KEEPING LOW SANCTIONS LOW

Clark D. Asay[*]

In her thoughtful new article, *The High Cost of Low Sanctions*, Professor Irina D. Manta provides a useful analysis of the (often) unanticipated negative effects that low legal sanctions can have.[1] While the presence of low legal sanctions may assuage the public's concerns about any given law, Manta argues that in many cases, low sanctions create a false sense of security. Indeed, in some instances low legal sanctions may be worse than high sanctions for a number of reasons: (1) they may make it easier to pass faulty laws in the first place; (2) these faulty laws then become increasingly difficult to eliminate; and (3) over time, the initially low legal sanctions grow into high sanctions either through incremental additions or simply through the way the laws are enforced.[2] Professor Manta is far from suggesting that high sanctions should be the default in any given congressional bill. But the presence of high sanctions does at least have the benefit of focusing the media and others on a bill before it actually becomes the law.[3] Those with low sanctions, conversely, often sneak through the legislative process only to rear their ugly heads later.[4]

In the article, Professor Manta elucidates many of her insights about the pernicious effects of low legal sanctions in the context of intellectual property and technology law. Hence, she discusses in detail copyright enforcement against peer-to-peer file sharers[5] as well as legal enforcement against Aaron Swartz, the Internet prodigy who tragically took his own life, at least in part because of the threat of legal sanctions for his hacking an MIT computer in order to publicly release JSTOR articles.[6] But Manta's insights should apply more generally to other areas of the law as well.

One outstanding question is whether those supporting various laws typically start with low sanctions as a strategic tactic. In places Manta suggests low sanctions are often the result of legislative compromise.[7] But in others she suggests that supporters of various laws may initially propose lower sanctions strategically in order to help ease the bill through the legislative process, with the understanding that, over time, they can add to the sanctions or simply raise them through the mechanics of litigation.[8] In reality, the strategy v. compromise distinction is somewhat difficult to

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* Associate Professor of Law, BYU Law School.

1. Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157 (2014).
2. *Id.* at 160.
3. *Id.* at 164–65.
4. *Id.*
5. *Id.* at 179–93.
6. *Id.* at 194–200.
7. *Id.* at 202.
8. *Id.* at 161, 165, 177.

parse, since strategy generally involves compromise and vice-versa. But it would seem to matter whether low sanctions are, as an initial matter, an outright tactic or simply something the supporters of bills eventually agree to in response to legislative opposition.

For instance, one reason this may matter is that bargained-for low sanctions may be less susceptible to some of the high costs that Manta identifies. That is, if low sanctions are the result of a hard-fought compromise, then parties to that bargain may be less willing (or able) to make significant adjustments to the bargain later. Furthermore, a hard-fought bargain may include more stringent internal limitations that make low sanctions less susceptible to being implemented as de facto high sanctions.

Indeed, Manta's own insights suggest that bills that start with high sanctions will attract media attention. At least in theory, this should mean that the bargained-for lower sanctions are known to the media and the public at large, since they may feel partially responsible for having helped achieve the legislative compromise. If that is true, it may mean ongoing media scrutiny of the compromise should parties seek to change it or implement it in ways that go beyond the original intention of the law, which in turn may make it more difficult to actually do either.

Of course, many other factors can ultimately lead to the initial bargain changing. Some obvious ones include changes in political dynamics, changing societal trends, and perhaps a fickle media. But all else being equal, hard-fought comprises may be less vulnerable to some of the high costs that Manta associates with low sanctions.

Conversely, if supporters of laws largely escape media attention as well as the ire of their political adversaries by strategically proposing low legal sanctions as an initial matter, then positions on the issue may be less entrenched in the absence of a hard-fought legislative battle. If that is so, it may mean that raising the sanctions and costs of initially low sanctions over time is easier to do. Hence, additional research on the starting and ending states of bills that include sanctions, along with tracking how those laws evolve over time, would provide crucial additional insights into the effects and strategic uses of low sanctions.

Another area worth exploring in connection with this topic is whether private ordering helps eliminate many of the problems that Professor Manta identifies. For instance, in the copyright sphere, copyright holders have begun striking deals with ISPs where the ISPs slow down consumers' Internet service if the system detects too many instances of copyright infringement.[9] These extra-legal measures may in the end prove more effective in deterring copyright infringement than the legal sanctions that

9. Jeff John Roberts, *ISP's "Six-Strike" System Is Now in Full Force, Says Industry Official*, GIGACOM (Apr. 2, 2014, 2:20 PM), https://gigaom.com/2014/04/02/isps-six-strike-system-is-now-in-full-force-says-industry-official/.

copyright law provides. And that may mean that some of the high costs that Professor Manta worries about become less worrisome. Of course, some worries certainly remain (and perhaps grow), since the sanctions remain on the books and thus in a copyright holder's toolkit. Nonetheless, as private ordering efforts grow in a number of legal contexts in order to solve problems that the law on its own has not,[10] it will be important to reassess the insights of Professor Manta's article.

In sum, Professor Manta's exploration of some of the possible high costs of low legal sanctions nicely extends some of her preexisting academic work[11] while providing scholars and commentators alike much to mull over. Indeed, as discussed in the preceding text, the article raises several additional inquiries that deserve further consideration.

10. For a few examples of private ordering efforts in the intellectual property law sphere, *see* Jason Schultz & Jennifer M. Urban, *Protecting Open Innovation: The Defensive Patent License as a New Approach to Patent Threats, Transaction Costs, and Tactical Disarmament*, 26 HARV. J.L. & TECH. 1 (2012) (proposing a community license solution to patent threats that open source software developers purportedly face); Kristelia A. Garcia, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117 (2014) (describing private ordering solutions adopted by players in the music world in response to uncertainty relating to the copyright statute).

11. *See, e.g.*, Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469 (2011) (discussing why criminal sanctions exist under trademark and copyright, but not patent law); Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241 (2013) (analyzing trademark infringement doctrines); Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012) (critiquing the "reasonable man" standard under copyright law infringement doctrines).