

The Economics of Intellectual Property Enforcement

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The economics of the intellectual property system has become a central focus of interest among researchers and policy-makers. In recent years, intellectual property enforcement has also become a priority at the international level, prompting the adoption of ambitious policies and demanding obligations in numerous and heterogeneous fora. Invariably, economic analyses on the scale and impact of intellectual property infringement have been invoked to justify the need of new enforcement norms and institutions.

Economic studies on the scale and impact of infringement have however numerous methodological difficulties. Estimates frequently fail to recognize relevant economic variables as well as unexpected externalities of infringement, the anticompetitive impact of some enforcement norms, and their eventual negative impact on welfare. Some of these problems can be solved if a broader view is taken of the social relevance of intellectual property and the reasons behind infringement.

Activities that commonly fall within the realm of enforcement and investment items related to those activities need to be identified in order to calculate the investment needed to enforce intellectual property law. The result should be assessed against the fact that levels of investment on enforcement which are optimal from the economic point of view do not necessarily coincide with the level of enforcement required to fulfill intellectual property law. A number of factors explain the mentioned gap, such as the adoption of international treaties where states assume obligations with the sole intention to reap benefits in fields other than intellectual property, internal pressures to adopt higher standards of protection, and the lack of reliable information on the socioeconomic impact of new enforcement commitments..

Enforcement norms should preserve the function devised for substantive norms and the objectives of the system itself. If enforcement overdeters competition, the trade-off that underpins some intellectual property norms – to spur innovation and creativity by temporarily restricting competition – is nullified. On the other hand, the strengthening of the rightholder's position may result in unexpected situations, where alleged enforcement rights become substantive rights or trespass national borders and confer to the rightholder the power to control foreign markets.

In a related but distinct set of matters, it is necessary to underline the lack of scholarly attention to the economic aspects of enforcement institutions *per se*. The central position of enforcement stands in stark contrast with the little knowledge about the economic significance of civil, border and criminal enforcement mechanisms considered independently. An explanation for this vacuum can be found in the confusion that seems to exist between the value of enforcement and the value of the intellectual property system itself. When assessed in the context of the intellectual

property system, the crucial role that enforcement norms play in the theories of John Austin, Hans Kelsen and H.L.A. Hart may make it difficult to distinguish between the economic impact of the *enforced* intellectual property system and the economic impact of intellectual property enforcement institutions themselves. Nevertheless, even if secondary norms may ultimately determine the value of substantive rights, we hold that an independent estimation of the value of secondary norms is possible.