THE SEMI-PRIVATIZATION OF DIGITAL COPYRIGHT REGULATION: THE POLITICS OF AUTOMATED FILTERING AND PLATFORM IMMUNITY IN CANADA, THE EUROPEAN UNION, AND THE TRANS-PACIFIC PARTNERSHIP

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Title: The Semi-Privatization of Digital Copyright Regulation: The Politics of Automated Filtering and Platform Immunity in Canada, the European Union, and the Trans-Pacific Partnership

Recent reforms to digital copyright enforcement have given platform intermediaries and large copyright holders the power to sanction billions of underrepresented users worldwide. The automated monitoring, filtering, and removal of user-generated content has mirrored other forms of machine-based decision making, as it provides legal authority to algorithms and privatizes control over legal expression. While there is much debate on the effectiveness of current enforcement methods, there is still much to understand about the *politics* that influence these changes and the legal and policy frameworks that lead to machine-based decision making.

To fill this gap, this study explores the recent policymaking discourses that have influenced public narratives of automated filtering and the legal outcomes of related regulatory debates. I present three case studies of international and national reforms in one specific area of internet policy: intermediary liability law. These case studies include the Trans-Pacific Partnership in the United States (2016), The Canadian Copyright

Modernization Act (2012), and Article 17 of the new Directive on Copyright in the Digital Single Market in the European Union (2018). I have analyzed hundreds of pages of government documents, including hearing transcripts, stakeholder submissions, and government reports to ascertain how reforms to digital copyright enforcement have developed and what this documentary evidence discloses about the politics and the geopolitics that have influenced these changes. Additionally, I analyze the legal and policy frameworks that lead to machine-based decision making, and the implications of automated content controls on social welfare and human rights.

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To our children, Almina and Domenic.
May their future be filled with possibilities.

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CHAPTER I:

INTRODUCTION

This dissertation focuses on one core area of internet policymaking, digital copyright enforcement, and the national and international regulations that govern the automated filtering of copyright material. Drawing from previous scholarship in political economy of the media, international communications, and media law, I present three case studies of digital copyright policy making: Canada's national copyright law (notice-and-notice), the intellectual property provisions contained within the stalled Trans-Pacific Partnership free trade agreement, and Article 17 of the Directive on Copyright in the Digital Single Market in the European Union.

Recent reforms to digital copyright enforcement have given platform intermediaries and large copyright holders the power to sanction billions of underrepresented users worldwide.[1] The automated monitoring, filtering, and removal of user-generated content has mirrored other forms of machine-based decision making, as it provides legal authority to algorithms and privatizes control over legal rights.[2] While there is much debate on the effectiveness of current enforcement methods, the shift to privatized automated enforcement is said to make the internet safer for commerce and more protective of creative work.[3] Yet evidence from a number of areas, including internet governance, law, and development studies suggest that these claims may be

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[1] IAN BROWN & CHRISTOPHER T. MARSDEN, REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE (2013). *Id.* at 87.; LAURENCE R. HELFER & GRAEME W. AUSTIN, HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE 513 (2011).

[2] Danielle Keats Citron, *Technological Due Process* (2007), https://papers.ssrn.com/abstract=1012360 (last visited Aug 27, 2018).

[3] Karyn Hollis, *A Critical Discourse Analysis of the Intellectual Property Chapter of the TPP: Confirming What the Critics Fear*, 6 COMMUN. 1 (2017), https://scholarworks.umass.edu/cpo/vol6/iss1/5.

inflated.[4] Recent scholarship in the area of algorithms and artificial intelligence has also established that engineering and design processes are not neutral and, in many cases, are exacerbating social inequities.[5] There is still much to understand about the *politics* that influence these changes, the legal and policy frameworks that lead to machine-based decision making, and the implications of automated content controls on social welfare and human rights.

Three laws – Article 17 in the E.U., the intermediary liability provisions in the TPP, and Canada's notice-and-notice – were all developed during or after the widespread use of automated software for enforcement. Therefore, I have selected them as exemplars because they provide three distinct standards of intermediary liability that govern automated filtering and where automated filtering was the technical backdrop of negotiations. Internet platforms and large entertainment companies in the U.S. began the widespread automation of notice sending and notice processing between 2011 and 2012.[6] As discussed later, these automated processes have led to exponential rises in daily takedowns and have been under increased scrutiny in recent years for high levels of false positives.[7] The debates surrounding them, therefore, shed light on the politics of this new era of automation.

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[4] Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, AVAILABLE SSRN 2755628 (2016), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2755628 (last visited Oct 12, 2016).

[5] VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018); SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018).

[6] Google's data shows that it removed an average of 10,000 URL's per day in response to copyright takedown requests in January of 2012. That number rose to 100,000 per day by January of 2013. See Transparency Report: Content Delisting Due to Copyright, GOOGLE, https://transparencyreport.google.com/copyright/overview

[7] See Urban, Karaganis, and Schofield, supra note 4.

I have also chosen to study these three laws because the decisions that are made in these jurisdictions will likely influence other countries' decisions. The policy choices made in the U.S. and the E.U. could lead to new international norms. As Freedman argues, the media policymaking of the European Commission (EC) and the U.S. Congress have international implications, as different countries seek to establish their own policy programs for digital economies.[8] The three laws under study here can also be seen as blueprints for other international agreements, such as within the WIPO or WTO forums. International media policy scholars have also looked at cases in the global north because they are resisted. Reform efforts also aim to counteract and create alternatives to the standards in the U.S. and E.U. My intent, therefore, is to look at these exemplars critically, not to say that these laws are somehow more desirable than those in other countries. These choices acknowledge the geopolitical power of the U.S. and E.U. in particular and the Canadian standard as an outlier to those two influential policy models. And, as I analyze the policy debates surrounding them, I hope to shed light on how global norms for platform regulation have developed.

Like other areas of internet policymaking, such as privacy and net neutrality,[9] digital copyright is a site of struggle between property rights and free expression rights. The discourses, arguments, and policy rationales that emerge from policymaking can reveal how internet policies are created in different national contexts. In addition, copyright is unique in the way that the law connects to many different financial sectors

[8] Des Freedman, The Politics of Media Policy 18 (2013).

[9] Michael Geist, *The Policy Battle over Information and Digital Policy Regulation: A Canadian Perspective The Constitution of Information: From Gutenberg to Snowden*, 17 THEOR. INQ. LAW 415–450 (2016).

and political constituencies and impacting nearly everyone who uses a computer for entertainment and information. In turn, the actors involved in the creation of digital copyright law – entertainment companies, telecommunication companies, digital rights advocates, copyright lawyers, academics, and artists – have shaped the public understandings of digital capitalism as they act within the policy field to justify various policy positions and coalitions.

Copyright takedowns are a form of filtering that are designed to deny access or to obscure content by deleting it from a host's index – such as a Google's search results or YouTube's library. Different jurisdictions have determined how much power hosting platforms have to remove content from their networks, how quickly they must remove it, and the amount of oversight they are subject to from government institutions. The international picture is constantly in flux and the balance of rights is an ongoing political contest in many countries.[10] Takedowns and the mechanisms that the law provides for content removal can be seen as a type of state-facilitated censorship – one that presents inherent conflicts with institutions of free expression.

While the future of this global spread of intermediary liability law certainly matters to expression rights of users, platform regulation and the laws that dictate automated filtering effects more than individual rights. In addition, these legal frameworks favor the platforms that have the human resources and computing power to respond to millions of takedown notices per day. Estimates have claimed that YouTube

[10] STEFAN KULK, INTERNET INTERMEDIARIES AND COPYRIGHT LAW. TOWARDS A FUTURE-PROOF EU LEGAL FRAMEWORK (2018). See also, Daniel Seng, *Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries*, WIPO STUDY AVAILABLE WWW WIPO INTCOPYRIGHTENINTERNETINTERMEDIARIES (2010), http://www.wipo.int/copyright/en/doc/liability_of_internet_intermediaries.pdf (last visited Mar 15, 2017).

developed its ContentID system, which filters out copyrighted material on upload, for $60 to $100 million.[11] In addition, they favor large corporations that have the legal resources to withstand litigation. Small startups, especially those in smaller economies, that could be the next YouTube or Facebook, simply do not have the material resources to purchase the software and hardware needed to maintain compliance with legal mechanisms that require immediate takedowns and impose immediate liability for infringing posts. The global diffusion of U.S.-based notice-and-takedown laws, therefore, further concentrates capital accumulation in the North, while also threatening norms of freedom of expression and information access.

This dissertation contributes to the contemporary conversations about internet policy to examine the globalization of U.S. copyright law as a site of struggle between the rights of users and the enforcement of copyright online. Broadly, I am interested in examining multilateral and national policymaking fora and their relationship to human rights, most specifically speech rights, including the right to freedom of expression in relation to techno-regulation. In terms of governance, I am concerned with questions of political transparency, corporate power and the inherent dynamics of a policy process that, in some cases, are occurring in secret or with limited public accountability.

Maintaining a human rights and a users' rights framework, this study focused on the legal infrastructures of content control, including *how those structures have developed, how they have evolved over time, the public policy discourses that support these legal changes, and the modes of resistance and alternative models that exist*.

[11] See Benjamin Boroughf, *The Next Great Youtube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALBANY LAW J. SCI. TECHNOL. 95–128 (2015).

In this chapter, I outline the broad topic of intermediary liability law and describe its significance to the internet and democracy. I describe the specific form of law in the United States, § 512 of the Digital Millennium Copyright Act (DMCA) and introduce the three cases under investigation: the Trans-Pacific Partnership, Article 17 of E.U. Copyright Directive, and Canada's Copyright Act. I discuss how public opinion of copyright in the U.S. has shifted since the 1970s and the major lobbying efforts behind that shift. I briefly address some of the legal challenges to § 512 of the DMCA and the lobbying efforts to strengthen it. I outline how notice-and-takedown, as codified in the DMCA, functions as an extra-judicial semi-privatized mechanism for copyright enforcement. I also address the recent self-regulatory efforts to automate the implementation of the law. I address the international perspective in two sections – the first pertains to U.S.-led free trade agreements and the second highlights other standards of digital copyright enforcement, including those in Chile and Canada. This introduction provides the background to understand the big picture(s) and the significance of the detailed discussions of policymaking that follow.

What is Intermediary Liability?

What will we tolerate as a society to protect the broadly received benefits of internet freedom? That question is the essence of intermediary liability law. For more than two decades, lawmakers have deliberated this issue and have historically reached vastly different conclusions.[12] However, more recent reform efforts in the United States and the European Union suggest that immunity from liability is continuing to narrow. The stakes for democracy, economic development and the future of the digital age are not

[12] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 150 (2019).

insignificant. Many policy questions remain unresolved: Will liberal democratic governments allow platforms to profit from the advertisements of child sex traffickers? How much irreparable defamation will the public tolerate before platforms are held responsible? Can search platforms continue to index copyright pirate sites without being required to automatically filter? When will the threats of misinformation and disinformation become so large that governments statutorily mandate platforms to self-regulate? In terms of copyright, the political economy of platform immunity is a complex multi-sided policy field dominated by competing corporate interests, with many big entertainment companies and industry associations arguing for state-mandated automated filtering and big technology companies, on the other hand, arguing for a continuation of light-touch regulation. But there are also actors who take more nuanced views that advocate for various compromise solutions, as well as coalitions of advocacy groups attempting to speak for the legal rights of users. In terms of other genres of illegal and harmful content, the coalitions of actors, their interests, and the discourses they are using vary by the type of content in question, the interests of political coalitions, existing case law, and the regional and domestic contexts. But, across content areas, intermediary liability laws are often cited by industry as the legal foundation of the internet economy.[13]

From this point, I will focus specifically on copyright as one distinct area of intermediary liability. In the U.S. and the E.U., two laws that have been in practice for over twenty years – the Digital Millennium Copyright Act (DMCA) (1998) in the U.S. and the E.U.'s e-Commerce directive (ECD) (2000) created the revolutionary legal

[13] Amir Hassanabadi, Viacom v. Youtube: All Eyes Blin*d* – The Limits of the DMCA in a Web *2.0 World* (2011), https://papers.ssrn.com/abstract=1809194 (last visited Sep 7, 2017).

mechanism of notice-and-takedown and set global standards for policing illegal and harmful content online. These once-obscure internet rules define what remedies are available to copyright owners when their works are pirated and what intermediaries must do to protect intellectual property on-line.[14]

While notice-and-takedown can be seen as yet another turning point in the historical progression of media markets, its effects extend far beyond the commodification of culture and the limiting of innovation. The resulting policies are also seen to violate the "positive duties" under European Convention on Human Rights and the speech rights afforded in the 1st Amendment in the United States. However, the First Amendment has limited impact on private action in a privatized system.[15] Therefore, intermediary liability is seen as outside the scope of the First Amendment to the U.S. Constitution.

In practice, notice-and-takedown has been shown to have far-reaching implications for the rights of users and for the business models of large technology (and media) companies. Critics from across different sectors of law have also criticized safe harbor laws for blocking innovative business ideas,[16] overburdening end-users in cases of fraud and abuse[17], lacking in the basic due-process protections afforded in traditional

[14] Urban, Karaganis, and Schofield, *supra* note 4.

[15] PETER YU, *The Graduated Response* (2010), https://papers.ssrn.com/abstract=1579782 (last visited Dec 5, 2017).

[16] WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (1 edition ed. 2009).

[17] Urban, Karaganis, and Schofield, *supra* note 4.

mediums[18], and favoring the needs of large corporations over the expression rights and educational needs of citizens.

Human rights groups and researchers have also documented cases where powerful actors such as governments and corporations have used the notice and takedown regime found in the Digital Millennium Copyright Act to silence critics. One of the most widely covered cases has occurred in Ecuador where the Spanish copyright watch firm Ares Rights was allegedly hired by the Ecuadoran government to submit takedown notices to social media companies in the United States to remove political content that originated in Ecuador. Over the course of 2014, Ares Rights was responsible for the removal of links on Facebook of videos of protests critical of the Correa administration, the suspension of a Twitter account that contained political cartoons, and the removal of a documentary that profiled indigenous resistance to mining operations. In all these cases, Ares Rights, working on behalf of Ecuadorian state actors, claimed the content in question violated U.S. copyright law. And, while most of this content was restored due to successful counter-notices, the put-back process took weeks and placed an unfair burden on the user to prove fair use. By the time the content was restored, the political moment during which the content was most relevant had long passed. [19]

[18] Margot Kaminski, *Positive Proposals for Treatment of Online Intermediaries*, 28 AM. UNIV. INT. LAW REV. WASH. 203–222, 215 (2013).

[19] see Adam Steinbaugh, *State Censorship by Copyright? Spanish Firm Abuses DMCA to Silence Critics of Ecuador's Government*, ELECTRONIC FRONTIER FOUNDATION (2014), https://www.eff.org/deeplinks/2014/05/state-censorship-copyright-spanish-firm-abuses-DMCA (last visited Jun 28, 2016); Maira Sutton, *Copyright Law as a Tool for State Censorship of the Internet*, ELECTRONIC FRONTIER FOUNDATION (2014), https://www.eff.org/deeplinks/2014/12/copyright-law-tool-state-internet-censorship (last visited Jun 28, 2016); Jose M. Vicanco & Eduardo Bertoni, *La censura en Ecuador llegó a Internet*, EL PAIS, December 15, 2014, http://elpais.com/elpais/2014/12/12/opinion/1418385250_354771.html (last visited Jun 29, 2016).

How Does Notice-and-Takedown Work?

The design of notice-and-takedown is deceptively simple: a copyright holder submits a short notice to an intermediary saying it is aware that a user has posted copyrighted content and the intermediary is obligated to promptly take the content down. § 512 of the DMCA provides this *safe harbor* to internet intermediaries, who can escape liability if they follow a notice and takedown process by responding to and removing the infringing material that was identified by the rights-holder. In the U.S., there are some user protections, including a counter notice procedure.[20]

As an example of how notice-and-takedown functions, we can look at the case of Stephanie Lenz v. Universal Music. In 2007, Lenz took a short video of her baby pushing a walker around her kitchen floor while Prince's "Let's Go Crazy" played in the background. She posted the grainy video on YouTube to share with family and friends. Shortly thereafter an employee in Universal Music Group's legal department found the video and submitted a DMCA takedown notice to YouTube, claiming it violated the Universal exhibition right. YouTube's staff read the notice and took the video down. For most users, this is where the interaction would end. But Stephanie Lenz sued Universal under the clause in § 512 of the DMCA that allows users to take legal against the copyright holder for an erroneous takedown. Her lawyers claimed that Universal knew or should have known that the inclusion of Prince's song in her video was fair use. The Ninth Circuit Court of Appeals ruled that copyright holders must take into account fair use before they send a notice, granting a partial victory to Lenz.[21]

[20] Jennifer M. Urban et. al., Supra Note 4.

[21] Marc J. Randazza, *Lenz v. Universal: a call to reform section 512 (f) of the DMCA and to strengthen fair use*, 18 VAND J ENT TECH L 743, 745 (2015).

The notice-and-takedown process requires involvement from four parties to function: the user, the copyright holder, the intermediary, and the state. In the Lenz case, the user (Stephanie Lenz) posted content containing copyrighted material to a publicly available platform. (In this case, it was a video with copyrighted audio in the background, but it could be any form of copyrighted work – video, images, audio, or even links in search results to an unauthorized copy of a work.) The copyright holder, Universal Music Group, on behalf of Prince, then recognized the unauthorized post and sent a notice to the hosting platform – YouTube in this case. § 512 outlines very specific requirements for the content of this notice that are discussed later in this chapter. When YouTube, the third actor in the process, received a notice, they (in theory) read the notice to check for validity and took the content down. This is where the path usually ends. But if the user believes that the takedown was unlawful, they can submit a counter notice to have the content put back up. Upon the receipt of a counter-notice, the intermediary waits ten days to see if the rightsholder wants to take legal action against the user. If they don't, the post is put back up and remains online. If the intermediary does not follow this procedure, it can be held liable to the user or the rightsholder, depending on the action (or lack of action) by the ISP. This is the key user protection found in § 512. If the rightsholder sends a notice of legal action against the user, however, the content remains down.[22] The state (actor number four) has two key responsibilities. One, the U.S. Copyright Office maintains a database of individuals who work at intermediaries, whose job it is to receive takedown notices. Intermediaries are required to assign these "designated agents" and to

[22] Lenz went in a totally different direction, and as the user, she sued the copyright holder for misrepresenting and abuse of the system. This happens very rarely, as most users do not have the resources to sue.

keep this information current; otherwise, they can lose their immunity. Second, disputes – however rare – are adjudicated in federal courts.

Through the DMCA, the Safe Harbors provision put the burden of policing the internet for copyright infringement on the shoulders of the copyright holders, the artists themselves in some cases, but in most cases, large U.S. based entertainment and media companies. To escape liability, the intermediary must "not have actual knowledge of the material or activity" and "upon notification of the infringement…acts expeditiously to remove, or disable access to, the material."[23] The intermediary must have what is called "red flag" knowledge in a two-part test that is designed to ensure that the host is not burdened with the duty to monitor.

§ 512, Paragraph C of the DMCA outlines the current notification requirements for copyrighted content residing on servers in the U.S. In addition to basic information regarding the identity of the notifying party and the location of the content in question, the law requires that notifications include: "A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."[24] This is a key user protection and was the basis for the Ninth Decision in the Lenz case.[25] Counter-notices are required to have many similar details, including the identification and contact information for the user and a description and location of the content in question. There is a similar good faith clause which states that a counter-notice requires: "A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of

[23] See 17 (U.S.C. 512(c)(1)

[24] See 17 U.S.C. § 512(c)

[25] See Lenz v. Universal

mistake or misidentification of the material to be removed or disabled."[26]

Critics of the DMCA's notice-and-takedown procedure refer to the lack of due process in such cases when the user who posted the content in question is afforded limited capacity to protest and have their speech restored. Typically, the process does not include judicial oversight until one party takes legal action. As a result, the system has seen widespread fraudulent use that results in the extra-judicial removal of lawful speech. This fraud and abuse have been well established.[27] The friend-of-the-court briefs and relevant legal commentary seem to indicate that none of the stakeholders involved are happy with the way notice-and-takedown is working in practice. However, there is little agreement on what direction the U.S. statute should evolve and the preferred alternative.[28]

After the DMCA and Legal Challenges

There is an ever-growing body of case law in the United States that it is defining the limits of rightsholders and clarifying legal definitions. In Viacom v. YouTube, Viacom sought over U.S.$1 billion in damages from YouTube for knowingly facilitating the illegal distribution of copyrighted works. Viacom claimed that YouTube's executives had full knowledge that users were posting and sharing copyrighted works. Prior to the case, YouTube and Viacom attempted to reach a business agreement in which Viacom would share YouTube's revenue from the posting of its works.[29] This deal failed when

[26] See 17 U.S.C. § 512(c)

[27] See Annemarie Bridy & Daphne Keller, *US Copyright Office Section 512 Study: Comments in Response to Second Notice of Inquiry* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920871 (last visited Oct 11, 2017).

[28] Urban, Karaganis, and Schofield, *supra* note 4.

[29] HASSANABADI, *supra* note 13.

YouTube refused to pay. In response, Viacom sent a takedown notice demanding the removal of over 100,000 clips. So, Viacom sued. Their case rested on the idea that YouTube was not free from liability because its executives had actual and real knowledge of specific instances of infringement and continued to leave the content online.[30] Estimates at the time claimed that 70-90% of the clips on YouTube were posted without the owner's permission. In response to Viacom's conflict with YouTube, the latter did not include the former in its fingerprinting technology that filtered copyrighted works that it instituted in 2007. Viacom claimed, "it was a deliberate business decision to not broadly deploy these techniques and instead…hold content owners hostage to the defendant's efforts to commercialize the site."[31] YouTube argued to the courts that it provided an open platform that supported democratic debate and had immeasurable impact on culture, politics, and society writ large. It was in compliance with the DMCA and was actually able to operate because of it. They framed Viacom as a self-interested corporate adversary that sought to bring down all that YouTube had accomplished. The court concluded that the DMCA was working efficiently in that YouTube was able to takedown all the material that Viacom requested through notices and affirmed prior courts' (and the Congress' intent of the DMCA) in regard to actual knowledge of infringement. Intermediaries continued to be held by the red flag knowledge standard, i.e., a notice is required for a takedown to take place.[32]

In addition to Viacom v. YouTube, a number of other cases helped to define "red flag" knowledge and the duties of OSPs under safe harbors, including *Corbis Corp v.*

[30] *Id.*

[31] Id.

[32] Hassanabadi, supra note 13.

Amazon, Perfect 10, Inc. v. CCBill LLC, and UMG Recordings, Inc. v. Veoh Networks, Grokster, Hotfile and *Lenz vs. Universal,* among others. These cases also confirmed that general knowledge was not enough; a giant crimson banner (or a takedown notice) was necessary under the DMCA. After the DMCA, the music sharing site Napster was founded to provide a platform for peer-to-peer downloading of copyrighted music. It was estimated that Napster "distributed more music than the entire record industry from its inception a century earlier."[33]

Copyright Law and Public Opinion

According to lawyer and copyright scholar Jessica Litman, public perception in the U.S. (and most western nations) has traditionally understood copyright as a bargain that compensates creators for their work, while providing the broadly received benefits of access. It is these general principles that undergird copyright statutes that matter most to people. The general public tends to believe that the details of copyright law only matter to a narrow collection of interest groups.[34] As such, public opinion has been generally favorable of laws that promote scientific and technological innovation and the protection of arts and culture. Political rhetoric then has coincided with these normative understandings and this pro-copyright sentiment has influenced policy making in the west. Litman argues, however, that these ways of thinking about copyright policy also can limit public interest reforms. As a result of this narrow understanding of copyright,

[33] Peter S. Menell, In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age, 59 J Copyr. Soc USA 1 (2011).

[34] Jessica Litman, Digital Copyright (2001).

the recent timeline of copyright reform is characterized by the expansion of protection, the removal of limitations, and a push for conformity in the digital environment.[35]

As Litman explains, until the 1970s, copyright in the U.S. existed as an agreed upon quid pro quo between creators and the public.[36] This balance gave creators and publishers limited commercial control and gave the public the right to control access for personal use. For example, people could freely hold private performances, resell one legitimate copy, and critique and teach with the work in a public venue.[37] Owners, on the other hand, had control over publishing, public performance, and duplication. Neither the author nor the public received all the surplus generated from the sale and production of a new work. The benefits from the creation of new works were shared between society and the author.[38]

In policy discussions, the stakeholders and lawmakers framed copyright in moral terms – as a *bargain* between the public and authors and a *balance* between competing rights. This rhetoric of bargains and balance lasted until the 1970s until the discourse of copyright gradually began to shift to broad economic and nationalistic justifications. Beginning in the 1970s, large rightsholders and some lawmakers framed copyright law as a necessary protection of American interests, a vital prerequisite for U.S.-led globalization and vibrant economic growth in the U.S. Lobbyists made causal links between the amount of copyright protection and the amount of creative, technological, and cultural production. They argued that more copyright law and stricter enforcement

[35] *Id.* at 78.

[36] *Id.* at 78.

[37] *Id.* at 79.

[38] *Id.* at 79.

would lead to more products and would strengthen the U.S. economy. In this view, the geographic fragmentation of enforcement and protection was tantamount to the global mass piracy of American creativity.[39]

According to Blayne Haggart, this shift in discourse led to a shift in political power and the corporate capture of policymaking in the U.S. As a result, digital copyright law in the 1990s and 2000s has been largely been created via industry-to-industry negotiations, mediated by Congress and government agencies. Sometimes this has resulted in legislation, while at other times, the process has resulted in non-statutory agreements to abide by certain corporate policies. The copyright lobby has been led by the major Hollywood studios, who have been represented by the Motion Picture Association of America (MPAA) and the International Intellectual Property Alliance (IIPA). These groups have tended to maintain the highest level of influence in Congress.[40]

According to McDonald, the MPAA has consistently used nationalistic discourse to connect copyright laws to jobs, framing copyright in terms of national well-being and the maintenance of a creative labor force.[41] Traditionally, MPAA lobbying for international policy diffusion has been backed up by the reported impact of piracy in targeted countries. Due to technological changes in distribution, more streaming and more broadband access, the IIPA and the MPAA are left with little credible evidence to judge the impact of piracy, except for takedown data from DMCA requests and data related to the rise in legal purchases made by former users of shuttered cyber lockers or

[39] *Id.* at 81.

[40] BLAYNE HAGGART, COPYFIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM 64 (2014).

[41] Paul McDonald, *Hollywood, the MPAA, and the formation of anti-piracy policy*, 22 INT. J. CULT. POLICY 686–705 (2016).

pirate streaming sites. Their self-published research reports that blocking of pirate sites generated more legal sales than other methods.[42] Overall, the new tech environment has forced the MPAA to expand the number and types of targets, and to employ the cooperation of external industrial sectors – advertisers, payment processors, search engines, and social platforms.[43] Hollywood (and the MPAA) is now more dependent than ever on other sectors of the economy to enforce its copyright in the digital environment. But it appears that these dynamics have not changed their nationalistic rhetoric regarding piracy and jobs.

According to Haggart, through the 1990s, copyright policy continued to be a high stakes and technocratic arena. Public opinion had barely registered as an influence on U.S. or internal copyright policy making. But the combination of the U.S. institutional structures (its diffuse, pluralist, and porous political process) and the "dissemination/protection" conflict inherent in this debate had left open the possibility that public interest voices could be a countervailing force to the interests of the dominant entertainment and copyright industries.[44] It wasn't until 2012, during the debates over Stop Online Piracy Act (SOPA) in the U.S., that public opinion became powerful enough to influence copyright policymaking.[45]

Safe Harbors and Free Trade

Since the passage of the DMCA, all of the multilateral and bilateral free trade agreements that were led by the U.S. have included some form of notice-and-takedown in

[42] Paul McDonald, *Hollywood, the MPAA, and the formation of anti-piracy policy*, 22 INT. J. CULT. POLICY 686–705, 698 (2016).

[43] NATASHA TUSIKOV, CHOKEPOINTS: GLOBAL PRIVATE REGULATION ON THE INTERNET (2016).

[44] HAGGART, *supra* note 41 at 64.

[45] *Id.* at 97.

their intellectual property chapters. However, only one, the Anti-Counterfeiting Trade Agreement (ACTA) in 2012, has explicitly been about internet governance issues. The rest of the agreements, including the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), the Korea-U.S. FTA, the Chile-U.S. FTA, and the Australia-U.S. FTA have been framed in terms of economic barriers to trade, however, all have sought to establish some form of ISP liability, including notice-and-takedown.

At the time of the Uruguay Round of General Agreement on Tariffs and Trade (GATT) (1995), prevailing modes of broadcast and exhibition lent themselves to the application of screen quotas and the geography of broadcasting allowed for a logical application of subsidies. However, by the mid-2000s the growing prevalence of the internet as the preferred mode of ancillary market delivery suggested that we had entered what Siva Vaidhyanathan has called the "digital moment."[46] The U.S. cultural industries began to shift their policy priorities, essentially ignoring screen quotas and local subsidies, and sought the reclassification of ancillary market delivery as electronic commerce, thereby opening up unrestricted markets for cultural products on-line (Bernier, 2004; Given 2003).[47] However, pay-per-download and streaming business models are built around an infinitely reproducible product that produces inherent challenges to electronic commerce. To address these conditions, the cultural industries

[46] See SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (2003).

[47] See Ivan Bernier, *The recent free trade agreements of the United States as illustration of their new strategy regarding the audiovisual sector*, MEDIA TRADE MONIT. (2004), http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/conf_seoul_ang_2004.pdf (last visited Oct 31, 2016); Jock Given, *Dealing in culture: Australia/US free trade agreement*, METRO MAG. 100–103 (2003).

have engaged with global governance bodies to develop an ever-evolving set of statutory frameworks that are positioned at the intersection of internet governance and cultural policies. Anti-circumvention, enforcement, protection rights for digital copies, and internet service provider (ISP) liability are being written into comprehensive treaties and backed up with legal reforms. And, as cultural protections are legislated away by the digital moment, new negotiating priorities have emerged in the governance of e-commerce. In this context, the free trade negotiations over intellectual property rules and internet policies have become sites of struggle between the internet and copyright.[48]

Through this period, large rights-holders, including representatives of the film and music industries, have tried to transform the open and neutral design of the internet and the democratic potential of the personal computer itself. [49] Since the development of the world wide web and the explosive growth of social platforms and search engines, the goal of the copyright industries has been to create scarcity, enforce control of copies, and limit access. However, these goals have yet to be achieved.[50]

In this context, recent trade agreements have built upon the Digital Millennium Copyright Act (DMCA), but with some significant differences. In the DMCA, intermediaries must takedown copyrighted material immediately after receiving a notice from the copyright holder or they are held liable for each copyright infringement. However, recent agreements, such as the TPP, do not require member states to enact user safeguards such as a "counter notice and put-back" protocol (as discussed above) that

[48] see TRISHA MEYER, THE POLITICS OF ONLINE COPYRIGHT ENFORCEMENT IN THE EU: ACCESS AND CONTROL (2018).

[49] McDonald, *supra* note 43.

[50] BROWN AND MARSDEN, *supra* note 1 at 90.

allow users to contest a takedown and have their content restored in a timely fashion. This is a key user protection under the DMCA. In addition, rights holders are often not required to state that they have made a good faith effort to determine whether the content in question is posted legally under the fair-use doctrine (for the purposes of news commentary or research) before sending a takedown notice.[51] This and other provisions make the TPP's framework for copyright protection less protective of users than the DMCA, more limiting of users' ability to legally oppose takedowns, and even more favorable to actors who wish to use copyright law to censor political speech online.

Internet policies that seek to control and restrict speech online have made trade agreements the subject of ongoing public controversy in recent years. In 2012, a coalition of civil society groups in Europe waged a successful public relations campaign to stop the Anti-Counterfeiting Trade Agreement (ACTA). ACTA was supported by the U.S. cultural industries, as it provided broader intellectual property protections and enforcement regimes than national laws or WTO rules. Anti-ACTA protesters framed the agreement's copyright regulations as bad for privacy rights, freedom of expression, and unfairly punitive to internet service providers. After two years of street protests, petitions and lobbying, the E.U. parliament rejected ACTA by a 92% margin. Research has revealed the agenda building power of civil society groups and their impact on public opinion in regard to intellectual property.[52] Similarly, in the U.S., a protest movement of

[51] See Annemarie Bridy, *A User-Focused Commentary on the Trans Pacific Partnership ISP Safe Harbors – infojustice*, INFO JUSTICE (2015), http://infojustice.org/archives/35402 (last visited Jun 3, 2016); Human Rights Watch, *Q&A: The Trans-Pacific Partnership*, HUMAN RIGHTS WATCH (2016), https://www.hrw.org/news/2016/01/12/qa-trans-pacific-partnership (last visited Jun 28, 2016).

[52] See Andreas Dür & Gemma Mateo, *Public opinion and interest group influence: how citizen groups derailed the Anti-Counterfeiting Trade Agreement*, 21 J. EUR. PUBLIC POLICY 1199–1217 (2014); Louisa Parks, *Popular Protest, EU Activism and Change: The Case of ACTA*, *in* ESA 11TH CONFERENCE CRISIS, CRITIQUE AND CHANGE (2013).

grassroots groups halted the Stop Online Piracy Act (SOPA). In early 2012, Google, Wikimedia, Mozilla and other prominent internet companies joined the citizen movement to lobby against SOPA, framing its enforcement regimes as stifling to innovation and free speech.[53]

The past twenty years of copyright case law, national digital policy making, and multilateral negotiations have resulted in a global fragmentation of legal frameworks for digital copyright enforcement.[54] Models continue to be tested and a number of national laws are challenging the global hegemony of the United States in intellectual property law that was established during the General Agreements in Trade in Services (GATS), and World Trade Organization (WTO) processes.

Fragmented Standards for Limiting Internet Service Provider Liability

Outside the E.U. and the United States, the various notice-and-takedown laws that have been implemented have created a fragmented and heterogeneous patchwork of practices. Given the previous established success of the United States in its push for intellectual property policy diffusion through bilateral and multilateral trade agreements, this is a notable discontinuity in the hegemony of the U.S. cultural industries.

In 2010, the Chilean National Congress rejected this notice/counter-notice

[53] see Jim Abrams, *PIPA and SOPA: What you need to know*, CHRISTIAN SCIENCE MONITOR, January 19, 2012, http://www.csmonitor.com/Technology/2012/0119/PIPA-and-SOPA-What-you-need-to-know (last visited Oct 31, 2016); Gloria Goodale, *SOPA and PIPA bills: old answers to 21st-century problems, critics say*, CHRISTIAN SCIENCE MONITOR, January 18, 2012, http://www.csmonitor.com/USA/Politics/2012/0118/SOPA-and-PIPA-bills-old-answers-to-21st-century-problems-critics-say (last visited Oct 31, 2016); By Rob Waugh, *U.S Senators withdraw support for anti-piracy bills as 4.5 million people sign Google's anti-censorship petition*, DAILY MAIL, January 19, 2012, http://www.dailymail.co.uk/sciencetech/article-2088860/SOPA-protest-4-5m-people-sign-Googles-anti-censorship-petition.html (last visited Oct 31, 2016).

[54] PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2007).

procedure between private parties and created a mechanism with judicial oversight to ensure compliance with Chile's fair use law (that was updated in the same statute). The constitutional rights of users were of central concern to policymakers. Rather than a notice to the ISPs, the law provides rightsholders with a process to petition the *courts* for an order that would compel an ISP to remove or block the material in question. The Chilean version of ISP liability law was enacted as an update to existing copyright law, to bring Chile into compliance with the U.S.-Chile Free Trade Agreement of 2004 and the requirements imposed by the courts for such notices are provided in the updated statute. The heart of Chile's notice-and-takedown mechanism is located here in § 85Q of law 20,430 (emphasis added):

> When the injunctions are requested before the lawsuit is served (preliminary injunctions), and *provided there are serious motives for it*, such injunctions may be ordered by the court without hearing the content provider, but in this case the petitioner must post a bond *at the court's satisfaction*. …
>
> Once the foregoing has been complied with, *the court* shall order without further delay to remove or disable access to the infringing contents. The *resolution shall be notified to the respective service provider by official notice, and to the petitioner through the publication board at the court. …*
>
> The affected content provider may, notwithstanding other rights, request the court issuing the *order to disregard the measure* of disabling access or removing the material. For this purpose, it shall file a petition…and *shall furnish any additional information supporting such petition*…[55]

[55] Chilean Law 20,430 – Modifying Law 17,336 on Intellectual Property, 2010, Eng. Translation, 27

This process requires the explanation of the *serious motives* and *clear descriptions* of the infringement until it meets the *court's satisfaction* before any takedown action can be taken. The burden of proof is on the rightsholder to prove the details of infringement in a case-by-case process overseen by a judge. In comparison, this slow and deliberate process is laid out in a statute that clearly favors the users' rights to fair use for education and commentary.[56]

While the Chilean law favors the addition of judicial oversight and greater due process protections, the Canadian system, formally adopted in 2012, retains the privatized nature of the DMCA, but goes further to protect the identity of the end user. ISPs are required to act as legal intermediaries and to forward takedown notices to the user immediately or they can face stiff fines and lose their liability protections. Once the ISP forwards the notice, they have met their obligations. This key distinguishing feature of the Canadian mechanism is presented in § 41.26 that stipulates the requirements for notice-forwarding:

> 41.26 (1) A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsection 41.25(2) shall, on being paid any fee that the person has lawfully charged for doing so,
>
> (a) *as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding* or, if applicable, of the reason why it was not possible to forward it…[57]

[56] See Center for Democracy and Technology, 2012

[57] Canada, Copyright Modernization Act, 2012

Furthermore, ISPs are not allowed to supply the rightsholder with the identity of the infringing user without a court order. The users then are required to takedown the content themselves after receiving the first notice or face fines of no more than $5000 for non-commercial infringement.[58] The Canadian statute, the subject of chapter six in this dissertation, was formally adopted by the Canadian Parliament in 2012 and has been comparatively untested by the courts.

In practice, the user could contest a takedown simply by leaving the content online. If the rightsholder is unsatisfied with the user's lack of action, the rightsholder can ask a court to compel the ISP to release the identity of the user. The system is more burdensome on both the ISP and the copyright owners, as ISPs must create infrastructure to support the forwarding of notices and the copyright owners must decide to sue (or not) on a case-by-case basis. The requirements for notices do not include a good faith clause, but require the claimant to explain their interest:

> (2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall
>
> > (a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;
> >
> > (b) identify the work or other subject-matter to which the claimed infringement relates;
> >
> > (c) *state the claimant's interest or right with respect to the copyright in the work or other subject-matter;*

[58] Notice the Difference? New Canadian Internet Copyright Rules for ISPs Set to Launch, , MICHAEL GEIST (2014), http://www.michaelgeist.ca/2014/12/notice-difference-new-canadian-internet-copyright-rules-isps-set-launch/ (last visited Mar 20, 2017).

(d) specify the location data for the electronic location to which the claimed infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the commission of the claimed infringement; and

(g) contain any other information that may be prescribed by regulation.[59]

It is not trivial that the Canadian Parliament left the door open to further changes to the notice requirements by including § (g) to require "*any* other information prescribed by regulation." This could possibly be an area for further inquiry and clarification.

During the Trans-Pacific Partnership (TPP) negotiations, Chile and Canada retained these statues despite the appearance of U.S. pressure to adopt stricter standards. While the governance process of the TPP was closed to the public and the media, the final text of the TPP includes single carve-out for these two distinct ISP liability frameworks and locks out the possibility that other member governments could adopt their own standards for ISP liability. While the TPP, in its current form, appears to have faltered due to political change in the U.S., the push for global intellectual property harmonization is ongoing.

The Move Towards Automation

Longstanding copyright law, no matter the medium, holds that it is the job and responsibility of the rightsholder to identify the potentially infringing material and to document the problem. Recent litigation of notice-and-takedown has sought to define and re-define the meaning of red-flag knowledge, the standard of the DMCA. As discussed

[59] Copyright Modernization Act – 2012 - Canada

previously, intermediaries must have red flag knowledge of specific instances of infringing activity on its networks, not just general awareness. Litigation is pushing intermediaries to move towards self-monitoring and notice and stay-down policies, against the intent and text of the DMCA. However, the courts are still determining what platforms know and when do they know it and setting the terms and extent of self-monitoring. As it stands, § 512 includes no self-monitoring obligation in defining the role of the platform in enforcement.[60]

A number of firms have adopted and enacted internal policy changes in regard to notice and takedown that can be seen as examples of DCMA+ self-regulation – some in partnership with government agencies and some completely voluntary. While it is hard to determine their precise motivations for these self-regulation practices, there is evidence that, at least during the Obama era, there were regulatory pressures for reform towards more obligations on the platform side. In 2013 there was a brokered agreement between Google, advertisers and credit card companies. And, in 2013 Google added code to their algorithm that served to push repeat offenders down in search results. And, in turn Google began publishing transparency reports on infringement.

Within this semi-privatized regulatory system of notice-and-takedown, automated monitoring and takedown software such as YouTube's Content ID have also been developed and implemented privately.[61] These proactive tools pre-screen uploads for copyrighted content, removing the need for notices entirely – a stricter form of compliance that is implemented on a voluntary basis by platforms seeking greater

[60] Urban, Karaganis, and Schofield, *supra* note 4.

[61] Laura Zapata-Kim, *Should YouTube's Content ID Be Liable for Misrepresentation under the Digital Millennium Copyright Act*, 57 BCL REV 1847 (2016).

protection.[62] The new automation-focused policies represent advancements beyond the rules included in the DMCA and a geographical advancement of corporate self-regulation. Throughout the history of post-DMCA case law in the United States, the courts have repeatedly sided with internet intermediaries in interpreting the implementation of the notice-and-takedown mechanism. Like in the Viacom case and Lenz v Universal, these court opinions in combination with requirements of § 512 have created the conditions for the overuse of the takedown mechanism and the submission of notices on a massive scale.[63]

As many large rightsholders see the situation, "the court simply provided no example of how one could possibly become 'aware of facts or circumstances' that a specific item is infringing other than a notice from the true owner."[64] For this reason, rightsholders have maximized the number of notices they can send and adopted automated tools that send tens of millions of notices per day. As some legal analysts have argued, copyright owners are left with no other choice.[65] While the true scale of the changes is unknown, it can be said that automated systems of enforcement have led to billions of takedowns.

Referred to as *automated content recognition (ACR),* proactive filtering systems work by filtering uploads as they are posted by matching them to a database of copyrighted music, for example. If the software detects a match, then the post is filtered before it goes live. Currently, ACR is voluntary, but the European Union has adopted

[62] Annemarie Bridy, Copyright's Digital Deputies: DMCA-Plus Enforcement by Internet Intermediaries (2015), https://papers.ssrn.com/abstract=2628827 (last visited Aug 24, 2017).

[63] Urban, Karaganis, and Schofield, *supra* note 4.

[64] Hassanabadi, supra note 13.

[65] Bruce Boyden, The Failure of the DMCA Notice and Takedown System (2013).

Article 17 of the controversial Digital Single Market Copyright Directive (discussed in chapter eight), which would mandate this form of self-monitoring on many platforms. However, studies have shown that ACR systems lack the complexity to make nuanced determinations between fair use and infringement nor are they likely to curb piracy.[66]

According to Urban et. al., during the timespan of 2009 to 2012, the automation of takedown notices in the United States in particular led to an exponential growth of takedowns.[67] For example, Google received 4,275 requests in 2009 and then 441,370 requests in 2012. Any one notice can, in fact, include thousands of URLs. Their study of the integrity of the notice and takedown system in 2014 showed that in 4.2% of their sample, the notice did not match the intended target i.e., they discovered two to seven million erroneous takedowns, out of 108 million takedowns over the six-month period. The rapid increase of takedowns in this period (2010 to 2012) can be attributed to the development of sophisticated algorithmic tools for searching vast databases of content for infringing content and automatically generating takedown requests. The requests are rarely checked for validity and platforms favor the approach of removal first, to avoid liability.

The size and scale of infringement has risen with the success of the major platforms, along with the scale and sophistication of enforcement through artificial intelligence. Large firms have made enormous structural investments to develop and

[66] EVAN ENGSTROM & NICK FEAMSTER, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 27 (2017), https://www.engine.is/the-limits-of-filtering (last visited Jun 17, 2019).

[67] Urban, Karaganis, and Schofield, *supra* note 4.

implement these new tools.[68] These pro-active measures can also include giving rights holders access to a platform's servers to remove content themselves and other agreements outside the law to supplement enforcement.[69]

According to Urban et. al., during the timespan of 2009 to 2012 three significant changes occurred to the notice and takedown landscape. First, the automation of notices and takedowns led to an exponential growth of takedowns. Second, this has led to the rise of the professionalization of enforcement and the widespread use of REO's (Rights Enforcement Organizations). And third, the increasing sophistication of pirates has led to the decreasing relevance of unique links or any one URL that leads to pirated content.[70]

Chapter Summary: Introduction

The intent of this chapter was to introduce intermediary liability and its significance to the internet and democracy, describe the basic functioning of notice-and-takedown, and explore recent political and technical changes that may affect future reform efforts. Through the lens of the semi-privatization of regulation, I explained the significance of automation to both human rights and the global political economy of the internet. And I addressed the domestic legal context and the international dimensions of the notice-and-takedown system. I explained a number of the reasons for the focus on the three cases presented in the dissertation and why the politics of the policymaking around these three laws can help us understand more about the political economy of internet law.

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[68] Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, AVAILABLE SSRN 2755628 (2016), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2755628 (last visited Oct 12, 2016).

[69] BRIDY, *supra* note 63.

[70] Urban, Karaganis, and Schofield, *supra* note 4.

Mapping This Dissertation

In the following chapter, I review related literature from critical political economy of the media, internet governance, and international communications. In these areas, I focus on influential studies of discourse, as well as studies in international internet policy, content filtering and digital copyright. In chapter three, I describe my methodological approach that is modeled from European scholars of policy discourse analysis. I describe the types of documents I have gathered, how I have coded them, and reasons for the chosen timelines. Chapter four outlines the theoretical approach – critical political economy of the media, international communication, and the theory of monopoly capitalism. Chapter five covers the history of copyright safe harbors in the international and national arenas. Chapter six is a case study of the actors, arguments, and discourses of copyright safe harbors policymaking in the Trans-Pacific Partnership in the U.S. Congress from 2010 to 2016. Chapter seven is a case study of the policy debates in the Canadian Parliament prior to the adoption of the Copyright Modernization Act (2010 to 2012) and the arguments and discourses therein that pertain to safe harbors. Chapter eight is a case study of one period of public comment in 2015, prior to the passage of Article 17 of the new Directive on Copyright in the Digital Single Market in 2018 in the European Union. Finally, chapter nine explores the larger significance of these public debates, the findings and limitations of this study, and opportunities for further research.

CHAPTER II:

LITERATURE REVIEW

Introduction

This chapter reviews the various strands of literature that relate to the study of the international political economy of internet intermediary law. The chapter begins with the central inspirations for this dissertation – the key texts in the critical study of multilateralism and copyright. My orientation began with an interest in free trade and media policy and a survey of the authors that provide a foundation in that area is provided. I also include a walk-through of the internet governance approach and touch on important related strands of scholarship in areas such as self-governance, algorithms, copyright law and agency, and the global digital divide. The chapter concludes with a review of the studies that I have drawn upon from a methodological perspective – specifically, studies of internet policy and discourse. My hope is that this dissertation will make a modest contribution to those studies that blend structural approaches with discursive analysis.

Media policy studies has produced a broad range of investigations that address copyright in the digital age. Much of this literature addresses the power of large entertainment and information companies under neoliberalism to impose statutory regimes that enclose knowledge and culture as private property.[71] The effects of this historical process and its continuities and discontinuities have been explored in terms of

[71] See SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS (2003).

social welfare, innovation, and creativity. With some notable exceptions,[72] the majority of this literature was written before the establishment of the platform economy. Today, a small group of internet intermediaries, including Google, Facebook, and Amazon, control the distribution of and access to information and culture for billions of users across the globe.[73] For users everywhere, Google searches, Facebook posting, and mobile technology have become synonymous with internet use. And, at the policy-making level, these platforms hold significant structural power over governments that need the internet to be both open and secure. In addition, internet infrastructures are now vital components of growth in all sectors of the economy, which requires digital platforms to be safe and ubiquitous. As a result of their ability to control both hardware and content on such a massive scale, this small group of technology companies are defining what is possible online and have a disproportionate influence over the limits of human agency and the conditions for social progress. Recent investigations by scholars of internet governance, political economy, science and technology studies, and law have attempted to analyze and explain these technological and political dynamics. Much of this discourse has been organized around themes of global pluralism, social justice, human rights, human flourishing,[74] and freedom of expression.

The transnationalized and liberalized marketplace of digital media has also led to a shift in the way that that media policy scholars have approached research. In 2011, Mansell and Raboy outlined a new sub-field that they call global media communications

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[72] See MONICA HORTEN, A COPYRIGHT MASQUERADE: HOW CORPORATE LOBBYING THREATENS ONLINE FREEDOMS (2013); MEYER, *supra* note 49.

[73] See DAL YONG JIN, DIGITAL PLATFORMS, IMPERIALISM AND POLITICAL CULTURE (2015).

[74] JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 6 (2012).

policy (GCMP)[75] To Mansell and Raboy,[76] the politics of media diversity, equality, and inclusion in the information society became located in a new site of struggle, the fora of global internet governance. Their analysis embraces multilateral institutional structures and the power dynamics and competing interests therein. GMCP examines the "highly politicized" system of media governance at many levels, including the governmental, local, and supranational, while foregrounding a global notion of the underserved and disempowered majority who fight for "inclusiveness," "diverse content," and "universality".[77] Culture and information are key to the global transformations that amount to a paradigm shift, to the dominance of transnational capitalism and of governance through the logic of global trade.

Mansell and Raboy write,

> Analysis of global media and communications policy also needs to depart...from the study of global policy problems that focus principally on state–state relations…[to] research [that] focusses on the distribution of power among institutions and the interactions among agents and institutions which are understood to co-determine outcomes within a political system.[78]

Copyright and Multilateralism

In the 2000s, media policy scholars began to do just this – and widened their focus to the global stage. Some of this research has focused on multilateral agreements

[75] See Robin Mansell & Marc Raboy, *Introduction: Foundations of the Theory and Practice of Global Media and Communication Policy*, *in* THE HANDBOOK OF GLOBAL MEDIA AND COMMUNICATION POLICY 1–20 (Robin Mansell & Marc Raboy eds., 2011), http://doi.wiley.com/10.1002/9781444395433.ch1 (last visited Aug 13, 2019).

[76] See *Id.*

[77] *Id.* at 2.

[78] *Id.* at 5.

and analyzed the political economy of copyright policymaking at free trade negotiations.[79] Key developments have included the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the World Intellectual Property Organization Copyright Treaty (WCT), among others.[80]

Deere, in her study of multilateral policymaking in this area concluded that the U.S. has used its economic power to leverage its trading-partner status to enforce conformity in the area of intellectual property.[81] Deere's study of the implementation of the WTO agreement on TRIPS examines the period (1995-2005) when countries were creating policies to place their nations in compliance with the agreement.[82] As noted in chapter eight, TRIPS was a historic step in the global harmonization of intellectual property law as it brought together 123 nations in a new framework of regulation and enforcement. As an outcome of the Uruguay Round of the General Agreement on Trade and Tariffs (GATT) and the General Agreement on Trade in Service (GATS), it was a political process led by the United States and E.U. nations. In her study, Deere found that in some countries, domestic compliance led to the adoption of stricter standards than

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[79] see Hernan Galperin, *Cultural industries policy in regional trade agreements: The cases of NAFTA, the European Union and MERCOSUR*, 21 MEDIA CULT. SOC. 627–648 (1999); TOBY MILLER ET AL., GLOBAL HOLLYWOOD (2001); NESTOR GARCA CANCLINI, CONSUMERS AND CITIZENS: GLOBALIZATION AND MULTICULTURAL CONFLICTS (George Yudice tran., 1st edition ed. 2001); Enrique E. Sanchez-Ruiz, *Globalization, cultural industries and free trade: an assessment of the Mexican audiovisual sector in the NAFTA Age*, *in* CONTINENTAL ORDER?: INTEGRATING NORTH AMERICA FOR CYBERCAPITALISM 86–119 (Vincent Mosco & Dan Schiller eds., 2001); R. Gomez, *Communication industries in North America after 20 years of North American Free Trade Agreement: Media policy, regulatory bodies and concentration*, 78 INT. COMMUN. GAZ. 177–199 (2016).

[80] HORTEN, *supra* note 73; DRAHOS AND BRAITHWAITE, *supra* note 55; CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES (2014), http://ebookcentral.proquest.com/lib/uoregon/detail.action?docID=415897 (last visited Jan 26, 2018); VAIDHYANATHAN, *supra* note 47.

[81] See SELL, *supra* note 72; DRAHOS AND BRAITHWAITE, *supra* note 55; DEERE, *supra* note 81.

[82] DEERE, *supra* note 81.

TRIPS, resulting in a patchwork of laws that were actually more beneficial to northern states than the standard set by the agreement. Deere concludes that many countries implemented stricter standards than TRIPS stipulated because of three factors: the coercive power enacted by the U.S., the presence of weak internal national institutions, and the lack of intellectual property infrastructure and agencies within targeted states. She presents a number of case studies of francophone African countries where weak institutions led to exposure and vulnerability to epistemic communities of policy entrepreneurs.[83]

In another study of the TRIPS process, Drahos and Braithwhite ask why states would give up sovereignty to intellectual property laws. They outline the negative effects of national reforms that favor the U.S. interests as reducing access medicines, threating the free expression and cultural exchange, and the limiting the human right to information.[84] In contrast to Deere, Drahos and Braithwhite examine what led up the inclusion of intellectual property in the Uruguay Round in the first place. They conclude that it was a combination of coercive and ideational pressure enacted through the political alliance of the U.S. and the E.U. Their study includes profiles of key policy leaders and entrepreneurs, such as Jack Valenti of the MPAA and Edmund Pratt of the Pfizer corporation, as well as political economic profiles of some of the key corporations involved in the TRIPS negotiations.[85]

Along these lines, Hesmondalph argues the most useful way to think about imperialism in relation to media and culture in the "present conjuncture is via the notion

[83] *Id.*

[84] DRAHOS AND BRAITHWAITE, *supra* note 55.

[85] Id.

of copyright."[86] In his historical analysis of neoliberalism, his central concern are the legal structures of marketization rooted in a western epistemology versus the social needs of public domain and creativity. To Hesmondalph, scholarship must interrogate differences in the characteristics of imperialism od copyright across epochs. For example, in the early twenty-first century, imperialism has been characterized by neoliberal capitalism that both requires the marketization of information and culture and is manifested through media and culture. In neoliberal theory, human well-being in this period is best advanced through entrepreneurship within an international framework of copyright and property rights. Free markets are regulated by free trade agreements and entrepreneurial freedom is assured through a marketplace governed by law and order. In this ecosystem of copyright, the law ensures prosperity.

To Hesmondalph, the multilateral policies of copyright, the WTO (TRIPS) and other free trade agreements are evidence of neoliberalism's "cultural turn." In other words, culture, information and knowledge are more central to capitalism than ever before and supranational policies are evidence of this. The worldwide compliance with these regimes is a form of imperialism in relation to culture. In this way, the global cultural marketplace is managed by regulations that limit the public domain and expand private ownership.[87] The political economic order of neoliberalism is then structurally bound to the governance of "symbol production and consumption" because copyright is the legal infrastructure that underpins it.

[86] David Hesmondhalgh, *Neoliberalism, Imperialism and the Media*, *in* THE MEDIA AND SOCIAL THEORY 95–111 (David Hesmondhalgh & Jason Toynbee eds., 2008).

[87] *Id.*

Meanwhile, Breen focuses on the U.S.-Australia Free Trade Agreement as a case study in what he calls *digital determinism*. He argues that in the digital age, technology carries inherent inequalities because of the unequal distribution of resources and awareness that define institutions of power. As Breen outlines, Australia – like many countries with well-developed cultural sectors – has a long history of cultural protections that support cultural labor and nation building. The U.S.-Australia FTA marks a break in these policies. Due to labor union pressures, the agreement maintains cultural exemptions, such as screen quotas and cinema subsidies, but only in analog formats and old technologies – not on the internet. The agreement was marked as a victory for cultural workers, but also for U.S. negotiators who sought market access for digital trade.

To Breen, digital determinism operates as a hegemonic force because both parties agree that it will be mutually beneficial. Key to the power of digital determinism are the economic and cultural changes that are considered to be the consequences of free trade agreements that loosen most national cultural industry protections in the digital environment. As Breen argues, technology, culture, policies, and values are exported from core countries as a continuation of unequal trading relationships that create inequalities. In Breen's account, Australian negotiators lacked the specialized knowledge of digital policy and its effects in other regions. This specialized knowledge, stemming apparently from more state-sponsored research agendas, could serve as a counterweight to U.S. negotiators and their discourses of development and optimism regarding digital trade policy.[88]

[88] M. Breen, *Digital determinism: culture industries in the USA-Australia Free Trade Agreement*, 12 NEW MEDIA SOC. 657–676 (2010).

In addition, Tusikov has examined the phenomenon of non-binding agreements as a form of self-governance that routes around free trade negotiation entirely. As Tusicov has shown, government agencies are brokering agreements between corporate stakeholders – to meet competing economic interests. These dynamics have been evident in the area of trademark law, where U.S. officials have brokered deals with online retail sites, credit card companies, and platforms to defund and filter out vendors that traffic in counterfeited goods.[89] Contracts are debated in secret with little to no public record keeping, accountability to courts, or independent review. As Tusicov has shown, the policymaking of non-binding agreements is more efficient, but the resulting policies have rapidly changed the legal landscape. Her research has mapped the privatization of trademark policing and the globalization of informal agreements.[90]

Algorithms

How states choose to regulate – or not regulate – platforms is reflective of dominant attitudes towards the person who is on the receiving end of algorithmically generated output. In this way, artificial intelligence can be seen as a tool for the expression of different forms of power[91] that corporate and state interests exercise over underrepresented groups. Contrary to the celebratory nature of recent technologists and their promises for what algorithms can do for us,[92] socially destructive values may be getting encoded into decision-making processes to such a degree that re-coding

[89] TUSIKOV, *supra* note 44.

[90] *Id.*

[91] See SANDRA BRAMAN, CHANGE OF STATE: INFORMATION, POLICY, AND POWER (2006). Braman theorizes three forms of power that are exercised by the informational state: instrumental, structural, and symbolic.

[92] ED FINN, WHAT ALGORITHMS WANT: IMAGINATION IN THE AGE OF COMPUTING (2017).

alternative values may be improbable, if not impossible.[93] For example, the provision of social services in the United States is currently being managed and facilitated by systems that track and surveille recipients – often the poorest and neediest citizens. Decisions regarding who gets what services – housing, food stamps, health care benefits – are determined computationally, in ways that both remove responsibility from state employees, but requires constant surveillance of the poor.[94] Automation reinforces old inequalities, and thereby perpetuates the problems of poverty and discrimination that they are said to solve. As Eubanks argues,

> Marginalized groups face higher levels of data collection when they access public benefits, walk through highly policed neighborhoods, enter the health-care system, or cross-national borders. That data acts to reinforce their marginality when it is used to target them for suspicion and extra scrutiny.[95]

Critics of big data have examined the social implications of algorithmic decision making in areas such as predictive sentencing, immigration, and surveillance of marginalized populations. Crawford addresses the use of predictive and surveillance infrastructure to target Muslim immigrants, as the use of computational tools to facilitate the state's targeting of social justice activists. She suggests that artificial intelligence (AI) tools are ideal for policing, given their lack of transparency, lack of accountability, tendency to encode bias and claims of neutrality. In turn, the lack of due process that

[93] EUBANKS, *supra* note 5.

[94] *Id.*

[95] *Id.*

characterizes automated decision-making allows governments to attack enemies without oversight, while hiding behind the supposed neutrality of the code within.[96]

Despite the common perception that Google results are neutral, studies have described stark differences between the ranking and output for racially opposite searches such as "black girls" vs. "white girls".[97] Search results in these studies reveal the biases of Google's engineers towards providing information that appeals to racist attitudes, rather than information that is most useful or relevant.

Eubanks proposes regulatory solutions that seek to impose transparency and the involvement of more publicly minded custodians of information, such as librarians. The underlying regulatory approach she advocates is one where the decisions regarding how information is indexed, filtered, and accessed should be driven by public policy, not privatized corporate practices. In this vision, we can begin to approach the de-privatization of algorithmic tools and the coupling of regulation with artificial intelligence for alternative ends. In the neoliberal model, the benefits that Google provides are a byproduct of an ad-driven for-profit platform, while in the public-good model that Eubank's proposes, the public's need to access, distribute, and receive valuable information are the central benefits. From the bottom, the system is designed to serve the users' rights without subjecting the public to the negative externalities of tools whose primary purpose is to serve advertisers.[98]

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[96] SXSW, *Kate Crawford: DARK DAYS: AI and the Rise of Fascism - SXSW 2017*, https://www.youtube.com/watch?v=Dlr4O1aEJvI (last visited Jun 17, 2019).

[97] EUBANKS, *supra* note 5.

[98] *Id.*

Democracy and the Internet

Amongst democratic societies, the relationship between state institutions and the internet has unique characteristics that set it apart from other political-economic dynamics and other modes of communication. On balance, most policy makers and leaders of state agencies need networked technologies to meet certain policy and administrative goals that intersect with and affect nearly all aspects of governing. As such, the net needs to be relatively open, secure and functional[99] for the sake of governmental and economic goals. Faster production of goods and services, lower transaction costs, greater growth and prosperity from electronic commerce, and the possibility of efficient control of transactions are all economic goals that can be met with networked communications.[100] Cybersecurity, surveillance, and law enforcement are also vital concerns of many state agencies.[101] In addition, internet corporations lobby governments and international institutions for favorable policies that allow for open data flows and for legal structures that secure online marketplaces, such as intellectual property protections.

As Denardis explains, while issues of internet governance are rising in the public consciousness, the outcomes, in terms of freedom of expression, privacy and openness, are all the result of complex legal, infrastructural, and technical decisions, understood only by a small set of elite experts.[102] While these experts are not always the decision makers, the full knowledge of the implications often rests with them. It is not enough,

[99] MONICA HORTEN, THE CLOSING OF THE NET (1 edition ed. 2016).

[100] *Id.*

[101] LAURA DENARDIS, THE GLOBAL WAR FOR INTERNET GOVERNANCE (2014).

[102] *Id.*

then, to describe the implications of internet policies, but research must also point to how decision-making is evolving in both national and international fora in order to better map the conditions that lead to international policy coordination. Furthermore, more research is needed to make sense of how internet policies, once adopted by states, become implemented and challenged.[103]

In one leading study of international internet policy, Horten argues that the governance of the internet is a contested space defined by two opposing perspectives: a market-led perspective that sees the internet as a site of commerce, and a user-empowerment perspective that holds freedom of expression as its guiding principle. According to Horten, citizen-led movements, corporate lobbying, and the needs of military and law enforcement have brought a number of ongoing policy debates into the public eye, including privacy, net-neutrality, copyright enforcement, and blocking and filtering. At the same time, policymakers in liberal democracies are regulating the web to meet policy goals such as faster production of goods and lower transportation costs, greater growth and prosperity, and the possibility of control over transactions. On the other hand, internet corporations that deal in information, entertainment and social connection need the state to create a favorable policy environment for them to control data flows and to meet commercial goals. In the end, as Horten explains, the future of the internet will be determined by the outcome of these two competing visions, one that is market-led and one that is public-led.[104]

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[103] see PAULA CHAKRAVARTTY & KATHARINE SARIKAKIS, MEDIA POLICY AND GLOBALIZATION (2006); DENARDIS, *supra* note 102; Giles Moss, *Internet governance, rights and democratic legitimacy*, *in* HANDBOOK OF DIGITAL POLITICS 377–394 (Stephen Coleman & Deen Freelon eds., 2015).

[104] HORTEN, *supra* note 100.

In the area of internet governance, Denardis argues that the technical standards that define the arcane management of online spaces have very tangible political dimensions. While the hidden technical aspects of the web, such as protocols and internet addresses are complicated, they need to be understood beyond a small group of elite experts. Moreover, the outcomes of governance decisions affect civil liberties such as privacy and freedom of expression. Interests in national security and commerce all play a part. Denardis sees a growing understanding in the public about the politics of the internet, while also calling on researchers to contribute research that supports that growing consciousness.[105]

To Denardis, internet intermediaries have risen in power as the internet has matured. States and traditional institutions have decreased in power. The narrative of the internet's democratic potential does not match with the reality of the censorship and control. In many cases, technology and democracy have diverged. However, internet governance is a set of continually negotiated contested spaces, and as such, will determine the future of innovation policy, national security, and freedom of expression. Denardis argues that the technical protocols – that define how traffic on the internet is managed – bake in a set of values to the design of the network. These standards are sites of conflict. On a very basic level, the internet works because of these universal technological arrangements, but the process of setting these standards is political.

In another related study, Mackinnon argues that the commons is the primary techno-political platform for a global netizen movement. In other words, sharing is the key to a pluralistic internet. Mackinnon's argument rests on a few central points. First,

[105] DENARDIS, *supra* note 102.

internet companies would not be so successful if the net was designed with proprietary technology – code that was built for free by the web's original engineers. Second, the digital commons played a key role in the uprisings in Tunisia and Egypt, allowing activists to access to global publishing and real-time information sharing platforms. Third, software code and technical standards are themselves forms of law and policy because they constrain what we can and cannot do online. As McKinnon argues, the modes and limits of expression are being shaped, not by governments alone, but by software developers, hardware engineers and network operators. Thus, Mckinnon finds that the citizen commons is the key counterweight to corporate and government power, allowing for "dissent, whistleblowing and non-mainstream conversations."[106]

Of particular importance is Mckinnon's treatment of the contested terrain of copyright enforcement. She recounts a U.S. government hearing on internet security when representatives from New York and California districts pressured Google's senior counsel to block, filter and pre-screen for copyrighted content. The Google representative fought back by focusing on free speech and freedom of expression. To MacKinnon, this hearing reflects the larger trend at the time – when it comes to copyright, politicians push for censorship and surveillance over free expression. During this period, lawmakers in the U.S. pressured internet companies to stop piracy because of aggressive lobbying by the entertainment industries. Protecting intellectual property (IP) became more important than due process. Mckinnon cites a number of examples: The PROTECT IP Act of 2011, the ICE shutdowns of 2011, ACTA, as well as § 512 of the DMCA.

[106] REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM 23 (Reprint edition ed. 2013).

In a related study, Mueller provides an historical account of the internet governance taking place in two forums, the World Summit on the Information Society (WSIS) and the Internet Corporation for Assigned Names and Numbers (ICANN). As Mueller argues, the internet has pressured states in five ways: through international communications that crosses jurisdictions, changes in the polity that result from online networks, decentralized control and distributed participation, new institutions that govern network design and policy, and unlimited storage of data and information. He concludes that new forms of governance are needed that recognize these dynamics. He argues ultimately against state power and for a form of decentralized multi-stakeholder governance.[107]

In contrast, Castells argues that the democratic nation-state is the key to addressing inequality of access and to establishing an internet run on liberal democratic norms. Castells argues that there are profound contradictions between in the celebratory discourses of technology and the evolutionary direction of the knowledge economy, that itself is profoundly exclusionary. As Castells writes, the global economy of the networked society could close itself off from the billions of people who are information-resource poor. For Castells, a massive program of international public policy is required to address inequalities of infrastructure, education, and information resources to prevent the moral, political, and economic crises of exclusion.[108]

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[107] MILTON L. MUELLER, NETWORKS AND STATES: THE GLOBAL POLITICS OF INTERNET GOVERNANCE (2010).

[108] MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE: ECONOMY, SOCIETY, AND CULTURE VOLUME I (2 edition ed. 2009).

Along those lines, Drezner also argues that there is little benefit to technological change, without liberal democratic governance and democratic institutions. Drezner surveyed the literature in political science and international relations in regard to the relationships between the internet and state-society relations and focused specifically on regime type. As Drezner argues, the internet can serve civil society through access to information and horizontal communication, but it can also serve the interests of autocratic governments who wish to surveil and control.[109]

In addition, Milner performed a cross-national comparison of 190 countries to better understand the relationship between institutional characteristics and the digital divide. Milner argues that states will block and filter if they see the internet as a threat. Milner concludes that the most significant factor in predicting the digital inclusion is regime-type. Autocratic regimes see little benefit from the internet if they don't connect it to economic development, whereas democratic regimes are more likely to promote openness and are assumed to recognize the benefits for economic growth (and desire those benefits).[110]

The Global Digital Divide

Within the field of international communications, scholars have also addressed the global nature of internet policymaking and the inequities of governance that is market-led. In her studies of neoliberalism and internet policy, Charkravarrty argues that critical communication scholars need to attend to the historical backdrop of the current

[109] see Daniel W. Drezner, *Weighing the Scales: The Internet's Effect On State-Society Relations*, 16 BROWN J. WORLD AFF. 31–44 (2010); Daniel Drezner, *The Global Governance of the Internet: Bringing the State Back In*, 119 POLIT. SCI. Q. ACAD. POLIT. SCI. 477–498 (2004).

[110] see Helen V. Milner, *The Digital Divide: The Role of Political Institutions in Technology Diffusion*, 39 COMP. POLIT. STUD. 176–199 (2006).

neoliberal attempts to solve the digital divide. She argues that discourses of media development have led to an "anti-politics" of tech-driven development and negates class conflict and colonial histories. Implicit in her critique is the argument that western international communication scholars need to be self-reflexive in their agreement (or neutrality) in regard to corporate-led solutions to the digital divide.[111]

Al-Ghazzi cautions against applying western liberal narratives to studies of democratic communications and social movements in the global south. Specifically, Al-Ghazzi cites the discourse of the "citizen journalist" in regard to the use of social media during the Arab spring uprisings of 2011. In many cases, media practices are varied and not always tied to notions of citizenship in any particular state. To solve this problem, Al-Ghazzi recommends that scholars take the time to learn from local and inter-cultural histories.[112]

In a related study, Charkravartty and Aouragh argue for the study of infrastructures of empire, while making the case that recent literature on infrastructure is missing references to the cold-war histories of the internet. In addition, they point out that internal conflicts within post-colonial states, rooted in race and class, that characterize the policy field of media development today have not been well understood. To Chakravartty and Aouragh, infrastructures are not just technologies, but the result of the combination

[111] Paula Chakravartty, *Governance Without Politics: Civil Society, Development and the Postcolonial State*, 1 INT. J. COMMUN. 297–317 (2007).

[112] Omar Al-Ghazzi, *"Citizen Journalism" in the Syrian Uprising: Problematizing Western Narratives in a Local Context*, 24 COMMUN. THEORY 1050-3293 435–454 (2014).

of technologies and policies. As such, scholars need to attend to the use, history, and design of infrastructures in the global south.[113]

At the same time, Yeo has studied the political economy of search engines to analyze the competition between Google and Baidu for Chinese audiences and the relationship of each company to state power and geopolitical contests. Yeo reveals the connections between competing ideologies of internet development on global scale, with the resulting controls on corporate advancement impacting the material lives of millions of internet users, as well as the profits of multinational internet intermediaries.[114]

Intellectual Property (IP) Law and Agency

Not all authors take a negative view of intellectual property laws in terms of the advancement of human rights. Chander and Sunder argue that in practice, IP laws can in fact serve social ends and economic development in the global south. For example, Chander and Sunder address how indigenous communities are using IP law to protect traditional knowledge and how the state could intertwine human rights and IP. Chander and Sunder assert that IP should include a broader set of values (as opposed to narrow libertarian theories) that would promote the use of IP to support human rights, public health, and economic development. As Chander and Sunder argue, human advancement is predicated on IP law that serves both human needs as well as profit. In fact, they point to the civil society groups that are insisting on this and advocated for it in different ways. Examples include efforts such as Creative Commons, lobbying for reforms within WIPO, new WTO declarations, as well as instances of trademark being employed to support

[113] Miriyam Aouragh & Paula Chakravartty, *Infrastructures of empire: towards a critical geopolitics of media and information studies*, 38 MEDIA CULT. SOC. 559–575 (2016).

[114] ShinJoung Yeo, *Geopolitics of search: Google versus China?*, 38 MEDIA CULT. SOC. 591–605 (2016).

agricultural and health related developments in poor communities. According to Chander and Sunder, these efforts towards using IP for social ends are having tangible and positive effects. But the inclusion of social justice concerns is now urgent because of the rise of the internet and the global adoption of the TRIPS agreement.[115]

In terms of the internet, Chandler and Sunder see hope in new technologies that allow for IP to be shared cheaply and easily, fostering the widespread use of human knowledge. However, at the same time, the ease of distribution has led to laws that criminalize the circumvention of copyright protections, laws that could be exploited to limit the spread of knowledge and lock out competition in the marketplace. Key to a new democracy of IP is not that copyright should be eliminated, rather, the lawmaking process should be opened further to include marginalized voices. According to Chandler and Sunder, the teleology of IP should not be determined by legal scholars, but by the democratic process, historical development and political struggle.[116]

The arguments presented by these legal scholars illuminate how the historical development of IP law impacts public health, communication rights, freedom of expression, and an open internet. Along with healthcare and food, access to knowledge and freedom of expression are also basic human needs in an egalitarian society. These rights are predicated on a global open internet and global governance of the internet that accounts for a plurality of viewpoints. Chander and Sunder's, arguments highlight new

[115] Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 INTELLECT. PROP. SOC. JUSTICE UC DAVIS LAW REV. (2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=982981 (last visited May 27, 2016).

[116] *Id.*

opportunities for change – examples of agency within an increasingly enclosed and privatized internet.[117]

Discourse and Internet Policy

Much has been written about the power of the Internet and social media vis-á-vis popular uprisings in dictatorships throughout the world. Memes such as 'net-neutrality', 'Arab-spring', and 'meta-data' have emerged as important frames that are supporting normative positions such as, an open internet is good for democracy and access to social tools are good for democratic movements, etc. Furthermore, a certain cluster of American corporate interests that rely on an expanded base of users to support their business models have benefitted greatly from these discourses. In parallel, a dichotomy has emerged between global centers of informational and technological power. In one popular narrative, China favors information control to maintain national order and state sovereignty, while the U.S. favors open access, legal and technical controls to protect commerce and surveillance to prevent terrorism. As a basis for policy decisions and foreign policy, American ideals of human rights, security and freedom are juxtaposed with authoritarianism and state control.

A number of scholars have examined these geopolitical dynamics by studying discourse – the words of that public officials and powerful people use to influence policymaking and public opinion. For example, when Facebook's CEO Mark Zuckerberg testified in the U.S. Congress that his company should not face antitrust regulation because Facebook takes a stand for *free expression*, he was using shorthand to argue that

[117] *Id.*

Facebook and Congress have shared interests.[118] The words "free expression," in this context, mean liberal democracy, the U.S. Constitution, and the origin story of the United States. They signify to the audience a story that is much more significant than the details of Facebook's alleged anti-competitive behavior – and how to regulate it or not. Discourse scholars argue that these words (and the ideas they signify) matter to how policy change happens – and how power operates in the various arenas of policymaking. Wilson maintains that some approaches to discourse analysis are more heavily influenced by linguistic theory, while others are more rooted in institutional approaches.[119] Regardless of the theoretical vantage point, discourse scholars claim that words used in policy making can be studied and analyzed using the tools of textual analysis – not unlike the way that a cinema studies scholar may study film "texts." Key to an institutional approach is the question of *who* is producing the text in question and what their interests are. In this way, the emphasis for an institutional political discourse analysis is on the *politics* of the issue under study.

In the area of internet policy, leading scholars have used discourse analysis to argue that U.S. policymakers use the discourses of "free flow" and "internet freedom" to maintain control over the world's internet resources for benefit and dominance of American companies.[120] For example, Powers and Jablonski situate their account of

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[118] Tony Romm, *Amazon, Apple, Facebook and Google grilled on Capitol Hill over their market power*, WASHINGTON POST, https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/ (last visited Sep 5, 2020).

[119] John Wilson, *Political Discourse*, *in* THE HANDBOOK OF DISCOURSE ANALYSIS, 2 775–794, 776 (Deborah Tannen, Heidi Hamilton, & Deborah Schiffrin eds., 2 ed. 2015).

[120] See D. MCCARTHY, POWER, INFORMATION TECHNOLOGY, AND INTERNATIONAL RELATIONS THEORY: THE POWER AND POLITICS OF US FOREIGN POLICY AND THE INTERNET (2015); SHAWN M. POWERS & MICHAEL JABLONSKI, THE REAL CYBER WAR: THE POLITICAL ECONOMY OF INTERNET FREEDOM (2015).

information policy in the critical political economy of the media and map a diverse set of examples to tell a century-long story of U.S. power and intentions in the on-going development of global governance. Powers and Jablonski argue that the U.S. political agenda in regard to the internet is directly tied to American tech companies, western norms, and serves to promote western products. Powers and Jablonski provide an account of how U.S. corporate interests have dominated the policy positions and geopolitical moves by the U.S. government in regard to information resources and the internet. In detailed case studies, Powers and Jablonski effectively hold up new understandings to consider in light of the dominant discourses of "free flow" and "information freedom."[121] Powers and Jablonski demonstrate how U.S. media companies maintain local control in infrastructure and are able to extract fees from global south countries – and how this lack of investment and profit extraction has been facilitated by the uneven process of global governance. In the end, they make the case for state controls that support state sovereignty and global rules that protect user privacy and personal data from government and corporate uses.

McCarthy uses the tools of critical discourse analysis to present one of the first studies that connects international relations to internet governance. Applying both an historical materialist and science and technology studies approaches, McCarthy accounts for the role of the U.S. government in the control of internet resources. And, using a constructivist analysis, he examines the discourse of U.S. officials to connect the norm of internet freedom to the spread of American control of the internet. McCarthy's key focus is on the design of the technology as policy – technological design that has both political

[121] POWERS AND JABLONSKI, *supra* note 121.

roots and political implications. He aims to rethink international relations theory itself by asserting that the internet is a form of power.[122]

In one short essay published in 2016, Pohle, Hosl, and Kniep propose a wholly new analytical approach to the study of the politics of internet policy. Pohle and her colleagues draw together sociological field theory (Bourdieu and Wacquant) and science and technology studies (Latour) to call for the study of the *core conflicts* of the internet policy field. They argue that the core conflicts are those that define what is truly at stake in the policy debate itself. The core conflicts are defined by actors in the field and through policymaking fora, and they become institutionalized into policies and structures. In the case of internet policy, this means debates over three central concerns: 1) what is the purpose of regulation (i.e., cybersecurity, innovation, or open communication); 2) whose expertise is recognized in the policy debates; and 3) how will the problem at hand be regulated. In short, actors in policy field are in a constant contest of meaning-making over these three questions and the outcomes define the character of our future internet. Therefore, given that the nature of the internet is defined by political struggle, the discourses used in that struggle are worthy of methodical examination and comparative analysis. According to Pohle et. al., discourses have a "performative effect" in that they become inscribed into technologies, laws, and even policymaking routines through the process of discourse institutionalization.[123] By combining a macro-level structural approach – identifying stakeholders and how policies are getting made – with a

[122] MCCARTHY, *supra* note 121.

[123] Julia Pohle, Maximilian Hoesl & Ronja Kniep, *Analysing internet policy as a field of struggle*, POHLE J HÖSL M KNIEP (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827696 (last visited Oct 12, 2016).

discursive approach that examines policy documents and government documents in granular detail, we can see how meanings are embedded in structures. In the end, mapping the conflicts of internet policy (and the discourses used therein) will lead to more informed stakeholders and a better policy field.[124]

Meyer, in her study of digital copyright policymaking in the E.U. presents a comprehensive study of discourse institutionalization in the area of internet policy. She covers over a decade of copyright policymaking in multiple countries in the E.U. through textual analysis of hundreds of government documents. Her central question is "how and why have selected policies in the European Union dealing with the online enforcement of copyright developed?"[125] She engages with this question through a series of case studies that provide thick descriptions of debates between stakeholders in a way that provides a nuanced account of central interests, arguments, and discourses in each case. Meyer argues that the many discourses and arguments that comprise the digital copyright policy field fall under the meta-debate between access and control i.e., between the internet and copyright. Powerful interests – entertainment industries and internet platforms – sit on both sides of the debate and the struggle between them is ongoing. Meyer sees little change in the fundamental nature of this debate and the political economy that drives it. She argues for more transparency and accountability on the part of government and a regulatory approach that addresses monopolistic practices on either side.[126] Meyer concludes that the theoretical approach of the study of political economy of the media

[124] *Id.*

[125] MEYER, *supra* note 49 at 293.

[126] *Id.* at 299.

should include discourse analysis, in addition to studies of market share and market power, to chart changes in power and control. She writes,

> …the lack of agreement on problem definitions, policy solutions and goals is in part driven by differences in stakeholder rationales for copyright and the internet. Analyzing ideas and discourses offers additional insight into the results and stalemates we observe in online copyright enforcement policies. Stakeholders compete to structure and frame the policy problem at hand.[127]

Conclusion

In all of these areas of scholarship, there appears to be little attention to multilateral policymaking that regulates algorithmic and automated filtering. In other words, copyright and internet policy have historically had profound geopolitical importance – which is well documented in political economy and internet governance – but the regulation of the automation of regulation appears to be understudied. Some, legal scholars have turned their analysis to the development of algorithms and automatic content controls to compare different regimes and assess the outcomes for free expression and privacy.[128] But, given the implications of algorithmic controls in terms of free expression and information access, there is room for further inquiry related to automated filtering in internet governance, international communications, and political economy.

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[127] *Id.* at 302.

[128] Taylor Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem With Content ID*, 13 DUKE LAW TECHNOL. REV. 66–88 (2015); Urban, Karaganis, and Schofield, *supra* note 4; Mike Zajko, *The Copyright Surveillance Industry*, 3 MEDIA COMMUN. 42–52 (2015); HARRY SURDEN, *Machine Learning and Law* (2014), https://papers.ssrn.com/abstract=2417415 (last visited Sep 21, 2018); DAN L. BURK, *Algorithmic Fair Use* (2017), https://papers.ssrn.com/abstract=3076139 (last visited Sep 21, 2018); JACK M. BALKIN, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation* (2017), https://papers.ssrn.com/abstract=3038939 (last visited Sep 21, 2018); HASSANABADI, *supra* note 13.

This literature review has brought together the various strands of scholarship informing this study of the political economy of intermediary liability. Keys areas have included critical political economy of the media, internet governance, critical data studies, and international communications. Scholars in these areas have been concerned with central questions of policy change and political economy – how do policy programs develop, who do they benefit, and to what effect? Within these various areas, some authors have analyzed the discourse of policymaking as a way to account for changes in power and control. The granular detail and the thick description of discourse analysis helps to understand important political debates and connect those debates to policy change. Thus, the chapter reviewed influential studies of discourse, as well as other areas of scholarship that are relevant to international internet policy, content filtering and digital copyright.

CHAPTER III:

THEORETICAL APPROACHES

Introduction

I begin with a focus on the critical political economy of the media approach, describing its key characteristics, and specifically its emphasis on power and praxis. I draw also from international communication theory and theories of monopoly capital. I include a broad survey of international communications that covers its three central paradigms – modernization, dependency, and post-modernist. All three paradigms are included to help ground this chapter in the trajectory of international communications in the twentieth century. I conclude with an explanation of the theory of monopoly capital and apply this framework to the study of corporate oligopolies and their power vis-á-vis the capitalist state.

In the area of media and globalization, scholars in international communications and critical political economy of the media (PEM) often have centered on theories of cultural imperialism and center/periphery as they relate to the dominance of the United States – in both telecommunications and entertainment.[129] And, recently, some notable critical investigations of the internet[130] have questioned liberal constructions of the networked technologies and mapped the global terrain of digital imperialism and

[129] see Hesmondhalgh, *supra* note 87; ROBERT MCCHESNEY & DAN SCHILLER, THE POLITICAL ECONOMY OF INTERNATIONAL COMMUNICATIONS: FOUNDATIONS FOR THE EMERGING GLOBAL DEBATE ABOUT MEDIA OWNERSHIP AND REGULATION (2003), http://www.unrisd.org/UNRISD/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/c9dcba6c7db78c2ac1256bdf0049a774/$FILE/mcchesne.pdf (last visited Oct 24, 2016).

[130] Christian Fuchs, Reading Marx in the Information Age: A Media and Communication Studies Perspective on Capital Volume 1 (1 edition ed. 2015); Monica Horten, The Closing of the Net (1 edition ed. 2016); Robert W. McChesney, Digital Disconnect: How Capitalism is Turning the Internet Against Democracy (Reprint edition ed. 2013).

monopoly capitalism in relation to the digital economy. In addition, *media policy*, as a subset of neoliberalism, has been the subject of theoretical inquiry in both political economy and international communications. Throughout the 20th century, scholars of international communications modeled the geopolitical dimension of cultural, informational, and technological flows–flows that included policy changes. This inquiry has focused on state-to-state relations and various models of geopolitical power.[131] This project draws on these theorists, but also addresses internet laws and regulations that have been developed since the rise of U.S.-based internet platforms. Therefore, I have chosen a theoretical approach that takes into account the persistence of colonial relationships – as well as the structural power of Silicon Valley companies – that shape our politics, our social world, and the conditions in which we live.

Critical Political Economy of the Media

Scholars within the critical political economy of the media approach (PEM) have found a nexus of corporate and geopolitical power under the neoliberal capitalist system that drives the movement of policy regimes. Evidence often supports a model of state power that sets programmatic agendas to further strengthen geopolitical positions and corporate profits. Critical analysis is typically intertwined with prescriptive proposals for more egalitarian programs and framings that often serve prosocial media reforms. In the study of transnational conditions and policy flows, the theoretical frameworks of critical political economy tend to mirror coercion theorists in international relations,[132] although

[131] Arjun Appadurai, *Grassroots Globalization and the Research Imagination*, 12 PUBLIC CULT. 1–19 (2000); HERBERT I. SCHILLER, MASS COMMUNICATIONS AND AMERICAN EMPIRE (1st ed. 1969).

[132] In International Relations, researchers have theorized international policy change in terms of policy diffusion (Dobbin, Simmons & Garrett, 2007; Weyland, 2005), coercion (Edwards, 1997; Gould, 2003; Owen, 2002), and epistemic communities (Adler, 1992; Haas, 1992).

analysis tends to be on the structural level and unified agendas are assumed to be present among actors in the capitalist class and in transnational institutions. Analysis includes detailed descriptions of how policy change has occurred and indemnifies the consequences and implications of policy outcomes, rather than strict empirical comparisons of change mechanisms.

PEM scholars often critique capitalism from a grounding in moral philosophy and also aid social movements for justice, equality and the public good. In opposition to mainstream and administrative approaches, critical PEM scholars provide a vision towards capitalism's eventual demise, and sometime aid the reform of media policies. The vision of such a line of research includes liberation from capitalist domination, a redistribution of resources, and a cultural sphere defined by people, not profit. Key to critical political economy is the use of historical and documentary methods to investigate questions of the role of the media in cultural and ideological struggle. While some scholars have sought to explicitly extend a Marxist critique of society and others have sought to directly aid social change with social critique, nearly all address the location of authority and the distribution of power in society. One of the significant differences that is evident throughout these texts is their treatment of the globalization of capitalism. There are varying levels of emphasis on this process and how it relates to the power of the United States, the dissemination of commercial culture and theoretical development.

Building from Marx and Engels, critical PEM disregards any notion that the empirical study of the economic relations could be an objective science. In *the Political Economy of Communication*, Mosco offers a broad definition that is useful to differentiate PEM from other schools of economics and their relationship to Marx. He

writes that any ideological strand (including Adam Smith and other classical political economists) of PEM typically share four aspects: a focus on the social totality, history, moral philosophy and praxis. This definition is echoed by Wasko, Murdock and Sousa in their introduction to *The Handbook of Political Economy of Communication*, but they emphasize the leftist context of the approach and distinguish critical PEM from media economics because it is holistic, historical, involves a moral philosophy, and embraces *praxis*, i.e., for work to have tangible impacts.

This obligation to apply one's research to public discussions is important to consider. When one examines the ways in which research and scholarship are valued both in our dominant financial institutions and in political movements on the right in the United States (and globally), we can see that knowledge generation is vital to social movements and political fights. In the study of the mass media, PEM makes that connection, understands the interrelated nature of research and policy, and provides a growing body of work that is relevant and increasingly impactful.

Towards a Political Economy of Culture

In calling for a political economy of culture, Nicolas Garnham addresses the significance of documenting and analyzing historical processes. To Garnham, capitalism requires that the market economy dominates society and industrial powers use the media to maintain the status quo. It is the role of the researcher to document the relationships between the economic base and the spheres of culture and information. Garnham applies a Marxist analysis to draw the boundaries of the field. In calling for a political economy of culture, he highlights the inherent need of capitalism to invest and expand, and the key role that surplus gained from labor play in the processes of capitalism. To Garnham,

political economy raises questions about how these surpluses have been allocated over time and how the relationships between industrial forces and cultural production have shifted and evolved. The political economy of culture examines the continuous historical process of attempts to surmount the barriers to this process. Garnham writes,

> Historically the sphere of mental production or non-material production presented and continues to present important barriers to [increased productivity and widening markets] and the forms and dynamics of the mass media can in part be understood as resulting from a continuous attempt to surmount those barriers and from the concretely various successes and failures of that attempt.[133]

The commodification of audiences is one piece of that story, but so are the processes of global governance, media privatization, runaway production, copyright agreements, and intellectual property enforcement agreements that serve the growth of the culture industries as businesses that seek to sell (and profit from) actual cultural commodities.

Murdock and Golding also stress the media's role in maintaining social relations and the importance of examining how that has evolved historically. To Murdock and Golding, the mass media have been absent from critical analysis of the reproduction and legitimation of class relations in advanced capitalism.[134] While other scholarship has examined education and other social and economic sectors, the ideological role of the mass media in maintaining capitalism has not been fully explored. Historical examination

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[133] Nicholas Garnham, *Contribution to a Political Economy of Mass-Communication*, *in* MEDIA, CULTURE & SOCIETY: A CRITICAL READER 9–32, 26 (Richard E. Collins M.D et al. eds., 1986).

[134] Graham Murdock & Peter Golding, *For a Political Economy of Mass Communications*, *in* APPROACHES TO MEDIA: A READER (Oliver Boyd-Barrett & Chris Newbold eds., 1995).

starts with the theoretical position that the mass media cement consensus among the working classes. The job of the researcher is to document how and why that happens.[135]

Mosco writes that PEM scholars are typically rooted in Marxian theory and examine how wealth is related to power and how economic power influences information and culture. A moral vision, rooted in democratic and communitarian ideals, guides both research and the political platform for change. Understanding is not distinct from social action, and the two work together to support political transformation. To Mosco, globalization is not the integrative part of PEM as a whole, but a sub-area, as labor, social class, technology, globalization are examples of sub-areas with critical political economy. According to Mosco, the social processes of commodification, specialization and structuration are central starting points for political economic research. He argues that the study of political economy differs from cultural studies in that it supports the perspective that consumption and commodification serve to "reproduce class power."[136]

Wasko emphasizes how PEM has been influential for a wide array of research within media studies and, as a discrete approach, has expanded internationally. She demonstrates how globalization and the study global capitalism is woven *throughout* all of the sub-areas of PEM. In her account, an international perspective and a consideration of global dynamics is essential to any critical analysis, whether the focus is media history, media as a business, labor, media and the state, or the public sphere. Global PEM scholarship has emerged in different variations that have focused broadly on the cultural industries, social movements, globalization, and the information-based media. Wasko

[135] *Id.*

[136] VINCENT MOSCO, THE POLITICAL ECONOMY OF COMMUNICATION (2009).

writes that as the field has grown in scope and impact, it has influenced more integrated studies involving cultural studies and media economics. PEM continues to be relevant and vital to our understanding of media and society within the evolution of market capitalism globally.[137]

One controversial figure amongst the authors of these selected readings (and the body of work referenced by Wasko and Mosco) is Dallas Smythe. While he is considered a founding member of PEM in the U.S. and Canada, his conception of the audience commodity has generated a number of critical responses and lengthy conversations about its impact on the evolution of Marxist theory, as it relates to communications. To Smythe, the distinction between base and superstructure has been complicated by an advanced form of capitalism that relies on the labor of audiences to perpetuate itself. He argues that audiences, not content, are the primary products of media. To Smythe, the study of content perpetuates subjective examinations of superficial concepts that are divorced from real life. Smythe claims that mainstream media economists and Marxists alike have not properly examined the market for audiences or the role that the media plays in making market capitalism function. Audience power is a form of labor that is bought and sold by the media. Demographics describe the different collectives of audiences to advertisers and determine their value in the market. Nielsen ratings and research are combined to statistically "grade" audiences and increase the probability that the

[137] Janet Wasko, *The study of the political economy of the media in the twenty-first century*, 10 INT. J. MEDIA CULT. POLIT. 259–271 (2014).

advertiser is hitting their target. Audiences actually pay for the privilege of working for advertisers, much more than broadcasters pay to operate, or advertisers pay for time.[138]

Smythe describes his central argument: "…what is the principle product of the commercial mass media in monopoly capitalism was simple: audience power. *This* is the concrete product which is used to accomplish the economic and political tasks which are the reason for the existence of the commercial mass media."[139] Smythe made his contribution decades before the growth of internet platforms and that are predicated on sophisticated audience segmentation.

International Communications Theory

International communications developed as an approach? in the 20th century and its key approaches and concerns were directly tied to geopolitical and technological factors. Historically, research has been most concerned with relationships between structural and institutional changes and peoples' real material lives and conditions. Thussu divides the field into three approaches: modernization, dependency, and post-colonial (or post-modernist).[140]

The dominant theory within international communications has been modernization. In connection with the free flow of communications discourse, modernization theorists see media as tools for hastening economic growth and development towards liberal democracy and capitalist economic structures. For example, Lerner studied audience exposure to western broadcasting in the Middle East, concluding

[138] Dallas W. Smythe, *On the audience commodity and its work*, MEDIA CULT. STUD. KEYWORKS 230–56 (1981).

[139] *Id.*

[140] DAYA KISHAN THUSSU, INTERNATIONAL COMMUNICATION: CONTINUITY AND CHANGE (2 edition ed. 2006).

that media were a key component of moving a population from a traditional to a modern way of life. He believed that media were a mobility multiplier, in that programming that exposed people to films and programs from overseas made them question their way of life and aspire for societal change.[141]

Another widely recognized proponent of modernization was Schramm, who published *Mass Media and National Development* in conjunction with UNESCO. Schramm believed that media were vehicles for transforming information from north to south and from urban to rural settings. He agreed with Lerner that media motivated people to aspire to a better life, but also believed that media could transfer norms and values, such as the American Dream (if you work hard, you will have a better life).[142]

Rogers was also highly influential in international communications and across the social sciences. Rogers, a leading researcher of modernization theory, presented the diffusion of innovations model in the 1960s.[143] His main interest was the process of adoption and he worked to better understand the characteristics of subsets of a population, and how those characteristics effected their capacity and willingness to adopt a new technologies or media products. However, he has been widely critiqued for ignoring place-based differences, disregarding the power dynamics inherent in technological change, and for not addressed the inequality of media development in general.

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[141] DANIEL LERNER, THE PASSING OF TRADITIONAL SOCIETY: MODERNIZING THE MIDDLE EAST (1964).

[142] WILBUR SCHRAMM, MASS MEDIA AND NATIONAL DEVELOPMENT: THE ROLE OF INFORMATION IN THE DEVELOPING COUNTRIES (1964).

[143] EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS, 5TH EDITION (5th edition ed. 2003).

Dependency

Given the geopolitical changes in the twentieth century and the politicization of telecommunications on world scale, the dependency paradigm arose as a theoretical orientation in the 1960s. Its chief assumption was that power dynamics are inherent in capitalist structures and that liberation and social change comes from exposing the connection between economic relationships and peoples' material realities, especially in regard to media and culture. The dependency theory's essential model of world power is that there is a center, or core, of elite nations, and these nations spread, diffuse, or impose media, information and culture on peripheral or poorer nations who are dependent on the informational and infrastructural power of the core nations. Loss of sovereignty, local culture, and economic independence are among the negative results.[144]

During this same time period, Norwegian sociologist Galtung published his theory of structural imperialism. Rather than a unipolar flow of economic and media domination, Galtung posited a symbiotic relationship between the center of elites within the center nations and the center, or core, of elites in peripheral nations. These alliances, of center of the center to the center of the periphery represent the dynamics of structural power for the world media system. His theory has often been applied in studying news flows, as news agendas and flows at the time were found to be driven by a global network of elites.[145]

Meanwhile, Wallerstein presented a theory of the world system to explain globalization from a neo-Marxian perspective. Building on the theoretical ground laid by

[144] THUSSU, *supra* note 141.

[145] Johan Galtung, *A Structural Theory of Imperialism*, 8 J. PEACE RES. 81–117 (1971).

Marx and Weber, Wallerstein posited a world economic order that can be studied like an organism, with cycles and phases that can be observed over time. He believed that the global division of labor was responsible for the center – periphery dynamic and that world history and structural power is driven by economic relations, not politics.[146]

One of the most well-known scholars in the dependency school is Herbert Schiller, who modeled a world communications order where the United States undermined the sovereignty and independence of other nations. In *Mass Communication and American the Empire*, he traced the role of the U.S. government in cultural domination and saw the spread of consumerism as dominating over pluralism, national culture, and public service. In reflecting on four decades of critical scholarship on cultural imperialism, Schiller writes that after World War II, the geopolitical dynamics made Europe and third world countries vulnerable to the technological and economic power of the U.S. At that time, American power was established not only through military might, but through the intentional dissemination of American entertainment and news around the globe. Ideological and cultural hegemony were the result.[147]

However, many scholars dismissed Schiller's Marxist position, and saw the rise of global capitalism as a movement away from domination and towards global diversity and equanimity that allows resistance to hegemony. Despite these critiques, in 1991, he asserted that "imperialism's vital signs are unimpaired."[148] In his view, transnational dynamics continued to be ruled by global capitalism and that any universalism was based

[146] IMMANUEL MAURICE WALLERSTEIN & SENIOR RESEARCHER IMMANUEL WALLERSTEIN, WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION (2004).

[147] SCHILLER, *supra* note 132.

[148] Herbert I. Schiller, *Not Yet the Post-Imperialist Era*, 8 CRIT. STUD. MASS COMMUN. 13–26, 17 (1991).

on business interests, not social justice or human rights. In the context of recent global positioning, Schiller's treatment of the state is important to emphasize. He admits that transnational companies don't necessarily work in the service of a particular nation-state, but in the service of companies' profits. However, he writes that in the media communications industries, American companies still dominate. Even where new centers of production exist in the global south, the content produced merely mimics the styles and formats popularized in America. The corporate takeover of culture for marketing purposes is not uniquely American, but the highest form of media capitalism is found in the U.S.[149]

Schiller's emphasis oscillated back and forth between a focus on corporate power, commercialism and U.S. geopolitical power, but in the end, he asserted that these are actually one and the same. In distinguishing a critical approach, he wrote that globalization theorists claim that autonomy defines the current world order, and that state interests and political power are cancelled out by new forms of international institutions and the broad-based access to instant global communications. In actuality, he argues that globalization is built on the infrastructure built to serve business interests. These business interests often operate in harmony, and collectively work to open markets and reach consumers. In this process they take command over the technological, economic, political and cultural practices to achieve their goals of growth and increased value.[150]

A number of theories of imperialism have updated Schiller's theories to the digital age and address the structural power of U.S.-based platform corporations. Jin has

[149] Schiller, *supra* note 149.

[150] *Id.*

introduced a theory of platform imperialism which places the U.S. and U.S.-based platforms in a dominant position over other countries in the area of internet governance. Jin argues that the structural power of U.S.-based internet corporations results in a loss of privacy and a lack of transparency in many countries. He uses four case studies, including intellectual property law, the digital divide, the labor power of internet users, and the dominance of U.S.-style entrepreneurship as evidence. Unlike previous eras of imperialism, users have the ability to organize and resist platform owners to transform this nexus of corporate and state power. But colonial relationships are on-going as a result of the collaborative relationship between big technology companies and the U.S. government.[151]

Post-Modernism, Post-Colonialism, and Post-Structuralism

Critics within the dependency approach have claimed that globalization represented domination of the west and its attendant commercial culture, while celebrants of modernization have emphasized positive trends such as democracy, development, and diversity. As theoretical examination developed, scholars addressed a number of the assumptions and perspectives that underlie both of these positions. One important area of concern has been the idea that culture, economic forms and political ideologies flow in a unidirectional fashion from the countries of the global north to the global south, i.e., the capitalist mass media of the global north produces messages that are received by audiences in the global south and these messages have certain effects. Recent theorists have transformed this linear correlation into models that take into account multiple levels of analysis and the multidimensionality of globalization processes. In this discourse, the

[151] JIN, *supra* note 74.

power dynamics of global capitalism are not erased, but its effects are found in examples of hybridization, not monoculture, and its source is not just the West, but from various geographic levels and locales. Local resistance, appropriation of technologies, cultural identity and the role of the nation-state are also points of analysis in these more postmodern conceptualizations of global culture.

In the 1990s scholars from across media studies began to develop new theories to explain globalization that argued against linear models of domination. One of the most well recognized theorists in this area is Appadurai, who asserts that cultural flows are complex and that, rather than cultural imperialism, there is a global heterogeneous dialog of cultural flows. In turn, social and political struggles create disjunctures or ironies and resistances that are a form of cultural power. Rather than a structural analysis, he argues that the power and context of cultural flows can be studied on five levels, or scapes: techno-scapes (technologies), ideo-scapes (ideas, norms, ideology), media-scapes (images), finance-scapes (capital), and Ethno-scapes (people). He argues that influence is created through ironies and contradictions, not hegemony.[152]

Sreberny argues that media corporations are truly global and linear models of flows of media and culture are outdated. She points to a number of ethnographic studies as evidence of the slippery boundaries of the global and the local. To her, there is a triangle of forces that shape culture, encompassing the local, the national, and the global.

[152] ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996).

In addition, she cites the success of Bollywood and TV Globo of Brazil as evidence of these varied flows and influences.[153]

Martin-Barbero focuses specifically on the question of national culture as the result of combined influences of media development, local culture, and foreign investment. He uses four case studies in radio, the press, music, and film to develop his model of national culture. While the development of national cultural identity is a process whereby local indigenous culture is essentially stolen and diversity is absorbed into the idea of a nation, he believes that technologies and media can be reclaimed to meet the needs of people.[154]

Monopoly Capital, The State, and Imperialism

Under monopoly capitalism, Baran and Sweezy posit a state that is characterized by big government coordinated in service to a small oligarchy of large corporations. Rather than manifesting a libertarian ideal of limited government, the capitalist state responds to rising surplus by creating the policies and infrastructures that guarantee its absorption. And, given that monopoly capitalism cannot possibly create enough demand to absorb massive surpluses that are a defining feature of monopoly capitalism, the state creates the necessary demand, and, in turn, further surplus is created. While the government can be, of course, a valued customer through vast and differentiated types of procurement across government agencies, it also distributes the surplus through "transfer payments" in the form of tax incentives, subsidies, and entitlements such as social

[153] Annabelle Sreberny-Mohammadi, *The Global and the Local in International Communication*, *in* MASS MEDIA AND SOCIETY (Michael Gurevitch & James Curran eds., 1991).

[154] Jesus Martin-Barbero, *The Processes: From Nationalisms to Transnationalisms*, *in* MEDIA AND CULTURAL STUDIES: KEYWORKS 626–657 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2009).

security. Baran and Sweezy go on to define the state's role in the actual generation of surplus itself, by defining a political economic model where the state's role is not parasitic, as the surplus it creates would not otherwise be generated were it not for the government. In the end, any advocacy on the part of elites for small government and less taxes is useful only for appeals to the voting public, as it is well understood how the state benefits all actors in the monopoly system.

How, then, do various interest groups effect policy change, government spending and transfer payments? What is the nature of the internal conflicts in the government and the influential dynamics of state agencies, lobbyists, and social movements? This is the key defining relationship of Baran and Sweezy's definition of the state – the private interests of capital control government programs in nearly every area of public spending, from military and non-military budgets, such as housing, highways, and education. Bourgeois democracy is preferred by elites where voters rule in theory, but the oligarchy rules in practice. In turn, spending that primarily benefits masses of citizens are limited only to essential basics, while programs that enhance the profits of a critical mass of corporations and industrial sectors are lavishly supported. Spending and transfer payment programs can be pro-active, such as the absurd amounts spent on the federal interstate highway system. And policy decisions can be also preventative to avoid threats to the class structure and private enterprise.[155] Decisions on investment amounts, or whether to invest at all, are based on the need to absorb and generate further surplus. As such, the range of debate is limited to conflicts between elite and moneyed interests. Furthermore,

[155] PAUL A. BARAN & PAUL M. SWEEZY, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER (1st Modern reader paperback ed edition ed. 1966).

any resistance from organized workers or other coalitions of non-property owners is typically limited to seeking small concessions that stay within the boundaries of monopoly capitalism. The power of the oligarchy is so great that trade unions are better off playing within the system, rather than suffering the consequences of defiance.[156]

According to Baran and Sweezy, three key processes define the American post-war political economy: the overwhelming reliance on military spending to avoid recession, the capture of bourgeois representative democracy by powerful corporate actors, and the limitation of government spending on social needs (despite clear needs in this area).[157] Legislative agendas and government agencies are trained to narrow the bounds and possibilities of government to an illogical set of priorities defined by class structure and private profits, "Real competition with private enterprise cannot be tolerated, no matter how incompetent and inadequate its performance may be; undermining of class privileges or of the stability of class structure must be resisted at any cost."[158] In many cases, including the construction of interstate highways, the management of national waterways, the provision of public education, the funding of the military, and the development of public housing, public spending (or lack thereof) is ruled and determined by the powers of the oligarchy. In fact, the structure of bourgeois democracy itself is carefully designed to serve oligarchy needs, even more so than an authoritarian regime.[159]

[156] *Id.* at 156.

[157] *Id.* at 168.

[158] *Id.* at 173.

[159] *Id.* at 156.

While corporate elites rule U.S. economic policy internally, foreign policy after the second world war has likewise been crafted in all instances to strengthen the centralized power of U.S. corporate interests and to dominate the world militarily. According to Baran and Sweezy, this has been a success in all regions of the world with few exceptions. The U.S. has created a "vast world-wide American empire"[160] that requires enormous military investment and government resources to maintain. As Baran and Sweezy define 20th century U.S. imperialism, the intertwined agendas of market expansion and military expansion have secured U.S. domination of markets as well as the policy programs within foreign governments. Policies then don't diffuse from nation to nation as such; they are written by corporations as preconditions for access to the benefits of the global economy. In monopoly capitalism, radical adjustments in domestic policies and laws facilitate corporate profits across geography and across time. Policies are written to ensure total control and to prevent any threats to profits. The root of this hegemonic power then, is the desire for monopoly power and corporate entitlement to all surpluses.[161]

The case of Cuba presents a clear example of the guiding motivations for U.S. foreign policy – an anti-socialist program of the highest degree. U.S. imperialism is managed by the need for what Baran and Sweezy define as "monopolistic control"[162] or the freedom of capital to move quickly and freely to respond to market conditions without restrictions, and on privileged terms that protect property and profits. Coercion is the primary modality of power for stopping the spread of sovereign and independent

[160] *Id.* at 182.

[161] *Id.* at 201.

[162] *Id.* at 201.

socialist states from emerging. And, militarism, the constant and near-total presence of the U.S. military and domestic military acting on behalf of monopoly interests is the central tool of power. The construction of bases, the provisions of weaponry, tanks, and aircraft through military aid, the public nature of military training missions – all of these concrete aspects of militarism work to draw foreign governments and foreign militaries closer to the U.S. and to, above all, maintain political stability by creating a conservative culture.

In all instances then, policy diffusion under Baran and Sweezy's model starts with the security state. The imagination of the citizenry and the understanding of what is possible is regulated by the constant display of military might and on-going expansion of military infrastructure overseas. Various forms of dissent and defiance are then re-framed. They are no longer progressive and welcome parts of democratic debate, but unpatriotic and irrational, "militarization fosters all the reactionary and irrational forces in society…Blind respect is engendered for authority; attitudes of docility and conformity are taught and enforced."[163] In this way, imperialistic domination is developed through military coercion as well as the provision of military aid, that in turn leads to disempowering socialist forces. Militarism mediates civil liberties[164] because any policy reform, from civil liberties to all out revolution, is then connected to communism and is an assault to the nation. Constant wartime, living under threat of the enemy, frames all politics as one of a nation under an external threat. The *us v. them* narrative allows capital

[163] *Id.* at 209.

[164] *Id.* at 210.

to connect social reforms to the enemy to win the agreement of the population and win support for imperialistic foreign policy.

Oligopolies and Neoliberalism in Crisis

In *the Implosion of Contemporary Capitalism*, Amin places the relationship between labor and imperialism at the center of his theory of global power relations. In his view, it is the intertwining of capitalism and imperialism that has led to the global domination of neoliberalism, or the globalization of generalized and financialized monopoly capitalism. To Amin, it is the measure of living conditions, effects on the poor, and wages that must guide any assessment of the state. The function of the capitalist state, particularly when spending GDP or creating policies that lead to the investment of GDP, is to "allow the accumulation to continue"[165] no matter what the conditions are for the populace or for individual workers. The privatization of entitlements is one area where we can see the capitalist state serve this function. In health care, as an example, the government's role is to increase the volume of surplus through privatization and public-private partnerships. Government's role in fact is to create policies that facilitate the increase in this volume over a broad swath of related industries.[166]

Key to Amin's analysis of the present phase of imperialism is his theory of generalized monopoly capitalism. In imperialism's most recent phase, oligopolies have become geographically centralized and integrated – so interconnected that any new firm must comply with the rules of the oligopoly to survive.[167] Power rests definitively in what Amin calls the Triad – Japan, Europe, and the United States. In this way, he maintains a

[165] SAMIR AMIN, THE IMPLOSION OF CONTEMPORARY CAPITALISM 5 (2013).

[166] *Id.* at 6.

[167] *Id.* at 1.

center/periphery model, but sees the centralization as further intensifying in a small set of firms. At the center of this entire model are the living conditions of all workers.[168] In the form of wages, vast surpluses are extracted from the periphery to the center through favorable laws and policies in the home country. Lack of wage growth - zero wage growth in the periphery – is the evidence and driver of the imperialist model, as all benefits of global economic growth are seen in the transfer of rents to richer countries.[169] In the global north, wages grow for the average workers and vast surpluses accrue for the ruling classes. As a result, any analysis of change can only be based on comparing processes of surplus absorption and the extraction of imperialist rents – any other measures, such as growth rates, are not appropriate measures of current conditions.[170]

Amin argues that the center-periphery polarization is a permanent state of global capitalism. Indeed, there is no catching up and state-socialism is the only way forward.[171] In this context, he presents his concept of the *emergent state* as a tool for analysis. For a state to be emergent, it need not have a coherent socialist or capitalist plan, but its program must be inwardly focused on national economic sovereignty and be determined by social movement pressures - class based and political.[172] There is no set of rules for emergence to emerge, according to Amin, but it must be state based, not globally focused. If it is a global program, in any respect, it is aimed at reducing the power and hegemony of "countries in the dominant capitalist center."[173] Leaving the door open

[168] *Id.* at 99.

[169] *Id.* at 15.

[170] *Id.* at 7.

[171] *Id.* at 64.

[172] *Id.* at 31.

[173] *Id.* at 32.

(apparently) for models of emergence that include capitalism (at least as an intermediary stage), he sees the primary factor in emergence as a coherent plan for state sovereign power. In discussing the case of China, he notes the key difference between most of the world's *emerging markets* (as defined by the World Bank) and the emergent Chinese state - the controlled exposure of China's economy to the control of global generalized monopolies. This internal focus and sovereign control have resulted in "the retention of the majority of the surplus-value produced there" and a comparably lower level of inequality than is evident in capitalist states ruled by generalized monopoly capital.[174]

Amin also recognizes that imperialism in the early 21st century continues to be built on other structures of power - access to natural resources, the patents and copyrights for technological innovations, and the centralization of financial services companies in the global North.[175] Furthermore, as the title of this thesis implies, the system of generalized monopoly capitalism is currently in a deep state of crisis. Since 2008, a new phase of capitalism has begun that is characterized by waves of wars, revolutions and resistance from peripheral nations.[176] Due to its own successes, and it is now magnified internal contradictions, neoliberalism is proving to be widely unstable. The global economic crisis is inherently connected to the decline of bourgeois democracy in the West and the development of some emergent states.[177] While all this is leading to the autumn of capitalism, the hegemony of generalized monopoly capital has by no means been erased and, as in continuity with other crises, is being maintained through

[174] *Id.* at 65.

[175] *Id.* at 7.

[176] *Id.* at 97.

[177] *Id.* at 28.

militarism. In addition, political-economic power continues to control the internal policies of client states.[178]

Chapter Summary

This chapter outlined the theoretical approach that I apply to the study of internet policy. I began by introducing the central tenants of the critical political economy of the media approach and have included its leading voices. I also survey the three approaches within the study of international communication and highlighted one leading scholar of international communications (Jin) and his theory of platform imperialism. Jin draws upon the dependency framework but updates it to the age of platforms. The chapter concludes with an explanation of the theory of monopoly capitalism as one critical model for the study of oligopolies and the capitalist state.

Research Questions

Given this evolving legal terrain and the open divergence of models across jurisdictions, I propose an examination of relationship between state-based governance of the internet, trans-national agendas, and local/regional norms in regard to digital development and digital rights. A series of questions will guide this research:

1. How have recent national and multilateral digital copyright policies that regulate copyright automation been negotiated? How has this new era of semi-privatization of the law developed in the E.U., U.S., and Canada in regard to intermediary liability?

[178] *Id.* at 28.

2. What are the leading arguments for and against reform in the policy field and how are those arguments tied to institutional interests? What coalitions of stakeholders have formed around these arguments?
3. How have the conflicts in the debate over semi-privatization and the automation of the law been expressed in discourses and what discourses have been used by stakeholders to maintain the status quo and to support reform?
4. How do these discourses incorporate geopolitical aims – that is, how do actors in the internet policy field use geopolitical narratives, as well as regulatory arguments, to influence the public and lawmakers' conceptions of the automation of and semi-privatization of internet policy?

CHAPTER IV:

METHODOLOGY

Introduction

This chapter describes the particular approach to discourse analysis I take in this dissertation. I explain how I coded government documents for actors, arguments, and discourses. I explain the choices I have made regarding corpus selection, including the timelines for analysis. I conclude with a discussion of discourse as a unit of analysis. In this section I describe how I define discourse, how I coded for discourses, and how other authors have engaged with discourses in policy studies. Here, I review what other authors have written about the idea that discourses have causal weight.

Previous studies of media policymaking have relied heavily on government documents. Government documents have provided evidence of changes in structural power,[179] changes dominant discourses, and new understandings of relationship between the internet and statecraft.[180] In the area of copyright, Meyer has relied on hearing transcripts and legislative reports published by the European Commission – and individual member states – to complete a series of case studies of different policymaking processes across the E.U..[181] Her approach combines document research with discourse analysis in order to identify the processes of discourse structuration and discourse institutionalization–whereby a discourse becomes "embedded into legal and supporting policy documents at the end of the policymaking process."[182] Based on a framework

[179] NATASHA TUSIKOV, CHOKEPOINTS: GLOBAL PRIVATE REGULATION ON THE INTERNET (2016).

[180] POWERS AND JABLONSKI, *supra* note 121.

[181] Trisha Meyer, The Politics of Online Copyright Enforcement in the EU: Access and Control (2018).

[182] MEYER, *supra* note 49 at 53.

developed by Hajer,[183] this approach links the text of the policy document to the author's coding of the *actors* involved, the *arguments* they make, and the *discourses* they deploy. The goal of the researcher is to connect discourses to power in the policy field – to better understand how frames and themes are used to justify positions and build power. These policy documents – statutes, submitted briefs, and transcripts of debates – support both linguistic analysis and political economic investigation. This allows us to answer both how and who questions that are at the core of political economic research. As Meyer writes, we are interested in both "how stakeholders advocate their problem definitions, policy solutions and goals and who is successful in this endeavor." In this way, the two modes of inquiry can combine to support the active and engaged orientation of the researcher, whereby research is a form of praxis that aids in both improving policymaking processes and the public good.[184]

Hajer describes discourse analysis as the study of "meaning of politics and political actions." He argues that discourses create meaning and studying that meaning is necessary to fully understand policy decisions. As Hajer outlines, discourses have the power to establish what is a policy problem and what is not, and to signal when a solution is possible or impractical. To study discourses, according to Hajer, discourses must be "tracked and traced."[185] Once they are described, they can be linked to discursive coalitions – to groups of stakeholders that use a certain discourse – and to a process he

[183] Hajer, M. (2006). Doing Discourse Analysis: Coalitions, Practices, Meaning. In M. van den Brink & T. Metze (Eds.), Words Matter in Policy and Planning. Discourse Theory and Method in the Social Sciences (pp. 65-74). Utrecht: Koninklijk Nederlands Aardijkskundig Genootschap & Netherlands Graduate School of Urban and Regional Research

[184] MEYER, *supra* note 49 at 46.

[185] Maarten Hajer, *Doing Discourse Analysis: Coalitions, Practices, Meaning*, ASIA PAC. J. HUM. RESOUR. - ASIA PAC J HUM RESOUR (2006).

calls discourse institutionalization.[186] In the study of discourse institutionalization, the researcher can make methodologically sound links between discourses used in deliberations and the development of related institutions of government and regulatory practices. Hajer argues that is it plausible then to measure the influence of a certain discourse by examining whether that discourse has "solidified"[187] into an institution. In other words, the researcher should not just describe discourse, but should connect it to norms and government action, then a fuller picture of policy change can emerge. In this way, there are real and measurable links between meaning making and policy choices, but discourse is not the sole cause of those choices. The three studies I present here are designed to explore the meaning making practices surrounding recent examples of internet policymaking. They aid in understanding processes of discursive coalition building and discursive institutionalization, but further study would be necessary to determine why policymakers have chosen to regulate automated filtering in these cases.

Document Gathering and Coding

In these three case studies, I have gathered four types of documents: stakeholder submissions, legislative hearing transcripts, government speeches, and government reports. I have used news reports and press releases as background research, but my analysis is weighted entirely on these government documents. For my analysis in all case studies, I have coded for three primary variables: actors, arguments, and discourses. The actors are identified by names and affiliation within the transcripts and submitted briefs. Using qualitative analysis software, Atlas TI, I have grouped them by their stated

[186] *Id.*

[187] *Id.* at 70.

position, in both their submitted briefs and testimony–pro, anti, and middle ground. I have coded for arguments as the presentation of factual grounds for a particular policy position or the stated opinion regarding the efficacy or fairness of the policy. I take these arguments as face value i.e. I assume that the author of those words is being truthful about their position. Discourses, rather, do not speak directly to reason or reasonableness of policymakers, but are made up of representations and narrative elements that attribute a broader meaning to the policy choice in question. In contrast to reasoned argument, discourses in the policymaking context can be defined as linguistic constructions that define the social payoff for the greater good. In this way they connect with the receiver's preconceived notions of what is good and what is right for the nation or society as a whole.[188] For example, I would consider the choice of the term *modernization*, in the Copyright Modernization Act, is a discursive construction. And I would code any statement regarding the level of responsibility that intermediaries should have in policing illegal content, as an argument.

Canada: The Copyright Modernization Act Hearings

In the timeline of the copyright modernization act in Canada, I have selected two key incidents in the legislative timeline. There are legislative hearings associated with the two final rounds of the Copyright Modernization Act, bills C-11 and C-32. These hearings, combined with the stakeholder submissions, provide the richest account of the opposing positions and the responses and questions from MPs, prior to the bill's passage in 2012. The selection narrows my corpus to an essential set of documents that are most

[188] Wilson, *supra* note 120; Teun A. Van Dijk, *Critical Discourse Analysis*, *in* THE HANDBOOK OF DISCOURSE ANALYSIS, 2 466–485 (Deborah Tannen, Heidi Hamilton, & Deborah Schiffrin eds., 2 ed. 2015).

revealing of the debates between cultural producers and intermediaries in the Canadian context. These hearings are referred to as *studies* in the Canadian parliamentary parlance. The prepared testimony and provided answers to MP's questions are the *evidence* of these hearings. Each hearing is available as separate PDF files and there are 30 hearings in total, between the two bills. This amounts to approximately 500,000 words of transcribed testimony.

The public record of these hearings includes testimony from a wide array of external stakeholders including industry associations, broadcasters, songwriters, artists, university educators, librarians, internet service providers, software companies, film industry representatives, production unions, copyright lawyers, the Chamber of Commerce, as well as representatives from other state agencies such as Canadian Heritage and the Department of Industry. The calendar, just for the C-32 committee, included 124 witnesses that were heard across 20 meetings. The amount and diversity of these stakeholders reflects the vast number of interconnections that radiate out from copyright law to touch nearly every economic sector and many areas of public interest. The amount of testimony and high level of public involvement also reflects the encyclopedic nature of the bills in question–covering nearly many aspects of copyright law. These included longstanding issues such as copyright terms and moral rights and a series of new rules of address digital distribution, such as exemptions for distance learning, the circumvention of technological protection measures (TPMs), exemptions for providers of cloud services, and intermediary liability. It is not possible, within the scope of this chapter, to discuss the politics of all the provisions within the Copyright Modernization Act, but we must recognize that they are all important to explore in regard

to structural power and the public interest. Here I narrow the focus to intermediary liability, given its geopolitical importance, its significance for users' rights, and what it can tell us about the structural power of platform intermediaries in the Canadian context.

Article-17: The Directive on Copyright in the Digital Single Market

As part of the European Commission's Digital Single Market Strategy, the Commission held a Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, and the Collaborative Economy in late 2015.[189] The questionnaire was open to the public for thirteen weeks, from September 2015 to January 2016 and was a part of the Commission's broader multilateral initiative on the digital economy – the Digital Single Market Strategy. The raw submissions to the consultation – from those stakeholders that agreed to publicize them – provide a sample of the institutional actors, the arguments tied to those actors, and the policymaking discourses that used to justify their positions on platform regulation. These stakeholders and the arguments and discourses they present, influenced the broad initiative of the Digital Single Market Strategy and the new Directive on Copyright. Section two of the questionnaire requested stakeholder comments on key questions of intermediary liability reforms – is the E-Commerce Directive (ECD) (2000) – that requires intermediaries to promptly remove illegal content upon receipt of valid notice – "fit for purpose"? Is the definition of intermediaries provided in the ECD – as passive and technical information society service providers – still relevant in the age of large content sharing platforms? Should national

[189] QUESTIONNAIRE, REGULATORY ENVIRONMENT FOR PLATFORMS, ONLINE INTERMEDIARIES, DATA AND CLOUD COMPUTING AND THE COLLABORATIVE ECONOMY, EUROPEAN COMM'N; Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy, EUROPEAN COMM'N (Sept. 24, 2015), https://ec.europa.eu/digital-single-market/news/public-consultation-regulatory-environment-platforms-onlineintermediaries-data-and-cloud.

laws implement a "duty of care" principle and require platforms to automatically monitor and filter copyrighted content?[190] Answers to the third question provide of sample of pre-decision arguments and a mapping of political alignments between conflicting groups – deploying conflicting discursive constructions to justify opposing positions on liability reforms.

The consultation received 1034 replies in multiple languages. Each response was approximately 10 pages and 5000 words. Respondents self-identified the type of their organization and respondents represented a broad cross section of economic and social sectors. My sample of responses were limited to those where the respondent indicated that they would make their answers publicly available – a total of 118 responses. Given my focus on intermediary liability reform, I further limited the sample to the responses that responded to those sections of the questionnaire (some only responded to those sections on data and cloud computing). As a result, I selected those documents that included comments related directly to questions regarding automated filtering, notice-and-takedown and counter notices. And given my practical constraints of English-language researcher, I selected only those responses submitted in English. The remaining sample of 48 responses included approximately 700 pages and 200,000 words of written comments, position papers, and testimony. With the exception of one response, all submissions were sent by organizations – businesses, industrial associations, and non-

[190] Giancarlo F Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, NORTHWEST. UNIV. LAW REV. 28, 24 (2017). See also Full Report on the Results of the Public Consultation on the Regulatory Environment for

Platforms, Online Intermediaries and the Collaborative Economy, EUROPEAN COMM'N (July 2, 2020), https:/ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultationregulatory-environment-platforms-online-intermediaries

governmental organizations – not individuals. Limiting the sample to those submissions publicly available allowed me to account for the intention of the actors and performative aspects of their choice to insert their comments in the public record.

The TPP: U.S. Congressional Hearings 2010-2016

The formal negotiations of the TPP took five years – from 2010 to 2015. All negotiating rounds were done in secret and no transcript of debates exists in the public record at this time. The information access group Wikileaks published leaked drafts of certain chapters over this time period, including multiple rounds of the draft chapters on intellectual property rights. These drafts allow us to assess the alliances of countries for differing positions, but not the details of the arguments presented nor the substance of the debate. Some commentary and letters exist from international civil society groups and non-governmental organizations, as well as statements and press materials released by offices within different member states. The U.S. Trade Representative (USTR) also published press releases after each round of negotiations that included their summary of the debates and outcomes. Given the lack of transcripts of debates, I focus on these sets of documents: the U.S. congressional record during the negotiation timeline – 2010 to 2015, U.S. government reports and research from the U.S. Congressional Research Service (CRS), press releases published by the office of the U.S. Trade Representative, presidential speeches, as well as press accounts from major U.S. daily papers.

The U.S. Senate and the U.S. House of Representatives held 13 committee and sub-committee hearings that included testimony relating to the intellectual property provisions of the TPP. These hearings, while few in number, provide the most detailed

account of the actors, alliances, interests, arguments, and discourses within the U.S. policy field in regard to copyright and free trade during that period.

The terrain of U.S. free trade policymaking is secretive by design. While this creates obvious challenges for social research, these constraints also create an opportunity to embrace the lack of transparency as the defining characteristic of the investigatory landscape. A closed process can be seen, not as impossibility, but as an invitation to trace all that lies outside the wall as the shadows of the truth, and to construct form from what exists. This investigation then, is an attempt to understand power from the absence of it, to examine secrecy as a discourse itself.

In addition to the congressional record, recent U.S.-negotiated trade deals have left behind a broad collection of documents that can be used to sketch a historical wireframe of actors, agendas, influence, and resistance. These documents include news coverage, trade press articles, government reports, private sector research, presidential speeches, public comments, and statements from industry as well as a small collection of leaked documents, including working drafts, policy proposals, and email communications.

In my investigation of the TPP, I conducted multiple full text searches in ProQuest Congressional that all used the term "trans-pacific partnership". I added additional searches with qualifiers such as: "copyright," "intellectual property," "internet service provider liability," and "ISP liability." These added terms limited the results to hearings that addressed copyright and internet policies as well as the TPP. Together, these searches yielded over a hundred documents, many of which were reports compiled by the congressional research service (CRS). Given their quantity, these reports may be a

productive corpus for an examination in another study. Here, I selected only the complete hearings within the search results. This yielded 13 hearings that directly addressed internet policy and the TPP. Given the implications of the TPP for the future of internet policy and the future of U.S.-led neoliberal globalization in general, there is surprisingly little in the congressional record on the TPP, copyright enforcement and its internet related statutes. However, the total number of combined pages is over 500, including appendices. In addition, the hearings spanned a broad cross section of committees and subcommittees in both the house and the senate. The timeline covered four years, from 2011 to 2015.

Document Research in Media Policy Studies

According to Scott (1990), documents must be assessed for their authenticity (soundness and authorship), credibility (sincerity and accuracy), representativeness (survival and availability) and meaning. Authenticity of a document can be understood in terms of 'soundness.' A copy is sound when it is close to the original and uncorrupted. In addition, the credibility of the author must be justified with evidence that is internal to the document and external to the document. Credibility is determined by examining how distorted the content has become. In turn, the motives of the author and whether the author was acting in good faith when they created the document are also assessed. An awareness of prejudices is very important here. The researcher must also know whether the documentary data is representative of the totality of the genre or type of evidence. Documents survive by being copied and published, and by being archived in suitable storage. In sum, the purpose of all of this is to locate interpretation and find meaning and

significance in the documentary evidence. This meaning can be both literal and interpretative.

Following Scott's explanation, documents can be used as resources or topics. Documents used as resources are valued for what they denote about the world. Documents as topics are treated as social products and the context of their production is most important. These two foci of interest are interdependent. In the end, the quality of the explanation deduced from research is determined by the quality of the documents. In this context, Scott defines the public government document as a very specific type of record that is born of specific social contexts of production. Their content must be interpreted in light of their context and the interests of the state that produces them. In this way, government documents are never neutral and are imbued with cultural and ideological significance.[191]

Discourse Analysis and Media Policy

In Critical Discourse Analysis, the analyst recognizes their political position in the dynamics of knowledge institutions. As a result, they bring forward their intentions to bridge knowledge and action. Scholars in this area propose that no mode of scientific inquiry is neutral. As a form of textual analysis, critical discourse analysis (CDA), according to Van Dijk, begins with defining discourse as the set of debates and conversations that occur between actors in a given field of social practice. The job of the analyst is to uncover the role of discourse in the exercise of power through the thick description of talk and text. In many cases, the researcher works in solidarity with social causes and is self-reflexive and aware of their political goals.

[191] JOHN SCOTT, A MATTER OF RECORD: DOCUMENTARY SOURCES IN SOCIAL RESEARCH (2014).

In choosing their texts to examine, in locating and exposing specific representations, and in contextualizing their results, they maintain the rigor of their inquiry through clear self-reflexive practices that situates themselves and the social mission of their research. CDA further distinguishes itself by foregrounding social causes over fads and producing contextualized explanations, rather than mere description.[192]

Key to Critical Discourse Analysis is intensive focus on the texts. Rather than merely coding the frames, words, or schemas, the analyst examines specific samples of the text deeply and completely. The goal is typically not to quantify relationships over time or to correlate the between frames in two sets (or more) sets of text, rather the practice of CDA explores and describes relationships to address *how* certain actors in the cultural field express themselves and their ideologies through symbols, images and language. As a gaze with a clear theoretical position, CDA penetrates into the texts and reveals structures of power, political constraints, rhetorical strategy and processes of movement building. It suggests who is forming alliances and sharing discourses and what purposes the discourse may serve in sites of struggle. As such, CDA is best suited to using case studies to answer *how* certain actors use language and symbols to express agendas, not *why* the discourse works or does not work to accomplish political ends.[193]

Chapter Summary

This chapter described the methods used in these three studies of internet policymaking. I gathered three extensive corpuses of government documents for each

[192] Van Dijk, *supra* note 189.

[193] Johnson, H. (2002). Verification and Proof in Frame and Discourse Analysis. In B. Klandermans & S. Staggenborg (Eds.), *Methods of Social Movement Research* (pp. 62–91). U of Minnesota Press.

case study. Each group of documents is primarily comprised of transcripts of legislative hearings that are publicly available. I described which chosen timelines, how the documents were obtained and coded for actors, arguments, and discourses. The chapter also surveyed key examples of (and techniques for) document analysis in media policy studies.

CHAPTER V:

THE HISTORY OF INTERMEDIARY LIABILITY

Introduction

This chapter outlines the historical progression of international information policymaking that has led to the inclusion of intermediary liability in free trade agreements. Highlighted are key examples of agreements and treaties that have been most influential to digital copyright law and have been recognized for their geopolitical significance. Particular attention is given to the copyright policies developed through U.S.-led free trade processes and other international institutions that govern intellectual property. This review of historical developments will provide the context for later chapters that address automation of takedown during the platform era.

Since the development of the telegraph in the 19th century, information policymaking has been consistently multinational.[194] The International Telecommunications Union (ITU) formed in 1865 (as the International Telegraph Union) to establish international technical standards for telegraph development. And the Berne and Paris conventions began in the 1880s to facilitate international cooperation for copyright and patent law. In these fora, international pressures influenced national decisions and national conditions also influenced a country's positions vis-á-vis dominant powers. Since the late 1980s, the internationalization of copyright law, as one area of national information policy decisions, has been driven by U.S.-led free trade institutions. In 1994, 133 nations signed the General Agreement on Trade in Services that established a global regime that tied

[194] DWAYNE R. WINSECK & ROBERT M. PIKE, COMMUNICATION AND EMPIRE: MEDIA, MARKETS, AND GLOBALIZATION, 1860–1930 (2007).

market access to neoliberal media and telecommunication reforms. The World Trade Organization (WTO) was established from these negotiations as a multilateral institution to adjudicate disputes and manage implementation. Intellectual property laws, including laws protecting media and cultural products on the world market, were also established under the WTO in the Trade-Related Intellectual Property Rights (TRIPS) agreement in 1994. Free trade agreements, such as TRIPS, did not require the consensus required in other international bodies, such as the ITU or the World Intellectual Property Organization.[195]

The Historical Roots of Notice-and-Takedown

Thussu discusses the development of international communications policy in parallel with geopolitical, technological, and social changes occurring after World War II. In the post-war world order, the two powers, the Soviet Union and the United States, engaged in an ideological war of propaganda. The clash of ideologies between capitalism and communism relied heavily on the use of the mass media and broadcast technologies, including film, radio, newspapers, and television. Each power used media to achieve its goal of convincing developing nations to align with them, both politically and economically. At first, Radio Moscow and the Voice of America were the primary channels used in these state-based campaigns, with the U.S. justifying its political operations under the discourse of the "free flow" of information. This ideological struggle lasted through the Vietnam War and the Cuban Missile Crisis.[196]

[195] HORTEN, *supra* note 73 at 69.

[196] THUSSU, *supra* note 141.

In the 1960's many countries did not align with the Soviet Union, given the economic strength of the United States. However, a number of more powerful countries choose not to align with either power. Led by leaders from Egypt, Indonesia, and India, a group of nations formed an east-west alliance, or the Non-Aligned Movement (NAM). Leaders from the non-aligned nations advocated for political and economic partnerships and coalitions between developing nations, rather than with the U.S. or the UK. They tied national goals of economic liberation and political independence directly to the need for equality in communication flows and media infrastructures.[197]

In the 1970s, working through UNESCO, the leaders with the NAM argued that inequality of access to technology and the unequal flows of culture and communications were tied directly to inequality of development. There was, in fact, a dependency on the countries of the north for news, entertainment, information, and the hardware and software needed to develop independent state-based media systems. As a result of this inequality in communications, the NAM leaders called for policy reform on a multilateral level, calling this dependency and lack of media development, a form of neocolonialism.[198]

In 1978, the NAM leaders achieved an historic political victory with the establishment of the MacBride Commission by UNESCO. The Commission's mission was to examine and analyze the state of information and cultural inequality among UN states. The political backdrop of this work involved the concerns of NAM countries and the significance of connections between economic and media development. The

[197] *Id.*

[198] *Id.*

MacBride Commission combined hundreds of studies from across the world and released its report, *Many Voices, One World*, in 1980 to establish what it called the New World Information and Communications Order (NWICO). NWICO had four central categories of demands: communication rights, freedom of the press, respect for national culture, and national sovereignty.[199]

Hamelink credits the MacBride Commission and NWICO with bringing recognition on a global stage to two political and social realities of the time. First, the technological developments in the global south to date had, in large part, been designed to serve the needs of transnational media corporations (TNCs) rather than the needs of civil society and developing nations. Second, an information famine in the global south and the uneven flows of cultural products had led to the politicization of telecommunications on a global scale.[200]

In the 1980s, citing political differences, newly elected U.S. President Ronald Reagan and British Prime Minister Margaret Thatcher left UNESCO and worked to delegitimize and remove its director general. As a result, UNESCO lost 30% of its funding, which threatened the implementation of the *Many Voices, One World* report and other UNESCO political projects.[201]

President Reagan argued that NWICO represented a form of reverse hegemony, whereby control of media and telecommunication technologies would be handed over to communist states. In order maintain TNC growth, Reagan's administration stepped

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[199] see Ulla Carlsson, *The Rise and Fall of NWICO – and Then?*, 24 NORICOM REV. 31–67; Cees Hamelink, *McBride with Hindsight*, *in* BEYOND CULTURAL IMPERIALISM: GLOBALIZATION, COMMUNICATION & THE NEW INTERNATIONAL ORDER 69–93 (1997).

[200] Hamelink, *supra* note 200.

[201] *Id.*

outside of the UN system and used market pressures to secure market access. Many elites around the world began to align under a U.S.-led neoliberal order, which was highly influenced by the economist Milton Freidman. In this way, the free flow doctrine of the cold war was replaced with the discourse of the free market.[202]

In 1991, with the dissolution of the Soviet Union, the world was left with one superpower, and led the Bush and Clinton administrations to globally push for a neoliberal economic and political order. Many nations began to privatize national telecommunication systems and open their markets to foreign investment. Loan conditionality and the promise of market access to the United States were key economic tools for alliance building and achieving the dominance of neoliberalism. By the late 1990s, the public service promise and the national development goals of NWICO had been overtaken by the logic of the free market and the neoliberal order.[203]

The global governance of these neoliberal reforms was managed through multilateral free trade agreements led by the U.S. and UK. The General Agreement on Tariffs and Trade (GATT) held the Uruguay Round of negotiations from 1986 to 1994. During this process 123 nations signed on to what became known as the General Agreement on Trade in Services (GATS). GATS liberalized a global market for services, including communications, by linking trade rules in other areas, such as manufactured goods, agricultural products, and raw materials, to trade rules governing media products and telecommunication services. The WTO was established from these negotiations as a multilateral institution to adjudicate disputes and manage implementation. Intellectual

[202] *Id.*

[203] THUSSU, *supra* note 141.

property laws, including laws protecting media and cultural products on the world market, were also established under the WTO in the TRIPS agreement.[204]

The 2000s saw the reemergence of the ITU as an important site of struggle over communication rights and access. First established to manage the technical standards of the telegraph, the ITU became politicized in the 1950s over the allocation of electromagnetic spectrum and then again in the 1980s over the allocation of satellite orbit positions. In the early 2000s there was another significant wave of political conflict and advocacy over the digital divide, or inequality of access to the internet. In 2003, in a joint project with UNESCO, the ITU established the World Summit on Information Society (WSIS). The chief concerns of these conferences were related to the work of NWICO in that WSIS addressed the inequality of internet access both between nations as well as on individual level. In addition, there were concerns that internet service providers in the global south were not given equal access to the backbone of the network. In addition, the U.S. had a dominant influence over the control of routing and switching, as well as assigning domain names.[205]

The WIPO Copyright Treaties

Despite the rapid growth of digital networks, the WTO had not addressed digital copyright enforcement in TRIPS, the most far-reaching international agreement on intellectual property to date. The birth of the world wide web in the mid 1990s led to the World Intellectual Property Organization (WIPO)[206] passing the *internet treaties* – the

[204] *Id.*

[205] Victor Pickard, *Neoliberal Visions and Revisions in Global Communications Policy From NWICO to WSIS*, 31 J. COMMUN. INQ. 118–139 (2007).

[206] The World Intellectual Property Organization is a specialized agency of the United Nations.

WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT) in 1997. These treaties created a global set of requirements for member states to enforce digital copyright and required each member state to pass domestic legislation to place these new policies into force. To comply, the U.S. Congress developed and passed the Digital Millennium Copyright Act (DMCA). However, the two central provisions of the DMCA went beyond the requirements provided in the WCT and WPPT: the protection of digital locks (technological protection measures) by outlawing anti-circumvention hardware and software and the safe harbor provision that allows internet intermediaries to escape liability when users post copyrighted content.[207]

The WIPO internet treaties and the resulting agreements are key examples of industry-to- industry pressure for stricter copyright reforms. U.S. negotiators with support from domestic copyright industries, including music and film, lobbied for a ban on all electronic devices that could circumvent digital locks, or technological protection mechanisms (TPMs) on MP3s, eBooks, and movies.[208] The U.S. consumer electronics industries (along with negotiators from developing countries) objected because electronics company were in the business of providing access to copyrighted works. This debate resulted in a more open-ended and flexible agreement than was initially desired by U.S. negotiators, which left room for domestic variation by member countries.[209]

The U.S.'s agenda at WIPO emerged during the Clinton administration when the Information Infrastructure Task Force (IITF) was formed. Led by Ambassador Bruce

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[207] David Kravets David Kravets Security, *10 Years Later, Misunderstood DMCA is the Law That Saved the Web*, WIRED , https://www.wired.com/2008/10/ten-years-later/ (last visited Dec 5, 2017).

[208] HAGGART, *supra* note 41 at 45.

[209] HAGGART, *supra* note 41.

Lehman, the task force sought a maximalist copyright approach in the digital environment. But due to opposition within Congress, the IITF decided to use the WIPO forum to reach a multilateral agreement first. They then used that multilateral agreement as leverage to get Congress to act. This policy making process in the U.S. led to possible standards for Technological Protection Methods (TPMs) and intermediary liability laws. With these standards in place, U.S. negotiators could then move to other nations through free trade agreements.[210]

Lehman, a former copyright lobbyist who had become Commissioner of Patents and Trademarks,[211] was a key figure in the pre-WIPO internet treaties policy making in the U.S. As chair of the IITF taskforce, he was highly influential in moving policy in favor of the copyright industries. In September 1995 he and a number of industry lobbyists produced a white paper entitled "Intellectual Property and National Information Infrastructure, the Report of the Working Group on Intellectual Property Rights."[212] This paper laid out the Clinton administration's vision for digital copyright and was the foundation of the U.S. position at WIPO. The white paper was crafted entirely by Lehman and even his senior staff and other members of the IITF were shut out. As a blueprint for policy, the document carried a near total bias towards the content and entertainment industries and essentially provided protection for the owners' rights at any cost.

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[210] Id.

[211] Pamela Samuelson, *The US digital agenda at WIPO*, 37 VA J INTL L 369, 379 (1996).

[212] Intellectual Property and National Information Infrastructure, the Report of the Working Group on Intellectual Property Rights.

The resulting domestic bill, "NII Copyright Protection Act," appeared a year before the discussion at WIPO in 1995. The bill quickly stalled because of wide cross-industry opposition led in part by Professor Peter Jazi of American University and the Digital Future Coalition that united pro-internet opposition groups. To date, inter-industry compromise and conflict had determined the character of copyright law and policy in the U.S. Lehman's white paper was seen as a one-sided departure from that precedent and failed to build consensus in the U.S. He then went to WIPO with his plan, got a version of it passed and returned to Congress with the leverage of WIPO. This process represented policy diffusion in reverse – the use of a treaty as leverage for Congress.[213]

The limitations on ISP liability began in the Lehman white paper and were transferred to the WCT and WPPT proposals. Originally, these proposals addressed the protections of temporary copies of digital content stored briefly in a computer's random-access memory (RAM). The copyright industries and author's groups argued that even these temporary copies could be reproduced and distributed. Despite tremendous debate and time spent on this issue, there was little evidence of the debate in the final text. Leaving wide flexibility to member states, the final text says only that Article 9 of the Berne Convention applies in the digital environment.[214] Article 9 reads,

> (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

[213] HAGGART, *supra* note 41 at 123.

[214] *Id.* at 123.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.[215]

The meaning of this passage in regard to digital copies is highly contested. In addition, a statement attached to Article 8 also addresses ISP liability: "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication with the meaning of this treaty or the Berne Convention."[216] This was inserted because telecom companies anticipated that they would be held liable merely for holding the temporary copies in their computers and servers – a necessary step for digital transmission. In order to avoid infringement claims, their legal identity and role in economic transactions needed to be re-defined. A coalition of developing countries led by the African delegation and the ISP lobby achieved this agreement and the E.U. and U.S. were forced into a compromise.[217]

The side note on the Berne convention and Article 8 can be seen as the first international agreements that defined the limitations of ISP liability and laid the foundation for the DMCA § 512 and the Canadian Copyright Modernization Act. The logical result of this agreement for U.S. lawmakers was notice and takedown, because

[215] S. Treaty Doc. No. 105-17 (1997); 2186 U.N.T.S. 121; 36 I.L.M. 65 (1997)

[216] as cited in Haggart *supra* note 15 at 124.

[217] HAGGART, *supra* note 41 at 124.

automatic secondary liability was removed by Article 8 and the agreement that the Berne Convention applies in the digital environment.[218]

The outcome at WIPO was due to the conflicting national interests of member states indicating the limited power of copyright interests in national fora. Also, the reason that WIPO was successful in creating the internet treaties was because the WTO did not address the internet in TRIPS, the most far-reaching international agreement on copyright to date. So, WIPO was the natural forum for the debate on digital copyright and was the preferred forum for the dominant and wealthiest countries. However, the U.S. was left with a much more flexible agreement than initially desired as more autonomy was given to member states to enact their own versions.[219]

This final version of the internet treaties was a result of compromise that allowed permanent member states to create varied levels of protection. Some, like the U.S., were permitted to take a maximalist approach that would give the copyright holder the ability to control digital access, with only moderate protections for fair use or freedom of expression. However, other member states could take a more minimalist approach that favored the expressive and fair use rights over the economic rights to protect property.[220]

WIPO worked as a forum that allowed developing countries and smaller powers to have some influence. The entertainment industry position was forced into a compromise and majority voting and consensus worked. However, the WIPO process and forum did not facilitate any radical reimagining of copyright in the digital age. The romantic notions of the singular author were not seriously questioned. Also, the public at

[218] *Id.* at 123.

[219] See HAGGART, *supra* note 41.

[220] Id.

large was not involved in the domestic debate in the U.S. that led to the draft treaties. To a small group of NGOs and progressive lobbyists in the U.S., fair use and access to scientific data were issues in the WIPO debate at the U.N. and the early debate over intermediary liability in the U.S.[221]

The Digital Millennium Copyright Act

The DMCA was the U.S. implementation of the copyright treaties and is the first major piece of U.S. legislation to regulate copyright enforcement for the internet.[222] Congress' intent was to define "remedies available to rightsholders and responsibilities of online service providers."[223] One of the main contested issues related to how internet intermediaries were legally defined. Are internet platforms and ISPs considered publishers and therefore liable for user generated content? Or are they neutral distributers? Copyright industry lobbyists argued that internet intermediaries are publishers and are therefore liable for user generated content. Intermediaries argued first that they could not edit like traditional publishers. They were not in the business of doing so and given the volume of posts, they could not possibly edit everything. Secondly, they argued that internet expression would disappear without safe harbors because they would have to restrict the options for users out of fear of liability. [224] This expression, they argued, was the key benefit that served the greater public interest. § 512 of the DMCA was thus designed to be a compromise between internet providers and the entertainment industry – to provide safe harbor for platforms to escape liability if they followed a notice

[221] Id.

[222] Id at 97

[223] § 512

[224] Urban, Karaganis, and Schofield, *supra* note 4.

and takedown process. Congress' intent was to create cooperation between owners and service providers, to incentivize self-regulation, and to promote growth in the digital economy.[225]

The DMCA was also, in part, the result of consistent litigation between content providers, mostly the largest players in the motion picture and music industries, and internet intermediaries. MGM v. Grokster and Columbia v. Fung were also important cases involving peer-to-peer sites that came about before the DMCA. ISPs were attracting attention due to the infringement operations of large pirate sites and because they were large wealthy companies and thus easily identifiable targets.[226] Entertainment companies and internet providers came together and urged Congress to find a solution that would support both industries.

This debate can be also seen in the context of the historical tensions between technology and the enforcement of copyright. New innovations in replication and distribution technology have consistently challenged the exclusive rights of copyright owners to reproduce and distribute their work. Each successive era of technological change, from the printing press, to the television, to the VCR, to the DVD has required the revision of copyright laws.[227]

Chapter Summary

This chapter covered the history of copyright safe harbors in the international and national arenas. I began with a review of the major milestones in the post-World War II multilateral policymaking – from the Cold War to the World Trade Organization and the

[225] Urban et. al. and Hassabandi

[226] Seng, *supra* note 10.

[227] HASSANABADI, *supra* note 13.

TRIPS agreement. These major periods led to fundamental political shifts and to a neoliberal ordering in the 1990s. The chapter included a review the U.S. copyright policy agenda in the context of neoliberalism and internet policy on the world stage, and a summary of the two leading accounts of the genesis of copyright safe harbors at WIPO and the WIPO internet treaties, the WPT and WPPT. The chapter concluded with a discussion of the politics of the DMCA and copyright in the U.S. Congress.

CHAPTER VI:

NOTICE AND TAKEDOWN AND THE TRANS-PACIFIC PARTNERSHIP

Introduction

Given the significance of the TPP as an international model for internet policy, this chapter describes the version of copyright safe harbors that was included in the TPP text in 2015, as well as providing comparisons to the Digital Millennium Copyright Act in the U.S. Despite the inherent secrecy of free trade talks, the discussion will include an outline of the actors, arguments, and discourses that characterized the final stages of the policymaking process from 2014 to 2016 in the United States Congress. The chapter reviews how the notice-and-takedown provision within the TPP was negotiated within the U.S. Congress, what political coalitions were represented in these negotiations, and what arguments were made to support their positions.

The Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP), a U.S.-led free trade agreement that included 12 Pacific Rim nations, provides a version of the U.S. law that erodes due-process protections. In the TPP text, there is only an optional requirement of counter-notices, which means that users are likely left with the no protection from fraudulent notices and abusive takedowns. In this scenario, the ISP has almost no concern of legal liability to the user for a wrongful takedown and no incentive to check the validity of infringement claims.[228] Furthermore, the ten-day lag between the receipt of the counter

[228] Bridy, *supra* note 52 at 1.

notice and the restoring of the content is rewritten as a "reasonable period of time."[229] Hypothetically, the copyright owner could take as long as they want to craft a lawsuit while the content in question remains offline.

In February 2006, representatives of the 12 nations that were party to the TPP held a signing ceremony in Auckland, NZ. The prime minister of Australia and New Zealand rubbed noses to express their good will. President Obama, who did not attend, called the agreement a "forward looking" trade deal that "sets new, high ideals for trade and investment" and "supports a free and open internet."[230] This event marked the end of international negotiations, but the beginning of the two-year national ratification process. If fully ratified, or approved by the governments of all 12 countries, the treaty would have created a trade pact that encompassed 40% of global economy.[231] The U.S. Congress passed a reauthorization of fast-Track trade promotion authority in 2015, which meant that Congress could only agree or disagree to ratify with a up or down vote–the final could not be amended. But, less than one year after the signing ceremony, newly elected President Trump abruptly pulled the U.S. out of the TPP and left the remaining 11 nations to negotiate a new version of the pact, based on the original text that was largely built on U.S. framework developed under Presidents George W. Bush and Obama.

To many observers, few issues highlighted the differences between Presidents

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[229] UNITED STATES TRADE REPRESENTATIVE, TRANS-PACIFIC PARTNERSHIP: INTELLECTUAL PROPERTY RIGHTS CHAPTER (2016), https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited Dec 7, 2020) art.18.82(4). (hereafter TPP)

[230] Mario Ritter, *40% of World's Economy Signs TPP Trade Deal*, VOA , https://learningenglish.voanews.com/a/pacific-trade-deal/3177251.html (last visited Aug 22, 2019).

[231] *Id.*

Obama and Trump more than the TPP.[232] In fact, few issues had been more important to President Obama in his second term than the TPP. President Obama led a persistent effort to persuade the nation and Congress to support the deal despite powerful opposition from both parties and from labor and consumer groups.[233] The Obama administration's public communications (press briefings, press conferences, speeches, and blog posts) revealed a concerted and calculated effort to control the global narrative of the TPP. Despite bi-partisan resistance, President Obama was nearly successful in his administration's push for U.S. ratification. Even a shallow reading of press coverage on this issue would reveal that his public communication efforts were highly influential over reporting of trade, geopolitical concerns and global economics. Throughout 2014 and 2015, the president, members of his administration, and close supporters chose to frame the TPP in terms of benefits to American jobs, the geopolitical contest with China, the spreading of American values, and levelling the playing field for American businesses.

Despite President Trump's executive order, the involvement of the United States in the TPP is far from settled policy. President Trump has faced mounting pressure from agricultural districts that are being economically harmed by the president's trade war with China.[234] And, in 2018 he assigned two members of his cabinet to study the potential of

[232] Jackie Calmes, *Pacific Trade Deal Talks Resume, Under Fire From U.S. Presidential Hopefuls*, THE NEW YORK TIMES, September 30, 2015, http://www.nytimes.com/2015/10/01/business/pacific-trade-deal-talks-resume-under-fire-from-us-presidential-hopefuls.html (last visited Oct 31, 2016).

[233] Julie Hirschfeld Davis, *Obama Promotes Benefits of Trade Deals to Workers and Smaller Businesses*, THE NEW YORK TIMES, February 26, 2015, http://www.nytimes.com/2015/02/27/business/obama-promotes-benefits-of-trade-deals-to-workers-and-smaller-businesses.html (last visited Oct 31, 2016).

[234] Ryan Mccrimmon, *Farmers nearing crisis push back on Trump trade policies*, POLITICO , https://politi.co/2SCksdw (last visited Aug 22, 2019).

re-entering the pact as another lever to apply trade pressure to China.[235] But, the 11 remaining nations have signed a new treaty, based on the original, entitled the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). In 2019, the Canadian government had been in talks with other countries in the Pacific Rim to widen the coalition throughout southeast Asia to add these countries.[236] President Trump lost to former Vice President Joe Biden in the 2020 election in the United States. Facing pressure from left-wing movements from economic justice, Biden has distanced himself from President Obama's pro-free trade stance.[237] He may or may not rejoin the TPP, but the remaining countries might welcome the U.S. back to the TPP. If political conditions in the U.S. allow for that reentry the U.S., Biden could re-enter in 2021.

The dominant debate over the TPP during the 2016 election cycle was largely about wages and jobs – a public dialog that reflected post-recession resurgence of nationalist arguments over protecting the American worker. Political pressure to oppose the TPP was so great from labor interests and populist coalitions that 2016 Democratic candidate Hillary Clinton changed course and opposed the deal, after she supported it as Secretary of State under Obama (and supported NAFTA in hindsight–a major initiative of her husband's administration). As a Senator from New York, in fact, the only trade agreement she voted against was the Central American Free Trade Agreement

[235] Scott Horsley, *Trump Suggests Rejoining TPP*, NPR.ORG , https://www.npr.org/2018/04/13/602090994/trump-suggests-rejoining-tpp (last visited Aug 22, 2019).

[236] Bennett Jones LLP-Valerie Hughes & Jessica B. Horwitz, *Canada Seeks Input on New Members for the CPTPP Agreement | Lexology*, https://www.lexology.com/library/detail.aspx?g=84065317-6d33-43d7-8618-540256778e93 (last visited Aug 22, 2019).

[237] A voter's guide to TPP 2.0: Compare where all the 2020 candidates stand, , https://politico.com/2020-election/candidates-views-on-the-issues/trade/tpp/ (last visited Aug 22, 2019).

(CAFTA).[238] But, as analysts have pointed out, the purpose of the TPP was not to remove tariffs and other nationalist protections. Much of that work had already been done through the WTO and bilateral treaties. In fact, the TPP (and other recent trade agreements) are coming at a time when most tariffs have already been eliminated. The TPP and other recent trade agreements are driven by the goal of the United States Trade Representative to protect intellectual property – to use trade agreements as leverage the economic power of the United States to enforce conformity in patent and copyright law.[239] As the economist Paul Krugman argues "these days, 'trade agreements' are mainly about other things. What they're really about, in particular, is property rights – things like the ability to enforce patents on drugs and copyrights on movies."[240]

Delving deeper, one central goal of the intellectual property chapter of the TPP was, in fact, the extension of IP rights to the internet. The IP chapter of the TPP would have done what the Anti-Counterfeiting Trade Agreement (ACTA) failed to do–to effectively – tie internet policy to free trade and embed western commercial values into the law and regulation of the internet. The work of extending IP rights globally in the analog domain had already been done in through the World Trade Organization. But the work that remained was to impose strict controls and legal mechanisms for policing the internet to protect intellectual property. This coupling of free trade with internet policy had begun in the Anti-Counterfeiting Trade Agreement (ACTA) that faltered in the E.U. in 2012, due

[238] Hillary Clinton once called TPP the "gold standard." Here's why, and what she says about the trade deal now, LOS ANGELES TIMES, September 27, 2016, https://www.latimes.com/politics/la-na-pol-trade-tpp-20160926-snap-story.html (last visited Aug 22, 2019).

[239] Paul Krugman, *No Big Deal*, THE NEW YORK TIMES, February 27, 2014, http://www.nytimes.com/2014/02/28/opinion/krugman-no-big-deal.html (last visited Oct 31, 2016).

[240] *Id.*

to public outcry and lobbying by internet platforms. This history of ACTA, and the beginning of the linking of digital copyright and free trade has been covered by Monica Horten,[241] who highlights the lobbying influence of the International Intellectual Property Association and its chief counsel Eric Smith. In 2005, Smith testified to the U.S. Judiciary Committee to say that the U.S. should use free trade leverage to "raise the level of statutory protection to encompass new technological challenges, like the Internet."[242]

Analyzing the Text of the TPP's Safe Harbors Provisions

The purpose of this section is to provide a clause-by-clause analysis of the TPP intermediary liability provisions. The TPP, as it is currently written, creates a model for policy diffusion that reforms §512 of the DCMA in the opposite direction of the Canadian model – broadening protections for rightsholders and leaving the user with impossibly high barriers to protest unlawful takedowns.[243]

Defining Intermediaries

Article 18.82 of the chapter on Intellectual Property of the TPP outlines the procedures that all parties – users, intermediaries, rightsholders, and the courts – must take to shield intermediaries from the threat of legal action. The article is preceded by article 18.81 that seeks to clarify the definition of an intermediary for the TPP parties. The experts who drafted the IP chapter clearly saw the importance of this definition to possible legal challenges and previous statute. In Canada, for example, court opinions and rulings of the Copyright Board relating to takedowns, safe harbors, and liability have

[241] HORTEN, *supra* note 73.

[242] As cited in (Horten, 2013, p. 52): US Senate (2005) Committee on the Judiciary. Testimony of Eric Smith before the Subcommittee on Intellectual Property, 'Piracy of Intellectual Property'. 25 May.

[243] Bridy, *supra* note 52.

relied on definitions that designated intermediaries as legally distinct from publishers in the analog environment, in that they can be understood as passive and neutral conduits between senders and receivers. In the intermediary liability provisions of the E.U. Commerce Directive (2000), the text outlines two ways that ISPs act as mere conduits: passive transmission and providing internet access.[244] In Canada, the courts and the Copyright Board have further defined the difference between passive transmission and digital communication.[245] Intermediaries are protected due the passive nature of transmission where the content in question is neither communicated by the intermediary nor authorized by the intermediary. In other words, the intermediary does not perform a communicative act that could be deemed unlawful, it merely passive transmits unlawful material. The TPP addresses the conceptual issue in article 18.81,

> Internet service provider means:
>
> (a) a provider of online services for the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing undertaking the function in Article 18.82.2(a) (article 18.81) (b) a provider of online services undertaking the functions in Article 18.82.2(c) or Article 18.82.2(d)[246]

The text of this article is specific and intentional in what it excludes–communication–and what it includes within definition of a neutral conduit. According to

[244] Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce* 21.

[245] Jeremy de Beer, *Copyright Royalty Stacking*, *in* THE COPYRIGHT PENTALOGY: HOW THE SUPREME COURT OF CANADA SHOOK THE FOUNDATIONS OF CANADIAN COPYRIGHT LAW 476, 344 (Michael Geist ed., 2013).

[246] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.81(a).

the TPP, an ISP can be eligible for the benefits of safe harbors when it is transmitting between sender and receiver without modifying, when it merely provides the connections that allow for the transmission– when it is storing for technical reasons as part of the transmission process, modifying the content for technical reasons only (i.e., digital compression), or storing digital files at the request of the user. In this definition, protection is granted to the dominant business models for platform intermediaries: streaming, social media, cloud storage services and cloud platforms, and broadband internet access. Exposure to liability is possible when the intermediary acts as if it is the sender or the user – active and knowing engagement in the communication, publishing, or storing of a copyrighted work. The breakdown of the paragraphs within this article seems to address multiple types of intermediaries and their specific markets. The text groups internet access providers and social platforms into paragraph (a), cloud service providers and search engines into paragraph (b), and specifically mentions services that engage in automatic server-side caching into a separate sub-paragraph under paragraph (b). This sub-paragraph begins "For greater certainty, Internet Service Provider includes a provider of the services listed above that engages in caching carried out through an automated process."[247] This appears to be a reference to cloud computing platforms such as Amazon Web Services (AWS) that use artificial intelligence to temporarily store content, or *cache* data that its clients pull up most frequently. In the process of caching, the AI tools can modify the content for technical purposes, to be able to speed up the transmission of that frequently used data. With this provision, all the services provided by a leading cloud platform like AWS would be included in this definition of an

[247] *Id.* art.18.81.

intermediary, and thus shielded from copyright liability, as long as it follows the following notice and takedown procedures as outlined in article 18.82 i.e., it responds effectively to a valid takedown notice.

This definitional article (18.81) is a shortened and updated version of what appears within the first few paragraphs of § 512 of the DMCA. § 512 begins with the similar, but more verbose definitional introduction that include the prerequisites and conditions that are designed to distinguish valid intermediaries from pirate sites that select the content to transmit. The DMCA doesn't breakdown groups of different types of intermediaries but does clearly distinguish the communicative act from what is termed "transmitting, routing, or providing connections."[248] In so doing, the DMCA provides more detailed conditions that must be followed to by ISP than the TPP. ISPs cannot modify content beyond what is necessary to technically transmit what material the user has requested. To be classified as transitory transmission, someone other than the ISP must initiate the transmission. The transmission may be automatic, as long as the ISP does not select the material and the ISP cannot select the recipients of the transmitted content. Similar to the TPP, the DMCA protects ISPs from liability of infringing works that as stored in cache databases, § 512 clarifies that this cache databases cannot be accessible to others beyond the intended user/audience.

Conceptually both the TPP and the DMCA clarify that protection from liability cannot be granted if the ISP selects, requests, or initiates the specific content to be transmitted. Protection is allowed only if the material in question was selected or chosen by the user, or through an automated process. In both the TPP and DMCA, these

[248] 17 U.S.C. § 512, (a).

definitional paragraphs transfer the liability for transmission to the user or to automation. It is the user that requests, the user that chooses, the user that specifies where content will be sent, the user that modifies the content, the user who posts, and the user that directs the storage of material on cloud storage service. Or the transmission is initiated, chosen, or undertaken by an automated process. These definitional questions are important to address in terms of the commercial values that are embedded in the text. The articles and the definitions are designed to protect the rights of the intermediary to profit from user activity, user data and advertising. But the TPP, and to a lesser extent the DMCA, exposes users to liability by defining who is at fault when infringing content is transmitted. Article 18.81 of the TPP explicitly defines what an intermediary must be, and how they must act to be eligible for safe harbor, but in so doing implicitly defines the role and exposure of the user to liability. And, despite the fact that engineers design the AI tools that are implemented to the supposed benefit of the user, these automated caching activities are not considered actual knowledge or the same as a manual request or communication of content. The roots of this protection are found in the DMCA, but the TPP goes further to leave the user with even less ability to counter a takedown request.

The Preamble

After article 18.81 on ISP definitions, Article 18.82, "Legal Remedies and Safe Harbours" begins with a preamble in paragraph one that defines the purpose of safe harbors. The text is clear who the law – and the enforcement mechanism it provides – are designed to protect:

> The Parties recognize the importance of facilitating the continued development of legitimate online services operating as intermediaries and, in a manner consistent

> with Article 41 of the TRIPS Agreement, providing enforcement procedures that permit effective action by right holders against copyright infringement covered under this Chapter that occurs in the online environment. Accordingly, each Party shall ensure that legal remedies are available for right holders to address such copyright infringement and shall establish or maintain appropriate safe harbors in respect of online services that are Internet Service Providers.[249]

The benefits to the consumer are not mentioned, nor are the protections of the rights of the user, or the importance of digital networks to a functioning democracy. The drafters make the values here explicit – to protect the commercial interests of intermediaries and to protect the property of rightsholders. The baseline obligation is provided by Article 41 of the TRIPS (Trade Related Intellectual Property Rights) agreement under the WTO. Article 41 of TRIPS which requires member states to ensure the availability of enforcement mechanisms that are effective, expeditious, and easily accessible by rights holders. The central caveat of the enforcement requirements is outlined as the avoidance of "the creation of barriers to legitimate trade" and to "provide for safeguards against their abuse."[250] But, TRIPS is not the only international agreement that puts into place a multilateral agreement on digital copyright enforcement. The World Intellectual Property Organization's copyright treaties are notably absent from this preamble. As discussed previously, the WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (1996), preceded

[249] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(1).

[250] MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ANNEX 1C, (THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS) ('TRIPS'), (1994), https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Dec 7, 2020) (1).

the DMCA and were the result of debate between northern and global south countries over the enforcement of copyright in the digital environment. Intermediary liability was addressed in the WCT and the WPPT, but the results of this process left much more flexibility in implementation than was desired by the U.S. The IP enforcement measures in TRIPS – the result of coupling of free trade and copyright – did not mention protection in the digital environment.

Sub paragraph (b) of paragraph 1 of Article 18.82 calls for the promotion of self-regulation: "Parties shall provide legal incentives for Internet Service Providers to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted materials."[251] A footnote widens the interpretation of legal incentives, "Parties understand that implementation of the obligations in paragraph 1(a) on 'legal incentives' may take different forms."[252] Legal analysts have highlighted the complexity of this task, given the multiple areas of law that may conflict with the privatization of policing.[253] The requirement – to create state facilitated non-binding private agreements – involves government in multiple levels of secrecy in a process that lacks any assurances of transparency. The trade agreement is negotiated without public input and the regulation that results requires no public input when it implemented locally. Such non-binding agreements either assume that the intermediaries' interests are the same as the users' or do not consider the user's rights or interests.[254] Despite these concerns, non-binding private agreements are currently in use across a number of areas of protection,

[251] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(1)(b).

[252] TPP, *Id.* art.18.82 (1)(a) n.150.

[253] Sean M. Flynn et al., *The U.s. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement**, 28 AM. UNIV. INT. LAW REV. WASH. 105–205 (2013).

[254] *Id.*

including counterfeiting and copyright.[255] Voluntary non-binding agreements align with commercial interests and reflect commercial values in a variety of ways. Most notably, they are flexible and can be renegotiated as market and technological conditions change. But they offer no assurances of protection from liability. Such agreements can be seen as defensive maneuvers on the part of intermediaries, who would prefer binding statutory provisions to protect them from liability.[256]

Control, Initiate or Direct

Subparagraph (b) mandates statutory protection via the ratification and implementation of local laws that define intermediaries as passive intermediaries whose activities shall be protected. Parties are required to create limitations through national laws that preclude "monetary relief against Internet Service Providers for copyright infringements that they do not *control, initiate, or direct,* and that take place through systems or networks controlled or operated by them.[257] This paragraph is a marked change from the DMCA § 512 paragraph (a) sub-paragraph (1) that protects the intermediary only in cases where someone else, such a user, *initiates or directs* the transmission.[258] § 512 does not address the issue of *control* in this condition of protection. In the DCMA, the notion of *control* of infringement is included as one of the possible rights and abilities of the ISP itself, not the user. In sub-paragraph (c)(1)(B) § 512 provides relief from monetary damages and injunctions in cases where the ISP "does not receive a financial benefit directly attributable to the infringing activity, in a case in

[255] TUSIKOV, *supra* note 44.

[256] *Id.* at 196.

[257] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(1)(b).

[258] 17 U.S.C. § 512, *supra* note 249.

which the service provider has the right and ability to *control* such activity."[259] This is the only mention of the ISPs or the user's ability to *control* an infringing transmission within § 512 of the DMCA. As written, Article 18.22 of the TPP protects intermediaries against situations where an intermediary would *not* have control over an infringing transmission that occurs on a network controlled or operated by them. It appears that the DMCA does not provide such a protection.

Notice Requirements

Paragraph 3 of Article 18.82 provides the essential components at the center of any notice and takedown regime, the requirements for a notice. But, unlike other national standards in place in Chile, Canada, or the United States (under the DMCA) the TPP stimulates that parties shall adopt their own qualifying conditions that must be followed by the intermediary to receive protection. In other words, paragraph 3(a) provides that intermediaries must

> expeditiously remove or disable access to material residing on their networks or systems upon obtaining *actual knowledge* of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a *notice*.[260]

The text does not require takedown notices but does outline what those notices must contain in a footnote, if a party decides to implement a notice-based system. The footnotes to paragraph (3)(a) text stipulate a notice,

> as may be set out under a Party's law, must contain information that:

[259] *Id.*

[260] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(3)(a).

(a) is reasonably sufficient to enable the Internet Service Provider to identify the work, performance or phonogram claimed to be infringed, the alleged infringing material, and the online location of the alleged infringement; and

(b) has a sufficient indicia of reliability with respect to the authority of the person sending the notice.[261]

Here, in the central components of the TPPs notice and takedown provisions, we can see the stark differences between the specific notice requirements of the DMCA and the openness of the TPP to multiple interpretations to the manner in which actual knowledge of infringement in reached.

The DMCA requires very specific information to be included in a notice (for it to be considered a valid notification and to constitute actual knowledge). The requirements include an electronic signature of the authorized rightsholder (or the rightsholder's agent), the name (or names) or the actual copyrighted work, the link to the infringing material, contact information for the notice sender, a statement that the "complaining party has a good faith belief"[262] that the material in question is actually infringing, and a statement that the notice is accurate, and the sender is indeed authorized by the rightsholder to send the notice. In contrast, Article 18.82 of the TPP allows countries to define their own mechanism for realizing actual knowledge, but it provides that if a country chooses to implement a notice requirement, the notices need to contain only a few minimal lines of information that allow the intermediary to identify the copyrighted work and to locate the allegedly infringing material. Finally, the remaining safeguard

[261] TPP, *Id.* art.18.82(3)(a) n.157.

[262] 17 U.S.C. § 512, *supra* note 249.

against abuse refers only to the notice sender and requires "sufficient indicia of reliability with respect to the authority of the person sending the notice."[263] The requirements for counter-notices are even less specific:

> *If a system for counter-notices is provided under a Party's law*, and if material has been removed or access has been disabled in accordance with paragraph 3, that Party shall require that the Internet Service Provider restores the material subject to a counter-notice, unless the person giving the original notice seeks judicial relief within a reasonable period of time.[264]

As discussed above, under this optional framework for counter-notices, users are likely left with little protection from fraudulent notices, abusive takedowns, or a mistake due to a technical error. If an automated system were to make a mistake, it may be that neither the intermediary nor the rightsholder would face legal liability for that wrongful takedown. If so, this would leave them with little incentive to check the validity of infringement claims.[265]

Government Review

One issue in the political debate between commercial values and the public interest is the role the state should play (and the level of state involvement) in what is essentially a semi-privatized extra-judicial system. The global debate over the role that the courts should take – whether takedowns should be pre-approved by a judge – is an unsettled line, with international coalitions forming on both sides. The TPP does address this question and I will address that issue of judicial review in a later section. Another

[263] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(3) n.156(b).

[264] TPP, *Id.* art.18.82(4).

[265] Bridy, *supra* note 52.

option for state review, which was instituted by the French government under HADOPI law (2009) for intermediary liability is to establish a distinct government agency that reviews notices from rightsholders for their validity. HADOPI was overturned by the French national assembly in 2016, when officials voted to end the system by 2022,[266] due the political controversy of it graduated response mechanism. But it is important to consider in relation to the options that parties have for being in compliance with the TPP.

In the case of HADOPI, the basis of the notice relates to file-sharing on peer-to-peer networks, not posts to user-generated platforms. However, conceptually, the regulatory solution can be applied to either uploaded content or content that is shared on peer-to-peer network. The key to the French law is the coupling of a new independent government agency with a three-strikes graduated response mechanism that eventually obligates the ISP to terminate internet access to repeat offenders. The role of the government agency is to review takedown notices sent by rightsholders for their validity in order to prevent abusive, fraudulent, or erroneous notices from reaching the intermediary. Laws and regulations targeting repeat offenders have been the subject of political controversies on the international and national levels given their power to mandate that ISPs deny access to be eligible for liability protection. But, in France, rightsholders can target individual users for sharing copyrighted works, the HADOPI agency acts as an intermediary between the rightsholder and the ISP. The verification role has created transparency regarding how many notices are actually forwarded to users

[266] Siraj Datoo, *France drops controversial "Hadopi law" after spending millions*, THE GUARDIAN, July 9, 2013, https://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy (last visited Aug 24, 2019).

(and acted upon) and it has been shown to limit the number of cases that are referred to judicial review.[267]

Article 18.82 outlines one option for TPP member states to establish a HADOPI-like commission, albeit one that is comprised of stakeholders – rightsholders and intermediaries. As outlined in the TPP, such a commission could be, "established with government involvement" to verify the "validity of each notice" before forwarding the notice to the "relevant Internet Service Provider."[268] Member states can decide how this commission will be formed, who will be on it, and what is meant by government involvement. The drafters are explicit about ensuring that any such commission should avoid slowing down the process of taking down. They write that, if there is a review process, it should include "timely procedures" that are carried out "without undue delay."[269] The text does not include a requirement that the public be represented in the oversight organization. Further, there is no mention of transparency. If a separate agency is established, it must include representation from rightsholders and intermediaries and it must act quickly to verify each notice. In practice, the level of state involvement could vary across jurisdictions and be dependent on the how much interest particular state officials have in notice verification.[270]

In this optional condition that the TPP provides, corporate actors have incentive to give resources to an agency that can be flexible and adaptive to changes in market

[267] Marc Rees, *Hadopi : la riposte graduée se pique au dopage*, NEXT INPACT, July 20, 2015, https://www.nextinpact.com/news/95857-hadopi-riposte-graduee-se-pique-au-dopage.htm (last visited Aug 24, 2019).

[268] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(3) n.155(a)(b).

[269] TPP, *Id.* art.18.82(3) n.155(a)(b).

[270] TUSIKOV, *supra* note 44 at 194.

players, technology, and the tools and techniques of piracy. There are no guarantees that the agency would maintain any independence from corporate interests. The text indicates that the verifying organization should be a "stakeholder organization" that is merely established by government. Further, the text only includes two parties in that range of stakeholders – rightsholders and intermediaries.

This provision is also notable given that there is no consideration of a verifying organization in the DMCA. § 512 outlines only one defined role for government, outside of the courts. All intermediaries must establish a "designated agent" as a condition of protection from liability. That designated agent must be listed with the Copyright Office to receive the notice. The ISP must pay a fee to support the maintenance of this database of contact information for each duly designated receiver of takedown notices. The TPP includes no mention of a designated agent requirement, thus leaving that up to ISP to establish and publish clearly on their own. The TPP seems to assume that intermediaries will make this clear because it is in their best interest to do, if they are to maintain protections from liability.

Such "stakeholder organizations" as outlined in Article 18.82 could be considered to be in the "DMCA-plus" category.[271] These types of arrangements have been made within U.S. jurisdiction and may, in the eyes of corporate actors, serve as a substitute for the DMCA, but provide different types of protections and engage different practices and mechanisms. For example, the five largest intermediaries and a group of major rightsholders created a privatized version of the graduated response that HADOPI had established in France. Efforts to create a three-strikes system failed in the FCC, so these

[271] Urban, Karaganis, and Schofield, *supra* note 4 at 55.

corporate actors created a non-binding memorandum of understanding to build such an agreement on their own. Intermediaries agreed not to terminate accounts – the most controversial component of three strikes provisions – but provided an agreed upon pathway to litigation. The privately managed and developed pact solved an important problem for intermediaries, notably it slowed the flood of millions of takedown notices they were receiving. It did not stop them all together but reduced the number of notices that were being sent by rightsholders, that were members of the participating industry trade groups in the U.S. – the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA).[272]

Within this list of obligations that a country may apply to rightsholders and intermediaries, the text also outlines what the duties are of this verifying stakeholder organization. If a party chooses to create such a government-brokered arrangement between stakeholders this commission must also confirm that "the notice is not the result of mistake or misidentification, before forwarding the verified notice to the relevant Internet Service Provider."[273] This language, "mistake or misrepresentation" is taken directly from the DMCA, but the DMCA places this burden on to the user and this determination of whether there is "mistake or misrepresentation" is made after the takedown has occurred.[274] Under the DMCA, the identified user, if they believe they would like to dispute a takedown, can submit a counter-notice have that material reinstated. Once that counter-notice is received, the intermediary has 14 days to reinstate

[272] *Id.* at 61.

[273] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(3) n.155.

[274] 17 U.S.C. § 512, *supra* note 249.

it.[275] This procedure under the DMCA allows for immediate takedowns without review by judge or any verifying organization but institutes the counter-notice as a method for a contesting a takedown. To make this content stay down after the counter notice is received (plus 14 days) the rightsholder must initiate a court order against that targeted user.[276] Under the TPP, one of the main duties of a "stakeholder organization" would be make a determination of validity before the notice is sent. But, as stated in the text, the stakeholder organization is optional. If a party chooses to implement one, it must take on that role. The stakeholder organization guidelines here are quite vague and states would have wide latitude in who exactly is making those determinations, how they would be processed, and what criteria would be applied to determine accuracy. When coupled with the limited requirements for what a notice must contain, it appears that much of the notice sending, notice processing, and notice receiving processes would be decided by national law and determined by the level of state interest in brokering a valid process for verification. It appears that the DCMA does not include a mandate that intermediaries verify the validity of a notice, nor does § 512 outline any type of verification process.

Timeline for Take-downs

In regard to the speed with which an intermediary must act to "remove or disable access" to material listed in a notice, article 18.82 states that ISPs must, upon receipt of a notice, remove the material in question "expeditiously" and "promptly."[277] Article 18.82 does not use the term *takedown* and the DMCA only uses it once, but instead both texts refer to required action as to "*remove or disable access."* The term used to note required

[275] *Id.*

[276] *Id.*

[277] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(3)(a)(b).

speed in the DMCA is expeditious, while in the TPP, the required speed is both *expeditious* and *prompt*. Neither text provides a set period time for removal nor disabling access. But, in practice DCMA takedowns often do occur within the first 24 hours after the receipt of a notice. Practices do vary widely, and legal analysts have addressed the need to move even faster to disable access to pirate sites that stream live sports, for example.[278]

Judicial Review

When we consider the TPP through the lens of privatization of process, few concepts are more relevant than how the agreement treats the judicial review of takedowns. In some jurisdictions, such as Chile and Argentina, governments have agreed with the United States in that intermediaries must have a clear process for limiting their liability from copyright infringement and must cooperate with a notice and takedown regime as a precondition for safe harbors. But they have diverged from the U.S. law in regard to judicial review. In Chile, for example, ISPs must petition the court for preliminary injunction and the judge must review that preliminary injunction request before the material in question is removed or disabled. ISPs are not required to remove or disable the material in question until the preliminary injunction is granted.[279]

Judicial review prevents the bulk removal of posts via automation and at the same time retains the power of the state to protect its interests and the integrity of its legal system, if it so chooses to. For example, government could enforce expression rights and

[278] James Rickard, *Going Live: The Role of Automation in the Expeditious Removal of Online Content*, 96 BUL REV 2171 (2016).

[279] See Chilean Law 20,430 (modifying Law 17,336 on Intellectual Property), Diario Oficial D.O., (2010), English translation available at https://www.cdt.org/files/file/ChileanLaw20430- ModifyingLaw17336.pdf.

prevent abusive or fraudulent claims of infringement. Judicial review is comparably slow and costly to ISPs and could potentially be a burden to the courts. In Brazil, rightsholders were strongly opposed to judicial review and were successful in removing copyright from the Marco Civil, Brazil's constitution of internet rights. The Marco Civil provides for judicial review in other types of content removal.[280]

In regard to the government review of notices as precondition for limited liability, the TPP states,

> The Parties understand that a Party that has yet to implement the obligations in paragraphs 3 and 4 will do so in a manner that is both effective and consistent with that Party's existing constitutional provisions. To that end, a Party may establish an appropriate role for the government that does not impair the timeliness of the process provided in paragraphs 3 and 4 and does not entail advance government review of each individual notice.[281]

This provision, in addition to the establishment of stakeholder organizations that may review notices and the second that prevents governmental review, define the TPP's approach to government involvement in enforcement. Government may facilitate and broker the formation of organizations that are made up of corporate actors to verify notices against pre-established measures of accuracy. But, due to the requirement that notices must be processed expeditiously and promptly, government may not play that role. Under this interpretation, parties could not establish an independent panel made up of government officials, such as in the case of HADOPI in France, nor could a TPP

[280] Pedro Mizukami, *Copyright Week: What Happened to the Brazilian Copyright Reform? | infojustice*, INFOJUSTICE , http://infojustice.org/archives/31993 (last visited Aug 24, 2019).

[281] TPP, UNITED STATES TRADE REPRESENTATIVE, *supra* note 230 art.18.82(3) n.156.

member state involve the courts in judicial review of takedowns and preliminary injunctions.

Actors, Arguments, Discourses

The purpose of the following sections is to assess the ways in which the internet policy aspects of the Trans-Pacific Partnership (TPP) have been addressed, debated, and represented in the U.S. Congress during the recent history of the TPP negotiations. This exploratory research seeks to summarize and describe the available transcripts and appendices that are included in the congressional record related to a specific area of internet copyright enforcement law found in the TPP, intermediary liability.

Popular resistance movements have derided intermediary liability as a backdoor to state censorship. However, entertainment and information companies, largely based in the U.S. have pushed for the geographic expansion of intermediary liability as the preferred mechanism of copyright enforcement on the internet. As such, the TPP represents an advancement beyond the rules included in § 512 of the DMCA and a geographical advancement to the largest trade bloc in the world, governed under the U.S. model of copyright enforcement. Here, I attempt an accounting of what is available in the public record in regard to the public contests over the future of multilateral internet policy in regard to the TPP in the U.S.

What follows is a summary of the key arguments and discourses of these hearing transcripts. I provide a partial accounting of how the TPP's articles on notice-and-takedown were negotiated, who was contributed to their development, what arguments were used justify policy positions and what discourses were deployed by policymakers,

lobbyists, and the Obama administration. First, by way of background, it is important to understand the timeline of the TPP and the nature and history of U.S. involvement.

The idea for a comprehensive trade agreement for the Pacific region began as early 1990's as informal conversations during Asian-Pacific Economic Cooperation summits. Australia, New Zealand, Chile, Singapore, and the United States discussed the proposal at these meetings throughout the late 1990's. Australia and the United States exited these talks in 2003, but Singapore, New Zealand, and Chile met formally between 2003 to 2005. Together, these three countries formed the Pacific-Three Closer Economic Partnership (P3 CEP) and began to negotiate regularly to outline a vision and develop a negotiating text. In 2005, Brunei was invited to negotiations and formally joined the partnership in 2006. The resulting coalition of four countries, dubbed the Trans-Pacific Strategic Economic Partnership (TPSEP), or P-4 developed an agreement with 20 chapters, including a critical ascension clause that created a simple pathway for new member states to join.[282]

In 2008, President Bush announced plans to enter into negotiations with these P-4 countries and Australia, Peru, and Vietnam soon followed in December of that same year. After a period of consultation with his trade representatives, President Obama took until November 2009 to announce his plans to keep the U.S. at the negotiating table.[283] In November 2009, at a stop in Tokyo, President Obama outlined a broad vision for engagement in the Pacific region that included the TPP, but also branched out into

[282] C.L. Lim & Deborah Kay Elms, *An overview and snapshot of the TPP negotiations*, *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT 21–44, 21–22 (C. L. Lim, Deborah Kay Elms, & Patrick Low eds., 2012).

[283] IAN F FERGUSSON, MARK A MCMINIMY & BROCK R WILLIAMS, *The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress* 61 1–2.

comprehensive support for treaties on human rights and climate change. In concluding his remarks, he outlined the importance of U.S.'s partnership with Japan,

> These are steps that the United States will take to improve prosperity, security, and human dignity in the Asia Pacific. We will do so through our close friendship with Japan -- which will always be a centerpiece of our efforts in the region. …
>
> None of this will come easy, nor without setback or struggle. But at this moment of renewal – in this land of miracles – history tells us it is possible. This is America's agenda. This is the purpose of our partnership with Japan, and with the nations and peoples of this region.
>
> And there must be no doubt: As America's first Pacific President, I promise you that this Pacific nation will strengthen and sustain our leadership in this vitally important part of the world.[284]

The president flew to Singapore that same day to meet with APEC nations. The next morning, his trade representative, Ron Kirk announced at the APEC meeting, the U.S.'s intention to enter official TPP talks.[285] Here, as early as 2009, President Obama envisioned the TPP as a vital aspect of a broad geopolitical agenda in the Asia. The agenda would lead to his investment in nation-wide campaign to promote the ratification of the TPP by the U.S Congress in 2014 and 2015. But first the U.S. led negotiations in the first round of talks in Melbourne in 2010 and convened parties ten more times over two years until the end of 2011 in Honolulu.[286] At that time, Canada and Mexico began

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[284] Pres. Barack Obama, *Remarks by President Barack Obama at Suntory Hall* (2009), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-suntory-hall (last visited Oct 3, 2019).

[285] Lim and Elms, *supra* note 283 at 27.

[286] *Id.* at 28.

the process of joining talks and became official members in 2012. Japan would join in 2013. Over 25 rounds of negotiations and ministerial meetings were held in total and the final talks were completed in Atlanta, GA in September of 2015.

The TPP's IP Chapter in Congress

From 2011 to 2016, The U.S. Congress held thirteen hearings where issues of intellectual property law were discussed in the context of the TPP. In January of 2016, the U.S. International Trade Commission (ITC) also held a three-day hearing that included testimony regarding the TPP's impact on all sectors of the U.S. economy – including technology and entertainment. Despite the significance of the text's intermediary liability provisions, there was little debate on the topic in over 40 hours of testimony over the course of that five-year period. But a small number of representatives from technology industry associations, copyright holder associations, and non-governmental organizations did present arguments for and against safe harbors in the TPP. A small group of lawmakers and government officials also spoke to the topic.

On the question of the TPPs safe harbors provision, stakeholders and lawmakers were split three ways. Some argued that the TPP's version of copyright safe harbors was consistent with U.S. law. Some argued that the TPP text might not be consistent to § 512 of the DMCA and therefore, was a potential threat to users' rights. And a third group argued that the TPP's version of safe harbors included too many exceptions and too much flexibility, i.e., other countries could implement safe harbors in ways that could be a threat to U.S. business interests. Informed dialog on the implications of the TPP was difficult because the U.S. Trade Representative allowed only limited access to the negotiating text, even for members of Congress. Technology industry lobbyists did

testify, but Congress did not invite experts in internet law and did not offer opportunities for public comment. The TPP internet law related provisions were presented in broad strokes. Rather than detailed arguments about the costs and benefits of particular paragraphs of the IP chapter; lawmakers, trade officials, and technology industry representatives deployed five discourses to signify their support for the TPP's safe harbors provisions. Stakeholders and government officials alike framed the TPP as a *21st century agreement* and a boost to the U.S. *digital economy*, and technology *job creator*. Some claimed that § 512 of the DMCA *created the internet economy* in the U.S. Many stakeholders argued therefore, that it made logical sense to export a similar rulebook through free trade agreements. Finally, some testified that the TPP represented a chance for the U.S. to set the *rules of the road* of the internet economy before China did so. In other words, the TPP's internet rules – including copyright safe harbors – mattered to the geopolitical position of the U.S. vis a vis it's power to control digital networks and foreign investment in internet ventures internationally. These five discourses – *rules of the road, digital economy, jobs, created the internet, and 21st century agreement* – characterized the arguments from a variety of industry stakeholders, lawmakers, and government officials throughout the five years of hearings that addressed the TPP's IP chapter. Stakeholders and government officials alike framed the TPP's safe harbors provisions as part of a package of the TPP's reforms that would address the needs of the technology industry and the platform economy.

When the issue of copyright safe harbors and the TPP was directly addressed in these hearings, stakeholders had differing opinions on the consistency between the TPP and the DMCA. The U.S. Trade Representative Ambassador Michael Froman, and two industry associations – the Copyright Alliance and Internet Association[287] – all argued in support of the TPP's safe harbors provisions and claimed they were consistent with U.S. law (see figure 6.1).

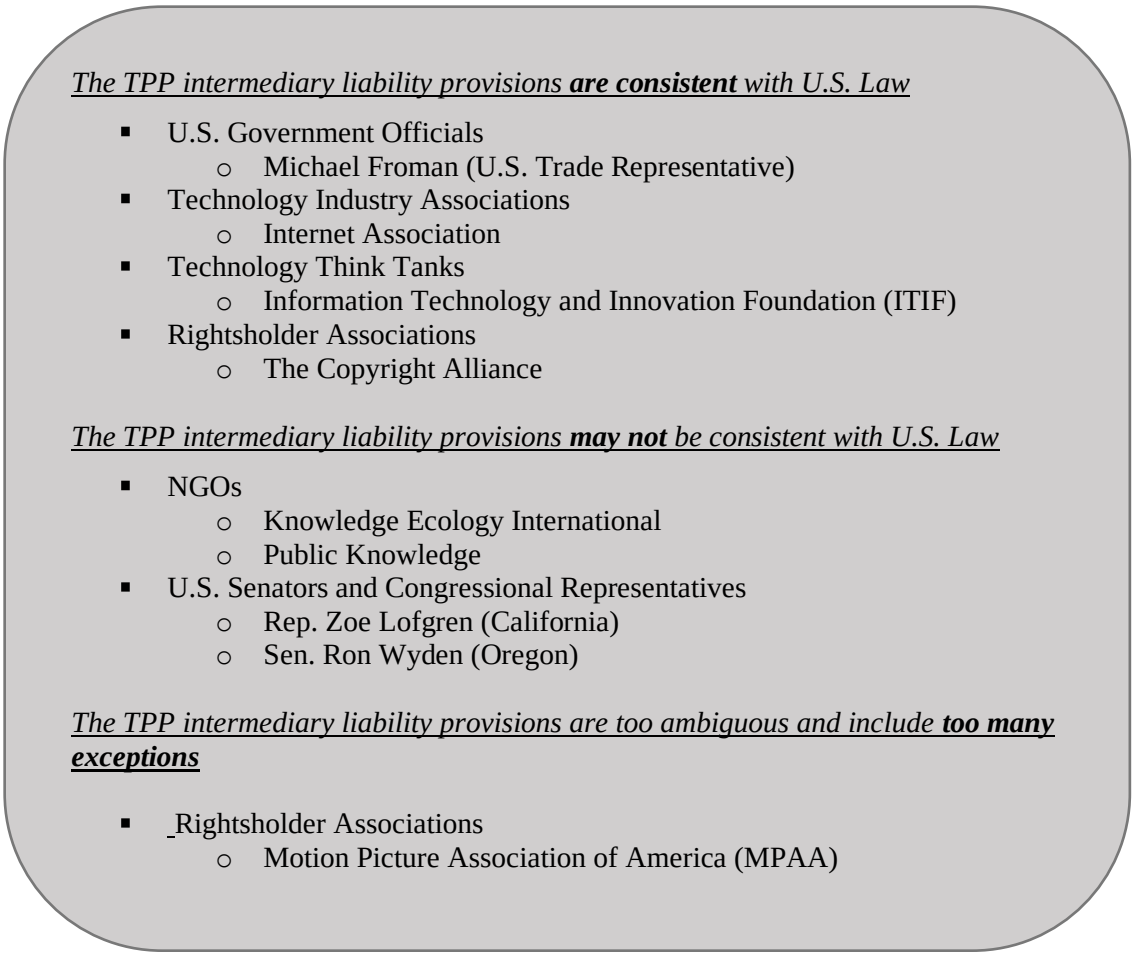

Figure 6.1. Stakeholder & Government Arguments on the Consistency of TPPs Intermediary Liability Provision with U.S. Law (Section 512 of the DMCA).

[287] Members of the Internet Association include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, lAC, Intuit, Linkedln, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga.

Ambassador Froman argued in a 2015 hearing on the TPP,

> So, what we are pursuing in TPP is based on the approach that has been crafted here under U.S. law, including around issues like ISP liability…this is the first trade agreement in history that we will put forward that allows for exceptions and limitations to copyright consistent with U.S. practice. So, our approach has been very much consistent with that approach.[288]

The exceptions and limitations that he cites here are the fair use protections that are found in the DMCA – and he claims the TPP is consistent with fair use. Michael Beckerman of the Internet Association argued that fair use protections work for the platform economy and they should be included in the TPP.

> …what we have sought…is to have the same balanced copyright policy that we have here in the United States, with fair use exceptions limitations. That is the U.S. balance that I think works very, very well here for creators. We think that should be part of trade deals around the world…[289]

The Copyright Alliance – who represents individual artists and publishers, as well as larger organizations – submitted a statement to the International Trade Commission (ITC) in 2016, which did not take issue with the TPP's version of copyright safe harbors.

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[288] PRESIDENT OBAMA'S 2015 TRADE POLICY AGENDA: HEARING BEFORE THE S. COMM. ON FINANCE, 114TH CONG., 35 (2015).

[289] EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 114TH CONG. 80 (2016), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105191 (last visited Nov 5, 2019).

Their CEO, Keith Kupferschmid wrote simply, "Significantly, the standards established in the TPP reflect current U.S. laws and regulations."[290]

Two lawmakers and two non-governmental organizations challenged the TPP's safe harbor provisions on users' rights grounds. Little testimony or questioning included a detailed critique of the text. Most comments regarding a critique of the TPP's approach on fair use grounds alluded to inconsistencies with the DMCA – and argued that the TPP may not be as protective of users' rights as the DMCA. For example, in 2011, Krista Cox of Knowledge Ecology International submitted comments for the record to the Subcommittee on Trade of the House Ways and Means Committee. She wrote, "The proposals are even more inappropriate when they would introduce backdoor changes into our own laws or block current legislative reform efforts…we believe that the USTR inappropriately pushes norms that are inconsistent with current U.S. law."[291] In a 2012 hearing, Rep. Zoe Lofgren of California questioned Teresa Stanek Rea, the Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office about fair use. She asks, "I didn't find the exceptions and safeguard, like fair use, that we enjoy in this country. So, the concern...is whether, under the treaty, people would have the same freedom as they would in the United States vis-a-

[290] Comments of The Copyright Alliance Before the International Trade Commission: Trans- Pacific Partnership, Likely Impact on the U.S. Economy and on Specific Industry Sectors, No. TPA-105-001, 2 (2016).

[291] TRANS-PACIFIC PARTNERSHIP. HEARING BEFORE H. SUBCOM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 112TH CONG., 88 (2011) (Comments for the record by Krista Cox, Knowledge Ecology International).

vis copyright."[292] In 2015, Senator Ron Wyden or Oregon questioned Ambassador Froman on similar grounds. He said,

> I just think that millions of Internet users want it clear and they want it straightforward that nothing is going to be done to undermine an open Internet. And particularly they want to buttress the victories that have been won here and look to over-seas opportunities for the same kind of policies.[293]

The advocacy group Public Knowledge submitted a written statement to a 2016 hearing that was entitled, "Expanding U.S. Digital Trade and Eliminating Barriers to U.S. Digital Exports." Four legal experts wrote on behalf of Public Knowledge. This appears to be the only mention of the TPP's source text in regard to copyright in all thirteen hearings that addressed the TPP and intellectual property. The legal experts wrote,

> While the TPP requires that signatories "shall provide" extensive intellectual property rights and enforcement mechanisms, it requires that signatories "shall endeavor to achieve" appropriate limitations and exceptions. Going forward, U.S. trade policy should ensure that trade agreements mandate parties to achieve balance in their intellectual property system through the provision of adequate limitations and exceptions.[294]

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[292] INTERNATIONAL IP ENFORCEMENT: PROTECTING PATENTS, TRADE SECRETS AND MARKET ACCESS: HEARING BEFORE THE SUBCOMM. ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET OF THE H. COMM. ON THE JUDICIARY, 112TH CONG., 24 (2012).

[293] PRESIDENT OBAMA'S 2015 TRADE POLICY AGENDA: HEARING BEFORE THE S. COMM. ON FINANCE, 114TH CONG., *supra* note 289 at 35.

[294] EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 114TH CONG., *supra* note 290 at 104 (Comments of Public Knowledge).

Public Knowledge and Knowledge Ecology International, as well as Rep. Lofgren and Sen. Wyden wanted some assurances that TPP's text would be explicit about fair use, as way of precluding national versions of safe harbors that didn't allow for user safeguards against mistakes, fraud, and abuse.

In a 2016 hearing at the ITC, Stephen Ezell Vice President, Global Innovation Policy at the Information Technology and Innovation Foundation (ITIF) in Washington testified to the contrasting position i.e., the non-binding nature of the TPP's approach to fair use rightly allows for national variation. He argued the opposite position to Public Knowledge on this point. He testified,

> The TPP…reflects the different legal systems and approaches that each member takes with regard to the issue of fair use. A prescriptive requirement for explicit fair use provisions probably would not have been a good approach given the differences of different countries. Overall, we think it's a flexible framework that accommodates different approaches and it is going to lead to great levels of digital and content and creative innovation throughout the Trans-Atlantic Partnership region.[295]

In 2016, the Motion Picture Association of America (MPAA) wrote a letter for the record to the ITC for their hearing on the economic impact of the TPP. The MPAA appeared to make an outlier argument that did not fit well into the range of debate regarding consistency with the DMCA. The MPAA wrote, "…MPAA is disappointed with several elements in the text, notably the ISP liability provision. MPAA also notes

[295] TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS: HEARING BEFORE THE UNITED STATES INTERNATIONAL TRADE COMMISSION, 988 (2016) (Testimony of Stephen Ezell, Vice President, Global Innovation Policy, Information Technology and Innovation Foundation).

that the TPP takes a different drafting approach to exceptions though this should not implicate the actual effect of the provision."[296] The MPAA's position is that the TPP does not go far enough to protect copyright in the digital environment because the open language permits variation in national implementation – which would potentially harm copyright enforcement in foreign markets.

Representatives of technology industry associations, The U.S. Chamber of Commerce, and a few members of Congress argued in support of including copyright safe harbors in the TPP – as part of suite rules that covered other relevant areas as well (see figure 6.2).

These stakeholders repeated three central arguments to make their case for copyright safe harbors in the TPP: TPP is a necessary update to the WTO for the digital age, TPP (and free trade agreements in general) should include intermediary liability rules, and the lack of intermediary liability protections in other countries amounted to a non-tariff barrier to trade for U.S. companies.

Stakeholders and lawmakers argued that U.S.-led free trade agreements needed to include copyright safe harbors because TRIPS was out-of-date and the TPP could support trade in digital goods – an area where the U.S. had a competitive advantage. Ed Black of the Computer and Communications Industry Association (CCIA) testified in 2010, "…the U.S. Government should move to close gaps in the existing WTO framework to ensure all GATS disciplines apply to trade over the Internet."[297] Grant Aldonas, the

[296] *Id.* at 5. (Written Submission of the Motion Picture Association of America).

[297] INTERNATIONAL TRADE IN THE DIGITAL ECONOMY. HEARING BEFORE THE SUBCOMM. ON INTERNATIONAL TRADE, CUSTOMS, AND GLOBAL COMPETIVENESS OF THE S. COMM. ON FINANCE, 111TH CONGRESS. 35 (2010) (Testimony of Edward J. Black, The Computer & Communications Industry Association).

international investment expert and economics professor, also highlighted the difference between digital and industrial goods. He said, "The real problem is that the WTO rules, such as they are, are largely confined to trade in industrial goods. They don't reach many of the things that are a competitive advantage."[298] Rep. Reichert of Washington argued that Congress's intent is to *update* trade law to account for significance of the platform economy to U.S. interests. He said, "Many of the problems our digital exporters now face arose after our existing trade agreements were negotiated years ago. And that is why Congress set forth important new and expanded principal negotiating objectives relevant to digital trade in goods and services…"[299] And, Stephen Ezell, CEO of the ITIF testified to the ITC that current WTO rules were a threat to U.S. interests because China and other countries are able to intervene to slow down trade in digital goods – in ways that would be prohibited for physical goods. He said,

> I think U.S. property sensitive sectors will benefit from a host of measures…that provide new legal protection and enforcement mechanisms for digital trade. Very important that these countries agree that digital and content has equal protection under terms of trades as physical ones do.[300]

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[298] UNFAIR TRADING PRACTICES AGAINST THE U.S.: INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT, PROPERTY EXPROPRIATION, AND OTHER BARRIERS. HEARING OF THE H. COMM. ON FOREIGN AFFAIRS, 112TH CONG., 52 (2012).

[299] EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 114TH CONG., *supra* note 290 at 4 (Opening remarks of Rep. David G. Reichert, Chairman).

[300] TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS: HEARING BEFORE THE UNITED STATES INTERNATIONAL TRADE COMMISSION, TRANSCRIPTION OF PROCEEDINGS VOL. III:, 1031 (2016).

*The lack of U.S.-style intermediary liability law in free trade agreements is a **non-tariff barrier to trade***

- Technology Industry Associations
  - Computer & Communications Industry Association (CCIA)
  - Association of Competitive Technology (ACT)
  - Internet Association
- U.S. Government Officials
  - Michael Froman (U.S. Trade Representative)
- U.S. Senators and Congressional Representatives
  - Rep. David Reichert (Washington)

*The World Trade Organization (WTO) Trade Related Intellectual Property Rights **(TRIPS)** agreement **needs to be updated** to the internet age*

- Technology Industry Associations
  - Computer & Communications Industry Association (CCIA)
- Technology Think Tanks
  - Information Technology and Innovation Foundation (ITIF)
- International Investment Consultants
  - Grant Aldonas (Split Rock International)
- U.S. Government Officials
  - Michael Froman (U.S. Trade Representative)
- General Business Organizations
  - National Foreign Trade Council
- U.S. Senators and Congressional Representatives
  - Rep. David Reichert (Washington)

*The **TPP should include intermediary liability** law provisions similar to Section 512 of the DMCA*

- Technology Industry Associations
  - Computer & Communications Industry Association (CCIA)
  - Internet Association
- Technology Think Tanks
  - Information Technology and Innovation Foundation (ITIF)
- General Business Organizations
  - US Chamber of Commerce (Global IP Center)
  - National Foreign Trade Council
- U.S. Government Officials
  - Michael Froman (U.S. Trade Representative)

Figure 6.2. Stakeholder & Government Arguments on Why the TPP Should Include a Notice-and-Takedown Provision Similar to Section 512 of DMCA.

Witnesses representing technology industry associations also appealed to lawmakers' desires to reduce trade barriers for U.S. companies. They argued that the TPP was an opportunity to reduce barriers that were not directly tied to tariffs. He argued that U.S. trading partners either lacked intermediary liability laws all together or they enforced strict liability for content that their governments wanted to control. The latter situation – where foreign governments were holding U.S. platforms liable under their national laws – that was of particular importance to the U.S. technology lobby. Ed Black of CCIA argued, "…from the perspective of advancing U.S. global economic opportunities, unreasonable liability rules are functionally no different than traditional market barriers."[301] Mike Sax, of the Association for Competitive Technology (ACT) and a software business owner testified that compliance with conflicting and overlapping intermediary liability regulations forced his business to invest heavily in avoiding liability. To him this was "prohibitive and almost takes away some of the advantages and the opportunities that cloud computing can present to us."[302] In a 2016 hearing, Michael Beckerman of the Internet Association repeated this point five times throughout his testimony and prepared statement to the Subcommittee on Trade of the House Ways and Means Committee. He wrote, "Inadequate intermediary liability laws make it impossible for e-commerce platforms to operate and serve as trade-enabling marketplaces."[303] 49 Beckerman also wrote, "…many countries lack flexible copyright rules such as fair use –

[301] INTERNATIONAL TRADE IN THE DIGITAL ECONOMY. HEARING BEFORE THE SUBCOMM. ON INTERNATIONAL TRADE, CUSTOMS, AND GLOBAL COMPETIVENESS OF THE S. COMM. ON FINANCE, 111TH CONGRESS., *supra* note 298 at 38.

[302] *Id.* at 10. (Testimony of Mike Sax, Board President, Association of Competitive Technology).

[303] EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 114TH CONG., *supra* note 290 at 49 (Testimony of Michael Beckerman, President & CEO Internet Association).

which creates significant barriers to entry for U.S. companies that are hoping to do business in those markets."[304]

A small group of internet industry lobbyists and a handful of general business groups also argued in support of the TPP's copyright safe harbors provisions on the grounds that the U.S. trade agenda was the appropriate place for pursue U.S. interest in the area of internet policy. As such, the U.S. should include safe harbors in trade agreements, along with a suite of laws that support U.S.-based internet platforms. They made their case by arguing the new digital trade rules in the TPP would benefit more than just technology companies – there was in fact a larger economy of U.S. businesses that sell goods and services through internet platforms. It was therefore, in the interest of the U.S. government to use trade leverage to export the same suite of internet regulations that worked at home. To them, the TPP's safe harbors provisions represented a vital new effort for the U.S. Trade Representative. Ed Black of CCIA testified on this point in 2015. He said, "…we believe it is…appropriate, for the U.S. Government as we try to persuade others in the world to have strong copyrights, that they also reflect the boundaries and limitations that have proved so important to the ability of…Internet companies to flourish."[305] In 2016, Michael Beckerman of the Internet Association also testified that the TPP copyright rules were important shift in the U.S.'s trade agenda. He said, "Historically, pro-Internet policies have been absent from trade agreements...we feel that the TPP does acknowledge the benefits of...safe harbors to protect the basic

[304] *Id.* at 47. (Testimony of Michael Beckerman, President & CEO Internet Association).

[305] INTERNATIONAL DATA FLOWS: PROMOTING DIGITAL TRADE IN THE 21ST CENTURY. HEARING BEFORE THE COURTS, INTELLECTUAL PROPERTY AND INTERNET OF THE H. COMM. ON THE JUDICIARY, 114TH CONGRESS., 99 (2015), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104145 (last visited Nov 5, 2019).

functionality of the Internet."[306] Robert Atkinson, President of the technology think tank, ITIF echoed this argument in the same hearing in 2016. He said, "I would agree with Mr. Beckerman that trade agreements should include some kind of provisions like § 230 for intermediate liability protection."[307] Atkinson cited § 230 of the Communications Decency Act (CDA), which covers defamation and other types of illegal content, but the thread of his argument is the same. All the technology industry lobbyists that commented on the TPP argued in support of this new effort on the part of the USTR – to include copyright safe harbors in the trade agenda now and into the future. In addition to the tech lobby, Ambassador Alan Wolff, chairman of the National Foreign Trade Council (NFTC)[308] testified to the ITC in 2016 in favor of safe harbors in the TPP. He submitted a policy platform to the ITC for the digital economy entitled, "Encouraging Economic Growth in the Digital Age: A Policy Checklist for the Digital Economy." Its first point (of ten) reads, "Ensure open global flows of information while regulating appropriately for the public good…maintain appropriate protections for Internet intermediaries."[309] The NFTC's platform doesn't specify the details of how these protections should function, only that they should part of a broad U.S. agenda to use trade agreements to influence internet regulation globally.

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[306] EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 114TH CONG., *supra* note 290 at 39 (Statement of Michael Beckerman, President & CEO, Internet Association).

[307] *Id.* at 79.

[308] The NTFC is a U.S.-based business association that lobbies on behalf of its membership for favorable trade policies. Its members include Fortune-500 companies from many sectors of the economy.

[309] TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS: HEARING BEFORE UNITED STATES INTERNATIONAL TRADE COMMISSION, RECORD OF WRITTEN SUBMISSIONS, DAY 1., 69 (2016) (Statement of Amb. Alan Wm. Wolff on behalf of the National Foreign Trade Council).

These three core arguments in favor of the TPP's safe harbors provisions – it's a needed update to TRIPS, it reduces barriers to digital trade, and it is an essential part of a new trade digital trade agenda – are found throughout the public record of Congressional hearings on the TPP and in transcripts of the three-day hearing at the ITC. As regulatory arguments, they were included with little debate and there were few opposing views on these lines of argument in the public record. There was, however, debate on these points outside of congress[310] but it appears that these conversations were absent from the hearings on the TPP. There were two NGOs, one senator, and one congressional representative who did argue that the TPP's copyright safe harbors text may not be consistent with U.S. law (see above). But the record doesn't include direct debates (back and forth discussions between witnesses and members of Congress) on these three central arguments.

Discourse: A 21st Century Agreement

The U.S. Trade Representative Michael Froman testified in three hearings regarding the TPP. Throughout his testimony, Ambassador Froman framed the TPP as a *21st century agreement* or a *high standard* agreement (see figure 6.3).

[310] Grant Gross, *Tech firms oppose fast-tracking of Trans-Pacific Partnership*, NETWORK WORLD (2014), https://www.networkworld.com/article/2176323/tech-firms-oppose-fast-tracking-of-trans-pacific-partnership.html (last visited Oct 22, 2020).

Figure 6.3. Stakeholder & Government Discourse: 21st Century Agreement

In his testimony, he grouped together a suite of rules regarding trade in digital goods, data localization, pharmaceuticals, state-owned enterprises (SOEs), labor, and the environment under the umbrella of *21st century*. According to Froman, these areas of reform make the TPP a *high standard* trade agreement, in that it serves the *21st century* economy. Numerous lawmakers and industry stakeholders, as well other government officials spoke of the TPP in this way. But, through the six years of hearings, different stakeholders had different understandings of what 21st agreement meant in the context of the TPP. When stakeholders had the chance to elaborate, their definitions of 21st century

tended to relate to the interests of their industry. Stakeholders and government officials alike spoke in general terms about these suite of policies – connecting them to e-commerce, intellectual property, and innovation – rarely connecting the broader idea to detailed discussions of specific rules.

In January of 2015, Ambassador Froman read a prepared statement about the TPP before answering questions. He said, "…we have made important progress…in addressing a number of 21st century issues such as intellectual property, digital trade, competition with state-owned enterprises, and labor and environmental protections."[311] In 2014, he referred to his own framing of the 21st century and argued that this was the USTRs agenda in negotiations. He said, "…when we talk about updating our trade agreements for the 21st century and bringing new issues like the emergence of the digital economy into those trade agreements, this is precisely what we are focused on."[312] And, at that same hearing in 2014, he connects the idea of a 21st century agreement with copyright safe harbors. He wrote,

> We are also seeking to establish in TPP, for the first time in any U.S. trade agreement, a balance in partners' copyright systems by means of limitations or exceptions…and to support strong and balanced Internet service provider liability and 'safe harbor' provisions that benefit 21st-century e-commerce and internet businesses.[313]

[311] PRESIDENT OBAMA'S 2015 TRADE POLICY AGENDA: HEARING BEFORE THE S. COMM. ON FINANCE, 114TH CONG., *supra* note 289 at 7 (Testimony of Amb. Michael Froman, United States Trade Representative).

[312] PRESIDENT OBAMA'S TRADE POLICY AGENDA WITH U.S. TRADE REPRESENTATIVE MICHAEL FROMAN: HEARING BEFORE THE H. COMM. ON WAYS AND MEANS, 113TH CONG., 59 (2014).

[313] *Id.* at 143. (Questions for the Record from Rep. Tom Reed).

Discourse: The Digital Economy

Stakeholders and lawmakers also repeatedly referred to the TPPs intellectual property rules as a key component of the *digital economy* – a necessary group of laws to promote e-commerce, the growth of platforms, and all the other sectors of the analog economy that rely on those platforms (see figure 6.4).

- Technology Industry Associations
  - Computer & Communications Industry Association (CCIA)
  - Internet Association
- U.S. Senators and Congressional Representatives
  - Sen. Ron Wyden (OR)
  - Rep. Howard Berman (CA)
  - Rep. John Conyers (MI)
  - Rep. Doug Collins (GA)
  - Rep. Reichert (WA)
- Technology Companies
  - IBM
- U.S. Government Officials
  - Ambassador Demetrios Marantis (Deputy U.S. Trade Representative)
  - Michael Froman (U.S. Trade Representative)
- International Investment Consultants
  - Grant Aldonas (Split Rock International)
- General Business Organizations
  - National Foreign Trade Council
- Rightsholder Associations
  - International Intellectual Property Association (IIPA)
- Foreign Government Officials
  - Ashok Kumar Mirpuri (Singapore's Ambassador to the U.S.)

Figure 6.4. Stakeholder & Government Discourse: The Digital Economy

The discourse of the digital economy here served as shorthand for a host of benefits to the U.S. economy. These included GDP growth, domestic jobs in technology industry, more opportunities for small businesses, and efficient transactions for sellers

and consumers. Lawmakers and tech industry stakeholders invoked the image of a global grand marketplace – populated by small businesses and facilitated by U.S.-based internet platforms – to argue in favor of TPP and its digital trade rules. Michael Beckerman, CEO of the Internet Association opened his prepared remarks to congress in 2016 by calling on lawmakers to support his corporate members. He said,

> Internet platforms are the global engine of the innovation economy. The Internet sector represents an estimated 6 percent of U.S. GDP in 2014, totaling nearly $1 trillion and nearly 3 million American jobs. In addition to the economic contribution to the Internet industry, our member companies are transforming the way we do business at home and abroad by lowering barriers to entry and providing unprecedented growth opportunities for American businesses, large and small, and entrepreneurs.[314]

Senator Ron Wyden of Oregon invoked the small rural business owners in his home state. In 2015, he argued,

> Three decades ago, an entrepreneur with big dreams in a place like Mt. Vernon, Oregon –a small town of 500 didn't have the Internet as a means to access global consumers. Today, that entrepreneur does. And that access could be direct or through Internet platforms, which could include eBay, Amazon, and Etsy.[315]

Michael Froman, the U.S. Trade Representative called on lawmakers to imagine Esty, the platform of global home businesses. He testified in 2015,

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[314] EXPANDING U.S. DIGITAL TRADE AND ELIMINATING BARRIERS TO U.S. DIGITAL EXPORTS: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 114TH CONG., *supra* note 290 at 38 (statement of Michael Beckerman, President and CEO of the Internet Association).

[315] PRESIDENT OBAMA'S 2015 TRADE POLICY AGENDA: HEARING BEFORE THE S. COMM. ON FINANCE, 114TH CONG., *supra* note 289 at 85 (statement of Sen. Ron Wyden).

> And when [sellers] engage through Etsy with the 95 percent of the customers of the world who live outside our country, they are using telecommunications services, software services, electronic payment services, express delivery services. Those are all issues that we are addressing in TPP, making sure that those services stay open, that our providers can continue to provide them and expand their access in these markets, to make it possible for small and medium-sized businesses all over the country to engage in global commerce.[316]

Discourses: Jobs, Rules of the Road, and Safe Harbors

Stakeholders and lawmakers used three other secondary discourses to argue in favor of the TPPs digital trade rules. First, they made a geopolitical case that the U.S. should be the one to set the *rules of the road* for the digital economy before other countries do (see figure 6.5). In this context, China was the competitor that they cited most. Second, they invoked the origin story of big tech in the U.S. and tied that early development to the legal infrastructure of safe harbors – both § 512 of the DMCA and § 230 of the Communications Decency Act. Here, the legal shield of safe harbors was the protection that *created the internet economy* in the U.S. (see figure 6.6). Third, stakeholders invoked the American worker to make the claim that internet rules that protected the digital marketplace would create more *U.S. jobs* (see figure 6.7).

[316] U.S. TRADE POLICY AGENDA: HEARING BEFORE THE H. COMM. ON WAYS ON MEANS, 114TH CONG., 44 (2015).

- Technology Industry Associations
  - Computer & Communications Industry Association (CCIA)
  - Internet Association
- U.S. Senators and Congressional Representatives
  - Sen. Ron Wyden (Oregon)
- Technology Companies
  - Etsy.com
- Digital Rights NGOs
  - Electronic Frontier Foundation (EFF)

Figure 6.5. Stakeholder & Government Discourse: Intermediary Liability Laws Created the Internet Economy in the U.S

- U.S. Government Officials
  - Michael Froman (U.S. Trade Representative)
- General Business Organizations
  - US Chamber of Commerce (Global IP Center)
  - U.S. Chamber of Commerce
- Foreign Government Officials
  - Ashok Kumar Mirpuri (Singapore's Ambassador to the U.S.)

Figure 6.6. Stakeholder & Government Discourse: Rules of the Road

- U.S. Senators and Congressional Representatives
  - Rep. David Reichert (WA)
  - Rep. Ileana Ros-Lehtinen (FL)
- U.S. Government Officials
  - Michael Froman (U.S. Trade Representative)
- General Business Organizations
  - US Chamber of Commerce (Global IP Center)
- Technology Industry Associations
  - Computer & Communications Industry Association (CCIA)
- Rightsholder Associations
  - International Intellectual Property Association (IIPA)

Figure 6.7. Stakeholder & Government Discourse: Jobs

Debates in Context

On December 14th, 2011, the Subcommittee on Trade of the House Ways and Means Committee held a hearing entitled "Trans-Pacific Partnership." Invited panelists included Ambassador Demetrious Marantis (the deputy U.S. Trade Representative), Devry Boughner (of Cargill and the U.S. Business Coalition for TPP), Angela Hofmann (of Wal-Mart), and Michael Wessel (of the Wessell Group).

The record also included a number of important public submissions from Ed Black of the Computer and Communications Industry Association (CCIA), Krista Cox of Knowledge Ecology International (KEI), and a coalition of medical professionals. The first two documents in this appendix provide the detailed opinions of two opposing positions on the TPP's copyright policies. Internet Service Provider (ISP) liability is mentioned in terms of the importance of safe harbors to protect innovation. Ed Black's submitted comments focus on the importance of copyright laws to protect innovation and Krista Cox's comments focus on the lack of transparency and the negative implications of the TPP for consumer rights and protections - a primary advocacy focus of Knowledge Ecology International. However, the oral testimony neglects the question of copyright for digital cultural products and instead focuses on protections for the U.S. pharmaceutical industries and vague mentions of the digital economy. The bulk of the questioning in regard to intellectual property is in regard to pharmaceutical brands, protecting drug patents and 'biologics' in the international market. Committee members framed these questions in terms of protecting American jobs in those areas. Mentions of digital trade, internet freedom, e-commerce, and cultural products appear to be limited to the first two attached submissions.

Six months later, on June 27th, 2012, the Subcommittee on the Intellectual Property, Competition, and the Internet of the House Judiciary Committee held a hearing entitled "International IP Enforcement: Protecting Patents, Trade Secrets and Market Access". According to the record, the hearing consisted of three opening statements from committee members and one prepared statement from Teresa Stanek Rea, the Deputy Secretary of Commerce and Intellectual Property and Deputy Director of the United States Patent and Trademark Office (USPTO) at the U.S. Commerce Department. She gave oral testimony, included a prepared statement for the record, and answered questions from the committee. These opening statements and oral testimony focused on the enforcement of U.S. patent law internationally and the role of the patent office and trade agreements in that enforcement. Discussion was primarily limited to technology and pharmaceutical patents and the threats that U.S. patents face in the global market. Committee members pressed Ms. Rea on how the U.S. patent office will be push the TPP member states to follow U.S. patent law in regard to drug patents and data protection for biologics. Ms. Rea made repeated comments reiterating the patent office's commitment to pushing for the strongest protections possible with the TPP. Her prepared statement summarizes her assurances to the committee,

> We (USPTO) continue to provide expert technical advice on the full range of substantive IP protection and enforcement issues to the USTR in connection with on-going trade negotiations. The USPTO plays an active role in the on-going

Trans-Pacific Partnership negotiations, and the implementation and monitoring for compliance of other bilateral and free trade agreements.[317]

Two lines of questioning in the record are particularly relevant to the public concerns of previous agreements and the inequities inherent in the process of U.S.-led IP governance. Ms. Rea's answers are instructive for gaining clarity on the U.S.' perspective on the connection between IP law and development, and the U.S. approach to free trade negotiations. The record reveals that Melvin Watt, a representative from North Carolina asked an open-ended question about the challenges that the USPTO faces in free trade negotiations. Ms. Rea responded, "Culturally, a lot of countries come from a different perspective from what we do. They have different legal systems."[318] She continues to discuss the IP training institute that the USPTO operates for judges in various countries to "bring them up to speed"[319] on the U.S.-style patent system. On a subsequent line of questioning Ms. Rea is pressed on the lack of transparency in the TPP negotiations by California representative Zoe Lofgren. Ms. Rea's answer neither explains nor defends transparency. She pledges to get back to the committee. This line of questioning was particularly relevant to controversy over internet policy. Rep. Lofgren compared the TPP process to the negotiations of the Anti-Counterfeiting Trade Agreement (ACTA), the first and only time this comparison was made to the committee in this hearing. This is notable, given the clear policy similarities between the two agreements, especially in regard to internet and intellectual property policy.

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[317] INTERNATIONAL IP ENFORCEMENT: PROTECTING PATENTS, TRADE SECRETS AND MARKET ACCESS: HEARING BEFORE THE SUBCOMM. ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET OF THE H. COMM. ON THE JUDICIARY, 112TH CONG., *supra* note 293 at 13.

[318] *Id.* at 18.

[319] *Id.* at 18.

Three weeks later, on July 19th, 2012, the House Committee on Foreign Affairs held a hearing entitled "Unfair Trading Practices Against the U.S.: Intellectual Property Rights Infringement, Property Expropriation, and Other Barriers." The Chairman of the Committee Rep. Ileana Ros-Lehtinen, Republican of Florida, framed the conversation at the outset in terms of rule breaking states i.e., other governments tolerating and encouraging the theft of intellectual property to support their domestic industries. She mentions cultural products in this context from the outset, "China is the most egregious example, where the U.S. Trade Representative estimates that 99 percent of all music downloads from the internet is done so illegally."[320] She continues on to cite Hollywood's estimates of losses due to global piracy and she returns to the well-worn image of pirated DVDs being sold on the streets of Beijing for pennies. The Chairman's position here represents the agenda of the government/Hollywood nexus in the U.S.: countries such as China and Venezuela are undermining American growth by promoting piracy on purpose. The answer here is presented as larger and more comprehensive trade agreements that set global rules on IP trade and punish countries for non-compliance through sanctions.

In this case, Hollywood's influence is felt directly and its agenda vis a vis the lack of IP protection in China frames the entire discussion and the bulk of the oral testimony. While the TPP was not the main focus of this hearing, the agreement receives repeated mention as a perceived counterweight to China and its active indifference to U.S. intellectual property law. Geopolitical concerns frame the discussion and the TPP is

[320] UNFAIR TRADING PRACTICES AGAINST THE U.S.: INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT, PROPERTY EXPROPRIATION, AND OTHER BARRIERS. HEARING OF THE H. COMM. ON FOREIGN AFFAIRS, 112TH CONG., *supra* note 299 at 2.

positioned as a geopolitical opportunity, with hardly any direct opposition to this view. One invited witness, Grant Aldonas of Split Rock International makes one comment[321] regarding Vietnam towards the end of the open questioning period that is particularly relevant in terms of understanding connection between financial investment and IP law. Aldonas sees the inclusion of Vietnam into the TPP trade bloc as a counterweight to China because American investors will be more likely to invest in Vietnam, if regulatory frameworks are in place. To summarize his testimony, he links IP legal structures to a rule of law foundation that technology investors need as a prerequisite for investment. According to Aldonas, when this happens in Vietnam, they will outcompete China for investment dollars from the west and China will be forced to shift its stance on IP. TPP, with its strict regulatory framework for IP in the digital environment is positioned as a strategy to shift financial investment away from China and towards markets that protect U.S.-based cultural exports.[322] To follow this argument, the adoption of internet policy influences brick and mortar development projects, because a country with U.S.-style internet policy is perceived to be more accessible and secure.

Nearly two years later, on April 3rd, 2014, the House Ways and Means Committee held a hearing entitled "President Obama's Trade Policy Agenda with U.S.

[321] "We have an opportunity with the Trans-Pacific Partnership, and it is going to be a challenge for Members of Congress because we are going to be negotiating with Vietnam. But I will say, the single most important reaction that I have seen out of the Chinese Government is when Intel decided to put a plant in Vietnam rather than in China. And to the extent we can use the TPP process to encourage Vietnam with its historic relationship with China to make choices that China has yet to make, and they do start to out compete the Chinese for capital because the reality is Vietnam has become the new south coast of China. The go west policy of the Chinese Government hasn't worked. The more you see of that the more responsive they have to become because they have to deal with the economic reality of trying to continue to attract that investment flow. And that will come to an end if there is a better option" (*Unfair Trading Practices Against the U.S.*, 2012, p. 69)"

[322] UNFAIR TRADING PRACTICES AGAINST THE U.S.: INTELLECTUAL PROPERTY RIGHTS INFRINGEMENT, PROPERTY EXPROPRIATION, AND OTHER BARRIERS. HEARING OF THE H. COMM. ON FOREIGN AFFAIRS, 112TH CONG., *supra* note 299 at 69.

Trade Representative Michael Froman". The record of the hearing consists of 60 pages of testimony from the featured witness, U.S. Trade Representative Michael Froman and 40 pages of submissions for the record from various lobbying groups. The last addition is an attachment entitled "Questions for the Record: Representative David Reichart". These twelve pages appear to be written testimony in the form of questions and answers to USTR Froman from various members of the committee. There are a number of exchanges in this attachment in regard to internet policy that were not included in the oral testimony of this hearing.

In one section of the "Questions for the Record" appendix, Representative Tom Reed of the Finger Lakes region of New York questions USTR Froman on the TPP's balance between users' rights and copyright enforcement. Rep. Reed asks,

> I have heard concerns expressed that the intellectual property provisions of U.S. trade agreements only reflect part of U.S. law -- strong protection and enforcement...Can you describe for me how USTR will be approaching IP within TPP and TTIP to reflect the full balance of U.S. law regarding the internet?[323]

USTR Froman proceeds to then provide a two-paragraph accounting of the U.S. trade agenda in regard to copyright and internet policy that includes reference to the unique mix of copyright enforcement mechanisms, data flow measures, criminal penalties, cyber theft safeguards, ISP liability statutes, and data localization requirements. The policies in these areas are included in TPP. Froman includes ISP liability in his laundry list of goals for the TPP. He writes, "We are also seeking to establish in TPP...to

[323] PRESIDENT OBAMA'S TRADE POLICY AGENDA WITH U.S. TRADE REPRESENTATIVE MICHAEL FROMAN: HEARING BEFORE THE H. COMM. ON WAYS AND MEANS, 113TH CONG., *supra* note 313 at 143.

support strong and balanced internet service provider liability and 'safe harbor' provisions that benefit 21st-century e-commerce and internet businesses."[324] The USTR's testimony here is notable for a number of reasons. First, this is one of the very few mentions of ISP liability and safe harbors in the transcripts of hearing testimony. Secondly, while he thoroughly describes the U.S. free trade agenda vis a vis copyright, but he does so without once directly mentioning Hollywood, films, music, or piracy. This omission is significant given how much these policies are designed to protect such copyrighted works and how explicit the USTR has been in the past in regard to the importance of free trade policies to Hollywood and the music industry.

Five months later on September 18th, 2014, the Subcommittee on Courts, Intellectual Property, and the Internet of the House Judiciary Committee held a hearing entitled, "U.S. Copyright Office." The single invited witness was the director of the U.S. Copyright Office, Maria A. Pallante. According to the record, there were three opening statements from members of the committee and nine submissions added to the appendix from industry groups and other members of Congress. The final submission in the appendix was submitted by the Motion Picture Association of America (MPAA).

The oral testimony and questioning from committee members focused on what the Copyright Office will need to do modernize its operations for digital enforcement. Free Trade was mentioned once in the oral testimony in the context of the duties of the Copyright Office. In this portion of the testimony, Pallante explains to the committee all the different types of work that is being done by the Office's lawyers and how much more staff they need. In her list of responsibilities, she includes the TPP, "We do

[324] *Id.* at 143.

everything. Regulations alone could keep that number of lawyers constantly engaged, and that doesn't count getting on a plane and going to Vietnam to help the USTR negotiate a Pacific Rim agreement."[325]

While the MPAA avoided entirely any mention of free trade in their submitted comments, the Songwriter's Guild submitted a statement lobbying for more resources for the Copyright Office. In this statement, the Guild quotes previous testimony from the Copyright Office about the multiple duties the office must perform, including assisting in free trade negotiations. In quoting the Copyright Office's previous testimony, the Guild writes, "the Copyright Office participates in important U.S. negotiations relating to intellectual property, for example, treaties and free trade agreements, at both the bilateral and multilateral levels.[326] The Guild explains that U.S. Copyright law is going through a major period of review to upgrade the law for the digital age and the global marketplace, while at the same time the U.S. economy is more and more dependent on the copyright industries for GDP growth and job growth. The Guild writes, "The Copyright Office must be provided with the support that it needs to protect this crucial cultural economic segment of the American landscape."[327]

Furthermore, the Authors Guild implies that technology moves faster than Congress and therefore Congress is ill equipped to legislate on copyright. Therefore, the most viable option is the privatization of regulation. They write,

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[325] U.S. COPYRIGHT OFFICE: HEARING BEFORE THE SUBCOMM. ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET OF THE H. COMM. ON THE JUDICARY., (2014).

[326] *Id.* at 117.

[327] *Id.* at 117.

> It may not be practical for Congress to legislate effectively for the long term on technology specific matters, such as safe harbors for online service providers…as soon as technology-related laws are adopted, technology changes...The Copyright Office could play an important role in interpreting the law and creating guidelines.[328]

The specific mention of ISP liability in regard to the interests of authors is significant. The Copyright Office plays a key role in the everyday practice of notice and takedown and ISP liability as codified in the Digital Millennium Copyright Act. To be eligible for safe harbors, an ISP must register with the Copyright Office and the Office maintains that database. The Authors Guild prepared statement appears to advocate for broadening the powers of the Copyright Office in regard to ISP liability, especially in regard to updating the law to reflect technological changes. However, it is unclear what this would mean.

Four months later, on January 27th, 2015 Congress hosted two hearings that addressed the president's free trade agenda. Both hearings included testimony related to copyright policies in the digital environment and the TPP. According to the record, The House Ways and Means committee hosted a hearing entitled, "Rep. Paul D. Ryan Holds a Hearing on the U.S. Trade Policy." The hearing included one invited witness, USTR Michael Froman. Froman entertained questions from the committee in regard to the TPP and TTIP, as well other agreements. The balance of the questioning related to specific trade agenda that related to each member's district. In addition, there were a number of challenging questions from committee members about transparency and having access to

[328] *Id.* at 95.

the texts. Internet policy was addressed in terms of data localization requirements and global ecommerce. The artisan platform Etsy.com was specifically mentioned in this context. Copyright was addressed only at one moment. Rep. Loretta Sanchez from Orange County California pressed USTR Froman on enforcement, "The difficulty that we -- that I've had in prior trade agreements is the issue of enforcement because you can have an agreement but if there's no enforcement of that or weak enforcement of that, you know, it's not worth the paper that it is written on."[329] In his response, USTR Froman connects the cultural industries, U.S. job growth, copyright enforcement, and ISP liability:

> So, in TPP, for example, we are promoting strong copyright rules, strong enforcement mechanisms, whether it is on camcording or the illegal downloading of copyrighted material from satellites or from cable. We are trying to find the right balance, consistent with U.S. law, with regard to ISP liability, and the relation to that to copyright enforcement. And, of course, all of those obligations, under TPP, will be both higher than TRIPS from the WTO, and fully enforceable, under the TPP dispute settlement mechanism.[330]

USTR Froman's language is important to recognize in regard to ISP liability. His choice to describe the USTR's goals in terms of finding the "right balance", "consistent with U.S. law" is notable given the later resistance from civil society groups in regard to the TPP's restrictive and market-led version of notice and take-down.

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[329] U.S. TRADE POLICY AGENDA: HEARING BEFORE THE H. COMM. ON WAYS ON MEANS, 114TH CONG., *supra* note 317 at 52.

[330] *Id.* at 52.

The Senate Finance Committee also held a hearing on this same day entitled "President Obama's 2015 Trade Policy Agenda." USTR Froman was again the only invited witness. Sen. Wyden of Oregon pressed Froman on internet freedom and users' rights. In his questioning, the Senator connects an open internet, political freedom, and the impact of ISP liability. The exchange addresses the topic, but Senator Wyden abruptly pivots, rather than delving into substantive debate. Senator Wyden begins the exchange:

> Ambassador, I want to talk with you for a couple of minutes about the importance of a free and open internet. It is obviously critically important to our economy, but it is also a platform...for the free exchange of ideas...so what I would like to hear briefly is how you are going to make sure that nothing in these agreements will undermine an open internet?[331]

In turn, Ambassador Froman then recognizes the contentious nature of recent internet policy debates in the U.S. and the resistance from other TPP member states, without directly mentioning speech rights or the specifics of the debate:

> We view the TPP as an opportunity to bring into the digital economy fundamental principles from the "real" or the physical economy, including the importance of the *free flow of information* and data across borders and maintaining a free and open internet. So, what we are pursuing in TPP is based on the approach that has been crafted here under U.S. law, including around issues like ISP liability, or around technology protection measures, or around copyright, making sure there

[331] PRESIDENT OBAMA'S 2015 TRADE POLICY AGENDA: HEARING BEFORE THE S. COMM. ON FINANCE, 114TH CONG., *supra* note 289 at 35.

> are strong copyright laws. But at the same time, this is the first trade agreement in history that we will put forward that allows for exceptions and limitations to copyright consistent with U.S. practice. So, our approach has been very much consistent with that approach.[332]

Senator Wyden responds,

> I just think that millions of Internet users want it clear and they want it straightforward that nothing is going to be done to undermine an open internet. And particularly they want to buttress the victories that have been won here and look to overseas opportunities for the same kind of policies.[333]

Discussion

Once adopted, the TPP could affect billons of users in TPP countries but there is little evidence that their interests were given serious consideration in international negotiations and the debates within the U.S. Congress. The time for testimony was in fact, dominated by technology industry associations and little time was offered to the copyright industries or digital rights NGOs. Internet platforms were represented by CCIA, ITIF, and the Internet Association and all argued in favor of exporting copyright safe harbors through the TPP. But spokespeople for these groups did have some disagreement over the details of TPP's version of safe harbors. This coalition of technology interests were supported by general business associations, including the National Foreign Trade Council and the U.S. Chamber of Commerce, who also argued in favor of safe harbors. Rightsholders were represented by three groups: The Copyright

[332] *Id.* at 35.

[333] *Id.* at 35.

Alliance, the International Intellectual Property Alliance (IIPA), and the Motion Picture Association of America (MPAA). Of these groups, only the IIPA was invited to testify in person in front of Congress. The MPAA and the Copyright Alliance submitted statements for the record for two hearings. These rightsholder groups often disagreed with the technology industries but had less of an opportunity to express those views in the front of Congress or at the ITC. There was very little evidence in the record of the extended and contentious political battle between the platforms and rightsholders that took place during the debates surrounding Stop Online Piracy Act (SOPA) and the Anti-Counterfeiting Trade Agreement (ACTA) in 2012.

If adopted by all member states, the TPP's copyright provisions could further privatize the policing of copyright online in many jurisdictions. There would be few requirements to create roles for government in the enforcement of digital copyright, unless states chose to involve courts or other regulatory bodies. Member states would have the option of removing most of the user protections that are found in § 512 of the DMCA. There would be few requirements for the content of takedown notices and removed content could stay-down indefinitely, unless states implemented their own user safeguards. Members could create a system of counter-notices, only if their governments chose to do so. If member states chose to implement the bare minimum of standards in the TPP, rightsholders and platforms would be able establish more efficient automated systems that lessoned the small amount of friction that exist in the DMCA-based process. Platforms would not be required to check for the validity of a notice and rightsholders could write notices in a way that best suited their preferences for efficiency.

The narrative(s) of the TPP's copyright safe harbors provisions in these hearings was shaped primarily by the office of the USTR and the technology industry groups. The broad coalition who argued in favor of the TPP's version of safe harbors deployed two core discourses to shape the public narrative about these policies: *21st century agreement* and the *digital economy*. These stakeholders, along with the USTR, supported these discourses with a number of related arguments: the TPP is *consistent with U.S. law*, *TRIPS must be updated* for the digital age, and the lack of notice-and-takedown systems in TPP countries is a *non-tariff barrier to trade*. I argue that these three arguments can help us understand what the USTR and tech industry lobbyists may mean when they claim that the TPP is a 21st century agreement or that the TPP is the needed legal framework for the digital economy. First, a U.S.-led global internet economy could be created in the image of TRIPS i.e., trading partners would agree to a rule book that most favored U.S. interests and the interests of U.S.-based corporations. Second, trade rules that dictate internet regulation should be modeled after U.S. law – because, as the argument could go, U.S. law works best for the stakeholders that create U.S. jobs and grow the U.S. economy. Third, U.S. technology companies and their investors need to a favorable legal environment to expand and compete overseas.

During the timeline of TPP negotiations U.S.-based platforms including Google, Facebook, Apple, and Amazon grew to such a size that they eliminated or purchased nearly all domestic competitors.[334] As a result, they amassed unrivaled political power domestically. Since the passage of the DMCA and Communications Decency Act, they

[334] See SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE (2017).

have also benefitted from a favorable legal environment at home via these well-protected immunity laws.[335] In fact, it could be argued that large Chinese technology firms are their only viable international competition.[336] As such, the TPP would begin the process of establishing favorable legal norms for U.S. allies and trading partners, so that these U.S. firms could more easily grow into Asia. The risk of liability would be minimized, along with the expense of adapted to differing legal systems.

The discourses deployed by U.S. tech firms in their congressional testimony – the 21st century agreement and the digital economy – largely hid this agenda from the public dialog. These two discourses in fact described what could be considered a universal and mundane set of interests – making the law more up to date and supporting small internet entrepreneurs. But in truth, there is little that is mundane or universal about the TPP's copyright rules. They would in fact, benefit a very narrow set of interests and regulate the possibilities for billions of users in TPP countries. The interests and legal rights of those users – to free expression and due process – were largely absent from the Congressional record and therefore, left out of the public discourse surrounding the TPP's internet rules.

Chapter Summary

This chapter explored what exists in the public record of U.S. Congressional hearings in regard to the TPP and intermediary liability law. I also provide a detailed legal analysis of the TPP's safe harbor provision vis-á-vis users rights and the automation of enforcement. The documents assessed were all produced as transcripts of congressional hearings held over a five-year time frame, 2010 to 2016. The text of these

[335] See KOSSEFF, *supra* note 12.

[336] See GALLOWAY, *supra* note 335.

transcripts included oral testimony of invited witnesses, statements from members of congress, prepared statements from stakeholders submitted for the record, and various appendices. From 500+ pages of oral testimony and appendices, there appears to be only a handful of references to policies that are based on copyright provisions that currently define U.S. law, under the Digital Millennium Copyright Act. However, it was still possible to account for the actors, arguments, and discourses related to the policymaking process of the TPP and safe harbors. The chapter concludes with a discussion of the implications of these debates for users' rights and the political economy of internet policy in the U.S.

CHAPTER VII:

THE CANADIAN MODEL FOR STATE INTERVENTION IN DIGITAL COPYRIGHT

Introduction

Using the Canadian policymaking process as a case study, the purpose of this chapter is to describe in detail the policymaking process that led up to the final adoption of Canada's unique mechanism for governing copyright takedowns, notice-and-notice. As one section of the Copyright Modernization Act (2012), I will describe how the law governs copyright takedowns, outline how the policy was created and account for the various conflicts over rights that were expressed during the policymaking process. Given the competing interests of the Canadian government, such as fostering the digital economy, protecting domestic cultural industries, and adhering to democratic norms, I will describe and situate the discourses and arguments that are contained in the text of these documents, while connecting these responses to the various actors and coalitions involved. The actors, discourses, and arguments that are unique to the Canadian case are highlighted and connected to these geopolitical dynamics.

Notice-and-Notice

> "We would have to fill a whole floor with individuals in order to process them all. We haven't automated that system as we wait to see what copyright legislation will bring our way."[337]

[337] Canada. Parliament. House of Commons., LEGISLATIVE COMMITTEE ON BILL C-32: MARCH 22, 2011, BILL C-32, AN ACT TO AMEND THE COPYRIGHT ACT, EVIDENCE OF PROCEEDINGS. NUM. 19, 3RD SESSION, 40TH PARLIAMENT, 4 (2011), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-19/evidence (last visited Oct 1, 2018).

From 2000 to 2010, the Canadian Parliament had been considering a series of reforms that would address changes in technology and bring Canada into compliance with international treaties. The proposed changes were linked by parliament under the umbrella legislation, the Copyright Modernization Act.[338] Among other things, the Copyright Modernization Act standardizes enforcement on digital networks. In so doing, it adopted, as state policy, a voluntary and privatized agreement that had already been created between rightsholders and ISPs called *notice-and-notice*.

Semantically juxtaposed to the U.S. standard of notice-and-*takedown*, notice-and-notice involves no immediate taking down and a takedown is not required for the hosting platform to be shielded from liability. First, a copyright holder notices that a user has shared a song or a movie that they own the rights to. They then send a takedown request to the internet company that provides the hardware and software that enabled that sharing. *Rather than removing the song, the internet host forwards that request to the responsible user*. The notice that the user receives is similar to a cease-and-desist letter in that it includes threats of legal action.[339] While the notice-and-notice system seemed straightforward in the early 2000s, practices varied across actors, and by 2010, ISPs were claiming they couldn't process the volume of notices that were arriving from rightsholders in a timely fashion.[340] In the 2001, The Canadian Association of Internet Service Providers proposed that the government abandon plans to adopt the U.S. system of notice-and-takedown. And, in turn, advocated that notice-and-notice be used as the

[338] Cite the act

[339] In Canada, the same process is applied to illegal peer-to-peer file sharing. However, the notices are sent when the rights holder has evidence that a user is making available or downloading copyrighted through their home internet connection, for example.

[340] Id at 4.

framework to establish a clear set of rules to apply to all parties – standardized requirements for the content of a copyright notice and a timeline for notice forwarding.[341]

In the quote above, chief council for Bell Canada, implies that the 'system' in question, the Canadian digital copyright enforcement mechanism, notice-and-notice, had been managed manually, and the cluttered floors at the offices of Canadian ISPs, Bell, Telus, and Rogers have been full of paper of notices. Here, there is an implicit complaint about the cost and burden of the system itself and a direct request to government to expediate the legislative process, to provide the rules that automation requires.

The Canadian Modernization Act provides this clarity. First it defines what a copyright notice must contain: the identifying information for the claimant (the rightsholder), the name or title of the work in question, the claimant's interest in the copyrighted material, the URL of the infringing post or link, and the timestamp for the recording of the copyright violation. In addition, to ensure the benefits of safe harbors, the statute requires that platform is obligated to forward the notice on to the user quickly, or "as soon as feasible".[342] This set of requirements creates both the guidelines for a shared practice amongst all rightsholders and intermediaries and it also provides the details that all parties need to create automated systems for notice sending and forwarding.

In addition, the law provides ISPs with only one data retention requirement. After receiving the notice, ISPs must keep the user's identifying information for sixth months.

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[341] Ottawa: Industry Canada and Department of Heritage, *Response from the Canadian Association of Internet Service Providers: Submission Received Regarding the Consultation Papers* (2001), https://web.archive.org/web/20110605062547/http://strategis.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01105.html.

[342] Canada. *Copyright Act* (R.S.C., 1985, c. C-42), s. 41.26(1)

Unless the rightsholder decides to sue the user, the ISP is not obligated to release it to anyone or keep the user's data for a longer period of time. Finally, if a user fails to remove the copyrighted content from a hosting platform or fails to stop downloading pirated material, they can be fined, but no more than $10,000.[343] Even if the accused user does not remove the copyrighted content, the ISP is still shielded from liability. These three defining elements of notice-and-notice: the notice requirements, the data retention rules and the limits on statutory damages, represent the legal infrastructure that puts into force the intent of notice-and-notice – *to incentivize the user's own action to remove allegedly copyrighted material that they have posted*.

Notice-and-notice provides two key protections for the user that are not in place in other jurisdictions. First, there is more protection of due process, as users are incentivized to self-enforce. Second, the user's identity is protected by the platform or the ISP. The platform is not required to release that personal information until there is legal action. In theory, this user self-enforcement shields the internet platform from legal liability in regard to both copyrights and free expression rights.

Case Law and Statutory History

The Canadian Constitution protects freedom of expression as a fundamental freedom, as it is a foundation for individual liberty and a functioning democracy. A number of laws have protected freedom of expression in Canada, but in the Constitution Act of 1982, the Canadian government put into force the Canadian Charter of Rights and Freedoms which implements constitutional protection for freedom of expression, freedom of the press and freedom of "other means of communication" as fundamental

[343] Id.

freedoms.[344] The Charter of Rights and Freedoms took over a decade to complete and was the product of extensive public involvement and social advocacy. Much of this advocacy centered on how The Charter handles limitations.[345] Ultimately, the final text ensures that limits on rights must be "prescribed by law". The limitation clause acknowledged that freedom of expression is not absolute. The charter specified how these limits are permitted and thereby more clearly defined how power to limit speech can be exercised over the majority in a democratic system.[346]

The second related and influential backdrop to Canada's approach to digital copyright is the data privacy regulation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), passed in 1999.[347] The statute stands out against the U.S.'s approach to privacy, in its user-focused policy intent. PIPEDA promotes the personal control of one's own data and requires platforms to obtain permission from the user before they disclose personal information to a third party or use personal data for another purpose than originally agreed to. It is the emphasis on personal control that appears to be unique to Canada.[348] However, the intent of policy, to protect the user's privacy from state and corporate misuse, also shares much in common with the E.U. Privacy Directive. In this way, PIPEDA has some bearing on the Copyright Modernization Act's handling of intermediary liability, in that it codifies a uniquely

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[344] Canada. *Charter of Rights and Freedoms*, s. 15, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

[345] LORRAINE WEINRIB, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution* (2001), https://papers.ssrn.com/abstract=2126650 (last visited Mar 18, 2019).

[346] *Id.* at 724.

[347] Canada. Personal Information Protection and Electronic Documents Act, (S.C. 2000, c.5)

[348] Avner Levin & Mary Jo Nicholson, *Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground*, 2 UNIV. OTT. LAW TECHNOL. J. 357–395, 392 (2005).

Canadian approach that protects user data from being passed between firms without consent. Rather than the U.S. model of privacy as individual liberty or the European model that sees privacy as dignity, the Canadian model defines privacy as the bundle of rights that allow the user control over use and transfer. Levin & Nicholson emphasize the importance of domestic influences and public pressure to protect personal privacy and the right to control personal information.[349] PIPEDA establishes this framework for all future laws that affect what can be shared, to whom, and for what purpose and the right to remain anonymous.

Thirdly, the need for intermediary liability statute in Canada is also connected to the Canadian Supreme Court's decision in the case of the Society of Composers, Authors and Music Publishers (SOCAN) v. Canadian Association of Internet Providers (CAIP), known commonly as the Tariff 22 decision.[350] Tariff 22 is seen to be the leading case on digital copyright and ISP liability in Canada[351] and has been key to defining the rights and responsibilities of ISPs when it comes to illegal content of all kinds on their networks. Essentially, the court upheld an earlier decision by the Canadian Copyright Board that defined ISPs as passive intermediaries by confirming the Copyright Board's decision that providing the means for communication is not the same as communication

[349] *Id.* at 393.

[350] *Society of Composers, Authors & Music Publishers of Canada v Canadian Association of Internet Providers* 2004 SCC 45, [2004] 2 SCR 427 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2159/index.do?q=SOCAN> *[SOCAN v CAIP]*

[351] For more on related court decisions see Supreme Court of Canada, Society of Composers, Authors and Music Publishers of Canada (SOCAN) v Canadian Assn. of Internet Providers (CAIP), 2004 SCC 45 | wilmap, , https://wilmap.law.stanford.edu/entries/supreme-court-canada-society-composers-authors-and-music-publishers-canada-socan-v-canadian (last visited Mar 18, 2019).

itself.[352] Both decisions, of the Board and the court, upheld the common carrier exception clause of the Copyright Act that exempted ISPs from liability by defining them as only conduits of information, not publishers, as would be the case in traditional media. Tariff 22 refers to the specific Tariff number that was proposed by SOCAN in 1996. SOCAN proposed tariff would collect royalties on the digital transmission of musical works to be paid by the internet service providers and telecommunication companies that provide the means of that transmission. The Copyright Board ruled against SOCAN in 1999 and SOCAN appealed to the Supreme Court. And the court ruled on the case in 2004. In its opinion, the court laid the groundwork for a system that designates the notice as the legal document that ascribes liability, and in so doing placed the burden of monitoring hosted content on the rightsholder. Judge J Binnie wrote in the decision, "copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g., if it has notice that a content provider has posted infringing material on its system and fails to take remedial action." Here the court went further than the copyright board in defining knowledge of infringement. The Copyright Board ruled that "Even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement."[353] But, judge Binnie's concluded that an ISPs lack of action (takedown or filtering) after a notice is received can create liability. Actual knowledge is defined as a received copyright notice and ISPs are released from a duty to monitor on their networks, even though they may know that illegal activity is

[352] Pierre-Emmanuel Moyse, *Decision "Tariff 22" of the Canadian Copyright Board and Internet Law Related Issues* (2000), https://papers.ssrn.com/abstract=3140248 (last visited Mar 19, 2019).

[353] SOCIETY OF COMPOSERS, AUTHORS & MUSIC PUBLISHERS OF CANADA V CANADIAN ASSOCIATION OF INTERNET PROVIDERS, *supra* note 28 at 124.

taking place across their software, services, and cables. The court's decision in Tariff 22 can be interpreted as a legal foundation for expansion of operations for both telecommunications and platforms intermediaries, as maintains the court's view that technologies that merely provide the means of communication are content neutral. Along with the Charter of Rights and Freedoms and the PIPEDA it creates the institutional foundations of notice-and-notice and Canada's approach to the building a foundational set of property laws that foster capital investment in digital economies.

It appears that notice-and-notice complies with existing case law, the Charter of Rights and Freedoms and existing privacy statute, and functions as a form of enforcement. It defines what a notice has to say, includes clear instructions for when it must be forwarded and provides a mechanism for protecting the identifying information of the accused user. It absolves ISPs from any obligation to monitor and police traffic on its own networks for copyrighted content. That responsibility is placed squarely on the rightsholders – in many cases, large entertainment companies and artist organizations, such as SOCAN. Additionally, it absolves the ISP from the responsibility for taking down, or filtering the infringing content, by placing that responsibility on the user. The threat of fines incentivizes the user to take action on removal of the content that they themselves posted. The hosting ISP neither has to monitor for copyrighted content, nor take it down when it is identified via notice. In so doing, it makes hosting platforms and search engines liable and puts the burden of actual knowledge of infringement back onto the platform. In the spirit of SOCAN's proposed Tariff 22, it asks platforms to transfer some of the revenue they make from facilitating the distribution of copyrighting to the

owners of those copyrights or pay for the removal of that content from their networks.[354] When held up against this new possible direction being proposed in the E.U., we can see the significance of the Canadian model, in regard to users' rights.

1997	Canada Signs World Intellectual Property Organization (WIPO) Internet Treaties
1999	The Copyright Board releases its ruling on the Tariff 22 case, common carrier clause of copyright act applies to internet intermediaries.
June 2001	Government launches Section 92 review process, releases three consultation papers, 700 Canadians submit public comments on the proposed reforms
March 2002	Government holds a series of in-person public consultations on copyright reform.
October 2002	Government releases its Section 92 report with recommendation to adopt DMCA-style notice and takedown system
March 2004	Government releases *Status Report on Copyright Reform*, reversing course to propose two versions of notice-and-notice.
June 2004	Canadian Supreme Court upholds the Copyright Board's decision in Tariff 22 case, upholds common carrier clause of the copyright act, introduces notification as basis for liability
June 2005	Minister of Canadian Heritage introduces Bill C-60, An Act to Amend the Copyright Act. Notice-and-notice is included. Dies on order paper in November due to new elections.
January 2006	The Department of Industry commissions a study on the economic impact of the notice-and-notice regime. Surveys all major ISPs in Canada.
June 2008	Minister of Industry introduces Bill C-61, An Act to Amend the Copyright Act. Notice-and-notice included with no changes. Bills dies in September when new elections are called.
June 2010	Bill C-32, Copyright Modernization Act is introduced to the House of Commons.
Nov. 2010	Legislative Committee on Bill C-32 begins to hear testimony
March 2011	Legislative Committee on Bill C-32 ends on its 20th meeting
September 2011	Bill C-11, Copyright Modernization Act is Introduced
February 2012	Legislative Committee on Bill C-11 begins to hear testimony
March 2012	Legislative Committee on Bill C-32 ends on its 11th meeting
June 2012	Bill C-11 achieves royal assent

Figure 7.1: The Timeline of the Copyright Modernization Act

Notice-and-Notice's Legislative Timeline

The digital copyright reform process in Canada took over twelve years, took four rounds of legislation and was completed in the 2012 with the passage of the Copyright Modernization Act (see figure 7.1). In contrast to previous political moments, the Canadian public took great interest in the debates and domestic pressure was applied from a growing number of stakeholders from across diverse sectors of Canadian social and economic spheres.[355]

The WIPO internet treaties were completed in 1997 and the United States passed in the Digital Millennium Copyright Act in 1998. Activist resistance influenced parliament through a series of public consultations and hearings held by the departments of Industry and Heritage that took place from 2001 and 2002.[356] At the beginning of this process the government wanted a U.S. style approach similar to notice-and-takedown. Public interest to this proposal had reached levels that were surprising to the government and the small groups of experts that had been working on copyright for decades. In 2002 and 2003 ISPs, small internet providers, lawyers, and bloggers formed a political coalition to advocate for users and consumers rights. These groups fought against notice-and-takedown and moved to replace it with notice-and-notice, which was already being used on a voluntary basis by ISPs and rightsholders. In 2004, then, the departments of

[355] Michael Geist, *The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 169–205 (Ruth L. Okediji ed., 2017).

[356] HAGGART, *supra* note 41 at 172; Sara Bannerman, *Canadian Copyright: History, Change, and Potential*, 36 CAN. J. COMMUN. (2011), http://www.cjc-online.ca/index.php/journal/article/view/2321 (last visited Dec 5, 2017).

industry and heritage jointly released a new report declaring the government's support for notice-and-notice, reversing its earlier position.[357] Haggart (2014) explains this change in terms of two domestic influences, the institutional power of the largest telecom companies in Canada (Telus, Rogers, and Bell) combined with the Supreme Court's ruling in the Tariff 22 case (as discussed above). Efforts to legislate notice-and-notice began in 2004 with Bill C-60 and it carried through, virtually unchanged through three more rounds of legislation, including C-61 (2008), C-32 (2010), and C-11 (2012).[358]

Geist on the other hand, attributes this policy shift to the growing influence of a coalition of groups, led by users' rights advocates who were opposed the government's position and advocated for a notice-and-notice regime.[359] The proposal of this coalition, to codify notice-and-notice was bolstered by the fact that it had already been in place, supported by a privatized agreement between the music and film industry in Canada and traditional internet service providers that began in 2001, soon after the Copyright Board's decision on Tariff 22 case.[360] The Canadian Association of Internet Service Providers (CAIP), the Canadian Cable Television Association (CCTA), and the Canadian Recording Industry Association (CRIA) agreed to follow a process whereby the "CRIA notifies the ISPs in writing about an alleged infringement of copyright by a customer of the relevant ISP; upon which the ISP notifies its customer in writing and also sends a written confirmation to the CRIA that the notification has happened."[361] The mechanism

[357] HAGGART, *supra* note 41 at 174.

[358] *Id.* at 174.

[359] Geist, *supra* note 356.

[360] HAGGART, *supra* note 41 at 174.

[361] Judit Bayer, *Liability of Internet Service Providers for Third Party Content*, 1 VIC. UNIV. WELLINGT. WORK. PAP. SER. 1–110, 58 (2008).

was initially designed to combat both illegal downloading via peer-to-peer networks and the illegal posting of copyrighted material and links to public bulletin boards.[362] No official contract appears to exist for the original private agreement, submissions by the Canadian Association of Internet Providers (CAIP) to the 2001 copyright review process reveal the details of the non-binding agreement. According to CAIP, the industry practice involved notice writing and notice forwarding. The rules for compliance were not set and the specific requirements for a notice were not standardized. But, in practice, it operated in a way that seem to function effectively.[363]

The first appearance of notice-and-notice in a bill in the House of Commons came in 2004 in the copyright reform Bill C-60. In 2003, CAIP submitted a report to House of Commons Standing Committee on Canadian Heritage to advocate for national copyright reforms and a specific provision for notice-and-notice. The report made specific recommendation for the how notices should be written and how the process should function.[364] But a patronage scandal involving Prime Minister Paul Martin in November of 2005 resulted in a vote of no confidence, the dissolution of parliament and new elections. All in-process legislation was tabled.[365] The draft of C-60 did include the model language for notice-and-notice that would influence future attempts to codify

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[362] Canada. Parliament. House of Commons., *supra* note 338 at 4.

[363] Canadian Association of Internet Providers (CAIP), '"Preliminary Reply Comments to Industry Canada and the Department of Canadian Heritage Government of Canada Copyright Reform Process"' (October 22,2001) at 3 as cited in Scott Nesbitt, *Rescuing the Balance? An Assessment of Canada's Proposal to Limit ISP Liability for Online Copyright Infringement*, 2 CAN. J. LAW TECHNOL. 115–133 (2003).

[364] Bernstein, Andrew & Dyck, Tyson, *ISP Liability: Canada's Proposed Copyright Reforms - Strategy - Canada*, MEDIA LAW RESOURCE CENTER (2004), http://www.mondaq.com/canada/x/28043/technology/ISP+Liability+Canadas+Proposed+Copyright+Reforms (last visited Mar 20, 2019).

[365] Andrew Palmer & Ljunggren, David, *Canadian Premier Loses Confidence Vote*, THE WASHINGTON POST, November 29, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/28/AR2005112800378.html (last visited Dec 2, 2017).

digital copyright in Canada. The basic mechanism was there – when an ISP receives a takedown notice, it forwards it directly to the end user and the ISP could not release the personal identity of the user for six months.[366] Fines are levied on the ISP for failure to forward the notice and for releasing the identity of the end-user before the end of the six-month wait period. The fines for releasing the user's identity ($10,000) are twice the amount for failing to forward the notice. C-60 goes further to protect the ISP, by explicitly defining actual knowledge of infringement as "actual knowledge of a decision of a court of competent jurisdiction to the effect that the other person who has stored a work or other subject-matter, or a reproduction of it, infringes copyright by so storing it or by the way in which the thing so stored is used."[367]

Digital Copyright Debated: C-11 and C-32

Notice-and-notice lasted, in this form, through three more attempts at copyright reform that eventually ended with the royal assent of C-11, the Copyright Modernization Act in 2012. The legislative timeline lasted eight years from the first reading of C-60 in 2004 to the final passage of C-11 in 2012. Bills C-60 (2005), C-61 (2008), C-32 (2011), and C-11 (2012). All contained the original framework of notice-and-notice, included in C-60, but with minor adjustments. The first two rounds of legislation, C-60 and C-61 never advanced beyond the first reading in the House of Commons. But, bills C-32 and C-11 were studied through extensive hearings, each with its own special legislative committee. The legislative committee for C-32 met 20 times during the winter of 2010 and 2011 and the committee for C-11 met 11 times during February and March of 2012.

[366] Canada. An Act to amend the Copyright Act (S.C., 2005, c. C-60), s. 40.1 (1)

[367] *Id.* s. 31.1(5) and Bayer, *supra* note 44 at 58.

Between the two committees, MPs heard from over 200 witnesses. The testimony, discussions, and submitted statements in these special parliamentary committees reveals the details of the central debates that characterize the implementation of Canada's domestic digital policy.

During this period, the international infrastructure of copyright takedowns was being built to facilitate automation and the bulk removal of illegal content. Internationally, notices and takedowns were increasing exponentially, given the development of artificial intelligence (AI) tools that allowed for bulk removal and notice sending and the reliance by U.S. rightsholders on the notice-and-takedown regulation. At the same time, Canada's digital policy was being influenced by two free trade agreements, The Trans-Pacific Partnership (with the U.S. and 11 other countries in the Pacific Rim) and the Anti-Counterfeiting Trade Agreement (led by the U.S. and Canada) that each included extensive regulation of intellectual property. This new international effort, especially in the case of ACTA, had been met with an unprecedented level of citizen backlash – a digital rights movement that had the backing of major U.S. intermediaries.[368]

There were three groups of stakeholders who had some concern with intermediary liability: strict copyright advocates who were seeking to implement a system similar to the United States' system of notice-and-takedown, those seeking a middle-ground between the two that would place more responsibility on the intermediary and a third group comprised of technology companies, and advocates who supported notice-and-notice. Each of the groups of stakeholders had different sets of arguments regarding the

[368] See Parks, *supra* note 53.

level of responsibility intermediaries should assume, why intermediaries should take on more (or less) responsibility for the copyright infringement on their networks, how those responsibilities should be enforced, the role that the state should play in digital regulation, and the importance of intermediary liability to Canada's status as a global trading partner.

Two government agencies also testified and presented views on intermediary liability that were not always consistent with the MPs positions: The Department of Innovation, Science, and Economic Development (ISED) and the Department of Canadian Heritage. According to published transcripts, the first meeting of the legislative committee that hosted witnesses heard from both the Minister of Industry and the Minister of Heritage and Official Languages. Their published testimony points to the attitude of the Harper government in regard to intermediary liability. Much like the uniquely Canadian approach to privacy,[369] the interests of consumers are placed on equal consideration with the interests of copyright owners–both artists and entertainment companies.

Anti-notice-and-notice advocacy came from performers, broadcasters, songwriters, filmmakers, creative industry associations, and artists, as well as their allies in Parliament who argued that intermediaries were benefitting from cultural content, but not paying for the benefits they received. During the legislative committee research on the Copyright Modernization Act, Pablo Rodriguez, a liberal MP from Quebec, questioned the Minister of Industry, a cabinet member under the conservative Harper administration. MP Rodriguez asks,

[369] See Levin and Nicholson, *supra* note 349.

> In your opinion, do Internet service providers have certain responsibilities? When I talked to them, they always say that they are just the "tube" carrying the information, when in my opinion, they are much more than that. They play a fundamental role, and they have certain responsibilities. In your opinion, at what point do their responsibilities come into play?[370]

The minister of industry, Tony Clement responds by emphasizing the importance of the consumer's needs, "…if you add more duties and responsibilities for internet service providers, you run the risk of their not providing as robust a service to consumers as consumers want in this country."[371] The Minister of Heritage, James Moore adds to Clement's testimony and signals the unity within the Harper cabinet on notice-and-notice,

> Service providers also have a responsibility to participate and must participate in the "notice and notice" regime that is part of this legislation as well, to help engage in the enforcement of intellectual property rights. This is an obligation that this legislation imposes on them to join with us, with all Canadians, in stepping up and confronting those who are doing the infringing.[372]

These two arguments together, that notice-and-takedown would hurt consumers and ISPs are already doing enough to combat piracy, ultimately carried through the remaining two years in the legislative process and The Copyright Modernization achieved Royal Assent in 2012 with notice-and-notice intact. The strength of united Harper government

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[370] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-32: November 25, 2010, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 3, 3rd Session, 40th Parliament.* 8 (2010), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-3/evidence (last visited Oct 1, 2018).

[371] *Id.* at 8.

[372] *Id.* at 9.

appeared to win out over intense opposition from creative industry associations, large rights holding corporations, and their allies in Parliament.

Who were the actors who sought to influence parliament on notice-and-notice, what arguments, rationales, and discourses did they use to justify their positions and what were the responses that characterized the debate? Here, I account for the coalitions that together sought to align Canada more closely to the United States and those that advocated for the uniquely Canadian solution of notice-and-notice.

Actors and Arguments

Two distinct groups of actors emerged from the debates on C-32: those pushing for the adoption of the U.S. model of notice-and-takedown, where ISPs were required to remove targeted content immediately, and those that argued in support of the current Canadian standard, notice-and-notice (see figure 7.2). The notice-and-takedown group was made up of a disparate collection of artists' organizations, software companies, entertainment companies, businesses associations, and lawyers, all closely aligned in their advocacy for stricter copyright protections. But, given the importance of copyright to cultural policy in Canada, a key constituency in this group of anti-notice-and-notice advocates are identified as Canadian artists, creators, and the cultural community. The testimony and submitted briefs that advocated for notice-and-takedown are important to examine, given what they can tell us about how the U.S. standard of notice-and-takedown is understood and framed by Canadian copyright industries and how the privatization of regulation has been debated in this national context. The openness of the process and the transparency of the legislative record sits as an example of one public debate over the validity and efficacy of U.S. law.

Pro-Notice-and-Notice

- Telecommunication and Platform Intermediaries, appearing under the Business Coalition for a Balanced Copyright:
  - Telus
  - Rogers
  - Bell
  - Yahoo!
  - Google Inc.
  - Tucows
  - Canadian Association of Internet Providers
  - Shaw Communications
- Lawyers and Advocates
  - Michael Geist, University of Ottawa
  - Russel McOrmond
  - Canadian Internet Policy and Public Interest Clinic
- Government Authorities and Agencies
  - The Department of Industry
  - The Minister of Canadian Heritage and Culture

Anti-Notice-and-Notice

- Canadian Media Production Association
- Society of Composers, Authors and Music Publishers of Canada
- The Creator's Copyright Coalition
- Union des Artists
- Canadian Recording Industry Association
- Canadian Motion Picture Distributors Association
- IATSE
- Business Software Alliance
- Artisti
- Olé
- Société québécoise de gestion collective des droits de reproduction (COPIBEC)

Middle Ground

- Entertainment Software Association of Canada

Figure 7.2. Canadian Copyright Modernization Act: Actor Coalitions

The pro notice-and-takedown group argued that nothing short of notice-and-takedown was viable. To them notice-and-notice was not just ineffective, but a fake policy that offered only the mirage of protection. Comments focused on the *simplicity* of notices that foreclosed any potential for *real* enforcement. In effect, rightsholders argued that notice-and-notice is a government subsidy for intermediaries to profit from piracy. And, therefore, it is immoral for intermediaries to get away with such little obligation. The solution would include an immediate takedown requirement, as this is the best tool for protecting revenues on open networks.

In her testimony, one of Canada's most famous recording artists, Loreena McKennitt and founder of the recording label Quinlan Road Limited questions the morality of the Tariff 22 decision that codified intermediaries as mere conduits.

> I believe the ISPs and the website owners should most certainly play a significant role in the management of that content that passes through their hands and be accountable for that...after all, it is these companies who are making their profits off the eyeballs that are driven to their site to access illegal content.[373]

In alignment with McKennit, Olé, Canada's largest full-service music publishers argued in their brief to the C-32 committee, "[C-32] provides no viable tools to allow creators and rightsholders to be fairly compensated…notice-and-notice…absolv[es] ISPs from any real responsibility."[374] In turn, Reynolds Mastin, counsel for the Canadian

[373] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-32: March 1, 2011, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 15, 3rd Session, 40th Parliament.* 4 (2011), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-15/evidence (last visited Oct 1, 2018).

[374] Ole, *Comments to Legislative Committee on Bill C-32* (2010), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/related-document/5401532 (last visited Dec 5, 2018).

Media Production Coalition argued, "We think it's important that there be an equitable process, but we also believe that a notice and notice regime does not provide the deterrent that we need for serial infringers."[375] Few comments in this group recognized the potential externalities of immediate takedowns. And most framed their arguments on the benefits of quick enforcement. The Union des artistes, Artisti, of Quebec, argued that immediate takedown would limit losses from piracy, but omits any discussion regarding the implications of the means of enforcement,

> The creation of such a requirement [notice-and-takedown] would have the benefit of giving rights holders real ways to stop infringements and do so quickly. Indeed, in many cases, early intervention, rather than a simple notice system whose effectiveness depends on the willingness of the copyright infringer, could severely limit the economic damage caused to the rights holder whose creation is found illegally on the Internet.[376]

Implicit to these arguments are differing positions on the rights of users to due process verus the faith in the rightsholders' allegation of infringement. Rightsholders here argue for a system that places that trust in the submitter of the notice – the artist themselves, the association, or publishing company that owns the copyright. In a privatized system, such as notice-and-takedown these for-profit entities are the arbiters of legality. Their decisions must consider free expression rights, moral rights of the author,

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[375] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-32: February 1, 2011, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 9, 3rd Session, 40th Parliament.* 13 (2011), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-9/evidence (last visited Oct 1, 2018).

[376] Union des artistes, & Artisti, Union des Artistes, *Comments to Legislative Committee on Bill C-32* 5 (2011), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/related-document/5401532 (last visited Dec 5, 2018).

and fair dealing (fair use in the U.S.). Members of parliament from both major parties questioned the legality of this proposal in the Canadian context. In a hearing on bill C-32, Conservative MP Mike Lake (Edmonton) pressed this point,

> In [notice-and-takedown] there's no proof of infringement; you just ask for it to be taken down, and it has to be taken down regardless of whether there's infringement or not…. We do live in a country where due process is important…. You can't live in a world where we automatically take things down. It doesn't work that way.[377]

MP Lake as well as other MPs addressed this relationship between consumers' rights, free expression, and due process throughout questioning. Questions revolved around the relativity of justice in the digital environment. MPs and the pro notice-and-notice coalition argued that it is not just to automatically remove content without proof of infringement. However, rightsholders argued that, given the level of mass infringement, due process cannot be expected. Fundamental to their argument was trust in the rightsholder's judgement. Helene Messier of Société Québécoise de Gestion Collective des Droits de Reproduction (COPIBEC) argued on this point,

> Do you really believe that creators and copyright owners have so much time on their hands that they will spend it sending out unnecessary notices? In my opinion, if they take the trouble to report a possible infringement, it's because they

[377] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-32: February 10, 2011, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 12, 3rd Session, 40th Parliament.* 15 (2011), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-12/evidence (last visited Oct 1, 2018).

> have serious suspicions… People do not just get up one morning and decide to send out dozens of notices for no reason.[378]

MPs also questioned rightsholders on users' rights to contest a takedown. Geoff Regan, liberal MP from Halifax also pressed rightsholders on this issue,

> One of the worries I have is that you have a small player who is a user or whatever and who has put up something that is allegedly infringing…. someone claims it's infringing. If you have notice to take down, the ISP has to take it down…rather than the person who's put it up having the chance to defend himself.[379]

Key to the rightsholders' arguments are the practical and infrastructural differences between the analog and the digital environment. Rightsholders argued that the volume of infringement made due process unrealistic. While MPs Lake and Regan questioned the legal justification for limiting due process in the digital environment. In questioning, Robert D'Eith of the Canadian Independent Music Association, argued what a number of cultural industry representatives were unwilling or unable to say.

> We believe that there should be some due process. What we don't believe is that it's practical to expect it. There are literally millions of infringements every day on the Internet—millions. Are we going to have to start millions of lawsuits because of the notice-and-notice provision?[380]

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[378] *Id.* at 16.

[379] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-11: March 6, 2012, Bill C-11, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 8, 1st Session, 41st Parliament.* 10 (2012), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-8/evidence (last visited Oct 1, 2018).

[380] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-11: February 29, 2012, Bill C-11, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 5, 1st Session, 41st Parliament.*

Advocates for Notice-and-Notice

The pro notice-and-notice group included user's rights advocates, lawyers, Canadian ISPs, and members of the Harper cabinet. This coalition appeared share a common set of arguments on notice-and-notice, but clearly had a different set of positions in regard to digital policy. Despite their institutional differences, their arguments were closely aligned around this central point – notice-and-notice is an effective deterrent and notice-and-takedown would be too intrusive. Once and end-user receives a notice that includes a threat of fines, they themselves will remove their post from the hosting platform and stop posting copyrighted content. Underlying this argument are a number of broader viewpoints that relate to both existing case law and previous statute. First, the pro notice-and-notice group argued that the user should have the right to leave their content live and intermediaries should not have the requirement to takedown content immediately i.e., there should be a version of due process built into the law. Second, a court should be the ultimate arbiter of legality, not a private individual artist or an institutional rightsholder. Third, the user has a right to informational privacy and the rightsholder should not have access to their identity, until a court releases their identifying information. Fourth, intermediaries are already doing their part and there is no need to require them to do more. Notice-and-notice does require them to take responsibility, as they must invest resources in compliance. Finally, a number of witnesses were also aligned in their disapproval of the U.S. model on both privacy and free expression grounds, but also in terms of its intrusiveness of the end-user.

16 (2012), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-5/evidence (last visited Oct 1, 2018).

Professor Michael Geist, of the University of Ottawa and Canada's leading expert on digital copyright and users' rights argued that notice-and-takedown lacked the privacy protections that are required by Canadian law. And he went further justify his position based, in part, on the experience of notice-and-takedown in the United States. He places the Canadian standard in direct opposition to the U.S. model, in terms of users' rights.

> I think the approach that the bill takes on notice and notice is one through which there is responsibility on the part of the ISP…. what it does is look at the experience in other jurisdictions and try to strike the appropriate balance so that there are remedies for rights holders and appropriate privacy and other protections for users.[381]

Professor Geist's testimony focused on the implications for the users' rights, while the technologist Russel Mc Ormond, directly addressed the question of privatization of enforcement and the morality of intermediaries as decision makers. This is one of the few references in the C-32 hearings on this point. McOrmond's position is in direct contrast to Ms. Messier's in terms of who should be given the authority to judging infringement. In support of notice-and-notice, he argued,

> …intermediaries should not be in the position of judging whether or not something is a copyright violation. It's not a simple yes or no. Most Canadians, most ISPs, are not lawyers, and nor do all lawyers agree on what is and is not an infringement.[382]

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[381] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-32: December 1, 2010, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 5, 3rd Session, 40th Parliament.* 6 (2010), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-5/evidence (last visited Oct 1, 2018).

[382] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-32: March 8, 2011, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 17, 3rd Session, 40th Parliament.* 6

Telecommunication Industry Coalitions

During the 19th committee hearing on C-32, the representatives and lawyers for the Canadian ISPs, TELUS, Bell, Rogers, and Shaw Communications all testified in favor of notice-and-notice. Their testimony includes a number of arguments regarding the appropriate role of the state and of corporate authority in terms of policing digital networks. There arguments mirrored those of user advocates who raised questions of privacy and freedom of expression. However, they emphasized the power and effectiveness of notice-and-notice and used their own data as evidence of efficacy. In alignment with the Minister of Industry, they cited the consumer's interest in paying for services without the threat of a service denial or a takedown.[383]

Craig McTaggart of TELUS argued that ISPs should not be working on behalf of rightsholders, "TELUS…encourages Parliament to arm rightsholders with effective tools to directly pursue those actively enable it [piracy]…"[384] But, he went further to invoke a specific Canadian legal foundation for notice-and-notice. In addressing privatization, he asserts the role of the courts and the specifically Canadian resistance to the privatization of legal authority. He argued, "ISPs cannot be put in a position of having to decide whether content should be taken down…Under Canadian legal values, only a court can determine whether a law has been broken."[385] Pam Dinsmore of Rogers, citing Rogers' own data of notices and user activity claims, "the notice and notice routine is effective at

(2011), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-17/evidence (last visited Oct 1, 2018).

[383] Canada. Parliament. House of Commons., *supra* note 371.

[384] Canada. Parliament. House of Commons., *supra* note 338 at 2.

[385] *Id.* at 2.

discouraging those people who are alleged to have infringed—only alleged to have infringed—from infringing again. We think it does put the fear of God into them and it is effective in doing that."[386] Ms. Dinsmore was questioned further by Sherbrooke MP Serge Cardin on why notice-and-takedown is undue interference on customers' activities. She responds, "The courts have to determine, with the information put forward by the rights holder, whether that alleged infringer actually is infringing…we are not in a position to make that decision.[387]

Over one year later, during the testimony on bill C-11, Jean Brazeau of Shaw Communications invoked the rights and needs of the consumer to critique the intrusiveness of the U.S. approach. In regard to notice-and-notice, he argues,

> We certainly think that notice and notice is a far less intrusive means to ensure that the government achieves its policy objective…. The response by the customers to those measures would be significantly negative. I think the measure is somewhat too draconian."[388]

Ultimately it is this argument that most addressed the interest of the Harper government. This theme, of the consumer's rights is echoed in the testimony of the Minister of Heritage and Culture and the Minister of Industry at the very opening of the legislative committee on bill C-32.[389]

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[386] *Id.* at 4.

[387] *Id.* at 10.

[388] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-11: March 5, 2012, Bill C-11, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 7, 1st Session, 41st Parliament.* 5 (2012), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-7/evidence (last visited Oct 1, 2018).

[389] Canada. Parliament. House of Commons., *supra* note 371.

ISPs, member of the Harper cabinet, and representatives from platform intermediaries argued that any move to adopt the U.S.-model of notice-and-takedown would conflict with the possibilities and options for customers. This framing, of users as customers, connected rights – the right to due process and free expression – to the needs of paying clients, clients that were fueling the growth of Canada's digital economy. Representatives of telecommunication and platform companies went further to argue that privatized enforcement has the potential to restrict innovation by limiting the construction of certain business models for hosted content. But testimony also reveals that these intermediaries had a particular aversion to the requirement that they monitor and police their own networks. These activities could not only prove to be expensive and potentially expose them to litigation, it appeared that the integrity of their brands were at stake. Innovation, customers' needs and therefore, the brand story of internet providers and platform companies are in conflict with extra-judicial takedowns, limiting access, and threatening users. These interests led to broad coalition of users' rights groups and powerful corporate actors that advocated against immediate takedowns and objected to government policies that required self-enforcement on the part of platforms, as requirement of safe harbors. Much like the Anti-SOPA coalitions in the United States in 2012 and the ACTA protests in the E.U., platform intermediaries joined with user advocates to argue in favor of a solution that limited the rightsholders ability to automate the limitations on access and more adequately protected users' rights.

Representatives from Canadian ISPs and content intermediaries were nearly united on these points. In testimony to the C-11 committee, Jacob Glick, counsel for Google Canada equates a takedown with an injunction and raises the question of

rightsholder power. Glick reframes a takedown notice as "lawyer's letter" that gives the rightsholder the power of an injunction with a mere letter. Key to argument is the question of the contextual circumstances of the legal action. An injunction in the analog context, according to Glick requires judicial action. Glick argues that there is no legal difference in the analog and the digital context, i.e., an allegation of infringement shouldn't be enough for an injunction in either context. He argues,

> You get the power of an injunction, which under law in normal circumstances is an exceptional legal remedy. So, you get the power of an injunction on an allegation in the lawyer's letter. That has proven to be problematic on a number of occasions…that provides a lot of opportunity for mischief and stifling of free expression."[390]

Therefore, to Glick notice-and-notice is not only a sufficient remedy for rightsholders it is more protective freedom of expression and limits the potential for overreach and abuse. Throughout the testimony, this point was held up as the cornerstone of the uniquely Canadian approach.

The Digital Economy Discourse

From what can be seen, MPs from different parties favored compliance with the WIPO treaties, liability protection for intermediaries, and protections for cultural works (as has been the case in a number of jurisdictions), however the record also reveals the stated goal of avoiding the United States' policy program through an independent and nationally relevant digital policy. Lines of questioning and arguments made by MPs and

[390] Canada. Parliament. House of Commons., *Legislative Committee on Bill C-11: March 1, 2012, Bill C-11, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 6, 1st Session, 41st Parliament.* 25 (2012), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-6/evidence (last visited Oct 1, 2018).

cabinet officials include references to a Canadian solution that stood up in the midst of international pressure. And, despite that pressure, Canadian officials, in collaboration with internet service providers, created their own version of an intermediary liability law, as they asserted the government's right to sovereignty in the area of copyright. In a speech to the House of Commons in October of 2011, The Minister of Heritage declared Canada's independence in this area, "Canadian Internet service providers have developed a unique model...The bill formalizes this practice into law. We disagree with the American approach with regard to copyright...for very good reason."[391]

The bill's sponsors and other officials connected the Canadian policy program directly with the government's digital economy strategy. Together, they appear to say that the growth and development of Canada's digital economy is predicated on set of digital laws that are uniquely Canadian. In the *Speech from the Thone* on March 3rd, 2010, to open the 3rd session of the 40th Parliament, Michaëlle Jean, Governor General of Canada couples Canada's digital economic growth with copyright reforms on a national level.

> To fuel the ingenuity of Canada's best and brightest and bring innovative products to market… [our Government] will launch a digital economy strategy to drive the adoption of new technology across the economy. To encourage new ideas and protect the rights of Canadians whose research, development and artistic

[391] Canada. Parliament. House of Commons., *Debates. No. 31 (41-1)* 2109 (2011), https://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-31/hansard (last visited May 13, 2019).

creativity contribute to Canada's prosperity, our Government will also strengthen laws governing intellectual property and copyright.[392]

To Jean, Canadian consumers and technology companies are the center of the strategy for growing the national digital economy. The stated strategy of the state protects the Canadian consumer's rights to due process and privacy while also protecting intermediaries from copyright liability. The end result of the Copyright Modernization Act is to give Canadian telecom companies and intermediaries an advantage over the intermediaries in other jurisdictions who face more heavy-handed enforcement obligations. Throughout the hearings on C-32 and C-11, Canadian officials and MPs repeatedly signaled their interest in providing Canadian intermediaries with that advantage. The state's interest, in this case, is to provide benefits for intermediaries – protection of the consumer's personal privacy and a low burden for safe harbors. They are released from both the actual cost of managing takedowns and the legal exposure to freedom of expression cases, while also overreaching into the lives and online activities of their customers. In this outcome, in fact, there is no incentive for them to overreach, to over-block to avoid liability. In the context of E.U. and U.S. statutes that do not provide those benefits, Canadian platform intermediaries are operating under a highly beneficial legal framework, while still taking responsibility and having obligations in regard to copyright enforcement. This one claim is asserted and is unquestioned throughout the government's testimony: limiting liability fosters private investment in the internet and that benefits all Canadians.

[392] Canada. Parliament., *Speech from the Throne to open the Third Session Fortieth Parliament of Canada* (2010), https://lop.parl.ca/sites/ParlInfo/default/en_CA/Parliament/procedure/throneSpeech/speech403 (last visited Apr 8, 2019).

Government officials from the department of industry and the department of Heritage deployed the discourse of the *digital economy* throughout the different channels of testimony, including debates, speeches, and submitted briefs. The vision of the thriving Canadian digital economy implies that a prosperous Canadian society can built similarly on the levels of wealth and investment that are evident south of the border. Reminiscent of discourses of the cultural economy or even the innovation economy, the digital economy focuses our attention on what private venture capital and innovation can do for us, but also leaves behind or diminishes the importance of updating legal and policy frameworks to foster more traditional creative industries such as film, television, and music. These are both encompassed by the digital and also excluded from policy priorities in the pre-platform era. The digital economy discourse also connects to the Canadian government's nationalist agenda to foster a trajectory of independently generated technology development as well asserting its political sovereignty to control its own legal structures for both intellectual property and digital rights. In the end, the digital economy promises nearly all needs and constituencies will be satisfied, birthing a society where entrepreneurs can foster growth, artists can thrive, and Canada can maintain its position as a middle-power status.

The Balanced Copyright Discourse

Advocates on both sides of the debates over the Copyright Modernization Act invoked the metaphor of *balance* to represent their positions in a positive frame. In terms of copyright, balance is often coupled with fairness to construct a narrative that positions the opposing policy position as unfair and elevates the proposed position as the solution to that unfairness. Balance identifies a middle ground where all stakeholders can find

partial satisfaction in their interests, but alas everyone had to compromise to the reasonable middle. Balance implies the benefit as balance itself–a good goal for a democratic society to achieve as it seeks to build a better democratic system. In other words, democracy has reached an efficacious end when a balanced process that includes all voices leads to a balanced outcome for those actors and the state. The United States Trade Representative (USTR) has invoked balance in its proposal for limitations and exceptions in the negotiations for the Trans-Pacific Partnership (TPP), but stopped short of requiring that national laws actually achieve that balance as a condition for their membership.[393] The Canadian supreme court has specifically referred to the balance of creator's rights and other interests–including innovation and users rights–in its opinions on a number of copyright cases.[394] But, the Canadian court's clarity on whose interests are being balanced constructs the tent under which the stakeholders sit. Without that clarity, balance could include only corporate interests, as in the balance between platforms and content producers, or could include a balance between users' rights and independent producers. Copyright statutes often are the result of prolonged negotiations between powerful industrial coalitions. In turn, the length and intensity of these negotiations are the narrative substance that is presented to argue for the fairness of the policy solution reached, despite who was, or who was not provided a voice in the process.

[393] Flynn et al., *supra* note 254 at 144.

[394] Edited Michael Geist, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* 476, 167.

This was the case in the hearings regarding the limitations and exemptions provisions of the Digital Millennium Copyright Act.[395]

We can say that the meaning of balance in terms of whose rights are being balanced and how the balance will be measured and defined is contingent on the positionality and identity of the person who is labeling a policy outcome or a policy process as balanced. At times the balance discourse appears to be a watered down and shallow descriptor deployed to justify the passage of the Act, but in other cases, the notion of balance is connected to the structural power of the actors whose needs are in play. When situated in fairness frame, the "fair balance" can reference the political power that each party has inherently to protect its own interests–thereby giving the notion of balance some political substance. Spencer Keys of the *Canadian Alliance of Student Associations*, in their testimony to the legislative committee on bill C-32 in December of 2010 assessed balance on the imbalance of economic power in the copyright system, "Yes, it is a fair balance, particularly because in this country you're not generally talking about individuals. You're talking about licensing collectives who absolutely have the capability to challenge the courts on behalf of individuals."[396] Keys did not specifically mention notice-and-notice, as their concern was focused on fair use rules that affect educational applications. But their testimony serves to deconstruct the fallacy of the balance discourse itself, a discourse that negates power differences by reducing each stakeholder to an equal player in the policy field. Keys implicitly asks what balance can

[395] BILL D. HERMAN & OSCAR GANDY, *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings* 137 (2005), https://papers.ssrn.com/abstract=844544 (last visited Sep 27, 2017).

[396] Canadian House of Commons, *Legislative Committee on Bill C-32: December 8, 2010, Bill C-32, An Act to amend the Copyright Act, Evidence of Proceedings. Num. 7, 3rd Session, 40th Parliament.* 4 (2010), http://www.ourcommons.ca/DocumentViewer/en/40-3/CC32/meeting-7/evidence (last visited Oct 1, 2018).

be achieved when the stakeholders in question have the legal resources to sue for infringement and students (and users) are left with few options to afford representation to contest takedowns or cease and desist letters (in educational cases).[397]

Discussion

The state's interest in the digital copyright policy program is based, in-part, on the need to create a favorable legal environment for venture capital investment to support the domestic growth of platform intermediaries.[398] Canada's digital economy is growing rapidly and highly concentrated. Digital advertising revenues grew from $3.8 billion in 2014 to $6.7 billion in 2017 with revenues are concentrated in two major players, Google and Facebook.[399] While mobile broadband adoption in Canada is lower than many other OECD countries, wired internet adoption is comparatively higher. Subscription revenues from wireline broadband have climbed from $1.8 billion in 2000 to $10.2 billion in 2017[400] and are concentrated in the three major Canadian providers: Rogers, Telus, and Bell. Throughout public testimony, representatives from these technology companies and the business coalitions they comprise have pointed to the legal structures that they say must be in place for their businesses to operate – with limited exposure to copyright liability in a predictable and disciplined marketplace. Without these protections and standardization, they argue, their businesses are strained and the legal terrain is

[397] *Id.* at 4.

[398] MATTHEW LE MERLE ET AL., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment* 28 (2011).

[399] Dwayne Winseck, Growth of the Network Media Economy in Canada, 1984-2017 16 (2018), https://ir.library.carleton.ca/pub/22657 (last visited Apr 10, 2019).

[400] *Id.* at 26.

uncertain.[401] And in turn, a favorable legal environment that limits liability and reduces the costs of compliance will lead to further tech investment.[402] The adoption and implementation of notice-and-notice in Canada suggests that some state actors, both in parliament and regulatory agencies are creating broader policy programs to foster private investment in platform technologies. In turn, these regulators have been more responsive to the influence of platform technology companies (those that are based in Canada and in the U.S.) than to the lobbying efforts of the entertainment industries and cultural interests.[403]

But the Canadian government has other competing interests in regard to internet policy – beyond its domestic platform economy. And the government has been subject to other coalitions of powerful and influential actors. While the state fosters investment in the digital economy, the film, music, and video game industries are also critical and growing sectors of the Canadian economy and important both to the export market and to Canadian heritage. For example, the music industry in Canada has gone through a profound transition in recent years, one that has mirrored the changes seen around the world in the past five years. While revenues from recorded music have declined, revenues from publishing, and internet distribution have grown alongside concerts and

[401] Canada. Parliament. House of Commons., *supra* note 2 at 5.

[402] Canada. Parliament. House of Commons., LEGISLATIVE COMMITTEE ON BILL C-11: MARCH 1, 2012, BILL C-11, AN ACT TO AMEND THE COPYRIGHT ACT, EVIDENCE OF PROCEEDINGS. NUM. 6, 1ST SESSION, 41ST PARLIAMENT AT 21 (2012), http://www.ourcommons.ca/DocumentViewer/en/41-1/CC11/meeting-6/evidence (last visited Oct 1, 2018).

[403] Dwayne Winseck, *Intermediary Responsibility*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF DIGITAL COMMUNICATION AND SOCIETY (Robin Mansell & Peng Hwa Ang eds., 1 edition ed. 2015).

performances. Total music industry revenues in Canada reached $2 billion in 2015 and revenues from internet and mobile delivery nearly doubled in 2016.[404]

While Canada is a net importer of cultural products, copyright reform has historically been an important component of cultural policy.[405] As such, leading companies within the domestic film, music, and video game industries support strong protections for copyright in the digital environment and have sought to limit exceptions and increase enforcement. And the Canadian government has historically supported the domestic film industries through tax incentives and direct investment, much which attracted Hollywood studios to produce films in Canada.[406]

As in many jurisdictions, national copyright policy is also a matter of international agreements and the various forces of policy diffusion that are involved in matters that impact trading partners around the globe. As such, some MPs and government officials stressed the importance of maintaining Canada's reputation as a trading partner with other neoliberal states and multilateral coalitions. Discourses of modernization, then, reflected previous waves of global legal reforms that are driven by the state's interest in a positive international reputation amongst capitalist states, abiding by the norms[407] established in multilateral free trade negotiations, internet governance, and copyright agreements, such as the Berne convention. Historically, the Canadian government has oscillated in its allegiance to the norms established international

[404] WINSECK, *supra* note 400 at 58–59.

[405] see SARA BANNERMAN, THE STRUGGLE FOR CANADIAN COPYRIGHT: IMPERIALISM TO INTERNATIONALISM, 1842-1971 (2013).

[406] Krista Boryskavich & Aaron Bowler, *Hollywood North: Tax Incentives and the Film Industry in Canada Trade and Culture*, 2 ASPER REV. INT. BUS. TRADE LAW 25–52 (2002).

[407] See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT. ORGAN. 887–917 (1998).

agreements.[408] Digital copyright laws that limit liability for internet intermediaries and create safe harbors laws have been included in a number of U.S.-led free trade agreements and have been established in multiple jurisdictions through the implementation of the World Intellectual Property Organization (WIPO) internet treaties.[409] During the debates of copyright reform, from 2010 to 2012, Canada was in negotiations for the Trans-Pacific Partnership, and, as leaked drafts suggest, Canadian and United States negotiators disagreed over the proposed framework for digital copyright.[410] However, until 2012, Canada had not implemented the WIPO treaties and, as the legislative record indicates, reputation in Canada's international community is a key driver for policy action to protect intermediaries from liability.[411]

Thirdly, maintaining consistency of democratic norms in the digital environment and adhering to free expression principles are also competing interests of Canadian officials that are driving a digital copyright policy program. The Canadian Charter of Rights and Freedoms and the Canadian Supreme Court opinions on digital copyright have provided the backdrop for the position of some state actors in the debates over the Copyright Modernization Act.[412] Democracy can be fostered or hindered by internet policies that fight piracy or attempts to filter or block content of any type. Certainly, policies that lead to blocking or filtering content or release the identity of users can be

[408] Bannerman, *supra* note 357.

[409] HAGGART, *supra* note 41.

[410] For access and analysis to the leaked drafts of the TPP see: The Trans Pacific Partnership Agreement negotiations (known as TPP or TPPA), , KNOWLEDGE ECOLOGY INTERNATIONAL , https://www.keionline.org/tpp (last visited May 1, 2019).

[411] Canada. Parliament. House of Commons., *supra* note 371 at 17.

[412] Michael Geist, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* 476.

designed in ways that are counter to democratic norms, especially when they are implemented without public oversight. It is precisely in area of digital copyright that the state's role is defined in the digital environment vis-à-vis the user's rights, such as freedom of expression.[413] This broad debate between freedom of expression and copyright has been a focus in the debates over digital copyright in Canada.

Public debates reveal the influence of internet rights groups in this area and suggests the significance of dramatic public conflicts in Europe over the Anti-Counterfeiting Trade Agreement (ACTA) and in the U.S. in over the Stop Online Piracy Act (SOPA).[414] The Copyright Modernization Act of 2012 addresses a broad range of digital copyright and most have some relation to democratic norms. But notice-and-notice specifically relates to the user's ability to contest a takedown and the power that platforms have to immediately and automatically remove hosted content. The state's interest in digital democracy appears to lie here, with those actors that are calling for the application of free expression norms in the digital environment, rather than only the material interests of competing economic coalitions. In fact, Geist, in his assessment sees a groundswell of grassroots citizen action as the key factor that shaped the Copyright Modernization Act. In contrast to the debates that occurs in the late 1990's and early 2000's when public interest and involvement in copyright issues were quite minimal, the negotiations leading up the Copyright Modernization Act included wide public consultation. This public involvement was facilitated by the government, but only because of the concerted advocacy calling for more openness. Mass protests regarding

[413] HORTEN, *supra* note 100 at 106.

[414] Parks, *supra* note 53; Dür and Mateo, *supra* note 53.

digital rights and the exponential rise of political organizing on social media are also cited as evidence of increased participation of the public in digital policy. According to Geist, there is reason to believe that user's rights have at least matched (if not overtaken) the political weight of corporate actors in the entertainment and digital industries.[415]

Chapter Summary

This chapter presented an investigation of the politics of Canada's law for copyright safe harbors, notice-and-notice. The chapter begins with a description of how notice-and-notice functions and how it compares to § 512 of the DMCA, emphasizing the significance of the Canadian model as a legal outlier that is vastly more protective of users' rights than U.S. or E.U. law. The statutory history and the case law in Canada that led to the Copyright Modernization Act also was reviewed. The remaining sections presented an analysis of the policy-making discourses that led to notice-and-notice with descriptions of the actors involved, the arguments presented, and the discourses that made up the primary legislative debates over notice-and-notice.

[415] Geist, *supra* note 9 at 445.

CHAPTER VIII:

THE POLITICS OF ARTICLE 17 IN THE E.U.: AUTOMATED FILTERING AND THE FUTURE OF NOTICE AND STAY-DOWN

Introduction

The European Union adopted Article 17 of the new Directive on Copyright in the Digital Single Market in 2018, which requires automated filtering for user-generated violations of copyright,[416] which sits alongside intermediary liability provisions of the eCommerce Directive (ECD)[417] and General Data Protection Regulation (GDPR).[418] In so doing, the E.U. established a new international standard for far stricter limitations on liability than U.S. law. This chapter provides a comparative analysis of intermediary liability provisions in U.S. and E.U. law, as well as the legislative discourse that has accompanied the adoption and modification of these laws in the E.U. The following research questions are addressed: What are the leading arguments for and against reform and how are those arguments tied to institutional interests? Who are the various actors – including state agencies, industry coalitions, and civil society groups – that have influenced the reform processes in the E.U. and the U.S.? How have the conflicts in the debate over safe harbors been expressed in discourses and what discourses have been used to support reform? To answer these questions, I analyze relevant laws in the E.U., recent legislative proposals, and the legislative discourse surrounding these (proposed) laws.

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[416] Annemarie Bridy, *EU Copyright Reform: Grappling With the Google Effect* (2019), https://papers.ssrn.com/abstract=3412249 (last visited Aug 24, 2019).

[417] ECD

[418] GDPR

Article 17

Article 17 of the DSMD[419] is perhaps the most legally significant reform of intermediary liability law in over two decades. The DMCA in the U.S. and the E.U.'s eCommerce Directive (ECD) established the legal standard of notice-and-takedown. As described above, notice-and-takedown requires rightsholders to send a notice of infringement each time that a user makes unlicensed copy available online. As numerous legal decisions have established, platforms do not have a duty to monitor all the traffic on their network for infringing posts. Knowledge of infringement is created on the receipt of a valid notice. Article 17 replaces this notice-and-takedown system with a notice-and-*stay-down* system. In practice, a notice-and-stay-down system obligates a platform to remove all instances of unlicensed work on their network, once an original notice has been received that refers to a single infringement. In other words, platforms are obligated to monitor all user activity in order to keep unlicensed copies of a specified work off their networks. The rightsholder does not need to send a notice for each instance of infringement, just one notice of the first instance that a user has posted a particular song, photo, or film clip. From that point forward, the platform is obligated to prevent any future uploads of that work. Knowledge of all future infringements in created by that original notice. Platforms are therefore required, de facto, to implement automated filtering technologies to maintain protection from copyright liability.[420]

[419] Directive 2019/790, O.J. 2019 (L 130/92) Art. 17

[420] Annemarie Bridy, *EU Copyright Reform: Grappling With the Google Effect*, 23 (2019), https://papers.ssrn.com/abstract=3412249 (last visited Aug 24, 2019).

Argument: The E-Commerce Directive is no longer fit for purpose

The European Commission (EC) published two documents in 2016 after the completion of the *Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy.*[421] The first summarized the responses to the consultation and the second that analyzed them for EC lawmakers. Both the summary and the analysis were created by contractors or EC staff and both included data analyzed from responses that were not made publicly available. In regard to the initial question of the e-Commerce's directive and its fitness for purpose in the current marketplace, the summary published by the EC framed the debate as one between rightsholders and all other stakeholders. According to the summary, rightsholders and argued that Article IV of the e-Commerce Directive (ECD) does not provide enough incentive to platforms to expeditiously remove copyrighted content. Many other stakeholders, including platforms and other business associations, argued that the ECD limited users' rights because it did not have a sufficient requirement and provision for a user to contest a take-down. In these reports, the range of debate was often defined as copyright protection versus the protection of users' expression rights.

There is another debate that is also evident with the responses of stakeholders to this question of the "fitness" of the notice and takedown provisions of the ECD. The submissions here reveal competing arguments over the role of the state in the platform economy of 2015. Stakeholders debated the proper role of self-regulation in 2015 versus 2000. Some argued it was still best for government to take a light-touch to regulation and

[421] Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy. European Commission. https://ec.europa.eu/digital-single-market/en/news/responses-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and

to incentivize self-regulation. Others argued that the current platform economy was so different that 2000, that government should now mandate self-policing.

§ 230 of the Communication Decency Act (CDA), § 512 of the DMCA, and e-Commerce Directive are based on the idea that governments should incentivize self-policing of illegal or harmful content. Under this legal philosophy, mandating self-policing would stifle innovation and slow the speed of economic development. At the core of this regulatory theory is the notion that the internet economy is different. This idea, called internet exceptionalism, is the principle that internet technologies, in order to thrive, require a different communications law framework than analog communications. U.S. lawmakers codified this philosophy in the prologue to CDA 230. The ECD is founded on the same principle - the role of the state is to incentivize self-policing, not to require it.

The question of "fitness" of the ECD asks respondents to assess changes in the marketplace over time and make a qualitative judgement - does this philosophy that guided a light-touch to regulation still hold in 2015? In the answer to these questions regarding the fitness of the ECD, many rightsholders argued that the digital economy has changed and the ECD is no longer fit for purpose (see figure 8.1).

The ECD Has Proven Fit for Purpose

- Industry Associations Representing Platforms:
  - The Internet Association
  - Tech-Net
  - The European eCommerce and Omni Channel Trade Association (EMOTA)
  - EDiMA
  - Digital Europe
- ICT Industry Associations
  - Finnish Federation for Communications and Teleinformatics (FiCom)
  - Nederland ICT
  - Information Technology Industry Council (ITI)
  - EuroISPA
- Consumer Electronics Industry Associations
  - Orgalime, The European Engineering Industries Association
- ICT Service Providers
  - Orange (France)
- Digital Rights NGO
  - Open Media
- Think Tanks and Research Groups
  - OpenForum Europe
  - International Center for Law and Economics
- Platform Companies
  - Facebook
- Legal Experts
  - Daphne Keller, Stanford Law School
- General Business Federations
  - BusinessEurope

The ECD is No Longer Fit for Purpose

- Rightsholder Associations
  - Independent Music Companies Association (IMPALA)
  - VG Bild-Kunst (Germany)
  - Irish Music Rights Organization (IMRO)
  - European Grouping of Societies of Authors and Composers (GESAC)
- Broadcast Trade Association
  - The European Association of Television and Radio Sales Houses (EGTA)
- Anti-Counterfeiting Trade Associations
  - European Brands Association (AIM)
  - Business Action to Stop Counterfeiting and Piracy (BASCAP)

Figure 8.1. Stakeholders Arguments on the Fitness of the e-Commerce Directive

To this coalition of stakeholders, internet service providers that needed safe harbors in 2000 are (were?) so fundamentally different than the internet platforms of 2015 that new regulation is needed protect the public, and rightsholders from harm. In regard to copyright, the rightsholders argued that any site that is the business of facilitating access to cultural content, that aggregates cultural content for users, and that indexes cultural products – even though that content is uploaded by a third party – should be now be regulated as a publisher. On the other hand, intermediaries and other stakeholders held that the e-commerce Directive had proven itself effective over time at serving the needs of both rightsholders and intermediaries and was best suited to continue working – in a future-proof and technologically neutral fashion.

In their contribution to the consultation, FiCom, the Finnish Federation for Communications and Teleinformatics, who represents the ICT industry in Finland wrote, "The existing liability framework is…well established, highly functional, …and serves the needs of the rightsholders and the practical needs of providers of information society services."[422] Other technology industry groups echoed the commitment to the ECD over time. Orgalime, the European Engineering Industries Association, who represents 42 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 24 European countries, also argued e-Commerce directive is currently functional and question the need to re-regulate. They wrote, "as to the question of liability of online intermediaries, Articles 12 to 15 of the e-commerce Directive (2000/31/EC) already regulate liability of Internet service providers. Therefore, there is

[422] Stakeholder submission - Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy.

no need for specific provisions for platforms."[423] The French mobile communications company Orange, in one of the few publicly available contributions from a corporate policy office, wrote "[the] current rules contained in the…e-Commerce directive still remain relevant."[424] The technology thinktank OpenForum Europe also saw no need for changes to notice and takedown framework. They wrote, "The e-commerce directive has proved its worth."[425] And, The Information Technology Industry Council, a tech industry lobbying group based in Washington DC questioned the justification for European Commission's interest in reform, "the Commission provides no significant evidence that that such entities engage in harmful conduct that is not already addressed by existing regulatory frameworks."[426] Other platform companies and technology industry groups, such as The Internet Association, Tech-Net, The European eCommerce and Omni Channel Trade Association (EMOTA), EDiMA, Nederland ICT, EuroISPA, Digital Europe, and Facebook all echoed these arguments and all claimed that the e-Commerce Directive remains appropriate, has been proven effective and is well established. (see figure 8.1).

A coalition of entertainment industry rightsholders, retail companies, and broadcasters all took the opposite stance on the question of fitness of the ECD. They argued that the incentive-based system framework codified in the ECD was no longer relevant, ill-adapted to mass piracy and not intended to regulate the current platform economy. The German artist association VG Bild-Kunst argued that the change in

[423] Id.

[424] Id.

[425] Id.

[426] Id.

business model is enough basis for reform. They wrote, "The safe harbour provisions of the ECD are no longer suitable for all the different business models which have emerged in the last 10-15 years."[427] The Irish Right Management Organization (IMRO) focused also on the comparison of industrial context between 2000 and 2015, "…at the time of the adoption of the ECD many of the services that now claim to be under Art 14 did not even exist. The intention was to address purely technical services…"[428] The European Association of Television and Radio Sales Houses (EGTA) wrote that platforms that dominate the digital economy in the current period behave like broadcasters, so they should be exposed to the same liabilities, "It is therefore no longer relevant to award these particular services, which provide both passive and active services, with the liability exemptions…"[429] (see figure 8.1). And the Business Coalition to Stop Counterfeiting and Piracy (BASCAP), a lobbying division of the International Chamber of Commerce, addressed the effectiveness of e-Commerce Directive over time. They wrote, "…we have a seen a shortfall or absence of pro-active measures by digital intermediaries to effectively deal with clear cases of illegal activity…the directive has not led to industry

[427] In their response IMRO includes a long list of new platforms and their business models as evidence that new regulation is needed. They write, "Platforms' appear in *different structures and technical typologies*; for example where individual end-users upload content (UGC or professional promotion platforms, e.g; You Tube, Dailymotion, Soundcloud, MySpace), individual end-users post links to cultural content or post their own content to share with others in a social media environment (Facebook, Hyves, Twitter, Musicyou, Snapchat, etc) operators of the services select, aggregate and facilitate access to existing content on other websites and/or platforms through hyperlinking and/or embedding (TuneIn, iHeartRadio, NL FM, 6 Seconds, UberRadios, OnLineTV Lite, etc.), some of which raising also moral rights issues (Bmusic, in Spain). operators develop software and dedicated search engines to find, index, list and access content (dedicated to certain type of cultural content such as books, images, videos, news and/or including cultural content as part of a general offer, e.g. Google, Yahoo, Bing, Qwant, etc.) recently there appeared application based services providing the technical facility to access cultural content available from other end-users' devices through links that give direct access to cultural content (e.g. periscope,etc.)."

[428] Stakeholder submission - Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy.

[429] Id.

agreements and standards…"[430] Other artists associations and anti-counterfeiting groups all agreed with this assessment that the ECD is outdated i.e., stricter regulation is now needed (see figure 8.1).

Argument 2: EC should require stay-down

The EC's Questionnaire addressed the question of a notice and stay-down mechanism in multiple ways and from multiple angles. The notice and "stay-down" mechanism, as opposed to notice and "takedown" requires the intermediary to remove all instances of the copyrighted content in question, once the notice has been received. Under notice and stay-down, the platform's automated system is the arbiter of illegality. The algorithmic controls are designed to maximize the platform's protection from liability. As legal researchers have shown, the algorithmic controls make mistakes, and their judgements are not easily contestable.[431]

Under a notice-and-stay-down system, in order to receive the benefits of safe harbors, platforms have an obligation to monitor all activity on their networks for any instances of a protected work, once they are put on notice that an unauthorized copy has been posted by any user. In a notice and action system, it is designed to prevent the "whack-a-mole" problem, whereby pirate sites quickly re-upload the same content on a different URL, sending the notice-sender into a supposedly indefinite chase. A "stay-down" system naturally leads large platforms to implement pro-active monitoring – the most efficient, albeit expensive, way to avoid liability. YouTube's ContentID was one of the first such voluntary systems and is widely cited.[432] The key question at hand in these

[430] Id.

[431] See Urban, Karaganis, and Schofield, *supra* note 4.

[432] See Zapata-Kim, *supra* note 62.

debates leading up to Article 17 is whether the government should statutorily require platforms to implement automated filtering system such as ContentID or should legislation merely incentivize self-policing through voluntary agreements (but stop short of a mandate).

The Synopsis Report on the Public Consultation summarized respondent answers to three questions that were relevant to stakeholders' opinions on notice and stay-down: 1. "Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures…?"; 2. "Should action taken by hosting service providers remain effective over time ("take down and stay-down" principle)?"; 3."Do you see a need to impose specific duties of care for certain categories of illegal content?" [433] These questions, among others, elicited responses from stakeholders that reveal their opinions on the stay-down principle and on whether the EC should direct states to impose a duty to monitor. The next section will address which groups of stakeholders wrote that the EC should require a notice and stay-down mechanism on platforms and which stakeholders argued against a duty to monitor. The arguments used on both sides of this debate are outlined.

According to the Synopsis Report on the Public Consultation, those opposed to a duty to monitor argued that a notice and stay-down system was disproportionate, raises barriers to entry, is not technically feasible, undermines right to freedom of expression, would lead to general monitoring, would limit access to public domain, be costly for intermediaries, and would not distinguish between fair use and illegal uses. They also

[433] The consultation questionnaire: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy.

argued that platforms should not be the arbiters of what is illegal. According to the synopsis, respondents made similar arguments against imposing duties of care, as the two questions were obviously similar and designed to address essentially the same issue. Those in favor of imposing a notice and stay-down system argued that the current notice and takedown system is costly to notice-senders and ineffective "in addressing large-scale online piracy as most service-providers remove only specific URL links notified in the takedown notice."[434]

A coalition of artist and publisher associations and anti-counterfeiting groups argued that regulation should require intermediaries to monitor (see figure 8.2). In opposition, a coalition of intermediaries, technology industry associations, and legal experts argued that intermediaries should not be arbiters of illegality. Not surprisingly, these alliances were similar to the coalitions that argued for and against the current fitness of the ECD's notice and takedown framework.

IMPALA, The European Association of Independent Music Labels, argued for reforms that mandated automated policing. They wrote, "…new rules should require online intermediaries to remove the notified file…and prevent re-uploading of the same file." Two other rightsholder groups used similar language regarding the shift from incentivizing to requiring. FESI, a Sports Equipment Industry group argued, "FESI is of the opinion that an obligation to actively monitor in order to prevent future infringements is not per se contrary to [the e-Commerce Directive]."[435] Anther anti-counterfeiting

[434] The consultation summary report: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy.

[435] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy.

organization with broader membership, The European Brands Association (AIM) argued that the duty of care principle inscribed in the e-Commerce Directive should apply to protecting consumer brands. AIM wrote, "The duty of care principle can be defined as the obligation for online platforms to act with diligence by taking any proactive…measures in order to protect consumers."[436] The Business Coalition to Stop Counterfeiting and Piracy (BASCAP), the lobbying division of the International Chamber of Commerce argued that the E.U. must do more to protect businesses that rely intellectual property, including requiring a duty to monitor. BASCAP wrote, "Platforms should remove duplicates and be under a *positive obligation* (emphasis added) to prevent reposting of identical content infringements."[437] UK Music, a broad coalition of music industry groups argued that one notice should cover all instances of the work, i.e. a notification of the title is all that was needed to require any illegal posting of a work on a platform, "It needs to be clarified that the notification of a work triggers actual knowledge regarding the work itself…"[438] The German artist association VG Bild-Kunst echoed this point, "…it should be clarified that the notice-and-action procedure for infringement of copyright protected works is a 'notice and stay down' procedure."[439] Together, this coalition of anti-counterfeiting groups argued that the government's role needed to change – from incentivizing self-policing and brokering voluntary agreements, to requiring automated filtering. The implications are not merely minor technical reforms

[436] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[437] Id.

[438] Id.

[439] Id.

to existing law, but a paradigmatic shift of the state's priorities in regard to the internet economy.

Intermediaries Should Not be Arbiters of Illegality

- Industry Associations Representing Platforms:
  - EDiMA
- ICT Industry Associations
  - EuroISPA
- Consumer Electronics Industry Associations
  - Digital Europe
- Platform Companies
  - Facebook
- Legal Experts
  - Daphne Keller, Stanford Law School

Intermediaries Should be Required to Self-Monitor and Self-Filter

- Rightsholder Associations
  - Independent Music Companies Association (IMPALA)
  - VG Bild-Kunst (Germany)
  - Irish Music Rights Organization (IMRO)
  - European Grouping of Societies of Authors and Composers (GESAC)
  - UK Music
- Anti-Counterfeiting Trade Associations
  - European Brands Association (AIM)
  - Business Action to Stop Counterfeiting and Piracy (BASCAP)
- Federation of European Sporting Goods Industry (FESI)

Figure 8.2. Stakeholders Arguments on the Requirement of Notice and Stay-Down

In response to these sets of questions regarding notice-and-stay-down and duties of care, intermediaries and allies in the technology industries argued that intermediaries should not be the lone arbiters of illegality. While few mention automated tools, they framed their responses around the potential harms that could come from requiring platforms to make legal decisions on the fly, whether those decisions are automated or

made manually. EuroISPA, which represents over 1800 internet service providers across Europe responded to the idea that duties of care should broadly apply to intermediaries, "…the intermediary should not be in a position whereby they have to assess which content is unlawful."[440] Digital Europe an association representing the consumer electronics industries framed their argument in terms of responsibility, "intermediaries should not be responsible for assessing if content is illegal or not."[441] Daphne Keller, an expert in intermediary liability law based at Stanford University in the United States, argued that requiring intermediaries to make legal decisions would incentivize censorship. She wrote, "Meaningful legal review of removal requests may simply not be a priority, or affordable, for many companies."[442] Finally, Facebook also argued to the Commission that the legal decisions in question are more complicated than rightsholders claim i.e., there may be legal uses for a copyrighted work and filtering on title alone disregards legal uses of a copyrighted work. Facebook wrote, "a user's upload of copyrighted content may be…perfectly lawful…due to fair dealing, a licensing arrangement, or a host of other reasons. To impose a stay down obligation on intermediaries would automatically eliminate consideration of all these other reasons."[443]

Argument 3: Voluntary agreements are better than more regulation

Voluntary filtering measures are programs – both manual and automatic – that intermediaries put into place to search, identify, and remove harmful and illegal content from their networks. The most commonly understood example of this are the efforts that

[440] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[441] Id.

[442] Id.

[443] Id.

social platforms put into place to remove child pornography. But many other types of posts are filtered as well – and many enforce platform-specific policies and codes of content. In regard to illegal content, the key characteristic of these filtering methods is that they are designed to go above and beyond what the law requires. In many cases, platforms are shielded by immunity laws such as § 230, but they filter anyway. It was in fact Congress's intent to foster such a patchwork of self-designed and self-imposed good Samaritan practices on the part of internet companies. The good Samaritan clause in § 230 allows platforms to legally remain passive intermediaries, even though they police their own networks. In the E.U., the law is not as clear on this question.

The Commission's questionnaire includes two questions regarding voluntary agreements and pro-active measures. They ask, "(For online intermediaries): Have you put in place voluntary or proactive measures to remove certain categories of illegal content from your system? Please describe them."[444] and "Could you outline the considerations that have prevented you from putting in place voluntary measures?"[445] The Commission did not provide examples of what they meant by voluntary measures and did not address the differences between automated and manual programs.

A number of respondents directly addressed voluntary measures in their responses to these questions as well as in other sections related to stay-down and to platform liability in general. The Commission's summary of the submissions provides a synopsis of responses regarding voluntary measures. In the summary, the EC wrote, "Over half of the online intermediaries described voluntary measures to remove certain categories of

[444] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[445] Id.

illegal content from their systems...most of these voluntary measures are targeting intellectual property infringements, child sexual abuse material, hate-speech, defamation, privacy and [fraud.]"[446] The EC also summarized the key argument on the part of intermediaries in regard to self-filtering:

> Many intermediaries prefer that duty-of-care remains voluntary. They argue that they are already expected to take action when notified, which is a type of duty-of-care, and that the Commission should foster the voluntary adoption and improvement of notice and action mechanisms already implemented by E.U. intermediaries.[447]

The analysis below focuses on the arguments presented by intermediaries on that point. It also examines the responses of a small group of rightsholder groups that argued that the ECD already allows for governments to strongly encourage self-policing and that such filtering is not per se barred under the ECD's framework.

Platforms and other intermediaries cited their current voluntary measures as evidence that the status quo was working and that they were investing in filtering technologies to protect consumers – voluntarily going above and beyond the law. Their focus was on what was already being done, as well as efficiency and effectiveness. Some respondents also argued that a light touch to regulation is preferable as a general principle for technology policy – for efficiency, flexibility and innovation. And a small group of rightsholder organizations argued that the Commission should not reform the e-

[446] The consultation summary report: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[447] Id.

Commerce Directive but should instead use it to "strongly encourage" further voluntary agreements.

The platform industry group, the Internet Association, argued that intermediaries were currently doing enough to prevent harm through voluntary efforts. They wrote, "The current legal framework is supplemented by voluntary efforts…that help stop the spread…of harmful content."[448] EuroISPA, which represents over 1800 internet service providers across Europe, agreed with this point and claimed that voluntary agreements actually do more to filter illegal content globally than regulation that is limited by jurisdictional boundaries. They wrote, "…intermediaries have developed their own policies, or adhered to codes of conduct, under which remedies can be provided that are broader than could be prescribed by law e.g., global removal of copyright infringing content."[449] Facebook also argued that no further regulation was needed when platforms were doing it themselves. They wrote, "A number of services have also voluntarily exceeded…obligations by creating additional tools, such as Facebook's recently announced copyright matching tool."[450] Facebook also argued that agreements between platforms and rightsholders were more flexible because they could adapt to changing business models, changing technologies, and new kinds of threats. Digital Europe, an association representing the consumer electronics industries, argued also for efficiency of voluntary measures. They wrote, "We believe that [voluntary measures] are more efficient than any imposed obligation… As a matter of fact, many online intermediaries

[448] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[449] *Id.*

[450] Id.

have already put in place their own monitoring systems."[451] Tech-Net, a network of tech industry CEO's also cited current efforts in their argument for the status quo. They wrote, "there are currently many voluntary, proactive measures adopted by intermediaries and a number of existing agreements between intermediaries, rights holders, and enforcement authorities."[452] EDiMA, a European trade association representing online platforms, cited specific examples of self-regulatory tools currently in place to make their case that platforms were effectively policing themselves. They wrote, "Some [platforms] have developed specific systems to further prevent the sharing of copyright infringing content, for example, DailyMotion's signature, YouTube's Content ID, and Facebook's recently announced copyright matching tool."[453] The think tank, the International Center for Law and Economics, made the broader argument that regulation, as a rule, should be a last resort. They wrote, "…it is generally preferable to seek every means of encouraging independent pro-social behavior of these large platforms before resorting to intrusive and distortionary regulation."[454]

Platforms and the industry associations that represent them were joined by a group of rightsholder organizations, who also argued for voluntary measures and against re-opening the ECD. This group included the Motion Picture Association (MPA), International Video Federation (IVF), International Federation of Film Producers Association (FIAPF), and European Association of Film Agencies (EFADS). These groups submitted similar comments with identical language (in some cases). All four

[451] Id.

[452] Id.

[453] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[454] Id.

groups argued that it is not necessary to remove and replace the ECD, but the Commission should strongly encourage more voluntary agreements between rightsholders and intermediaries – through releasing some type of "interpretive communication" or "recommendation." The MPA argued, "Changing the ECD is not required, but the Commission should step up efforts to encourage voluntary agreements between rights holders and legitimate platforms."[455] IVF wrote, "We believe that the Copyright Directive, as interpreted by the CJE.U., already embodies relevant principles."[456] EFADS agreed, "The Commission should explore how to implement this principle without opening the ECD."[457] FIAPF concurred, "Changing or reopening the E-Commerce Directive is not required to address this situation…"[458] Together these four European film industry groups advocated that the EC take some type of alternative approach, rather than a wholesale reform of the existing regulation. FIAPF argued for non-regulatory solutions, "…the Commission could more strongly encourage voluntary agreements between right holders and legitimate platforms and could codify current case law via recommendations and/or interpretative communications."[459] EFADS argued for three possible options such as, "interpretative communication, revision of the Copyright Directive and/or IPRED [the Intellectual Property Rights Enforcement Directive]."[460] It appears that EFADS recommended all three options concurrently. The MPA argued that

[455] Id.

[456] Id.

[457] Id.

[458] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[459] Id.

[460] *Id*.

the Commission should look to relevant case law in member states, "Several E.U. MS have already developed such voluntary agreements, the Commission should consider building on this experience and relevant case law at the Member State level to promote model agreements (including in the follow the money strategy)"[461] IVF appears to argue that the ECD is fit for purpose, but just needs clarification. It is therefore the job of the Commission to provide that clarification to member states. IVF stops short of specific prescription on how best the Commission should go about doing so, but they are clear that it should not involve reopening the directive. They wrote, "The Commission may wish to explore alternative means to clarify (via a recommendation, communication or separate legislative instrument) that sites, which are actively involved in content distribution, cannot avail themselves of the liability privileges."[462]

It is notable that the group of rightsholders that argued for replacing the ECD – it is *not* fit for purpose – was comprised of music industry groups and anti-counterfeiting groups. On the other hand, the group that argued to keep the ECD and to clarify it with some type of recommendation, was comprised of motion picture industry groups. At this point, in late 2015, there appears to split amongst rightsholder groups in the E.U., in regard to the direction the EC should take at this time.

Discourse: ECD Created the Internet in Europe

Lawyers and technologists on both sides of the Atlantic have claimed that well-crafted immunity laws, such as CDA § 230 literally created the internet that we have today i.e., safe harbors have made it possible for start-ups to grow into successful

[461] Id.

[462] Id.

businesses.[463] In so doing, they imagine a world without the ECD, § 230 or the DMCA – where the first intermediaries would never have been allowed to grow and the platforms of today would not exist. Without the legal shield, their ideas would be stuck before release – chilled and limited by the constraints of liability. This discourse invokes a three-way relationship between the government, internet startups, and consumers. In this three-legged stool of an open internet, government protects the startups so startups can provide more communication tools to users, and all parties benefit. In turn, the state protects freedom of expression, fosters economic development and startups continue to grow. And, users (all of us), reap seemingly endless benefits to our individual lives from digitally networked tools we use every day. Judges in numerous federal courts of the United States have supported this interpretation of immunity laws.[464] And, a number of Governments have received innumerable benefits from privately developed and managed platform technologies and collaborate with platforms to perform state functions.[465]

In their written comments to the EC, Platform companies deployed this construction – that the ECD created the internet in Europe (see figure 8.3) – in an attempt to appeal to the Commission's interest in a certain liberal democratic notion of the internet. This discourse helped to promote and maintain the free flow of commerce across Europe for economic growth.

[463] KOSSEFF, *supra* note 12.

[464] *Id.*

[465] See JOSÉ VAN DIJCK, THOMAS POELL & MARTIJN DE WAAL, THE PLATFORM SOCIETY: PUBLIC VALUES IN A CONNECTIVE WORLD (2018).

Voluntary agreements and voluntary measures are working:

- Industry Associations Representing Platforms:
  - The Internet Association
  - EDiMA
  - Tech-Net
- ICT Industry Associations
  - Information Technology Industry Council (ITI)
  - EuroISPA
- Consumer Electronics Industry Associations
  - Digital Europe
- ICT Service Providers
  - Nokia
- Think Tanks and Research Groups
  - International Center for Law and Economics
- Platform Companies
  - Facebook
- General Business Federations
  - BusinessEurope

The Commission should not reform the ECD but should strongly encourage voluntary measures.

- Rightsholder Associations
  - Motion Picture Association (MPA) (very similar to the two below)
  - International Video Federation (IVF) (identical response to FIAPF)
  - International Federation of Film Producers Association (FIAPF)
  - European Association of Film Agencies (EFADS) (unique response, but similar)

Figure 8.3. Stakeholder Argument: Voluntary Agreements Work

They also coupled the stated goals of the Digital Single Market initiative with the ECD. In so doing, they portrayed the ECD as the singular law that allowed the internet economy in Europe to be born and to mature. Representatives of industry associations that advocate for platforms and the spokespeople and in-house council for platform companies wrote that the ECD was the essential infrastructure for growth, an innovation engine, the legal foundation of economic growth in Europe – and that the law that undergirds all of the information society. In their construction, this law is also future proof and all future possibilities for all online users hinged on this one law. In other words, any fundamental changes to it could chill the next tech industry boom before it leaves the developer's metaphorical garage.

The Asociación de Empresas de Electrónica, Tecnologías de la Información, Telecomunicaciones y Contenidos Digitales (AMETIC) (an association that defends the interests of the Spanish digital sector) and Digital Europe, who represents Information Technology, telecoms and consumer electronics companies across Europe, submitted identical comments that implored the Commission to see the ECD as crucial to a functional internet in Europe. They wrote,

> The liability limitations for third party content provided by the eCommerce Directive have been essential to the development of online services in Europe and its principles have underpinned the development of the Internet in Europe as the Digital Single Market Communication recognizes.[466]

[466] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

Orgalime, who represents the consumer electronics industry in Europe, concurred, "…its principles have allowed the development of [the] Internet in Europe."[467] EDiMA, a European trade association representing online platforms, conjured the image of the ECD as a timeless treasure that, once altered, could lead irreparable harm to the digital economy. They wrote, "The layered framework in the e-commerce Directive shows huge foresight and has proved enduring, providing precious legal certainty for the digital players in a market where such certainty has been limited."[468] Facebook used one of the Commission's own studies on the impact of the ECD to claim the singularity of the law for intermediaries.

> …The 2007 study prepared for the Commission on the economic impact of the Directive notes that 'several intermediary service providers suggested that this provision is the single most important one in the directive for intermediaries, because it so clearly provides certainty in a crucial area where there was uncertainty before.' This remains true today.[469]

Orange, the French telecommunications company wrote, "The exemptions for liability of intermediaries contained in the E-Commerce Directive are core principles for the functioning of the information society and for the provision of innovative services."[470] Two Dutch groups, Nederland ICT and Stichting Digitale Infrastructuur Nederland (DINL) submitted identical comments, "These Articles served as a catalyst for

[467] Id.

[468] Id.

[469] Id.

[470] Id.

the development of a prosperous European Internet Ecosystem…"[471] The Internet Association[472] broadened the frame of safe harbors to include the United States and contrasted the insecure times when startups were not protected by immunity laws, to the confidence in the marketplace that the law provided. They positioned safe harbors as a progressive and liberal approach – where the state filled a wide legal gap with a policy ahead of its time, "In the Internet's early days, the legal status of startups was uncertain. However, both the United States Congress and the EC Commission responded to this vacuum in an enlightened way and courts in both systems have done a good job interpreting these legal frameworks…" Technet, a bipartisan group of technology CEOs based in the United State used the principles behind immunity laws to connect the interests of government, business, and users. In this interpretation, immunity laws are vital to nearly all stakeholders who use or depend on digital technologies. Technet submitted, "Strong intermediary liability protections promote innovation, empower users and small businesses to use platforms to reach a global audience, and encourage free expression and the democratization of access to information."[473]

Discussion

After four years of research and negotiations, the European Parliament approved Article 17 of DSMD in April of 2019. Its regulation of platform liability further

[471] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[472] The Internet Association's members include Airbnb, Amazon, auction.com, Coinbase, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Gilt, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, Snapchat, SurveyMonkey, TripAdvisor, Twitter, Yahoo, Yelp, Uber, Zenefits, and Zynga.

[473] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

fragments the international picture of copyright safe harbors, as the law contrasts with the U.S. and Canadian models in significant ways. For example, it is far more protective to copyright holders than the two other models under study here. Rather than notice-and-takedown or notice-and-notice, it requires notice-and-s*tay-down* in all E.U. member states. In the end, it appears to obligate automated filtering – although it does not state that requirement explicitly.[474]

According to Bridy, there are two sections of Article 17 that stand out as being most important for understanding the implication of the law and how it compares to other models. First, the law defines a new class of intermediaries. In the text of Article 17, this new category of intermediaries is labelled, "online content-sharing service provider" (OCSSP). The OCSSP label refers to platforms that stream and store large amounts of copyrighted works, specifically audiovisual files for profit, such as YouTube. In the case of YouTube, for example, the content is user-generated, but the OCSSP provided the means of the user-generated exhibition. Secondly, in addition to establishing the OCSSP, Article 17 includes a "best efforts" clause to define the intermediary's responsibilities in a notice-and-stay-down system. To avoid liability, the OCSSP first receives and notice of an infringing post. Second, the platform must apply its "best efforts to prevent further uploads of the notified works and other subject matter for which the rightsholders have provided relevant and necessary information."[475] There is no specific requirement in the final text that requires one particular method for preventing further uploads. The text only refers to "suitable and effective means" and "professional diligence."[476] As Bridy argues,

[474] Bridy, *supra* note 421.

[475] Id.

[476] Id.

automated filtering methods are the only practical method of compliance with a stay-down requirement. This de facto obligation to implement upload filters is the fundamental shift that Article 17 represents.[477]

This chapter examines only one phase in the negotiations in the E.U. that led up to the passage of Article 17. But this sample of 46 stakeholder submissions contain some of the core arguments and discourses that characterized the politics of platform immunity in the E.U. in 2015. First, it is clear that all parties were framing the reforms in question as a significant departure from the previous directive that regulated intermediary liability – the e-Commerce Directive (ECD) (2000). A broad coalition of technology and telecommunication groups argued for keeping the ECD and a coalition of rightsholder groups argued for reform. Even though this is just a sample of the stakeholder submissions to one consultation, we can still see evidence of the depth and breadth of the internet platform lobby (and it's supporting coalition) in the E.U. (see figures 1 and 4). Representatives from nearly every technology sector wrote in favor of keeping the ECD and its notice and takedown mechanism. These representatives made informed and detailed regulatory arguments and deployed targeted discourses. This coalition was led by large platform companies that were headquartered in the U.S., such as Facebook. But the coalition also included thousands of start-ups, software developers, and service providers from within E.U. member states. For example, the group Stichting Digitale Infrastructuur Nederland (DINL) submitted a statement to the EC arguing in favor of keeping notice and takedown. Their organizational description states,

[477] Id.

DINL is the voice of hundreds of online companies and represents the interests of leading parties in the Netherlands that provide underlying technical facilities and services for the digital society. The members of DINL are the DDA (Dutch Datacenter association), the DHPA and ISPconnect (representing the hosting and cloud sector), the NLNet foundation, SURFnet (the NL academic network), AMS-IX (the world's largest Internet Exchange point), SIDN (the ccTld registry for .nl), the VVR (Dutch domain registrars association) and NL ICT - The NL IT sector organisation.[478]

- Industry Associations Representing Platforms:
  - Asociación de Empresas de Electrónica, Tecnologías de la Información, Telecomunicaciones y Contenidos Digitales (AMETIC)
  - The Internet Association
  - Tech-Net
  - EDiMA
  - Digital Europe
  - Stichting Digitale Infrastructuur Nederland (DINL)
- ICT Industry Associations
  - Nederland ICT
  - Information Technology Industry Council (ITI)
- Digital Advertising Industry Associations
  - IAB Poland
- Consumer Electronics Industry Associations
  - Orgalime, The European Engineering Industries Association
- ICT Service Providers
  - Orange (France)
- Platform Companies
  - Facebook
- Legal Experts
  - Daphne Keller, Stanford Law School

Figure 8.4. Stakeholder Discourse: The E-Commerce Directive Created the Internet in Europe

[478] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

Most of the other E.U. stakeholders who wrote in favor of notice-and-takedown represented similar types of companies – datacenters, cloud computing companies, hosting companies, domain registrars, and IT companies. Most were headquartered within E.U. and have direct connections to the platform economy in Europe. These platform industry groups were supported by online advertisers, consumer electronic groups, digital rights advocates, think tanks, and general business groups.

A much smaller and narrow coalition argued against notice-and-takedown, and for a stay-down system. These group was led by the motion picture industry and music recording and publishing groups. They had support from retail brands and broadcasters. The balance of these groups represented E.U.-based rightsholders, publishing companies, and artists.

Each side deployed discourse to support their position to the EC and to influence the public narrative of safe harbors in the E.U. The technology sector claimed that the legal shield provided by the ECD *created the internet economy* in Europe. In this construction, they invoked a story of the law as the benevolent protector of a universal society benefit. The lessoning of liability leads not just to further investment in commerce, but it contributes to the greater public good as well. It allows small startups to experiment and innovate without fear of liability and the public gains. While this discourse appeals to a positive public opinion of internet technologies, much is hidden.

Chapter Summary

This chapter was an investigation into the actors, arguments, and discourses of Article 17 of the new Directive on Copyright in the Digital Single Market that became law in the European Commission in 2018. The chapter began with a brief description of

the law and how it fits within the recent history of internet policymaking in the E.U. The primary focus of this investigation was over 40 stakeholder submissions to the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, and the Collaborative Economy that was commissioned by the European Commission in late 2015.[479] I identified two central stakeholder debates and one discursive construction that characterized the texts of these submissions. The central arguments and discourses of these debates are described, as well as how they connect to debates in other jurisdictions and the stakeholder coalitions that have formed around competing arguments for (and against) reform.

[479] QUESTIONNAIRE, REGULATORY ENVIRONMENT FOR PLATFORMS, ONLINE INTERMEDIARIES, DATA AND CLOUD COMPUTING AND THE COLLABORATIVE ECONOMY, EUROPEAN COMM'N; Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy, EUROPEAN COMM'N (Sept. 24, 2015), https://ec.europa.eu/digital-single-market/news/public-consultation-regulatory-environment-platforms-onlineintermediaries-data-and-cloud.

CHAPTER IX:

CONCLUSION

Both internet policymaking and free trade negotiations have separately faced crises of legitimacy amongst mass publics that see little personal agency over the financial and telecommunications decisions that affect their future possibilities.[480] To foster a sense of agency and to avoid the political consequences of a legitimacy crisis, Moss argues that internet policymaking must maintain and assert democratic processes that prioritize public involvement and a diversity of ideas and interests.[481] In addition, this governance should be done on the foundation of a cosmopolitan rights framework. Moss cites Benhabib[482] in arguing that a rights framework has proven effective in holding stakeholders and institutions accountable and can be useful for prescribing a shared vision of the internet that makes the connection between opportunities for democratic participation and the openness of the system. As Moss argues,

> ...the internet has the potential to facilitate more deliberative-democratic forms of participation…. [Therefore,] rights relating to democratic participation - given their importance in procedural terms in interpreting and legitimating rights more generally - warrant certain priority in our thinking about how the internet should be governed.[483]

[480] see CHAKRAVARTTY AND SARIKAKIS, *supra* note 104; Moss, *supra* note 104.

[481] Moss, *supra* note 104.

[482] see Seyla Benhabib, *Claiming Rights across Borders: International Human Rights and Democratic Sovereignty*, 103 AM. POLIT. SCI. REV. 691–704 (2009); Seyla Benhabib, *The legitimacy of human rights*, 137 DAEDALUS 94–104 (2008).

[483] Moss, *supra* note 104 at 391.

We can see intermediary liability law as one shifting terrain of struggle over just the argument that Moss presents, as the decision point between specific competing rights - the right to freedom of expression as it relates to democratic participation and the right to private property, or intellectual property rights. In other words, the debates within, and the outcomes of policymaking processes that relate to copyright enforcement on the internet help us to see "how rights are best realized in practice" and what "balance is to be struck when rights conflict."[484] In turn, we can see what values are guiding internet policymaking, how those values are asserted in a non-transparent policymaking process, and how best to intervene to envision a more participatory future.

In following pages, I outline what the findings in these three case studies reveal about the political economy of internet intermediary law in the current period. First, I argue that the corporate capture of copyright lawmaking has entered a new era characterized by two central characteristics: the semi-privatization of the law and the rapid rise in the political power of internet platforms. Second, the recent reforms of digital copyright enforcement are slowly limiting possibilities in online spaces and this process is happening in relative darkness. In other words, the regulation of automation and broader implications of automation are not well understood by the public or by governments. And third, the discourses of policymaking of intermediary liability law are geopolitical. In other words, the dominant discourses used by lobbyists and lawmakers alike portray the interests of internet platforms and the state as overlapping. While this is certainly not new in terms of the history of copyright policymaking, there is little discussion in the literature about the relationship between platform self-governance and

[484] *Id.* at 377.

geopolitical agendas. The chapter concludes with some theoretical implications of these findings, outlining the limitations of these three studies, and proposing ideas for future research.

Corporate Capture and Safe Harbors

While there is some debate about the extent to which digital copyright rules can create agency and public good,[485] studies of copyright policymaking have demonstrated that large entertainment companies have attained unethical levels of lobbying power that have been relatively unchallenged by democratic accountability.[486] In the arena of copyright, examples include the WTO TRIPS agreement, ACTA, and the variety of bills in the U.S. Congress.[487] These investigations show how the values of private property gained prominence and shifted policy over time to further restrictions and fewer limitations and exceptions – aided by the lobbying power of a small group of multinational entertainment and software companies.[488] As changes in consumer electronics and digital technology evolved, discourse surrounding enforcement justified harsh penalties, threats, and fines with the language of the law – labelling large scale counterfeiters and individual users alike, as pirates. This discourse of direct infringement carried through to the popular narrative of digital copyright. Available copies could be considered and labelled as illegitimate and illegal or legitimate/legal depending on how

[485] See Chander and Sunder, *supra* note 116.

[486] HORTEN, *supra* note 73 at 272.

[487] see RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (2018); HORTEN, *supra* note 73; DEERE, *supra* note 81; DRAHOS AND BRAITHWAITE, *supra* note 55; LITMAN, *supra* note 35.

[488] See DAVID HESMONDHALGH, THE CULTURAL INDUSTRIES (3 edition ed. 2012).

they were obtained and produced.[489] The policy discourse of the corporate-led fights against direct piracy in the 1980s and 1990s was aided by high-profile raids by both private security and law enforcement agencies. For example, the aggressive legal activities of Software Business Alliance in the 1990s focused on private investigations and public raids. In one of the earliest domestically published cases, U.S. marshals raided offices in New Jersey and California and seized an estimated $9 million worth of illegal versions of MS-DOS. The tactic of using U.S. marshals for search and seizure operations continued throughout the 1990s.[490] Pirates used hard infrastructure – disc replicators (software) camcorders and DVD replicators (cinema) – to create and distribute illegal copies. Related discursive constructions of this type of pre-internet piracy and direct infringement were used in congressional hearings well into the 2010s.[491] Also, in regard to peer-to-peer downloading and illegal cyber lockers, direct infringement was discursively linked with direct investigation, prosecution, and penalty – fines, raids, and the involvement of law enforcement agencies.[492] The crime can be considered a private transaction, but in cases involving direct infringement, the enforcement of the law often, but not always, involves one or more state agencies. The public narrative, and hence the policy discourse has been driven by and characterized by high profile raids and arrests

[489] Lee Edwards et al., *Discourse, justification and critique: towards a legitimate digital copyright regime?*, 21 INT. J. CULT. POLICY 60–77, 65–67 (2015).

[490] Peter H. Lewis, *The Executive Computer; As Piracy Grows, the Software Industry Counterattacks (Published 1992)*, THE NEW YORK TIMES, November 8, 1992, https://www.nytimes.com/1992/11/08/business/the-executive-computer-as-piracy-grows-the-software-industry-counterattacks.html (last visited Nov 6, 2020).

[491] PRESIDENT OBAMA'S TRADE POLICY AGENDA WITH U.S. TRADE REPRESENTATIVE MICHAEL FROMAN: HEARING BEFORE THE H. COMM. ON WAYS AND MEANS, 113TH CONG., *supra* note 313.

[492] see Ross Drath, *Hotfile, Megaupload, and the Future of Copyright on the Internet: What can Cyberlockers Tell Us About DMCA Reform?, 12 J. Marshall Rev. Intell. Prop. L. 205 (2012)* 38.

– to attack the infrastructure of direct infringement and pressure lawmakers to dedicate resources to these types of enforcement.

In the case of copyright safe harbors, and in the findings in this study, we can see the emergence of a new discourse of copyright that frames the indirect (or secondary) infringement of intermediaries and the policies that incentivize the self-regulation of those intermediaries. In terms of direct infringement and law enforcement action, discourses that support further copyright restrictions and the involvement of the state in that enforcement, rely on a public narrative of illegality and the fight against that anti-social behavior. What we see in regard to the dominant public narrative of safe harbors (and indirect infringement in general) contains little of a policing/law enforcement frame. In these three case studies, stakeholders largely replace narratives of the state – law enforcement and policing – with discourses of self-regulation. As a legal framework, self-regulation is positioned as a modern and high standard 21st century approach that achieves universal goals – growth in the internet economy and jobs in the technology sectors. Certainly, the political divisions between the copyright industries and platform companies remain, but debates (in these cases) relate to mechanics of self-regulation, not the legitimacy of self-regulation itself.

Three discourses support self-regulation and semi-privatization: 1. the *21st century agreement*; 2. *the digital economy*, and 3. *safe harbors created the internet*. In the case of the TPP, the *21st century agreement* discourse appeals to what is understood as a universal need: for the law to be up-to-date, modern, forward looking, serving the economy of the future. Second, the *created the internet* discourse imagines a lawless internet of the past and a regulated, safe, and profitable internet economy of the current

day. This discourse can be found in all the policymaking debates analyzed in this study: in the E.U., Canada, and the U.S. While, the *created the internet* discourse looks to the past successes of safe harbors, the *digital economy* discourse looks to the future – to imagine new levels of economic growth facilitated by the legal shield that the law provides. These narratives position internet platforms – Facebook, Google, and Amazon – as 21st century protagonists. Their successes are not limited to the technology sector – but their growth is essential to the well-being of the nation and all of our individual possibilities. In this construction, copyright liability is a real threat to their growth and, in turn a threat to the universal benefits received from platform growth – information access, social connection, and the gig economy. And given the norm established by § 512 of the DMCA, the solution to the threat can only be considered in relationship to the standard of notice-and-takedown. Simply put, if *safe harbors* created the internet of the early 2000s, it would work for the internet of the 2020s. This discourse sidesteps the threats of self-regulation to user possibilities and to users' rights to contest takedowns. The appeal to universal benefits erases arguments regarding the expense of compliance for new entrants, the lack of due process in enforcement, and the inherent lack of transparency in automated takedowns. I would argue that the success of these discourses – *21st century, digital economy,* and *created the internet* – signal an emerging hegemony of privatization of regulation in the area of copyright. This new period is different from past eras of policymaking in two respects – the political dominance of platforms and the norm of privatization of media policy.

The Lobbying Power of Platforms

Since the passage of the DMCA, all the multilateral and bilateral free trade agreements that were led by the U.S. have included some form of notice-and-takedown in their intellectual property chapters. But, a number of states including Brazil and Chile, as well as Canada, have developed and implemented some form of liability protection for internet intermediaries that can be seen as alternatives to the U.S. model. The processes involved in a state's decision to adopt safe harbors are distinct in each case and states are adopting their own particular methods of liability protections that are resulting in distinct policy outcomes. This diverse patchwork of safe-harbor legal mechanisms represents a challenge to the scholarly analysis of intellectual property law adoption in regard to the corporate capture of copyright policymaking by the entertainment and software industry lobbies.

Given the available analysis of E.U. and U.S. copyright policymaking, we would expect the lobbying power of the creative industries to hold influence over other interests.[493] In the United States, the Motion Picture Association of America (MPAA) has lobbied for favorable copyright law domestically for many decades, reaching various levels of government and a variety of state agencies to apply trade pressure to foreign governments to combat piracy and enforce international copyright laws. The lobbying activities of the MPAA have been found to correlate with election cycles and the legislative pushes on PIPA and SOPA in 2011. The MPAA has used the discursive power of industry-funded studies to argue that the creative sector takes large losses due to

[493] HORTEN, *supra* note 73; McDonald, *supra* note 43; DRAHOS AND BRAITHWAITE, *supra* note 55.

piracy.[494] The International Intellectual Property Alliance (IIPA), another industry group based in the U.S., publishes a special 301 watchlist every year that identifies countries whose domestic policy environments are potentially favorable to pirates. Also, the IIPA commissions research in the form of the "Copyright Industries in the U.S. Economy" report, which presents the economic contribution of the copyright industries to GDP and to U.S. employment. In an analog environment–based on direct sales–the MPAA was able to build enough power over time to capture both domestic and U.S.-led free trade copyright policymaking. In the digital environment, the MPAA has involved other partners–such as payment processers and intermediaries–in its enforcement efforts.[495]

In contrast, the Canadian case reveals that numerous creative industry associations were not able to sway MPs to adopt a U.S.-style approach to digital copyright. U.S.-trade pressure was referred to throughout the legislative hearings on the Copyright Modernization Act and the negotiations of the Trans-Pacific Partnership were ongoing during the Canadian copyright debates. In this context, Canadian lawmakers held on to framework that countered both E.U. and U.S. policy. This lack of conformity in digital policy on the international level suggests an era of platform governance that is led by the lobbying power of large technology firms.

Given the outsized influence of big tech's lobbying power during this period (2010 to 2016), the discourses they deploy deserve attention and further analysis. An account of such policy narratives contributes to our understanding of where human rights are situated in political dialog and how exactly corporate messaging connects to policy

[494] McDonald, *supra* note 43.

[495] *Id.*

outcomes. But what of the political economic power balance itself? What do these debates and these coalitions tell us about the transformation of media power in the platform era? In the early 2010s, political economists pointed to the lobbying dominance of the copyright industries.[496] But scholarship seems to indicate that the platform lobby is overtaking both traditional internet service providers (ISPs) and the copyright industries.[497] Winseck cites intermediary liability specifically as evidence that the technology lobby has overtaken the copyright lobby, in terms of the political power needed to influence media policy. To Winseck, it is not that social movements for internet freedom have created a new-found effectiveness over copyright lobbyists. The politics of internet policymaking could indicate that the compromises of the copyright industry are more likely related to the comparatively huge lobbying budgets of platforms such as Google and Facebook.[498] To Popiel, the lobbying power of platforms is so great, in fact, that the public's interest is not contested by big tech but subsumed to the point that big tech's interests and the public interest are actually framed as one and the same.[499] In other words, Google's policy goals define the greater good. Freedom of expression, access to information and the gig economy are merely positive aftereffects of the business of platforms.[500]

The findings for the three cases in this study add additional evidence to support this trend. In the case of the TPP, the USTR Michael Froman claimed that his office's

[496] See SELL, *supra* note 72.

[497] See Pawel Popiel, *The Tech Lobby: Tracing the Contours of New Media Elite Lobbying Power*, 11 COMMUN. CULT. CRIT. 566–585 (2018).

[498] Winseck, *supra* note 404 at 11.

[499] Popiel, *supra* note 498.

[500] *Id.* at 15.

mission was to negotiate for the priorities of the digital economy – to deliver a 21st century agreement to Congress and for the president. In 2014, he said, "When we talk about updating our trade agreements for the 21st century and bringing new issues like the emergence of the digital economy into those trade agreements, this is precisely what we are focused on."[501] Multiple members of Congress echoed the USTR. For example, Representative Kevin Brady of Texas said in 2011, "We must now make the most of this new momentum to seek 21st century solutions, to streamline trade to end non-tariff barriers…"[502] General business associations also shared the interests of the tech lobby. In a written submission to the International Trade Council in 2016, Ambassador Alan Wolff of National Foreign Trade Council (ITC) wrote, "TPP stakes out important new ground in promoting an open digital economy throughout the Pacific Rim's participants. This alone makes the TPP a 21st Century Agreement."[503] For the technology industry, Stephen Ezell of the Information Technology and Innovation Foundation wrote in a submission to the ITC, "When it comes to information technology policy, the TPP agreement generally sets a high bar that will maximize the opportunity for innovation worldwide."[504] Ed Black of the Computer and Communications Industry Association (CCIA)[505] wrote in a prepared statement to Congress in 2011,

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[501] PRESIDENT OBAMA'S TRADE POLICY AGENDA WITH U.S. TRADE REPRESENTATIVE MICHAEL FROMAN: HEARING BEFORE THE H. COMM. ON WAYS AND MEANS, 113TH CONG., *supra* note 313 at 59.

[502] TRANS-PACIFIC PARTNERSHIP. HEARING BEFORE H. SUBCOM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 112TH CONG., *supra* note 292 at 4.

[503] TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS: HEARING BEFORE UNITED STATES INTERNATIONAL TRADE COMMISSION, RECORD OF WRITTEN SUBMISSIONS, DAY 1., *supra* note 310 at 53.

[504] TRANS-PACIFIC PARTNERSHIP AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS: HEARING BEFORE THE UNITED STATES INTERNATIONAL TRADE COMMISSION. WRITTEN SUBMISSION: INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION., 2 (2016).

[505] CCIA members include eBay, Facebook, Google, Uber, Microsoft, and Amazon.

> The USTR needs to become a vocal force pushing for strong pro-Internet language in both bilateral and regional trade agreements. If the TPP is really going to set the gold standard for 21st century trade agreements, it must address the issues pertinent to the most dynamic element of the 21st century economy.[506]

Alongside the 21st century discourse, lobbyists and lawmakers in Canada, the E.U., and the U.S. have made use of the *digital economy* discourse to portray the benefits of safe harbors as universal and as a key component of social progress online. Public statements and government documents surrounding the Canadian Government's Digital Economy Strategy[507] contain a number of illustrative examples of this dialog – as it connects with the broader interests of government. In the *Speech from the Throne* on March 3rd, 2010, Michaëlle Jean, Governor General of Canada announced the importance of Canada's digital economic growth. She said, "To fuel the ingenuity of Canada's best and brightest and bring innovative products to market… [our Government] will launch a digital economy strategy to drive the adoption of new technology across the economy."[508] The National Foreign Trade Council (NFTC) submitted a policy white paper to the International Trade Commission (ITC) in 2016 entitled, "Encouraging Economic Growth in the Digital Age: A Policy Checklist for the Digital Economy." The NTFC's platforms ostensibly spoke for all its members, not just who that would be benefit directly from safe harbors. The tech industry association TechUK wrote the European Commission in 2015 and argued that the platform economy and the digital economy were so intertwined as to

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[506] TRANS-PACIFIC PARTNERSHIP. HEARING BEFORE H. SUBCOM. ON TRADE OF THE H. COMM. ON WAYS AND MEANS, 112TH CONG., *supra* note 292 at 77.

[507] https://www.canada.ca/en/news/archive/2010/05/government-canada-launches-national-consultations-digital-economy-strategy.html

[508] Canada. Parliament., *supra* note 393.

be indistinguishable. Is their submission to the EC's public consultation, TechUK wrote, "So fundamental is the platform model to the functioning of the digital economy that it is difficult to separate out the benefits of platforms from the benefits of the digital economy as a whole."[509]

Despite the different legal outcomes, the policy debates of these three laws reveal that there was, at least at the time of these hearings, broad coalitions of stakeholders in each jurisdiction that used the discourse of the platform industries. General business associations, public policy think tanks, legal experts, telecommunications companies, lawmakers, and government agency heads in all three cases used the arguments and discourses of the platform industries to argue in favor of limiting the liability of intermediaries. There were in some cases differences related to the details of the legal text, but I argue that the presence of these discursive coalitions points to the broadly recognized power of the platform and technology lobby in this period.

The Gradually Increasing Threats to Communication Rights

Legal analysts have described recent trends in internet policy as a slow but sure, disorganized set of confrontations that limit user possibilities and chip away at digital rights. These haphazard losses and hits to the public interest have been framed in terms of the gradual removal of the public domain[510] and the enclosure of the internet into a set of private, commercially controlled spaces.[511] I argue that the three laws presented in these three case studies aid and contribute to what Monica Horten refers to as the closing of the

[509] Stakeholder submission: Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy

[510] Rodrigo Cetina Presuel & Loreto Corredoira, *Current Copyright Policy Tendencies in 2015: Further Weakening of Limits and Exceptions and the ever reducing Public Domain*, 14 (2015).

[511] HORTEN, *supra* note 100 at 146.

prism through which we "view and interact with culture, knowledge, and beliefs."[512] They do so not in a rapid radical break with what was before, but act against our rights, as Horten argues, in the form of a "gradual closing, a piecemeal application of the barrier tape."[513] Article 17 of the Digital Single Market Directive mandates the enforcement of *stay-down* as a prerequisite to legal immunity. In so doing, it makes automated content filtering as the de facto mechanism of the law in practice. The TPP's copyright provisions, if enacted, would allow member states to simply toss out the user protections that are found in § 512 of the DMCA. Its vague and flexible language would create a patchwork of standards in TPP countries and could lead towards a *stay-down* approach in the U.S. in the coming years. The Canadian standard of notice-and-notice is certainly more protective of users' rights than Article 17 or the TPP, but it still lives on the spectrum of semi-privatization and automation. In all three cases, there is little government oversight of enforcement and seeming no mandates of transparency of individual takedowns. In these jurisdictions, public accountability rests with those users who have the legal resources to fight individual takedowns and internet rights NGOs who apply public pressure within (and outside) internet policymaking fora.

Theoretical Considerations

As a theoretical lens, the critical political economy of the media approach can complement other frameworks of media policy analysis by foregrounding the power dynamics of policymaking. At times, political economists provide detailed accounts of market power – market share and monopolistic structures – while in other cases,

[512] *Id.* at 146.

[513] *Id.* at 146.

scholarship points to trends in soft power, such as lobbying and other forms of political influence.[514] Recently, political economists have published a number of significant studies that chart the abuses of power by internet platform companies and the dominant corporations in the technology sectors.[515] Given their explicit normative orientation, these studies have been able to provide evidence and analyses that help us understand the politics of the internet over time. In particular, political economy can examine the *how* questions of media policy change. Studies of structural power – both hard and soft power – do indeed compliment scholarship and critique of legal scholarship and internet governance. In addition, political economic research and critique can aid in tangible policy change. As recently as July 2020, the Judiciary Committee of the U.S. House of Representatives questioned the CEOs of Google and Facebook on their market power.[516] In these hearings, the power of platforms was questioned by lawmakers across the political spectrum. The theories of the critical political economy of the media can be useful in guiding the moral and democratically oriented response to these events, while critical scholarship can also contribute to the public understanding of these types of changes. Indeed, political economy has maintained a focus on the historical trajectory of changes in the structural power in the media system and is poised to contribute to a moment when monopoly power is publicly questioned.

Two theoretical frameworks, Braman's theory of the *informational state* and Jin's theory of *platform imperialism*, offer contrasting models of the nature of government power within the context of the exponential rise of digital platform technologies and

[514] Popiel, *supra* note 498 at 2.

[515] Popiel, *supra* note 511 at 2.

[516] Romm, *supra* note 119.

broadband connectivity. To Braman, information law and policy research in the digital age is guided by three central questions: How should existing laws be reformed to "achieve enduring social and political goals?"; What do the changes in the law actually mean for us?; And, third, "What is the nature of government in the deeply informatized world of the twenty-first century?"[517] Given that the state's ability to gather and process information has altered institutions of governance and information processing and access has changed the conditions for the exercise of power, there is now a *change of state*. In sum, the exercise of *informational power* has transformed the bureaucratic welfare state into the *informational state* where governments "consistently control information creation, processing, flows, and use to exercise power."[518]

On the other hand, Jin argues that there is not necessarily a change in the nature of the state, but imperialism and geopolitical contestations persist. In the platform era, the makeup of corporate-state power has changed, but Jin argues that the cultural imperialism of the post-war period has been replaced with a *platform imperialism* of the technology economy. Citing the dominance of U.S. platforms in all markets except China and Korea, Jin writes, "…it is not controversial to say that American dominance has been continued with platforms. Platforms have functioned as a new form of production and distribution that the U.S. dominates. Arguably, we are still living in the imperialist era."[519] To Jin, the era of *platform imperialism* is characterized by three central conditions: First, the role of users as commodities to be bought and sold to advertisers, but also the power of users to resist platform ownership and control; second, the ideology of platforms in the form of

[517] BRAMAN, *supra* note 92.

[518] *Id.*

[519] JIN, *supra* note 74 at 6.

symbolic hegemony over the daily activities of billions of users around the world; third, the expansion of U.S. power through a non-territorial form of imperialism – one that lacks a direct political role, but is arguably an unlimited form of ideological dominance.[520]

Recent reform efforts in intermediary liability law seems to point to the reach of platform imperialism into the implementation of platform regulation internationally. In the case of safe harbors, the state appears to have three distinct roles: brokering self-regulatory agreements between industry stakeholders, (in some cases) maintaining a registry of ISPs and platforms that receive notices, and the adjudication of disputes (in cases where parties have the resources to litigate a takedown). These roles have been codified first in the passage of § 512 of the DMCA that established the standard by which reforms in other countries have followed, or not followed, in the case of Canada and the E.U. Whether other nations have adopted the same legal mechanism, I argue that the degrees of change are minor in the context of platform regulation – the guiding framework of self-regulation has been maintained through many jurisdictions. Self-regulation, or the semi-privatization of regulation, supports the model that Jin proposes, as the ideology of platform economy extends through both market power and political influence.

Limitations and Further Study

One of the most significant limitations of this study was the lack of publicly available documents. In the case of the TPP, I chose to focus on U.S. Congressional hearings because those transcripts are available. The documents analyzed in the TPP case

[520] *Id.* at 39.

do reveal much about actors, arguments, and discourses in the U.S. Congress – but this analysis is limited to one national legislative body. The trade negotiations that led to TPP's final text took over ten years and included lawyers and representatives from all member states. However, the arguments and discourses used by representatives and officials of the TPP member states remain hidden. Wikileaks was able to release draft texts, but not meeting transcripts. When and if these transcripts and notes are ultimately available, they may help researchers get a better understanding of how the U.S. negotiators were able to bring most parties to agree with their version of notice-and-takedown. I expect also that these negotiations would include more substantive policy debates and regulatory arguments regarding the details and specific clauses in the intellectual property chapter of the TPP. Interview might also fill this gap, adding to what is available in the public record and Wikileaks releases.

In the case of the Canadian Modernization Act, the Canadian government published most of the hearings related to bills C-11 and C-32, although some sessions were held *in camera* or in other words, available only to the committee members and not to lobbyists or the general public. Also, since 2012, the Canadian Parliament has completed further study into the effectiveness of the Copyright Modernization Act. Due to time constraints, I have not analyzed these new hearings. The transcripts of these new hearings and the resulting report that was completed in 2019 could be rich material for further study on the changing political economy of internet policy in Canada.[521]

[521] See https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131

In the case of Article 17 in the E.U., a larger corpus would lead to a better understanding of policy discourses and how the automated filtering is being debated in a multilateral context that is not as favorable to U.S.-based platforms. The European Commission (EC) has created an enormous amount of documentation – hundreds of hours of video, numerous studies, and qualitative surveys, as well as transcripts of parliamentary debates. And, the EC continues to release more material, as the implementation of the digital single market directive is an on-going process. This material is vast and would best be analyzed by a team. The set of stakeholder submissions that was analyzed in this study is limited by its timeframe (2015), the language of the submissions (English), and by what the EC made publicly available. In this 2015 consultation alone, there were hundreds of submissions that remain unpublished. Therefore, any conclusions that can be drawn from this corpus reflect only this consultation and may not be a large enough sample to make conclusions about the policymaking process in the E.U. surrounding the Digital Single Market Initiative.

Finally, this research was limited by my language abilities. Multi-lingual analysis of documents in multiple jurisdictions could also allow for better understandings of how internet policies are being debated in the global south and in areas that are resisting U.S. and E.U. standards of technical regulation.

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