

The Enforcement Session

Joe Karaganis chaired a session on IP Enforcement, anchored by presentations by Glyn Moody, Jeremie Zimmerman, Derek Slater, Pablo Ortellado, Rodolfo Tsunetaka Tamanaha, Lawrence Liang, and Rosana Pinheira Machado. The presentations provided a broad overview of the enforcement landscape, focusing on the three major sites or targets of enforcement measures: individuals, intermediaries, and ‘pirates.’

The group described a range of developments at the individual level, primarily in the form of continued pressure for ‘graduated response’ initiatives, to the expansion of private enforcement (copyright trolling), to efforts to lower thresholds for criminal infringement charges. These have worrisome implications for privacy, due process, and proportionality. With regard to law enforcement, participants raised concerns about the rise of extraterritorial raid and asset forfeiture practices directed against accused infringers, as in the Megaupload and Dajaz1 cases last year.

But most participants felt that the biggest concerns involve the question of intermediary liability for infringement and related forms of pressure on the Internet ecosystem. Most directly, these include efforts to lower the threshold for secondary infringement for search engines, file locker sites, and other core web services. Less directly, they involve efforts to expanding copyright liability to other types of intermediaries, including payment systems. And still less directly, they involve includes efforts to regulate the status of key building blocks of the web, such as searching and linking.

The group also discussed the problem of relying predominantly on a ‘negative agenda’ in response to the array of enforcement proposals put forward in the last decade. Arguably, the lack of a clear public interest account of the appropriate boundaries and contexts for enforcement hinders public interest engagement with these measures. The group discussed—but did not fully resolve on—the need for a stronger ‘positive agenda’ on enforcement focused on the continued value of the commercial threshold for liability, the need to protect individual privacy, and the need for corresponding checks and penalties for the abuse of enforcement powers. Such a positive agenda would not attract universal support in this group—especially among those who prefer a more fundamental critique of copyright—but may be an area where stronger public interest tools can be made.

Needs:

The group focused on identifying needs amenable to or dependent on collective efforts.

Things amenable to crowdsourcing by the public interest community

- Better coordination of ‘early warning systems’ for upcoming Free Trade Agreements and national policy windows. We agreed that the best means of doing so was to make better collective use of tools like Bilaterals.org and the Infojustice policy timeline to provide some of these services.

Things that require more programmatic international coordination

- Better documentation, comparison, and analysis of national (and other) laws on issues such as graduated response, intermediary liability and the criminalization of infringement. Global Censorship Chokepoints provides one framework for this documentation. We agreed to discuss how to better develop and coordinate these efforts.
- (Contested) Elaboration of a clearer 'positive agenda' on IP enforcement.

Narrower research needs:

- More work on the scope and impact of private enforcement—especially copyright trolling, which dwarfs formal enforcement measures in a number of countries.

Priority forums:

Trade agreements: Participants agreed that trade agreements remain the main vehicle for expanded, unbalanced enforcement powers, and that the proliferation and secrecy of negotiations remains a core problem for the public interest community. This year, the focus is on the Trans-Pacific Partnership agreement (TPP), but there are others CETA (EU-Canada), EU-India negotiations, and many others.

Universities – We discussed these not as key institutions in the larger evolution of enforcement policy but as (1) especially complex ones in their capacities as ISPs, teaching institutions, and libraries—and (2) as locations where many of the participants in this network may be able to exert more direct influence.