RECONSIDERING CRIMINAL ENFORCEMENT OF COPYRIGHT AND THE RISE OF CIVIL ENFORCEMENT IN THE DIGITAL AGE

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Background
  Copyright Crisis
  Centrality of Enforcement

Criminal Enforcement
  Challenges to Criminal Enforcement
  Expansion of Legal Frameworks
  Enforcement in Practice

The Rise of Civil Enforcement
  Expansion of Civil Enforcement Frameworks
  Algorithmic N&T and Statutory Damages in Practice
  A Powerful Package

Reconsidering Criminal Enforcement
BACKGROUND
COPYRIGHT CRISIS

COPYRIGHT LAW IS IN CRISIS:

- Accused of not promoting a fair, balanced and efficient outcome.

- Copyright “wars” between right-holders, intermediaries and users.
COPYRIGHT CRISIS

WAYS TO EASE THE CRISIS:

- Redefinition of rights
- A remedial path

Enforcement as a key factor
CRIMINAL ENFORCEMENT
CHALLENGES TO CRIMINAL ENFORCEMENT

Challenges to Criminalization of IPR Infringement

• Intangible assets – not as intuitive as theft of tangible assets

• Moral wrongfulness is not consensual

• Damages are difficult to assess

Challenges to Criminalization of Copyright Infringement

• Expressive assets – harder to perceive infringement as theft

• Copyright uncertainties regarding permitted uses foster public perception that infringement is not morally wrong

• Chilling effect on freedom of speech

Criminal Offence
EXPANSION OF CRIMINAL MEASURES

- NET Act 1997 + DMCA 1998
- PRO-IP Act 2008
- PLSA 2020
CRIMINAL ENFORCEMENT IN PRACTICE

Number of Offenders Over Time

The figure includes the 2069 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure.

Source: https://ida.ussc.gov/analytics/saw.dll?Dashboard
CRIMINAL ENFORCEMENT IN PRACTICE

Criminal Charges in Copyright Cases - 2014-2020

Source: United States Department of Justice PRO IP Act Annual Reports 2014-2020
THE RISE OF CIVIL ENFORCEMENT FRAMEWORKS
EXPANSION OF CIVIL ENFORCEMENT FRAMEWORKS

DMCA 1998

Copyright Alternative in Small-Claims Enforcement Act 2020

Digital Theft Deterrence Act 1999
CIVIL ENFORCEMENT IN PRACTICE

DMCA § 512 Notice & Takedown
- Algorithmic N&T proven to be effective (e.g., YouTube Content ID)
- Mandatory proactive monitoring and takedown framework in the EU (§ 17 CSM Directive)
- Controversial due to over-blocking

Statutory Damages
- Proven to be an effective enforcement measure that serves as a deterrent
- Functions primarily as a punitive mechanism
- Controversial due to over-deterrence
POWERFUL SYNERGISTIC CIVIL ENFORCEMENT PACKAGE

Algorithmic N&T Efficiency

Statutory Damages’ Deterring Effect

CCB Potential Effect
RECONSIDERING CRIMINAL ENFORCEMENT
IS CRIMINAL ENFORCEMENT JUSTIFIED?

Civil Enforcement

Criminal Enforcement
THANK YOU

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