

A Wave of Fresh Air in Copyright Regulation?



Loreto Corredoira, Professor of Communication Law at Complutense University of Madrid, shares some initial observations from a wider research project^[1] looking at the evolution of legal and political IP regimes at both international and national levels. She argues that there is potential for European countries to adopt new approaches to protect content industries, focusing more on user rights, fair use and personal freedoms.

The **multinational ACTA treaty** and the *SOPA* and *PIPA* legislation proposed in the US faced substantial public protest. Critics called them over-regulation that stifles markets and opportunities, and could end up asphyxiating not only the media industry but also user freedoms and constitutional rights. In response to this protest, several national governments now appear poised to adopt new approaches to copyright regulation.

In the UK, the **Hargreaves Review** and Richard Hooper's **subsequent copyright study** signal a true shift in the European legal framework. Similarly, in Spain, the Minister of Culture is preparing a new Law of Intellectual Property to be debated in Parliament during 2013 to reinforce the recent **Ley Sinde**. French President Hollande launched a review of the aggressive *Hadopi* Law, which is now in the process of being **revoked**. The French law had been the strictest in Europe because it allowed Internet access to be denied to anyone who, after three warnings, downloaded "illegal content".

Existing Enforcement Regimes: Mixed results so far

A generation of supranational instruments (Figure 1) has strengthened the powers of states to enforce IP rights within and even outside their borders. By building up extensive legal and policy measures around the concept of copyright, the instruments laid out by the ITU, EU, WTO and the signatories to *ACTA* have created an "umbrella" wide enough to allow implementation of standards and sanctions with fewer jurisdictional obstacles.

Figure 1: SUPRANATIONAL IPR ENFORCEMENT REGIMES IN THE DIGITAL ERA		
Name	Jurisdiction	Current status
<i>ACTA</i>	Multilateral treaty	Enacted in some countries; rejected by the European Parliament
<i>TRIPS</i>	WTO-WPO	Enacted by 157 Member States
European <i>Copyright</i> Directives (Directive 2001/29/EC, Directive 2006/115/EC, Directive 2012/28/EU ²)	EU	Enacted by 27 Member States
<i>CETA</i>	Canada-EU	Draft stage

Within this atmosphere of strengthened enforcement, policymakers and government agencies like the FBI have become increasingly aggressive in trying to close or block controversial sites like Megaupload and Wikileaks.


Furthermore, national digital-era IP enforcement regimes (Figure 2), according to widespread public opinion, many civil organisations and several scholars like myself, are suffocating private content users, content distribution intermediaries, and to a certain extent, content creators. Although they were rejected by the US Congress, I have included *SOPA* and *PIPA* in this list because they are examples of attempts to establish “national laws” that would have given the US government the power to shut down Internet businesses and enforce US copyright law worldwide.

Figure 2: SOME NATIONAL IP ENFORCEMENT REGIMES IN THE DIGITAL ERA		
Name	Jurisdiction	Current status
<i>Loi Hadopi 1</i> and <i>Loi Hadopi 2</i>	France	Enacted, found to be unconstitutional in June 2009. Subsequently revised by the Constitutional Council. Revocation in process as of July 2013.
<i>Ley y Reglamento SInde-Wert</i>	Spain	Enacted
<i>Digital Economy Act</i>	U.K.	Enacted
<i>Ley Derecho: Internet Law</i> (Marco Civil da Internet)	Brazil	In process
<i>Ley Lleras</i>	Colombia	In process
<i>SOPA</i> and <i>PIPA</i>	US	Rejected

These supranational and national enforcement regimes listed above have so far been imperfect, in particular because they do not always account for the following realities:

- Nearly all countries have legal frameworks in place to prosecute fraud, plagiarism and copyright violations, but do not always do so. INTERPOL collaborates with the legal authorities of individual countries to investigate crimes, yet getting those states to prosecute the crimes is not always effective.
- The TRIPS Treaty of the WTO and its predecessor, the Berne Convention, make up the “global” framework for IP rights enforcement worldwide. These legal tools are probably not sufficient on their own, but importantly they do respect the constitutions and sovereignty of the signatory nations. This is something that ACTA did not do with respect to EU law, leading the European Parliament to reject it.
- Even though any administrative body or agency in Europe can legally spy on or close down any means of communication such as websites, obtaining authorisation to do so requires them to go through procedures designed to protect individual rights and constitutional freedoms. This is why a regime like PIPA/SOPA is unlikely to be workable in Europe.
- National judicial processes vary. For example, the Spanish *Ley SInde* allows a judge to send a request to close down a website to the Constitutional Tribunal before making a ruling. Such a process may make blocking web pages impossible in practice, rendering the new law ineffective.

New Approaches to IP Enforcement: What will the wave of fresh air bring?

After examining IP enforcement policy and draft laws over the past two years, we can observe that these policies are gradually loosening up and becoming more flexible. Governments are increasingly considering it more efficient to follow the money instead of following the user or the site. Beyond this efficiency, enforcement regimes are also recognising a human right to communicate. As I have **previously written**, this right includes more than speaking, but also the ability to share, receive, impart and utilise information. The reasonable struggle against piracy cannot allow any kind of political or legal action that trespasses or violates these rights. 

We can see several examples. A wave of fresh air that suggests some promise for reform of IP rights enforcement in Europe is embodied in the principles of the UK's [Hargreaves Report](#), which has led to proposals for extending user freedoms, such as [broader fair use/fair dealing exceptions](#), and prosecuting piracy businesses instead of individuals.

Additionally, the Spanish IP Commission's operating procedures (like the finalised *Loi Hadopi 2*) require judicial review in order to close a website. [Experts believe](#) that this provides greater assurance that personal freedoms to communicate will be protected. Spain's proposed reforms also include better rules to coordinate the IP Commission's enforcement work with criminal and civil enforcement mechanisms, along with incorporating fair use exemptions into Commission enforcement procedures. Furthermore, the Spanish Supreme Court in a [recent decision](#) adopted the European Court of Justice's doctrine in *SABAM v. Netlog NV*, in which the ECJ rejected mandatory filtering systems for websites in part because of the risk such a system would pose for the freedom to receive or impart information. These developments suggest that Spanish IP rights enforcement is emphasising more a fundamental right for users to communicate online.

As academics, professionals and policy makers continue to work on IP reform, it should be recognised that any legitimate enforcement of the IP rights of content authors will need to account for a people-centred law that respects such individual freedoms and liberties. These latest initiatives demonstrate a welcome shift in that direction.

The post gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

[1] The larger research project is financed by two programs of the Ministry of Economy and Competitiveness of Spain: *Participación y transparencia electrónicas y uso de las redes sociales por los poderes públicos* [Ref. DER2012-37844], and *Supervivencia del periodismo en la era post-digital: Producción de contenidos en los medios emergentes, consecuencias de la participación ciudadana y evolución de las audiencias* [Ref. CSO2011-29510-C03-02], IP: Elvira García de Torres, Univ. CEU-Cardenal Herrera. This paper was presented at IAMCR Dublín 2013.

[2] See also "Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures", *available at* http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm.

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