

Business conflict and international law: the political economy of copyright in the United States

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Abstract: The internet industry has emerged as an important economic and political actor, both within the United States and internationally. Internet companies depend on exceptions from copyright law in order to operate. As a result, internet companies have considerable incentive to try and influence international copyright law. However, the current literature has neglected the role of the internet industry, instead focusing on the influence of copyright owning media companies. This has largely homogenized the concerns of business interests, neglecting the interests of business actors which do not favor stricter copyright protection. By examining business conflict over recent copyright initiatives by the United States, this article criticizes the literature. It illustrates that the internet industry has been able to alter the negotiating preferences of the United States against the wishes of copyright owners. This argues against the homogenization of business interests regarding copyright whilst illustrating the importance of material over discursive factors in determining political outcomes.

Keywords: business conflict, international copyright law, internet industry, online piracy, trade.

Introduction

Intellectual property has been a cornerstone of the United States' (U.S.) international trade agenda over the past three decades. From 1984, the U.S. began imposing unilateral trade sanctions on its trading partners for inadequately protecting intellectual property rights (Sell, 2003, pp. 82-83). The U.S. also worked to ensure that intellectual property would be included in the Uruguay Round starting in 1986, and later the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) signed in 1995. TRIPS harmonized intellectual property by committing its signatories to 'roughly similar and rather high [intellectual property] protection and enforcement standards' (Muzaka, 2013, p. 820). However, prior to this, multilateral trade negotiations rarely addressed intellectual property rights, which were largely left to the World Intellectual Property Organization

(WIPO). Whilst WIPO continues to be an important forum for international standard setting, trade agreements now provide the foundations of international intellectual property law. Of the 300 preferential trade agreements signed since 1986, just under two-thirds include intellectual property right provisions – including all of those with the U.S. as a party (World Trade Organisation, 2018).

All intellectual property grants some form of ‘exclusive right’ to its owner over its sale, reproduction, distribution, adaptation and representation. However, this exclusive right also needs to be balanced with other social goals. According to Muzaka (2013), this exposes a contradiction in intellectual property policy between the importance of recognizing intellectual property as private property, and the need to maximize access to intellectual property to serve the public good. For example, how should a company’s ownership of life-saving pharmaceutical patents be balanced with the broader public’s right to affordable and accessible medical treatment? The competing private property and public good frames can create grounds for political conflict, as the way that policymakers define a problem ultimately determines policy outcomes (Blyth, 2002; Erikson, 2015). If policymakers view intellectual property as primarily a private property issue, they will favor policies which enable intellectual property owners to extract maximum economic value from ‘their property’. However, if they view intellectual property as primarily a public good, they will favor policies which facilitate greater access to intellectual property.

Whilst not ignoring material interests, the literature on international intellectual property law largely focusses on how these competing discursive frames have been promoted by actors in order to secure policy outcomes (Drahoš & Braithwaite, 2002; Morin, 2014; Muzaka, 2013; Quack & Dobusch, 2013; Sell, 2003, 2010a; Sell & Prakash, 2004). This literature has divided these actors between commercial interests which favor private property framing, and civil society actors which favor public good framing. For example, U.S. actions to move multilateral intellectual property negotiations from WIPO to the General Agreement on Tariffs and Trade in the 1980s is viewed as the result of a successful effort by corporate intellectual property owners in getting the U.S. to assume private property framing on intellectual property (Drahoš & Braithwaite, 2002; Sell, 2003, 2010a; Sell & Prakash, 2004). Meanwhile, in the late 1990s and early 2000s public health advocates sought to set new patent standards which would allow developing states to manufacture generic pharmaceuticals without permission of the patent holder (although, with some

compensation) to address a public health crisis. As advocates reframed patents as a health (public good) not a commercial (private property) issue, they pursued patent reform through the World Health Organization, in alliance with developing countries (Murphy & Kellow, 2013, pp. 143-144).

However, by generally homogenizing commercial actors as favoring a private property frame, the literature often fails to account for conflict *between* different commercial interests in setting international intellectual property law. Instead, there is a tendency to ‘conceive of business as one political interest group and focus on its interaction with the state and/or NGOs’ (Roemer-Mahler, 2013, p. 125). Meanwhile, political cleavages within industry are at best recognized only in passing and not systematically integrated into analysis (Roemer-Mahler, 2013, p. 125). To address this shortcoming, Roemer-Mahler (2013) applies a body of literature called the ‘business-conflict school’ which examines the conflicting interests within business communities and their impact on a state’s foreign policy. Applying this approach to pharmaceuticals, for example, exposes cleavages between companies that depend on high investment into research and development to innovate new drugs, called ‘the innovators’, versus companies that manufacture generics, ‘the imitators’ (Roemer-Mahler, 2013, p. 126). Haggart (2014b) applies a similar analysis to the implementation of WIPO copyright treaties by North American states. Whilst still focusing on frames and ideas, his research examines the division between companies that *own* copyright and companies that *use* copyright. Copyright using companies are those which manufacture technologies and/or provide services which enable consumers to use and access copyright - such as video cassette recorders and internet search engines.

Despite this, few other scholars have seriously considered the impact of these commercial copyright users on the U.S.’s international preferences on intellectual property law. Instead, the literature has stressed the political strength of copyright owners over both U.S. trade policy and domestic copyright reform (Kaminski, 2013; Sell, 2013; Yoder, 2012). In doing so the literature has overstated the influence of copyright owning industries supporting a private property frame. Furthermore, commercial copyright using interests have at times align with civil society actors pursuing public good framing. Because the crucial support of these commercial actors is neglected in research, this means that the influence of framing itself is also overstated (Cartwright, 2018a).

The neglect of commercial copyright users is detrimental to the literature given the emergence of the internet industry as an important economic and political actor, both within the U.S. and internationally. Whilst being copyright owners themselves, internet companies are also copyright users and depend on exemptions from copyright law in order to operate. As a result, internet companies have considerable incentive to try and influence international copyright law. States also have, or should have, an incentive to incorporate the concerns of internet companies into their international negotiating preferences (Erickson & Leggin, 2016).

After establishing that internet companies have different preferences on copyright, this article asks the questions: what have they done about this, and what has been the outcome? Specifically, the article examines how internet companies have sought to influence the international preferences of the U.S. The influence of internet companies is significant because at the international level, states are often assumed to have either a maximalist (seeking extensive intellectual property protections) or a minimalist (seeking less stringent intellectual property protections) position. Developed states, especially the U.S., are considered maximalists (Sell, 2010b). However, domestic factors which can complicate this dichotomy are often marginalized (Morin, Serrano, Burri, & Bannerman, 2018). The U.S. hosts an economically and politically powerful industry which benefits from less stringent copyright protections. By analyzing the impact of business conflict, this article assesses the impact this has had on the U.S.' international preferences.

Specifically, the article examines the business conflict between copyright owning media companies and copyright using internet companies, and its impact on U.S. negotiating preferences over the past twenty years. The article begins by analyzing the political economy of copyright law in U.S., including the central role business conflict plays. It then examines how this business conflict has manifested over the past twenty years, particularly in regard to how best to address online copyright infringement. The article then analyses how the business conflict between copyright owners and internet companies has influenced U.S. trade policy, looking specifically at U.S. negotiations in the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership. These two agreements have been selected for three reasons. First, they were both multinational negotiations of international significance. Second, both address intellectual property extensively and in great detail. Third, both involved business conflict between copyright owners and copyright

using internet companies. The role of internet companies in these negotiations makes this research timely, given the industry's increasing (and increasingly controversial) political influence both within and outside of the U.S. By analyzing these to agreements in particular, the article illustrates the importance of internet companies in shaping international law, and is thus empirically useful for research outside of intellectual property specifically.

Using this case study, the article argues that material interests have been more important than the discursive strategies of political actors in driving U.S. international preferences on copyright. Furthermore, it argues that it is important to analyze how a 'public good' conception of intellectual property may at times be favored by commercial actors. As the article illustrates, commercial copyright using companies have supported 'public good' conceptions of intellectual property when it suits their interests. As such, the business conflict approach suggests that commercial interests cannot be reduced to being in favor of the exclusive rights of copyright owners. This nuance has been neglected in the existing literature.

The political economy of copyright in the United States

The political economy of copyright invites a business conflict analysis because, in addition to its impact on the public good, copyright law has *distributive consequences* for commercial actors (Benkler, 2001). That is, 'changes in the institutional content of property rights can help some of [business] strategies *at the expense* of others' (Benkler, 2001, p. 273, emphasis in original). The winners and losers of changes to copyright law will attempt to protect their income, putting them in conflict with other business interests. Benkler (2001) identifies four main commercial interests with regard to copyright: owners which earn income from large inventories of copyrighted works such as motion picture studios (called 'Mickey's'); owners which earn income from a small inventory or a single piece of copyrighted work such as individual authors or small software companies (called 'romantic maximizers'); owners which exploit early access to information to extract rents such as news wire services (called 'quasi-rent seekers'); and owners which give copyrighted work away freely in order to gain advantages in other goods or services they may provide, such as lawyers or medical practitioners publishing in a journal (called 'studious lawyers'). The latter two lose from more stringent copyright protections while the former two gain.

However, broadly speaking there are two main coalitions of interests which underlie the political economy of copyright law in the U.S.: copyright owners and copyright users (Patterson, 2009, p. 383). Copyright owners include creators who produce copyrighted work, such as musicians, and publishers who distribute copyrighted work, such as record labels (Patterson, 2009, p. 383). Copyright owners are primarily concerned with exclusive rights: monopoly rights over how their work is sold, copied, or distributed. An author could, for example, decide that their book will only be available for sale in one country. A photographer may decide to produce a limited number of copies of a photo to sell. As the owner of the copyright, these are their decisions to make. This control enables copyright owners to monetize their work and receive financial compensation for its use. Meanwhile, copyright users are consumers, including organizational consumers such as libraries. Users are primarily concerned with having access to copyrighted work. This exposes a divide noted by Muzaka (2013) and others between copyright as private property versus copyright as a public good.

The authority of the U.S. Congress to legislate on intellectual property is enshrined in the Constitution, which grants Congress the authority to ‘promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries’ (The United States of America, 1787, pp. Article I, Section 8, Clause 8). This forms the basis of the U.S.’s ‘utilitarian’ approach to copyright law, so-called because its main purpose is to ensure the maximum number of people benefit from creation and dissemination of culture and knowledge (Okediji, 2000, pp. 94-95). The Constitution grants private property rights (‘exclusive rights’) over copyright, but only as a means by which to secure the public good (‘promoting progress’). Without a reasonable prospect of a financial return, there is no incentive to invest in establishing new culture and knowledge. This would hurt users and the public good, because no new work would be available for consumption (Aufderheide & Jaszi, 2011, p. 16). Thus, under the U.S.’s copyright legal tradition, private property and the public good are not seen as being diametrically opposed. Rather, private property is granted as means by which to achieve the public good.

However, whilst exclusive rights are needed to incentivize creation they can also undermine the broader public interest. For example, they can restrict access to culture and knowledge too much

and can inhibit creation that builds from existing work et cetera. Because exclusive rights are granted only to further the public good, copyright law also includes a number of limitations and exceptions to mitigate these negative consequences (Aufderheide & Jaszi, 2011, p. 17). These provide circumstances in which the copyright owner's exclusive rights do not apply. Limitations and exceptions focus on user rights such as fair use, education, research, and news reporting. Limitations and exceptions are used to balance against the exclusive rights of owners, and to ensure that the public good is not adversely impacted by the economic monopoly given to creators.

Whilst limitations and exceptions address public interest areas there are also numerous commercial interests that require limitations and exceptions. Such commercial interests are usually manufacturers of technologies or service providers which enable consumers to use and access copyright — such as video cassette recorders and internet search engines. These companies are concerned with limitations and exceptions because of the threat of liability. If a company makes a product that allows consumers to infringe copyright (i.e. violate an owner's exclusive right, or 'pirate') it can itself be held accountable. However, limitations and exceptions can protect companies from liability. Commercial interests behind copyright using technology therefore tend to have opposing interests to copyright owners, favoring limitations and exceptions over the protection of exclusive rights. This conflict between commercial copyright owners and users is fundamental to the political economy of copyright reform in the U.S. (Cartwright, 2018a). Therefore, U.S. international preferences cannot be reduced to those of its copyright owning firms, and must consider the interests of copyright using firms (Haggart, 2014b).

Business conflict: Hollywood versus Silicon Valley

The main business conflict in the field of copyright policy today is between copyright owning media companies, particularly the motion picture industry, and copyright using internet companies such as Google and Facebook. In Benkler's typology internet companies combine elements of 'quasi-rent seekers' by profiting from their investments in technology that allows for prompt access to information, and 'studious lawyers' by giving away some services for free (for example a search function) in order to boost another revenue-producing services (usually advertising). Whilst internet companies are owners of intellectual property, including copyright, they nevertheless rely on limitations and exceptions to operate. For example, they rarely own the

information they give access to, and will often rely on limitations and exceptions to display the information to users. Most importantly, internet companies are protected from liability through so-called ‘safe harbor’ exemptions under the landmark *Digital Millennium Copyright Act* of 1998. Safe harbors protect internet companies from liability when performing four specific functions: conduit functions (automatic transmission), caching (creating temporary copies to allow quicker access), user storage, and information location tools such as search engines (Balaban, 2001, pp. 262-264).

However, in order to be eligible for these safe harbors, internet companies must comply with three conditions. First, they must expeditiously remove infringing content after being notified by the copyright owner. Second, copyright owners can subpoena internet companies for identifying information of their users. Third, internet companies must implement a process to terminate the services of repeat infringers under ‘appropriate circumstances’. Therefore safe harbors not only establish limited liability internet companies, but also creates obligations for protecting copyright on the internet (Band & Schruers, 2002; Williamson, 2000). Companies such as Amazon and Google support safe harbors, arguing that they strike the right balance, are effective and do not need to be changed (Misener, 2013, p. 88; Oyama, 2014, pp. 42-43). Google has also described safe harbors as the ‘foundation’ of the internet industry which has become the engine of the U.S. economy (Oyama, 2014, p. 42).

However, internet companies such as Google, which clash with copyright owners today, are largely different to those which negotiated safe harbors under the *Digital Millennium Copyright Act*. This coalition was dominated by telecommunication companies which provided access to the internet as well as services over the internet – such as America Online and CompuServe (Burrington 1996; Heaton 1996). Meanwhile, the commercial interest of these companies aligned with the public good framing of civil society groups such as the Digital Futures Coalition and Electronic Frontiers Foundation. Together, internet companies and civil society groups defeated the *NII Copyright Protection Act* in 1995-6, a precursor to the *Digital Millennium Copyright Act* which did not include safe harbors.

Another source of conflict under the *NII Copyright Protection Act* was the so-called technological protection measure provision, designed to prevent the circumvention of digital ‘locks’ on digital

content such as compact discs. It was believed that these provision under the *NII Copyright Protection Act* were too broad and ambiguous (Black, 1996). However, as part of a compromise to secure safe harbors following the failure of the *NII Copyright Protection Act*, the technological protection measure provisions under the *Digital Millennium Copyright Act* became broader and more favorable to the interests of copyright owners. Once it no was no longer in their interests, major commercial actors in the internet industry abandoned their public good position on technological protection measures in order to secure safe harbors. Meanwhile, whilst internet companies accepted this trade-off civil society groups did not (The Digital Future Coalition, 1997). Nevertheless, the *Digital Millennium Copyright Act* was able to pass into law with this compromise intact, suggesting that industry opposition was more important to the defeat of the *NII Copyright Protection Act* than that of civil society actors.

Today's largest internet companies have emerged over a small period of time to establish themselves as powerful economic and political actors in the U.S. For example, Google was founded in August 1998, however by 2016 it was the ninth most profitable company in the world and the second largest by market capitalization (Fortune Magazine, 2018; PricewaterhouseCoopers, 2016)ⁱ. Of the 20 most trafficked websites in the world, 12 are based in the U.S. or subsidiaries of U.S.-based companiesⁱⁱ. Google is particularly dominant, with Google itself being the most trafficked website in the world and Google-owned YouTube being the second most trafficked. Meanwhile Google subsidiaries, such as its Indian search engine google.co.in and its Japanese search engine google.co.jp, occupy a further 12 of the top 50 most trafficked websites in the world (Alexa, 2018). This has also translated into significant political influence. From President Obama's first term up until the beginning of 2015, Google employees made 230 visits to the White House to meet with senior officials – more than any other company (Mullins, 2015). Meanwhile, between 2008 and 2017, the internet industry as a whole more than quadrupled its total expenditure on lobbying from \$15 million to \$68 million (OpenSecrets.org, 2018).

Business conflict between copyright owners and copyright users in the internet industry is most evident in policy debates over how to respond to the widespread use of peer-to-peer (P2P) file sharing technology for the distribution of copyright infringing material, i.e. 'online piracy'. Copyright owners have become dissatisfied with the remedies included in the *Digital Millennium*

Copyright Act and have been lobbying Congress to a) increase the liability of internet companies for copyright infringement that occurs on their network and b) increase their obligations to actively police against online copyright infringement. One of the most notorious attempts at this was the *Stop Online Piracy Act* (SOPA) in 2011, which aimed to undermine safe harbors and compel internet companies to block access to websites associated with copyright infringement, essentially acting as an internet filter (Tremblay, 2013, p. 831).

However, internet companies were effectively able to prevent SOPA (and its counterpart in the Senate, the PROTECT Intellectual Property Act) from passing. As the analysis of Cartwright (2018a) illustrates, the opposition of the internet companies proved crucial in the defeat of the Bills. Furthermore, even though companies such as Google found themselves in agreement with civil society actors on the issue, this was driven by commercial concerns and not values. In fact, the public good framing pursued by anti-SOPA activists was largely not replicated by companies, which emphasized the commercial impact on their industry. Meanwhile, the response of the Obama Administration was not to assume the public good discourse either, but to emphasize the need for balance in copyright law, whilst still reiterating the importance of exclusive rights, and to call on copyright owners and internet companies to negotiate a compromise. Whilst internet companies have also been successful in blocking less-known efforts to increase their liability in the past, such as the *Inducing Infringement of Copyrights Act* in 2004, the defeat of SOPA was a turning point for the industry. First, it became much more political afterwards. Second, it had clearly illustrated to politicians, the media and other political actors its ability to fight political battles against more well-established interests – and win.

In addition to being a political force in the U.S., U.S.-based internet companies are also highly integrated in the international economy. For example, since 2008 the majority of Google's revenue has come from international markets. By 2010, Google received \$15.2 billion or 52 percent revenue from outside the U.S., and by 2017 this grew to \$58 billion or 53 percent of total revenue (Alphabet Inc., 2017; Google, 2010b). As such, the internet industry is increasingly promoting itself as important to U.S. trade competitiveness, arguing that 'the removal of barriers to Internet-enabled international commerce [s] critical to U.S. economic interests' (Computer & Communications Industry Association, 2015c, p. 1). Internationalizing safe harbors is a priority

for contemporary internet companies, which have grown frustrated with the lack of protection from liability under foreign law, mainly in Europe (for example see Sternburg & Schruers, 2013). However, the industry's internationalization agenda does not stop at safe harbors. Internet companies now advocate for a variety of other limitations and exceptions to be included in trade agreements (Computer & Communications Industry Association, 2011; The Internet Association, 2013).

The internationalization of U.S.-based internet companies, their growing political clout in the U.S. and their demands that more limitations and exceptions be included in international agreements has had a significant impact on the U.S.'s international negotiating preferences. However, this has not been analyzed in existing research. First, scholars have ignored or understated the pivotal role internet companies have played over domestic copyright reform, such as SOPA, instead emphasizing the public good framing of copyright issues by activists. For example, Sell (2013) does not view SOPA through this owner/user business conflict approach of copyright law reform, instead arguing that the use of the internet itself was crucial in enabling greater participation in the reform process, undermining the influence of commercial interests. This views the SOPA campaign as not being a conflict between copyright owners and users, but between *insiders* and *outsiders*. Insiders are the copyright owners which were backed by access to legislators and structural power derived from their lobby efforts and political contributions. The outsiders were the social movements that emerged online and which used public good frames against SOPA, advocating for free speech and an open uncensored internet (Benkler, Roberts, Faris, Solow-Niderman, & Etlings, 2015; Berghofer & Sell, 2015; Yoder, 2012).

Second, this insider outsider divide has been extended to international copyright law. As Sell argues, a “*transnational* Insider/Outsider coalition of rooted cosmopolitans succeeded in killing *domestic* US anti-piracy laws” (Sell, 2013, p. 80, emphasis in original). This transnational coalition has since mobilized around international agreements, such as the Anti-Counterfeiting Trade Agreement. Thus, the analysis applied by Sell sees SOPA and the international negotiations that followed it to be between the US/copyright owners and a ‘transnational’ pro-internet freedom social movement. Copyright owners remain undisputed ‘insiders’ having enjoyed considerable access to and influence over the office of the U.S. Trade Representative (USTR) since the 1980s

(Kaminski, 2013; Sell, 2010b). Once again, it neglects the business conflict at the heart copyright reform, mentioning the role of commercial interests such as Google only in passing (Sell, 2013, pp. 79-80). To address this oversight, the following analysis examines the mobilization of the internet industry around trade issues, how these have directly challenged the interests of copyright owners, and the impact this has had on U.S. negotiating preferences.

The Anti-Counterfeiting Trade Agreement

When the Clinton Administration led efforts to reform domestic copyright law to address the growing popularity of the internet in the 1990s, it understood that effective protection of exclusive rights online would require new international standards to be set. A major government review of domestic laws established by President Clinton, called the Information Infrastructure Task Force assessed the ‘adequacy of copyright laws’ by investigating ‘how to strengthen domestic copyright laws *and international intellectual property treaties* to prevent piracy’ (Brown, Irving, Prabhakar, & Katzen, 1993, p. 13, emphasis added). This required the U.S. to ‘initiate efforts to work toward a new level of international copyright harmonization’ (Lehman & Brown, 1994). The task force’s work to reform domestic copyright law coincided with multilateral negotiations at WIPO in 1996 (Haggart, 2014b, pp. 113-114). These negotiations resulted in the WIPO internet treaties, the preeminent multilateral agreements specifically addressing digital copyright issues. The U.S.’s *Digital Millennium Copyright Act* was passed to ratify these agreements in 1998. However the *Digital Millennium Copyright Act* differs from the WIPO internet treaties in important ways. For example, the issue of liability and safe harbors for internet intermediaries are not addressed in the WIPO internet treaties (Ficsor, 2006, p. 26).

Whilst the U.S. has encouraged countries to ratify the WIPO internet treaties, it has also sought to internationalize the *Digital Millennium Copyright Act* which provides a higher standard of copyright protection. This was achieved through a series of preferential trade agreements (Cartwright, 2018b). Between 2000 and 2007 the U.S. negotiated and signed 11 bilateral trade agreementsⁱⁱⁱ and one regional trade agreement in Central America (World Trade Organisation, 2018). Copyright owners have supported efforts to internationalize the *Digital Millennium Copyright Act*. This is evident from the reports of the Advisory Committee on Intellectual Property Rights, a committee that advises the U.S. trade negotiators in the USTR during negotiations and

offers final comment after an agreement is signed. Up until 2007, this committee was filled entirely by intellectual property owning interests. The reports of the Advisory Committee on the numerous free trade agreements up until 2007 consistently commended the USTR for including U.S. standards on safe harbors, believing them to be essential ‘if U.S. protected material is to find its way safely into global e-commerce to the great benefit of the U.S. economy and to U.S. jobs’ (IFAC-3, 2004, p. 20). Key to their support is not the limited liability the safe harbors grant, but instead the fact that they establish ‘a system of potential liability’ at the same time (IFAC-3, 2004, p. 20).

Internationalizing U.S. standards of online copyright protection was used to defend the interests of U.S. copyright owners as the popularity of online copyright infringement grew throughout the 2000s. Internet companies at the time were also pleased with this approach, as safe harbors were left intact (Kelly, 2003, p. 112; Sanders, 2003, p. 179). However, as discussed above, the internet companies which dominate both commercially and politically today are different to those which dominated up until the 2000s. Domestically, copyright owning interests and copyright using interests, including internet companies, frequently clashed on the scope of exclusive rights, liability and limitations and exceptions – as they have for over a century (Cartwright 2018a). However, it was not until more recently that international copyright law has been so contested within the U.S.

In addition to using trade agreements to protect exclusive rights internationally, the U.S. has also dedicated law enforcement resources to targeting the largest online operators which engaged in criminal copyright infringement. As part of these efforts, the USTR initiated discussion with ‘likeminded IP [intellectual property]-friendly governments to build international support to attack the trade in fakes’ (Espinel, 2005, p. 18). The result of this was the Anti-Counterfeiting Trade Agreement (ACTA), announced by the USTR in 2007. The ACTA negotiations were to focus on strengthening international cooperation whilst providing a robust legal framework for intellectual property enforcement (United States Trade Representative, 2007). That is, ACTA was initiated as an international treaty on intellectual property law enforcement and not, as its name suggests, a trade agreement. Furthermore, ACTA was being negotiated as what is called an ‘executive agreement’. As an executive agreement, ACTA would not need to be ratified by the Congress as

free trade agreements are. The USTR, which was overseeing the negotiations, argued that the President could negotiate ACTA as an executive agreement because it would not change any U.S. laws (Flynn, 2010, pp. 158-162).

Copyright owners believed that ACTA was an opportunity to significantly advance the internationalization of U.S.-style exclusive rights. The International Intellectual Property Association, for example, believed that ACTA should ‘go beyond TRIPS, along the lines of the [Intellectual Property Right] Chapters the U.S. government has negotiated in its Free Trade Agreements’ (E. H. Smith, 2008, p. 2). However, whilst copyright owners were supportive of the internationalization of U.S. standards overall, many no longer felt that the *Digital Millennium Copyright Act* was adequate in combating online piracy. These owners, including the Recording Industry Association of America, the Motion Picture Association of America, and the International Intellectual Property Association sought to use ACTA to bypass domestic opposition from internet companies to initiate changes to domestic law.

However, as an executive agreement ACTA could not change any U.S. law. Fortunately for the copyright owners, however, ACTA provided other opportunities. As an agreement on coordination of intellectual property enforcement, not just standard setting, ACTA would also include ‘best practice’ solutions. Whilst not strictly obligations, these best practices would secure commitment from party states to implement stringent and well-resourced policies to address copyright piracy. Furthermore, as ACTA was an agreement among ‘likeminded intellectual property-friendly’ states, these best practices were expected to set a high bar for enforcement. As such, ACTA could influence how U.S. laws were actually enforced, even if the laws themselves remained the same. Owners could therefore still use ACTA ‘as a back door for policymaking’ to expand their exclusive rights in the US ‘under the guise of better-coordinated enforcement’ (Bridy, 2011, p. 567).

The most controversial ‘best practice’ considered in the ACTA negotiations was graduated response – a policy recently implemented in a number European states that were party to the negotiations. Under graduated response, internet users receive a predetermined number of warnings (usually three) for infringing behavior before having their internet access terminated. This is more stringent than the requirement under U.S. law to terminate ‘accounts’ of repeat

infringers under ‘appropriate circumstances’. The Motion Picture Association of America argued that graduated response had ‘proven to be successful in various contexts around the world’ (Glickman, 2009, p. 1), and explicitly called, along with several film industry unions, for it to be included in the agreement (American Federation of Musicians et al., 2009, p. 2). Both the Motion Picture Association of America and the Recording Industry Association of America also supported online filtering to remove infringing content from the internet (Glickman, 2009, p. 1; Love, 2008). The copyright owners therefore sought to use ACTA to broaden the responsibilities of internet companies to enforce copyright online.

As ACTA sought to establish best practice enforcement procedures, internet companies raised concerns with the USTR that the negotiations would ‘re-open the [*Digital Millennium Copyright Act*]’ (American Association of Law Libraries et al., 2008). Additionally, U.S.-based internet companies were anxious that the European Union was also party to the negotiations, because European Union directives on online liability differ from the U.S. in a variety of ways (Farano, 2012, pp. 65-147). As a result, internet companies have been found liable in Europe for activity that has been permitted in the U.S. (E. Smith, 2011, pp. 1568-1573). From the beginning of the negotiations, internet companies raised concerns that negotiating online liability with the European Union may ‘challenge American companies engaging in online practices that are entirely legal in the U.S., that bring enormous benefit to U.S. consumers, and that increase U.S. exports’ (Amazon.com et al., 2008, p. 2). Consequently, they urged safe harbors to be left out of the negotiations completely (American Association of Law Libraries et al., 2008). Throughout the negotiations, internet companies continued to caution the USTR that efforts to marry U.S. and European Union standards may result in ambiguity which would provide little assurance that the integrity of domestic law would remain.

Internet companies were therefore primarily concerned with preserving limitations and exceptions, especially safe harbor provisions, from being weakened by ‘best practice’ copyright enforcement. A number of civil society groups also opposed ACTA, pursuing a public good discourse and objecting to the secrecy surrounding the negotiations. These civil society actors worked both independently of and in conjunction with internet companies. Prominent members of Congress also sympathized with the internet companies and urged the USTR not to include online liability

and safe harbors in the agreement (Leahy, 2010; Leahy & Specter, 2008; Wyden, 2010). The USTR sought to reassure both the internet companies and Congress that ACTA would reflect the balance struck under the *Digital Millennium Copyright Act* and existing free trade agreements (Inside U.S. Trade, 2008; Schwab, 2008). The USTR even eventually gave internet companies and some civil society groups access to negotiating drafts, as many copyright owners already did by virtue of sitting on the Advisory Committee. A freedom of information request by the advocacy group Knowledge Ecology International revealed that several internet companies and some public interest groups received drafts of the internet section of ACTA in 2009 after signing non-disclosure agreements. This included representatives from Google, eBay and the Computer and Communications Industry Association (Love, 2009). However, this did not ease the concerns. As the Chair of the Senate Judiciary Committee, Patrick Leahy argued in a letter to the USTR:

The chapters in the draft ACTA text that address international cooperation and enforcement practices represent significant accomplishments. I urge you, however, not to enter into an Agreement that creates inflexible standards for civil, criminal, and border enforcement. Further, any language in the text that addresses secondary liability for online service providers should be very general in nature to provide flexibility for Congress. This is one of the most hotly debated topics in intellectual property law, and an international executive agreement is not the proper place to resolve it - or to lock into place current standards or safe harbors (Leahy, 2010, p 2).

The final agreement did not include provisions on online liability and safe harbors, however this was not because of the opposition from internet companies, civil society or even Congress. Whilst the USTR continued to pursue provisions on online liability and safe harbors in the agreement despite this opposition it was stymied by European negotiators. The differences between U.S. and European Union standards caused difficulty as neither party was willing to agree to standards that would require changes to domestic law. As one commentator argued during the negotiations ‘[t]he bottom line is that the Europeans believe that the US proposal goes far beyond the requirements of many [European Union] directives, and far beyond the laws of many [European Union] member states’ (Inside U.S. Trade, 2009). As a result, ACTA did not include an internet intermediary liability or safe harbor standard. In fact, overall, the standards under ACTA were weaker than the

U.S.'s free trade agreements, U.S. law and European Union law (Weatherall, 2011). Nevertheless, internet companies still opposed ACTA after a draft text of the final agreement was released in April 2010 (Black, Shapiro, & Bond, 2010, p. 1).

ACTA has not been ratified by the U.S., however again this is not the result of domestic opposition. Instead, ACTA failed for other reasons, after being rejected by the Mexican Senate in 2011 and the European Parliament in 2012. Whilst the U.S. could still ratify ACTA if it wanted to, the absence of the European Union in particular makes this unlikely. The failure of these parties to ratify the agreement has effectively derailed it, and to date ACTA has only been ratified by one party — Japan. The defeat of ACTA in the European Parliament was driven considerably by the work of activists pursuing a public good frame (Dür & Mateo, 2014). Likewise, political activists were also important in the rejection of ACTA by the Mexican Senate (Haggart, 2014a). Whilst it is possible that civil society was crucial in Europe, Mexico or elsewhere in the eventual collapse of ACTA, civil society opposition did not sway the content of the agreement itself, nor did it prevent the European and Mexican negotiators from signing the agreement. In the U.S. specifically neither opposition from internet companies nor civil society appeared to have caused the USTR to alter its approach to the negotiations.

Despite the eventual failure of ACTA, the negotiation of the agreement is analytically important. It was the first time internet companies took such a major interest in international negotiations, and the first agreement since the *Digital Millennium Copyright Act* where the copyright provisions were so heavily contested domestically. However, this conflict was not limited to safe harbors and internet intermediary liability. During the ACTA negotiations, internet companies began to articulate broader demands for the USTR to include copyright standards which limit their liability beyond what is included under safe harbors. These standards are found in U.S. law, but have been omitted from the U.S.'s preferential trade agreements (Google, 2010a, p. 9; NetCoalition and CCIA, 2010, pp. 47-50). Indeed, the critiques that internet companies made of ACTA extended to the U.S.'s overall approach preferential trade agreements:

The current U.S. positions in ACTA and the free trade agreements (FTAs) on which they are based fail to reflect significant changes that have occurred in our international

trade over the past decade. In particular, these positions do not support the interests of Internet companies, the fastest growing sector of the economy (NetCoalition and CCIA, 2010, p. 49).

Internationalizing safe harbors remains a priority for internet companies (Oyama, 2014, p. 43). However, the industry's internationalization agenda does not stop at safe harbors. Indeed, it now feels these are 'no longer sufficient by themselves to protect the new services introduced by Internet and technology companies' (NetCoalition and CCIA, 2010, p. 51). Since ACTA, internet companies have developed an even more proactive agenda on the internationalization of U.S. copyright law. Through ACTA internet companies saw how international copyright law affects their interests, and in response they have taken an active interest in shaping U.S. negotiating preferences. Furthermore, shortly after ACTA internet companies became embroiled in a political contest over domestic copyright law through SOPA – a contest they won. By 2012, the internet industry had thus developed a proactive agenda for shaping the U.S.'s preferences on international copyright law and had amassed considerable political influence. They were thus later able to pursue their interests through the Trans-Pacific Partnership (TPP) – a multinational agreement which included standards on copyright.

The Trans-Pacific Partnership

When TPP negotiations formally commenced in 2010, the USTR had not yet settled on its proposal for copyright standards. It was not until July 2012 that the USTR announced ahead of a TPP negotiation round that it would be 'proposing a new provision...that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research' (United States Trade Representative, 2012). This was to appease the concerns of internet companies, which had negotiated privately with copyright owners (Inside U.S. Trade, 2015). Representatives from internet companies were also given access to both the USTR's Advisory Committee for Trade Policy and Negotiations and the Advisory Committee on Intellectual Property Rights. This included the Chief Executive Officer of online marketplace Etsy and of the Vice President of Intellectual Property Policy at Yahoo! Inc. (ITAC-15, 2015; ACTPN 2015).

Technology trade group Information Technology Industry Council^{iv} would later join the Advisory Committee for Trade Policy and Negotiations (United States Trade Representative, 2016).

In 2015 the Obama Administration sought to pass the Trade Promotion Authority through Congress, which would empower the USTR to finalize the TPP negotiations. However, the internet industry offered only tepid support for this legislation due to its lack of ‘balance’ (Computer & Communications Industry Association, 2015b; The Internet Association, 2015b). In response it proposed changes to the Bill which would require the USTR to ensure that U.S.-style limitations and exceptions are also included in trade agreements in greater detail (Beckerman, 2015, p. 5). Whist this was not successful, the Senate Finance Committee did make other changes designed to establish balance (Hatch, 2015). Following the revisions, the internet industry came out in support of the Trade Promotion Authority (Computer & Communications Industry Association, 2015a; The Internet Association, 2015a). However, the pivot in the industry’s position was also a result of a deal struck with the USTR (Behsudi, 2015; Inside U.S. Trade, 2015). This deal became apparent in July 2015 when the USTR re-opened negotiations on the TPP’s limitations and exceptions provisions, seeking a higher level of commitment from the parties to implement limitations and exceptions to balance against the exclusive rights of copyright owners^v.

Copyright owners were reportedly ‘livid’ with the about-face and reacted swiftly (Inside U.S. Trade 2015). The Motion Picture Association of America contacted the office of every single Congressional Representative from the State of California and urged them to put pressure on the USTR. Meanwhile, copyright allies in Congress spoke publicly against the USTR’s actions including Tennessee Senator Bob Corker, who accused the internet industry of lobbying the USTR to change language on intellectual property that was already settled amongst the stakeholders following negotiations in 2012. He argued that this would undermine the bipartisan support for the USTR’s agenda and potentially send the message that the US was not serious about protecting intellectual property (Inside U.S. Trade 2015).

The *coup d’état* failed and the final text of the TPP did not include the stronger language. The agreement was instead similar to what the USTR had proposed earlier in 2013, which reads:

Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled ("The Trans-Pacific Partnership Agreement," 2016, p. Article 18.66).

This clause is a significant achievement for internet companies, as no U.S. agreement to date had included any provisions on creating balance in copyright law. The USTR has also indicated that, as far as it is concerned, the clause is an obligation to continuously balancing copyright laws, suggesting parties have to adapt to new technologies on an ongoing basis and in a timely manner (Band, 2015, p. 11). Because of this, the USTR managed to negotiate copyright standards in the TPP that won support from domestic industries, avoiding the divide that emerged under ACTA^{vi}.

Meanwhile, the European Union was not a member of TPP negotiations. With no comparable power to oppose it, the U.S. had far more success in internationalizing its own copyright standards. The TPP also included four countries that already had committed to U.S. standards on internet intermediary liability and safe harbors through bilateral agreements: Australia, Singapore, Peru and Chile. Leaked negotiating drafts show that Australia in particular was a reliable ally for the US, supporting almost all of the proposals that matched provisions in the Australia-US free trade agreement, making it the second most supportive of US proposals after Japan (Weatherall, 2015, pp. 544, 552; Wikileaks, 2014). However, the US faced robust opposition from other parties, particularly Canada, which was the source of most of the alternative proposals to the U.S. (Wikileaks, 2013). As a multinational forum with many members, U.S. negotiators still faced challenges in emulating, wholesale, what it had achieved at the bilateral level.

The TPP's standards on liability and safe harbors protects internet companies in a similar way to the *Digital Millennium Copyright Act*. However, it does not include some of the same conditions on internet intermediaries, such as the requirement to terminate the accounts of repeat infringers.

Overall, however, the TPP progressed the US copyright standards under the *Digital Millennium Copyright Act*. However, this is again moot as the U.S. withdrew from the TPP in 2017. Whilst the TPP is being renegotiated following the U.S.'s withdrawal, this has already resulted in eleven intellectual property provisions being suspended from the agreement – including those on liability and safe harbors (Trans-Pacific Partnership Countries, 2017). With respect to copyright for the digital era, the new TPP does not emulate the U.S.'s standards, pursued over the past two decades.

Nevertheless, the case does illustrate the importance of analyzing business conflict when researching international negotiations. The USTR clearly made active efforts to include the internet industry in TPP negotiations and to broker agreements between the industry and copyright owning interests. This is not only illustrated through deals made with industry, but the inclusion of internet companies and trade groups in the USTR Advisory Committees. That is, the trade negotiating institutions of the U.S. adapted to accommodate internet companies and their interests. Civil society groups, meanwhile, were not accommodated in this way. This is not to discount the role of civil society, but rather to illustrate the importance internet companies, backing less stringent copyright protections for their own commercial interests, had on the outcomes of the U.S.'s negotiation.

Examining the TPP whilst only considering the interest of copyright owning industries therefore ignores the importance of internet companies. By neglecting the role of internet companies, scholars are in-turn unable to explain key concessions that internet companies were able to extract in the TPP with regard to balance in copyright law. Some scholars have suggested that political conflict over ACTA and the TPP reflected an insider/outsider divide, with copyright owning insiders pursuing private property frames and activist outsiders pursuing a public good frame (Sell, 2013). However, this obscures the material interests which promoted from the inside for a more balanced approach in the TPP for material reasons, not in the service of public good values. By examining business conflict between copyright owners and users, it is apparent how the U.S. state attempted to reconcile these competing interests with its own in order to establish its preferences in setting international copyright law.

It is important to note that because internet companies have been motivated by commercial interests, their position is subject to change. In fact, this is not without precedents in copyright law. For example, the motion picture industry was once considered a copyright using technology, running afoul of copyright owning book publishers in its search for stories to adapt for the screen (Litman, 1989, pp. 288–289). Today the motion picture industry is perhaps the most active and strident advocate for exclusive rights in the U.S. Just because the interests of internet companies align with public good goals on copyright currently does not mean they will into the future. Indeed, despite their conflict over copyright law, internet companies have engaged with direct negotiations with copyright owners, often brokered by Office of the U.S. Intellectual Property Enforcement Coordinator, to reach voluntary and non-binding agreement for preventing online copyright infringement. These agreements include obligations that are beyond what is required under the law. Furthermore, given the dominance of (often American) internet companies over their respective markets, these private agreements can create regulations that apply globally, not just in the U.S. (Tusikov, 2016).

Conclusion

This article has argued that research of international intellectual property standard setting, specifically copyright, must consider the impact of business conflict and competing material interests on shaping state preferences. This was argued by examining the conflict between copyright owning media companies and internet companies over international standard relating to online liability and online copyright infringement prevention. This case illustrated that internet companies played an important role in the negotiating outcomes of the TPP, after mobilizing on the issue of international copyright law during the negotiations of ACTA.

The article thus makes several contributions to the literature. First, the division between copyright as private property and copyright as serving the public good is not always clear. As discussed, the U.S. Constitution sets out an approach to copyright in the U.S. that considers private property as a means by which to achieve the public good. The Constitution also lays the foundation of the political economy of copyright in the U.S., which establishes a coalition of interests which support, and profit from, expansive exclusive rights and another which supports, and profits from, expansive limitations and exceptions to those rights.

Second, this means that actors in civil society are not the only ones to support greater access to copyrighted work through more flexible limitations and exceptions. Various commercial interests which manufacture goods or provide services which enable or facilitate the use copyright work also support greater access to copyright. This serves their material interests as more access through limitations and exceptions reduces their risk of being successfully sued for copyright infringement, and allows them to use copyright work without having to compensate copyright owners. These material factors should receive greater scholarly attention than they currently do.

Third, the article empirically illustrates the influence that internet companies now exercise over the international preferences of the U.S. and thus their ability to shape international law. This also means that the U.S, whilst still a copyright maximalist, can at times support more minimalist positions. This does not suggest an embrace of the ‘public good’ by the U.S., but is rather in the service of the profitability of its commercial constituencies. Last, the article illustrates that when also taking into consideration the material interests that support greater access to copyright work, the relative influence of both copyright owners and discursive strategies over state preferences is reduced.

Endnotes

ⁱ Or rather its parent company Alphabet Inc., which was established as part of a restructure in 2015.

ⁱⁱ Including Wikipedia, which is a not-for-profit.

ⁱⁱⁱ Jordan (2000), Chile (2003), Singapore (2004), Australia (2004), Morocco (2004), Bahrain (2004), Oman (2006), Peru (2006), Colombia (2006), Panama (2007) and Korea (2007).

^{iv} Which includes Google, LinkedIn, Twitter, Dropbox, Apple, Amazon, Facebook, Microsoft and Yahoo! among its members, as well as a number of consumer electronics manufacturers.

^v Leaks from 2013 show that the USTR was already seeking stronger language than it had been in 2012, requiring parties to ‘endeavour’ to achieve *overall* balance in copyright law, rather than merely ‘seeking’ to achieve balance in *limitations and exceptions*. However, in July 2015 the USTR was reportedly seeking to make the language stronger still by requiring the parties to actually achieve balance, not just ‘endeavour’ to.

^{vi} The U.S.-Mexico-Canada agreement does not include the TPP’s clause on ‘balance’ in copyright law. This has been criticised by copyright using internet companies. During the U.S.-Mexico-Canada negotiations, internet company interests were represented on the new advisory committee on ‘Digital Economy’, with Information Technology Industry Council sitting on the Advisory Committee for Trade Policy and Negotiations. Copyright and other intellectual property owners again dominated the advisory committee on intellectual property. Whilst the Digital Economy committee has raised concerns with some elements of the safe harbour provisions of the U.S.-Mexico-Canada agreement as well, they are overall happy with them – as are both the advisory committee on intellectual property and the Advisory Committee for Trade Policy and Negotiations (ACTPN, 2018; ITAC-8 2018; ITAC-13, 2018).

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