Copyright's "new" politics: Implications for the Trans-Pacific Partnership negotiations

Abstract: Though understudied in international political economy, copyright and intellectual property (IP) have become increasingly central to the appropriation of value in global production chains; stronger IP is the bedrock of U.S. attempts to maintain global economic dominance. As digital technologies have brought individuals and telecommunications companies into direct contact with copyright laws, copyright has been politicized, capable of sparking massive worldwide protests. While traditional copyright interests continue to seek ever-stronger copyright laws and international treaties in the name of stronger "property rights," they are increasingly being countered by those promoting "user rights." One of the most dramatic of these protests, the January 2012 "Internet blackout" in protest of two copyright bills, occurred in the United States, ironically the foremost state proponent of stronger copyright.

Copyright's politicization offers a useful lens through which to consider the wider issue of global norm diffusion. Its politicization threatens not only the direction of future copyright laws and treaties, but also the structure of the global political economy. This paper considers the implications of copyright's politicization by focusing on the most recent IP treaty, the Trans-Pacific Partnership (TPP). Using historical institutionalism and analyzing the effects of copyright politicization in three key TPP countries, Canada, Mexico and the United States, it argues that the United States' strong-copyright position will become increasingly untenable, as copyright politicization becomes increasingly ubiquitous. However, regulatory capture of key copyright and trade institutions by the copyright industries means that the trend toward stronger copyright may not reverse immediately.

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Introduction

Since the mid-1980s, stronger intellectual-property (IP) protection has been a cornerstone of practically every international trade agreement. Trade agreements in the 21st century are in large part (perhaps even primarily) intellectual-property agreements, negotiated under a trade banner. IP's ubiquity, however, has tended to overshadow its awkward fit with the stated rationale of free trade agreements, namely the reduction and elimination of tariffs and other barriers to trade. Stronger IP protection, in fact, functions much like a traditional non-tariff barrier, restricting the flow of goods, services, knowledge and technology across borders.

This trade-IP link is politically constructed, emerging from specific contingent historical processes, namely a confluence of interests among IP firms and U.S. trade officials in the 1970s and 1980s (Drahos and Braithwaite 2002). This linkage has served as the primary means by which the United States – the main state sponsor of stronger global IP rights – has successfully promoted an ever-rising IP-protection ratchet through bilateral and plurilateral trade agreements, as well as (most prominently) via the inclusion of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) at the World Trade Organization (WTO). The United States continues to pursue this trade-IP linkage strategy in its trade negotiations and via the Special 301 process of criticizing trading partners' IP regimes when they disadvantage U.S. IP companies.

That this linkage is politically constructed means that it can be politically deconstructed. Some IP-critical groups seem to have recognized this point, calling for IP not to be included in any new trade agreements (La Quadrature du Net 2013). This paper argues that this strategy, aimed at delegitimizing the trade-IP linkage, is a sound one. It analyzes the vulnerability of the trade-IP linkage to such a disruption. Drawing primarily on Campbell's (2004) insights regarding the importance of ideas in legitimizing and supporting policies and institutions, it argues that this linkage has never been more vulnerable. The mass politicization of IP, especially copyright, in the wake of the popularization of the Internet as a means of mass reproduction and distribution of digital works (ebooks, videos, MP3s and so on) is undermining traditional rationales for IP protection within trade agreements and creating new interest groups trying to make their voices heard in trade and IP negotiations. These forces have given rise to an IP counter narrative that emphasizes freedom of expression, freedom to innovate and (ironically) free trade over trade-IP's dominant "protection" narrative. Given the increasing centrality of IP to current international (and especially U.S.) trade agreements, this disruption could have far-reaching effects on the future content of international trade treaties.

To understand the nature of this challenge, it examines three recent battlefronts in the battle over digital copyright: the 2007 Canadian Fair Copyright for Canada Facebook movement (Haggart forthcoming); the Mexican Senate's 2011 unanimous rejection of the Anti-Counterfeiting Trade Agreement (ACTA), an IP-enforcement treaty; and the successful online U.S. protests against the Stop Online Piracy Act (SOPA) in 2012. The similar legitimizing arguments used by actors in the three cases, along with the new actors they introduced into the three domestic copyright policymaking regimes are

analyzed in light of the three countries' participation in the Trans-Pacific Economic Partnership (TPP) negotiations among several Pacific Rim countries, also including Australia, Japan, New Zealand and Singapore.

This paper is structured as follows. The first section outlines the paper's historical institutionalist perspective. It focuses on the role of ideas in sustaining institutions and policies, drawing in particular on Campbell's treatment of ideas as both constraints on what actors consider possible and tools for achieving their objectives. The second provides a brief account of the emergence of this trade-IP linkage, focusing primarily on digital-copyright reform. The third section provides some background information on the TPP, and the fourth describes the three case studies, emphasizing the emergence of new actors and ideas. The conclusion discusses the implication for these changes on trade agreements in general and the TPP in particular.

A. Ideas as the foundation of institutions

An historical institutionalist perspective understands policy and institutional change as the product of the interaction of institutions, ideas and interests (actors) over time (e.g., Hall and Taylor 1996; Thelen 1999; Streeck and Thelen 1992). It sees human political behaviour as occurring within a series of overlapping institutions. Institutions, both formal and informal, set the "rules of the game" for political and social behaviour. They constrain behaviour, favouring some strategies, policies and actors over others. Actors are purposeful agents who, while their preferences are shaped by the institutional context within which they act, can exert agency to maintain or change their institutional contexts. Ideas play an important role in historical institutionalist analysis.[1] Campbell notes that they play two roles in social life. First, as "background" ideas, they can act as constraints on actors. Under this category, "public sentiments" (or public opinion) can set the boundaries of what democratically elected officials consider as possible. Meanwhile, "cognitive paradigms," or "elite assumptions" about how the world works perform a similar limiting function. Second, ideas can be used as tools to promote specific policies. These "foreground" ideas can take the form of "programs" – specific policy ideas – and "frames" – symbols and concepts that enable decision makers to legitimize programs to their constituents" (Campbell 2004, 94, 384-385).

In terms of functioning, institutions are neither necessarily internally nor externally consistent. These inconsistencies provide what Campbell (2004) calls "institutional entrepreneurs," or what Kingdon (2003) refers to as "policy entrepreneurs," openings to exploit tensions within and among institutions to promote their preferred agendas, leading to institutional and policy change. Campbell remarks on one particular form of institutional change that he refers to as "*bricolage*, the process whereby actors recombine locally available institutional principles and practices in ways that yield change" (2004, 65). "Institutional entrepreneurs" can undertake two types of bricolage. "*Substantive bricolage*" involves "the recombination of already existing institutional principles and

[1] While Schmidt (2010) argues that an emphasis on ideas in institutionalist analysis requires a new "discursive institutionalism," this paper follows Bell (2011) and his contention that historical institutionalism, applied properly, can incorporate ideational factors into its analyses.

practices to address [substantive] problems." *Symbolic bricolage*, meanwhile, involves "the recombination of symbolic principles and practices" (Campbell 2004, 69-70). Symbolic bricolage deals with issues of legitimacy, in which actors attempt to link their preferred policy options to those ideas that serve as the foundation of institutions. The use of ideas is central to symbolic bricolage. The use of ideas is central to symbolic bricolage. As will be seen, much of the IP policy debate involves the relative emphases on IP's two frames – protection and dissemination.

Copyright, and intellectual property generally, can be thought of as institutions that structure the market in abstract and intellectual works. They are far from internally consistent, however. Intellectual property rights involve conflicting "protection" and "dissemination" functions (Doern and Sharaput 2000). Intellectual property provides limited rights for the IP owner to determine who can copy their work, the assumption being that such protection is necessary to incentivize a societally optimal level of production of intellectual works. This protection function, however, necessarily interferes with IP's other objective, dissemination of abstract works. Allowing someone to set limits on what music, books, industrial processes and symbols (think McDonald's Golden Arches) can be used by whom restricts the dissemination of these works. Far from an abstract issue, an increasing number of observers are raising concerns that existing IP protection is negatively restricting the dissemination of everything from life-saving drugs to the knowledge and information needed to build a modern advanced economy (van Rhijn 2012).

B. Understanding IP's trade and protection orientation

Current intellectual property policy features two defining traits: it is biased in favour of protection interests (Doern and Sharaput 2000), and it is seen as an international trade issue. On the first point, terms of protection, scope of protection, legal remedies and enforcement have been trending upward since the internationalization of IP in the late 19th century. For example, in the United States copyright terms have gone from 14 years, with the possibility of renewal for another 14 years, to life of the author plus 70 years. On the second point, due in large part to U.S. efforts, IP has been a central component of essentially every bilateral and multilateral trade agreement since the 1980s and particularly since the mid-1990s. This "trade-based strategy" (Sell 2010) in many ways had its most complete expression in the 1995 Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which established for the first time an enforceable global baseline of IP protection and was essentially the price demanded by the United States for the creation of the World Trade Organization (WTO) (Drahos and Braithwaite 2002).

This IP-trade-protection nexus was not a natural or inevitable occurrence. Rather, it can be understood as the outcome of symbolic and substantive bricolage by purposeful agents seeking to promote their perceived self-interest within pre-existing institutional structures. Specifically, the IP industries in the 1970s and 1980s exploited U.S. fears of economic decline to argue that the United States could retain its economic hegemony by promoting stronger IP protection in its international trade agreements (Drahos and Braithwaite 2002; Sell 2003). This linkage of two previously independent institutions is

an example of substantive bricolage, allowing U.S. IP interests to leverage the wider U.S. trade agenda (which involves more than just IP) to promote their narrow interests. This strategy has been phenomenally successful.

Drahos and Braithwaite date the linkage of trade and IP in the United States to U.S. *Trade Act of 1974*, which included an amendment linking trade concessions to intellectual property (2002, xi). Most impressively (with the exception of the TRIPS Agreement), the IP industry successfully advocated for an annual review of U.S. trading partners' IP policies (see Sell 2003; Drahos and Braithwaite 2002). The "Special 301" process has been used to pressure other countries, through sanctions and diplomatic pressure, to change their IP laws. Implementing U.S.-favoured IP laws is a standard quid pro quo in its bilateral trade agreements ranging from Australia (2005) to South Korea (2007), to name only two. The symbolic bricolage, meanwhile, involved emphasizing IP's protection over its dissemination function while engaging in a bit of cognitive dissonance with respect to the overall U.S. trade agenda's objective of *reducing* trade barriers (stronger IP protection effectively acting as a trade barrier).

The digital challenge to the trade-protection nexus

Since the mid-1980s the trade-protection nexus has been reinforced via political, institutional and economic power. In the United States, the global IP hegemon, IP industries run persistent trade surpluses ($US 84 billion in 2011), countering an overall persistent deficit (Haggart forthcoming). They also have a well-funded lobbying presence on Capitol Hill. In copyright policy alone, in 2011 the Motion Picture Association of America spent $2.1 million and employed 28 lobbyists, while the Recording Industry Association of America spent $5.7 million and employed 41 lobbyists.[2]

The relatively small Office of the USTR has long been dependent on industry analyses for its Special 301 reports, and has used interdepartmental meetings associated with the Special 301 process to ensure that the government speaks with one (pro-strong-IP) voice on IP issues (Haggart forthcoming). Consequently, voices for stronger IP have tended to dominate policy discussions in both the Democratic and Republican parties.

The situation is similar in other countries. In Canada and Mexico, for example, IP historically has been seen as a technocratic issue (Doern and Sharaput 2000; Haggart forthcoming) and had followed the general international upward ratchet in IP rights' scope and duration. Internationally, the copyright term has risen in some places, from life of the author plus 50 years under the 1886 *Berne Convention* to life plus 70 in the European Union and a world-leading life plus 100 years in Mexico (it remains life plus 50 in Canada). Its scope has similarly expanded along the lines of that in the United States. The international term of patents was standardized (with exceptions) in 1995 at 20 years, up from 17 years.

Recent events, notably in the area of copyright policy, have challenged the legitimacy of the IP trade-protection nexus. The ability to reproduce and distribute any work that can

[2] Data from http://www.opensecrets.org.

be digitized fundamentally undermines the scarcity-based nature of the copyright industries. Through copyright and IP laws, the state creates scarcity in things (books, chemical formulas, and so on) that otherwise could be reproduced without destroying the original. However, commercial-scale copying before digitization was an expensive and time-consuming endeavour. As a result, there was a rough congruence between IP laws and forms of production. Now, anyone with access to a computer and the Internet can create and distribute digitized works as easily as the transnational corporations that previously monopolized this business. While digitization currently affects copyrighted works primarily, the invention of 3-D printers, which can replicate objects, is expanding this disruption to the world of patents.

The digital age has given rise to new interest groups with perspectives different from those of the legacy copyright industries. Having experienced the ability to download and upload – to share – music, literature and movies at no cost, the general public has been loath to return to a world in which the content industries dictate when and how they should enjoy these works. The digital age has also led to the creation of new businesses based on the provision of Internet-related services. Some of these are wholly new creations (Google, Amazon), while others are legacy telecommunications industry having to deal with copyright on a large scale for the first time (such as Internet Service Providers like AT&T and Rogers). While the content and telecommunications (including Internet-based) industries both deal with information, they tend to have emphasize different values, and make their money in different ways, placing them on different sides of the "protection/dissemination" divide. If the default position for content and IP industries is to restrict and to control the spread of information through ever-strong IP rights, that of the computer/Internet industries is toward the encouragement of spreading information, as widely and efficiently as possible. The Internet itself, a decentralized network linking the whole world and allowing cheap communication over tens of thousands of miles, is the embodiment of this position. Unsurprisingly, the protests discussed below all centre, to different degrees, on the protection of the Internet and freedom of communication.

Individuals, meanwhile, have been radicalized by the copyright industries defence of their copyright/scarcity-based business model. Faced with an existential threat, the copyright industries, particularly the motion picture and music industries, have responded by successfully convincing governments to criminalize personal digital copyright infringement (file sharing) and then suing individuals (that is, their customers). These legal moves and appreciation for the promise of digital file sharing have radicalized individuals and politicized copyright.

C. Intellectual property and the Trans Pacific Partnership

Far from dissipating "naturally" in the face of these new groups and technologies, the use of trade agreements to promote ever-stronger IP protection, particularly by the United States, has only increased. The 2011 Anti-Counterfeiting Trade Agreement (ACTA), for example, is a plurilateral treaty whose negotiations were led by the United States and conducted primarily among like-minded developed countries (as well as Mexico and

Morocco). As its name suggests, this treaty was not only an attempt to establish a global "TRIPS-plus-plus" IP baseline (Sell 2010a, 3), but also to continue to reinforce the legitimacy of locating IP within trade discussions.

Indeed, although countries continue to negotiate trade agreements, these bear a diminishing resemblance to traditional "free trade" agreements that were devoted to reducing tariff and non-tariff barriers. This is partly because after over 60 years of continuous multilateral trade negotiations, the "battle" to liberalize the global trading regime "has been decisively won," with "import tariffs and other restrictions … reduced to the lowest levels the world has ever seen" (Rodrik 2011, 252). According to the World Bank, the average all-country most-favoured-nation applied tariff rate in 2010 was 8.1%. This was down from 26.3% in 1986. In high-income OECD countries, the rate was even lower: 2.8% in 2010.[3]

As the gains from further tariff reductions have declined (Rodrik cites research that eliminating all remaining tariffs would raise world economic activity by only one-third of 1 percent (2011, 252)), "trade" agreements have refocused on non-tariff economic issues such as government procurement and intellectual property. The ongoing (as of May 2013) Trans Pacific Strategic Economic Partnership Agreement (TPP) negotiations represent the most recent attempt to maintain the trade-protection nexus and to ratchet up IP protection. The agreement is currently being negotiated among Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. Japan has expressed its intention to join the talks (Ermert 2013). Beyond traditional market access, the talks are addressing IP, services, government procurement, investment, rules of origin, competition, labour, and environmental standards and other disciplines," and touches on novel issues such as "state-owned enterprises, regulatory coherence, and supply chain competitiveness" (Fergusson et al, 2012, summary). While the talks have been ongoing since 2010, the actual text remains secret, though on the IP side, negotiators, particularly the United States (but also including Japan) are seeking a TRIPS-plus "gold standard" (Ermert 2013). According to a leaked U.S. proposal, the United States was exclusively looking for ways to strengthen IP laws, without considering consumer protections or other industries' needs (Masnick 2013).

While negotiations were slated to be concluded by October 2013 (Masnick 2013), reports indicate that disagreements over the IP chapter are "massive" and are presenting a significant roadblock to the agreement's conclusion (Flynn 2013). According to American University law professor Sean Flynn, "The intellectual property chapter is rumored to be over 80 pages of text – including all the bracketed suggestions and alternatives. Some describe it as the longest text currently under negotiation." Key issues include pharmaceuticals and "internet issues" related to copyright (Flynn 2013). The lack of a publicly available agreement has meant that the exact language being discussed is unknown, though the U.S. position likely reflects the interests of the IP industries that have dominated U.S. IP policy since the 1970s (Sell 2011, 464).

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[3] From World Bank Data on Trade and Import Barriers, http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/tar2010.xls (May 22, 2013).

D. Rise of a counter-myth

These blockages reflect, in part, policy disagreements among the negotiating countries. Chile, in particular, had been considered a "slam dunk supporter," but has expressed strong reservations about "the value of the deal as presently being constituted" (Prestowitz 2012). In particular, according to a "higher level government official … Chile may pull out of the TPP negotiations if the U.S. does not significantly moderate its intellectual property demands" (Flynn 2012). However, while the U.S.-driven trade-protection linkage is in full force in current trade negotiations, there are reasons to suspect that it is becoming increasingly vulnerable to a reframing as in such a way as to deemphasize its protection function in favour of its dissemination role, while also shifting public sentiments in the same direction. This change in emphasis has the potential to upend U.S. global IP-trade strategy, complicating its pursuit of stronger global IP via trade agreements.

This section examines three recent key, successful protests against stronger copyright – the 2007 Fair Copyright for Canada Facebook "uprising," the 2011 Mexican Stop ACTA Twitter protests, and the 2012 U.S. "Internet blackout" protesting the Stop Online Piracy Act (SOPA).

Canada (2007): The first Facebook social movement[4]

In December 2007, concerned that a copyright bill about to be tabled by the governing Conservative party would restrict Canadians' ability to use and access copyrighted digital works, Michael Geist, a University of Ottawa law professor and noted digital-copyright expert, created the Fair Copyright for Canada (FCFC) Facebook page. The page's goal was designed:

> to help ensure that the government hears from concerned Canadians. It features news about the bill, tips on making the public voice heard and updates on local events. With regular postings and links to other content, it also provides a central spot for people to learn more about Canadian copyright reform (http://www.facebook.com/group.php?gid=6315846683).

The page was a viral sensation, the first successful grassroots political social-media movement in Canada, and perhaps the world. Tens of thousands of Canadians joined the page and from there engaged in direct political action, forming local Fair Copyright for Canada chapters, and lobbying ministers and their local Members of Parliament for greater user rights. One particularly inventive group even crashed the riding Christmas party of Industry Minister Jim Prentice, who was responsible for the legislation (Haggart forthcoming-a). This was a kind of organizing that would have been prohibitively expensive before the advent of social media. The two-way interactive nature of Facebook (and social media generally) allowed for the rapid linking of individuals otherwise

[4] This section draws on Haggart (forthcoming) and Haggart (forthcoming-a).

isolated by geography to reach a critical mass that could coordinate loosely in pursuit of the general objective of increased user rights.

The Fair Copyright for Canada protesters were only the most visible and vocal of several groups, which included longstanding copyright "user" interests such as universities and libraries, and newer interests such as the telecommunications industry. They were also joined by groups such as the Canadian Music Creators Coalition, a group of artists who did not think that suing their fans for copyright violation was a sound business move (Haggart forthcoming).

The protests and ensuing debate changed the complexion of Canadian copyright politics. While they did not realize a key demand of denying legal protection to digital locks placed on digital content (such as the encryption that prevents someone from reading an Amazon-purchased ebook on anything but a Kindle or Kindle app), they effectively legitimized user rights in the Canadian political copyright conversation. More concretely, they compelled the government in Summer 2009 to hold public consultations (in which their views on user rights dominated). Furthermore, the resulting legislation contained several new user rights, such as the right to make YouTube "mashups" of copyrighted works.

Mexico (2011): The quiet copyright revolution[5]

On June 22, 2011, the Mexican Senate unanimously passed a resolution calling on the Mexican president not to sign the Anti-Counterfeiting Trade Agreement (Juárez 2011). This rejection is remarkable for several reasons. It represented the first time the Senate had taken a firm stand against strengthening intellectual property rights. Most importantly for the purposes of this paper, it marked the first time user rights had such a strong voice in a policy issue that was traditionally negotiated among a small group of creator, business and government groups and institutions. The victory was all the more impressive because it was the work of about one dozen activists who leveraged Twitter and social media, and key Senate contacts to achieve this objective.

The pre-ACTA Mexican copyright establishment – the institutions and actors that set the country's copyright policy – had a largely singular view of the purpose and direction of copyright, favouring the "protection" side of the copyright equation. Its policymaking process in large part reflected the country's corporatist past, in which a not-completely-neutral state coordinates negotiations among accepted groups representing capital (i.e., the copyright industries, both domestic and foreign) and labour (i.e., *sociedades de gestión colectivas*, creator-focused collection societies) from an oligopolistic sector (Callejas, interview by author, October 26, 2009). Politicians from all parties treated copyright as an apolitical, technical issue of interest primarily to creators and the content industries – that is, those directly affected by copyright laws. This reputation, combined with the popular perception of copyright as a policy to safeguard Mexican culture, did not provide politicians with many reasons to oppose its extension. For example, at the request of the *sociedades de gestión colectivas*, the government in 2003 increased the general

[5] This section draws on Haggart (2013).

term of protection to life of the author plus one hundred years, easily the longest term of protection on the planet.[6]

New Mexican copyright actors, with a different institutional base, have emerged in recent years. As the Mexican copyright establishment's concerns have shifted to digital infringement (tracking the rise in Mexicans' broadband use), the telecommunications industry has become an important actor in the copyright debate. While the traditional copyright establishment is primarily fixated on strengthening copyright protection, telecommunications companies like Telmex (owned by Carlos Slim, the world's richest person, with a near-monopoly on the Mexican ISP market) and their federal regulator, the *Comisión Federal de Telecomunicaciones* (Federal Telecommunications Commission, COFETEL), are primarily interested in ensuring the spread of Internet access.

The 2011 Stop ACTA was led by about a dozen activists with a strong interest in Internet freedom and copyright. They had previously come together, using Twitter, in 2009 to successfully fight a 2009 luxury tax on Internet tax, successfully arguing that Internet access was a right, not a luxury. (The Spanish paper El País referred to the 2009 protest, which was organized around the #internetnecesario Twitter hashtag, as "the first Twitter protest" (cited in Zamora 2010, 26).) This previous protest legitimized the norm of Internet access within Mexican politics, with the protesters becoming the go-to Internet-issues experts for journalists and the government.

The Stop ACTA movement exploited the fact that the Mexican government (following the lead of its ACTA negotiating partners) had kept the treat secret and failed to inform the Senate of its content, as required by law. They convinced Senator Francisco Javier Castellón Fonseca, the chair of the Senate Science and Technology Committee, to hold five months of open hearings, an unprecedented event in Mexican politics. All sides were invited to allow Senators to understand the treaties in light of la lack of official information.

At the hearings, the Mexican copyright establishment generally argued that ACTA was necessary to modernize Mexican IP law, to promote creativity, and to keep Mexico in line with international standards. In contrast, civil-society groups, telecommunications and Internet representatives largely argued that while intellectual property rights were important, they should not come at the expense of fundamental rights, including the constitutionally guaranteed right of the inviolability of communications. Critics, including from the telecommunications sector, focused on the ambiguity in ACTA's Internet provisions, which dealt with ISP requirements to police their systems. Telmex, the leading Mexican ISP, for example, did not want the cost or hassle of having to monitor its customers activities, while human-rights groups objected to the monitoring on constitutional grounds. There was no business support for ACTA beyond the usual suspects: Telmex, Google (which had just recently set up an office in Mexico), the Internet industry, as well as the banking and tourism industries were all against it.

[6] In contrast, the main international copyright treaties (TRIPS and the *Berne Convention*) require only a term of life plus 50 years.

Perhaps most interesting thing to arise from the Senate's unanimous rejection of ACTA, beyond the fact that it happened in the first place, was that they raised the concern that ACTA could lead to restrict both personal freedom and Internet usage, potentially broadening the "digital divide" and restricting the introduction of beneficial new technologies that would support the development of the information society. This ideational innovation – a form of bricolage, linking copyright to developmental concerns – is based on the Mexican government's *Plan Nacional de Desarrollo 2007-2012* (National Development Plan), which called for both improved broadband service and for 60% of all Mexicans to be online by 2012. Going forward, by including civil society in the ACTA hearings the Senate also effectively legitimized these groups' involvement in a copyright establishment that had previously been closed to them. This involvement, combined with the practical need to include the telecommunications industry in talks related to digital copyright (since they control the network), has expanded the Mexican copyright universe.

United States (2012): The Internet blackout[7]

January 18, 2012, witnessed what some have called the political coming of age of the Internet. Copyright and Internet activists had been concerned for months about the negative effects of two copyright bills then before Congress: the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA). They argued that the bills could, if implemented as originally planned, "break the Internet." Specifically, they argued that the bills would damage "the core functionality of the Domain Name Service (DNS) system," – the means by which website names are linked to underlying addresses – by requiring that ISPs maintain lists of sites that Americans would be forbidden from accessing, and that computers be redirected away from any forbidden sites (Hruska 2011). In the run-up to the vote, activist groups like the Electronic Frontier Foundation worked to raise public awareness of the bills online, with great success. In late December 2011, the bill was becoming contentious enough that the Representative Lamar Smith, the Republican chair of the House Judiciary Committee, which was considering the bill, postponed its consideration until February 2012 (Masnick 2011a).

To protest the bills, Jimmy Wales, founder of Wikipedia, came up with the idea of staging an Internet strike. Following extensive discussion among the Wikipedia and Internet community (Oz 2013), on January 18, thousands of websites, most notably Wikipedia and Reddit, blacked out their sites. When users tried to access Wikipedia, for example, they were greeted with a (very stylish) blacked-out page that read:

Imagine a World
Without Free Knowledge

For over a decade, we have spent millions of hours building the largest encyclopedia in human history. Right now, the U.S. Congress is considering legislation that could fatally damage the free and open internet. For 24 hours, to raise awareness, we are blacking out Wikipedia.

[7] This section draws on Haggart (2013) and Haggart (forthcoming).

The blacked-out page also linked to background information on the bills, and provided links to Facebook, Google+ and Twitter to "Make your voice heard."

Americans took this suggestion to heart by the millions in what became the largest online protest in history (and one of the largest of any kind ever). Google collected more than seven million signatures for its anti-SOPA online petition, while more than 162 million people saw the Wikipedia blackout page. According to Wikipedia more than eight million people looked up their elected representatives' contact information via Wikipedia, with so many people trying to contact their representatives that "the Senate's web site was unable to accommodate the number of citizens attempting to use its contact forms" (Wikipedia 2012). Twenty-four hours later, faced with unanticipated public fury, the bill was effectively dead (Sell 2013).

The SOPA protests – which marked the first major policy defeat for U.S. copyright interests since the major copyright reforms of the 1970s – represent a potentially game-changing event in U.S. copyright and IP policymaking. As in Canada and Mexico, the public, and Internet and telecommunications firms are making their voices heard. While Sell (2013) and others argue that this was a large victory for civil society, it should also seen alongside the growing clout of Internet-based companies in Washington. While Internet companies, often run by individuals with a strong libertarian bent, had tended not to focus on the D.C. lobbying game, the SOPA battle has spurred them to become more involved in Washington, where their influence and clout has traditionally not matched their economic importance. In September 2012, Google, Amazon, eBay, Facebook and other Internet companies launched The Internet Association, to lobby Congress on Internet-related issues. According to the association's President and CEO Michael Beckerman, a former House Energy and Commerce Committee deputy staff director, "It's the first time that the Internet is coming together as an industry here in Washington" (Frates 2012). Its mission, according to its website (internetassociation.org), is to represent "the interests of America's leading Internet companies and their global community of users. We are dedicated to advancing public policy solutions to strengthen and protect Internet freedom, foster innovation and economic growth and empower users."

E. Analysis and conclusion: Bricolage, the TPP and the reframing of intellectual property

These three successful protests, occurring within just over four years of each other, have several things in common. Each marked the arrival of new actors into the IP policy arena. Social media facilitated the creation of a grassroots protest movement, allowing dispersed individuals to forge a basic common position and coordinate loosely to make their voices heard. This involvement has politicized what had previously been seen as a technocratic issue in all three countries. Just as significant, the necessary involvement of the telecommunications and Internet industries – actors of substantial and increasing economic importance – as the actors who would have to implement or deal with the

proposed digital-copyright reforms injects a different "user" perspective into a debate previously dominated by the economically powerful copyright industries.

In promoting their concerns, these individuals and groups engaged in both symbolic and substantive bricolage, in ways that have the potential to recast the entire copyright and IP debate. Symbolically, all three groups articulated similar themes, or *frames*. In Canada, activists focused on issues such as fairness (the need for public hearings) and the ability to access creative works and to create (as in the case of mashups). In Mexico, activists and politicians like Castellón were concerned with issues such as fairness (hence the hearings), freedom of expression and privacy rights, basic human rights guaranteed by the Mexican Constitution. The Working Group's final report also expressed concern that ACTA could impede Mexico's ability to participate in the 21st century digital economy. In the United States, activists "effectively framed the issue as one of First Amendment rights and the threat of censorship," galvanizing millions of Americans in the process (Sell 2013, 79). Similarly, the U.S. SOPA protests focused on freedom of speech and an anti-censorship message.

These frames all fall on the "dissemination" side of copyright's protection/dissemination divide. In short, they (or at least most of the protesters) were not arguing against its abolition, but rather for a rebalancing between two legitimate priorities. In other words, they have been engaging in a recombination of copyright's "symbolic principles" to favour dissemination over protection. The positive results of the campaign suggest that this reframing and the expression of public sentiment against stronger copyright has the potential to have a long-term effect on elites' (i.e., lawmakers') cognitive paradigms shaping their views of how the world works, essentially reshaping their views of what copyright policies are seen as possible (politically) and legitimate. This would be a damaging blow to the protection perspective that continues to dominate copyright and IP policymaking.

All three cases also involve substantive bricolage, "the recombination of already existing institutional principles and practices to address [substantive] problems," with actors promoting values like openness and freedom of speech traditionally associated with Internet-related businesses. The U.S. case illustrates particularly vividly how substantive bricolage works. As already noted, the U.S. copyright and IP industries engaged in substantive bricolage in the 1970s and early 1980s by linking their institutional practices (emphasizing strong IP protection) to the U.S. trade agenda. At that time, IP firms exploited U.S. government officials fears about losing economic hegemony by arguing that increased IP protection would help maintain U.S. global economic dominance (Drahos and Braithwaite 2002). This linkage constructed the current U.S. government position in favour of ever-stronger global IP protection, reinforced by institutions such as the Office of the United States Trade Representative and the Special 301 process.

Their argument – what's good for the IP industries is good for America – roughly parallels the arguments by companies such as Google and Silicon Valley tech companies, as witnessed by the Internet Association's mission statement. The greater involvement of Internet and telecoms companies in copyright issues represents an attempt at substantive

bricolage, linking the dominant principles and practices in their industries, emphasizing distribution of content rather than its protection, to copyright policymaking. These attempts are at an early stage, but they are likely to become more prominent given that these companies are increasingly backing up their message with substantive resources. As companies like Google have realized that their business depends as much on Washington politics as on their economic prowess, they have increased their spending on government relations. In the first quarter of 2012, it spent $5.3 million on lobbying, about as much as it spent in 2010 as a whole (Pelroth 2012). Devoting these resources to lobbying on an issue that was previously primarily the purview of the copyright industries has the potential to change – eventually – Washington's institutional pro-protection bias.

This paper has argued that recent protests in Canada, Mexico and the United States suggest that institutional biases in favour of the protection side of intellectual-property policy, particularly with respect to copyright, has been weakened through processes of symbolic and substantive bricolage undertaken by actors new to the IP policymaking club. This weakening has potential far-reaching consequences for the current dominant trade-protection IP nexus. Its political construction is vulnerable to changes in the elite paradigms and public sentiments that together bound the universe of legitimate policy options available to policymakers. From this perspective, the symbolic and substantive bricolage undertaken by the public and Internet-related companies can be seen as a direct challenge to the legitimacy of the current policy of embedding demands for ever-stronger IP protection within trade talks. Furthermore, the trade-IP linkage is maintained by the IP and copyright industries. The arrival of new interest groups and their pursuit of a dissemination-based copyright strategy threatens this linkage.

What does this mean for the TPP? The three protests covered in this paper were largely focused on a single issue, while the TPP is a comprehensive economic agreement involving many more – and potentially more substantial – interests. IP protests, consequently, are unlikely to derail the TPP completely, even if it contains many of the same proposals protesters found objectionable in these other contexts.[8] It does, however, help to explain the reluctance of countries like Chile to agree to further IP strengthening. Furthermore, it also opens the door for groups to challenge seriously both the nature of IP demands within international negotiations. Should countries' (particularly the United States') negotiating positions on IP continue to reflect primarily those of the IP industries, the legitimacy of linking trade and IP itself could come under fire.

There are signs that this is happening. Individuals and activist groups that had been involved in the ACTA and SOPA debates have begun calling on the United States and the European Union (the other major global IP power) to take IP out of trade agreements. In Europe, for example, some 47 European and international organizations have called on the European Union not to include "provisions related to patents, copyright, trademarks, data protection, geographical indications, or other forms of so-called "intellectual

[8] Thanks to Antonio Martínez for this point.

property" in the upcoming Trans-Atlantic Free Trade Agreement.[9] Signing groups include the U.S.-based Public Knowledge, which has been central in promoting "user rights" in U.S. debates, as well as several AIDS-activist groups. This last is significant; while the most effective IP critiques have been focused on digital-copyright issues, IP subgroups (copyrights, trademarks, patents) are often lumped together. While this conflation has often resulted in arguments for protection in one area being used to argue for a general increase in IP protection, it is not implausible that the same could be true for arguments for a relative weakening of, say, copyright protection influencing thinking about IP in general.

One, of course, cannot predict the future from one declaration. However, given the weakening legitimacy of the protection justifications for digital copyright, a direct critique of the trade-IP linkage would seem to be a reasonable strategy. Although the events in the three countries suggest that pressure for a more dissemination/user-focused IP (or at least copyright) policy is widespread, U.S. trends are the most significant for the future of global IP policy. That copyright interests were dealt such a stunning defeat in the United States, the originator of the trade-IP linkage, is particularly important and signals that copyright, and potentially IP, interests do not have as solid a hold on U.S. policy as they had previously. In the end, these three protests, and the SOPA protests in particular, may come to be seen as the beginning of the end of the trade-IP era in global intellectual-property policy.

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