

Creative Strategies for Beefing Up Copyright Enforcement

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Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 SMU L. Rev. 169 (2015), available at [SSRN](#).

Corporate copyright owners based in the United States have been frustrated by the prevalence of piracy in China and in certain other fast-growing markets, and that frustration has led to three primary responses. The copyright industries have (1) supported proposed legislation that would impose enforcement obligations on U.S. parties, such as the [Stop Online Piracy Act](#); (2) advanced expansive interpretations of the enforcement jurisdiction of the [International Trade Commission](#); and (3) [deployed technological protection measures](#).

In his new article, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, [Professor Priest](#) identifies two additional strategies that seem to have promise. These strategies rely on pressuring certain intermediaries that hold the power to deny infringers access to the markets they seek to serve. Presenting these as case studies, he then abstracts away to model how and when market-based pressure on intermediaries or customers – the “Acupressure” in the title – are likely to be effective. He concludes by revisiting familiar critiques of copyright enforcement through private ordering and integrates these into his analysis of the public policy ramifications of these new developments.

After explaining why attempts to police foreign conduct in U.S. courts has largely failed, Professor Priest introduces the first case involving the online video market in China. In a very short period of time, two of China’s largest sources of online videos changed their advertising-based business model from one that relied on infringement to one that relies on licenses from copyright owners. Why incur these substantial costs when these service providers enjoy certain limits on liability that closely resemble those that U.S. intermediaries enjoy and when the threat of judicial enforcement for transgressions is negligible?

According to Professor Priest, these services’ most valuable advertisers – multinational corporations – faced internal and external pressures to dissociate their brands from platforms identified as pirate sites. He supports this assertion with some original reporting based on interviews with executives at the two companies. He emphasizes that after these two companies became licensees, their incentives aligned with the advertisers and the copyright owners, which led them to use legal process to pressure their unlicensed competitors, such as Baidu. He also persuasively explains why alternative theories of causation are less plausible.

His second case involves use of theories of unfair competition in the United States to block market access to foreign manufacturers that use infringing software in their operations. The theory is that companies that rely on copyright infringement for a critical input into their business operations enjoy an unfair advantage that allows them to artificially lower prices. The theory is accepted in “anti-IT theft” statutes in force in certain U.S. states and in case law that deems this an unfair trade practice under a state’s mini-FTC Act. Professor Priest cites examples in which foreign manufacturers agreed to license their software in response to threatened loss of market access.

From these examples, Professor Priest derives models of alternative enforcement. Most prominent is the “market pressure” model applicable “[i]n jurisdictions in which the state’s influence over infringers is weak, the state may be replaced in the enforcement chain by a powerful ‘third party’ with greater influence over the infringer.” The essential elements are that a third party with sufficient leverage exists, that the enforcement targets belong to a relatively small, tight-knit group to form compliance norms that can be internally monitored and enforced, that enforcement is ongoing

either through the third party or other community members, and that the complying members are incentivized to invest in enforcement against defectors.

This model better conforms to the Chinese video market case study than to the use of unfair competition in the United States because the users of infringing software are a large and diffuse group. Professor Priest highlights Washington state's law as having an innovative feature because it targets retailers in the United States who sell products derived from uses of infringing software, analogous to regulations prohibiting the sale of products produced with child labor or in violation of certain environmental norms. By shifting the target, this strategy pressures the retailer, such as Walmart, to exert copyright compliance pressure throughout its supply chain. But, query whether this law would survive a challenge under the Dormant Commerce Clause.

Professor Priest is more sanguine than I am about the desirability of these new enforcement strategies from a public policy perspective, but his article does a great service by bringing these to light, by engaging with concerns about non-judicial enforcement of copyright norms, and by analyzing the key ingredients that contribute to these strategies' relative success.

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