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Policy Change: Revisiting the Past, Analyzing Contemporary Processes and Stimulating Inter-temporal Comparisons

Who cares about Reddit? Historical institutionalism and the fight against SOPA and PIPA

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Introduction

On May 12th 2011 the *PROTECT Intellectual Property Act* (PIPA) was introduced to the United States Senate boasting 31 sponsors from both the Democratic and Republican Party and a list of approximately 190 supporters, including pharmaceutical companies, Hollywood studios, software companies, manufacturers, unions, and sporting codes among others (Leahy 2011). By January 2012 PIPA, along with its counterpart in the House of Representatives known as the *Stop Online Piracy Act* (SOPA), had become politically toxic and was indefinitely shelved. Many have attributed this dramatic shift to the widespread backlash against the bills emerging from online organising spaces and technology news websites. These accounts highlight the effectiveness of the internet in establishing new frames to challenge incumbent institutionalised interests. This suggests that the defeat of the bills was a result of the discursive power of political activists, highlighting the importance of agency in explaining political outcomes.

Historical institutionalism is an approach to research that stresses how institutions shape the behaviour of political actors to effect political outcomes. In particular, it analyses how institutions are designed to benefit political 'winners', creating policy feedback that entrenches certain actors in positions of power - making change difficult. Therefore, historical institutionalism has been criticised for failing to account for change, including policy change (Peters, Pierre, and King 2005). It has also been criticised for failing to account for the role of agency and discursive power, which appears so prominently in the defeat of SOPA and PIPA by online activists. While some of these 'discursive institutionalist' critics have stressed the importance of discursive power in processes of institutional change (Schmidt 2009), the defeat of SOPA and PIPA suggests that agency and discursive power can be important in explaining *continuity* as well – as the defeat of the bills meant that copyright laws remained the same. How can historical intuitionalism, which favours institutions over agency, especially when explaining continuity, account for this?

The deficiencies of historical institutionalism in accounting for agency and change has also been acknowledged within the literature itself. Bell (2017), for example, argues that historical institutionalism has 'bifurcated' to create two camps that explain either stability (path dependency) or change (agent-based incremental change). Furthermore, Bell argues that neither adequately

accounts for the role of agency. However, Bell (2011) also rejects discursive institutionalism, arguing that by prioritising discursive power too much, the approach ignores institutions almost entirely. That is, Bell argues that the literature is missing a unified account for the role of agency *within* institutions in explaining both stability *and* change.

This article will apply historical institutionalist analysis to explain the defeat of SOPA and PIPA. In doing so it examines how the approaches measure up to the criticisms of both Bell (2017) and Schmidt (2009). It argues that agent-based approaches within historical institutionalism (Mahoney and Thelen 2010) are able to explain the role of both agency and institutions in the continuity and change of the United States' (US) copyright law. To do this it proposes a framework – the Copyright Protection Cycle – which can be used to explain the process of copyright reform in the US for the past century. This analyses SOPA and PIPA within a broader process of incremental change following the development of the internet and its use for 'online piracy', while still accounting for the defeat of the bills themselves – representing institutional stability. Agency is important to this account, though not the agency of online activists realised through discursive power, but rather the agency of corporate interests realised through material power. The article thus argues that existing agent-based approaches within historical institutionalism can account for the role of agency *within* institutions in explaining both stability *and* change.

The article begins by introducing historical institutionalism and how it has been criticised for neglecting the role of agency and for failing to account for change. This discusses the two 'bifurcated' camps identified by Bell (2017), and how both approach the question of institutional stability and change, and the relationship between the agency of political actors and institutions. These are the path dependent approach, which explains change through exogenous shocks called critical junctures, and the agent-based approach, which explains incremental change through endogenous efforts by political actors. The article applies each of these to the case of the defeat of SOPA and PIPA. It argues that the agent-based approach is more consistent with the evidence on how copyright reform in the US has historically occurred, as well as the defeat of SOPA and PIPA specifically. It thus argues that the defeat of SOPA and PIPA was not a crisis that redefined power asymmetries or illustrated the new role of online activists in shaping public policy. Rather, the

defeat of the bills fits within a well-established process of copyright reform, called the Copyright Protection Cycle.

Historical intuitionalism and agency

Historical institutionalists are interested in how time and sequencing influences the way that institutions constrain and shape political actors to effect political outcomes. This is because of 'positive feedback', that is a process by which "[e]ach step along a particular path produces consequences that increase the relative attractiveness of that path for the next round" (Pierson 2004, 18). Because of this, decisions on the design and function of institutions can shape outcomes long after the conditions that saw those decisions made have dissipated. However, these decisions can lock in power asymmetries between political actors, creating circumstances that favour some over others. Consequently, these favoured political actors will be better able to defend institutional arrangements from rivals in the future (Pierson 2015, 130). This institutional 'stickiness' through positive feedback processes often referred to as 'path dependency'.

Under path dependent conditions agency is severely constrained and change incredibly difficult to achieve. However, institutional change does, of course, occur. Scholars such as Schmidt (2009) have argued that historical intuitionalism suppresses the agency of political actors too much to adequately account for this change. She instead advocates for *discursive institutionalism* which argues that change can occur through the application of discursive power. Discursive power is defined as the "ability of agents with good ideas to use discourse effectively…to build a discursive coalition for reform against entrenched interests" (Schmidt 2009, 533). For example, Erikson (2015, 459-460) has argued that political actors can use 'jurisdictional framing strategies' to (re)define policy problems, which in turn impacts what policies are used to address them, leading to change. These new frames can be institutionalised, meaning that other actors want to change policies they will either have to "formulate policy in accordance with" the institutionalised frame "or have to question its credibility and push for a different frame" (Erikson 2015, 458). That is, the impetus for change comes from strategies of actors to reframe policy in a way that is favourable to the sorts of 'solutions' they favour.

The defeat of SOPA and PIPA in 2011-12 appears to illustrate this deficiency in historical institutionalism. As scholars such as Yoder (2012, 380) have argued, the anti-SOPA and PIPA campaign was the first time that copyright reform had enjoyed such widespread participation from the general public, which was crucial in explaining the failure of the bills. Meanwhile, the internet empowered these activists at the expense of 'entrenched interests' in copyright owning industries (Yoder 2012, 385). Such 'owning' industries include film studios, record labels, publishing houses et cetera. Normative frames developed by activists were disseminated through online networks, and eventually able to infiltrate the mainstream press (Benkler et al. 2015). These frames focused on the corrupting effects of lobbying on the American political system and sought to create a libertarian understanding of intellectual property and how it ought to relate to the 'freedom' of the internet and the constitutional right of free speech (Berghofer and Sell 2015, 9, Yoder 2012, 384). That is, the defeat of SOPA and PIPA suggests that agency and discursive power can be important in explaining not only change but, in fact, continuity. How can historical intuitionalism, which favours institutions over agency, especially when explaining continuity, account for this?

Critical junctures

Discursive institutionalism, as the name suggest, is still a branch of intuitionalism and thus maintains that institutions have a role in explaining and shaping political outcomes. However, critics of the approach have argued that discursive power is not needed to explain intuitional change, while relying on it to do so marginalises the importance of institutions:

> By essentially eschewing a meaningful institutional analysis, recent constructivist or discursive institutionalists place almost all explanatory weight on agency and lose sight of institutions. In fact, they go further by eschewing a meaningful contextual analysis of agency and instead conflate agents with the ideational (Bell 2011, 891).

The challenge for historical institutionalist theorists, then, is to account for the role of agency *within* institutions in explaining both stability *and* change. However, Bell (2017) argues that overall the historical institutionalist literature currently lacks a unified approach that is capable of

doing this. Bell argues that instead the literature has 'bifurcated' to create two camps that explain either stability *or* change, but not both. First, there are path dependency approaches which emphasise 'sticky' institutional constraints, resulting in "overly-structuralist" accounts that have "little to say about agency or endogenous institutional change" (Bell 2017, 1). Despite this, path dependency scholar can and do explain change through *exogenous* crises. Meanwhile agency, in fact, is crucial to this account. Because path dependency scholars focus on institutions as constraints on agency, they can only explain change by relying on exogenous crises, called critical junctures, which loosens these restraints. Therefore, institutional constraints on political actors explains stability (the norm), while the weakening of these constraints explains change (the exception).

A critical junction results from some failing of the existing institutional order to address a crisis. Furthermore, critical junctures must also be "*relatively* short periods of time during which there is *substantially* heightened probability that agents' choices will affect the outcome of interests" (Capoccia and Kelemen 2007, 348). The critical juncture brought on by a crisis empowers actors use discursive and framing strategies to define the 'problems' the institutions are facing, and thus what solutions must be deployed through new institutions to address them. Thus, "the *politics of ideas* is what ultimately determines the institutional outcome of a critical juncture…[as] powerful actors strategically promoting new social norms to manipulate the preferences of social groups may have more chances of success than during periods of stability" (Capoccia 2015, 165). During a critical juncture, decision makers have multiple options at their disposal. Once an option is chosen winners are once again empowered at the expense of the losers, leading to another period of path dependant institutional stability (Capoccia 2015, 151).

The problem with critical junctures is that they essentially argue that "institutions explain everything until they explain nothing" (Steinmo and Thelen 1992, 15). Critical junctures don't explain change as being driven by agents *within* institutions, but rather by agents *free from* institutions. In this respect, they suffer the same deficiency as discursive institutionalism in that they place "almost all explanatory weight on agency" (Bell 2011, 891) when explaining change. Additionally, while the approach can explain large breaks in institutional stability during times of crisis it fails to adequately consider ongoing endogenous process of policy change and how

policies evolve overtime in incremental ways (Peters, Pierre, and King 2005, 1283-4, Steinmo and Thelen 1992, 16-8).

Agent-based change

The second historical institutionalist school for explaining change identified by Bell (2017, 1) is more "change-orientated" by focusing on endogenous processes of incremental change. However, Bell argues that while this approach is good at explaining intuitional change, it has little to say on institutional constraints, stasis and continuity. Under this model, institutions are defined as rules, either formal or informal. Formal institutional rules are defined as rules that are "obligatory and subject to third-party enforcement" (Hacker, Pierson, and Thelen 2015, 183). Informal rules are the impact institutions actually have 'on the ground' – that is, at the point of enforcement and compliance. The model also has two variables: veto possibilities and discretion. Veto possibilities are high when actor(s) are able to block changes to rules or the practical effects they can have. Discretion relates to how the rules of the institution are interpreted, enforced and observed. There are four modes of institutional change Mahoney and Thelen (2010, 15-8) build from these two variables:

- Displacement – new formal rules replace existing formal rules.
- Layering – new formal rules are created to coexist with or complement existing formal rules.
- Drift – new *in*formal rules as changes to external conditions impact how formal rules apply.
- Conversion – new *in*formal rules as formal rules are reinterpreted.

The most likely mode of change under different situations is summarised in the following two-by-two table. As it illustrates, displacement occurs when veto possibilities are low and discretion is low, making it relatively easy for political actors to replace old rules with new ones, changing formal institutional rules. If, however, there are strong veto possibilities then incumbent interests will be able to block this change, so layering is pursued, introducing new rules that compliment and coexist alongside existing ones. If discretion is high, then new rules do not need to be

introduced at all – it is instead possible to pursue informal institutional change and interpret and apply existing rules in a more favourable way. Therefore, when discretion is high but veto possibilities are low, political actors can convert existing rules so that their practical impact changes, while they stay formally the same. If, however, veto possibilities are also high, making this sort of change subject to blocking, then the practical impact of the rules and standards may nevertheless change over time as political actors instead seek to influence how the rules apply to changing exogenous conditions.

TABLE ONE - MAHONEY AND THELEN'S MODEL FOR INSTITUTIONAL CHANGE

	Low Discretion in Interpreting/Enforcing Rules	High Discretion in Interpreting/Enforcing Rules
Strong Veto Possibilities	Layering	Drift
Weak Veto Possibilities	Displacement	Conversion

Source: (Mahoney and Thelen 2010:19)

Both drift and conversion are similar in that they describe situations where formal rules remain the same but their informal impact 'on the ground' changes. Conversion differs from drift primarily in that this change is due to active reinterpretation of the rules, while drift occurs due to policy inaction (Hacker, Pierson and Thelen 2015, 185). Institutional structure determines between drift and conversion as the likely modes of change, as this depends on whether formal rules are flexible enough to be reinterpreted. Flexibility of formal rules thus acts as another variable in determining the likely mode of institutional change. Hacker, Pierson and Thelen (2015,189) refer to this variable as 'precision' – with high precisions meaning low flexibility.

However, in addition to failing to account for institutional stability, Bell also asserts that this agent-based approach still "says too little about agency" (2017:1) – although he does not elaborate on

why. Overall, Bell argues that both approaches by themselves cannot explain the role of agency *within* institutions on institutional continuity *and* change. However, how accurate is this critique of the historical institutionalist literature? There certainly is a bias towards either continuity or change under each approach. However, they both have mechanisms for explaining continuity – through either path dependency or high veto possibilities. Just as they both have mechanisms for explaining change – through either critical junctures or endogenous processes (see table one). Finally, both include a role for agency, which is central to the endogenous process of change and fundamental to change under critical junctures. The following analysis will apply these approaches to the case of SOPA and PIPA, to assess how well they can (or can't) address the criticisms of both the discursive intuitionalists and more critical historical institutionalists such as Bell (2017) – who has proposed an alternative model.

SOPA and PIPA as a critical juncture

Under conditions of path dependency institutions, not agency, explains continuity. While it is certainly possible that the mobilisation of online activists contributed to the defeat of SOPA and PIPA, the failure of reforms is not particularly unusual. That is, while the role of online activists in shaping and guiding public debate on the bills is undeniable, they may not be needed to explain what essentially resulted in the survival of the status quo. However, just because the defeat of SOPA an PIPA resulted in continuity does not mean that agency was not at work. In fact, the power of the internet in aiding the defeat of SOPA and PIPA could be considered a critical juncture. This is because critical junctures do not always result in actual change, as political actors can fail to effectively seize the opportunity created by critical junctures, resulting in 'near misses' and continued stability (Capoccia and Kelemen 2007, 165-6, Capoccia 2015, 352).

This argument defines SOPA and PIPA conflict as one between institutionally powerful actors on the one hand, and institutionally weak ones on the other (Sell 2013). The copyright owning industries, the 'insiders', which supported the bills enjoyed a number of benefits, such as superior resources, access to lawmakers and extensive networks built over years of exploiting Washington's notorious 'revolving door' (Sell 2013, 72-4). As 'winners' of pervious battles, copyright owning industries were favourably placed in the current institutional arrangements (Sell 2010, 2013).

SOPA and PIPA was thus a conflict between networks of activists and the politically powerful copyright industry, which "has arguably been the single largest influencer of copyright policy, both nationally and internationally" (Yoder 2012, 380).

The activists did have the backing of large commercial interests too, namely internet companies such as Google and Facebook, as the bills undermined the limited liability they enjoyed under the current law (Tremblay 2013, 831). However, these commercial actors were initially resigned to the fact that the copyright industry would be victorious - as they have been historically (Sell 2013, 78). As the more powerful party *within the existing institutional setting* the copyright industry was expected to secure the reforms. Therefore, while the internet allowed activists to 'abridge' the power of corporate allies it did not eliminate them. Ultimately the anti-SOPA/PIPA campaigns did not take on corporate power, they aligned with part of it, namely the internet industry (Bessant 2014, 227-8). Nevertheless, the institutional power of the copyright industry was superior both of the commercial and civil society actors which opposed them. Institutional power asymmetries encourage the sort of coalition that emerged in opposition to the bills, as weaker actors work together to both pursue *and oppose* institutional change (Capoccia 2016, 1110).

While the defeat of SOPA and PIPA preserved the status quo in the sense that the copyright laws remained the same, it also resulted in change to the power asymmetries in the institutional environment. Path dependency explains an institutionally perpetuated political equilibrium, and a critical juncture explains a change to that equilibrium (Pierson 2004). Such a change to the political equilibrium is observable following the defeat of the reforms. The failure of SOPA and PIPA was a victory for the online activists and internet companies which opposed them, and with political victories come feedback processes (Pierson 2015:134-141). In this case, however, both formal and informal institutions remained the same, therefore these victors did not received additional resources. However, Pierson (2015) identifies three other feedbacks in which political victories beget power, all of which are identifiable in this case.

First, by winning a political contest, political actors signal their relative strength to others, resulting in bandwagoning with the winner (Pierson 2015, 136-7). This is particular evident in Congress, with multiple representatives and Senators seeking to distance themselves from the SOPA and

PIPA legislation and align with the so-to-be victorious activists (Benkler et al 2015, 616-7). Second, political victories can change discourse and thus what political actors view as possible or even desirable (Pierson 2015, 137-8). Following the success of the anti-SOPA/PIPA campaigns, internet freedom frames have also been used by online activists in opposition to similar threats - such as the Anti-Counterfeiting Trade Agreement and the Trans-Pacific Partnership (Powell 2016, 257-60, Sell 2013, 80-1). Finally, new institutional arrangements will alter the investments political actors make under the new environment. This in-turn changes their preferences (Pierson 2015, 138-9). This is evident by the massive increase in resources that the internet industry has dedicated to political lobbying. Between 2011 and 2015, the industry more than doubled its total expenditure on lobbying from $25.3 million to $55.3 (OpenSecrets.org 2016).

Thus, in viewing the campaign against SOPA and PIPA as a critical juncture, it is possible to respond to Bell's (2017) critiques. First, there is an observable role for agency under path dependent conditions in accounting for institutional *continuity*. Second, there is also observable *change* in the distribution of power within existing institutional setting. That is, far from neglecting the role of agency and ignoring change, both feature prominently in the analysis. Therefore, agency, continuity and change are accounted for. What is missing, ironically, are institutions. As discussed, no change to actual institutions has occurred. Rather, how political actors *think* about their relative power within existing institutions has changed. That is, what is evident from applying a critical juncture approach is it was ideational change, not change in institutions, that actually impacted the distribution of resources which underlie path dependency. Therefore, the case of SOPA and PIPA would suggest either that discursive power is itself capable of enacting change, as the discursive institutionalist have argued (Schmidt 2009), or that institutions do matter in explaining continuity and change, but critical juncture approaches are unable to account for them. Therefore, an alternative theory of institutional change is needed if historical institutionalism is to be able to offer a unified approach.

Agent-based change and copyright: the Copyright Protection Cycle

The following will argue that the agent-based approach to institutional change is not only able to offer a unified explanation of the role of agency and institutions on change and continuity, but it

offers a far superior account of the defeat of the SOPA and PIPA bills than the above critical juncture analysis. One reason for this is that the above literature, which focusses on the impact of online activists, relies on an insider/outsider understanding of copyright law making. As Sell (2013, 67) summarises, copyright owners were "shocked" by their defeat because "[f]or the first time in thirty years, they did not achieve legislative victory". This, however, is not correct. Indeed, the role of commercial copyright *using* interests has been important to the political economy of copyright reform in the US for over a century. Since reforms to the *Copyright Act* in 1909, copyright reform in the US has followed a standard pattern in addressing new technologies as they arise and changing copyright law to accommodate them (Litman 1989). The manufacturers, distributers or providers of new technologies are important actors in this.

Applying the agent-based model of change to this history of copyright reform yields an analytical model for understanding copyright reform. It begins with the development of a new copyright using technology which disrupts the compromise embodied in existing law. Copyright using technologies are those that enable the general public to consume copyrighted work in some way. Over the years such 'new' technologies have included self-playing pianos, broadcast radio and TV, video cassette recorders, MP3 players and, today, internet companies such as Google. Generally, copyright owners want to protect retain has much control over the sale, distribution and reproduction of their work as possible. This means protecting their so-called 'exclusive rights' under copyright law. It also means keeping so-called 'limitations and exceptions' under copyright law, which weaken their exclusive rights, as narrow as possible. Meanwhile, commercial copyright users do not care how wide the limitations and exceptions are necessarily, as long as they allow their particular use of copyrighted works without needing to get permission from owners, or to pay any royalties.

When a new technology emerges the incumbent copyright owners will mobilise to assert their exclusive right, either to get the technology shut down completely, or to get some sort of monetary compensation for the use of their work. However, the owners face high veto possibilities as both the existing copyright owners and the commercial interests associated with the new copyright using technology are capable of exercising enough political pressure to block major reforms through the Congress (Litman 1989). Facing a tough prospect of protecting their exclusive rights

through legislative reform, copyright owners will instead choose to sue the manufacturers, distributers or providers of the technology (Litman 1989, 302). However, the rules themselves cannot be changed through the courts because only the Congress can change the actual law. Instead, the owners are seeking sympathetic application of existing formal rules. However, the formal rules under copyright law were negotiated to address very specific uses of copyright by 'new' technologies in the past, resulting in laws which "enlarge the copyright pie and divided its pieces…so that no left overs remain" (Litman 1989, 317). That is, copyright laws tend to have high levels of precision saving little to no pie for future technologies. This results in one of two situations.

First, the highly precise rules can create confusion over how the formal rules apply to the new technology. In this case, the courts will have high levels of discretion in how they interpret and enforce the law. Of course, courts are bound by formal institutional rules. However, they are also reluctant to strike down new technology that benefits the public just because it has emerged faster than the ability of the Congress to legislate. As a result, existing rules, often ill-equipped to deal with new technologies, are 'stretched' to accommodate them nonetheless - which changes their impact. We thus see the all conditions for institutional drift (Hacker, Pierson and Thelen 2015:184) being met:

- First, new technology alters the impact that formal rules have 'on the ground'.
- Second, law makers are aware of this, particularly as copyright owners mobilise against the new technology.
- Third, ambiguity in the law *could* be addressed through legislative reform.
- Fourth, this reform, however, is blocked by the interest associated with the new technology. This leads to informal institutional change through the courts.

Alternatively, highly precise laws may instead have low levels of ambiguity in how they apply to the new technology. In these circumstances, discretion is low because how formal institutional rules apply is straightforward. However, despite not being covered by the limitations and exemptions, the new technology may nevertheless offer significant public benefit and enjoy widespread public support. As such, the courts will want to preserve the technology. In these

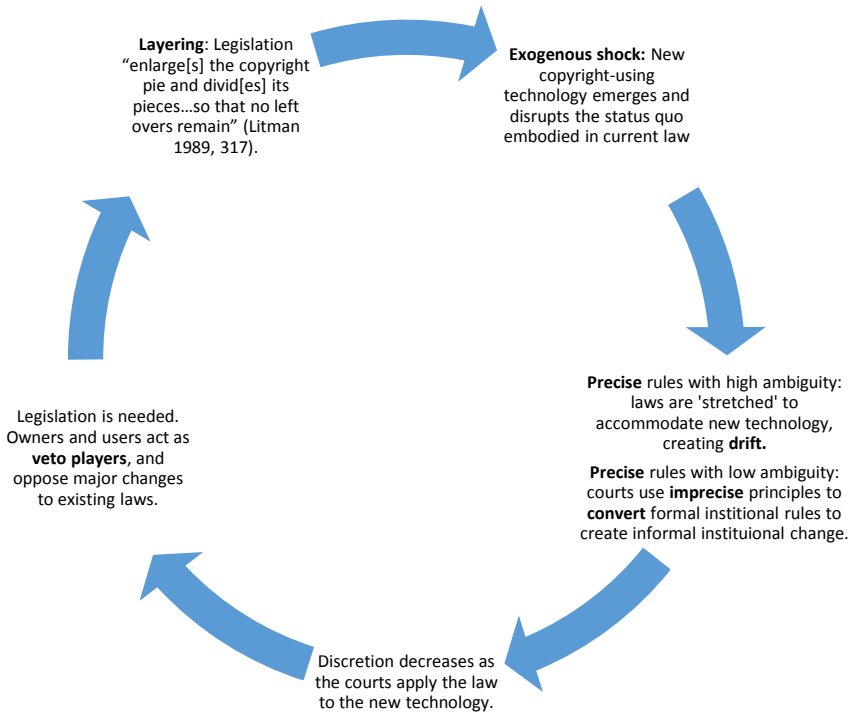
circumstances, the courts will seek to use flexible *principles* which are also included in US copyright laws, and which apply widely and in an ad-hoc manner. The most important of the flexible principles is what is known as the fair use doctrine, which gives copyright users broad scope to use copyrighted work, provided it meets a number of 'fairness factors' (Hughes 2017, 334-42, Litman 1989). Principles such as fair use, by their nature, bring with them high discretion and *imprecision* because they apply in a board and flexible way. However, veto possibilities are low as copyright and technology lobbyists cannot pressure a court as they do the Congress. The court itself then becomes the main change agent, seeking an outcome that can support new technology, applying principles from copyright law to do so. The resulting informal change meets all the conditions of conversion (Hacker, Pierson and Thelen 2015:185):

- First, principles in copyright law such as fair use have high levels of imprecision and can be interpreted to serve multiple ends.
- Second, these ends are politically contests, as owners seek to reinforce their exclusive rights while users seek to be covered by limitations and exceptions.
- Third, by pursuing litigation through the courts, political actors are able to use fair use and other principles to serve their interests.
- Fourth, despite informal institutional change occurring, the copyright law itself has not changed.

The courts thus interpret how the law should be enforced through litigation against the new technology, resulting in either drift or conversion. This establishes precedent which begins to bind courts, reducing their discretion in applying existing law. However, both owners and users will nevertheless want more clarity. This is particularly the case as the markets for the copyright using technologies begin to mature and the companies behind them seek to reduce their risk through gaining explicit protection under limitations and exceptions written into law. Owners, meanwhile, are also eager to clarify the boundaries of how the limitations and exceptions apply to the new technology, which in turn clarifies their ability to assert their exclusive rights. This requires new legislation to address any lingering risks and ambiguities. As veto players, owners and users will vigilantly defend the concessions won in previous negotiations and any favourable court decisions since. This means that major changes to the existing law, and the compromise it embodies, will be

extremely difficult. Instead, the reforms will address specific ambiguities to coexist with existing law. Copyright reforms thus result in layering as it builds on existing rules through compromises negotiated between the veto players.

DIAGRAM ONE – THE COPYRIGHT PROTECTION CYCLE



This final step lays the ground for a future iteration of the reform process because it embodies a compromise of existing, not future, interests resulting in high-precision rules. Therefore, this model of reform is in fact a cycle – what is referred to in this research as the Copyright Protection Cycle. Diagram one above summarises this cycle. It begins with an exogenous shock – the development of a new technology. In order to trigger a 'turn' of the cycle this new technology must threaten the interests of incumbent copyright owners to assert or enforce their exclusive rights, and/or it must allow the use of copyrighted work in a manner that was unanticipated in previous iterations of the cycle and therefore largely unaddressed in existing laws. The exogenous shock provided by the technology is thus a consequence of the endogenous process of change in the cycle, as new technologies only have this effect because of the tendency of the cycle to produce high-precision rules. The new technologies disrupt the status quo, however reform through the

Congress is blocked, leading to either drift or conversion through the courts. As discretion decreases but ambiguity remains, legislative reform is required. Copyright owner will protect their broad exclusive rights while copyright users will instead seek to explicitly protect their use of copyrighted work. This results in the final step, layering, in which new laws are passed to complement existing ones.

The Copyright Protection Cycle and the internet

In the early 1990s the emergence of a new technology – the internet - triggered the beginning of a new turn of the Copyright Protection Cycle. In 1993 the Clinton Administration launched a policy review, led by the Information Infrastructure Task Force and chaired the Secretary of Commerce, to determine what reforms would be needed to address this new technology. This included a report specifically on intellectual property reforms, which focused almost entirely on copyright (Lehman and Brown 1995). In 1995 a bill based off of the recommendations of this report called the *NII Copyright Protection Act* ('the NII bill') was introduced to the Congress. However, the bill attracted strong criticism from online service providers (OSPs). An OSP includes companies and organisations that provide access to internet (such as Comcast or Time Warner Cable), as well as those that provide services over the internet (such as Yahoo! email). In particular, OSPs were concerned with their liability for copyright infringement which may take place by users on their networks. They argued that the mass of information being transmitted meant that they could not be responsible for all of it, and that making them liable for the copyright infringement of others would cripple the development of the internet (Burrington 1996, Black 1996, Heaton 1996).

The issue of liability had been litigated in the courts, however this had resulted in inconsistencies, meaning that legislation was required to clarify if and when they were liable for the use of their networks for copyright infringement (Norris 2005, 8). After the OSPs began to pressure lawmakers in February 1996, closed negotiations between the industries for a compromise position began (Washington Telecom News 1996). However, the issue of liability in particular remained contentious. In May the main OSPs held a press conference panning the NII bill, warning that the "legislation seems to bring back Big Brother and turn … the long distance carriers and the on-line service providers, into Internet police" (Neel 1996). On May 21st, the bill was postponed for two

weeks, and by June it was delayed indefinitely. The failure of the NII bill illustrated that OSPs, mainly telecommunication companies, had emerged as veto players in the Copyright Protection Cycle.

After the failure of the NII bill, copyright owners were eager for a legislative solution to address the protection of their exclusive rights on the internet. Despite their hostility to limiting liability for OSPs, it was obvious that they would need to reach a compromise in order for reforms to pass the Congress. This compromise came in 1998 when the Congress passed the *Digital Millennium Copyright Act* (DMCA). The DMCA increased protection of copyrighted material online while including limitations on OSP liability. These limitations took the form of four 'safe harbor' functions: conduit functions (automatic transmission), caching (creating temporary copies to allow quicker access), user storage and information location tools such as search engines (Balaban 2001, 262-4).

Peer-to-peer technology and the Copyright Protection Cycle

The DMCA compromise was disrupted almost immediately with the emergence peer-to-peer (P2P) file sharing technology. P2P allows users on the internet to share and download files directly from each other. P2P, like all technology, is neutral, however it has come to be widely used for the distribution of infringing content – or 'online piracy'. Under the DMCA there was ambiguity over the liability of P2P operators used for copyright infringement, and as a result they were promptly sued by copyright owners. The first major causality of this litigation came in 2001 when P2P operator Napster voluntarily shut down after a prolonged legal battle with the Recording Industry Association of America - the RIAA (Beets 2001, 544). However, the ruling against Napster did not implicate P2P technologies more broadly (Bridy 2009, 585). By applying the DMCA in a way to target Napster but not P2P technology itself, the courts were creating informal intuitional change and drift.

The post-Napster P2Ps made a number of technical work-arounds to avoid the same legal trouble as Napster but largely failed and many were forced to close through litigation (Giblin 2011, 140). However, one case in particular is important, which concerned a company called Grokster in a

case decided in the Supreme Court. Napster and other cases has established precedent that helped Grokster's structure itself in a way to avoid liability. However, this also meant that there was less discretion. Meanwhile, the scale of infringement on Grokster was so massive the court had little choice but to rule against it. Thus, the court was "unclear about how to formulate the basis for liability without opening the floodgates to excessive liability" (Chan 2008, 299). Copyright owners were aware of this, and were hoping that, in ruling against Grokster, the Supreme Court would be forced to overturn or weaken existing limitations and exceptions (Samuelson 2005). Instead, the courts engaged in *conversion* by borrowing a principal from patent law known as 'inducement'. This made Grokster liable because it actively encouraged people to infringe content on its service (Bridy 2009, 587). This has led some to characterise the decision as "little more than a political compromise" (Chan 2008, 299).

Despite the numerous legal victories infringement remains more prevalent than ever, especially as few illicit P2P operators stayed in the US, moving/establishing themselves in foreign jurisdictions beyond the reach of US copyright law (Tremblay 2013, 831-3, Chan 2008, 317-25). Modern P2P operators, particularly BitTorrent search engines such as The Pirate Bay, have survived not only litigation in their host-states, but also domain seizures by law enforcement, police raids and imprisonment of their founders. Facing these challenges, copyright owners have been seeking legislative means of targeting and shutting down access to websites dedicated to copyright infringement. SOPA and PIPA were a result of these efforts. However, a significant problem with SOPA and PIPA is that they attempted to *displace* existing rules in the DMCA. By expanding the responsibility of OSPs for policing 'online piracy', SOPA and PIPA were in essence an attempt to re-open the DMCA negotiations over OSP liability.

SOPA and PIPA as agent-based change

Through the Copyright Protection Cycle it is possible to see the failure of the SOPA and PIPA reforms as an example of agent-based institutional change and continuity. First, the model is capable of explaining institutional stasis. The SOPA and PIPA reforms, as efforts aimed at displacement, were blocked by veto players in the internet industry. On the 15th of November, 20 days after SOPA was introduced to the house, a letter of opposition was sent to the sponsors of

SOPA and PIPA, signed by AOL, Google, eBay, Facebook, LinkedIN, Mozilla, Twitter, Yahoo! and Zynga Game Network. The letter, which also featured as a full-page advertisement in the *New York Times*, noted that:

> We are concerned that these measures pose a serious risk to our industry's continued track record of innovation and job-creation …. We are very concerned that the bills as written would seriously undermine the effective mechanism Congress enacted in the Digital Millennium Copyright Act (DMCA) to provide a safe harbor for Internet companies that act in good faith to remove infringing content from their sites. Since their enactment in 1998, the DMCA's safe harbor provisions for online service providers have been a cornerstone of the U.S. Internet and technology industry's growth and success (AOL et al. 2011).

Thus the companies argued that the bills would displace key elements of existing institutions, namely safe harbors, which would undermine their industry. The letter would go onto stress their contribution to US Gross Domestic Product. This framing is consistent with that usually used during copyright reform efforts, and continued to be stressed by the industry throughout its campaign against the bills.

For example at the 16th of November public hearing on SOPA a Google representative spoke on behalf of the internet industry more broadly (Oyama 2011, 98-9). They argued that the bill posed an unacceptable threat to the DMCA's safe harbor provisions, and advocated instead for measures that built from the DMCA rather than undermining it. Overall they asserted that "SOPA undermines the legal, commercial, and cultural architecture that has propelled the extraordinary growth of Internet over the past decade, a sector that has grown to $2 trillion in annual U.S. GDP, including $300 billion from online advertising" (Oyama 2011, 99). Google finished its testimony by setting its parameter for future negotiations for a census-based approach to curbing online infringement. This included protecting the DMCA, preserving current court precedent on liability, ensuring that legislation targets the 'worst-of-the-worst' operators only, not interfering with the architecture of the internet and dismantling barriers to the development of "compelling, legal

offerings for copyrighted works" (Oyama 2011, 109). That is, a clear defence of the internet industry's favoured elements of the current system and an appeal to layering over displacement.

Second, this was part of a broader process of institutional change in which existing formal rules were adapting to a new environment brought about by technological development. This process has already resulted in informal institutional change through both drift and conversion. Meanwhile, the efforts to displace key informal institutional rules under the DMCA saw the emergence of a new coalition of commercial copyright users as a 'veto player'. The SOPA/PIPA battle suggests that internet industry has emerged as a political coalition distinct from that which existed during the DMCA negotiations – which was comprised mostly of telecommunications companies. Meanwhile, the mobilisation of internet companies which provide services over the internet was important to the defeat of SOPA and PIPA. Therefore, internet companies were not bandwagoning, but rather assuming their veto position following an actual threat to the institutions that underpin their industry. While it is true the commercial interests were slower to move on PIPA than the online activists (Benkler et al. 2015, Sell 2013), it is also true that they mobilised quickly after SOPA was introduced to the House, and that just three months later *both* SOPA and PIPA were effectively block.

Therefore, the rise of internet companies such as Facebook and Google is changing the balance of power within and between political coalitions and how they view copyright law. For example, in October 2011 it emerged that Yahoo! had left the U.S. Chamber of Commerce, which was a prominent supporter of PIPA (Romm 2011). By November 2011 there were reports that Google and the Consumer Electronics Association were threatening to do the same (Kang 2011). Meanwhile, more established computer and software companies and groups began to soften their support. For example the Business Software Alliance, which had initially "commended" the introduction of SOPA and pledged to with lawmakers to "push this important legislation forward" (Business Software Alliance 2011), softened its support in November 2011 stating that "valid and important questions have been raised about the bill" which need to be "duly considered and addressed" (Holleyman 2011).

However, it could be argued, as some legal scholar have (Bridy 2012), that the scale of popular involvement in the anti-SOPA and PIPA campaigns was so massive that it truly represents a break

in this long-term cycle of copyright reform which focusses on the compromise between commercial interests. This, again, views the power of online organising as a critical juncture, disrupting this institutional arrangement and injecting new norms emphasising the public good into the reform process. However, there are several reasons to suggest this is not the case. First, the commercial interests did not simply assume the frames that online activists had been promoting. Indeed, as shown above, they also stressed how displacing existing formal intuitional rules would undermine their businesses and the competitiveness.

Second, the response of policy makers wasn't to assume the narratives of the activists either, but to attempt to promote a compromise position between the commercial interests. For example, the Obama Administration, in a response (Phillips et al. 2012) to petitions against the bills, focused on how they could lead to "unjustified litigation that could discourage startup businesses and innovative firms from growing". Far from assuming a libertarian frame of intellectual property, the response instead repeated talking points from copyright owners over the importance of respecting their exclusive rights. It concluded that online 'piracy' was a major issue that needed to be addressed, and called on "all private parties", including both copyright owners and "Internet platform providers" to work together on voluntary measures and to find a compromise position that could be legislated (Phillips et al. 2012). That is, a call for the commercial interests to negotiate a compromise, as they traditionally have.

Indeed, since the failure of SOPA and PIPA the Congress has returned to a census-based approach to reforming copyright law. In 2013 the then-Register of Copyright, Maria Pallante, urged the Congress to conduct a comprehensive review of US copyright law, arguing that both the current law was failing to address contemporary copyright issues (Pallante 2013). In response, the House of Representatives Judiciary Committee has held a series of hearings on copyright law, which ran from 2013 to 2015. Members of the internet industry were well-represented in these hearings, defending the existing arrangement against any change, arguing that the DMCA's take down provisions and safe harbors strike the right balance, are effective and don't need to be changed. That is, there has been no major shift or fundamental reframing of copyright issues. Copyright reform is progressing as it has for over a century.

Last, the narrative of the 'David' (i.e the online activists) slaying the 'Goliath' (the institutionally powerful copyright owners) ignores the fact that legislative defeats are common in copyright reform, especially if they displace important institutions that govern existing copyright using industries. The notion that SOPA and PIPA represented an unprecedented defeat is unsupported. It is certainly true that owners invested considerable resources in the bills, and were shocked by the level of opposition they faced (Sell 2013). However, they had already failed to expand the liability of OSPs with the successful blocking of the *Inducing Infringement of Copyright Act* in 2004-5. This bill was supported by copyright owners, which argued that it would leave P2P technologies themselves unscathed (Bainwol 2004, 37). However, the technology interests disagreed and argued that the bill would threaten the *Sony safe-harbour* and potentially undermine the DMCA safe harbors too (Shapiro 2004, 163). Other groups meanwhile saw the bill its broader historical context thus questioning the claims that it was about operators not technology:

> The history of new communications technology over the last century, be they piano rolls, radio, the VCR or MP3 files, has been one of incumbents seeking to block or cripple the innovator. We fully expect the future will be no different, and to empower the incumbents with more legal tools is unwise and unnecessary (Black 2004, 76).

SOPA and PIPA are merely the latest attempt by 'incumbent' copyright interests to undermine new copyright using technology. Their failure, and the aftermath, fits within the Copyright Protection Cycle – a process which has defined copyright reform for many decades. This cycle is true to the history of copyright reform and applies the agent-based approach of Mahoney and Thelen (2010). In doing so, it can account for the role of agency *within* institutions in explaining both continuity *and* change.

Conclusion

Popular accounts of the defeat of SOPA and PIPA pose a problem for historical intuitionalist scholars. The role of online activists applying discursive power appears crucial in explaining the defeat of the bills. This illustrates the importance of agency in explaining intuitional continuity. Historical intuitionalists, meanwhile, rely on intuitions to explain continuity. Agency is important in explaining institutional change, particularly during critical junctures, but not continuity. The

case of SOPA and PIPA thus appears ideal to exposing the theoretical flaws of the historical intuitionalist approach. These flaws have also been noted by historical intuitionalist scholars such as Bell (2017), who has argued that the literature does not have a unified approach to accounting for the role of agency *within* institutions in explain both continuity *and* change.

Applying the critical juncture approach to the case of SOPA and PIPA does indeed expose some flaws. By defining the role of online organising as a critical juncture, the approach can account for the role of agency in explaining institutional *continuity*. However, in order to do this, it marginalises institutions from the analysis. Instead, it relies on discursive power to explain the defeat of the reforms. This leads to *ideational* changes in how political actors think of their place within institutional arrangements without any actual change in institutions that divide resources between political players. Thus, this analysis either confirms some of the criticisms of the discursive institutionalists, or suggests that a unified account must be found elsewhere.

The article argues that the agent-based approach can account for agency, institutions, stability and change. Applying this approach to copyright reform, the article proposes the Copyright Protection Cycle. This Cycle provides an analytical framework which explains the history of copyright reform in the US for over a century. This Cycle also explains the failure of SOPA and PIPA, which would have displaced formal institutional rules, as a successful vetoing by the internet industry. This industry mobilised once the threat of this displacement was imminent. The internet industry is now a veto player, concerned with limitations and exceptions, which must be included in negotiations in order for copyright reforms to be passed. These reforms must not displace existing institutional rules, but should instead build from them through institutional layering. Prominent internet businesses and lobbyist have made such appeals during and after the campaign against SOPA and PIPA.

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