html).


\(^11\) See [http://www.huffingtonpost.com/art-brodsky/pipa-and-sopa-were-stoppe_b_1230818.html](http://www.huffington.com/art-brodsky/pipa-and-sopa-were-stoppe_b_1230818.html).
more troublesome than the harsh civil and criminal enforcement measures described above, because intermediaries generally operate outside of the supervision of independent judicial or administrative oversight.

The best known example of enforcement through intermediaries is the French HADOPI or “three-strikes” law, under which those accused of copyright infringement by industry investigators could be fined or disconnected from the Internet. In reality, the HADOPI experiment has been a failure, with only one conviction having been secured in its first four years, coming at a cost of several millions of euros. Unperturbed by this, in the USA, a similar “six strikes” industry scheme will kick off in the coming weeks, which will require ISPs to engage in systematic privacy violations of their users in order to monitor their suspected download of unlicensed copyright files.

Intermediaries also act to take down suspected copyright-infringing content that has been uploaded to the Web. The dominant legal regime for this is that established under the United States Digital Millennium Copyright Act (DMCA), which implements the WIPO Copyright Treaty in a very expansively and proactive manner. It require content providers to take content down in response to a copyright claim, even before the uploader has had a chance to respond – which creates an improper incentive for copyright claimants to lodge bogus complaints.

Outside of the legal regime established by the DMCA, providers have entered into agreements with content-owners that go still further, requiring the use of automated scanning technologies such as Google's Content ID system that will flag suspected infringing content automatically. But there are problems with this and similar systems, whereby content can be flagged and down despite being in the public domain, or even being completely uncopyrightable. In one notorious case, a recording of birdsong was reported as a copyright work, and taken down automatically.

Payment intermediaries are also being used as pawns in the intellectual property enforcement war. The financial blockade against Wikileaks by Paypal, Visa and Mastercard is well known. Less well known is that Paypal has also wrongly blocked hundreds of cyberlocker websites, which are repositories for storing large files. Although these can be used for storing copyright material, some of which may be infringing, cyberlockers are also used for many legitimate purposes, even by military and government users.

Finally, customs officers are being used as intermediaries to seize suspected counterfeit goods. The problem is that oftentimes the goods have not been counterfeit, as in the case of India-made generic medicines, legally produced under compulsory licence, being shipped to other developing markets in which the medicines are also legal. At last 19 such consignments of such life-saving medicines were seized by European customs authorities in 2008 and 2009, raising the reproach of the World Health Organisation (WHO).

In July 2011 the European Union gave a commitment that this would not recur, yet the notorious Anti-Counterfeiting Trade Agreement (ACTA) reserved a broad role for customs authorities to act

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15 See [http://www.youtube.com/t/contentid](http://www.youtube.com/t/contentid).
as intermediaries in the seizure of suspected infringing products, and similar text is believed to be under negotiation in the TPP also.

**Self-help remedies**

Self-help remedies are also used in which the copyright owners themselves seek to prevent or to avenge infringements of their intellectual property rights, usually by technological means.

A recent disturbing example is found in the case of Norwegian journalist Andreas Ødegård, who loaded up a dictionary application on his iPad one day last year, and was prompted to provide his Twitter account details, without an explanation of why they were needed. He declined, but the app then exited. After repeating this a few times he finally accepted. A few minutes later he received a notification email about a reply to a tweet that he had apparently posted. The tweet said “How about we all stop using pirated iOS apps? I promise to stop. I really will. #softwarepirateconfession”.

Andreas hadn't, of course, posted this “confession” – his dictionary app had done so. But the confession was false: Andreas’ app wasn't pirated: he had paid $50 for it, and had the receipt to prove it. It soon emerged that hundreds of other innocent users were similarly affected. Whilst Andreas wasn't at fault, even if he had been, this was no excuse for the application developer to retaliate by abusing his private Twitter account details to post a fraudulent confession in his name.

Another example is the automatic updating of tethered appliances. In a well-publicised 2009 incident, 17 year old student Justin Gawronski lost all of the notes and annotations that he had added to the Kindle e-book version of George Orwell's “1984” for a school assignment, when Amazon silently deleted the book from his Kindle. Gawronski had purchased the book legitimately (and his purchase price was refunded when the book was deleted), but according to Amazon, the publisher had not cleared the rights properly. A lawsuit by Gawronski was settled for $150,000.

Sony has been another repeat offender in this regard. The Sony PlayStation was originally sold with the ability to run as a computer, running a third-party operating system. But Sony disabled this feature with a software update, thereby crippling already-purchased consoles. Users were forced to “agree” to this because the software update was compulsory if they wanted to retain access to Sony's gaming network. This also prompted a lawsuit – but on this occasion a settlement was not forthcoming, the lawsuit being dismissed due to the “fine print” in the terms of use that users were assumed to have read.

Other examples of self-help enforcement measures taken by industry (though with legislative backing through anti-circumvention provisions in copyright law) are the use of TPMs such as Digital Rights Management technologies. Colloquially known as “digital locks”, these hobble the digital content products and devices that consumers purchase, in a pre-emptive attempt to stop illegal copies (or, indeed, legal copies) from being made.

Sony provides another example of this, having deliberately and secretly installed a form of DRM malware onto the computers of those who purchased its music CDs. This malware was intended to stop the CDs from being copied, but also incidentally exposed consumers' PCs to third-party viruses. The use of this DRM malware by Sony led to a class action that was settled in favour of

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consumers.\textsuperscript{25}

**International norm-setting**

ACTA and the TPP have both already been mentioned as recent multilateral efforts at setting TRIPS+ protection and enforcement standards (that is, standards higher than those set out in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS). The secretive process of negotiation of these treaties has so far led to the downfall of the former, when it was spectacularly and overwhelmingly rejected by the European Parliament in July 2012, following widespread online and street protests.\textsuperscript{26}

But the TPP continues to be negotiated under similar conditions of secrecy, and includes even more TRIPS+ enforcement measures than ACTA had. For example, it is proposed that copyright owners should give permission for temporary copies, such as those that are made when accessing content over the Internet. This could cast a legal shadow over much of Asia's content, cloud and service provider industry, whilst leaving US competitors unaffected (due to their ability to make use of the “fair use” exception in American copyright law, that most other countries in this region lack).

This is painted as an anti-piracy provision, but it's unnecessary to prevent against piracy: if the content is unauthorised, then whoever uploaded it has already committed a copyright violation. Rather, the temporary copying provision will impact on intermediaries like search engines and user-generated content hosts, and thereby on ordinary consumers.

In addition, the TPP would prohibit the use of tools to allow access to copyright works protected by digital locks. This could prevent the use of unlocking devices for mobile phones, and the sale or use of region-free DVD players that currently allow the citizens of many TPP-negotiating countries to play DVDs legally purchased overseas.

A DMCA-style content takedown system would also be required under the TPP, whereby user-generated content is taken down in response to a complaint before the user has a chance to be heard. In conjunction with this, it promotes Content ID-style technical standards for systems to identify copyright material in user-generated content. Finally, the TPP encourages legal incentives for ISPs and copyright owners to reach under-the-table deals to combat piracy – such as the American six-strikes regime – deals in which consumers will have no say.

Whilst this text is being negotiated in secret, the US government office that is driving the negotiations has a panel of 600 advisers, mainly from big corporations, who have not only seen the text, but have helped to write large parts of it. No clear explanation has been given of why big business should get a direct say in the negotiations, but consumer groups and other public interest representatives shouldn't.\textsuperscript{27}

**Challenging national and consumer sovereignty**

Until the explosive growth of IP enforcement measures described in this paper, it was largely up to the consumer to decide on the limits of their use of copyright material. The consumer would, for example, decide how wide would be the “personal circle” of family and friends with whom copyright works could be shared. They could decide for themselves how much of an article they could copy in exercising their “fair use” or “fair dealing” rights.

Now, the copyright owner decides these things, through DRM technologies that set a limit on how

\textsuperscript{25} See \url{http://www.pcworld.com/article/125838/article.html}
\textsuperscript{26} See \url{http://www.bbc.co.uk/news/technology-18704192}
\textsuperscript{27} See \url{http://www.techdirt.com/articles/20120622/23220319444/ustr-gives-mpaa-full-online-access-to-tpp-text-still-wont-share-with-senate-staffers.shtml}
much (if anything) can be copied, how many times (if at all) such copies can be made, and on what other devices (if any) the copy can be used.

Previously too, if a consumer purchased a product, they could use it for any purpose they liked. Now, the company puts digital and contractual fences around their digital products, that constrain their use to only the purposes that the copyright owner approves. The supplier for example decides in what other countries you can watch a DVD that you have legally purchased, whether third-party software can be used on a Sony Playstation or an Apple iPhone, whether or not an e-book can be read aloud on a Kindle.28

The boundaries of personal and private use are thereby being taken out of the consumer's hands, diminishing the consumer's sovereignty. The consumer is constrained by pages of small-print terms of use that they can't realistically be expected to read (still less to understand). They are constrained by digital locks, that stop them from copying and sharing, even for “fair use” or “fair dealing” purposes. Should they break those locks in order to gain access, or should they share the work more widely than the copyright owner says they ought, then they face a crushing burden of civil damages, and the prospect of criminal penalties.

This amounts to a significant realignment of the rights of consumer and creator. Worse, through multilateral agreements such as the TPP, this realignment of rights is being pushed from the developed countries throughout the developing world, thereby resulting not only in a challenge to consumer sovereignty, but to national sovereignty as well.

The need for balance

In the cases described above and many others, the copyright enforcement industry has overstepped the bounds of proportionality and fairness. The owner of a piece of land has the right to charge for admission to his property, but doesn't have the right to beat an otherwise innocent trespasser to a pulp with a baseball bat. So too, a copyright owner (or, let's be frank – a large corporation to whom creators assign their copyrights in order to commercialise them) has the legal and moral right to enjoy the benefits that flow from the commercialisation of its work in the market.

But when copyright owners' inordinately harsh enforcement tactics (or those of governments in their thrall) are driving ordinary individuals to suicide or bankruptcy, or besmirching their reputations, something has gone very wrong. It tells us that the enforcement of copyright has swung way out of balance with other important (indeed, more important) human rights.

The bottom line for the consumer movement on industry's use of harsh enforcement measures against counterfeiting and piracy has to come back to the eight consumer rights.29 As consumer advocates, we are primarily interested in ensuring the right to safety (and consumers often rely on trusted brands as a proxy measure of safety), and the right to information (ie. not to be misled about the origin of a product).

In this light, counterfeits can often be bad for consumers - but they are not always bad. This applies especially to products that infringe copyrights or patents, but do not infringe trade marks, and therefore do not attempt to mislead anyone about their origin. Siding with industry against copyright or patent infringement, which is an unlawful practice but one that generally does not harm consumers, would be a misapplication of our time and resources.

Whilst copyright owners will also claim a link between piracy and organised crime, this supposed

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link is actually a myth. Internet file sharing, along with the commodification of optical disc media, has driven the cost of pirated DVDs and CDs down to levels so low that there is no longer any significant profit in it, and certainly not enough to be any longer an attractive means of funding for organised crime.

A 2011 study concluded on this point, “We found no evidence of systematic links between media piracy and more serious forms of organized crime, much less, terrorism, in any of our country studies.” 30 Why, then, is piracy so prevalent in emerging economies? The study's conclusion was very simple: the products are way over-priced. It is this that should be the industry's focus in reducing the incidence of piracy and counterfeiting: not in an over-zealous pursuit of enforcement measures, which do not even have their hardest impact upon pirates, but on ordinary consumers.

Conclusion

Whilst intellectual property rights are important, this paper has demonstrated how the unrestrained expansion of IP enforcement activities through civil and criminal enforcement, through intermediaries, and through self-help, has gone too far, and begun to undermining consumer sovereignty in important ways.

It is time for the global consumer movement to take a strong stand against this unbalanced approach to intellectual property enforcement. Whilst the arguments against commercial piracy are compelling, we should not forget that strong enforcement measures are only one way in which this phenomenon can be attacked. Another is to make legal offerings more compelling and more affordable.

As consumer advocates, it is incumbent upon us to draw a line in the sand. We have to cease accepting new IP enforcement measures that create greater hardship for consumers than they do on commercial pirates, and to roll back those that are already in place. Our IP enforcement regime must be made to recognise the ultimate sovereignty of consumers over the uses to which they put legitimately-obtained content, and the circles within which they share it.

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