

**COPYRIGHT LAWMAKING AND PUBLIC CHOICE:
FROM LEGISLATIVE BATTLES TO PRIVATE ORDERING**

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I. INTRODUCTION

On January 18, 2012, millions of people awakened to an Internet that was not quite right. Encyclopedia giant Wikipedia, Internet search engine Google, and many others blocked access to content¹ in a twen-

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ty-four-hour strike to symbolize their opposition to two anti-piracy bills: The Stop Online Piracy Act (“SOPA”)² and its Senate companion, the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act (“PIPA”).³ The two Bills would expand the power of U.S. law enforcement to combat online trafficking in copyrighted content and counterfeit goods by enabling court orders to prevent advertisers and payment facilities from conducting business with infringing websites, search engines from linking to them, and Internet Service Providers (“ISPs”) from offering access to the sites.⁴

Over one hundred thousand websites⁵ took part in the strike, during which some were effectively closed, while others featured information about the Bills and directed users to action centers to communicate their worries to Congress.⁶ Users zealously responded and fulminated against the Bills through posts on social networks, online petitions, and e-mails and phone calls to Congress.⁷ The protest was unanimously hailed as successful, as the stated positions by members of Congress on SOPA and PIPA shifted overnight from 80 for and 31 against to 55 for and 205 against.⁸ According to former House Judiciary Committee Chairman Lamar Smith, the House of Representatives “postpone[d] consideration of the legislation until there [was] wider agreement on a solution.”⁹ Senate Majority Leader Harry Reid announced that the procedural vote on PIPA, which had

1. See Ned Potter, *SOPA Blackout: Wikipedia, Google, Wired Protest 'Internet Censorship,'* ABC NEWS (Jan. 18, 2012, 11:00 AM), <http://abcnews.go.com/blogs/technology/2012/01/sopa-blackout-wikipedia-google-wired-join-protest-against-internet-censorship/>.

2. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

3. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011) (also known as the Protect IP Act).

4. CONG. RESEARCH SERV., BILL SUMMARY & STATUS S. 968, 112th Cong. (2011), available at <http://thomas.gov/cgi-bin/bdquery/z?d112:SN00968:@@D&summ2=m&>; CONG. RESEARCH SERV., BILL SUMMARY & STATUS H.R. 3261, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03261:@@D&summ2=m&>.

5. *The January 18th Blackout / Strike in Numbers and Screenshots*, FIGHT FOR THE FUTURE, <http://www.sopastrike.com/numbers/> (last visited Dec. 20, 2013).

6. Potter, *supra* note 1.

7. FIGHT FOR THE FUTURE, *supra* note 5.

8. See Dan Nguyen, *SOPA Opera Update: Opposition Surges*, PRO PUBLICA (Jan. 19, 2012, 12:39 PM), <http://www.propublica.org/nerds/item/sopa-opera-update> (stating SOPA/PIPA had eighty supporters and thirty-one opponents on January 18); Dan Nguyen, *SOPA Opera: Where Do Your Members of Congress Stand on SOPA and PIPA?*, PRO PUBLICA (Jan. 20, 2012), <http://projects.propublica.org/sopa/> (stating SOPA/PIPA had 55 supporters and 205 opponents and “Leaning No” as of January 20th).

9. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, available at http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html?_r=1.

been scheduled for January 24th, would be postponed “[i]n light of recent events.”¹⁰

The ability to organize a large crowd with diffuse interests into effective political action — as seen in the SOPA/PIPA protest — challenges a broad array of copyright scholars using public choice theory to demonstrate the disproportionate influence copyright holders, especially the entertainment industries, have had on copyright lawmaking.¹¹ Based on the assumption that decisions in public entities are made by individuals attempting to advance their rational interests, public choice theory looks at administrative decisions as the product of pressure from interest groups.¹² According to public choice models, the lawmaking process involves organized interest groups who compete to implement their agenda, while the outcome is dictated by relative group strength — the group with the greatest political capital is likely to wield superior influence on the process.¹³ Consequentially, the market for legislation systematically produces too few laws that are conducive to the overall benefit of society (i.e., “public goods”), while systematically delivering too many laws that allocate resources to an interested group (i.e., “rent-seeking” laws).¹⁴

By applying public choice analysis to copyright lawmaking, a prominent body of copyright scholarship has argued that for virtually twenty years the content industries have used their political power to extend the scope, reach, and enforcement of copyright at the expense of the general public.¹⁵ Under this line of commentary, copyright owners are a well-organized group with resources and clearly defined interests, while the public consists of decentralized groups suffering from collective action problems.¹⁶ The practical consequence of the disparateness of the public is a systematic bias within the legislative process, where the public is unable to effectively advocate for itself, while the interests of copyright owners and the content industries are

10. Harry Reid, *Twitter Feed*, TWITTER (Jan. 20, 2012, 6:27 AM), <https://twitter.com/senatorreid/status/160367959464878080> (“In light of recent events, I have decided to postpone Tuesday’s vote on the PROTECT IP Act #PIPA.”).

11. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 85–97 (2001); Jessica Litman, *Copyright Legislation and Technological Change*, 68 ORE. L. REV. 275, 277 (1989) (suggesting that “the nature of the legislative process we have relied on for copyright revision is largely to blame for those laws’ deficiencies”); *infra* Part II.

12. MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 7–10 (2009).

13. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 380 (1983).

14. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988).

15. Yochai Benkler, *Seven Lessons from SOPA/PIPA/Megaupload and Four Proposals on Where We Go from Here*, TECH PRESIDENT (Jan. 25, 2012), <http://techpresident.com/news/21680/seven-lessons-sopapipamegaupload-and-four-proposals-where-we-go-here>.

16. See *infra* Part II.

broadly met.¹⁷ Professor Jessica Litman, who is most closely identified with this argument, has demonstrated through a typical public choice analysis how commercial interests shaped the 1976 Copyright Act and the Digital Millennium Copyright Act (“DMCA”).¹⁸ According to Litman, “our copyright laws have been written not by Congress, not by Congressional staffers, not by the copyright office or by any public servant in the executive branch, but by copyright lobbyists.”¹⁹ Professor Lawrence Lessig also pointed to the influence of powerful copyright owners in the enactment of the Sonny Bono Copyright Term Extension Act,²⁰ which extended copyright protection for all works by an additional twenty years.²¹

While the public choice theory argument has not been met with unanimous agreement,²² the claim that the copyright industry has had an excessively forceful position in drafting copyright legislation could hardly be confuted — that is, until recently. The SOPA/PIPA protest highlighted what many view as a shift toward a new political calculus in copyright lawmaking.²³

Two relatively recent developments have paved the way for the overwhelming success of the SOPA/PIPA backlash: (1) the tech lobby became stronger and successfully countered the traditionally dominant entertainment lobby in Washington, and (2) social networks lowered coordination costs for users wishing to mobilize into political action. The introduction of the Internet and copying technologies has redefined the target of copyright legislation, adding technology providers and end-users to the circle of affected parties.²⁴ As a result, an additional sector entered copyright politics: the tech industry. As years passed, the tech sector has turned into a highly influential actor and

17. See Litman, *supra* note 11, at 281 (“The 1976 Act solved the problem of accommodating future technology by reserving to the copyright owner control over uses of copyrighted works made possible by that technology. Broad, expansive rights were balanced by narrow, stingy exceptions.”); JESSICA LITMAN, DIGITAL COPYRIGHT 74 (2001) [hereinafter LITMAN, DIGITAL COPYRIGHT].

18. See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810 (2012)); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C. (2012)); LITMAN, DIGITAL COPYRIGHT, *supra* note 17, at 74, 128–45.

19. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 350 (2002).

20. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203, 301–304 (2012)).

21. LAWRENCE LESSIG, FREE CULTURE 134 (2004).

22. This body of scholarship has been criticized for its sweeping design of the public choice argument by other prominent scholars, like Robert Merges, who attributed the expansion of copyright to efficiency-promoting modifications. See Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 291 (2004).

23. Benkler, *supra* note 15 (noting the “political calculus” was changed following the SOPA/PIPA protest).

24. See Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 846–48, 860 (2009).

increased its lobbying efforts in Washington.²⁵ Google, for example, went from spending \$5.2 million in 2010 to \$18.2 million in 2012,²⁶ and Facebook nearly tripled its lobbying expenses between 2011 and 2012.²⁷ Some viewed the SOPA/PIPA battle as the opening test of the political strength of the tech and Internet industries, which, for the first time, took an uncompromising stand against some of the uppermost lobbying interests in Washington, including the United States Chamber of Commerce and the Motion Picture Association of America.²⁸ Federal disclosure records show that a total of 115 companies and organizations had lobbyists working on both sides of the anti-piracy Bills.²⁹

Still, the overnight transformation in lawmakers' position cannot be attributed to corporate lobbying alone.³⁰ The protest against the Bills, which successfully swayed lawmakers to oppose SOPA and PIPA, also originated as a grassroots movement in social media, blogging websites, e-mail chains, and numerous message and discussion boards.³¹ While past copyright legislative efforts did not capture a great deal of public attention, as more people use technological means to communicate through online networks, individual users have be-

25. According to a report by the Center for Responsive Politics, the computer and Internet industries spent more than \$133 million on lobbying in 2012. *Compare Lobbying, Computers/Internet Industry Profile, 2012*, CTR. FOR RESPONSIVE POLITICS (July 29, 2013), <http://www.opensecrets.org/lobby/indusclient.php?id=B12&year=2012> [hereinafter *Lobbying, Computers/Internet, 2012*], with *Lobbying, TV/Movies/Music Industry Profile, 2012*, CTR. FOR RESPONSIVE POLITICS (July 29, 2013), <http://www.opensecrets.org/lobby/indusclient.php?id=B02&year=2012> [hereinafter *Lobbying, TV/Movies/Music, 2012*] (reporting that the total lobbying by TV/Movies/Music was more than \$117 million).

26. *Compare Lobbying by Google Inc. in 2010*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000022008&year=2010> (last visited Dec. 20, 2013) [hereinafter *Lobbying by Google in 2010*], with *Lobbying by Google Inc. in 2012*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000022008&year=2012> (last visited Dec. 20, 2013) [hereinafter *Lobbying by Google in 2012*].

27. *Compare Lobbying by Facebook Inc. in 2011*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000033563&year=2011> (last visited Dec. 20, 2013) [hereinafter *Lobbying by Facebook in 2011*] (reporting Facebook spent \$1,350,000 on lobbying in 2011), with *Lobbying by Facebook Inc. in 2012*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000033563&year=2012> (last visited Dec. 20, 2013) [hereinafter *Lobbying by Facebook in 2012*] (reporting Facebook spent \$3,850,000 on lobbying in 2012).

28. See Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES (Jan. 17, 2012), <http://www.nytimes.com/2012/01/18/technology/web-wide-protest-over-two-antipiracy-bills.html>.

29. *Id.*

30. For a similar view, see Somini Sengupta, *Big Victory on Internet Buoy Lobby*, N.Y. TIMES (Jan. 26, 2012), <http://www.nytimes.com/2012/01/27/technology/victory-on-antipiracy-issue-buoys-internet-lobby.html>.

31. See Jenna Wortham, *Public Outcry over Antipiracy Bills Began as Grass-Roots Grumbling*, N.Y. TIMES (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?_r=1&pagewanted=all.

come further involved in copyright debates.³² Technological advancements have also provided the means through which users can effectively campaign for their interests. In particular, social and participatory media³³ have decreased transaction costs for collective action. With its global reach, social media, like Wikipedia and Facebook, has stimulated the diffusion of information and reduced information costs, such as those associated with informing the public about legislative bills and their ramifications.³⁴ Social media has also significantly reduced organizational costs for social movement actors, allowing them to mobilize and collaborate beyond time and space constraints.³⁵ Thanks to social media, Internet users could overcome collective action problems and influence lawmakers' decisions during the SOPA/PIPA revolt.

In the days following the SOPA strike, Internet activists rejoiced with new hope for a better, more balanced, copyright reality. With the public now holding the power to sway lawmakers, theoretically the latter would be more prudent when considering legislation that the former regards as harmful to the open and participatory culture of the Internet.³⁶ This Article argues, however, that while social networks have empowered individuals to become more active in the political arena, the success of the SOPA/PIPA revolt does not herald the end of the issues in copyright lawmaking identified by public choice theory. Specific characteristics of the SOPA/PIPA protest indicate that the public should be viewed as a "sleeping giant" who may or may not awaken to actively participate in copyright legislative debates. First, the SOPA/PIPA events were part of a wave of uprisings that stormed around the world at that time.³⁷ Personal and inspirational links to the Occupy movement in the United States and to the Arab Spring in Africa and the Middle East testify to the place of the SOPA/PIPA events in the global trend.³⁸

32. See Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1837 (2009).

33. Andreas Kaplan and Michael Haenlein defined social media as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content." Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010), quoted in Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 146 (2012).

34. See Christopher M. Mascaro & Sean P. Goggins, *Brewing up Citizen Engagement: The Coffee Party on Facebook*, in COMMUNITIES & TECHNOLOGIES, PROCEEDINGS OF THE 5TH INTERNATIONAL CONFERENCE ON COMMUNITIES AND TECHNOLOGIES 11, 11 (2011).

35. Jeroen Van Laer & Peter Van Aelst, *Internet and Social Movement Action Repertoires: Opportunities and Limitations*, 13 INFO. COMM. & SOC'Y 1146, 1151 (2010).

36. Leslie Harris, *PIPA / SOPA and the Online Tsunami: A First Draft of the Future*, ABC NEWS (Feb. 2, 2012), <http://abcnews.go.com/Technology/pipa-sopa-online-tsunami-draft-future/story?id=15500925>.

37. See *infra* V.A.

38. See *infra* text accompanying note 258.

Second, SOPA and PIPA purportedly threatened webhosts of user-generated content (“UGC”), such as Facebook and YouTube.³⁹ By so doing, SOPA and PIPA called into the controversy many who are apathetic to politics but who could not imagine being deprived of their right to social sharing.⁴⁰ The popularity of UGC, in this sense, played a major role not only in lowering collective action costs, but also in condensing the interests of users during the SOPA/PIPA campaign. With the understanding that the anti-piracy Bills jeopardized users’ rights to post pictures of their cute cats⁴¹ came the assurance that no great wall is greater than one’s Facebook wall. The potential harm to UGC networks also occasioned a vigorous alliance, which may not stand in the future, between UGC platforms and their users. UGC platforms, whose existence purportedly would have been at risk had the Bills become law, had ample incentives to fight SOPA and PIPA. As the platforms’ loyal customers, users were also motivated to protect UGC networks in the face of the risk brought about by the Bills. Most importantly, UGC platforms functioned as the main information source and the most effective organizational tool for users to fight the anti-piracy Bills — a fact that caused many supporters of the Bills to accuse UGC webhosts of misleading the public and misusing their power.⁴²

Third, the SOPA/PIPA opposition successfully passed the high threshold for garnering extensive public engagement. While isolating the factors that brought about such extensive participation is beyond the scope of this study, this Article argues that the volume of the protest could not replicate itself for every legislative initiative that potentially threatens users’ interests. The indifference of the public in the enactment process of current legislative proposals, some of which are said to make SOPA look “like the equivalent of a bad hair day,”

39. While shutting down mainstream and established websites has always been considered highly unlikely, under some of the drafts the language of the bills could have been interpreted widely to include such course. See Bill Keller, Op-Ed., *Steal This Column*, N.Y. TIMES (Feb. 5, 2012), <http://www.nytimes.com/2012/02/06/opinion/steal-this-column.html?pagewanted=all>. (“Interpreted in the most draconian way, it might have criminalized innocent sites and messed with the secure plumbing of the Internet itself.”) But see Cary H. Sherman, Op-Ed., *What Wikipedia Won’t Tell You*, N.Y. TIMES (Feb. 7, 2012), <http://www.nytimes.com/2012/02/08/opinion/what-wikipedia-wont-tell-you.html>.

40. See Ethan Zuckerman, *The Cute Cat Theory Talk at ETech*, ETHAN ZUCKERMAN (Mar. 8, 2008), <http://www.ethanzuckerman.com/blog/2008/03/08/the-cute-cat-theory-talk-at-etech/> (“Cute cats are collateral damage when governments block sites. And even those who could care less about presidential shenanigans are made aware that their government fears online speech so much that they’re willing to censor the millions of banal videos . . . to block a few political ones.”); Noam Cohen, *As Blogs are Censored, It’s Kittens to the Rescue*, N.Y. TIMES (June 21, 2009), http://www.nytimes.com/2009/06/22/technology/internet/22link.html?_r=2.

41. The cute cat theory of Internet censorship was presented in 2008 by Ethan Zuckerman, the director of the MIT Center for Civic Media. Zuckerman, *supra* note 40.

42. See, e.g., Sherman, *supra* note 39.

strongly supports this view.⁴³ Furthermore, the threshold of public participation necessary to effectively promote a legislative reform is higher than that necessary to prevent legislation's enactment. Even if all harmful copyright bills are successfully halted by the public, until new legislation changes current law, the present state will preserve the negotiated agreements of industry players from 1976.⁴⁴

The Article then continues to revisit the public choice argument in the post-SOPA/PIPA political reality and submits that while the threat of waking the sleeping giant is expected to impact legislative decisions in the near future, as time passes, that effect will not be sufficient to counteract lobbying efforts by powerful industry players. Furthermore, even if the sleeping giant can arise more frequently, the growing tendency of dominant industry players to explore non-legislative venues to restructure copyright law through private ordering essentially constructs a large-scale copyright regime away from the public eye. With the public rarely cognizant of those arrangements, its ability to review them and to oppose them is far more limited. Many commentators have already recognized that rights holders prefer contractual arrangements and technological protection measures to governmental policing.⁴⁵ Private ordering in copyright has manifested itself in three classes of interplays: (1) the user-industry relationship (e.g., digital locks on software and end-user license agreements), (2) the inter-industry relationship (e.g., collective rights management organizations and other joint ventures),⁴⁶ and (3) the cross-industry relationship (e.g., business partnerships between rights holders and broadband providers).⁴⁷ While the deference to private ordering in user-industry and inter-industry settings has been widely tackled in legal commentary, private ordering in the cross-industry context has yet to be studied in detail. This form of private enforcement, however, has significant consequences for users, as it often directly affects their actions and legal statuses without them being fully aware of the governing arrangement's details.

43. Patrick S. Ryan, *The ITU and the Internet's Titanic Moment*, 2012 STAN. TECH. L. REV. 8, ¶ 2.

44. See LITMAN, *DIGITAL COPYRIGHT*, *supra* note 17, at 54–69 (discussing the negotiations leading to the 1976 Act).

45. See Julie E. Cohen, Lochner in *Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 491 (1998).

46. Robert Merges argues that repeat players in high-transaction-cost industries use private ordering in the form of collective rights organizations to effectively substitute their property rights for liability rules. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996); see also Jonathan A. Mukai, *Joint Ventures and the Online Distribution of Digital Content*, 20 BERKELEY TECH. L.J. 781 (2005) (discussing additional examples of joint ventures formed to influence the online distribution of content).

47. See, e.g., Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 82 (2010).

Like other forms of private ordering in copyright, deference to cross-industry partnerships was prompted by the spread of digital media and broadband technology.⁴⁸ Rights holders first attempted to fight technological reform through massive litigation, but when that strategy failed to provide satisfactory results, rights holders started engaging in private collaborations with Internet intermediaries.⁴⁹ The failure of the anti-piracy Bills may have motivated a similar reaction, as executives in the entertainment industry stated that legislation is no longer an appealing route.⁵⁰ The turn to cross-industry partnerships in this context makes perfect sense for corporate players; it saves lobbying costs, implements quicker policy adaptations to new technologies, and economizes on potential litigation expenses. Cross-industry partnerships can also offer new business opportunities to dominant players, which could not have been carried out independently.⁵¹ The demand for formal rules as provided by the legislature, as well as litigation battles, are unlikely to be completely discontinued.⁵² Although private ordering produces an effect similar to public lawmaking while avoiding many of the inefficiencies the latter entails, when industry players resort to private ordering, significant copyright practices are carried out with no public involvement, review or opposition.

The remainder of the Article unfolds in five parts. Part II discusses public choice theory and its historic bearing on the copyright lawmaking process. Part III describes the SOPA/PIPA protest from its inception until the indefinite shelving of the Bills. Part IV analyzes the two developments that opened the door for the successful opposition to the anti-piracy Bills: the growing dominance of the tech lobby and social networks' ability to reduce collective coordination costs for users. Part V argues against the impression of a new political order in copyright lawmaking by singling out three unique attributes of the

48. See Margaret Chon, *Sticky Knowledge and Copyright*, 2011 WIS. L. REV. 177, 202–03.

49. Bridy, *supra* note 47, at 83; see also Yafit Lev-Aretz, *Second Level Agreements*, 45 AKRON L. REV. 137, 166 (2012) (discussing how copyright holders have chosen to collaborate with UGC platforms); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 335–36 (2003) (The motion picture industry also partnered with the consumer electronics industry “to agree to install an access-, use-, and copy-control technology, the Content Scramble System (CSS), in all DVD players.” Because of this inter-industry negotiation, “the motion picture industry did not need to ask Congress to require CSS to be installed in every DVD player. It simply made a private agreement with the consumer electronics industry to achieve this goal.”).

50. Amy Chozick, *Tech and Media Elite Are Likely To Debate Piracy*, N.Y. TIMES (July 9, 2012), http://www.nytimes.com/2012/07/10/business/media/tech-and-media-elite-are-likely-to-debate-piracy.html?_r=3&ref=business&pagewanted=all.

51. Lev-Aretz, *supra* note 49, at 166–68.

52. Regardless of the newly posed challenges, public lawmaking would remain a practical alternative for both industries. Jonathan Macey found that strong demand for legal rules can arise “even where the norms generated by private ordering are producing enviable results.” Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123, 1136 (1997).

SOPA/PIPA episode and describing the public as a sleeping giant not frequently awakened. Part VI further demonstrates that, even if the public successfully overcomes public choice barriers and commonly defends its interests in the legislative process, deference to non-legislative alternatives through business partnerships among dominant players could keep major copyright policymaking away from the public eye and immune to any public objection.

II. PUBLIC CHOICE THEORY AND COPYRIGHT LAWMAKING

Over the years, a predominant group of IP scholars has attempted to explain the expansion of U.S. copyright protection. Indeed, over the past two centuries the monopoly of copyright has enlarged considerably. The term of copyright has gradually grown from fourteen years plus a renewal term of another fourteen years (subject to certain conditions) in the 1790 Act,⁵³ to the life of the author plus seventy years in the Sonny Bono Copyright Term Extension Act.⁵⁴ The subject matter protected by copyright has also broadened to include virtually any creative work fixed in a tangible medium of expression, and includes music, performances, architecture, creative design, and software.⁵⁵ Congress has also steadily increased the exclusive rights granted to copyright owners. The 1790 Act granted the rights of reproduction and distribution of protected works, whereas the current Act grants the rights of reproduction, distribution, preparation of derivative works, public performance, and public display of protected works.⁵⁶ The remedies available against infringers have also expanded: from destroying infringing works and recovering statutory damages, to a wide range of remedial choices.⁵⁷ The scope of the criminal sanctions in copyright law has widened, too.⁵⁸

53. Copyright Act of 1790 § 1, 1 Stat. 124 (1790), reprinted in Copyright Office, Library of Congress, Bulletin No. 3 (Revised), Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright, at 22, 22.

54. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203, 301–304 (2012)). For a comprehensive description of the various extensions over the years, see Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 781–83 (2001) and YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM*, 439–44 (2006).

55. Bell, *supra* note 54, at 781–82 (providing a detailed account of the expansion of copyright subject matter); see also Lawrence Lessig, *The Architecture of Innovation*, Meredith and Kip Frey Lecture in Intellectual Property at Duke University School of Law (March 23, 2001), in 51 DUKE L.J. 1783, 1792–99 (2002) (discussing the changes in the copyright law.)

56. See 17 U.S.C. § 106 (2012); Bell, *supra* note 54, at 782–83.

57. Bell, *supra* note 54, at 783–84.

58. See, e.g., Artists' Rights and Theft Prevention Act of 2005, Pub. L. No. 109-9, §§ 102–103, 119 Stat. 218, 218–21 (setting criminal penalties for unlicensed recording of motion pictures in theaters) (codified as amended at 17 U.S.C. § 506(a) (2012) and 18 U.S.C. § 2319 (2012)); Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, tit. II, 122 Stat. 4256, 4260–64 (reinforcing criminal

An established line of commentary has applied public choice theory to explain this copyright expansion and demonstrate the disproportionate influence of corporate rights holders over copyright lawmaking in the past forty years. Modern public choice theory, which originated in the work of James Buchanan and Gordon Tullock,⁵⁹ applies economic reasoning to political institutions by analogizing regulatory decision-making to market decision-making.⁶⁰ Prior to public choice insights, governmental decisions were viewed as disconnected proceedings and were believed to serve the general public benefit.⁶¹ Buchanan and Tullock challenged the traditional conception by offering a positive analysis of governmental decision-making, according to which groups tend to pursue special legislation to guarantee their own welfare.⁶² Legislation is considered “a good demanded and supplied much as other goods,”⁶³ so, groups with great stakes in the legislative process would dedicate resources to influence governmental transfers of wealth through rent-seeking activities.⁶⁴ As autonomous actors, legislators are primarily motivated by their wish to be reelected, while interest groups possess useful political resources, such as financial support, public exposure, and reputation.⁶⁵ Consequently, legislators would use their voting privileges to garner support from dominant interest groups and would avoid choices that may provoke opposition from those groups.⁶⁶ Nonetheless, the cost

sanctions for repeat infringers of copyrighted works) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.); see also Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 840–49 (1999); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469 (2011) (providing an in-depth analysis of criminal sanctions for intellectual property infringement).

59. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1965).

60. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34 (1998). While public choice theory incorporates interest group theory, social choice theory, game theory, and other subfields, see D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1031 (2011), in this Article the term “Public Choice Theory” refers mainly to interest group theory.

61. Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT’L L. & POL. 473, 515 (1997).

62. BUCHANAN & TULLOCK, *supra* note 59, at 285–95.

63. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

64. See Gordon Tullock, *Rent Seeking*, in *THE WORLD OF ECONOMICS* 604, 604–09 (John Eatwell et al. eds., 1991); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 228–30 (2012).

65. See Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553, 572 (1997).

66. The Honorable Robert A. Katzmann, *Statutes, James Madison Lecture at the New York University School of Law* (Oct. 18, 2011), in 87 N.Y.U. L. REV. 637, 674 (2012).

incurred by the public due to the resulting legislation typically surpasses the special benefits to the interest group.⁶⁷

Mancur Olson's theory of group organization further demonstrates the inefficiency of the legislative process.⁶⁸ To effectively sway lawmakers, Olson argued, an interest group must be sufficiently dominant to attract legislative attention, and appropriately sized to eschew "free riders," who can enjoy the statutory gain without contributing to the group.⁶⁹ Olson provided that any group trying to obtain collective benefits for a large and diffuse body of people is unlikely to form.⁷⁰ In the improbable event that a large number of individuals manage to form a group, collective action problems — and especially information costs, organization costs, and free rider costs — are likely to inhibit the group's political activity: "[T]he larger the group, the farther it will fall short of providing an optimal amount of a collective good."⁷¹ The costs associated with contributing to communal effort to promote legislation are significant, while the reward to each individual member from joining a public lobby is minor.⁷² For this reason, when the demanded benefit is collective to a large group as a whole, rational and self-interested individuals would opt to free ride instead of fostering the common interest.⁷³

Conversely, groups with a limited number of members and well-defined interests, while also susceptible to organization costs, can overcome collective action hurdles more easily than their large diffuse counterparts.⁷⁴ As each individual has a greater interest in her own sought after benefit — "simply because of the attraction of the collective good to the individual members" — smaller groups can effectively use their organizational advantages to extract economic benefits.⁷⁵ In other words, the benefits small groups acquire from their investment by advancing favorable statutory mandates frequently outweigh the costs.⁷⁶ Small, organized groups are thus incentivized to offer higher bids to the political branches, thereby making politicians more

67. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12–37 (1991).

68. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

69. *Id.* at 9–16. A free rider is an individual (or firm) who is "within the protective scope of some proposed piece of legislation [and] will benefit from its enactment whether or not he makes any contribution, financial or otherwise, to obtaining its enactment." RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 497 (3d ed. 1986).

70. OLSON, *supra* note 68, at 1–66.

71. *Id.* at 35 (emphasis omitted).

72. Croley, *supra* note 60, at 35.

73. See OLSON, *supra* note 68, at 2.

74. See *id.* at 34–35; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & ECON.* 211, 213 (1976).

75. OLSON, *supra* note 68, at 36.

76. See Croley, *supra* note 60, at 38–39.

attuned to the group's interests.⁷⁷ Those groups constantly survey lawmakers, penalizing failures to meet the group's demands, and repaying those who provide satisfactory legislation.⁷⁸ Ultimately, the interest groups with the highest stake in a particular legislative outcome would devote the greatest investment to secure their interest, and they would normally end up obtaining favorable legislation.⁷⁹

The decision-making process hosts a pluralistic dynamic, in which rival interest groups compete to achieve the best policy outcome for their individual benefit.⁸⁰ Lawmakers respond to those contesting interests by orchestrating compromises and trade-offs among the participants and enacting legislation that reflects an equilibrium among the competing groups.⁸¹ Special interest groups, however, do not always work toward advancing the general public welfare, and their interests are typically only aligned with those of the general public coincidentally.⁸² Public choice theory, then, concludes that the market for legislation is a poorly functioning one, with what Olson characterized as a "systematic tendency for exploitation of the great by the small."⁸³ Public goods that should be regularly delivered by legislatures are seldom provided because they are under-demanded and vest lawmakers with little political gain.⁸⁴ Narrow interest groups, due to their organizational advantages, effectively warp the lawmaking process to maximize their benefit in the resulting legislation while inflicting inefficiencies and costs on society as a whole.⁸⁵ Consequently, lawmakers systematically produce too few laws that are conducive to the overall welfare of the public, while consistently delivering too many laws that allocate resources to an interested group.⁸⁶ The most pessimistic among public choice theorists also point to a never-ending cycle of governmental dysfunction: "Already well-endowed groups are strategically positioned to use their access to politicians to entrench and increase those endowments."⁸⁷ And so, the same disproportionate influences that previously generated rent-

77. *Id.*

78. *Id.* at 38 (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 11 (1971)).

79. Croley, *supra* note 60, at 39–40.

80. *Id.* at 32; see also FARBER & FRICKEY, *supra* note 67, at 17.

81. FARBER & FRICKEY, *supra* note 67, at 17.

82. Croley, *supra* note 60, at 32.

83. OLSON, *supra* note 68, at 29 (emphasis omitted) (internal quotation marks omitted) (footnote omitted).

84. Eskridge, *supra* note 14, at 294.

85. Schuck, *supra* note 65, at 580–81.

86. Eskridge, *supra* note 14, at 285.

87. Schuck, *supra* note 65, at 573.

seeking statutes would frustrate future endeavors for legislative reform.⁸⁸

In the eyes of many copyright scholars, the public choice theory accurately accounts for the expansion of copyright protection. Through her book,⁸⁹ as well as through her many publications, Professor Jessica Litman has contributed a great deal to the scholarship of the public choice model of legislation in copyright lawmaking. Litman's historical review of copyright legislative process goes back to the enactment of the 1909 Copyright Act, which was born out of conferences convened by the Librarian of Congress.⁹⁰ Only representatives of interest groups whose rights had already received statutory recognition were among the invitees.⁹¹ Those who were not invited expressed their disapproval of the drafted bill that resulted, and a series of negotiations among the representatives of the affected parties ensued.⁹² The revised draft of the copyright bill embodied the resulting agreement, and it was promptly enacted by Congress.⁹³ Still, under the 1909 Act, authors were granted "limited rights for limited times," while other rights were kept in the public domain.⁹⁴ It was clear that the Act's sponsors believed authors should enjoy the commercial value of their works in order to be incentivized to create more.⁹⁵ However, the 1909 copyright system was also designed to benefit the public at large by endowing the public with some value of the copyrighted work.⁹⁶

The language of the 1976 Copyright Act,⁹⁷ which is still in effect today, was generated through the same method of negotiations.⁹⁸ The strategy included granting copyright owners expansive rights, while placating copyright users who participated in the negotiations with privileges or exemptions specifically customized — but narrowly limited — to their requirements.⁹⁹ Thus, by the time the hearings on the

88. *Id.* Many scholars have tried to rebut some of the public choice principles. See, e.g., Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167, 168 (1988); Steven Kelman, "Public Choice" and Public Spirit, 87 PUB. INT. 80, 80–81 (1987). Nonetheless, ubiquitous evidence of rent-seeking statutes erodes much of those arguments. See, e.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 186 (1988).

89. LITMAN, DIGITAL COPYRIGHT, *supra* note 17.

90. Litman, *supra* note 11, at 284–88; LITMAN, DIGITAL COPYRIGHT, *supra* note 17, at 36–40.

91. Litman, *supra* note 11, at 284–85.

92. See *id.* at 286–87.

93. *Id.* at 287–88.

94. For example unauthorized copies for personal use were legal. Litman, *supra* note 19, at 342–43.

95. See *id.* at 343.

96. *Id.* at 342–43.

97. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

98. See LITMAN, DIGITAL COPYRIGHT, *supra* note 17, at 54–57.

99. *Id.* at 37.

1976 Act began before the House and Senate subcommittees, the parties to the pre-legislative negotiations, which included authors, publishers, and others with economic interests, had already agreed on the bill's basic form.¹⁰⁰ Because the language of the Act was the result of informal, even secretive, dialogues among a small group of stakeholders, some believe the 1976 Act appropriated value for the benefit of those stakeholders at the expense of the public at large.¹⁰¹ In the words of Litman, "[t]he bill that emerged from the conferences enlarged the copyright pie and divided its pieces among conference participants so that no leftovers remained."¹⁰²

The story continues with the enactment of the DMCA,¹⁰³ which was preceded by complicated, years-long, multiparty negotiations.¹⁰⁴ The old battle between electronics makers, educational institutes, libraries, and content industries became further entangled by an internal conflict between the House Commerce and Judiciary Committees.¹⁰⁵ The resulting statutory language is "long, internally inconsistent, [and] difficult even for copyright experts to parse and harder still to explain."¹⁰⁶ Additionally, the DMCA compromises public interests and advances the benefit of many interest groups, including some that embarked on the legislative journey with high-minded objectives to strive for the benefit of the greater public.¹⁰⁷ Libraries and universities, for example, who had historically endeavored to promote the public interest (alongside specific limited library and university goals) were required to participate in special negotiations about library copying and distance education, and were thus literally absent from major parts of the discussions that determined the general policy of the bill.¹⁰⁸

Professor Lawrence Lessig has also viewed copyright expansion as a typical example of rent-seeking by dominant interest groups. Lessig has pointed to the fact that while within the first 150 years of its

100. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 861, 873 (1987).

101. *See, e.g., id.* at 883–84.

102. Litman, *supra* note 11, at 317.

103. Digital Millennium Copyright Act Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. §§ 512, 1201–05, 1301–32 (2012) and 28 U.S.C. § 4001 (2006)).

104. *See* LITMAN, DIGITAL COPYRIGHT, *supra* note 17, at 128–145; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 90–93 (2004) (providing a historical overview of the DMCA).

105. LITMAN, DIGITAL COPYRIGHT, *supra* note 17, at 136–40.

106. *Id.* at 145.

107. *Id.*

108. Jessica Litman, *The Politics of Intellectual Property*, 27 CARDOZO ARTS & ENT. L.J. 313, 315 (2009). *But see* Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 137 (1999) (discussing the DMCA as "the fruit of intensive lobbying by a wide range of interest groups of copyright owners, on the one hand, and, particularly, users, on the other").

existence copyright duration had been extended only twice, it has been extended retrospectively eleven times in the past four decades.¹⁰⁹ Virtually all of the late extensions were triggered by corporate rights holders, who chose to extract rent from the legislative process by extending copyright duration instead of accommodating themselves to new technology.¹¹⁰ Perhaps epitomizing this recurrence is the Walt Disney Company, whose beloved Mickey Mouse would have fallen into the public domain if not for some well-timed extensions of the term of copyright at Disney's behest.¹¹¹ The enacted legislation reportedly harmed the public by allowing rights owners to demand exaggerated prices and by lowering the use of copyrighted material in new works.¹¹² Congress, however, responded to the rent-seeking wishes of a politically influential association of rights holders, turning an adverse bill into binding law.¹¹³ Disturbed by the issue, which he described as "corruption," Lessig announced in the summer of 2007 that he would no longer lead the fight against copyright restrictions in the Internet Age and would instead devote himself to the "problem of lobbyists' undue influence over legislation."¹¹⁴

Professor Yochai Benkler has similarly found that Congress suffers from anti-social-production-bias under the pressure of rent-seeking interest groups.¹¹⁵ The systematic expansion of exclusive private rights at the expense of the public has continued because the beneficiaries of such rights are industrial players, whose focused, well-organized, and well-funded interests are more effectively communicated to lawmakers during the legislative process.¹¹⁶ As opposed to the public, these players band together easily, are highly aware of any proposed changes to the copyright system, and enjoy powerful lobbyists to confirm that such changes agree with their shares.¹¹⁷ The social costs of legislation of this sort are diffuse and only materialize after the statute is enacted, further hindering the public's ability to recognize the costs and influence the legislation appropriately.¹¹⁸

109. LESSIG, *supra* note 11, at 107.

110. *See id.* at 107–09.

111. *Id.*

112. *See id.* at 107–09.

113. Lindsay Warren Bowen, Jr., Note, *Givings and the Next Copyright Deferment*, 77 *FORDHAM L. REV.* 809, 821 (2008) (citing LAWRENCE LESSIG, *FREE CULTURE* 232 (2004)).

114. *Id.* at 827 (citing Noam Cohen, *Taking the Copyright Fight into a New Arena*, *N.Y. TIMES*, July 2, 2007, available at <http://www.nytimes.com/2007/07/02/business/media/02link.html>).

115. Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 *YALE L.J.* 1472, 1491 (2007) (citing YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 393 (2006)).

116. *See* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 *LAW & CONTEMP. PROBS.* 173, 196 (2003).

117. *See id.* at 196–97.

118. *Id.* at 196.

Recognizing the same deficiency in the legislative process, Professor William Patry went as far as calling on interpreters of copyright statutes to disregard the legislative history, because the law has been essentially written by special interest groups:

Copyright interest groups hold fundraisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as *their* legislation and *their* committee report.¹¹⁹

Other scholars have followed this line of argument, pointing to the legislative bias as a typical case of public choice theory.¹²⁰ Some, however, have not credited the influence special interest groups have exerted over Congress to all aspects of copyright expansion. Instead, they suggest, technology and the growing economic importance of information required the expansion of copyright to allow the market to function efficiently.¹²¹ Even these scholars, however, concede that while some copyright statutes can be justified on efficiency grounds, others cannot. Professor Robert Merges, for example, contended that the high volume of interest groups' action in the legislative arena, "[b]y itself, . . . is not necessarily disturbing."¹²² After all "it stands to reason that interest groups would increase their spending on lobbying, just as they would in any area with a growing impact on the bottom

119. William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996).

120. See, e.g., Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 757 (2001) (lamenting that, "the Copyright Act appears to have fallen into a vicious cycle, creating beneficiaries who use their clout to lobby for still greater benefits"); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 898 (2001) ("Congress's increasing willingness to enact into law compromises crafted between those who create, those who publish, and those who provide the means to distribute works of authorship further diminishes the political voice of copyright's consumers."); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 67-69 (2001); Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 1, 9 (2004) (discussing "the public choice problems presented by the current copyright law and policy-making process"); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1244 (1996).

121. Professor Tim Wu mentions Professor Paul Goldstein and Professor Robert Merges as members of the school optimistically depicting the evolution of copyright in the twentieth-century. Wu, *supra* note 22, at 291 & n.36.

122. Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2235 (2000).

line.”¹²³ Still, Merges identified at least one example of “almost pure rent-seeking legislation” in the Copyright Term Extension Act, and concluded that increased judicial intervention in pure rent-seeking legislation should be considered in such cases.¹²⁴

III. THE SOPA/PIPA PROTEST

PIPA was introduced by Senator Patrick Leahy and seven co-sponsors,¹²⁵ and it enjoyed overwhelming initial support by co-sponsors.¹²⁶ The Bill was intended to address a long-known concern: foreign websites engaging in mass copyright violations.¹²⁷ For this aim, the legislation authorized the Justice Department to request court orders against “rogue websites” dedicated to the infringement of copyrights and the creation and dissemination of counterfeit goods, demand ISPs or search engines to block access to such websites, and require payment processors or advertising networks to avoid conducting business with them.¹²⁸ “Qualifying” private parties were also allowed to file a lawsuit against a “domain name used by an Internet site dedicated to infringing activities.”¹²⁹ Furthermore, under PIPA both the Attorney General and civil plaintiffs could serve those court orders on classes of support services following an approval from a court.¹³⁰

On October 26, 2011, SOPA was introduced in the House by Representative Lamar Smith and twelve co-sponsors.¹³¹ Similar to the Senate version, SOPA was designed to target online trafficking in copyrighted content and counterfeit goods by foreign websites that current U.S. copyright law is ill-equipped to combat.¹³² Under SOPA the U.S. Attorney General could proceed against a “foreign infringing site,”¹³³ while civil litigants could initiate a legal action against an

123. *Id.*

124. *Id.* at 2236–37.

125. See Mike Palmedo, *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property (PROTECT-IP) Act Introduced in the Senate*, INFOJUSTICE (May 16, 2011), <http://infojustice.org/archives/3401>.

126. See CONG. RESEARCH SERV., BILL SUMMARY & STATUS S. 968, 112th Cong. (2011), available at <http://thomas.gov/cgi-bin/bdquery/z?d112:SN00968:@@/@D&summ2=m&>.

127. S. Rep. No. 112-39, at 6 (2011)

128. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S. 968, 112th Cong. § 3 (2011).

129. *Id.* §§ 3(a), 4(a). One of the critics’ concerns was that the private right of action under PIPA would equally apply to foreign and domestic offending websites. See Hillel I. Parness, *Straight Talk about SOPA*, BLOOMBERG L. REP. TECH. L., Feb. 6, 2012, at 11, 13.

130. S. 968 §§ 3(d), 4(d).

131. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

132. CONG. RESEARCH SERV., BILL SUMMARY & STATUS H.R. 3261, 112th Cong. (2011), available at <http://thomas.gov/cgi-bin/bdquery/z?d112:HR03261:@@/@D&summ2=m&>.

133. H.R. 3261 § 102.

Internet site “dedicated to theft of U.S. property.”¹³⁴ Like PIPA, SOPA also adopts procedures intended to prevent certain classes of Internet support services from subsidizing infringing websites; a court could order advertisers and payment facilities to abstain from conducting business with infringing websites, search engines from linking to them, and ISPs from providing access to the sites.¹³⁵

Before proceeding, one clarifying comment is due. SOPA and PIPA alike have generated abundant scholarly analyses as to their substance.¹³⁶ While opponents of these bills eventually overshadowed their supporters, reasonable arguments were made on both sides. Although many concerns as to the broad language of the Bills seemed to have solid ground,¹³⁷ others were probably overstated.¹³⁸ This Article does not subscribe to the supporters’ view or to the opponents’ approach, and does not intend to analyze the Bills to advocate either way. Instead, this Article uses the SOPA/PIPA episode only to explore trends in U.S. copyright politics; thus, a detailed analysis of the Bills’ text is beyond the scope of this study.

The first signs of opposition to PIPA surfaced in June and October 2011, mostly through YouTube videos.¹³⁹ The House Judiciary Committee held its first hearing on SOPA on November 16, which was declared “American Censorship Day” by several open Internet advocacy organizations.¹⁴⁰ On that day, the cause gained visibility when some websites, such as Tumblr, a micro-blogging platform and

134. H.R. 3261 § 103. Moreover, the early version of SOPA would have authorized private litigants to serve notices upon support services without bringing a legal action against the foreign infringing website. Parness, *supra* note 129, at 16 n.16.

135. H.R. 3261 § 102(c)(2).

136. See, e.g., Jonathan Band, *The SOPA-TPP Nexus*, 28 AM. U. INT’L L. REV. 31 (2012); Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21 (2013); Jeffrey A. Lindenbaum & David Ewen, *Catch Me if You Can: An Analysis of New Enforcement Measures and Proposed Legislation To Combat the Sale of Counterfeit Products on the Internet*, 32 PACE L. REV. 567 (2012).

137. See, e.g., John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821, 1866 (2013) (“SOPA potentially imports the same expansive interpretations of ‘facilitation’ that the government has used in the domain seizure cases.”).

138. Parness, *supra* note 129, at 15 (“Because SOPA and PROTECT IP are both now structured to require notice to the websites in question when federal lawsuits are initiated, followed by court orders against the problematic sites and further court permission before serving the orders upon support services, the abuse scenario seems less likely.”).

139. For example, videos by gamers who recognized the extensive reproductions of the felony streaming provisions in PIPA were posted on YouTube beginning June 30th, 2011. Another anti-PIPA video was posted to YouTube and Vimeo in October, gaining over four million views within the following three months. *SOPA Timeline*, FIGHT FOR THE FUTURE, <http://www.sopastrike.com/timeline> (last visited Dec. 20, 2013).

140. Sarah Kessler, *Tumblr, Firefox and Reddit Censor Websites To Protest SOPA*, MASHABLE (Nov. 16, 2011), <http://mashable.com/2011/11/16/sopa-tumblr-firefox-reddit/>.

social networking website, symbolically blacked out its front pages,¹⁴¹ while others pasted a “Censored” banner over the site’s logo.¹⁴² Users were also exhorted to contact their elected officials through mass letter-mailing campaigns led by sites like Mozilla Foundation and the Electronic Frontier Foundation.¹⁴³ The American Censorship Day protest generated over one million contacts with Congress and two million petition signatures.¹⁴⁴

On January 10, reddit announced that it would black out its site for twelve hours on January 18.¹⁴⁵ “The freedom, innovation, and economic opportunity that the Internet enables is in jeopardy,” said the official release by reddit administrators.¹⁴⁶ A month earlier, on December 10, 2011, Wikipedia co-founder Jimmy Wales asked the members of the English Wikipedia community to comment on SOPA, and specifically on the possibility of a protest blackout.¹⁴⁷ The following discussions contemplated various proposals for action.¹⁴⁸ Since Wikipedia’s neutrality has always been considered one of its cornerstones, the decision to stage the black-out “wasn’t lightly made.”¹⁴⁹ The need for an appropriate “legal structure that makes it possible for [Wikipedia] to operate,” however, prevailed over the fear of criticism.¹⁵⁰ And so, through a consensual decision-making process, with the participation of approximately 1,800 editors,¹⁵¹ the Wikipedia community decided in favor of a twenty-four-hour global blackout of the English Wikipedia website on January 18.¹⁵²

141. See Adam Clark Estes, *The Web Collectively Protests Congress’s Censorship Law*, THE ATL. WIRE (Nov. 16, 2011), <http://www.theatlanticwire.com/technology/2011/11/web-collectively-protests-congresss-censorship-law/45068/>.

142. *Id.*

143. *Id.*

144. FIGHT FOR THE FUTURE, *supra* note 139.

145. Reddit Admins, *Stopped They Must Be; on this All Depends.*, REDDIT BLOG (Jan. 10, 2012, 2:46 PM), <http://blog.reddit.com/2012/01/stopped-they-must-be-on-this-all.html>.

146. *Id.*

147. Rebecca J. Rosen, *Wikipedia Considers Black Out To Protest Anti-Piracy Law*, THE ATLANTIC (Dec. 13, 2011, 11:07 AM), <http://www.theatlantic.com/technology/archive/2011/12/wikipedia-considers-black-out-to-protest-anti-piracy-law/249922/>; *Protests Against SOPA and PIPA*, WIKIPEDIA, http://en.wikipedia.org/wiki/Protests_against_SOPA_and_PIPA (last visited Dec. 20, 2013).

148. WIKIPEDIA, *supra* note 147.

149. Memorandum from Sue Gardner, Wikimedia Found. Exec. Dir., to English Wikipedia Readers and Cmty. (Jan. 16, 2012), http://wikimediafoundation.org/wiki/English_Wikipedia_anti-SOPA_blackout.

150. *See id.*

151. *Wikipedia: SOPA Initiative/Action*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:SOPA_initiative/Action (last visited Dec. 20, 2013); John D. Sutter, *Why Wikipedia Went Down at Midnight*, CNN (Jan. 18, 2012), <http://www.cnn.com/2012/01/17/tech/web/wikipedia-sopa-blackout-qa/index.html>.

152. WIKIPEDIA, *supra* note 151; see Brian X. Chen, *How Wikipedia Turned off the Lights*, N.Y. TIMES BITS BUS. TECH. BLOG (Jan. 18, 2012, 5:08 PM), <http://bits.blogs.nytimes.com/2012/01/18/wikipedia-blackout/>.

On January 13, Representative Lamar Smith, the author of SOPA, and Senator Patrick Leahy, the author of PIPA, announced their intention to remove the Domain Name System (“DNS”) blocking provisions of the proposed legislation.¹⁵³ According to these provisions, broadband providers would be required to prevent the domain names of websites from resolving if a U.S. court had ordered they be taken down for infringing copyrights or selling counterfeit goods.¹⁵⁴ The Bills’ opponents were not placated, and they launched SopaStrike.com to organize the protest and the January 18 SOPA strike.¹⁵⁵ On the same day, six Republican Senators requested that Majority Leader Harry Reid not hold the scheduled consideration of PIPA on January 24, as “the process at this point is moving too quickly and this step may be premature.”¹⁵⁶ On January 14, in an official response to a petition, the White House stated that while online piracy by foreign websites is “a serious problem that requires a serious legislative response,” it would not support legislation that “reduces freedom of expression, increases cybersecurity risk, or undermines the dynamic, innovative global Internet.”¹⁵⁷ The call against the bills appeared to cross professional and ideological boundaries, as on January 17, a group of artists including Hollywood actors, Saturday Night Live comedians, comic-book authors, musicians and others joined the anti-SOPA cause by signing an open letter in opposition of the anti-piracy bills.¹⁵⁸

The SOPA strike officially started on Wednesday, January 18, 2012.¹⁵⁹ On Tuesday night, as the clock struck nine p.m. at the Wikimedia headquarters, its operations staff activated the blackout page on Wikipedia, the world’s sixth most visited website.¹⁶⁰ Upon inserting a search term, visitors were momentarily directed to the requested page before being redirected to a protest page with the headline “Imagine a World Without Free Knowledge.”¹⁶¹ According to an official state-

153. Greg Sandoval & Declan McCullagh, *DNS Provision Pulled from SOPA, Victory for Opponents*, CNET (Jan. 13, 2012, 1:27 PM), http://news.cnet.com/8301-31001_3-57358947-261/dns-provision-pulled-from-sopa-victory-for-opponents/.

154. Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(c)(2)(A) (2011).

155. FIGHT FOR THE FUTURE, *supra* note 139.

156. Letter from Charles Grassley et al., Senate Republicans, to Harry Reid, Senate Majority Leader (Jan. 13, 2012) (text of the letter available at <http://www.opencongress.org/articles/view/2461-Six-GOP-Co-Sponsors-of-PIPA-Ask-Reid-to-Cancel-Vote>).

157. Victoria Espinel, Aneesh Chopra, & Howard Schmidt, *Combating Online Piracy While Protecting an Open and Innovative Internet: Official White House Response to Stop the E-PARASITE Act*, WE THE PEOPLE, <https://www.whitehouse.gov/petition-tool/response/combating-online-piracy-while-protecting-open-and-innovative-internet> (last visited Dec. 20, 2013); FIGHT FOR THE FUTURE, *supra* note 137.

158. Peter Pachal, *Artists: SOPA Would Hurt More Than Help*, MASHABLE (Jan. 18, 2012), <http://mashable.com/2012/01/18/artists-against-sopa/>.

159. FIGHT FOR THE FUTURE, *supra* note 139.

160. Chen, *supra* note 152; *The Top 500 Sites on the Web*, ALEXA, <http://www.alexa.com/topsites> (last visited Dec. 20, 2013).

161. Potter, *supra* note 1.

ment released by the Wikimedia Foundation after the blackout, 162 million users saw the blackout page and over 8 million users looked up their elected officials through Wikipedia to voice their opposition to the anti-piracy Bills.¹⁶² Others, such as news-sharing platform reddit, technology blog BoingBoing, and the makers of the Firefox web browser, Mozilla Foundation, also blacked out entirely, featured information about the bills, and directed users to action centers.¹⁶³ A few members of Congress also took part in the strike and blacked out their Congressional websites in protest.¹⁶⁴

Additional joiners of the movement chose less drastic measures to claim solidarity. For example, Google placed a black redaction box over the logo on its U.S. home page¹⁶⁵ and video-sharing website Vimeo displayed a window with a protest message and a “take a stand” link.¹⁶⁶ Some UGC platforms, such as photo sharing site Flickr and blogging platform WordPress, allowed users to black out their content to voice their opposition to the anti-piracy Bills.¹⁶⁷

Users of Facebook formed anti-SOPA groups¹⁶⁸ and censored content on their individual profiles to publicize their opposition to the

162. Press Release, Wikimedia Foundation, Press Releases/Wikipedia Blackout Supports Free and Open Internet (Jan. 19, 2012) http://wikimediafoundation.org/wiki/Press_releases/Wikipedia_blackout_supports_free_and_open_internet.

163. See FIGHT FOR THE FUTURE, *supra* note 5 (displaying many websites’ blackout pages). For a full list of participants see *SOPA Strike*, FIGHT FOR THE FUTURE, <http://www.sopastrike.com/> (last visited Dec. 20, 2013).

164. Jenna Wortham, *With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle*, N.Y. TIMES, Jan. 18, 2012, available at <http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html?pagewanted=all> (naming House Democrats Anna G. Eshoo and Earl Blumenauer as participants in the blackout).

165. National Post Staff, *Google Blacks Out Its Home Page in Support of Wikipedia SOPA Protest*, NATIONAL POST (Jan. 18, 2012), <http://news.nationalpost.com/2012/01/18/google-blacks-out-its-home-page-to-support-of-wikipedia-sopa-protest/>.

166. *Vimeo SOPA Message*, FLICKR, <http://www.flickr.com/photos/soxiam/6723578485/> (last visited Dec. 20, 2013).

167. Flickr allowed its members to darken their photos or the photos of others for 24 hours through a blue, “Darken this photo” button placed next to the photos. A message about the anti-piracy bills, and a link to Flickr’s blog post was displayed in place of darkened photos. Chloe Albanesius, *Flickr SOPA Protest Lets You Black Out Photos*, PCMAG (Jan. 18, 2012, 12:57 PM), <http://www.pcmag.com/article2/0,2817,2399029,00.asp>; Zack Sheppard, *Help Raise Awareness About PIPA & SOPA*, FLICKR BLOG (Jan. 18, 2012), <http://blog.flickr.net/en/2012/01/18/pipa-sopa/>. WordPress urged its users to stand up against the bills, and offered a variety of blackout plugins through the WordPress.org plugins directory for the use of bloggers who wish to darken their posts or otherwise draw attention to the protest. Jen Mylo, *Internet Blackout Day on January 18*, WORDPRESS (Jan. 17, 2012), <http://wordpress.org/news/2012/01/internet-blackout/>; Jane Wells, *Join Our Censorship Protest!*, WORDPRESS (Jan. 18, 2012, 1:25 AM), <http://en.blog.wordpress.com/2012/01/18/join-our-censorship-protest/>.

168. To name just a few groups: *Stop SOPA*, FACEBOOK, <http://www.facebook.com/StopSopaNow> (last visited Dec. 20, 2013) (55,063 likes); *Stop SOPA and PIPA*, FACEBOOK, <http://www.facebook.com/defeat.SOPA.and.PIPA> (last visited Dec. 20, 2013) (28,154 likes).

bills.¹⁶⁹ Mark Zuckerberg, Facebook's CEO, spoke out against the legislation in a post on his Facebook account, saying: "We can't let poorly thought out laws get in the way of the [I]nternet's development. Facebook opposes SOPA and PIPA, and we will continue to oppose any laws that will hurt the [I]nternet."¹⁷⁰

The day following the SOPA strike revealed the magnitude of the protest. A total of 115,000 websites reportedly participated in the protest, including 45,000 blogs.¹⁷¹ The media reported a heavy volume of SOPA-related calls on Capitol Hill on the day of the strike.¹⁷² Google said it generated at least thirteen million page views to its anti-SOPA page and got seven million people to sign its petition.¹⁷³ According to statistics posted to the Mozilla blog, 30 million people saw the call to action on the Mozilla Firefox browser's start page, 1.8 million visited the info page about the Bills, and the effort generated 360,000 e-mails to Congress.¹⁷⁴ The White House blog announced that nearly 104,000 people signed petitions asking the Obama Administration to protect the Internet.¹⁷⁵ Some non-profit organizations, including the Electronic Frontier Foundation, Fight for the Future, and Demand Progress, estimated that over four million e-mails were sent through their websites.¹⁷⁶ Even though Twitter did not formally participate in the strike, the anti-piracy bills appeared to occupy the thoughts of many users, with approximately 2.4 million SOPA-related tweets on January 18 alone.¹⁷⁷

The overwhelming voices of opposition made it to Washington, leading lawmaker after lawmaker to renounce support for the Bills. On the morning of the SOPA strike, eighty members of Congress supported the legislation, and thirty-one opposed.¹⁷⁸ Following the

169. Catharine Smith & Ramona Emerson, *Mark Zuckerberg: 'Facebook Opposes SOPA and PIPA'*, THE HUFFINGTON POST (Jan. 18, 2012, 5:52 PM), http://www.huffingtonpost.com/2012/01/18/mark-zuckerberg-sopa_n_1214090.html; Mike Tuttle, *SOPA Blackout: Individual Protests on Facebook and Twitter*, WEBPRONEWS (Jan. 18, 2012), <http://www.webpronews.com/facebook-individual-blackouts-2012-01>.

170. Obinna Egbule, *Mark Zuckerberg Speaks on SOPA*, DA GEEK'S TECH, SOCIAL MEDIA AND WEB GUIDE, <http://onwaweb.com/mark-zuckerberg-speaks-on-sopa/> (last visited Dec. 20, 2013).

171. FIGHT FOR THE FUTURE, *supra* note 5.

172. Timothy B. Lee, *SOPA Protest by the Numbers: 162M Pageviews, 7 Million Signatures*, ARSTECHNICA (Jan. 19, 2012, 1:45 PM), <http://arstechnica.com/tech-policy/2012/01/sopa-protest-by-the-numbers-162m-pageviews-7-million-signatures/>.

173. *Id.*

174. Josh Constine, *Mozilla's Anti-SOPA Message Reached 40 Million People*, TECHCRUNCH (Jan. 19, 2012), <http://techcrunch.com/2012/01/19/mozillas-anti-sopa-message-reached-40-million-people/>.

175. Megan Slack, *By the Numbers: 103,785*, THE WHITE HOUSE BLOG (Jan. 18, 2012, 4:15 PM), <http://www.whitehouse.gov/blog/2012/01/18/numbers-103785>.

176. FIGHT FOR THE FUTURE, *supra* note 5.

177. *See id.*

178. Dan Nguyen, *SOPA Opera Update: Opposition Surges*, PROPUBLICA (Jan. 19, 2012, 12:39 PM), <http://www.propublica.org/nerds/item/sopa-opera-update>.

publicized backlash, the number of supporters dropped to 55, while opposition surged to 205.¹⁷⁹ Two days later, Senator Harry Reid, the majority leader, availed himself of the same medium used by the protesters, announcing on his Twitter page that the planned ballot on the Protect IP Act would be delayed.¹⁸⁰ The House Judiciary Committee followed suit and postponed consideration of SOPA until a wider agreement on a solution could be reached.¹⁸¹ SOPA's sponsor, Lamar Smith said, "I have heard from the critics and I take seriously their concerns regarding proposed legislation to address the problem of online piracy."¹⁸²

IV. TECHNOLOGY SETS THE GROUND FOR THE SUCCESSFUL SOPA/PIPA OPPOSITION

The SOPA and PIPA protest was not the first effort by the public to contest unfavorable copyright legislation. In the 1980s, against the backdrop of the Sony Betamax case pending before the Supreme Court, consumer groups lobbied against outlawing personal use copying.¹⁸³ A decade later, an exemption for noncommercial copying of sound recordings was enacted as a result of similar lobbying.¹⁸⁴ Moreover, the SOPA blackout was not the first Internet blackout actuated by a detrimental legislative action. During the "The Great Web Blackout" protest in 1996, also known as "Black Thursday," webmasters blacked out more than 1500 webpages for forty-eight hours in protest of the Communications Decency Act of 1996 ("CDA").¹⁸⁵ The CDA outlawed indecent and obscene communications previously accessible on the Internet, as well as the transmission of obscene or in-

179. Nguyen, *supra* note 8. The number of opponents includes both opponents and "leaning no." *Id.*

180. Harry Reid, *Twitter Feed*, TWITTER (Jan. 20, 2012, 6:27 AM), <https://twitter.com/senatorreid/status/160367959464878080> (tweeting "In light of recent events, I have decided to postpone Tuesday's vote on the PROTECT IP Act #PIPA"); Weisman, *supra* note 9.

181. *Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act*, U.S. HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY (Jan. 20, 2012), http://judiciary.house.gov/issues/issues_RogueWebsites.html.

182. *Id.*

183. Pamela Samuelson, *Toward a "New Deal" for Copyright in the Information Age*, 100 MICH. L. REV. 1488, 1500 (2002).

184. *Id.*

185. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (current version at 47 U.S.C. § 223 (2006 & Supp. V 2011)); Anthony Collings, *Home Pages to go Black in Protest: Debate Rages over Bill to Restrict 'Net Smut*, CNN (Feb. 7, 1996, 10:45 PM), http://www.cnn.com/TECH/9602/cyber_censors/index.html; Dan Mitchell, *Remembering the Great Web Blackout*, WIRED (Feb. 8, 1997), <http://www.wired.com/politics/law/news/1997/02/1947>. See generally Joel Snyder, *Too Little, Too Late*, 7 INTERNET WORLD, May 1996, reprinted at OPUS ONE, <http://www.opus1.com/www/jms/iw-may96.html>.

decent communications to any person under the age of eighteen.¹⁸⁶ Following the lead of the Voters Telecomm Watch and the Center for Democracy and Technology, thousands of websites, including major sites such as Netscape, joined the protest to voice their opposition to the Bill's restrictions on free speech on the Internet.¹⁸⁷ That Internet strike, as opposed to the one instigated sixteen years later, bore no fruit and the CDA was signed into law.¹⁸⁸

Technological, political, legal, and social changes have laid the groundwork for the successful SOPA/PIPA campaign by admitting additional players into the legislative process. The advent of the Internet and the ability to make copies at low costs has changed the target of copyright legislation. In addition to professionals and old media, whose actions have traditionally been reactive to copyright laws, technology providers and end-users have in recent years joined the circle of affected parties.¹⁸⁹ As the tech sector has grown to become a much more influential player, users have been empowered by social media to spread information, connect, and mobilize on issues they care about.

A. The Dominance of the Tech Lobby

Throughout history, copyright law has been modified in response to new technology that facilitated the reproduction and distribution of preexisting works. Every new innovation, starting with the printing press in the fifteenth century, and followed by later inventions such as the photograph, radio, and television, has “forced reconsideration and adaptation of copyright principles” to a new reality.¹⁹⁰ However, within the first 200 years of copyright law's existence, the law was narrowly aimed at reconciling the interests of a limited number of parties.¹⁹¹ As long as the production of a copy was contingent on access to a printing press, anyone without such access could not copy, and thus did not fall within the direct reach of copyright law.¹⁹² The introduction of home copying devices and digital forms of copyright-

186. See § 502(2)(d).

187. Mitchell, *supra* note 185; Snyder, *supra* note 185.

188. Collings, *supra* note 185. The CDA, however, did not remain intact for long, as the Supreme Court struck down several provisions as unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997).

189. Gervais, *supra* note 24, at 847.

190. Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 366–67 (2004).

191. Christopher Jensen, Note, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 543–44 (2003).

192. *Id.* at 543.

ed works brought providers of these technologies into the scope of copyright debates.¹⁹³

Concurrently, the tech and Internet industries have gained more and more power, turning from a collection of low budget start-ups into a significant sector with some well-funded actors. During the early days of the Internet, the tech industry “happily ignored” Washington policy debates and successfully fostered the growth of tech powerhouses without government interference.¹⁹⁴ Nevertheless, when major technology companies found themselves facing “the sharp end of copyright,” they started paying closer attention to copyright legislation.¹⁹⁵ While ISPs and telecom companies actively lobbied during the enactment of the DMCA in the 1990s,¹⁹⁶ with some success, the political strength of tech companies as well as their investment in lobbying has increased dramatically since then. A recent report by the Center for Responsive Politics shows that the computer and Internet industries are active in the lobbying field, with more than \$133 million spent on lobbying in 2012 alone.¹⁹⁷ Furthermore, the amount spent by tech companies has risen dramatically in recent years.¹⁹⁸ The top lobbyist in the computer sector, Google, went from spending \$80,000 in 2003, to \$5.1 million in 2010, and \$18.2 million in 2012.¹⁹⁹ The lobbying expenses of social media giant Facebook nearly tripled from its \$1.35 million spending in 2011 to more than \$3.8 million in 2012.²⁰⁰ Even the Wikimedia Foundation, parent of Wikipedia, registered in 2011 to lobby for the first time.²⁰¹ The computer and Internet industry is also reported to have fielded 1158 lobbyists during 2012, which far

193. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 488 (2000); see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 196 (2003).

194. April Dembosky, *Silicon Valley Learns Fast in Game of Lobbying*, FIN. TIMES (Jan. 18, 2012, 11:57 PM), <http://www.ft.com/intl/cms/s/2/f426700a-41f5-11e1-a1bf-00144feab49a.html?ftcamp=rss#axzz1jwJ6o4vO>.

195. Greg Lastowka, *Innovative Copyright*, 109 MICH L. REV. 1011, 1026 (2011).

196. The DMCA's safe harbor provisions for online service providers are the product of tech lobbying at that time. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 133–35 (2003).

197. *Lobbying, Computers/Internet, 2012*, *supra* note 25.

198. *Id.*

199. *Compare Lobbying by Google Inc. in 2003*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientsum.php?id=D000022008&year=2003> (last visited Dec. 20, 2013), with *Lobbying by Google in 2010*, *supra* note 26, and *Lobbying by Google in 2012*, *supra* note 26. See also Cam Lincoln, *Playing Politics: Who's Spending in Silicon Valley*, MOBILEEDIA (Apr. 13, 2012), <http://www.mobileedia.com/news/137729.html>.

200. *Compare Lobbying by Facebook in 2011*, *supra* note 27, with *Lobbying by Facebook in 2012*, *supra* note 27. See also Emil Protalinski, *Facebook Breaks Its Lobbying Record in Q2 2012*, CNET (July 22, 2012, 12:27 PM), http://news.cnet.com/8301-1023_3-57477457-93/facebook-breaks-its-lobbying-record-in-q2-2012/.

201. Viveca Novak, *SOPA and PIPA Spur Lobbying Spike*, OPENSECRETS BLOG (Jan. 26, 2012, 1:02 PM), <http://www.opensecrets.org/news/2012/01/sopa-and-pipa-create-lobbying-spike.html> (noting, however, that it only “spent a minimal \$10,000”).

outnumbered the 610 lobbyists deployed by the TV, music, and movie industries during the same year.²⁰²

While these numbers validate the growing political power of the tech sector, they refer to the total amount spent on lobbying by tech companies, and not specifically to lobbying expenses on copyright-related issues. In the lobbying challenge of SOPA and PIPA, traditional media companies were outspending the tech industry by greater than a four to one ratio — with old media according \$1.4 million in campaign contributions to current House Judiciary Committee members, in support of SOPA, as opposed to less than \$336,000 received by SOPA opponents from the tech industry.²⁰³ Alexis Ohanian, reddit co-founder, referred to the SOPA/PIPA events as “the first time the tech community as a whole, including all the tech folks beyond Silicon Valley, have really come to realize how things work in D.C.”²⁰⁴ Even though this realization came after the proposed Bills had been discussed for months and were nearing passage, the tech industry is said to be catching up quickly to the lobbying game, which the entertainment lobby has dominated for a long time.²⁰⁵ Recently, major Internet firms like Facebook, Google, and Amazon launched a new lobbying association to present a joint front on issues such as copyright, privacy, and cybersecurity.²⁰⁶ In this sense, the battle surrounding the anti-piracy bills represents a turning point for both the tech sector — which recognized the importance of copyright lobbying and successfully entered the game with greater force — and the entertainment sector, which is losing its exclusive lobbying power in the copyright legislative arena.

B. Social Networks Reduce Coordination Costs for Users

Together with the tech industries, individual users have gradually become more and more interested in the copyright debate. Software programs that can create and copy music, documents, and art are now

202. *Lobbying, Computers/Internet, 2012*, *supra* note 25; *Lobbying, TV/Movies/Music, 2012*, *supra* note 25. Among lobbyists for both sides were former staffers from the House Judiciary Committee. Keenan Steiner, *SOPA Revolvers: Sixteen Former Judiciary Staffers Lobby on Online Copyright Issues*, SUNLIGHT FOUND. (Dec. 14, 2011, 12:22 PM), <http://reporting.sunlightfoundation.com/2011/sopa-sleuths/>.

203. Jeffrey ErnstFriedman, *Entertainment Media Outspends Internet Companies on the Campaigns of Representatives Marking up SOPA (Anti-Piracy Bill)*, MAPLIGHT (Dec. 20, 2011), <http://maplight.org/content/72899>.

204. Dembosky, *supra* note 194.

205. Michael Crowley, *Washington SOPA Opera: Lobbying Power Shifts from Hollywood to Silicon Valley*, TIME (Jan. 20, 2012), <http://swampland.time.com/2012/01/20/washington-sopa-opera-lobbying-power-shifts-from-hollywood-to-silicon-valley/>.

206. Cecilia Kang, *Facebook, Google, Amazon Join Forces in D.C. Lobby*, WASH. POST (Sep. 19, 2012, 12:01 AM), http://www.washingtonpost.com/blogs/post-tech/post/facebook-google-amazon-join-forces-in-dc-lobby/2012/09/19/5bc41e74-01ef-11e2-b260-32f4a8db9b7e_blog.html.

in the hands of countless users, who use the technology in the same way upscale studios previously have.²⁰⁷ While the digital era has provided users with access to professional creation, reproduction, and editing tools at low or no cost, the Internet has allowed users' uploaded content to enjoy mass exposure through dissemination on a large scale. With the endless possibilities that the Internet bestowed upon users came copyright concerns which have become the target of both litigation and lobbying endeavors.²⁰⁸ In the wake of immense criticism over lawsuits against individual users, efforts took aim at advancing new legislation to better address direct copyright infringement by users.²⁰⁹

As detailed above, past copyright legislative attempts usually failed to attract much public interest. The rise of the Internet and digital technology has changed the public's indifference in two significant ways. First, as technological developments usually precede legal reactions, by the time the legal answer to the new technology is found and agreed upon, "users of that technology are no longer neutral bystanders."²¹⁰ Instead, they have already internalized the use of the new technology, thus feeling deprived of what they have come to feel is their "right," when a "previously free use" becomes unlawful.²¹¹ Second, and more importantly, the rise of the Internet, and especially the advent of social and participatory media, has facilitated and accelerated collective action as well as what has been termed "e-democracy."²¹² In the past, mobilizing the public to protest was often prohibitively expensive.²¹³ Today, with the Internet lowering the resource threshold for group formation and collective action, even small, poorly-funded groups can successfully be at the helm of public mobilization.²¹⁴ For example, expensive traditional mass media (e.g., television) can now be substituted or supplemented by alternative ad-

207. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH L. 921, 929 (2009).

208. See Ben Depoorter, Alain Van Hiel & Sven Vanneste, *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1259–62 (2011) (describing how growing online infringement led the entertainment industry to target individual users of file-sharing technologies with high statutory damages).

209. In addition to suing users, recording companies also sued the facilitators of the infringing activities. Andrew C. Humes, *The Day the Music Died: The RIAA Sues Its Consumers*, 38 IND. L. REV. 239, 260–261 (2005).

210. Depoorter, *supra* note 32, at 1837.

211. *Id.* (internal quotation marks omitted).

212. See generally Michael E. Milakovich, *The Internet and Increased Citizen Participation in Government*, 2 EJOURNAL EDEMOCRACY & OPEN GOV'T 1, 7 (2010), <http://www.jedem.org/article/view/22/50> ("Tools provided by information technologies can be used in the development of a more participatory democracy. This direct participation in political activities is called e-democracy.")

213. Young Mie Kim, *Organized Interests' Collective Action in the New Information Environment*, 8 (Feb. 22, 2010) (unpublished manuscript), <http://users.polisci.wisc.edu/apw/archives/YoungMieKim.pdf> (last visited Dec. 20, 2013).

214. *Id.*

vertising mediums with vast publicity potential (e.g., designated web-sites, blogs, or even e-mail chains).²¹⁵

Specifically, social media lowered two forms of transaction costs previously faced by users wishing to team up for action: information costs and organization costs.²¹⁶ Information costs are defined as the costs of “determining the effects of a particular issue on an individual’s personal welfare.”²¹⁷ Organization costs are defined as the costs of “identifying similarly situated individuals and persuading them to participate in an effort to influence a particular legislative outcome.”²¹⁸

Social media is one of the predominant channels for people to share information. Prior to the Internet, two sorts of media were available — One-Way Media (also known as Broadcast Media), and Two-Way Media (also known as Communications Media).²¹⁹ One-Way Media includes newspapers, radio, and television, which support unidirectional transference of information, typically from a central source to a wide-ranging audience.²²⁰ Two-Way Media refers to interactive communication between two individuals or a small group, such as through telephone and telegrams.²²¹ These traditional communication patterns offered people either one-to-many or one-to-one (or one-to-a few) types of communication.²²² The emergence of social media, however, gave rise to the many-to-many communication pattern, which incorporates the broad audience element of One-Way Media with the interactive quality of the Two-Way Media, thus generating a new model of citizen engagement and collective information-sharing.²²³ Thanks to social media’s enablement of communication and its lack of fixedness, information diffusion has reached a new pace, nearly free from time, space, and cost constraints.²²⁴ Access to

215. *See id.*

216. *See generally* Bruce Bimber, *Information and Political Engagement in America: The Search for Effects of Information Technology at the Individual Level*, 54 *POLITICAL RES. Q.* 53 (2001).

217. Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 *GEO. L.J.* 1075, 1079 (1998).

218. *Id.*

219. Shaked Spier, *CollectiveAction2.0: The Impact of ICT-Based Social Media on Collective Action — Difference in Degree or Difference in Kind?*, 19 (August 2011) (unpublished manuscript) (*available at* <http://ssrn.com/abstract=1979312>); *see also* CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 86–87 (2008); Bernie Hogan & Anabel Quan-Haase, *Persistence and Change in Social Media*, 30 *BULL. SCI. TECH. & SOC’Y* 309, 310 (2010).

220. *See* SHIRKY, *supra* note 219.

221. Spier, *supra* note 219; *see* SHIRKY, *supra* note 219.

222. Spier, *supra* note 219.

223. *Id.*

224. Carrie O’Connell, *Network Theory and Political Revolution: A Case Study of the Role of Social Media in the Diffusion of Political Revolution in Egypt*, 31–33 (2012) (unpublished paper presented at The Student Research Symposium, San Diego, CA) (*available at* http://sdsu.academia.edu/CarrieOConnell/Papers/644629/Network_Theory_and_

information occasions the establishment of political opinions through conversation and discussion.²²⁵ By providing citizens access to real-time information, social media has changed the way individuals develop political stances and has allowed more people than ever to conceive and voice civil opinions.²²⁶ Furthermore, the information communicated via social networks is typically more specialized and issue-oriented than information communicated through traditional means, thus effectively conveyed to the most relevant, interested individuals within the public.²²⁷

By furthering many-to-many communication, social networks aid the implementation of decentralized and nonhierarchical organizational formations, thus facilitating grassroots movements of collective action.²²⁸ In the classical model of institutional organization, the organization functions best through hierarchy: each member is essential for communication between the various levels, and each member must fulfill her duties to allow others to complete theirs.²²⁹ The Internet, however, has lowered the costs of collective action so that group undertakings, which in the past necessitated central coordination and hierarchy, can now be performed through various methods of coordination.²³⁰ And so, in offering inexpensive and efficient communication, social media equips large groups of individuals for mobilization by neither a regulating structure nor the high costs previously associated with such action.²³¹

As social networks draw the citizenry's attention and endow the public with geographically independent organizational means, new forms of virtual political organization began to surface, such as issue

Political_Revolution_A_Case_Study_of_the_Role_of_Social_Media_in_the_Diffusion_of_Political_Revolution_in_Egypt). For an interesting case study about information diffusion on social media, see generally Sheldon Levine, *How Fast the News Spreads Through Social Media*, SYSOMOS BLOG (May 2, 2011, 11:23 AM), <http://blog.sysomos.com/2011/05/02/how-fast-the-news-spreads-through-social-media/> (demonstrating the pace of news spread on social media through tracking activity related to the story of Bin Laden's death.)

225. Joseph, *supra* note 33, at 155.

226. *Id.* at 152 (citing Clay Shirky, *The Political Power of Social Media*, 90 FOREIGN AFF. 28, 28–29 (2011)).

227. Kim, *supra* note 213, at 11.

228. See R. Kelly Garrett, *Protest in an Information Society: A Review of Literature on Social Movements and New ICTs*, 9 INFO. COMM. & SOC'Y, 202, 211 (2006). See generally PETER DAHLGREN, *MEDIA AND POLITICAL ENGAGEMENT: CITIZENS, COMMUNICATION, AND DEMOCRACY* (2009).

229. See SHIRKY, *supra* note 219, at 39–40.

230. *Id.* at 47.

231. See Dahlgren, *supra* note 228, at 194. For a different view see Malcolm Gladwell, *Small Change: Why the Revolution Will Not be Tweeted*, NEW YORKER (Oct. 4, 2010), http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell (“Because networks don’t have a centralized leadership structure, . . . they have real difficulty reaching consensus and setting goals. They cannot think strategically; they are . . . prone to conflict and error. How do you make difficult choices about tactics or strategy or philosophical direction when everyone has an equal say?”).

entrepreneurship and deliberative discourse.²³² In countries where media freedom is limited, such as Ukraine and Iran, the Internet and social media have been used to mobilize individuals into political action.²³³ Customers have utilized social media to stop disliked acts by private corporations, such as the outcry that forced Verizon Wireless to reverse its proposed “convenience fee” less than twenty-four hours after announcing it.²³⁴ Even social networks themselves are affected by the revolution they have come to generate: Facebook’s members have effectively employed the platform to protest changes to the website.²³⁵

Lastly, the rise of the Internet and social media has also reduced collective action dilemmas for individuals, especially the incentive to free ride.²³⁶ Social media blurs the distinction between public and private, as individuals constantly share personal observations and private information via social networks, sometimes with relatively minimal understanding as to how, and by whom, their information may be used.²³⁷ By vaguely redefining the line between public and private domains, social networks mitigate the free-rider problem, which has been endemic to collective action.²³⁸ Recent social science commentary and economic literature have been attempting to redefine the classic binary free-riding decision metric to explain, *inter alia*, why individuals contribute publicly valuable information online via interactive processes.²³⁹ In the digital era, people are less motivated to engage in the cost-benefit analysis that previously grounded rational choices to free ride, when contemplating the contribution of a private

232. Mascaro & Goggins, *supra* note 34, at 13 (citing Philip E. Agre, *The Practical Republic: Social Skills and the Progress of Citizenship*, in COMMUNITY IN THE DIGITAL AGE 201, 211–12 (Andrew Feenberg & Darin Barney eds., 2004)) (“According to Agre, the ‘Issue Entrepreneur’ is an individual situated in a network, who proliferates the existence of an issue and information about it to a network of others. Agre contends that these networks exist in the national, local, institutional and ideological contexts.” Particularly important in the context of protesting, “individuals in each of these respective lattices will tend to network with others in their lattices that have an interest in the same issue, contributing to the formation of a four-dimensional network.”).

233. Mascaro & Goggins, *supra* note 34, at 12.

234. Brian X. Chen & Ron Lieber, *Verizon Drops Plan for \$2 Fee on Some Bill Payments*, N.Y. TIMES BITS BUS. TECH. BLOG (Dec. 30, 2011), <http://bits.blogs.nytimes.com/2011/12/30/verizon-backtracks-on-plan-for-2-convenience-fee/>.

235. Andrés Sanchez, *The Facebook Feeding Frenzy: Resistance-Through-Distance and Resistance-Through-Persistence in the Societed Network*, 6 SURVEILLANCE & SOC’Y 275, 282–83 (2009).

236. Bruce Bimber, Andrew J. Flanagin & Cynthia Stohl, *Reconceptualizing Collective Action in the Contemporary Media Environment*, 15 COMM. THEORY 365, 373 (2005); see Kim, *supra* note 213, at 10. A free ride occurs when a member of a group “obtains benefits from group membership but does not bear a proportional share of the costs of providing the benefits.” Robert Albanese & David D. Van Fleet, *Rational Behavior in Groups: The Free-Riding Tendency*, 10 ACAD. MGMT. REV. 244, 244 (1985).

237. See Bimber, Flanagin & Stohl, *supra* note 236, at 373.

238. Kim, *supra* note 213, at 10.

239. See Bimber, Flanagin & Stohl, *supra* note 236, at 371.

matter to the public sphere.²⁴⁰ Existing technology facilitates individual input to information repositories in a manner that requires limited or no intention to contribute or even knowledge of contributions, like being counted by Google when searching for information about SOPA. Since this private information is often automatically and easily publicized, motivations to free ride are virtually dissolved.²⁴¹

V. THE PUBLIC AS A SLEEPING GIANT

In the days following the SOPA strike, Internet activists celebrated the future of copyright with sheer optimism. The participation of the public in the opposition wave was compared to the “kind of solidarity and commitment” that materialized after 9/11,²⁴² and the SOPA strike was designated as the beginning of “a new era of political engagement based on social media.”²⁴³ Internet freedom activists were said to acquire both a better understanding about mobilization and a stronger political position in the post-SOPA market.²⁴⁴ The “Internet Spring”²⁴⁵ has not only taught Hollywood not to interfere with the Internet, but it also left its mark on lawmakers, who are now unwilling to promote any kind of Internet legislation for fear of another backlash.²⁴⁶ One blogger went as far as stating that in the post-SOPA/PIPA reality, “the voters, not the content industry lobbyists, call the shots.”²⁴⁷

240. Kim, *supra* note 213, at 10.

241. For this reason, according to Bimber, Flanagin & Stohl, “free riding by withholding individual contributions can in some cases actually become *more* effortful than contributing information would be.” *Supra* note 236, at 373.

242. Avantika Krishna, *The Reason SOPA and PIPA Protests Were So Successful*, POLICYMIC (Jan. 20, 2012), <http://www.policymic.com/articles/3531/the-reason-sopa-and-pipa-protests-were-so-successful>.

243. David Binetti, *SOPA Scorecard: Internet 1, Lobbyists 0*, TECHCRUNCH (Jan. 19, 2012), <http://techcrunch.com/2012/01/19/sopa-scorecard-internet-lobbyists/>.

244. David Scharfenberg, *Game Change?*, THE PHOENIX (May 30, 2012), <http://thephoenix.com/boston/news/139391-game-change/#ixzz2IGQbwhNc>.

245. Craig Newmark, *This Internet Spring Could Lead to an Internet Awakening*, CRAIGCONNECTS (Jan 19, 2012), <http://craigconnects.org/2012/01/the-internet-awakening-or-liberty-and-well-armed-lambs.html>.

246. Lydia DePillis, *Why the Anti-SOPA Band Hasn't Gotten Back Together*, THE NEW REPUBLIC (Jan. 4, 2013), <http://www.npr.com/blog/plank/111610/why-the-anti-sopa-band-hasnt-gotten-back-together#>.

247. Gary Shapiro, *Americans Revolt Against Copyright Powergrab*, FORBES (Jan. 11, 2012, 2:06 PM), <http://www.forbes.com/sites/garyshapiro/2012/01/11/americans-revolt-against-copyright-powergrab/>. Similar statements as to the change in the political reality after SOPA and PIPA were also made in legal commentary. *See, e.g.*, Bradford L. Smith, *Technology and Intellectual Property: Out of Sync or Hope for the Future?*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 619, 638–39 (2013) (“The defeat of SOPA demonstrates that American consumers care deeply about their access to technology, and that lawmakers listen to them.”); Rachel Storch, Note, *Copyright Vigilantism*, 16 STAN. TECH. L. REV. 453, 462 (2013) (“The public backlash against SOPA and PIPA has made Congress wary to pursue any new online copyright enforcement legislation.”).

The power of the public to vindicate its interests through social networks could suggest that the public, which used to be systematically disadvantaged in copyright political processes, has transformed into a potent advocate with proven influence over lawmakers' decisions. Thus, future legislation would have to make allowances for the public's concerns and wishes, and the public choice analysis would arguably no longer apply to copyright lawmaking.²⁴⁸ Indeed, the unprecedented success of the public in changing a virtually given outcome in the legislative arena during the SOPA/PIPA episode cannot be trivialized.

Nonetheless, it would be a mistake to conclude that a new era of Internet-powered citizen democracy could dramatically change the future of copyright lawmaking into one involving vast public participation in the decision-making process. When looking at the future of copyright lawmaking, and reflecting on the demise of the public choice model in that realm, one must accurately define the place of the public within the political map of copyright. For this purpose, the exceptionality of the SOPA/PIPA protest must be appreciated. Three unique attributes of the SOPA/PIPA outcry suggest that the future holds no permanent public engagement in copyright lawmaking: (1) the context of the SOPA/PIPA protest as a part of a global public rise, (2) the anti-piracy Bills' detrimental effect over UGC, and (3) the high threshold for extensive public engagement. Given these attributes, we should view the public as a "sleeping giant" who may or may not be awoken to actively participate in copyright legislative debates. In this sense, the sleeping giant is composed of two aspects: it is "sleepy" — unless roused, its existence constitutes merely a potential threat — and it is also a "giant" — immensely forceful and persuasive when awoken, as evidenced by the SOPA/PIPA episode.

A. *The Global Public Rise of 2011*

The expression of public outrage as evidenced by the SOPA/PIPA backlash cannot be disconnected from its historical context. In 2011, Time Magazine chose "The Protester" as its "Person of the Year," announcing that "[i]n 2011, protesters didn't just voice their complaints; they changed the world."²⁴⁹ Numerous publicized protests cropped up globally during 2011, from the revolutionary wave of the

248. While the rise of social media challenges basic assumptions in general public choice theory, and could suggest that the theory must undergo major changes to conform to the reality of the Internet era, this Article strives to limit the discussion to the influence of social media on copyright lawmaking only, in light of an established literature accepting public choice insights as a given in that area.

249. Kurt Anderson, *The Protester*, TIME (Dec. 14, 2011), <http://www.time.com/time/person-of-the-year/2011/> (emphasis omitted).

Arab Spring to the Occupy movement around the world.²⁵⁰ Each of these protests demanded political and economic reform and was organized with the help of social media. A recent study found that discussions about political uprisings on social media often preceded major events in the Arab Spring, and encouraging stories of protest were communicated across geographical borders.²⁵¹ The inspiration from abroad was swiftly translated into action, leading individuals in other countries to pick up the conversation.²⁵² When protesters of Occupy Wall Street took over Manhattan, the link to the Arab Spring was immediately inferred. Some reported actual connections between the organizers of both protests,²⁵³ while some described how the “Occupiers” borrowed tactics,²⁵⁴ and drew inspiration from the Arab Spring.²⁵⁵ Some have even referred to the movement as the “American Fall” or “American Autumn.”²⁵⁶

The same motivational effect, or at least parts of it, materialized in the SOPA/PIPA protest, which began slightly after the commencement of the Occupy Wall Street events. Organizations previously associated with the Occupy Wall Street protests, such as MoveOn.org,

250. Gideon Rachman, *2011, The Year of Global Indignation*, FIN. TIMES (Aug. 29, 2011, 9:55 PM), <http://www.ft.com/intl/cms/s/0/36339ee2-cf40-11e0-b6d4-00144feabdc0.html#axzz21jloVyI9>; Nouriel Roubini, *World Class Warfare: Why Almost Every Continent on Earth Is Experiencing Social and Political Turmoil*, SLATE (Oct. 13, 2011, 3:28 PM), http://www.slate.com/articles/business/moneybox/2011/10/what_occupy_wall_street_the_arab_spring_the_chilean_students_and.html.

251. Catherine O’Donnell, *New Study Quantifies Use of Social Media in Arab Spring*, U. WASH. NEWS (Sep. 12, 2011), <http://www.washington.edu/news/articles/new-study-quantifies-use-of-social-media-in-arab-spring>; Philip N. Howard et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?*, 23 (Project on Info. Tech. & Political Islam, Working Paper No. 1, 2011), available at http://pitpi.org/wp-content/uploads/2013/02/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf.

252. O’Donnell, *supra* note 251.

253. Adam Clark Estes, *How Occupy Influenced Egypt’s Arab Spring (and Vice Versa)*, THE ATLANTIC WIRE (Dec. 16, 2011), <http://www.theatlanticwire.com/global/2011/12/how-occupy-influenced-egypts-arab-spring-vice-versa/46334/> (“Occupy organizers and those behind the Arab Spring have not only been taking queues [sic] from each other and borrowing brands, they’ve actually been collaborating.”); see Sal Gentile, *Egyptians March in Support of Occupy Wall Street. Are There Parallels With the Arab Spring?*, PBS (Oct. 28, 2011), <http://www.pbs.org/wnet/need-to-know/the-daily-need/egyptians-march-in-support-of-occupy-wall-street-are-there-parallels-with-the-arab-spring/12147/>.

254. Mitchell Hartman, *Did the Arab Spring Spark the “Occupy” Movement?*, MARKETPLACE (Jan. 24, 2012), <http://www.marketplace.org/topics/life/did-arab-spring-spark-occupy-movement>.

255. TJ Winick, *Occupy Wall Street Protesters: We Are Americans*, ABC NEWS (Oct. 2, 2011), <http://abcnews.go.com/US/occupy-wall-street-protesters-americans/story?id=14652698#UBFjDWgm8IK>.

256. Stephanie Condon, *After “Arab Spring,” Liberal Groups Say It’s Time for “American Autumn.”* CBS NEWS (Oct. 4, 2011), http://www.cbsnews.com/8301-503544_162-20115566-503544.html; Ayman Mohyeldin, *From the Arab Spring to the American Fall?*, TIME (Oct. 12, 2011), <http://ideas.time.com/2011/10/12/from-the-arab-spring-to-the-american-fall/>.

actively revolted against the anti-piracy Bills.²⁵⁷ The NYC General Assembly, which organized and set the vision for the Occupy Wall Street movement, posted a passionate statement against SOPA on its website.²⁵⁸ Some of the Occupy Wall Street sites, including OccupyWallSt.org, blacked out their websites on the SOPA strike day.²⁵⁹ The global uprisings did not end with the SOPA/PIPA protests. The European opposition to the Anti-Counterfeiting Trade Agreement — with mass protests in Germany, Poland, the United Kingdom, and the Netherlands — was also organized in part online, and it ultimately succeeded when the European Parliament rejected the treaty.²⁶⁰

Returning to the sleeping giant metaphor, when the SOPA/PIPA opposition commenced, the giant was not fully asleep. The global atmosphere was one of social change and worldwide uprisings. The public was thus more attentive, and as discussed below, could easily relate to the protest theme.

B. SOPA, PIPA, and UGC

The SOPA/PIPA protest succeeded in bringing two bills to a halt. But perhaps its greater success has to do with the impressive number of individuals it mobilized into action. The anti-piracy Bills seemed to matter to many who strove to express their disapproval. Indeed, the fact that this was mostly an online protest made things much easier for the activists, who could act from the convenience of their homes. It is also true that tweeting about SOPA, sending a template e-mail to a Congressman through an automated system, or signing an online peti-

257. Sean Captain, *Occupy SOPA: Inside the New York Protests*, TECH NEWS DAILY (Jan. 18, 2012, 5:53 PM), <http://www.technewsdaily.com/3638-occupy-sopa-york-protests.html> (updated Jan. 19, 2012, 7:20 AM); see also Danny Goldberg, *Hysterical Over SOPA for All the Wrong Reasons*, CBS NEWS (Jan. 25, 2012, 9:31 AM), http://www.cbsnews.com/8301-215_162-57365620/hysterical-over-sopa-for-all-the-wrong-reasons/.

258. *Statement Against SOPA*, N.Y.C. GEN. ASSEMBLY, <http://www.nycga.net/resources/documents/sopa/> (last visited Dec. 20, 2013). Some have connected the SOPA strike with the issues that inspired Occupy Wall Street. See, e.g., Bruce Gorton, *Sopa, Censorship and Wall Street*, TIMESLIVE (Nov. 22, 2011), <http://www.timeslive.co.za/opinion/2011/11/22/sopa-censorship-and-wall-street>. Similarly, the Occupy Wall Street movement started with “a single blog post inspired by the Arab Spring.” Bill Chappell, *Occupy Wall Street: From a Blog Post to a Movement*, NPR (Oct. 20, 2011, 6:02 AM), <http://www.npr.org/2011/10/20/141530025/occupy-wall-street-from-a-blog-post-to-a-movement>. Cf. Peter Apps, *Wall Street Action Part of Global “Arab Spring”?*, REUTERS (Oct. 11, 2011), <http://www.reuters.com/article/2011/10/11/uk-global-politics-protest-idUSLNE79A03Z20111011> (arguing that Occupy Wall Street and the Arab Spring are both signs of “a global, popular backlash against elites”).

259. Chris Bowers, *Boing Boing Blacks out to Protest SOPA and PIPA*, DAILY KOS (Jan. 18, 2012, 11:50 AM), <http://www.dailykos.com/story/2012/01/18/1056041/-Boing-Boing-blacks-out-to-protest-SOPA-and-PIPA>.

260. Dave Lee, *Acta Protests: Thousands Take to Streets Across Europe*, BBC NEWS (Feb. 11, 2012, 1:57 PM), <http://www.bbc.com/news/technology-16999497>; Eric Pfanner, *European Parliament Rejects Anti-Piracy Treaty*, N.Y. TIMES (July 4, 2012), <http://www.nytimes.com/2012/07/05/technology/european-parliament-rejects-anti-piracy-treaty.html>.

tion all represent “low-risk activism” and do not require sacrifice-like conventional street protests.²⁶¹ Yet any expression of disapproval, even as negligible as “liking” an anti-SOPA post on Facebook, accumulates as part of the collective effort, especially when coupled with the vast number of people deviating (albeit slightly) from their daily routine to communicate their opposition. Moreover, it could very well be the case that the option to object to the bills through trivial methods was conducive to the immense level of public participation in the SOPA/PIPA protest. As the SOPA/PIPA case proves, low-risk activism is powerful enough to drive a significant political change when performed by a sufficient amount of collaborators.

Besides allowing people to be informed of proposed legislative acts, discuss them with others, and oppose them, the Internet, and especially the rise of UGC, has also given rise to “The Cute Cat Theory of Internet Censorship.”²⁶² The theory suggests that most people use the Internet for trivial and mundane purposes, such as sharing photos of cute cats. If a government decides to censor UGC websites, it would effectively block undesired speech, but also those cute cat pictures — “[a]nd even those who could care less about presidential shenanigans are made aware that their government fears online speech so much that they’re willing to censor the millions of banal videos . . . to block a few political ones.”²⁶³ The Cute Cat Theory as originally presented in 2008 pertains chiefly to developed countries where political censorship is common and accepted, like Saudi Arabia and China.²⁶⁴ The public reaction in the United States to government attacks on UGC would be even more severe under this theory because the right to post a video of one’s cute cat is protected under the First Amendment.²⁶⁵

With the rise of Web 2.0, the term censorship gets an enhanced meaning.²⁶⁶ Digital tools and mass exposure that were previously reserved to professionals are now in the hands of countless users, making censorship harmful not only to professional media, but to any common Internet user wishing to share pictures of her cute cat. The popularity of UGC and its central role as a one-to-many communication tool allowed users’ interests to concentrate around one clear issue. So when SOPA and PIPA purportedly attempted to censor the Internet, UGC networks had not only lowered collective action costs

261. Gladwell, *supra* note 231.

262. Zuckerman, *supra* note 40; Cohen, *supra* note 40.

263. Zuckerman, *supra* note 40.

264. *See id.*

265. U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

266. The term Web 2.0 refers to collaborative, user-generated content space, which uses the Internet as a software platform. *See generally* Tim O’Reilly, *What Is Web 2.0*, O’REILLY (Sep. 30, 2005), <http://oreilly.com/web2/archive/what-is-web-20.html>.

and facilitated mobilization, but they had also helped users to focus on a wide, common understanding — that no great firewall is greater than one’s Facebook wall.²⁶⁷

SOPA and PIPA proponents, however, argue that Silicon Valley industries exploited their power unethically, and misinformed the protesters about the anti-piracy Bills.²⁶⁸ In other words, according to the Bills’ supporters, SOPA and PIPA never endangered anyone’s free speech, and the future of cute cat pictures online — as long as they do not infringe on anyone’s copyright — has never been safer. A day before the SOPA strike, SOPA’s sponsor, Representative Lamar Smith, condemned Wikipedia and the participants of the planned blackout, saying “[t]his publicity stunt does a disservice to its users by promoting fear instead of facts. Perhaps during the blackout, Internet users can look elsewhere for an accurate definition of online piracy.”²⁶⁹ Chris Dodd, the head of the Motion Picture Association of America, also rebuked SOPA opponents for “resorting to stunts that punish their users or turn them into their corporate pawns.”²⁷⁰ Dodd referred to the blackout as an “abuse of power” and warned against manipulation of information by online platforms, which provoke users into action for the benefit of their business interests.²⁷¹ After the successful blackout and the shelving of the bills, SOPA and PIPA supporters insisted that the public was misguided — “[m]isinformation may be a dirty trick, but it works.”²⁷²

Social media and Internet platforms, and particularly key platforms like Facebook, Wikipedia, and Google’s YouTube, enjoy the power to readily shape public opinion, and some of the information communicated to users during the protest may not have been accurate. Even so, crediting the purported misinformation for the protest’s success is not persuasive. The sources of information in the SOPA/PIPA protest were diverse, and included news reports from reputable

267. The relative silence of the public toward the Cyber Intelligence Sharing and Protection Act (“CISPA”), see *infra* Part V.C, demonstrates that other acts that may be detrimental to the other aspects of online activities, but still allow people to upload cute cat pictures, face less opposition.

268. Sherman, *supra* note 39; see also Chris Dodd, *These Two Bills Are the Best Approach*, N.Y. TIMES (Jan. 18, 2012, 9:07 PM), <http://www.nytimes.com/roomfordebate/2012/01/18/whats-the-best-way-to-protect-against-online-piracy/these-two-bills-are-the-best-approach>.

269. Carl Franzen, *SOPA/PIPA Supporters Blast “Blackout Day,”* TPMIDEALAB (Jan. 17, 2012, 9:10 PM), <http://talkingpointsmemo.com/idealab/sopa-pipa-supporters-blast-blackout-day>.

270. Press Release, Sen. Chris Dodd, Chairman and CEO, Motion Picture Association of America, Inc., Statement on the So-Called “Blackout Day” Protesting Anti-Piracy Legislation, THE MOTION PICTURE ASSOCIATION OF AMERICA (Jan. 17, 2012), available at <http://mpaa.org/resources/c4c3712a-7b9f-4be8-bd70-25527d5dfad8.pdf>.

271. *Id.*

272. Sherman, *supra* note 39.

sources (such as the New York Times and CNN),²⁷³ numerous blog posts,²⁷⁴ and legal opinions from lawyers and law school professors.²⁷⁵ Furthermore, Google and other high-profile websites officially joined the protest months after Internet advocacy groups started voicing their opposition online.²⁷⁶ Last, among the websites protesting the Bills, Wikipedia occupies a singular place as ideological entrepreneur.²⁷⁷ Wikipedia is everything the public-service essence of the wide-open Web stands for: “nonprofit, communitarian, comparatively transparent, free to use and copy, privacy-minded, neutral and civil.”²⁷⁸ The decision to blackout the website was not lightly made, and involved days of discussions among 1800 Wikipedia editors followed by a democratic vote.²⁷⁹

In sum, it was neither the tech industry manipulating their users to promote their business interest, nor was it the users’ community who called upon Silicon Valley companies to lend them a helping hand in the protest. It was the combination of both, which, among other factors, made the SOPA/PIPA protest so successful. UGC platforms had a clear interest in stopping the anti-piracy bills, but UGC platforms were also the platforms through which users shared their cute cats. Thus, users likewise had an interest in preventing the Bills from passing. Furthermore, and most importantly, users received their information about the Bills and acted against them via the same channels the Bills were purportedly endangering. This state generated an alignment of interests between the two groups, which was sufficiently

273. Julianne Pepitone, *SOPA Explained: What It Is and Why It Matters*, CNN MONEY (Jan. 20, 2012, 12:44 PM), http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm (discussing SOPA); Wortham, *supra* note 28.

274. In a fascinating talk broadcasted online, Professor Yochai Benkler recounted the SOPA/PIPA protest by mapping the public discourse of the online SOPA/PIPA debate. In his talk, Benkler alludes to many blogs that participated in the opposition, such as technology blog Techdirt and news-sharing platform reddit. Yochai Benkler, “*The Networked Public Sphere*”: *Framing the Public Discourse of the SOPA/PIPA Debate*, THE GUARDIAN (May 15, 2012), <http://www.guardian.co.uk/media-network/video/2012/may/15/yochai-benkler-networked-public-sphere-sopa-pipa>.

275. Mike Masnick, *Over 100 Lawyers, Law Professors & Practitioners Come out Against SOPA*, TECHDIRT (Nov. 15, 2011, 6:31 PM), <http://www.techdirt.com/articles/20111115/17382616784/over-100-lawyers-law-professors-practitioners-come-out-against-sopa.shtml>; Letter from Law School Professors to the House of Representatives (Nov. 15, 2011), available at <http://politechbot.com/docs/sopa.law.professor.letter.111511.pdf>; see Benkler, *supra* note 274.

276. Larry Magid, *SOPA and PIPA Defeat: People Power or Corporate Clout?*, FORBES (Jan. 31, 2012, 10:40 AM), <http://www.forbes.com/sites/larrymagid/2012/01/31/sopa-and-pipa-defeat-peoples-power-or-corporate-clout/>.

277. For a good overview on ideological entrepreneurship see generally Virgil Henry Storr, *North’s Underdeveloped Ideological Entrepreneur*, in 1 ANN. PROC. WEALTH & WELL-BEING NATIONS 99 (Emily Chamlee-Wright ed., 2008), available at <http://www.beloit.edu/upton/assets/Storr.pgs.vol.1.pdf>.

278. Keller, *supra* note 39.

279. See Memorandum from Sue Gardner, *supra* note 149; Sutter, *supra* note 151; WIKIPEDIA, *supra* note 151.

significant to allow joint action toward the ultimate point of victory.²⁸⁰ The alliance between UGC networks and users, however, was comprised of different groups with distinct sets of interests that may not align next time.²⁸¹

The same applies to the groups themselves: not all users, just as not all UGC platforms, share identical interests. Google's business interest may require a different copyright system than the one envisioned by Wikipedia, and Jane from New York could favor a proposed copyright reform, as opposed to Jessica from Michigan, who would find it intolerable. It is virtually impossible to determine the exact mainspring that cast a spell of perfect consensus within the tech and users' communities during the SOPA/PIPA opposition. It could be that SOPA and PIPA were truly that bad. It could also be that it was the first time a legislative act touched on UGC networks at a time when those networks were so influential, both in terms of lobbying power and in terms of users' engagement. Either way, first times happen just once, and it is not a given that the alliance between users and Internet companies, as well as the consensus within each sector, would commonly reoccur.

C. A Threshold for Extensive Public Engagement

The success of the SOPA and PIPA opposition is measured not only through its ultimate results, but also through the level of public participation it stimulated. It is hard to predict what sort of controversy may give rise to such sweeping opposition in the future. In fact, while social scientists have been trying to identify the circumstances under which online collective action is likely to succeed (or fail), no conclusive answer has been agreed on.²⁸² Recent domestic and international legislative endeavors involving Internet uses and intellectual property enforcement, even though widely criticized by Internet advocacy groups and human rights organizations, have not provoked a public outcry close to the one SOPA and PIPA generated. A bill, titled the Cyber Intelligence Sharing and Protection Act ("CISPA"), exemplifies this point.²⁸³ CISPA is intended to facilitate government investigations of cyber threats and to safeguard the security of networks

280. Benkler, *supra* note 15.

281. An example for such diversity in interest is found in CISPA, Cyber Intelligence Sharing and Protection Act, H.R. 3523, 112th Cong. (2012), which was supported by UGC platforms like Google and Facebook while advocates of Internet privacy and civil liberties eagerly warned against its consequences to users' privacy. Nevertheless, as of the moment of this writing, CISPA is still alive. *See infra* text accompanying notes 284–91.

282. Bimber, Flanagan, & Stohl, *supra* note 236, at 371.

283. H.R. 3523.

against cyber attacks.²⁸⁴ For this purpose, CISPA permits the sharing of cyber threat intelligence between the private and public sectors.²⁸⁵

Advocates of Internet privacy and civil liberties strongly oppose CISPA, noting that the bill authorizes monitoring of private communications and sharing of personal information with no judicial oversight.²⁸⁶ Trying to invoke the success of the SOPA outcry, opponents of CISPA called it “SOPA 2” and have been impressively striving to enlist the public to fight against the bill.²⁸⁷ Even a weeklong campaign, titled “Stop Cyber Spying Week,” was announced in April 2012.²⁸⁸ Yet, to date the CISPA opposition has been far less sweeping compared to the one of SOPA and PIPA. The opposition managed to call upon fewer participants, enjoyed less media coverage, and has not succeeded in completely halting the bill, which was introduced in November 2011, and passed the House by a vote of 248 for to 168 against in April 2012.²⁸⁹ Despite being defeated in the spring of 2013, a version of CISPA is being considered for reintroduction to the Senate as of October 2013.²⁹⁰

The Anti-Counterfeiting Trade Agreement (“ACTA”),²⁹¹ a voluntary, plurilateral agreement to internationally bolster protection and enforcement of intellectual property, was also highly criticized, both for the secrecy in which it was negotiated, and for its content.²⁹² The opposition to ACTA propelled mass protests in Europe, where it was ultimately rejected by the European Parliament.²⁹³ Yet, even though

284. CHAIR AND STAFF OF H.R. COMM. ON INTELLIGENCE, 112TH CONG., REP. ON TEXT OF H.R. 3523: THE CYBER INTELLIGENCE SHARING AND PROTECTION ACT (Comm. Print 2012), <http://docs.house.gov/billsthisweek/20120423/CPRT-112-HPRT-RU00-HR3523.pdf>.

285. *Id.*

286. Trevor Timm, *Cybersecurity Bill FAQ: The Disturbing Privacy Dangers in CISPA and How To Stop It*, ELEC. FRONTIER FOUND. (Apr. 15, 2012), <https://www.eff.org/deeplinks/2012/04/old-cybersecurity-bill-faq-disturbing-privacy-dangers-cispa-and-how-you-stop-it> (updated to reflect recent developments in Mark M. Jaycox & Kurt Opsahl, *CISPA Is Back: FAQ on What It Is and Why It's Still Dangerous*, ELEC. FRONTIER FOUND. (Apr. 22, 2013), <https://www.eff.org/deeplinks/2012/04/cybersecurity-bill-faq-disturbing-privacy-dangers-cispa-and-how-you-stop-it>).

287. Cory Doctorow, *CISPA Is SOPA 2.0: Petition To Stop It*, BOINGBOING (Apr. 10, 2012, 2:59 PM), <http://boingboing.net/2012/04/10/cispa-is-sopa-2-0-petition-to.html>.

288. Mandy Simon, *Kicking off “Stop Cyber Spying Week,”* AM. CIVIL LIBERTIES UNION (Apr. 16, 2012, 12:00 PM), <http://www.aclu.org/blog/national-security-technology-and-liberty/kicking-stop-cyber-spying-week>.

289. H.R. 3523 (112th): *Cyber Intelligence Sharing and Protection Act, Bill Overview*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr3523> (last visited Dec. 20, 2013).

290. Jacob Kastrenakes, *Controversial Cyberthreat Bill CISPA May Return to Congress*, THE VERGE (Oct. 21, 2013, 6:11 PM), <http://www.theverge.com/2013/10/21/4863734/feinstein-working-on-new-cispa-cyberthreat-bill-curb-privacy-concerns>.

291. Anti-Counterfeiting Trade Agreement (ACTA), Office of the U.S. Trade Rep., http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.

292. See, e.g., David S. Levine, *Bring in the Nerds: Secrecy, National Security and the Creation of International Intellectual Property Law*, 30 CARDOZO ARTS & ENT. L.J. 105 (2012).

293. Pfanner, *supra* note 260.

Internet activists described ACTA as more expansive and worse than SOPA,²⁹⁴ similar mobilization efforts in the U.S. fail to gain traction. The Trans-Pacific Partnership (“TPP”), which is still being negotiated between the United States and seven other countries,²⁹⁵ is reportedly implementing restrictive copyright measures that go beyond the requirements specified in existing international treaties.²⁹⁶ Like ACTA, the TPP has been discussed in the media and condemned by Internet advocates.²⁹⁷ Still, no SOPA-like opposition has ensued.

As these examples indicate, the majority of the public is reluctant to fight for the public interest on a regular basis. There is a threshold for extensive public participation, and this threshold is too high to be crossed frequently. It could be that the SOPA/PIPA protest displayed a peak of public participation, from which more and more people have withdrawn, leaving several groups of activists who are repeat players. The extent to which repeat players influence the copyright legislative process will only be fully appreciated in the future. Nonetheless, it is very unlikely that those groups would succeed in swaying lawmakers in the way the countless voices of the public did during the SOPA/PIPA campaign.

The high threshold for large-scale public engagement touches on another concern. The SOPA/PIPA protest had one, clear, defensive goal: stop the Bills. This goal was easy to set and easy to follow, and success was easy to determine. It is an axiomatic truth that it is much easier to stop legislation from being enacted than to enact it. The required procedure for turning a bill into law includes several stages of internal consideration: a proposal must be considered and approved by legislators in congressional committees, presented in hearings, discussed in debates, approved by majorities in both houses of Congress, and either approved by the President or backed by a veto-override in

294. See, e.g., Cory Doctorow, *White House Petition To End Support for ACTA*, BOINGBOING (Jan. 22, 2012, 10:29 PM), <http://boingboing.net/2012/01/22/white-house-petition-to-end-su.html>; Erik Kain, *If You Thought SOPA Was Bad, Just Wait Until You Meet ACTA*, FORBES (Jan. 23, 2012, 11:10 AM), <http://www.forbes.com/sites/erikkain/2012/01/23/if-you-thought-sopa-was-bad-just-wait-until-you-meet-acta/>.

295. *The United States in the Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership> (last visited Dec. 20, 2013). For a comprehensive description of the partnership, see generally Meredith Kolsky Lewis, *The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep's Clothing?*, 34 B.C. INT'L & COMP. L. REV. 27 (2011).

296. See Peter K. Yu, *The Alphabet Soup of Transborder Intellectual Property Enforcement*, 60 DRAKE L. REV. DISCOURSE 16, 24–28 (2012); *Trans Pacific Partnership Agreement*, ELEC. FRONTIER FOUND., <https://www EFF.org/issues/tpp> (last visited Dec. 20, 2013).

297. *Trans-Pacific Partnership Agreement*, ELEC. FRONTIER FOUND., <https://www EFF.org/issues/tpp> (last visited Dec. 20, 2013); Glyn Moody, *Where TPP Goes Beyond ACTA — And How It Shows Us the Future of IP Enforcement*, TECHDIRT (Apr. 6, 2012), <http://www.techdirt.com/articles/20120402/09551618327/where-tpp-goes-beyond-acta-how-it-shows-us-future-ip-enforcement.shtml>.

both houses.²⁹⁸ SOPA and PIPA made it through this process fairly quickly within their brief existence, before being effectively halted by their foes. Nevertheless, another legislative initiative, which attempts to propose a softer alternative to SOPA, proves that it will not be easy to pass copyright legislation anytime soon.

Senator Ron Wyden and Representative Darrell Issa introduced the Online Protection & Enforcement of Digital Trade Act (“OPEN Act”) on the day of the SOPA strike, January 18.²⁹⁹ The drafters of the OPEN Act apparently succeeded in creating a more balanced approach to online piracy and enjoyed wide support, including from some of SOPA’s and PIPA’s supporters and their opponents.³⁰⁰ The OPEN Act was endorsed by a long list of tech corporations, including AOL, eBay, Facebook, Google, LinkedIn, Mozilla, Twitter, Yahoo, and Zynga.³⁰¹ The only organizations publicly opposing the Bill are the Motion Picture Association of America and the Recording Industry Association of America, who were not joined by many of their SOPA and PIPA allies, like the U.S. Chamber of Commerce and major record labels.³⁰² Understanding the significance of users’ input, the sponsors of the Bill launched a special website designated for receiving input on the OPEN Act from the public.³⁰³ Through this website visitors were offered to “review the legislation, submit comments, suggest edits and even ask questions.”³⁰⁴ Still, as of this writing, the OPEN Act has made very little progress. When compared with SOPA and PIPA, which made it impressively far within less than four

298. See generally William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1447–48 (2008).

299. The OPEN Act was first announced in a press release on Senator Ron Wyden’s website on December 8, 2011. *Wyden-Issa Release Draft Digital Trade Legislation*, RON WYDEN (Dec. 8, 2011), <http://www.wyden.senate.gov/news/press-releases/wyden-issa-release-draft-digital-trade-legislation>; see also Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012).

300. See H.R. 3782 — *Online Protection and Enforcement of Digital Trade Act: Money Trail*, OPEN CONGRESS, <http://www.opencongress.org/bill/112-h3782/money> (last visited Oct. 19, 2013), available at <http://web.archive.org/web/20130426171725/http://www.opencongress.org/bill/112-h3782/money> (last visited Dec. 21, 2013) (listing Google, Facebook, Sony Music Entertainment, and Random House as supporters).

301. *Letters to Congress*, KEEP THE WEB OPEN, <http://www.keepthewebopen.com/supporters> (last visited Dec. 20, 2013).

302. See OPEN CONGRESS, *supra* note 300 (listing the Motion Picture Association of America and the Recording Industry Association of America as the only specific organizations opposing H.R. 3782). The U.S. Chamber of Commerce, Sony Music Entertainment, and Warner Music Group, were among SOPA and PIPA supporters. Declan McCullagh, *SOPA’s Most Aggressive Defender: U.S. Chamber of Commerce*, CNET (Nov. 30, 2011), http://news.cnet.com/8301-31921_3-57334409-281/sopas-most-aggressive-defender-u-s-chamber-of-commerce/.

303. *OPEN: Online Protection & Enforcement of Digital Trade Act*, KEEP THE WEB OPEN, <http://www.keepthewebopen.com/open> (last visited Dec. 20, 2013).

304. WYDEN, *supra* note 299.

months, the OPEN Act seems to be extremely slow, with no actions or votes since it was first introduced.³⁰⁵

The struggles associated with enacting new copyright legislation are also linked to the difficulty in determining what constitutes a public interest and which actions would advance the benefit of the public. Under public choice theory, legislation that promotes the benefit of interest groups does so at the public's expense.³⁰⁶ Accordingly, detractors of the copyright legislative process criticize its failure to take account of the public's interest in proposed legislation.³⁰⁷ Yet, with no understanding of what the public interest is, even if the legislative process exclusively includes public benefit seekers, agreeing on a proposed draft has proven difficult.

The fate of the anti-piracy Bills signals that the power of the public to stop proposed legislation is immense and — when opposition passes the high threshold to vast public engagement — effective. Even when the sleeping giant awakens, however, if its power to stop harmful legislation is not paired with the power to enact new, balanced copyright laws, the old bargains, as fixed in current copyright laws, would remain in effect.

VI. FROM PUBLIC CHOICE TO PRIVATE ORDERING IN COPYRIGHT LAWMAKING

By detailing the distinctiveness of the SOPA/PIPA protest, the previous section concluded that the public, who seemed at first to be a new active player in the copyright legislative process, is in fact a sleeping giant who would not often rise. Nonetheless, the increasing dominance of the tech lobby, along with the public's quiet presence constantly threatening lawmakers with a potential backlash, suggest that public choice analysis as traditionally applied to the copyright legislative process should be revisited. Through looking at each of the major players in the legislative process — the legislator, the entertainment industry, the tech industry, and the public — this Part reviews public choice insights in the post-SOPA/PIPA era and concludes that the perceived change is not a revolution.

A. Public Choice and Copyright Legislation After SOPA and PIPA

Lawmakers: After the SOPA/PIPA protest, legislators are expected to be alarmed at the possibility of another public rise, which

305. CONG. RESEARCH SERV., BILL SUMMARY & STATUS H.R. 3782, 112th Cong. (2012), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03782:@@D&summ2=m&>.

306. See discussion *supra* Part II.

307. See discussion *supra* Part II.

explicitly threatens their reelection prospects. As one commentator observed: “[T]he issue’s resonance with voters is now undeniable, and members have begun proceeding with caution when considering new legislation affecting digital media.”³⁰⁸ Yet, as time goes by, the public’s quiet presence and the risk of another backlash will be given less and less consideration. While every day that passes makes the risk of a public opposition appear smaller, constant lobbying by the relevant industries makes the risk of losing the campaign support of financially dominant players increasingly concrete. Wishing to advance their rational interests, legislatures remain utility-maximizing players, whose chief ambition is to be reelected. As such, and as public choice theory predicts, legislators remain generally responsive to the intensive lobbying efforts by the entertainment and tech industries.

The Tech Sector: The tech industries, as previously mentioned, have come to realize the rules of the copyright lobbying game. As a centralized group with defined interests, tech companies can effectively organize to sway lawmakers to their benefit. Moreover, as the provider of social media platforms and other collective action facilitators, the tech industry has substantial control over information diffusion. While the tech industry may have used its control to manipulate users (as some SOPA proponents have argued), it is widely accepted that Internet industries typically employ a copyright agenda that aligns with users’ needs.³⁰⁹ Copyright wars have occurred between copyright owners wishing for stronger copyright protection and better tools to fight the free circulation of their content, and Internet companies pushing for weaker copyright protection to advance and safeguard their business model, which is better served through greater accessibility and availability of copyrighted works.³¹⁰ Thus, the interests of the tech sector are traditionally considered closer to the public’s interests in the use of copyrighted works.³¹¹ As Internet intermediaries successfully lobby to promote those interests, the copyright law-making process will have to accommodate them, as opposed to its one-sided legislative past.

The Entertainment Industry: The entertainment industry has long been a textbook example of how a well-funded group with concentrated interests can predispose legislators to advance its benefit. Nevertheless, the industry is no longer the predominant copyright lobby in Washington. While the entertainment sector’s influence cannot be

308. Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987–2012*, 14 *YALE J. L. & TECH.* 162, 220–21 (2012) (noting that “this fear is also wrapped in the popular misunderstanding that the major technology industry players are the ones who orchestrated the protests”).

309. Orit Fischman Afori, *The Evolution of Copyright Law and Inductive Speculations as to Its Future*, 19 *J. INTEL. PROP. L.* 231, 236 (2012).

310. *Id.*

311. *Id.*

underestimated, it is now facing a powerful political competitor, whose copyright agenda is notably different and often contradicts the traditional conceptions of copyright. The entertainment industry, however, enjoys special resistance to public hostility. While the industry may sometimes be subject to public criticism, it does not face direct financial risk when the public resists its actions. In this classic case of agency dilemma, ties that are maintained between consumers and their favorite artists (musicians, actors, etc.) do not extend to the latter's corporate agents. Thus, for example, when a record label sues an individual for illegal file sharing, public opposition would find it hard to boycott the label's products, because that would mean damaging a popular musician.

The Public: The rise of the public during the SOPA/PIPA events invalidates the very basic insights of the public choice model. The public, which supposedly has diffuse interests, has no centralized financial resources, and suffers from collective action problems, succeeded in fighting proposed legislation. Social networks have lowered information and organization costs, and alleviated free-rider problems. The public uprising has buried the anti-piracy Bills, and it is anticipated to affect future lawmaking, with legislators fearing another backlash. Nevertheless, the public is unlikely to widely protest any detrimental legislation, instead functioning as a sleeping giant who rouses occasionally. The public also lacks a clear agenda and concentrated interests, and hence is unlikely to regularly engage in political action, especially when such action is directed towards promoting — as opposed to halting — copyright legislation. Smaller public interest groups, however, will now find it easier to form and organize around copyright issues. Such groups can utilize social media to promote their agenda, and will share sufficiently common interests to effectively advance their agenda. But the political power of public-interest groups is dependent on their political capital, which, at least currently, does not compare to that of the corporate lobbies.

As the above discussion shows, the post-SOPA/PIPA political reality has left much room for public choice awareness. Some aspects of this state, like the potential for additional public uprising due to low collective action costs, are inconsistent with public choice insights. Others, like the fact that the giant is generally asleep, still follow the traditional perceptions of the public choice model. In any case, while copyright lawmaking after SOPA and PIPA still suffers from many public choice failures, it is clearly better equipped to produce more balanced legislation than it previously delivered. The arrival of a lobbying power whose agenda typically does not align with the stated objectives of the entertainment industry guarantees representation of a more diverse array of interests in the legislative process. The potential for another public rise, even though merely a potential, is still ex-

pected to have some effect on the actions of legislators and other players. Finally, lower collective action costs give hope of more civic participation by small public-interest groups, whose influence, though perhaps not as significant as the one exerted by the corporate lobbies, could still play down some of the current inefficiencies in copyright lawmaking.

B. Private Ordering and Copyright Policymaking After SOPA and PIPA

As the above discussion demonstrates, the ongoing changes in copyright politics should not be regarded as a revolution. Even if a revolution were in place and public choice failures no longer applied to copyright legislative process, the public interest would still remain unsatisfied in copyright reality. A growing trend of private enforcement through cross-industry partnerships between dominant players in the copyright market keeps the initiation and execution of far-reaching policy decisions away from the public eye, thus leaving no possibility of public support or opposition.

While public ordering is based on centralized governing bodies that generate rules, such as the legislature and the courts, private ordering refers to norms formulated by private parties using decentralized processes.³¹² Interested parties privatize the rule-making process relating to the use of information; thus, they practice a legal control over the public access to information.³¹³ Deference to private ordering in copyright is not new — a significant strand of copyright scholarship has already identified that corporate rights holders find private ordering more efficient than public policing.³¹⁴ Private ordering typically counters a failure of public institutions to supply a demanded public good.³¹⁵ Corporate rights holders have turned to self-help means for similar failures in the copyright market. These failures include the high costs of lobbying for copyright legislation,³¹⁶ the insufficient response of public ordering to the challenges posed by new

312. The definition of private ordering includes many layers and is still in the midst of a scholarly debate. For the purpose of this paper, I borrowed a simplified definition from Niva Elkin-Koren, who points mainly to the public vs. private aspect of such ordering. Niva Elkin-Koren, *Copyrights in Cyberspace — Rights Without Laws?*, 73 CHI.-KENT L. REV. 1155, 1161 (1997); see also Omri Yadlin, *A Public Choice Approach to Private Ordering: Rent-Seeking at the World's First Futures Exchange*, 98 MICH. L. REV. 2620 (2000) (discussing the different approaches to defining private ordering).

313. Niva Elkin-Koren, *A Public-Regarding Approach to Contracting over Copyrights*, in EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 191, 192 (Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman & Harry First eds., 2001).

314. Cohen, *supra* note 45, at 492.

315. See Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6, 6 (1988).

316. See, e.g., *Lobbying, Computers/Internet, 2012*, *supra* note 25.

technologies,³¹⁷ and the expensiveness and uncertainty involved in copyright litigation.³¹⁸ While legislative endeavors have never stopped, private players used their control over access to information to create private copyright regimes alongside the law.³¹⁹

Private ordering in today's copyright market is conducted through either contractual provisions or technological measures.³²⁰ The software industry, for example, commonly uses adhesion contracts to license mass-market uses. The standardized terms of those contracts were criticized for overriding the default scope of the property right set by the Copyright Act.³²¹ Contracts were also used to counteract copyright expansion, promote collective access to information, and encourage sharing of copyrighted works.³²² Agreements governing the use of open-source software and licenses of open-access initiatives such as Creative Commons are typical examples of private ordering which promote production and distribution of copyrighted works through the disavowal of proprietary exclusion.³²³ Rights holders have also employed digital rights management systems — like encryption, watermarking, and rights permission databases — devised to track, charge for, or preclude uses of digital works by users.³²⁴

Private ordering in copyright practice has presented itself in three categories of interactions: users-industry relationships (e.g., software digital locks and end-users licensing agreements), inter-industry relationships (e.g., collective rights management organizations and other joint ventures),³²⁵ and cross-industry relationships (e.g., business part-

317. Bridy, *supra* note 47, at 83 (“This turn to private ordering and technology-based solutions represents a departure from the dominant strategies of lobbying and litigation that corporate rights owners have pursued domestically None of these efforts, however, made much of a dent in the prodigious volume of illegally traded files.”).

318. Lev-Aretz, *supra* note 49, at 178.

319. Lital Hellman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1200 (2011).

320. PRIMAVERA DE FILIPPI, COPYRIGHT LAW IN THE DIGITAL ENVIRONMENT: PRIVATE ORDERING AND THE REGULATION OF DIGITAL WORKS 2 (2012).

321. Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 126–31 (1999) (discussing common license provisions that are likely to be at odds with copyright policy); see Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1090–91 (1998); Samuelson, *supra* note 49, at 335–36.

322. Séverine Dusollier, *Sharing Access to Intellectual Property Through Private Ordering*, 82 CHI.-KENT L. REV. 1391, 1394 (2007).

323. *Id.*; see also Niva Elkin-Koren, *What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005).

324. Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 287 (2003).

325. Robert Merges argues that repeat players in high-transaction-cost industries use private ordering in the form of collective rights organizations to effectively substitute their property rights for liability rules. Merges, *supra* note 46, 1302–03; see also Mukai, *supra* note 46, at 784–91 (providing additional examples of joint ventures).

nerships between rights holders and broadband providers).³²⁶ While the use of private ordering in users-industry and inter-industry settings has been widely discussed in legal commentary, private ordering in cross-industry relationships has yet to be studied in detail. Like other forms of private ordering in copyright, deference to cross-industry partnerships was prompted by the spread of digital media and broadband technology.³²⁷ The entertainment industry adopted several strategies to fight infringement-enabling technologies: lobbying for legislative reform, litigation, and private ordering in users-industry interactions through copy-protection technologies and licensing.³²⁸

At first, litigation appeared to be an effective strategy for the entertainment industry, as it initially had “phenomenal success in lawsuits against companies operating file-sharing networks, forcing most of them into shutdown, sale, or bankruptcy.”³²⁹ In 2001, several record labels won a high profile case against Napster, then the predominant peer-to-peer network.³³⁰ Additional cases against similar file-sharing platforms Grokster and Aimster were also successfully litigated by the entertainment industries.³³¹ Nonetheless, as time went by, the entertainment industry has realized that the litigation business model has not delivered satisfactory results — neither in terms of winning cases, nor in terms of halting piracy.³³² Furthermore, by pursuing adversarial courses to fight technology, the entertainment industry failed to make the most of technology as an additional revenue generator.

The litigation strategy has not been entirely deserted, but its limited benefits and high costs have motivated corporate rights holders to engage in private collaborations with Internet intermediaries.³³³ They have hitherto partnered with Internet access providers to fight piracy through a combination of digital applications and private law means, e.g., terms of use and acceptable policies.³³⁴ In 2009, for example, Verizon and the Recording Industry Association of America entered into an agreement under which the former would forward notices of infringement to users, whose IP addresses linked to infringing activity.³³⁵ This agreement is reportedly one of many agreements, some of

326. Bridy, *supra* note 47, at 83; Samuelson, *supra* note 49, at 335–36.

327. Chon, *supra* note 48, at 202–03.

328. See Mukai, *supra* note 46, at 788–90.

329. Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 913 (2004).

330. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

331. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–20 (2005) (ruling against Grokster on grounds of contributory liability for infringement of copyrighted works); *In re Aimster Copyright Litigation*, 334 F.3d 643, 646 (7th Cir. 2003) (finding a file-sharing service liable on grounds of contributory infringement of copyrighted works).

332. WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 24–25 (2009).

333. Bridy, *supra* note 47, at 83–84; Lev-Aretz, *supra* note 49, at 166.

334. Bridy, *supra* note 47, at 82–83.

335. *Id.* at 101.

which merely require passing on infringement notices on behalf of content owners, while some are said to effectuate a graduated response regime.³³⁶ Second Level Agreements, another form of business partnerships I have discussed elsewhere, also represent deference to the cross-industry form of private ordering.³³⁷ Second Level Agreements are preemptive licenses, under which copyright owners authorize the employment of their content by a platform's users in return for royalties, company stakes, or ad-revenue shares.³³⁸ Another, less binding method of cross-industry partnership involves a voluntary shaping of best practices through the collaboration of various entities. Over the years, several sets of agreed principles were festively announced, such as the "User Generated Content Principles" signed by major copyright holders like Viacom and Disney, and online service providers, like MySpace and Dailymotion.³³⁹ In December 2011, just as the SOPA/PIPA controversy began to heat up, American Express, Discover, MasterCard, PayPal and Visa designed an agreed set of best practices to diminish online sale of counterfeit pirated goods, one of the issues that SOPA and PIPA targeted.³⁴⁰

Following the SOPA/PIPA events, an executive in the entertainment industry conceded the importance of "find[ing] a solution that works better for everyone."³⁴¹ Concurrently, others in the industry have voiced their doubt as to the probability of future statutory reform, referring to the legislative route as "no longer appealing or practical."³⁴² As a result, the content industries augmented enforcement via business collaboration with partners like Internet platforms, advertisers, and credit cards companies.³⁴³ Just as recent years of litigation have led rights holders to the realization that litigation alone is an inapt business model, the appreciation of the political changes in the copyright legislative market could further the already ongoing turn to

336. *Id.*; see also Peter K. Yu, *The Graduated Response*, 62 FLA. L. REV. 1373, 1374 (2010) ("[G]raduated response system[s] provide[] an alternative enforcement mechanism, through which ISPs can take a wide variety of actions after giving users two warnings about their potentially illegal online file-sharing activities. These actions include, among others, suspension and termination of service, capping of bandwidth, and blocking of sites, portals, and protocols.")

337. See generally Lev-Aretz, *supra* note 49.

338. *Id.* at 152.

339. *Principles for User Generated Content Services*, USER GENERATED CONTENT PRINCIPLES, <http://www.ugcprinciples.com> (last visited Dec. 20, 2013).

340. Amy Chozick, *Tech and Media Elite Are Likely To Debate Piracy*, N.Y. TIMES (July 10, 2012), http://www.nytimes.com/2012/07/10/business/media/tech-and-media-elite-are-likely-to-debate-piracy.html?_r=3&ref=business&pagewanted=all.

341. *Id.*

342. *Id.*

343. David E. Green, Vice-President for Public Policy for NBC Universal, discussed those new efforts at the NYC Copyright and Technology Conference on December 5, 2012. See *Copyright and Technology NYC 2012 Conference: Speaker Bios*, COPYRIGHT AND TECH., <http://copyrightandtechnology.com/ct-nyc-2012-conference/speaker-bios/> (last visited Dec. 20, 2013).

cross-industry partnerships. After all, such partnerships could save the industry some of its high lobbying and litigation expenses, enable better and quicker adaptation to new technologies, and offer new business opportunities to replace traditional distribution models with contemporary ones.

Private ordering also makes perfect sense for the Internet industry. Through cross-industry partnerships, the tech sector could save some of the industry's lobbying expenditure. The Internet industry also regularly produces technology changes that challenge copyright laws. In addition to the required financial investment, addressing such changes through lobbying costs valuable time that the tech industries often cannot afford. The responsiveness of private ordering to market changes is carried on through the life of the partnership. After the terms of a partnership are stipulated and agreed upon, future adjustments, whether minor or major, also could be made quickly and efficiently through private ordering.

The tech industry has already found private ordering via cross-industry partnerships more efficient and more effective than litigation. The goal of the DMCA, the main statute governing ISPs in the copyright context, is to "preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment."³⁴⁴ To put the point differently, the legal framework within which many in the tech industry operate was designed to motivate cross-industry partnerships. The DMCA safe harbor provision "shields webhosts from liability for monetary damages resulting from infringement committed by users, . . . as long as they adopt and reasonably implement a system for removing infringing content at the request of copyright owners."³⁴⁵ While these requirements are not mandatory, virtually every commercial website hosting or otherwise dealing with copyrighted content in the United States endeavors to comply with them to enjoy the safe harbor's protection.³⁴⁶ Nonetheless, the exact application of the safe harbor provision has been a source of much controversy.³⁴⁷ Together with the potential damages exposure, the uncertainty surrounding the safe harbor requirements and the high costs of litigation have given ISPs a cogent motivation to safeguard themselves against litigation through business partnerships with rights holders.³⁴⁸ Tech players have thus opted to use cross-industry partnerships as a form of insurance against expensive and

344. H.R. REP. NO. 105-796, at 72 (1998) (Conf. Rep.).

345. Hellman & Parchomovsky, *supra* note 319, at 1196; *see* 17 U.S.C. § 512(c) (2012).

346. Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 234 (2009).

347. *Id.*

348. Bridy, *supra* note 47, at 85.

uncertain litigation, which has pauperized Internet companies in the past to a point of bankruptcy.³⁴⁹

Cross-industry partnerships have also been of value to tech players as those partnerships represent new business opportunities that could not have been carried out independently. For example, Second Level Agreements allowed UGC networks to capitalize on high-quality premium content, which could not have been provided legally otherwise.³⁵⁰ The importance of cooperation in the modern, knowledge-based economy has turned the boundaries between industry and market segments flexible and easy to overcome — adversaries in one market sector could join forces in another.³⁵¹ Accordingly, the Internet industries, which have already been incentivized to partner with copyright holders, find themselves doing business with the same rights holders they currently fight against in court.³⁵²

Cooperation among dominant industry players empowers private ordering to be as far-reaching and forceful as public legislation. As Merges has rightfully observed, “a dominant contractual form can operate as a form of ‘private legislation’ that restricts federally conferred rights every bit as much as a state statute.”³⁵³ The number of Google searches per day is over 4.7 billion;³⁵⁴ Google’s YouTube has over 800 million users visiting each month,³⁵⁵ Facebook has nearly 1 billion active users,³⁵⁶ and 245.2 million people in the United States use broadband providers to connect to the Internet.³⁵⁷ The behavior of all users, as well as the terms of use under which they access any in-

349. For example, even though Veoh prevailed in two cases brought against it on grounds of copyright infringement, the expensive litigation costs were a predominant cause in the company’s bankruptcy filing. Hellman and Parchomovsky, *supra* note 319, at 1208.

350. Lev-Aretz, *supra* note 49, at 166–67.

351. Keith Porcaro, *Private Ordering and Orphan Works: Our Least Worst Hope?*, 2010 DUKE L. & TECH. REV. 15, ¶ 31 (“Google’s YouTube and Maps services are prominently featured on the iPhone, even while Google launches a competing smartphone operating system.”).

352. YouTube, who has a content partnership agreement with Viacom, is being sued for \$1 billion by the very same Viacom. *Viacom Intern. Inc. v. Youtube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *aff’d in part, vacated in part*, 676 F.3d 19 (2d Cir. 2012). Just a day before the Second Circuit Court of Appeals reversed the lower court decision in favor of YouTube, YouTube and Viacom announced a partnership to offer online rentals of Paramount films, which is owned by Viacom. Brian Stelter, *Appeals Court Revives Viacom Suit Against YouTube*, N.Y. TIMES (Apr. 5, 2012, 2:40 PM), <http://mediadecoder.blogs.nytimes.com/2012/04/05/appeals-court-revives-viacom-suit-against-youtube/>.

353. Robert P. Merges, *The End of Friction? Property Rights and Contract in the “New-torian World” of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 126 (1997).

354. *Google Annual Search Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/google-searches/> (last visited Dec. 20, 2013).

355. *YouTube Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics/ (last visited Dec. 20, 2013).

356. David Goldman, *Facebook Tops 900 Million Users*, CNN MONEY (Apr. 23, 2012), <http://money.cnn.com/2012/04/23/technology/facebook-q1/index.htm>.

357. *Internet Usage Statistics for all the Americas*, INTERNET WORLD STATS (June 3, 2012), <http://www.internetworldstats.com/stats2.htm>.

formational service, are regulated by the infrastructure that facilitates their access.³⁵⁸ Those numbers indicate that cross-industry partnerships could often produce an effect similar to public lawmaking while avoiding many of the inefficiencies the latter implies, including those explained by public choice theory. Furthermore, the resort to self-help methods can cross geographical borders and generate private international regulation easier and faster than public international law.

Through private ordering, dominant industry players can also partner to settle copyright conflicts using negotiated regimes with confidential procedures. Opacity is often required for those arrangements to take place, not necessarily to hush up troublesome terms, but for other business reasons. When the public neither participates in the negotiations nor is aware of the resulting deal, it has no way of learning about the resulting arrangement, and no way of objecting to that arrangement if the practice it generates is a harmful one. Contractual agreements between industry players could encompass objectionable rules; yet, by the time one of the disturbing scenarios would have harmed a sufficient amount of people to meet the threshold for extensive public protest, the agreement will have been in effect for a while, impacting marginal cases, the fate of which is not of the mainstream social interest.

To demonstrate this point: following a request from Universal Music Group, YouTube removed a video featuring various superstars endorsing Megaupload, the recently closed file-sharing website.³⁵⁹ Even though some popular Universal artists appeared in the video, it only contained original content. Megaupload brought legal action against Universal, alleging that Universal misused the content takedown system set out by the DMCA.³⁶⁰ Universal argued it did not exploit the DMCA takedown system. Instead, Universal claimed they have a contractual agreement with YouTube that allows use of a “Content Management System” to take down content from the site “based on a number of contractually specified criteria.”³⁶¹ As this example shows, socially disruptive provisions that effectively censor

358. Elkin-Koren, *supra* note 312, at 1157.

359. Surat Lozowick, *Copyright Enforcement Gone Wrong: Universal Takes Down a Song It Doesn't Own*, THE NEXT WEB (Jan. 28, 2012, 9:52 AM), <http://thenextweb.com/insider/2012/01/28/universal-music-group-youtube-copyright-enforcement-gone-wrong/>.

360. In the wake of Megaupload being shut down on piracy charges by the United States Department of Justice, the company's lawyers recently filed a notice to dismiss the claims against Universal Music Group without prejudice. David Kravets, *Megaupload Drops Universal Lawsuit To Focus on Criminal Charges*, WIRED (Mar. 29, 2012, 2:04 PM), <http://www.wired.com/threatlevel/2012/03/megaupload-focuses-on-charges/>.

361. Eriq Gardner, *Universal Music May Have Inadvertently Exposed a Flaw in the YouTube Takedown Process*, THE HOLLYWOOD REPORTER (Jan. 27, 2012, 10:45 AM) (internal quotation marks omitted), <http://www.hollywoodreporter.com/thr-esq/megaupload-youtube-lawsuit-universal-music-285298>.

speech based on market preferences could be kept secret until an interested party reveals it.

The choice between norms and law as tools of social governance has occupied many commentators.³⁶² Some have argued that resources are most efficiently allocated in the private marketplace, especially against the backdrop of public choice problems, and that private ordering best defends individual freedom.³⁶³ Others have asserted that private norms will not typically optimize efficiency, since they stem from conditions that do not conform to the classic model of perfect competition.³⁶⁴ The cross-industry partnerships model also involves at least one market failure in the form of asymmetry of information — users are widely affected by private arrangements that are typically opaque — and may result in other negative externalities.³⁶⁵ While the question of government intervention in cross-industry forms of private ordering (through antitrust laws, for example) exceeds the boundaries of this Article, such intervention has been pointed at (perhaps ironically) as suffering the same public choice deficiencies that engendered the resort to private ordering in the first place.³⁶⁶

VII. CONCLUSION

When SOPA and PIPA were introduced, no one could have imagined that soon thereafter the debate would turn from arcane policy discussion to the greatest online revolt in copyright history. Two major developments laid the foundation for the success of the SOPA/PIPA protest: (1) the rise of a powerful technology lobby, whose copyright views are notably different than those expressed by the entertainment industry, and (2) the rise of social media, which has allowed users to economize collective action costs and overcome free rider problems.

The SOPA/PIPA protest spawned talks about a new order in copyright politics, which initially appeared to contradict an established line of commentary applying public choice theory of legislation to explain the growth in copyright protection during the last forty years. Public choice theory in this context views copyright legislation as a

362. See, e.g., Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841 (1999).

363. John J. Costonis, *Casting Light on Cultural Property*, 98 MICH. L. REV. 1837, 1839 (2000); Macey, *supra* note 52, at 1125.

364. Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1749 (1996). Katz is careful to add, however, that because state-set norms may suffer from the same limitations, a priori there is no basis for preferring public or private lawmaking. *Id.* at 1751.

365. For a comprehensive discussion on the externalities embodied in private ordering in copyright see DE FILIPPI, *supra* note 320, at 101.

366. See Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745 (2004).

direct response to the lobbying efforts of the copyright industries. As copyright laws were formulated via negotiation between interest groups, only those with well-defined interests, who were effectively organized and substantially financed, could secure their benefit in the resulting legislation. Larger groups with diffuse interests suffer collective action costs that prevent them from forming a group and mobilizing into political action. Accordingly, corporate rights holders, mostly the entertainment industry, successfully advocated for richer rights in information. Less dominant, but still well organized entities, such as academic institutions and libraries, were given specific exemptions, and the voiceless public remained largely unrepresented.

This Article argues that the unprecedented public rise was one of a special context that does not herald a revolution in copyright lawmaking. The public should be viewed as a “sleeping giant,” who does not regularly engage in copyright legislative debates, but may arouse occasionally with great might. To demonstrate this claim the Article analyzed three unique attributes of the SOPA/PIPA episode: (1) the historical context of the protest, especially the global public rise of 2011; (2) the threat SOPA and PIPA posed to UGC, which not only led eager users to protect their free speech right to post pictures of cute cats, but also generated an alliance with UGC networks; and (3) the high threshold for extensive public participation, passed successfully when SOPA and PIPA were at stake, but not when other controversial proposals (e.g., CISPA, ACTA, and the TPP agreement) are promoted, nor overcome to actively advance beneficial legislative initiatives (e.g., the OPEN Act).

The Article then continued to reevaluate public choice insights in copyright lawmaking, and submitted that legislative attempts would continue through a more diversified course. However, a growing deference to private ordering by corporate players in the copyright market undermines the changes to copyright lawmaking in the post-SOPA/PIPA reality. Recourses to private ordering have been identified in users-industry and inter-industry interactions. A little discussed form of private ordering — cross industry partnerships — carries out practices that can reach as far as a legislative product with no obligation to disclose the details of the agreement. Such partnerships, being simpler to conclude, faster, with less transaction costs, confidential, and responsive to future changes, make perfect economic sense for private players in the copyright market. As significant policy decisions are concluded and executed away from the public eye, the occasions on which the sleeping giant will likely wake up to fight for the public interest are even fewer.