

**POLICING ACCESS TO KNOWLEDGE:
AN ANALYSIS OF THE INTELLECTUAL PROPERTY PROHIBITION
REGIME**

A Dissertation

by

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ABSTRACT

This dissertation is an analysis of criminal enforcement of digital copyrights. I argue that an international prohibition regime to govern intellectual property rights (IPR) has emerged through systems of international trade and law enforcement. The regime, or international system of norms and decision-making procedures, is supported primarily by the United States, the European Union, and multinational intellectual property industries, and these stakeholders are consistently creating measures to strengthen intellectual property (IP) enforcement to include criminal sanctions. The question guiding the research is how the governance of IP enforcement through the international prohibition regime affects the legitimacy of intellectual property law enforcement. I engage the research question through case study analysis that adopts a critical legal methodology and relevant stakeholder analysis.

The case studies occur in the European Union, where the standardization of copyright among member states takes place to strengthen the European Union's common market. I conduct the case research through a critical legal analysis of policy documents, court cases, diplomatic cables, secondary sources and previous research on the cases. The two cases include the international police raid of the file sharing website OiNK's Pink Palace and the formation of and protest against Spain's *Ley Sinde*, a law created under U.S. pressures to strengthen Spanish copyrights. Two major findings are revealed: First, despite the difficulty of establishing digital copyright laws that legitimize criminal enforcement, police agencies are increasingly involved in the

governance of intellectual property; second, the legitimacy of IP policy is contested by political actors when governance occurs through the mechanisms of a global prohibition regime. As a result of these conclusions, I recommend that Access to Knowledge (A2K) advocates and policy proposals confront the expansion of police enforcement of digital copyrights, and recommend further study into the phenomenon of criminal enforcement of copyright.

For Erin

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NOMENCLATURE

ACTA	Anti-Counterfeiting Trade Agreement
A2K	Access to Knowledge
BPI	British Recorded Music Industry
BSA	Business Software Alliance
DEA	Digital Economy Act
EC	European Commission
ECJ	European Court of Justice
EFF	Electronic Frontier Foundation
EP	European Parliament
FBI	Federal Bureau of Investigation
DDoS	Distributed Denial of Service
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
FIOD ECD	Fiscal Information and Investigation Service
GATT	General Agreement on Trades and Tariffs
GPR	Global Prohibition Regime
HADOPI	<i>Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet</i> , or “Law Promoting the Distribution and Protection of Creative Works on the Internet”
ICT	Information and Communication Technology

IFPI	International Federation of the Phonographic Industry
IGO	Inter-governmental Organization
IIPA	International Intellectual Property Association
InfoSoc	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society
Interpol	International Criminal Police Organization
IP	Intellectual Property
IPR	Intellectual Property Rights
IPR Center	National Intellectual Property Rights Center
IPRED	Intellectual Property Enforcement Directive
ISP	Internet Service Provider
LDC	Less Developed Country
MNC	Multinational Corporation
MPAA	Motion Picture Association of America
NGO	Non-governmental Organization
p2p	Peer-to-peer
RIAA	Recording Industry Association of America
SOPA	Stop Online Piracy Act
TPB	The Pirate Bay
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

U.S. DOJ	United States Department of Justice
USTR	United States Trade Representative
WCO	World Customs Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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CHAPTER I

INTRODUCTION AND LITERATURE REVIEW

Introduction

Intellectual property is a form of information policy that underpins the commodification of informational, communicative, and cultural goods. The extent to which the law should commodify culture and information is the basis of political lobbying and activism from all sides of the debate. This dissertation is a critical examination of intellectual property (IP) policymaking and the enforcement of international IP policies. I focus in particular on the European Union's enforcement of digital copyrights, as the European Union's common market and information society initiatives create contested standards of emergent intellectual property law. The IP debate is rooted in the struggle between the importance of communicating and sharing ideas and the economic value of creativity and innovation. The debate takes heightened precedence in networked, informational societies that are constantly interacting with knowledge and creation online. In a networked setting, IP laws that were initially designed for disputes between authors and firms spread their reach to everyday people interacting online (Braman, 2007, p. 62). The problems surrounding the everyday practice of engaging with culture and information online have led to "range wars of the Internet" (Boyle, 2009, p. 31) over the prohibitions on access to knowledge online. This dissertation is both a scrutiny of those range wars and an analysis of how new laws surrounding IP affect communication throughout culture and society. I argue that

instead of reconfiguring policy and law to strike new balances between shared network culture and online commodification, international IP policy is moving to expand IP law and introduce greater criminal enforcement. Once law enforcement agencies become more integrated into the governance of digital IP, the question of striking a balance between culture, information, and capital is transformed by policymakers into questions of crime and punishment. The criminal enforcement of intellectual property policy also leads to the emergence of the IP prohibition regime that is the primary point of analysis in this study. The methods used to operate prohibition regimes include criminal enforcement and international policing procedures involving extraditions and raids. Task forces and “copyright police” physically enforce IP law just as police agencies regulate drugs and other prohibitions. Examples of prohibition enforcement abound across Europe and globally. Peter Sunde, a co-founder of the file sharing website The Pirate Bay (TPB), was arrested by Swedish police after a two-year hunt by Interpol involving criminal charges in the operation of the website (Kreps, 2014). Gottfrid Svartholm Warg, another TPB co-founder, was hunted down by police and extradited to Sweden for the same reason. Extradition was also used as a tool against Richard O’Dwyer, a British student that ran *TVShack.net*, a hub for sharing television shows online (Halliday, 2012). Kim Dotcom, the founder of the cyber locker site MegaUpload, was also threatened with extradition by the United States after being arrested in New Zealand (Johnston, 2012). The Dotcom case is a vivid illustration of the criminalization and police enforcement of intellectual property rights (IPR). Seventy-six New Zealand police officers and two helicopters were dispatched to arrest the MegaUpload founder in

his mansion after he was indicted in the United States on criminal charges including conspiring to commit copyright infringement (Graeber, 2012). The dramatic raid included police in paramilitary gear descending on the property from helicopters and attacking and arresting Dotcom (Graeber, 2012). The New Zealand raid occurred after extensive cooperation between the FBI, U.S. Department of Justice, and New Zealand and Hong Kong police (Graeber, 2012). The MegaUpload raid is stark evidence of the operations of an IP criminal enforcement regime. The case studies given in Chapter III of this dissertation describe other instances of international police coordination toward IPR within the European Union. I describe the escalation of IP enforcement by presenting a critical history of global IP enforcement and through case studies that document the emergence of an international prohibition regime to enforce digital copyrights. The cases build on existing literature to describe the political economic, social, and cultural consequences of allowing international governance, law enforcement agencies, and multinationals to dictate the course of information policy, or policy that controls information creation, flows and processing (Braman, 2004, p. 1). Democratic deficits, activist politics, and ineffective policy are all potential consequences of the prohibition regime increasingly surrounding digital copyrights. Chapter I is an introduction to this project and includes a literature review that sketches the current debate surrounding the core concepts of the dissertation. The literature review maps the discussion of the history and political economy of prohibition regimes, information policy and policymaking, cybercrime enforcement, and the social movement and activist politics that resist the global escalation of intellectual property rights. I use the literature

to situate this study within a larger, ongoing discourse of critical legal studies and IP enforcement. Critical legal studies is an approach that views the law as a political construct that reflects the interests of the most powerful stakeholders in a given society (Hutchinson, 1989, p. 4).

The IP and information policy critique utilized here is informed by works from Braman (2004; 2007), Benkler (2006), Boyle (2008), Cohen (2012), and Drahos (2002). These authors' research on IP and access to knowledge communicates the weaknesses of past and emerging IP laws and regulatory practices and details calls for policies granting greater digital freedoms for the public. I review this critique with a focus on how, why, and by whom IP laws are enforced internationally. The literature and case studies I provide examine the policy-making relationships between international governance organizations (IGOs), non-governmental organizations (NGOs), states, corporations, social movements, and activists. Another contribution that I provide to the literature is the application of criminological research and theory to the existing IP discussion in political economic and communication texts. I use criminological studies to diagram how police organizations, including the FBI, Interpol, EuroPol, and others, influence policy and policing of international IPR. I argue that international crime control complicates the reform of international IP by enabling violent police raids, property seizures, extraditions, and surveillance to enforce policies that are out of proportion with social norms.

Chapter I evaluates the landscape of international IP law by first drawing from literature on modern international regimes (Krasner, 1981, 2009). Regime theory is an

effective framing mechanism for international information policy because it provides a way to operationalize the impact that IGOs, states, markets, culture, technology, and informal normative structures have on international law and regulation (Braman, 2004, pp. 1, 12-13). The international regime that I focus on throughout the study to analyze international IP law and policy is a global prohibition regime (GPR) as described by Nadelmann (1990), Andreas and Nadelmann (2006), and observed by Getz (2006) and Wrage and Wrage (2005). Andreas and Nadelmann offer research in criminology and international relations to explain how and why social norms are prohibited by the state and international actors, and what qualities of norms make them more or less appropriate for criminalization on a global scale. If an activity can be efficiently limited through criminal sanctions and law enforcement, the GPRs will be effective (Andreas & Nadelmann, 2006, p. 22). If a GPR is not effective, the results can be damaging to the state and IGOs and result in democratic deficits, criminal enterprises, or other socially detrimental phenomena (Andreas & Nadelmann, 2006, pp. 22-24). This dissertation's analysis of the prohibition regime surrounding IP is concerned with the effectiveness of prohibitions to regulate digital copyrights, and I evaluate the processes of the prohibition regime through scrutiny of relevant literature and case research. The original GPR research maintains that efforts to "police the globe" (Andreas & Nadelmann, 2006, p. 23) should be carefully considered and selectively chosen, and I analyze how policing is affecting the international governance of IP as a feature of specific free trade treaties and harmonization initiatives. Chapter II frames information policy and IP standards within

the European Union and discusses how the European Union's history, institutions, and social norms limit and enable IP enforcement.

I use Nadelmann's (1990) model for prohibition regime formation as the basis for the model of an IPR GPR that I formulate in this dissertation. Nadelmann's international prohibition regime model has been utilized for studies of prohibition regimes surrounding drug trafficking (Levine, 2003), arms proliferation (Kelle, 2007), pollutants (Getz, 1995), business corruption (Wrage & Wrage, 2005), human trafficking (Papanicolaou, 2008), and tobacco (Campbell & Sato, 2009). All of these GPR studies focus on the existence and emergence of prohibition regimes and note the effects of their success or failure. I also utilize the GPR model to better understand the enforcement model of the current international intellectual property regime. Andreas and Nadelmann (2006) briefly discuss the emergence of an international IP prohibition regime, and IP policy research from Sell (2010) extrapolates on the increased role of police organizations and criminal enforcement in the governance of intellectual property. I build on both the regime and policy studies by exploring the arrangement of IP prohibitions in the international arena.

I argue that the IPR GPR is largely coordinated by the most powerful states, IGOs, multinational corporations (MNCs), and international police cooperation. The intellectual property prohibition regime is potentially problematic because criminal enforcement disregards the underlying cultural and social value of cultural and information goods in favor of solely combating theft and digital piracy. If IP policy cannot be effectively enforced and socially legitimated, the prohibition regime enforcing

the policy could inflict a loss of legitimacy and democratic deficits against law and policymaking institutions. I explore the concept of legitimacy through international relations research from Hurd (1999) and Machida (2009) in Chapter I and the literature on democratic deficits in the European Union in Chapter II. Legitimacy and democratic deficits, or a lack of democratic accountability and representation in governance, are highlighted to demonstrate how international prohibitions on communication technologies can alter the inherited ties between international institutions, states, and society.

The legitimacy loss potentially inflicted by the IPR GPR is reflective of power relations within international governance. I explain the operation of these power relations with an overview of literature discussing the international political economy. I use analysis of the political economy of communication from Mosco (2009), Fuchs (2008, 2011), and Schiller (1999) to differentiate information and communication technologies (ICTs) from other prohibited activities—such as the drug or arms trades—that are regulated by GPRs. Communication technologies affect the way that people communicate, create, and access knowledge. The results of the struggles for control over knowledge are a determinant of political economic and social power. The political economic analysis clarifies what rights are at stake in the struggle for access to knowledge via ICTs and to analyze power distribution in the struggle for influence over the path of IP policy formation.

The construction of rights to informational and cultural goods is crafted through information policy. I use Braman's (2007) research to dissect how information policy is

constructed, how it regulates the use and innovation of ICTs, whom information policy is crafted to benefit, and the types of oppositional actors that emerge to contest these policies. I also use criminology research to underscore the difficulty of information policy regulating ICTs. Cybercrime studies posit that digital copyrights are extremely difficult to enforce (Towers, 2011; Kigerl, 2012) and that police organizations are by design incapable of dealing with the social and cultural points of contention surrounding digital IP (Lemieux, 2010; Leman-Langlois, 2012). I discuss the social movement actors who do engage with digital IP issues by reviewing literature emphasizing the human right of A2K and the development of a democratic agenda for policy surrounding creative works. The A2K movement's efforts at IP reform emphasize how the prohibition model for IPR is misguided in its aims to enhance the restrictions of intellectual property. I observe examples of the A2K movement utilizing legitimate democratic processes for policy change and examples of more radical hacktivist collectives using extra-political tactics.

I seek to improve the literature on IPR by emphasizing the connections between international regime theory, criminology, information policy theory, and political economic and liberal legal critiques of power and justice as pertaining to IP and information societies. An advantage of engaging in cross-disciplinary discussion is that it enables this research to consider several critiques and analyze a broad range of cases in order to improve the overall scholarly discussion of IPR. A disadvantage to this cross-disciplinary approach is that it invites the critique that the study is unable to apply a singular, established theoretical model and that certain categorical inconsistencies exist

between approaches; nevertheless, the benefit of improving the understanding of IPR and dispelling misconceptions that exist between approaches outweighs this risk. The unique contribution of this study is an analysis of international police influence on IPR policy within the European Union. The dissertation, including the framing of theory, creation of models, analysis of policies, and the cases themselves, also refines critiques of and approaches to IPR research by applying theory and argument to case research.

The remainder of Chapter I is as follows. First, I propose the research question guiding the study. The second section is the literature review, which includes a theoretical background and history of the international IP prohibition regime and an evaluation of political economy and A2K critique of the regime. I then describe the research design that will guide the case studies, and conclude by emphasizing the significance of the dissertation to the fields of IP and media studies.

Research Question

The research question guiding the study is, “How is legitimacy negotiated in political conflicts over intellectual property when the governance of IP occurs through a global prohibition regime?” This question stems from literature—described below in the literature review—that legitimacy problems may be embedded in the current IP prohibition regime. The literature review provided in the next section outlines the potential problems that an IP regime can face when trying to attain legitimacy. The case research, however, leaves open the possibility that IPR prohibition regime does not have a negative impact on social perceptions of institutions, and that criminal enforcement of IP policy is part of a legitimate regulatory system. The possible quandaries faced by the

regime are explored through an analysis of regime literature, information and IP policy, and cyber policing in the literature review section of this chapter. The problems discussed in the literature are all potential pitfalls of the IPR GPR and are points of analysis in the Chapter III case studies. Before discussing the literature, though, clear definitions of “governance,” “regime,” and “legitimacy” are in order.

The concept of governance that I use in this research is based on Sarikakis’ (2012) approach to governance in information and media policy. Sarikakis (2012) understands governance as “a political process, through which decisions are made about the media and which is ‘located’ in procedures, formal and informal structures, spatio-temporal dispersions and beyond the clearly defined spaces of ‘government’” (p. 143). Governance, then, goes beyond the authority of individual governments and encompasses the creation and regulation of international institutions and policy regimes (Sarikakis, 2012, p. 144). Within media governance, policy mechanisms and institutions within states and state-like entities such as the European Union work to guide and transform their regulatory interests into policy regimes (Sarikakis, 2012, p. 144).

The most common definition of “regime” in the field of global policy studies comes from Krasner (1983):

Regimes can be identified as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions for actions. Decision-making

procedures are prevailing practices for making and implementing collective choice. (p. 2)

Regime theory was chosen for this study because of its value to studying the international relations of information policy (Braman, 2004, p. 1). As “specific prescriptions for actions” (Krasner, 1983, p. 2), regime theory offers an opportunity to analyze how international relations converge to govern a particular phenomenon, and this research, the phenomenon being studied is the enforcement of IPR. The theory offers a framework for demonstrating how technology and culture are as important as law and regulation to matters of state, (Braman, 2004, p. 1). Regime theory offers an opportunity to analyze how norms and procedures govern policy-making procedures and, as such, provide an examination of what social stakeholders those norms and procedures benefit most in society. Additionally, the state is prioritized as an important actor within regime theory, with the most powerful states contributing the most to regime formation (Braman, 2004, p. 8). In the study of information policy, where the United States and European Union are at the forefront of policy formation and exportation, regime theory is especially important for analyzing how political, social, economic and legal structures are arranged to manage relations (Braman, 2004, p. 8). The importance of the state to this study makes regime theory a more appropriate model of analysis than other theories of international systems such as modern systems theory, which does not emphasize the continued social importance of the state in arranging international relations and instead emphasizes a notion of world society divided into subsystems of law and politics (Albert, 1999, p. 260). Despite its fit for this study,

though, regime theory in Krasner's (1983) ideation does require some corrective measures from other theorists.

Fellow international relations theorist Strange has identified Krasner's definition as over-broad and imprecise, but also noted that the definition is useful in practice as a mechanism to study the policy objectives of government and international organizations (Strange, 1988, p. 203). Regime theory is also useful in that it looks to institutions and norms and not only to states and markets as agents of behavioral governance in international systems. Krasner's (1983) definition holds that regimes are reciprocal relationships between states that are based on general obligations and long-term commitments (pp. 2-3). For regime change or collapse to occur, the norms and principles of international institutions, not just rules or procedures, must change (Krasner, 1983, pp. 3-4). A critique of a regime is an appraisal of an entire system of governance, as opposed to a critique of specific regulations or a particular state.

Regimes consist of states, MNCs, intergovernmental organizations, and other elite institutional actors (Getz, 2006, p. 255). For these institutions to be effective, they should be perceived as democratically legitimate (Machida, 2009, p. 374). A definition of legitimacy from international studies is the "normative belief by an actor that a rule or institution ought to be obeyed" (Hurd, 1999, p. 387). In liberal democracies and institutions, legitimacy is dependent upon representation (Mather, 1999, p. 277). Democratic representation strengthens legitimacy by creating popular mandates for government activity requiring a government to be chosen under and subject to a system that has acquired popular sanction (Mather, 1999, p. 277). Problems of legitimacy due

to a lack of representation from citizens are a common critique of international governance (Machida, 2006, p. 372). A lack of legitimacy leads to democratic deficits that undermine the authority of and trust in states and IGOs (Machida, 2006, p. 373). Democratic deficits are understood to occur in situations in which citizens lack institutions that represent their interests and are unable to influence the governance of IGOs (Machida, 2006, p. 372). There are a variety of reasons that international organizations foster legitimacy problems. These include a lack of democratic input into governing mechanisms and attempts to encourage norms that are inconsistent with societies (Machida, 2006, pp. 375-376). This dissertation explores literature and case look for evidence of whether or not democratic deficits and social norms undermine legitimacy within the IPR GPR. I also analyze the political economic and social consequences of IP laws and regulations and the legal, political, and economic systems that produce them in order to produce a focused critique of international IP law. The following literature review scrutinizes some of the core arguments used to make claims about the legitimacy of international regimes. The review begins with a description of GPRs as discussed by Nadelmann (1990) and Andreas and Nadelmann (2006). Regime critique within the GPR model founds the arguments about the IPR GPRs legitimacy that are woven throughout this dissertation. The rest of the literature review incorporates theory on the political economy of communication, criminology, information policy, and the A2K movement to reinforce the critical history of the IPR GPR and sketch the landscape for the case studies.

Literature Review

The literature review is divided into two major sections. The first section discusses and links theoretical frameworks and mechanisms from international relations, criminology, and communication research to describe international regimes, international police cooperation, and information policy. I expand on Krasner's (1983) definition of an international regime, and discuss the relationship between international regimes and multinational regulation as described by Getz (1995). I then focus on global prohibition regimes as both a historical and ongoing phenomenon that drives international enforcement, and I give examples of GPRs from Getz (2006) and Wrage and Wrage (2005). I describe Andreas and Nadelmann's (2006) model for how GPRs evolve and explain how the model applies to IPR. A central mechanism of GPRs are international police cooperation, and so an analysis of criminological research on international police cooperation regarding IP and information and communication technology-based crimes from Lemieux (2012) and Leman-Langloix (2012) is covered as well. I also analyze criminological theories of file sharing and digital piracy. Legal and historical work on IP and trade regimes from Drahos (2002) and Johns (2009) is discussed in order to clarify the history of IP prohibitions and their ascent into the policy arena of international institutions. I then provide an overview of information policy theory and the emergent information policy regime from Braman (2004, 2007) in order to emphasize how information is qualified through policy. This section describes several approaches—international relations' regime models, criminological approaches to digital crime and international police cooperation, communication research on information

policy, IP and ICTs—in order to build a common theoretical framework of the international governance of intellectual property. The literature review also evaluates potential obstacles to an IP prohibition regime from studies in international relations, the critical legal tradition, information policy, and criminology.

The second section offers critiques of and alternatives to the systems, norms, and policies that make up the IPR GPR by introducing political economic and A2K descriptions of international law and policy and alternatives to them. The second section ties the discussion on international regimes and policies to the political economy of communication. This section emphasizes the traits of the political economy surrounding ICTs, intellectual property, and modes of regulation. I examine critiques of the international political economy and the political economy of communication as offered by Strange (1988), Mosco (2009), Fuchs (2008, 2011), and Schiller (1999). In particular, I look at how states and markets operate to commodify information and internationally implement intellectual property law through processes of spatialization. The second section of the literature review also provides an analysis of the role of ICTs in information-based economies, and ties the GPR model into the narrative of commodification and spatialization. In the final portion of the second section, I hone in on critiques of and alternatives to the current IPR regime through a discussion of the role of intellectual property in an international system. This final portion discusses the work of A2K scholars and activists including Kapczynski and Krikorian (2010), Benkler (2010), Cohen (2012), and Boyle (2008). I analyze A2K literature on IP and copyright in particular to provide a framework for the legitimate social functions of intellectual

property policy. The arguments provided by A2K scholarship supports access to knowledge, information, and culture, and points to A2K discourse and mobilization as necessary for creating a just international system norms and principles. I conclude the literature review by stressing connections and a broader narrative that relates information policy and IP to a political economic critique of the IGOs, states, and power relations that exist within international regimes.

Overview of Theories

International regimes and the IP prohibitions. As mentioned above, regimes are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectation converge in a given area of international relations” (Krasner, 2009, p. 113), wherein “actors” generally refer to states, multinationals, and other institutional actors (Getz, 2006, p. 255). Regimes are socially constructed arenas and involve negotiation within a set boundary of expectations. The most significant international regime since the 1940s is a liberal trade regime that exists to generate and protect the market interests of the most powerful, industrialized nations (Krasner, 2009, pp. 114-115). Krasner (2009) contends that the norms and principles of this regime guide the rules and procedures that govern international trade and law enforcement (p. 115). The liberal regime was born of a need to reconstruct the world economy after World War II (Cohen, 1983, p. 320). Chase-Dunn (2005), in a discussion of the rise and decline of core powers, states that U.S. power allowed it to be the world’s hegemonic political actor in the world system until the early 1970s (p. 185). During this hegemonic period, the United States heavily influenced the creation of the international liberal

order. The regime was launched with the Bretton Woods Conference in 1944, which tied currency to the value of gold (Cohen, 1983, p. 325), and with the 1947 General Agreement on Tariffs and Trade (GATT) (Cohen, 1983, p. 323). Bretton Woods established the International Monetary Fund (IMF) and the World Bank to reconstruct the international monetary system and help rebuild Europe (Cohen, 1983, p. 325). In an exposition of regime history, Cohen (1983) notes that the United States was the primary beneficiary of the Bretton Woods system and was able to use its leverage as the premiere post-War power to export a liberal ideology that supported free trade and privatization (p. 65). The United States used its military, economic, and ideological might to back the emerging liberal regime (Cohen, 1985, p. 65). The Bretton Woods system was largely dependent on U.S. finances and a system of conditionality that ensured that states receiving loans adopted policies that supported deregulation and reductions in government spending (Cohen, 1983, p. 327). Conditionality primarily affected smaller European nations and the Third World, as wealthier and more powerful states were given opportunities to opt out of conditional loans (Cohen, 1983, p. 324). GATT also favored established industrial powers through discriminatory arrangements in its framework for an international free trade regime (Lipson, 1983). GATT's tariff and trade barriers are most beneficial for the United States, the European Community, and Japan (Lipson, 1983, p. 267).

The Bretton Woods system weakened considerably in the 1970s with the decline of U.S. economic influence and the strengthening of other world powers in Europe and Asia (Krasner, 2009, pp. 64-65). The collapse weakened the liberal regime, with private

banks taking over many of the duties of the IMF, and the Third World's influence was bolstered in the world scene (Krasner, 2009, pp. 64-65). Krasner (2009) points to the leverage of the Third World in particular as a moment of erosion for the liberal regime (p. 114). For a regime to weaken or collapse, the norms and principles that govern the regime must change (Krasner, 2009, p. 114). Krasner (2009) argued that revisions to GATT in the 1970s signaled the weakening of the liberal regime because it acknowledged "special and differential treatment" for less developed countries (LDCs) (pp. 115-116). A core norm of the liberal regime—that access to the world's largest markets was dependent on all parties adopting similar market-oriented rules—was weakened through the creation of the LDCs (Krasner, 2009, p. 115). The norms and principles that governed the regime shifted. Regime change is not simply a matter of introducing new laws or policies, but of altering standards of governance. The weakening of international liberalism and the decline of U.S. hegemony hardly spelled the end for the liberal regime, though. GATT remained a crucial tool for international trade (Drahos, 2002, pp. 110) and the IMF found renewed purpose in the 1980s through exploiting the debt of developing nations (Strange, 1988, p. 113). The United States also remained the most powerful actor in the international trade system and led the way for the globalization of the liberal regime (Krasner, 2009, p. 64).

The liberal regime is an embodiment of the overarching international order, and is based in a strong set of norms and principles by elite actors that prioritize global liberalization. The concept of a regime, though, is not without criticism. Strange (1983) offers a structural objection to the regime concept in international relations (pp. 346-

351), arguing that regime theory underrates the dynamism of the international system and overrates the stranglehold that standards of governance have on international society (pp. 346-351). Regimes, where they exist, are epiphenomenal to the political and economic arrangements and bargains that make up international relations (Krasner, 1983, pp. 5-7; Strange, 1983, pp. 351-353). The structural constraints of states and markets make static regimes too difficult to maintain through systems of norms and principles. The alternative that Strange (1983) proposes to regime research is a world system analysis that centralizes the structural relationship between states and markets (p. 351). Strange's analytical method evaluates how the market affects basic structures of the international political economy such as security, trade, transport, and credit (1983, p. 352). The approach offered by Strange (1994) also places greater focus on corporations, banks, civil society, social movements, and the individual power of states than does Krasner's approach to regime studies (p. 21). In particular, Strange notes the inordinate power of the United States in the world system and stresses that its global reach make its interests central to the agendas of IGOs and international regimes that do not explicitly include the United States (1994, pp. 21-22). An approach to regime analysis that also emphasizes the importance of the most powerful states in the international political economy stems from Chase-Dunn's (1989) work on world-systems theory. He takes a structural approach to history and social change that prioritizes class, markets, state interaction, and a core/periphery hierarchy (pp. 2-3). The core/periphery hierarchy includes core states that control the flow of capital and semi-peripheral and peripheral states that have a weaker standing in the world economy and are exploited for labor and

other resources (Chase-Dunn, 1989, pp. 202-203). In Chase-Dunn's formulation, North America, Europe, and Japan are the current core actors, with other regions rapidly developing and chipping away at the current hegemons. The world system is dynamic and the core and periphery are always developing and changing; regimes have the potential to rapidly change or collapse. Chase-Dunn's and Strange's work proposes analyses that avoid taking structures of the international political economy for granted as static institutions. I incorporate this awareness of dynamism and the stress on states, market actors and social movements into the regime analysis conducted in this dissertation. I also acknowledge the potential of the core/periphery by emphasizing the roles of the United States and European Union in the maintenance of international governance. The importance that Strange (1983, 1994) assigns to markets and social movements in altering international systems is also central to this study.

The specific regime analyzed in this dissertation, the international IP prohibition regime, is a functional regime. Functional regimes are smaller regimes that regulate specific industries, activities, or problems (Getz, 2006, p. 256). Activities such as telecommunications, trade, and currency exchange are often governed by functional regimes (Getz, 2006, p. 266). Research on functional regimes particularly takes into account the dynamism of the international system and the idea that regimes can be secondary to weak policies and arrangements (Getz, 2006, p. 256). Smaller international regimes operate under the logic of the larger liberal regime and form when actors recognize shared problems and opportunities (Getz, 2006, p. 266). The IP regime, for instance, is shaped through the market interests of core states to regulate intellectual

property in the world economy. Getz (2006), in a discussion of the global bribery prohibition regime, stresses that functional regimes are designed to promote the interests of the actors that put them in place (p. 266). For the intellectual property GPR, the interested actors are enumerated in the stakeholder analysis I provide in Chapter IV and include trade associations from the IP industries.

GPRs are legal, economic, social, and political regimes that regulate prohibited norms (Andreas & Nadelmann, 2006, p. 17). GPRs encompass a diverse range of activities, including but not limited to counterfeiting, high seas piracy, money laundering, terrorism, poaching, and the trades of prostitution, ivory, and weapons (Andreas & Nadelmann, 2006). Nadelmann first discussed GPRs and the evolution of social norms in international society in 1990. In a 2006 work with Andreas, the authors move away from the broader “global” in favor of the phrase “international prohibition regime.” The change was almost purely cosmetic and the core concepts and definitions from Nadelmann’s early GPR writings remain the same. I maintain the original term “global prohibition regime” for two reasons. First, the emerging prohibition regime on IP is truly global and includes trade agreements, law enforcement, and judiciary procedures worldwide. The prohibition regime functions differently in the United States, European Union, China, Russia, South Korea, New Zealand and so forth because of structural constraints, but the goals and mission of the regime are the same globally. This dissertation’s case studies focus on events in the European Union, but as I demonstrate in the reviews of political economy and A2K literature, disputes over IP governance are linked through the same patterns of international policymaking and the

same networks of states, IGOs, multinationals, and activists. Braman (2004), for instance, identifies the emergent information policy regime as a global phenomenon with implications throughout the world system. The IP prohibition regime also has a global outreach, even as its use varies considerably across regions. The second reason that I use “global prohibition regime” is for the more mundane goal of avoiding acronym confusion with “intellectual property rights.”

The arguments that Andreas and Nadelmann offer for the ascendance of GPRs emphasize the influence of power in regimes. The rules of prohibition regimes usually stem from social norms that are developed by historically elite states such as the U.S. and Western European nations, economic actors and civil society, or “moral entrepreneurs” that lobby for the enforcement of particular norms (Nadelmann, 1990, p. 480). For a prohibition regime to expand to the international arena, the regulations that underpin the regime must be supported by hegemonic actors that are typically made up of the most powerful states and institutions (Andreas & Nadelmann, 2006, p. 21). In general, GPRs may take shape due to the need of states to protect the well-being of people, the need to protect markets, through the moral outcry of nonstate actors such as religious groups, or through any combination of those three factors (Nadelmann, 1990, p. 480). GPRs, like other regimes, are dynamic and subject to change or weakening due to alteration in the international power structure or changes in social norms and principles due to political and moral activism (Andreas & Nadelmann, 2006, pp. 11-13). Andreas and Nadelmann (2006) point to War on Drugs, for instance, as gradually weakening due to changing international norms toward drug prohibitions and the need to

re-direct law enforcement resources toward the War on Terror (pp. 194-195). Other prohibitions, such as those against anarchist political movements, dissolved over time due to declining perceptions of threats from the actors involved in the prohibited activities (Andreas & Nadelmann, 2006, p. 84-85).

International prohibitions are also complex and encompass a wide range of activities. Many of these activities are effectively managed through prohibition regimes, and GPR literature is not a wholesale condemnation of international prohibition regimes. Kelle (2007), for instance, insists on the necessity of a GPR to control arms proliferation, and Campbell and Sato (2009) hail the potential of a prohibition regime to regulate tobacco in Japan. The literature does, however, point to concerns that the increased harmonization of criminal justice systems, stronger criminal justice relationships across borders, and the influence of multinationals over international governance leads to over-criminalization of activities (Andreas & Nadelmann, 2006, pp. 8-9, 250-251). The most commonly criticized prohibition regime is drug enforcement (Levine, 2003). The drug war is broadly criticized for relying too strongly on criminal measures to curtail drug trafficking and failing to approach the political, economic, and social reforms that are necessary for alleviating the illicit distribution of drugs (Levine, 2003, pp. 148-149). Certainly, A2K critics of intellectual property policy echo the sentiments of drug war criticism by pointing to fundamental injustices within the institutional administration of IPR. The appropriateness and efficacy of the IPR GPR is evaluated throughout this dissertation.

Andreas and Nadelmann (2006) describe most GPRs as developing through a five stage model. The first two stages are largely historical and not a point of analysis throughout this dissertation, but the later stages describe the international growth and influence of prohibition regimes. Stages one and two involve the development of prohibitions. The activity is considered legitimate under certain conditions in the first stage, but scholars, civil society, and social movements begin proscribing the activity as a problem or an “evil” in the second stage (Andreas & Nadelmann, 2006, p. 22). The actors clamoring for prohibitions frequently take the form of “moral entrepreneurs” (Nadelmann, 1990, p. 484) or stakeholders such as religious or humanitarian groups investing resources into creating rules and norms to prevent activities perceived as unethical.

The drug GPR, for example, reached its second stage in the early 20th century when a reform movement emerged in the United States (Andreas & Nadelmann, 2006, p. 22). The U.S. drug reform movement manipulated fears of drug use by immigrants and minorities to foster prejudice to psychoactive substances that were not tobacco or alcohol (Andreas & Nadelmann, 2006, pp. 42-44). In the third stage, prohibition proponents begin to “agitate actively for the suppression and criminalization of the activity by all states and the formation of international conventions” (Andreas & Nadelmann, 2006, p. 21). Transnational moral entrepreneurs and core states began the call for international prohibitions through methods ranging from the formation of international institutions, diplomatic pressures, economic inducements, military interventions, and propaganda campaigns (Andreas & Nadelmann, 2006, p. 21).

Andreas and Nadelmann's account of drug prohibitions is flawed in that it fails to differentiate categories of moral entrepreneurs based on a hierarchy of political economic relations within the international system (Papanicolaou, 2008, p. 403). Research of human trafficking in Greece conducted by Papanicolaou (2008) stresses the importance of acknowledging power in the international system and criticizes Andreas and Nadelmann for lacking political economic analysis (pp. 404-405). Papanicolaou offers a "corrective approach" to GPR research that takes political economic factors into account, especially when criticizing regional implementation for a GPR. For Papanicolaou (2008), Greece's implementation of the Greek human trafficking GPR is flawed because the regime stems from U.S. policies, U.S. advocacy groups, and IGOs that operate under U.S. influence, and the U.S. approach is unfit for Greek domestic conditions (p. 382). I use a similar corrective approach in applying the GPR model to IP policy. The IP prohibition regime stems from the policy interests of core states and actors, and the political economic difficulty of exporting the regime's institutional factors and norms into individual states causes tensions and dysfunction.

The later stages of Andreas and Nadelmann's model are not as reliant on moral entrepreneurship and are more accommodating toward theories of international regimes heavily influenced by hegemonic states and institutions. If the third stage is successful, the regime moves into a fourth stage where international institutions and IGOs launch criminal sanctions and police action toward the activity throughout large sectors of the globe. Pressures on all states to adopt the legal regimes that enforce prohibition are intense, and states that do not adopt the framework for the GPR are seen as illegitimate

actors in global society. Dissident states, states that implement but do not enforce prohibitions, noncompliant individuals, and criminal organizations are all perceived as threats in the fourth stage (Andreas & Nadelmann, 2006, p. 21). The core/peripheral hierarchy of the world-systems analysis (Chase-Dunn, 1989) is particularly useful in discussing stage four because it is at this stage that the core states of the regime pressure weaker states to institute enforcement. The U.S. and E.U.-dominated efforts to spread IP enforcement are a central area of analysis in this dissertation. Outside of IP, the influence of core states on drug policy is evident with international drug prohibitions. The U.S. export of prohibitions on the cocaine, opiates, and cannabis in regions where the drugs are historically prevalent demonstrates the ability of hegemonic states to enforce their norms globally (Andreas & Nadelmann, 2006, pp. 44-45). The failure of the drug GPR, though, demonstrates the difficulty of international prohibition regimes to reach a fifth stage. In stage five, the prohibited activity is nearly eliminated and only persists in isolated areas (Andreas & Nadelmann, 2006, p. 21). The fifth stage is exceptionally rare, and only applies to prohibitions that can be successfully tackled through criminal sanctions and law enforcement (Andreas & Nadelmann, 2006, p. 22). Slavery and high seas piracy from the late 19th to early 20th century are examples of GPRs eliminating a practice, although piracy did resurge in the later 20th century (Andreas & Nadelmann, 2006, pp. 26-32). Piracy was effectively eliminated by states withdrawing support and enforcing criminal measures, in addition to pirates having difficulty accessing steam technology (Andreas & Nadelmann, 2006, pp. 26). Slavery was eliminated due to the waning political influence of slaveholders, international

conventions, and transnational moral leadership leading to a powerful GPR against the practice (Andreas & Nadelmann, pp. 30-32).

GPRs for which resources are readily available, for which little expertise is required, that are not seen as legitimate and are thus unlikely to be reported to authorities, and for which demand is consistent and resilient are unlikely to ever reach the fifth stage (Andreas & Nadelmann, 2006, p. 22). The success or failure of GPRs depends on the complexity of the problem that the GPR is attempting to solve, the degree of behavioral change required, the resources spent on combating the activity, and the clarity of objectives articulated by the regime (Getz, 2006, pp. 259-263). International prohibitions on drug trafficking are a clear example of a GPR failing to reach the fifth stage due to the limited ability of criminal enforcement measures to stop drug use and trade. The resources to grow and manufacture illicit drugs are plentiful, distribution and sale requires little expertise, drug trafficking does not produce many victims that want to notify police authorities, and the demand for drugs is substantial and irreplaceable (Andreas & Nadelmann, 2006, p. 45). Prohibitions on IP, particularly digital copyrights, may be similarly difficult. Benkler (2006), analyzing networked communication technology in an information economy, outlined the problem of controlling information by noting how reproducing and creating information, knowledge, and content through ICTs is simple and socially legitimated (pp. 4-5).

Andreas and Nadelmann (2006, pp. 54-55) briefly describe the IP prohibition regime as between the third and fourth stages of development. Research on IP policy supports Andreas and Nadelmann's claims on the current state of IP prohibitions, and the

advancement of prohibitive intellectual property policy detailed in IP scholarship aligns with the claim that the IPR GPR is between a third and fourth stage. Literature on IP policy from Sell (2010), Burkart (2014), and Andersson (2014) all describe international IP policy as increasingly reliant on lateral pressures and criminal enforcement measures. Sell's (2010) work is concerned with an upward ratchet—that is the incremental, unidirectional movement—of IP law stemming from the United States and including the U.S. government, trade organizations, IGOs, and international police organizations (p. 10). Burkart (2014) and Andersson (2014) focus on broad European laws and directives and international trade agreements that criminalize file sharing in efforts to stem piracy. The movement into a fourth stage consists of greater clamoring by U.S. and E.U. interests for more robust and aggressively enforced IPR. The literature presented in the next section of this chapter and the case studies provided in Chapter III detail the systems and structures used to propel the IPR GPR into the fourth stage and beyond. I also argue that international prohibitions on IP, especially digital copyrights, face many of the same implementation and execution problems as the drug war in terms of high demand, weak social prohibitions, and the ease of distribution. Yet the inability to completely halt an activity does not make the pursuit of prohibitions inherently flawed. As an example, while the failure of the drug war is one important example of an unsuccessful GPR, it is not indicative of all prohibition regimes that are unable to reach a fifth and final stage. Other GPRs, such as human trafficking, face many of the same obstacles but are not widely viewed as misguided or unnecessary (Papanicolaou, 2008, pp. 403-404). Policymakers usually understand that harmonization does not guarantee

full implementation, and the success of international regulatory regimes may be measured incrementally (Drezner, 2008, pp. 11-13). If international regulations on a chemical pollutant are designed to eliminate that pollutant but only succeed in significantly reducing the pollutant, the regulation may still be considered a partial success and superior to alternative measures (Drezner, 2008, p. 13). For example, international regulations to curb certain ozone pollutants were a success because of effective communication and cooperation among the multiple sets of actors involved (Getz, 1995). IGOs sponsored policy was developed to curtail the use of the pollutants (Getz, 2006, pp. 307-308). International regulation does not guarantee implementation, however, so the true test of efficacy for the anti-pollutant regime was approval from NGOs and cooperation from multinational corporations (Getz, 2006, p. 308). Multinationals embraced the new regulations and the targeted pollutants were largely eliminated from production. Importantly, the pollutants were still allowed on a limited basis in developing nations that did not export goods containing the pollutants (Getz, 2006, p. 308). The targeted ozone pollutants were significantly curbed but not eliminated, and the GPR was considered a success by policymakers (Getz, 2006, p. 309).

The lesson from the ozone pollutant example in regard to prohibition regimes is that a regime can still be considered effective if it only partially stops a prohibited activity. Perfect prohibition may not be, and likely is not, an intended policy outcome of the global regulation of intellectual property. In the case of intellectual property, policy analysis should question whether or not the legal regimes put in place will be efficient in managing intellectual property infringement, or if the regimes will be over-reaching,

dangerous, and ineffectual. GPRs require resources and dedication to international governance and cooperation, legal regimes, and investment in law enforcement coalitions such as task forces (Andreas & Nadelmann, 2006). The case research in this dissertation analyzes the resources used to combat digital copyright infringement within the context of communicative and cultural relations in the European Union in order to evaluate the efficacy and necessity of prohibitions and criminal enforcement. If the benefits of prohibition do not outweigh the political, social, and economic costs of enforcement—especially if prohibition is implemented at the expense of more constitutive approaches to solving problems—then the case for sustaining the GPR becomes problematic.

A critical history of the IPR GPR. This section overviews how advances in ICTs and telecommunications historically shaped the IPR GPR. I also trace how the expansion and liberalization of the international telecommunication and information infrastructure and the globalization of the United States' drug war were pivotal to the development of the IP prohibition regime. The section maps how advancements in technology and policing continue to shape the way that multinational regulation is created, implemented, and enforced. The beginnings of IPR prohibitions are derived from European conceptualizations of intellectual property (Johns, 2009, pp. 8-11), the Berne Convention as an agreement to unify IP rights across Europe (Johns, 2009, pp. 284-286), and European pressure on the United States to conform to European IPR standards (Drahos, 2002, pp. 32-33). This dissertation, however, is not concerned with the early stages of the IPR GPR so much as the methods and mechanisms involved in the

historic transformation to the third and fourth stages of implementation. How European IP policy fits into the framework of a prohibition regime informs this study by contextualizing the influence and breadth of the GPR. I conceptualize the IPR GPR as a functional regime within the post-War liberal regime described by Krasner (1983, 2009), Lipson (1983), and Cohen (1985). I also recognize international IP prohibitions as a function of what Braman (2004) identifies as an information policy regime; Braman (2004) traces the emergence of the information policy regime with advances in ICTs and emerging international policies to govern communication technology (pp. 30-31). The development of both the IP prohibition regime and the information policy regime is rooted in the history of telecommunication and media policy.

Histories of telecommunication reveal that the United States began to dominate the spread of telegraph cables after WWI, which laid the groundwork for U.S. dominance in telecommunications after the Second World War after decades of British preeminence in the telecommunication field (Thussu, 2006, p. 8). The United States' position over the cable infrastructure gave it an early lead in the global networking of the telecommunication system over a weakening Europe and an isolated Eastern bloc. During the 1950s, the United Kingdom and continental Europe operated telecom systems primarily through public monopolies, while the United States operated through a state capitalism model fueled by private monopolies, notably AT&T (Hudson, 1997, pp. 66-68). By the 1960s, the United States was at the zenith of its status as an informational superpower. U.S.-influenced post-War IGOs accelerated the spread of telecommunication systems developed under U.S. terms (Schiller, 1992). The United

States began to introduce competition to its private monopolies and eroded its state capitalism model in favor of models of liberalization (Hudson, 1997, pp. 69-71). The United States then used a model for expanding telecommunication systems based on deregulatory policies that encouraged the liberalization of state enterprises and the opening of structural and cultural markets for competition across the globe (Schiller, 1999).

Telecommunication firms lobbied to encourage the United States to expand its liberal-minded economic policies around the globe in the form of trade agreements and lateral pressures (Schiller, 1999, pp. 47-49). The World Trade Organization (WTO), for instance, demands that states embraced market-friendly development of telephone, cable, satellite, and Internet infrastructure in trade negotiations (Schiller, 1999, pp. 47-49). The globalization of financial capitalism was enhanced through the expansion of telecommunication systems, and the international liberal regime became the engine driving the economies of states that controlled the means of regulation (Schiller, 1999). By the time the United States' informational power began to decline and disperse internationally in the 1970s, its model for governing telecommunication systems and financial capitalism was firmly in place (Schiller, 1992, pp. 4-6). The digitization of communication systems and the growing importance of information-based sectors led to new policies and organizations to manage information policy.

The acceleration of globalization led to an increase in the consensus among states, IGOs, NGOs, and international policing agencies for the need of greater transnational law enforcement (Andreas & Nadelmann, 2006, pp. 51-53). The growth of international

capital exchange created a sharp increase in crimes related to “transnational securities transactions, banking exchanges, commercial ventures, and credit card” fraud (Andreas & Nadelmann, 2006, p. 125). ICT innovations enabled transnational crime and allowed law enforcement agents to coordinate investigations internationally (Andreas & Nadelmann, 2006, p. 126). Advancements in telecommunications and ICTs allowed police to keep track of criminals, exchange intelligence with foreign counterparts, and create databases of criminal activity (Andreas & Nadelmann, 2006, p. 126).

Technologies of information exchange and surveillance expanded both police and criminal activity by giving both a means to operate more efficiently internationally.

Advances in telecommunications and surveillance technology enhanced the presence of GPRs that were primarily guided by the United States’ drug war model.

Transnational capitalism made global the need to protect property and capital (Andreas & Nadelmann, 2006, p. 126). The IP prohibition regime is one in a line of many regimes that emulated the drug war. Post-War regulations on exports and, by 1970, money laundering were examples of how new crimes related to transnational capitalism spawned new regulatory regimes, IGOs, and international police cooperation (Andreas & Nadelmann, 2006, p. 126). In the wake of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1996, IPR enforcement spread to the Internet, where multiple police and law enforcement institutions cooperate internationally in efforts to arrest the operators of peer-to-peer (p2p) and streaming websites (Andreas & Nadelmann, 2006, p. 55).

TRIPS represents the culmination of years of the U.S.-led post-War push to strengthen control of IP (Drahos, 2002), marks the solidification of the IPR GPR. U.S. enforcement of intellectual property rights rapidly accelerated after World War II (Drahos, 2002, p. 39). The U.S. drive to strengthen IPR came about when emerging economic realities made evident the fact that the control of intellectual property would be a driver for the global economy (Drahos, 2002, p. 39). Multinationals are the dominant force in persuading policymakers how to regulate intellectual property. These corporations insist that successful trade agreements must enhance a legal regime that creates complete market control over knowledge-based goods (Drahos, 2002, p. 39). Multinational corporate cartels and business associations representing the software, entertainment, pharmaceutical, and publishing industries act as the primary outlets for the IPR industries to create and promote policy preferences (Drahos, 2002, p. 40). The largest regulatory success for the multinationals to date was the inclusion of TRIPS into the WTO (Drahos, 2002, p. 5). The WTO, established in 1994, replaced the international trade regime established by GATT with a global trade regime that included stronger regulations for information services and intellectual property (Braman, 2007, p. 237). The WTO was the culmination of years of effort from the United States to expand the liberalization of international trade to information policy (Braman, 2007, p. 237). Supporters of the WTO, particularly the U.S. and trade associations, argued that it was essential for economic growth to dismantle the barriers to the free flow of information through international organizations (Thussu, 2006, p. 68). TRIPS became enforceable in 1996 and holds all signatories to minimum standards for enacting and enforcing IP law

(Thussu, 2006, p. 224). The International Intellectual Property Association (IIPA), a trade association made up of U.S. IPR holding companies, was instrumental in the inclusion of TRIPS into the WTO (Thussu, 2006, p. 225). The IIPA argued that billions were lost due to IP infringement and that advancements in Internet technology would make the problem worse in the coming years (Thussu, 2006, pp. 224-225).

Other than the U.S., the primary powers invested in TRIPS negotiations were the European Community and Japan (Drahos, 2002). Concessions were made throughout TRIPS negotiations to assuage the European Union's concerns toward overly broad patent laws that protected U.S.-based pharmaceuticals, and Japan was allowed to protect its laws regarding CD rentals (Drahos, 2002, p. 146). However, Europe did not get its desired implementation of moral rights, or the ability of an author to control the modification of a work even when a work is licensed to a third party, into TRIPS (Drahos, 2002, p. 146). The agreement was protested by developing countries, particularly Brazil and India (Thussu, 2006, p. 225), as many industrializing nations were fearful of the fact that the global north held 90% of all patents and the vast majority of copyrights (Thussu, 2006, p. 225). The taxes on knowledge and innovation were a threat to developing nations, but the threat of trade sanctions from WTO members outweighed these concerns and most nations signed on (Thussu, 2006, p. 225). As Drahos (2002) explains, developing nations did not have the leverage to stop TRIPS, and instead worked for provisions that would give them time to implement TRIPS' standards (pp. 144-145).

TRIPS marked the globalization of the IPR prohibition regime because of the extent of its international framework, but the extent of prohibition enforcement varies by region. For instance, China is a member of the WTO as of 2001 and a signatory of TRIPS, but its compliance is unstable. Chinese policy openly supports an “indigenous innovation” (Raustiela & Sprigman, 2013, para. 1) model that is criticized by the United States as legitimating piracy. The U.S. International Trade Commission estimated in 2011 that Chinese IP infringement cost \$2 billion (Raustiela & Sprigman, 2013, para. 2). The United States took China to the WTO court over the piracy issue from 2007-2009 and largely failed to get the WTO to force China to ramp up enforcement measures (Broude, 2010, pp. 668-669). The Office of the United States Trade Representative (USTR) claims that nearly all digital content in China is pirated and that the nation does not fare much better with its protection of physical trademarked goods and pharmaceuticals (USTR, 2014, pp. 34-35). Enforcement in China is being slowly and steadily ratcheted upward, however, as evidenced by China materially committing to its WTO accession and expanding its civil remedies for IP disputes in 2013 (USTR, 2014, p. 31). The USTR also showed cautious optimism regarding China’s 2013 copyright and patent reform (USTR, 2014, p. 31). The ineffectiveness of the IPR GPR in China leads to condemnation from the United States and IPR industries, but global prohibitions on copyright infringement are beyond the scope of this dissertation, which is limited to the development of European IP prohibitions and the difficulties in harmonizing enforcement across the European Union.

TRIPS affected all levels of IPR, from biotechnology to counterfeit DVDs, and pressured the developing world to import the intellectual property norms of the United States and Europe (Drahos, 2002, p. 5). In addition to TRIPS, the United States and European Union engaged in bi- and multilateral agreements with other states that favored the economic interests of the two dominant economic powers (Drahos, 2002, p. 73). States that refused diplomatic relations regarding IPR and those that did not meet the obligations of the treaties were attacked as “pirates” and accused of supporting counterfeiting and theft by IP groups (Drahos, pp. 73-74). For states that signed in to TRIPS, violations could mean a court hearing in front of the WTO (Drahos, 2002, p. 107). All states in violation of U.S. IPR norms are pressured by the United States to adopt a stronger IPR regime or face trade sanctions (Drahos, 2002, p. 73). A notable tool that the United States uses to enforce IPR standards is the United States Trade Representative’s (USTR’s) Special 301 list (Drahos, 2002, p. 96). The list is based almost entirely on suggestions from the IIPA and pharmaceutical companies (Drahos, 2002, p. 96). The IIPA’s complaints include levels of piracy in countries and often dubious and inflated claims of monetary losses (Drahos, 2002, p. 95). The claims of monetary harms from the IP industry and U.S. regulatory agencies are consistently large and difficult to confirm. For example, the FBI and International Trade Commission publicly claimed in 2008 that \$200 to \$250 billion is lost every year due to copyright infringement (Sanchez, 2008, p. 1). The numbers were based on a 20 year-old report of calculations of the entire global market in counterfeit goods that additionally claimed that copyright infringement cost the U.S. economy \$60 billion annually (Sanchez, 2008,

p. 2). The report noted, however, that the calculations were from “biased and self-serving” rights holders and included activities covered under fair use, such as academic photocopying (Sanchez, 2008, p. 3). Another study by the Motion Picture Association of America (MPAA) claimed that the U.S. movie industry loses \$6.1 billion per year due to Internet piracy. The numbers were admittedly rough estimates by the movie industry, and counted each individual download of a movie as a loss (Balik, 2013, para. 1). Additionally, a 2010 report from the United States Government Accountability Office that no current major study on the harms inflicted by IP infringement could be substantiated due to a lack of underlying studies and the difficulty in garnering financial estimates for illicit activities (United States Government Accountability Office, 2010, p. 1). Despite the difficulty in gaining accurate numbers for losses, the expansive Special 301’s Watch List of countries with poor IP standards includes dozens of nations each year (Drahos, 2002, p. 96). Suggestions for fixing piracy in nations usually include IP restrictions that include new laws, task forces, and education initiatives that promote the interests of U.S.-based multinationals. The 301 list is often criticized for its lack of interest in the well-being of the nations it blacklists and for leading to cultural and economic damage in developing nations (Drahos, 2002, pp. 95, 127).

The regulatory mechanisms for enforcing IPR are encouraged by intellectual property coalitions acting to define and redefine social norms and principles surrounding the use of creative and information works. For instance, the entertainment industry asserts that it is defending the integrity of artists and ensuring the future of the arts by lobbying for strict copyright laws (Drahos, 2002, p. 177). The recording industry has a

particularly long history of attempting to justify more stringent copyright law as a defense of the arts that goes back to the Music Copyright Association's condemnation of sheet music "pirates" near the beginning of the 20th century (Johns, 2009, pp. 332-333). In the United Kingdom, the Association went so far as to band together paid-for-hire thugs to break into people's houses and destroy allegedly infringing sheet music before managing to successfully lobby for new copyright laws (Johns, 2009, pp. 335-336). By the late 20th century, the figure of the intellectual property pirate expanded from organizations to individuals when communication technologies began to make home taping, recording, remixing, and copying easily accessible to individuals (Drahos, 2002, p. 181). Constructing the "home taper" as a pirate and a thief was a process that required the entertainment and software industries to engage in propaganda campaigns informing consumers that they were contributing to the collapse of culture and damaging the livelihood of programmers and artists (Johns, 2009, p. 433). Not only was the counterfeiter or the file sharing website creator a pirate, but users of the technology now were, too (Johns, 2009, pp. 433-434). In the wake of TRIPS, the boundaries and definitions of piracy shifted even further outward at the behest of private interests. Digital rights management (DRM) laws as constructed under the Digital Millennium Copyright Act (DMCA), for example, make circumventing digital locks that prevent copying on media like DVDs and .MP3s illegal (May, 2003, sect. 2, para. 1). The U.S. and E.U., which instituted DRM respectively in 1998 and 2001, promoted anti-circumvention policy across the globe through trade agreements and the aggressive condemnation of states that do not recognize the act as piracy (Drahos, 2002, p. 184).

The figure of the pirate under the United States' DMCA and the European Union's Information Society Directive included the person who broke the lock on her compact disc even if she was not reselling or even copying the CD. The expanded sphere of piracy under DRM is widely criticized by IP law and policy scholars. Lessig (2004) criticizes the potential for DRM to inhibit fair use by granting content holders full control over cultural goods (pp. 159-160). Litman (2001) argues that the DMCA's DRM provisions go well beyond any previous standards of copyright and grant content owners greater monopolies over copyrighted materials (p. 114). Vaidhyanathan (2001) goes further in the argument against DRM and claimed that the DMCA was part of a "surrender of culture to technology" (p. 160); the "surrender" eliminated the public bargain between producers and users over copyrighted material in favor of legally legitimizing anti-circumvention technology (p. 160). May and Sell (2006) describe the public bargain of copyright as a gray area wherein producers and consumers agreed upon certain forms of socially acceptable copying, access, and use of copyrighted goods (p. 184). May (2003) concludes that the restrictions caused by DRM erode the legitimacy of copyright law by violating the social norms that regulate access to knowledge (sect. 1, para. 3). The backlash against the private enclosure of technology, information, and culture by anti-circumvention policies and other forms of IP overreach has led to both a global political movement to reassert rights of access to knowledge and a public disregard for digital copyright laws (May, 2003, sect. 5, para. 7); in May's formulation, digital copyright laws that expand private interests at the expense of public goods are harmful to the democratic legitimacy of IPR. Digital copyright laws then create a

potential crisis for an IP prohibition regime. Compounding the problem of social legitimization of digital copyright laws, Drahos (2002) warns that failed prohibitions lead the IP industries to lobby for ever more draconian copyright laws and protections (p. 184). The new protections are often packaged as “TRIPS-Plus” agreements that exceed the minimum standards of TRIPS. TRIPS-Plus legislation that seeks to normalize far-reaching digital copyright standards includes the example of “reeducation campaigns” in which states are obliged by treaties and trade law to use resources to educate law enforcement officials and public classrooms of the importance of protecting copyrights (Drahos, 2002, p. 27). Intellectual property education campaigns are present in French copyright legislation that introduced copyright education as a mandatory part of the class room curricula in many grade schools and colleges (Giannopoulou, 2012, sect. 4). If the expansion of digital copyright laws causes the illegitimization of copyright as May (2003) and Drahos (2002) argue, then TRIPS-Plus policy could worsen the problem of enforcing an IP prohibition regime. In the case studies in Chapter III, I observe how individuals respond politically and socially to prohibitions on digital copyright infringement to better understand if and how legitimacy problems surround IP law.

Labeling a social activity as deviant and that deviant behavior as criminal is an important condition to be met before setting up a prohibition regime. An activity’s identification as socially dubious influences the policy-making process and the reaction that legal regimes have to prohibited activities. In the case of enforcement of digital copyrights, which can include tactics from seizing Internet domain names (Sellars, 2011)

to cross-border commando raids to arrest website owners (Kerr, 2012), the willingness of policymakers to support and create maximalist intellectual property policy that regards digital IP infringement as a serious threat to economic security is crucial. The private sector is also at the forefront of efforts to ratchet up IP law. Multinationals use moral entrepreneurship to promote and establish sets of norms regarding global activities related to their business (Wrage & Wrage, 2005.) The case of bribery prohibitions among corporations in the 1980s described by Wrage and Wrage (2005) illustrates the moral entrepreneurial role of corporations. Corporations coordinated prohibitions because they were worried that the process of globalization created too much competition from foreign businesses susceptible to bribery (Wrage & Wrage, 2005). In the case of the IPR GPR and information policy, multinationals are concerned about the potential use of digital technology to disrupt business models. Benkler's (2006) study of ICTs stresses the ability that digital communication technology gives to individuals, industries, and innovators to easily reproduce content. Intellectual property industries lobby for and create policies that expand IPR in order to halt the potentially disruptive use of ICTs. The underlying factors that define the type of information policy that expands intellectual property rights is detailed in the next sub-section, where I describe and apply the information policy regime introduced by Braman (2004, 2007).

The information policy regime and IP prohibitions. The international IPR prohibition regime is interdependent with what Braman (2004) identifies as an emergent information policy regime. The information policy regime is emerging to govern international issues of E-commerce, data retention and privacy, intellectual property, and

other forms of information management in the digital environment (Braman, 2004, p. 1). Within information policy formation, there are struggles as to how to identify and define information; those that are most relevant to the IP research in this dissertation are the struggle over information as a commodity or as a constitutive cultural force, information as property or as part of a commons, and information as private or public (Braman, 2004, pp. 35, 37). The private/public struggle is especially important to the E.U. policy landscape surveyed in Chapter II and the cases discussed in Chapter III. In those two chapters, I identify tensions between the European Union's privacy framework and its surveillance-heavy anti-piracy agenda, which complicate the implementation of IP policy in European member states. The struggles between information as a commodity as opposed to a cultural resource and as property versus a commons are particularly salient in the arena of digital copyright policy. With IP regulation, information policy is used by the state to stem the reproduction of goods and to enforce the notion of creative content as a commodity (Braman, 2007). Policymakers have a tendency when regulating intellectual property to "ratchet up" IPR through systems of international governance; the upward ratchet of intellectual property leads to an energetic focus by policymakers on combating both counterfeiting and piracy (Sell, 2010, p. 3). The policies that stem from anti-piracy efforts combined with the ease of digital production leads to the problem of "deprofessionalization of policy issues" (Braman, 2007, p. 162). "Deprofessionalization" refers to laws initially created for disputes between firms and authors expanding to prohibitions regarding individual behavior (Braman, 2007, p. 162). Digital copyright infringement in particular can lead to industrial-scale punishments for

small scale file sharing, and famously did so in the United States through dozens of lawsuits from the Recording Industry Association of America (RIAA) against individuals in the 2000s (Miller, 2005, p. 313). The lawsuits, such as the one against single mother Jammie Thomas, were viewed by many as disproportionate to the copyright infringements (Miller, 2005, p. 314). Thomas was originally fined \$222,000 for sharing two dozen songs on a file sharing network in 2008 (Henslee, 2009, p. 3). Deprofessionalization and other inefficiencies in the information policy models of the IP prohibition regime are symptomatic of the difficulties that the IPR GPR faces in exerting control over information flows.

Braman's (2007) research on information policy as a mode of power maintains that states in an information economy use information policy as a mechanism for structural power in society. Information policy is used to identify which communication technologies and what cultural content are commodities, which are public goods, which are restricted for use by governments, and which are inaccessible to individuals (Braman, 2007). Information policy guides the flow of communication and social interaction in global society. IPR are governed by information policies that are structured to regulate knowledge-based goods as strict commodities instead of public goods (Braman, 2007, pp. 177-179). The policies are also resistant to creating spaces for information as a commons instead of property. The emerging information policy regime is especially restrictive of open access to intellectual property because IPR underpin a significant portion of the information economy (Braman, 2007, p. 177). Additionally, communication technologies also make it easy for individuals to create, disseminate, and

manipulate information-based goods, so there is a push by policymakers to be especially restrictive of how individuals are allowed to interact with informational and cultural resources (Braman, 2007, p. 177). Copying and sharing knowledge-based goods is easier than ever before in an era of digitization, and collective authorship, wherein many individuals build on and distribute texts, is commonplace online. IPR holders are forced to cope with these challenges of individual distribution of copyrighted goods (Braman, 2007, p. 162). The ability of criminal sanctions and law enforcement to tackle complex rules and norms governing the exchange of information is made more difficult as the practice of individual information production is normalized and made increasingly simple (Braman, 2007).

Information policy research as articulated by Braman (2007) and liberal legal approaches to governing IP in a networked society typified by Benkler (2006) differ in many respects, but there is an overlap in the description of how communication technologies can disrupt the business models of IPR industries. The networked ICT approach views the Internet as the “communications environment built on cheap processors with high computation capabilities, interconnected in a pervasive network” that allows individuals to engage in the information production sector (Benkler, 2006, p. 3). Individual reproduction of content operates outside of the corporate control of information production. The inability to control individual reproduction leads to corporate pressure on policymakers to lock down intellectual property through policy that tightly controls the distribution and reproduction of creative goods (Benkler, 2006; Braman, 2007). The policymakers, in turn, designate forms of content reproduction as

cybercrimes. The next section details the interdependence of IP prohibitions and cybercrime law.

Cybercrime theory, international policing, and the IPR GPR. Enforcement measures are essential to the operation of information regulation. I focus primarily on digital copyrights here, so it is important to relate how digital copyright enforcement operates in a prohibition regime. Policymakers generally consider online IP infringement to be digital piracy, which is considered a type of cybercrime (Leman-Langlois, 2012, pp. 3-4). A widely accepted criminological definition of cybercrime is “computer-mediated activities which are either illegal or considered illicit by certain parties and which can be conducted through global electronic networks” (Yar, 2005, p. 409). Yar (2005) summarizes definitions and conceptions of cybercrime from across the criminological field, differentiating *computer-assisted* crimes like theft, money laundering, and fraud from *computer-focused* crimes such as hacking and defacing websites (p. 409). Digital piracy is further narrowed into the category of *cyber-theft* (Yar, 2005). The criminological category of cybercrime is differentiated from terrestrial crimes because of the technology underlying the Internet. The near-instantaneous communication between spatially distant individuals makes people vulnerable to “an array of potentially predatory others who have us within instantaneous reach, unconstrained by the normal barriers of physical distance (Yar, 2005, p. 410). Cybercriminals are also capable of reaching vast numbers of people through the network, and can maintain anonymity online (Yar, 2005, p. 411). For Yar and others that the author references in the criminological tradition, managing cybercrime is

difficult because of the structural properties of the network. The Internet allows easy reproduction and transmission of information, so it is difficult to control the flow of specific information—including copyrighted material—without altering the network in a way that infringes on socially legitimated normative behaviors (Leman-Langlois, 2012, p. 3). Critical criminological scholars also acknowledge that another major problem of managing cybercrime is that the criminal classification of many online activities is misleading and difficult to harmonize through international law (Leman-Langlois, 2012, p. 3). A challenge for criminal classifications of digital copyright infringement comes from the fact that information policy may overstate the commodified qualities of cultural goods and criminalize online activity that is not commonly perceived as illicit behavior (Leman-Langlois, 2012; Lemieux, 2010).

Critical criminological studies of crimes that occur through digital networks are circumspect of the definitions and discourses surrounding the criminalized online activities. The critical criminological research, typified by Leman-Langlois (2012) and Lemieux (2010), is skeptical toward the categorization of so-called cyber crimes. The overreach of IGOs and transnational police organizations in influencing information policy are also discussed in critical criminological research. Enforcement against digital crimes operate in an often extra-legal atmosphere wherein police use tactics such as surveillance, property seizures and arrests beyond their legal authority after the state, through its own initiative or the persuasion of others, determines that a practice—such as “cybercrime, cyberwar, cyberwar, cyberharrassment, cyberpiracy, cyberloitering”—is worthy of criminal status (Leman-Langlois, 2012, pp. 3-4). Unlike physical crimes, such

as breaking into someone's car, digital crimes rarely have tangible, immediately observable effects (Leman-Langlois, 2012, p. 3). The underlying assumption of digital crime is that people are criminally abusing the power of technology, but this assumption is often not shared by users of communication technology (Leman-Langlois, 2012, p. 5). Criminology research also flags the problem of legitimating laws that are not representative of social norms. For example, members of the underground "warez scene," who are often responsible for hacking into and redistributing copyrighted material, are geographically dispersed around the globe and rarely have an understanding of what laws they are breaking and what the legitimacy of those laws are (Leman-Langlois, 2012, pp. 5-6). Even when such users are in the same international jurisdictions—states linked through lateral agreements or regional harmonization—the criteria for what constitutes intellectual property infringement are increasingly broad and the objectives of the law are increasingly hazy. Towers (2011), in a study of how individual content reproduction becomes routine, notes that activities like digital file sharing and streaming content become habitual activities for many Internet users (p. 23). Even with the acknowledgement that these activities are criminal, there is a sense that the crime is of little magnitude: People engaged in file sharing and streaming often identify as ordinary Internet users participating in socially legitimated activities (Towers, 2011, p. 26).

Police organizations that enforce digital IPR are given their agenda from legislatures, executive bodies and IGOs intent on ratcheting up IP laws to protect multinationals and trade groups (Leman-Langlois, 2012, p. 6). Police agencies perpetuate the dominant

discourse about the threat of digital piracy and cybercrime and react accordingly (Leman-Langlois, 2012, p. 6). For example, Leman-Langlois (2012), using criminological theory to critique digital crime enforcement, evaluated a report from Symantec, a large security software association, which claimed \$388 billion annually in harms due to cybercrime (p. 4). Toward the end of the report, Symantec noted that it was counting “mere irritants” such as using someone’s unsecured WiFi network or receiving spam e-mails as cybercrimes (Leman-Langlois, 2012, p. 4). Symantec’s numbers are suspect, but reports such as theirs support the notion that cyber-theft is a social detriment. Beliefs about the nature of cybercrime are then engrained in the culture of law enforcement. Information is construed as a type of economic output no different than goods and services, and law enforcement adapts new forms of security and surveillance to restrict this theft (Leman-Langlois, 2012, pp. 5-6). The tools used to combat digital crimes are both online and physical, leading to a hybrid form of law enforcement that works diligently to enforce constantly evolving laws based around broad prohibitions that have little backing from greater society (Leman-Langlois, 2012, p. 6). International policing is based around the harmonization of enforcement measures (Lemieux, 2010, p. 5), meaning that digital surveillance and seizures, as well as physical efforts such as violent raids and extradition, are pushed by agencies such as Interpol, EuroPol, and the FBI as the global standard for digital copyright enforcement. Police organizations, then, become stakeholders in the governance of IP because the international harmonization of enforcement procedures is partially dependent on their standardization of enforcement.

International policing works most effectively by locating the commonalities in different criminal regimes, which is why various cybercrimes are often clustered together as one social, cultural, and economic threat (Leman-Langlois, 2008, pp. 4-5). The clustering of criminal categories is apparent in international trade agreements and U.S. and E.U. regulatory mechanisms that associate file sharing with terrorism, organized crime, and money laundering (Johns, 2012, p. 6). Police agencies also drive policy and encourage the international standardization of criminalization and policing: These agencies train national police officers to work with a set of standardized procedures such as surveillance, and then the national officers go home and persuade their governments to codify into law the procedures that were taught by the international police agencies (Lemieux, 2010, p. 5). Interpol, the international policing organization that facilitates other policing agencies (Andreas & Nadelmann, 2006, pp. 90-91), is often involved in these training programs. Interpol ran 83 cybercrime training programs to police from 169 countries in 2009 (Lemieux, 2010, p. 8). Officers in these programs learned to streamline their procedures with Interpol and how to approach certain crimes, including those related to intellectual property (Lemieux, 2010, p. 8). Interpol is also a prominent participant in anti-piracy and counterfeiting conventions around the globe and works with numerous stakeholders to develop IP crime databases (Sell, 2010, p. 14). Sell (2010), in the analysis of the upward ratchet of IP, notes that international police agencies are used as instruments of enforcement to advance U.S. and E.U. intellectual property norms around the globe (pp. 13-14). The police agencies also act as vocal moral entrepreneurs of maximalist IP policy and frame the threats of piracy and counterfeiting

as grave hazards to both the global economy and international security (Sell, 2010, p. 15).

International police agencies consist of vast bureaucracies that wield significant influence on trade agreements, treaties, and the global police force by coordinating with policymakers and setting international standards for crime control (Lemieux, 2010, p. 6). The agencies are designed to transcend national laws and governmental authority and strengthen the global enforcement of prohibitions regimes. Police play a central role in GPRs, and any call for IP regime reform or change must take into account the influence of international police enforcement on the structure of policy and law. The norms and principles of the IPR GPR empower international police organizations to enforce an agenda built around the commoditization of information. Intellectual property is a difficult policy area to effectively govern through a GPR, though, as the simplicity of sharing and copying through ICTs and the norms surrounding these technologies make criminal enforcement difficult. IP enforcement is critical to the international prohibitions, and political economic factors also contribute to the development of a fully realized prohibition regime for intellectual property. A criticism of the GPR model (Papanicolaou, 2008) and broader criticisms of regime theory in general (Strange, 1983, 1994) focus on the need for implementing political economic factors into regime analysis. The next section corrects for regime criticism utilizing political economic theory for critique and analysis of IP prohibitions. I also discuss A2K research as a tool for scrutinizing the institutions and structures that create and contest the future of intellectual property policy and enforcement.

Critiquing an IP Regime: Political Economy and A2K

This second section of the literature review evaluates two perspectives that are critical of global information policy and IP regimes. The two approaches—political economy and Access to Knowledge (A2K)—are used throughout the dissertation as means of evaluating resistance to the IPR GPR. Political economic and A2K criticisms are rooted in different traditions, but both are useful tools for criticizing information policy and prohibition regimes. The political economic critique is valuable because it illustrates how processes of commodification, the process of transforming things valued for use into things valued for their economic function, and spatialization, the way that capitalism transforms and improves the means of transportation and communication to reduce the time it takes to move goods and services (Mosco, 2009, pp. 127, 157), contribute to information policy that gives control of information to the elite at the expense of a broader public. The A2K critique is consistent with the framework of political economy, but focuses on access to knowledge, cultural goods, and communication as human rights. Both the political economy and A2K research focus on the loss of a digital commons to capitalist interests and both outline categories of stakeholders that conflict in the emergent information policy and IP prohibition regimes. However, the A2K approach has been criticized by Cohen (2012) as relying too strongly on the liberal legal paradigm that stresses law and the judicial system as mechanisms to protect the rights of individuals. In the discussion of A2K, I evaluate Cohen's (2012) corrective approach to creating A2K policies, but first, I explain tenets of liberal legal theory and compare it to a critical legal approach.

Comparing liberal legal and critical legal theory. Liberal legal theory prioritizes individual rights and considers the promotion of individual liberty and equality before the law to be essential functions of the state (Brown & Halley, 2002, p. 6). Within liberalism, the state and legal institutions are considered to be neutral entities that can be leveraged by liberal reformers to enhance personal and economic freedoms (Brown & Halley, 2002, p. 6). There are many liberal legal critiques of how the state and the law have oppressed individuals on the basis of race, class, gender and sexuality, but the solution to social oppression is found through corrective legal approaches that enhance equality before the law (Brown & Halley, 2002, p. 6). For liberal legal thought, equality in society comes from laws that are uniform, public and capable of being enforced (Unger, 1989, p. 20). The approach also presumes the existence of a legitimate democratic state that is capable of applying legal equality (Brown & Halley, 2002, p. 5). Legal equality will, as Cohen (2012) explains, create a balance of rights between rational, individual interests (p. 11). For digital copyrights, the balance means finding measures that can promote creativity and innovation without hindering freedom of expression and maintaining a degree of access to creative and scientific works (Cohen, 2012, p. 11). According to Cohen, the liberal legal objective is to balance the protection of private property—copyrights—with minimal interference into individual rights to expression or privacy (Cohen, 2012, p. 45). Cohen (2012) argues, however, that the state is ineffective at balancing rights and that liberal governance tends to protect private property above individual freedom of expression. Additionally, Cohen (2012) argues, states are subject to trade agendas and regulatory capture— instances where regulatory

agencies act on the concerns of the industries they are supposed to be regulating— inhibits their capability to enact equal application of the law (p. 45). I have identified through the work of Drahos (2002) and Thussu (2006) how the IIPA has large influence on the USTR and how TRIPS is international policy heavily informed by IP interest groups. The case analysis I conduct also relates the impact of stakeholder interests on international law, and a liberal legal critique of the stakeholder analysis would not be adequate to describe how power relations influence law within the international IP prohibition regime.

The critical legal analysis that I use to evaluate international IPR prohibitions is a critique, though not a complete rejection, of liberal legal thought. Critical legal thought views the law as a form of politics as opposed to a mechanism capable of the neutral arbitration of freedoms (Hunt, 1999, p. 355). The critique is founded on an understanding that liberal legalism underestimates the influence that social power structures, especially markets, have on the formation and enforcement of the law (Hutchinson, 1989). As Brown and Halley (2002) argue in a comparison of liberal and critical legal the notion of an egalitarian system of rights built through legal mechanisms is naïve because there is no substantial separation between the law and social power (p. 7). Brown and Halley (2002) note that critical legal thought does not always contain a wholesale rejection of the idea of rights to individual freedoms and equality, but rather recognizes that the notion of rights to liberty and freedom are often used by institutions to extend the power of the advantaged (p. 7). Critical legal studies is useful here because it recognizes that institutions and norms are, as Brown and Halley (2002) describe, at the

foundation of regulation (p. 7). Since regimes are comprised of norms and decision-making procedures in the form of institutions in which international interests converge (Krasner, 1983), critical legal analysis is useful for identifying and evaluating the stakeholder interests prioritized by the law in an IP prohibition regime.

Critical legal arguments also support dismantling institutions that privilege the rights of the most powerful state and market stakeholders at the expense of weaker groups within society (Duncan & Halley, 2002, p. 7). For instance, Freeman (1989) discusses how institutional racism in the United States is based on legal processes and systems of employment and contract rights that disenfranchise minorities. The solution to institutional racism, then, is not a neutral application of the law, but a disintegration of racist law altogether (Freeman, 1989; Hutchinson, 1989, p.7). A key difference between liberal and critical legalism, then, is based on critical legal scholars' tendency to view the law as part of the problem instead of the solution. In the next section, I expand on the critiques of social power found in critical legal thought through a discussion of the international political economy of communication.

Commodification and spatialization in the IP prohibition regime. This section begins with a explanations from the international political economy of communication in order to situate the roles of commodification and spatialization in the IP prohibition regime. The political economic discussion in this dissertation are sourced from Strange (1994) and Mosco (2009). Strange (1994) discussed the international political economy as concerning “the social, political and economic arrangements affecting the global systems of production, exchange and distribution, and the mix of values therein” (p. 18).

Strange's approach to the international political economy, which is based within an institutional approach to international relations, is centered on the human decisions and man-made institutions that affect global systems. The focus on values, norms, and rules is valuable to the GPR concept because it puts into perspective why social, political, and economic arrangements support prohibitions on particular activities. Prohibition regimes, following Strange, are a product of arrangements and values in global systems by institutions to enforce IP law. Narrowing from Strange's definition into the particular context of communication studies, Mosco's (2009) explains the political economy of communication as the "study of social power relations that mutually constitute the production, distribution and consumption of communication, or the social process of exchange of social relationships" (pp. 67-68). Mosco's definition is valuable here because it focuses on means of communication, which allows for a focused discussion of the political economic impact of ICTs and intellectual property. The role of ICTs and information policy in international society is a subject of much political economic literature (e.g., Mosco, 2009; Fuchs, 2008, 2011; Schiller, 1999). The post-industrial, information-driven form of capitalism that makes up the global economy is partially reliant on the manipulation of communication technologies by multinational corporations; communication technologies allow multinationals to accumulate capital by outsourcing labor and management functions worldwide (Mosco, 2009, pp. 67, 69-71). Once multinationals have a large enough presence within the global economy, they are able to overcome regulatory obstacles and integrate with regulatory systems that would otherwise inhibit their economic interests (Mosco, 2009, pp. 178-179). Mosco (2009)

argues that multilateral organizations such as the European Union and WTO—and by extension, TRIPS—are a reflection of the push for the global, liberalized trade agenda of the current international political economy (p. 177). Commodification, the process of transforming things valued for use into things valued for their economic function (Mosco, 2009, p. 127), is central to expanding the international trade agenda. May and Sell (2006), in a history of IPR, note how TRIPS expanded the commodification to eliminate access to information, knowledge and culture to public and potential innovators (p. 158). TRIPS, then, was part of an economic arrangement to expand the resources and influence of the IP industries within the international political economy. Political economic analysis from May (2003) and May and Sell (2006) assesses the expansion of IPR through TRIPS as a major development in the history of using intellectual property to enclose science, technology, culture, and information.

The concept of enclosure as a means for commodification is discussed by May (2000) in a political economic analysis of international IPR. In May's (2000) enclosure argument, information societies create new spaces for the commodification of knowledge (p. 43). The economic and social organizations of information societies work to expand and maintain the legitimacy of intellectual property through policy that characterizes knowledge as private (May, 2000, p. 43). May (2000) argued that IPR has long been a tool for the commodification of knowledge, but that the signing of TRIPS was a touchstone moment in the enclosure of information within digital networks (p. 49). Boyle (2008), while writing from a liberal legal rather than political economic perspective, also argues that the freedom of people to access knowledge and information

is curtailed by a new enclosure movement designed to capture resources (pp. 80-82). Enclosure is used in the international political economy to control the production, consumption and distribution of information in order to increase the economic returns of the IP industries. Enclosed information is part of a commodified space, and the new information commodities are protected by the state. The defense of informational commodities involves institutions that use moral and legal power to deprive individuals of information access (Andrejevic, 2013, pp. 154-155). The IP prohibition regime, as an enforcement mechanism for information policy, is one such agent for controlling and preventing access to information. Intellectual property prohibitions exist to guard enclosed spaces and protect commodified information and knowledge. The political economic critique of the IPR GPR, then, is dependent on the critique of the commodification of information. The discussion of E.U. IP policy in Chapter II describes how the European Union commodifies information and encloses access to knowledge through policy initiatives and directives. The case studies in Chapter III also reflect on the political economic consequences of enforcement and prohibitions arising in E.U. member states because of institutional, state, and corporate pressures. The analysis in the later chapters also relate to spatialization, the process that allows the IP prohibition regime to internationalize in the European Union.

Spatialization refers to the way that capitalism transforms and improves the means of transportation and communication, reducing the time it takes to move goods and services (Mosco, 2009, p. 157). International prohibitions are set into place to prevent illegitimate goods and services from utilizing the benefits of spatialization. Therefore,

the actors that can achieve the most power from spatialization are those that can define the legitimate use of goods and services. Since advances in the communication industry are central to spatialization, the multinationals that influence telecom and media industries are a central source of power in the political economy of communication (Mosco, 2009, pp. 158-159). Corporate concentration in the media industry allows companies to control production, distribution, and exchange of communication, as well as limit competition (Mosco, 2009, pp. 158-159). The concentration of corporate power also gives the private sector resources to affect policy (Mosco, 2009, p. 160). Corporate influence on regulation is not one-sided, however, and the state actively encourages the growth and self-regulation of the communication industry (Mosco, 2009, p. 175). Mosco's (2009) discussion of regulation critiques the concept of "deregulation" by arguing that when the state eliminates government regulation, it is actually expanding market regulation (p. 176). The expansion of market regulation can be construed as a form of commercialization, where the state replaces regulation designed to benefit the public good with market standards that emphasize private profits (Mosco, 2009, p. 176). The DRM protections of the DMCA and Information Society Directive described earlier in this chapter are a clear form of commercialization. The public good of being able to copy or share was invalidated by the market's right to lock down media through anti-circumvention technology. DRM puts the regulation of media under the supervision of content holders, and the market also regulates sectors of the telecommunication system. The commercialization of the Internet—that is, the market regulation of the Internet that prioritizes the profitability of digital networks—is part of the emerging information

policy regime described by Braman (2004) and enumerated in the previous section. Where state regulation of the Internet does exist, it is heavily influenced by market demands and recommendations. The IIPA's influence on TRIPS and the USTR's 301 report, described earlier in this chapter, is an example of the state regulating IP with the close assistance of industry. The IPR prohibition regime is a product of the constitutive regulatory agendas of the state and the market, and the regime is largely regulated through internationalization in the form of IGOs, supranational institutions, and trade alliances. Internationalization is a form of spatialization that includes the creation of regional and global organizations (Mosco, 2009, p. 177); GATT, the WTO, the World Bank, the United Nations and other international organizations discussed throughout this chapter are all products of internationalization. Regimes are also products of internationalization insofar as they are made up of international organizations and institutions working together to maintain common interests. The political economic perspective addresses Strange's (1983) critique of early regime theory as ignoring the role of the market in international relations (p. 352). The state and industry are primary forces in the development of information policy (Mosco, 2009, p. 178), and both state and industry are responsible for regime formation. Mosco (2009) also notes that the world's richest and most powerful regions exert the most control over global information policy, and work with corporate decision makers to create communication regulation (p. 178). The IPR prohibition regime was certainly launched by the United States, and the European Union's development of IP policy both internally and externally is an example of state and industry constitutively constructing regulation.

Spatialization is at the core of the European Union's common market initiatives toward intellectual property. The purpose of the common market is to eliminate barriers to trade and harmonize markets across the European Union (Dinan, 2010, p. 29). The various E.U. directives and policy initiatives discussed at length in Chapter II are designed to contribute to the growth of the common market. The European Union's information policy agenda is crafted to harmonize digital IP policy across member states and create a single framework for Internet regulation across the European Union (Burkart, 2014, p. 73). E.U. intellectual property policy discussed throughout the dissertation is often created through joint deliberation with E.U. leaders and the private sector with little to no input from public interest groups or NGOs (Burkart, 2014, pp. 40-41). The efforts to harmonize E.U. IPR through constitutive state and market action create policies that prioritize information policy as a tool for commodification. Fuchs (2011), in a critique of the political economy of media, described the type of information policy that occurs through constitutive state/market relations as prioritizing the need to exploit cultural goods and creative works in order to profit (Fuchs, 2011, p. 5). The prioritization of market interests creates a "field of conflict" that pits governments and media industries against A2K groups, activists and many individual Internet users (Fuchs, 2011, p. 5). The European Union's E-commerce initiatives illustrate potential areas of conflict in IPR. The European Union's revenue of online goods and services was €311.6 billion in 2012, and the European Commission outlined plans to double sales by 2015 (European Commission [EC], 2012a). Part of the European Union's plan to increase E-commerce revenues is to make it easier for police and copyright holders to

take down websites by imposing greater liability on Internet Service Providers (ISPs) and websites to police users and filter content (EC, 2012a). ISPs and websites are then forced to police the Internet by boosting surveillance and potentially violating the privacy of users. Larsson (2011a), in research critical of the European Union's IP agenda, describes the prevalence of mass surveillance in emerging IP policy to be part of a trend in increasing control over the flow of information online (pp. 28-29).

Fuchs (2008, 2011) is critical of state and market regulation that controls digital information flows and commodifies online spaces. Fuchs (2008) argues that ICTs, peer-to-peer technology, and social networks are capable of threatening the dominant economic order (p. 129). There is no need for the market distribution of information and knowledge when those two resources can be shared and copied openly online (Fuchs, 2008, pp. 132-133). States and industries act cooperatively to create information policy that gives the market control over the access and distribution of knowledge resources and communication technologies (Fuchs, 2011, p. 38). Information policy commodifies information, and enforcement mechanisms are put into place to protect the private property of corporations (Fuchs, 2011, p. 226). The European Union institutes heightened surveillance and DRM protections to enforce IP protection as police agencies broaden IP crime databases and bolster IPR enforcement. All of the increase in control and enforcement of information flows is driven by policy to grow markets and increase the profits of multinationals (Fuchs, 2011, pp. 225-226). Fuchs (2011) is concerned with the corporate influence on global information policy and maps trajectories of resistance. Fuchs (2011) argues that resistance to global capitalism comes from leftist alternative

media and politicized civil society organizations (pp. 318-322). An example of resistance would be Wikipedia's stand against the United States' Stop Online Piracy Act (SOPA). SOPA was a U.S. policy proposal that was designed to enhance copyright enforcement through increased surveillance and website blacklisting (Carrier, 2013, pp. 21-22). The legislation was criticized for being broad and vague in its proposals and a potential source of copyright overreach (Carrier, 2013, p. 30). In protest of the law, several websites staged a blackout (Netburn, 2012). Wikipedia, described by Fuchs (2008) as a non-commodified open content project (p. 133), was taking political action against the United States government. The anti-SOPA blackout was part of a larger, successful protest against the legislation, and it marked the emergence of Wikipedia as a political actor (Netburn, 2012). Fuchs (2013) labels both Wikipedia and WikiLeaks "shining beacons of a commons-based Internet and a political, networked public sphere" that exist in outside the realm of corporate media (p. 221). The two wikis are still heavily reliant on and limited by existing structures, though, and WikiLeaks in particular is reliant on traditional mass media outlets to distribute its journalism (Fuchs, 2013, p. 221). Both sites are part of a communicative commons that Fuchs (2013) argues is made up of noncommercial Internet projects, watchdog groups, public search engines, and digital rights organizations (p. 222). These noncommercial actors could—and, for Fuchs (2013), should—create coalition politics to reverse the capitalist takeover of the digital commons (p. 222). The case studies in Chapter III, which incorporate European policies similar to SOPA, detail the individual and coalition politics of the institutions that resist the European Union's common markets agendas of spatialization and commodification.

Political economy and the critical media and information approach are used as tools for analyzing and critiquing the systems that create international regimes and prohibitions.

Political economy is one of two approaches that I use to evaluate resistance to the IP prohibition regime. The other approach is the policy-based approach to IP reform, which I describe in the next sub-section through the context of the A2K movement.

A2K as a framework for IP policy. The literature describing the international regimes system and the political economy illustrate a trajectory of intellectual property wherein information is treated as a global commodity and is ever more tightly controlled through international organizations, trade agreements, and police groups. In information economies, IP is an underlying right that allows multinationals to maximize profits, and the social and cultural needs for access to knowledge are secondary to commodification. Supporters of Access to Knowledge view the current and emerging IP regime as “intellectual property absolutism” (Kapczynski & Krikorian, 2010a, p. 12; Drahos, 2012, p. 212), “information-as-control” (Cohen, 2012, p. 7), copyright “maximalism” (Samuelson, 1996), and similar descriptions that denote an abuse of IPR. By contrast, the A2K movement prioritizes the use of information outside the domain of intellectual property for the betterment of society (Cohen, 2012, p. 216; Kapczynski & Krikorian, 2010a, pp. 9-14). A core principle of A2K is that the expansion of absolutist IP policy is anti-democratic, restrictive (Kapczynski & Krikorian, 2010a, pp. 28-51), and an outright threat to cultural participation and creative practice (Cohen, 2012, pp. 69-70).

The normative critiques of IPR governance are abundant and diverse, and often conflict with one another over the nature of knowledge, information, property, and rights

(Correa, 2010, pp. 238-239). However, concepts such as the *public domain*, the *commons*, *sharing*, *openness*, and *access* are all part of a common language that makes up the political discourse of A2K (Kapczynski, 2010, p. 30). The conception of the public domain and the commons online is often based on an environmental metaphor (Kapczynski, 2010, p. 30; Boyle, 2008). Boyle's (2008) contribution to A2K stresses the importance of an ecology that encompasses the entire landscape of information, creative works, and knowledge (pp. xi-xv). The environmentalist metaphor—associating the informational, cultural environment with the physical environment—provides a framework for critiquing the abuse of IP as the abuse of the information ecology (Cohen, 2012, p. 4). The commons and the public domain are part of this ecology, and they should exist in equilibrium with IPR (Boyle, 2008, pp. 238-239). The public domain consists of creative works and ideas that operate outside of the realm of property, and is endangered by IPR's enclosure of creative works (Boyle, 2008, pp. 45-50). Proponents of A2K stress the value of the public domain as an asset to the public (Kapczynski, 2010, pp. 31-32). The free works provided by the public domain are at once important for creativity—as individuals are allowed to build on, perform, or alter works—and a public asset, as they are exempt from financial exchange.

The commons function alongside the public domain in the information ecology, and the environmental metaphor is expanded through a reference to communally shared and managed land (Kapczynski, 2010, pp. 32-33). The cultural commons consists of collectively governed and shared information, such as free, open source software (Kapczynski, 2010, p. 33). Unlike physical commons, the cultural commons cannot be

degraded via overuse, as the use of intellectual works by one person does not interfere with the use of the same works by another (Boyle, 2008, p. 68). Additionally, the belief exists that collective ownership regimes may be equal or superior to the individual rights guaranteed with intellectual property (Kapczynski, 2010, pp. 33-34). Benkler (2012), in a critique of legal approaches to the commons, argues that the enclosure of creative works through IP regimes leads to the “underutilization of information” (p. 228). Benkler’s underutilization of information thesis, when applied to the ecology metaphor, implies that overly protective rights regimes damage the cultural environment.

Cohen (2012) is critical of the environment/ecology metaphor and warns of the dangers of comparing culture with the physical environment, claiming that while scientists can make empirical statements as to what will be beneficial or damaging to the physical environment with certainty, evaluation of a cultural ecology is more relative (p. 8). Cohen’s approach prioritizes the cultivation of individual and cultural creativity over legal liberal notions of just distribution of knowledge. This cultivation approach to A2K supposes that the environmental metaphors offered by reformers and activists may be as misplaced or even as dangerous as the market metaphors applied to creative culture by IP absolutists (Cohen, 2012, pp. 8-9). The political economic binary of “freedom” and “control” in the debate between IPR critics and absolutists may be buried too deeply in liberal democratic thought and out of touch with the cultural, social, political, and technological systems that actually foster creativity (Cohen, 2012, pp. 28-29). Cohen (2012) argues that cultural play is an important part of a life well lived (p. 145); policy regimes should work to preserve the interplay of cultural practices and shape the social

geography in a manner that allows creativity to flourish (pp. 58-62). From a perspective that prioritizes the development of creativity and human culture, information policy in a digital environment should express the understanding that creativity is fostered through the self. Creativity does not occur in a vacuum of property or speech rights, but is, rather, dependent on the broader social and cultural landscape surrounding authors (Cohen, 2012, pp. 21-22). To create a just policy regime, information policy needs to create room for privacy and access to knowledge (Balkin, 2012, p. 103). Information policy also needs to focus on the privacy and access rights of individuals to the detriment of the same rights by corporations (Cohen, 2012, pp. 9-10).

While Cohen's cultivation approach is critical of the legal liberalism that surrounds A2K theory and activism, it still acknowledges a recognition of the need for people to access cultural works and artifacts in order to encourage practices that "allow human beings to flourish" (Cohen, 2012, pp. 42-43). Cohen's work is skeptical of policy models based around fostering a specific notion of a public domain or the commons because Cohen's theory of information policy focuses on preserving culture and human happiness more so than liberal legal and democratic processes. The narrative of *sharing* and *openness* that is common throughout the A2K movement is largely—though not completely—compatible with proposals to model information policy toward fostering human creativity and the development of the self.

The discourse of sharing and openness in A2K supports an argument that "the whole is greater than the sum of its parts" (Kapczynski, 2010, p. 35). IP regimes that focus solely on the relationship between an individual and a creative work lose sight of the

social, cultural, and technological norms and practices that inform creativity (Kapczynski, 2012, p. 35). For example, the open software movement demonstrates how sharing and collaboration can improve technologies and spur innovation through upgrading, modifying, improving, and developing software (Kapczynski, 2010, p. 36). Arguments from proponents of sharing and openness view the software as collaboration of shared knowledge, not as a commodity. As Kapczynski (2010) explains:

The demand for sharing and openness is thus also a demand that the ability to access and manipulate knowledge and information be democratized. What is being shared and opened is not just a set of commodities, but also the processes by which we communicate with one another and create together and the processes by which we act as citizens of our increasingly informational societies. (p. 36)

A2K researchers and activists hold that creative works should be viewed as processes of communication, as opposed to strict commodities. Additionally, access to knowledge is crucial in forming a democratic system that allows people to contribute to and benefit from culture fairly (Kapczynski, 2010, p. 38). People cannot contribute to the development of society and culture without access to the networks, resources, and tools necessary for cultural and social participation (Cohen, 2012, pp. 179-180). Beyond the realm of creativity, access is also important as a mechanism for distributive justice in society by ensuring that people are able to access scientific information and medicine (Kapczynski, 2010, pp. 39-40). In terms of copyright policy, A2K advocates argue that there is a moral imperative to improve the post-TRIPS IP landscape in order to better protect and cultivate open systems of knowledge and information sharing (Krikorian,

2010, pp. 86-87). Sell (2010) describes the A2K movement as important in limiting the influence of “IP maximalists” in intergovernmental forums that work continuously to ratchet up IP enforcement (pp. 2-3). IGOs, the United States, European Union, and police agencies like Interpol consistently promote TRIPS-Plus policies that heighten the global expansion of IP (Sell, 2010, pp. 2-3, 14). Policies such as TRIPS and TRIPS-Plus violate the social contract of copyright as a means to spur creativity and innovation by limiting activities such as library access to digitization projects or Internet users’ abilities to “remix” creative works (Franz, 2010, pp. 521-522).

Access to knowledge encompasses a legitimate set of norms and principles that its advocates claim should be pursued in human rights discourse (Kapczynski, 2010, p. 38). In terms of policy discourse, A2K’s major contributions come within the World Intellectual Property Organization (WIPO). WIPO is a UN agency founded in 1967 to protect, advance, and harmonize IPR (Netanel, 2009, p. 143). The agency oversees international copyright agreements and in 2002 extended digital copyright protection and DRM standards through the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (Tellez & Musungu, 2010, p. 186). After the ratification of the two treaties, WIPO continued to engage in efforts to create new rights for IPR holders in the digital environment (Tellez & Musungu, 2010, p. 187). However, aggressive outreach by pro-A2K civil society groups toward developing nation governments and WIPO began in 2004 to refocus WIPO’s agenda from “new intellectual property protection standards toward economic development and non-proprietary approaches to promoting human innovation and creativity” (Helfer, 2007, p. 1010). The move to an A2K-

supportive WIPO began when pressure from A2K-supportive institutions and developing nations prevented the ratification of a copyright maximalist broadcast treaty in WIPO that was backed by the European Union and Japan (Tellez & Musungu, 2010, p. 189). The highlight of the A2K agenda at WIPO came when Brazil and Argentina proposed the Development Agenda (Helfer, 2010, p. 1011). The crafting of the proposal began with a coalition of nations with similar concerns regarding the protection of public access to medicines being threatened by patent law, including Brazil, Egypt, India, and South Africa and grassroots organizations in those countries (Latiff, 2010, p. 101). The national coalitions were joined by A2K-supportive civil society and NGO groups such as *Medicins San Frontieres*, Knowledge Ecology International, and the Third World Network (Latiff, 2010, pp. 101, 109). The Development Agenda abandoned WIPO's IP-centric mission in favor of an approach to information and knowledge resources that recognized that, while IPRs can fuel innovation, creativity, and development, they often fail to do so (Netanel, 2009, p. 2). The supportive coalitions explicitly acknowledged the importance of A2K in both a developmental sense in support of access to medicine and technology as well as in the sense of developing creativity and innovation through reforming copyright standards (Latiff, 2010, p. 117).

The Development Agenda's proposal included the "Geneva Declaration on the Future of WIPO" written by civil society groups that urged WIPO to pay greater attention to the social and economic costs of IP protection, scaling back IPR through reform, and greater support of free and open software projects, distance education tools, and medical research tools (Helfer, 2007, pp. 1011-1012). The Geneva Declaration used

the language of human rights discourse and stemmed from the premise that “[h]umanity faces a global crisis in the governance of knowledge, technology and culture” (Geneva Declaration on the Future of the World Intellectual Property Organization, 2004, p. 1). Due to the size and influence of the coalitions supporting the Development Agenda, WIPO repositioned itself in support of a strong public domain and a rejection of absolutist IP policy (Netanel, 2009, pp. 2-3). The Development Agenda was ratified in 2007 after three years of deliberation. The finalized Agenda’s primary function is to apply empirical research and analysis to better understand appropriate approaches to IPR around the world and facilitate norms and policies that encourage those approaches (Netanel, 2009, p. 6).

Netanel (2009) describes the Development Agenda as part of a broader international rejection of the “Washington Consensus” that prescribes free trade and liberalization to development policy (p. 3). The World Bank and other economic forums began moving away from the Consensus in the early 21st century in favor of nuanced policy that considers local conditions, human rights, and social justice as part of generating economic growth (Netanel, 2009, p. 3). A2K advocates seized on the change in development policy to articulate to governments and IGOs the need for a robust public domain and national flexibility in defining and delimiting IP rights (Netanel, 2009, p. 3). The Development Agenda is widely regarded as a major victory of the A2K movement and an important counter-balance to TRIPS and TRIPS-Plus agreements (Latiff, 2010, pp. 99-101.) Parts of the initial proposal for the Agenda never made it through deliberations, though. The A2K Treaty is one aspect of the Agenda that was not ratified

(Helfer, 2007, p. 1012). The A2K Treaty offers specific policy proposals across the IP spectrum and was meant to be a counter-balance to TRIPS (Helfer, 2007, p. 1013). TRIPS' minimum standards for IPR were met by the A2K Treaty with maximum standards that would limit the ability of signatories to institute TRIPS-Plus proposals (Helfer, 2007, p. 1014). In relation to digital copyright law, the Treaty calls for limits to DRM protections, broad provisions for public access to information, and a ban on copyrighting databases (Treaty on Access to Knowledge, 2005, pp. 7-8). Though not ratified, the Treaty maintains support from A2K proponents and provides a clear outline of A2K policy discourse (Helfer, 2007, pp. 1013-1014).

The Development Agenda is an example of A2K success in the international arena and an example of how some governments and IGOs are beginning to reject the IP aspects of the Washington Consensus. At the regional level, a coalition of NGOs, civil society and trade groups, scientists, and businesses including Sun Microsystems and a political coalition organized by the Green Party defeated a proposal for new standards for software patents in the European Union in 2005 (Aigan, 2010, pp. 168-170). On a national and later regional level, the Pirate Party first emerged in Sweden as a reaction to the police raid of the file sharing website The Pirate Bay (Krikorian, 2010, p. 90). The Pirate Party has since won parliamentary seats in Sweden, the European Parliament, and across the European Union, establishing itself as a political party in support of access to knowledge, information, and privacy (Kapczynski & Krikorian, 2010b, pp. 377, 383-384). The Pirate Party, along with the coalitions that defended open software in the

European Union and changed WIPO's IP agenda, are part of the A2K collective that has emerged in opposition the absolutist IP policy agenda.

The A2K sector is primarily composed of political parties, social movement organizations, activists, and interest groups that support reforming IP to reduce restrictions on public access to information and knowledge. On the fringes of and intertwined with the A2K movement are radical actors that are willing to ignore or flout the law to further their goals. The fringe groups include file sharing sites like The Pirate Bay, stateless whistleblowing organizations like WikiLeaks, and countercultural hacktivist collectives like Anonymous. The Pirate Bay was the largest BitTorrent tracker in the world and was famous for its prankster ethos and crass rebuttals of legal threats from the entertainment and software industries (Andersson, 2013, p. 133). The international police raid that took its servers, the show trial of its founders, and the defiant persistence of The Pirate Bay's services sparked the emergence of many imitators and strengthened a file sharing ecosystem that is dismissive of digital copyrights (Andersson, 2013, pp. 133-134). Another provocateur of the digital commons is the whistleblowing organization WikiLeaks that achieved global fame after leaking footage of U.S. soldiers firing on innocents in Iraq. WikiLeaks is perhaps best known for its controversial founder and its leaks of the U.S. military and surveillance agencies, but the organization has played a crucial role in the success of A2K politics. Benkler (2013) describes WikiLeaks as being at the forefront of an interactive, collaborative "networked fourth estate" that bypasses traditional information gatekeepers (pp. 30-31). Leaked information can be especially useful to the A2K movement because IP law and policy is

often created opaquely between private and government actors with little or no input from public interest groups. WikiLeaks leak of the initial text of the Anti-Counterfeiting Trade Agreement (ACTA) revealed to the world the U.S. and European Union's push for graduated response policies that would ban users from the Internet for alleged digital copyright violations (Geist, 2010, December 22). WikiLeaks released diplomatic cables that revealed the extent of behind-the-scenes pressure by the United States on Spain to adopt new copyright policy. The Spanish case also details the protest politics of Anonymous, the leaderless hacktivist collective and another radical actor intertwined with the A2K movement. Hacktivist groups demonstrate political activity through collective action, but lack the focused political agency of traditional social movement groups (Burkart, 2014, pp. 32-33). Anonymous, which originated in 2003 as a collection of hackers engaging in light-hearted pranks around the web (Gerbaudo, 2012, p. 107), first became associated with copyright activism in 2010 when it took down the Motion Picture Association of America's and others' websites with distributed denial-of-service (DDoS) attacks in retaliation for legal action against The Pirate Bay (Zetter, 2014, sect. 2, para. 4). A similar, larger attack was launched later that year against credit card companies denying donations to WikiLeaks (Zetter, 2014, sect. 2, para. 4). Anonymous-oriented calls for engagement in street protests against the United State's Stop Online Piracy Act, ACTA, (Norton, 2012) and Spain's copyright reform laws (Postill, 2014, p. 5) also illustrate the collective's participation in A2K politics. Anonymous, like WikiLeaks, is far from solely focused on digital rights issues. These and similar entities, however, do play a role in the backdrop of the A2K movement.

A2K is best understood as a broad theoretical, political, and activist landscape of individuals and institutions that oppose the current IP regime as unjust and anti-democratic. There is no one solution or set of policies or ethics that are understood to fix the problem of the current global IP regime, and harmonization of the A2K agenda would likely prove as difficult as international harmonization efforts in general. There is, however, a general set of norms and values, including support for the public domain, the commons, sharing, openness, and access that permeates through A2K and aims to reform the norms and principles of the current international system of IPR .

Concluding the Literature Review

The purpose of the present literature review is to illustrate how IP prohibitions are incorporated into an international regime and to identify conflicts and disputes between stakeholders within the prohibition regime. The first section provided a background for the IPR GPR by tracing the history of the liberal regime in the world system. I then discussed a framework for information policy from Braman (2004; 2007) that describes how international policy is used to control the flow of information, knowledge and culture through digital networks. I also selected approaches from cybercrime theory from Lemieux (2010) and Lemay-Langlois (2012) that describe the role of police organizations in enforcing and standardizing the enforcement of IP law.

The second section of the literature review applies two frameworks of critique for international IP prohibitions. The first, the critique of the international political economy, addresses questions of power within regimes. The need to apply political economy to regime theory was articulated by Strange (2003) as a means of critically

evaluating the influence of the state and especially the market on regime formation. I apply Mosco's (2009) definition of the political economy of communication to analyze the prevalence of the commodification and enclosure of information by states and media industries. The constitutive relationship between the state and the market support international systems that harmonize IP law. The harmonization of IP law is a point of focus throughout this dissertation, and Chapter II describes how the European Union operates to spatialize IP standards throughout Europe. The European Union utilizes the GPR model within confines of its political, economic, and legal system to enforce the harmonization of intellectual property. The political economic critique that the international system favors powerful state and industrial actors and is damaging the digital commons is examined in Chapter III's case studies.

Both the potential enclosure of a digital commons and political dissent to IP regimes are addressed in A2K politics, activism, and theory. As described in the latter part of the literature review's second section, the A2K literature defends the qualities of a digital commons, a public domain, sharing, openness, and access to information (Kapczynski 2010, p. 30). A2K is similar to the political economic critique of IP regimes in that it is concerned with enclosures of information and the power of multinationals to shape policy, but A2K activists and supporters have approached IP reform within the legal paradigms of the international system. The WIPO Development Agenda and A2K treaties are clear examples of access to knowledge policy discourse that offer alternatives to the international upward ratchet of IP law. The application of the A2K agenda outside of WIPO is detailed in Chapter III's study of Spain's *Ley Sinde*. In that case, I analyze

stakeholders and evaluate the impact they have on policy at the Spanish and E.U. levels. A2K and political economy are applied throughout the dissertation to qualify stakeholders, analyze outcomes, and to observe social perceptions of the European IP prohibition regime.

Research Design

The research in this dissertation includes the literature review in Chapter I, the enumeration and critique of E.U. IP policy and procedure in Chapter II, and a series of case studies in Chapter III. The case studies apply the research from the first two chapters to cases in the European Union that deal directly with IP prohibitions and international information policy. The cases are concurrent with similar events occurring across the European Union in regard to the harmonization and enforcement of European IP law. The value of case study research is that it allows the researcher to obtain vivid descriptions of events as they occur both temporally and spatially, and to find causality through deductive reasoning and contextual evidence (Gerring, 2007, p. 184). Despite the importance of other areas of IP policy, I have chosen to focus on regimes guiding digital copyright for two reasons. First, to maintain an appropriate scope of research. This study is better served focusing on one aspect of IP—digital copyright enforcement—and not evaluating patents, trademarks, and physical copyright infringement. Additionally, as a contribution to the field of information policy, the study of physical infringement is outside the boundaries of this dissertation. Related to the issue of scope, I am aware that digital copyright is a feature of IPR. Enforcement and policy related across the spectrum of intellectual property and cultural goods will carry

over to particular aspects of this study, even if these outlying facts are not a point of emphasis. Secondly, digital copyright infringement involves both the problems of intellectual property and cybercrime, both of which are guided by policy related to information and communication technologies. As such, I am able to stay narrow in scope but broad in implication, as many GPRs in the 21st century rely on ICT policy.

I clarify and verify the arguments that I make about the nature and direction of enforcement regimes by observing, analyzing, and mapping the cases. I am using the case study method to gain insight into how GPRs guide information policy and to better understand what challenges the norms and principles of prohibition regimes offer to IP policy formation and reform. The case studies will demonstrate political, legal, and social relations within the prohibition regime and focus in particular on areas of contention within the regime. The literature in Chapter I discussing cybercrime, information policy, international political economy, and A2K and the research on democratic deficits and Europeanization in Chapter II indicate that social perceptions of IP prohibition regime legitimacy may be weak. Chapter III's case studies analyze critical claims of international IP systems to determine what effects prohibitions and enforcement have on the legitimacy of IP governance. Chapter IV discusses the effects of prohibitions and offers policy recommendations based on the observations of the European Union's utilization of the IP prohibition regime. The specific cases that guide the dissertation are overviewed in the next section.

Overview of the Case Research

In the case research, I offer a history of the international IP prohibition regime and two case studies that demonstrate the path of prohibitions in the European Union. I chose Europe's administration of the IP prohibition regime for several reasons. European nations have a long history of international copyright enforcement (Johns, 2011) and the European Union is currently striving to build a dominant information market that is competitive globally and consistent with the formation of its common market (EC, 2012b). The European Union is a TRIPS signatory and prioritizes a strong information economy (EC, 2012b). The European Union has launched directives requiring minimums for IPR enforcement that are similar to those in the United States, and several E.U. nations have established prohibitions on the digital sharing of information that outweigh U.S. standards. Burkart (2014) noted that the European Union may have surpassed the United States' embrace of ratcheting up IP policy because of the greater importance of international trade in Europe (p. 73). In addition to E.U. policy that increases and internationalizes IP prohibitions, the individual E.U. member states encounter lateral U.S. pressures to adopt higher standards of IPR. Researching the European Union, then, gives insight into international prohibition regimes by presenting the internal information policy processes within Europe, the lateral pressures of the United States, and the response of a region to TRIPS and TRIPS-Plus. The European Union is indicative of the emerging IPR GPR in both the industrialized and informationalized world, and the outcome over its intellectual property disputes will eventually influence trade agreements and international development (Netanel, 2009).

The cases selected to analyze the E.U.'s IP prohibitions were chosen because of their individual implications and because they are broadly applicable to situations occurring across the European Union during the same time period. The case research is conducted in the form of a critical history that begins with the launch of global prohibitions toward digital copyrights near the turn of the 21st century. After describing the launch of prohibitions, I provide the case of the file sharing site OiNK's Pink Palace. I address legal actions against the site for digital copyright infringement, including the removal of the website and the arrests of several of its operators and users. The second case documents the 2007-2014 formation and implementation of Spain's copyright reform law, *Ley Sinde*, to regulate digital copyrights.

Summary of the Case Analysis

The cases are prefaced with a discussion of the launch of international prohibitions on digital copyright infringement through several operations by U.S. law enforcement, Interpol, and national police forces. The operations were the first examples of international cooperation to enforce digital copyrights (Urbas, 2007, p. 20). International police cooperation in the operations is the result of years of building an IP prohibition regime through trade agreements, corporate lobbying, and lateral pressures from the United States (Urbas, 2007, pp. 17-18). The operations are important precedents in the evaluation of the rise of actual enforcement mechanisms that physically impose copyright prohibitions. After analyzing the process through which international digital copyright enforcement arose, I move on to cases that analyze how the European Union has adapted the IPR GPR to further common market goals.

The first case regards OiNK's Pink Palace, a file sharing website that was taken down in 2007 in an international European raid. Several administrators and users were arrested, but the cases fell apart due to the recording industry's insistence on trying the OiNK cases as criminal instead of civil (Wray, 2010, January 15, para. 5). The case was a major failure for the International Federation for the Phonographic Industry (IFPI) and increased calls among British politicians and the entertainment industry for harsher copyright legislation in the United Kingdom (Wray, 2010, para. 7). OiNK also illustrated the failure of prohibitions on digital copyrights when imitation sites popped up in the immediate aftermath of its demise (van der Saar, 2007, para. 1). For the timeline of the OiNK case, I use research from Sockanathan (2011) and Carraway (2010) and several news articles to map the timeline of the raids, seizures and prosecutions involved with the site. The value of the Pink Palace to this study is that it is the first major takedown of a file sharing site by U.K. authorities and it shows how early attempts at criminalization transpired among E.U. member states. The website's servers were raided internationally and several arrests occurred. None of the defendants were found guilty, however, and failure of the criminal infringement prosecutions led the entertainment industry to lobby for stronger IP laws (Wray, 2010, para. 7).

The second case is also noteworthy for the protests that it inspired in addition to new laws and policies for digital copyright protection that emerged in Spain. The *Ley Sinde* case demonstrates how anti-democratic information policy formation feeds into national perceptions of democratic deficits in the European Union and contributed to social unrest in Spain. The build-up to and aftermath of the *Ley Sinde* in Spain is also a prime

example of the ratcheting up of IPR legal harmonization and enforcement. In the case analysis, I explain the dynamics of IPR law in Spain, including an analysis of relevant court cases including *Promusicae v. Telefónica* and *Puerto 80 v. United States of America*, both of which deal with copyright enforcement in Spain. I also analyze how the U.S. government was revealed by WikiLeaks to be working closely in secret with the Spanish government to reform and strengthen its copyright laws (Horten, 2011, p. 177). The proposed law, known as *Ley Sinde*, forced ISPs to monitor customer activity, made civil claims against alleged infringers easier, established an IP task force and criminalized much online activity (Horten, 2011). The reporting of the law's ties to U.S. pressure coincided with economic frustrations across Spain and contributed to mass protests in the streets of Madrid and Barcelona (Slattery, 2011). Where the OiNK case is used to evaluate IP enforcement mechanisms in the European Union, the Spanish case is analyzed in order to evaluate the challenges of digital copyright harmonization across the European Union.

The purpose of the case selection is to evaluate historically significant instances of IPR policy development, enforcement, and activism that are representative of the IPR GPR. None of the cases exist in a vacuum, and their ties to information policy, past legal precedents, economic factors, and concurrent enforcement of digital copyrights are grounded throughout the study.

Collecting and Analyzing the Data

The data for this study are collected primarily through secondary sources. I examine policy documents and commentary, trade agreements, legal cases, economic data, and

statements and analyses from politicians, social movement organizations, police organizations, dissident groups, and private companies in order to map the actions and debates taking place within the cases. I also look to journalistic accounts in the form of press releases, news items, and investigative journalism in order to map a sequence of events relating to the cases. Specific data sources include the official E.U. website, <http://europa.eu>, which provides access to information published by every E.U. institution, agency and body about a range of issues affecting the European Union. I also evaluate texts of trade agreements and international disputes provided by industry and NGOs. For the Spanish case, I analyze leaked diplomatic cables from WikiLeaks, provided by <http://www.cablegate.com>. Official statements and reports from organizations representing intellectual property holders as well as law enforcement agencies including Interpol, Europol, and the FBI are included in the case research.

From the data, I determine relevant stakeholders and determine cost-benefits to stakeholders due to the nature of the prohibition regimes. I conduct a historical analysis and integrate a stakeholder analysis to reveal a narrative of events occurring in and around the cases. I utilize a critical legal framework that is expressly political economic and examines how law benefits the most powerful (Gordon, 1989, pp. 81-83), which allows the political economic critique of the IP prohibition regime to be integrated into the study.

I also apply Majchrzak's (1984) approach to stakeholder analysis by analyzing debates, conflicts, policy proposals, and results to determine the attitudes, interests, and motives of actors in the struggles over prohibitions. The power of each group of

stakeholders is analyzed through a description of available resources, the ability to mobilize and access to primary decision makers (Majchrzak, 1984, p. 77). Majchrzak suggests that groups of stakeholders are placed into a hierarchy, with the decision makers, usually representatives of the state, at the top, with others grouped on the basis of power and influence among the decision makers. This aspect of the stakeholder analysis makes it possible to look at the negotiation process of policy and to make normative assessments about the legitimacy of policy. The enumeration of stakeholders and their interests also allows the study to map the effects of prohibitions in terms of how well each policy addresses the social, political, and organizational contexts of intellectual property policy.

Significance of the Study

The primary purpose of this dissertation is to enhance the understanding of prohibition regimes, media law, and policy in order to analyze the implications of IP enforcement. This study's most significant contribution to information policy research is the application of the GPR model toward digital copyrights as a means of better evaluating the role of criminal enforcement and police organizations in digital copyright law. I conclude after the case analysis that study of the IPR GPR highlights an important aspect of digital copyright regulation; namely, that as international and national proposals for criminal enforcement of copyrights are failing to be enacted, police agency involvement toward digital copyright enforcement is increasing. Pro-A2K information policy proposals, then, must take into account the role of police organizations in enforcing copyright. Even though the arrests, raids, and seizures that police agencies

conduct rarely result in convictions, the intimidation of police enforcement is used significantly in the governance of the digital exchange of information and communication. The study, then, provides a unique contribution of policy analysis to information policy and media studies because it explores the influence of international police enforcement on policies and actions that are aimed at shaping social norms and principles regarding intellectual property and access to knowledge and culture. Other studies that incorporate a critical legal analysis of intellectual property, such as May and Sell's 2006 work on the evolution of global IP policy, Andersson's 2014 analysis of file sharing practices, cultures, and politics, and Burkart's 2014 work on the emergence of pirate politics, all evaluate the systems of power that underlie IP policy. This study builds on the critical legal analysis of IP policy with its emphasis on the police organizations that are tasked with enforcing copyright law. I argue, following Leman-Langlois' (2010, 2012) work on the political influence of international police agencies, that these organizations are also gaining increased influence in the construction of copyright policy. Police practices such as surveillance, standardization of law enforcement, and perceptions of criminal activity are all deeply rooted in the IPR GPR. This study is applying criminological analysis of international police agencies (Anderson, 1995; Andreas & Nadelmann, 2006; Lemieux, 2010; Leman-Langlois, 2008, 2012) to reveal how police influence IP law, strengthen prohibition regimes, endanger access to knowledge, and affect other potential problems related to the study of ICTs. The crime-and-punishment emphasis of police agencies is in direct conflict with the

A2K desire for Internet governance to incorporate openness, sharing, and cultural protections.

This research contributes to A2K discourse and the study on the political economy of communication by mapping the power relations in a struggle over information and communication technologies. I am specifically examining conflict over ownership and social norms in global capitalist society. This study contributes to knowledge on how global capitalism affects states, policy, law enforcement, and activism. The understanding of how commodification, digital enclosures, and internationalization affect policy and social conflict in an information regime are broadened in this study. Political economic studies from Fuchs (2011) argue that the Internet provides an outlet for people to leftist political organization, and liberal legal notions of the networked society claim that the complex, user-friendly nature of ICTs generates a state of conflict between citizens and corporations (Benkler, 2006). The assumptions of conflict and resistance are tested in this study with the analysis of information policy and enforcement. Furthermore, this dissertation makes a significant contribution to information policy studies by uncovering the instrumentation and consequences of policies designed to govern the behavior of individuals. Braman (2009) argues that effective information policy should take into account the constitutive nature of information, and this research analysis finds that policymakers take to crafting digital copyright law and how that approach and its consequences is experienced by civil society. Finally, this dissertation is valuable as a study of the democratic legitimacy of law and policy in the IPR prohibition regime.

Overview of the Chapters

The dissertation contains four chapters. Chapter II surveys and criticizes the history of information policy in the European Union. The purpose of the chapter is to illustrate the political economic and historical background of the cases. I review the European Union's directives related to copyright and explain how each one affects the E.U.'s goal of creating a competitive common market with a thriving information economy. I also discuss the concept of *Europeanization* as a driving factor for harmonizing prohibitions across Europe. Arguments about the critical role of Europeanization in the development of E.U. politics, policies, and institutions from Europeanization scholars including Bretherton and Mannin (2013), Pollack (2005), and Ladrech (2010) are enumerated. Policy harmonization, the fostering of a European identity, and the relationships of power between European Union and national leaders all underlie the development and reception of IP prohibitions in the European Union.

The historical analysis in Chapter II traces European copyright from the 19th century into the 21st and describes how the European Union works with multinational and regional media industry to craft directives and policy proposals. The history implements the historical narrative of Drahos (1999) and May and Sell (2006). For an analysis of E.U. development and processes, I draw from both government sources regarding IP law and directives available from the European Commission (EC, 2004) and critical policy analysis from Mazziotti (2008) and Agarwal (2010). I find through the historical analysis that the European Union has failed to implement criminal copyright enforcement across Europe due to civil society objections to proposed directives and trade agreements. Despite its inability to implement criminal prohibitions, the E.U.'s

leadership, particularly the European Commission, still supports an upward IP ratchet and persistently works toward stronger prohibitions. The historical description and the analysis of laws governing IP and ICTs inform the background of the case studies that appear in Chapter III.

The third begins with a summary of related information policy research from Sell (2010), Larsson (2011a; 2011b), Sarikakis (2012), Burkart (2014) and Andersson (2014) in order to situate the case studies both theoretically and historically. I then detail the critical legal methodology that I use throughout the study and address the framework of the stakeholder analysis that I use in the cases. The cases studies begin with a historical background of the IPR GPR's enforcement of digital copyrights and details several U.S.-led operations from the United States and international police agencies to crack down on digital copyright infringement through arrests, raids and extradition. The background culminates with a description of the MegaUpload raid, which was briefly discussed at the beginning of this first chapter. I argue that the MegaUpload raid and aftermath is unlikely to occur in the European Union due to its framework of civil liberties described in Chapter II.

I then begin the first case, that of OiNK's Pink Palace. The OiNK case demonstrates a disparity between users of file sharing services, who value OiNK as an elite digital music library and community, and law enforcement and the music industry, which frame the site as a criminal organization (Sockanathan, 2011). The OiNK case also shows the difficulty of prosecuting file sharing through criminal prosecutions. Despite the coordinated police raids and charges against OiNK's operators and some of its users, the

criminal charges were dismissed (O’Connell, 2007, p. 3). Additionally, multiple successful copycat sites emerged after OiNK was shut down (Jones, 2007). I argue that the lack of legal alternatives that offering the depth and quality of OiNK’s digital music library caused users to be dismissive of the legal mechanisms that shut the site down. I also note how the United Kingdom failed to implement its criminal copyright law, the Digital Economy Act, after OiNK was shut down but was able to create a new IP task force to combat copyright infringement (Solon, 2013). From the observation that the United Kingdom created a copyright task force, I suggest that copyright police that can shut down websites and arrest individuals are expanding even as legislation for criminal copyright enforcement is failing to gain traction in the European Union. I suggest that the strengthening of police forces without legal authority is indicative of the expansion of cybercrime enforcement that is integrated into the IP prohibition regime.

The final case in Chapter III is the most expansive. Spain’s *Ley Sinde* has been written about from multiple critical perspectives by authors including Horton (2011), Sarikakis and Rodriguez-Amat (2014) and Postill (2014). This study combines their criticisms and histories to trace a narrative of the case that focuses on the struggle over IP prohibitions occurring among E.U. institutions, national governments, the United States, IP industries, ISPs, A2K activists and economic protest movements. The case describes Spain’s implementation of E.U. E-Commerce and Copyright Directives and struggles with the USTR and the IPR industries. I also give a legal history of digital copyrights in Spain and discuss noteworthy legal cases over file sharing and enforcement. I note how the United States describes Spain as a rogue state in the global

prohibition regime and works closely behind closed doors to strengthen Spain's copyright issues. The pressures lead to vibrant protests from actors across the spectrum of the A2K movement and were eventually networked with Spain's massive protests regarding the 2008 global financial collapse (Castells, 2012; Gerbaudo, 2012). The protests and eventual weak implementation of the new copyright laws demonstrate the political economic limitations of the European Union, United States, and multinationals to impose policy changes on states and change norms and attitudes among citizens. In closing, I note that U.S. pressure on Spain to change its copyright laws is still strong and Spain is currently proposing a new round of copyright enforcement legislation ("Spain readies hefty jail terms over internet piracy," 2014, para. 1). The *Ley Sinde* case serves as a demonstration of the complications facing the prohibitions that govern IP in the European Union and elsewhere. The implications of the case are drawn into the discussion at the end of Chapter III, where I note that the case demonstrates the obstacles to the legitimacy of IP governance through a prohibition regime through the creation of democratic deficits that lead to strong objections and protests from stakeholders in opposition to stronger copyrights.

Chapter III's discussion reassesses the importance of the GPR model as a theoretical framework for IP enforcement and determines that GPR theory's emphasis on law enforcement agencies is extremely useful in analyzing information policy. Particularly, I argue that the impact of police organizations in the OiNK case and other police-led copyright operations demonstrates that IP research needs to focus more heavily on the role of police agencies and cybercrime enforcement in order to better assess the how

information policy is executed in international society. The discussion forms a bridge to the larger analysis found in the fourth chapter.

Chapter IV concludes the dissertation by revisiting the research question and the theoretical implications of the study and offering suggestions for future research. I address the research question with the observation that the legitimacy of IP law is complicated through global prohibition measures that rely on heavy-handed police enforcement, surveillance mechanisms and criminal law to enforce copyright issues. I revisit the A2K conceptualizations of the digital commons and the public domain to discuss how criminal enforcement removes the copyright regulation from a robust cultural debate and turns the intellectual property into strictly a matter of crime and punishment. I also observe how the IPR GPR is relevant to the discussion of commodification and spatialization as described by Mosco (2009) through continuous international efforts to harmonize copyright policy and enclose and commodify the digital commons. I argue that a more effective, legitimated measure for digital copyright policy would incorporate A2K-oriented suggestions to scale back criminal law and police enforcement and to encourage market innovations that can normalize the sharing of digital culture without compromising the economic interests of the United States or the European Union's common market. I close the dissertation by discussing the need for future research that should further investigate the role of cybercrime and police enforcement on digital copyright law.

CHAPTER II

THE EUROPEANIZATION OF INFORMATION POLICY

The protection and expansion of information commodities is critical to the E.U.'s information economy because of the importance of the IP industries to the European Union, which in 2010 provided 26% of its employment and 39% of its GDP (Office for the Harmonization of the Internal Market, 2013, p. 6). The growth of IP industries is advantageous to the E.U.'s common market, which is its system to eliminate barriers to trade and harmonize markets across the European Union (Dinan, 2010, p. 29). The power structure within E.U. institutions supporting purely economic approaches to IP governance are able to outweigh A2K principles toward networked culture and society. Due to the importance and influence of IP industries in the European Union, the European Union often governs intellectual property through the enforcement mechanisms of a prohibition regime. Chapter II, then, describes how the configuration of the E.U. institutions and their information policy agenda underlies European participation in the IPR GPR.

Defining and Conceptualizing Europeanization

This dissertation uses European cases to conceptualize broader global problems with information policy and prohibition regimes. While the cases do have global implications and inform international policymaking, they are specifically European, and this chapter describes some key components from the E.U. system of policymaking. The Europeanization of information policy and, more narrowly, digital copyrights, are

critical to understanding the case analysis in the next chapter. “Europeanization” here refers to the European Union’s effects on policies, politics, institutions, culture, and identity across the European Union (Sassatelli, 2009, pp. 1-2; Ladrech, 2010, pp. 7-10).

I use a broad definition from Europeanization studies that observes the process of Europeanization as one

of construction, diffusion and institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’, and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated into the logic of domestic discourse identities, political structures and public policies. (Ladrech, 2010, p. 15)

The strength of this definition is that it is not limited to state and legal institutions, and enables a description of how social and cultural norms are affected by European institutions. Prohibition regimes generally fail when the norms of the regime are not transferred to the populace (Andreas & Nadelmann, 2006, p. 45), and so an understanding of how E.U. policy affects the norms of citizens in member states is qualified throughout this study in the discussion of directives. The concept of Europeanization emphasizes the political and cultural effects of European integration and the social transformations that integration brings (Sassatelli, 2009, p. 1). A common theme in Europeanization studies is that the development of a European cultural identity and social norms complement the integration of European politics, policies, and institutions (Pollack, 2005, pp. 40-41). Shared cultural identity and European norms are important for the success of E.U. initiatives, as the European Union governs without any

claim to statehood and relatively weak coercive capabilities (Wallace, Wallace, & Pollack, 2005, p. 41). Shared norms are especially important in supplanting digital copyright standards across member states, since, as articulated in Chapter I, citizens have to socially accept the new rules governing online cultural exchange and access to knowledge. Particularly, Johns (2009, pp. 497-498) pointed out that various forms of media piracy would not have registered as illicit a few years earlier, and so states and IP industries must engage in vigorous antipiracy policing in order to shape individual behaviors. On a global scale, this police enforcement is coordinated between coalitions of multinationals, IGOs, and organizations like the Motion Picture Association of America (MPAA), the UN, and Interpol, respectively (Johns, 2009, p. 499). In the European Union, antipiracy efforts are also spearheaded by various layers of the political system.

The European Union is a partial political system that has little popular engagement outside of Parliament, which is perceived as relatively weak in comparison to the other branches of government and, as such, suffers from elections that are perceived as less important by voters and media (Wallace et al., 2005, p. 42). The most powerful officials are the indirectly elected Council of Ministers and the unelected European Commission (Wallace et al., 2005, pp. 42-43). The lack of representation found in E.U. governance contributes to democratic deficits that can cause citizens to question the legitimacy of the European Union (Mather, 1999, p. 278). Another challenge toward policymaking in the European Union is the lack of a shared identity across the European Union (Ladrech, 2010, p. 7). Fostering a European identity is complex because of the various governing

structures and cultures within the European Union, and the integration of E.U.-wide policies and cultural integration is generally measured by the “goodness of fit” between the European Union and national policies, institutions, and norms (Ladrech, 2010; Bretherton & Mannin, 2013). The goodness of fit relates to how different E.U. goals are than national goals, and how nations implement E.U. policies and suggestions; it is measured by analyzing the differences between an E.U. policy and national policies and norms, observing the national implementation of the European Union’s agenda, and then examining how effectively the European Union’s goals are implemented (Wallace et al., 2005, p. 40). The concept is important to this study because misfits have led to difficulties with the implementation of the telecommunication and IP directives discussed later in the chapter. In the case of IPRED, which I discuss at length later in this chapter, a misfit between national agendas and E.U. legislation led to uneven adoption of the directive among member states (Agarwal, 2010, p. 799). The difficulty in implementing IPRED underscored the problem of misfit and information policy. Copyright norms in particular have developed differently across European nations, and efforts by the European Union to harmonize standards to a questionably high degree of copyright maximalism are a difficult sell to nations that are trying to develop and protect their own cultural and economic interests. Outside of the IP arena, high levels of misfit between E.U. policy and a national political agenda has led to the non-implementation of agricultural reform in France and the Euro’s failure to be adopted in the United Kingdom (Bretherton & Mannin, 2013, p. 16). National leaders need to believe that by implementing E.U. policy, they will be in a better position to advance domestic goals at

the E.U. level, and E.U. policy breaks down at the national level when the costs of implementation outweigh the benefits (Ladrech, 2010, p. 51).

Europeanization can be conceptualized through “uploading” and “downloading” (Ladrech, 2010, pp. 7-10). Downloading occurs when nations integrate directives, laws, and suggested norms from the European Union, and uploading occurs when the European Union adopts precedents set by member states (Bretherton & Mannin, 2013, p. 11). A noteworthy example of uploading in the European Union that is relevant to the Spanish case study in Chapter IV is Germany’s push for anti-inflationary measures, austerity, and deregulation of labor markets as the E.U. solution for addressing the 2008 global financial crisis (Daehnhardt, 2011, pp. 36-37). The German-based measures were directed at Spain and led to social unrest during the timeframe of the *Ley Sinde* case. Uploading also stems from demands on member states that are made by the United States, global market forces, or other third party actors (Bretherton & Mannin, 2013, p. 16). In the realm of information policy, an example of uploading is the European Union’s information society directive (InfoSoc), which adopted anti-circumvention standards for digital media locks similar to those of the United States’ Digital Millennium Copyright Act (Mazziotti, 2008, pp. 181-182). Downloading is the standard practice of European integration, and occurs through the use of hard and soft policies by the European Union (Wallace et al., 2005, p. 182). Hard policies include directives that set minimum standard for policy adoption by member states, and soft policies include white papers, green papers, and other recommendations to nations that are not binding (Wallace et al., 2005, p. 182). Soft policies are indicative of the policy norms that the

European Union wants to standardize and it is not uncommon for language, goals, and metaphors that first appear in green papers to later appear in official E.U. documents. The process of Europeanization heavily favors the downloading model, as the ability of nations to affect E.U.-wide change is structurally limited. Typically, the executive body of the European Union, the European Commission (EC), passes policy proposals on to the Council of Ministers, which is made up of national executives, and the European Parliament (EP) (Ladrech, 2010, pp. 48-49). Negotiation and implementation of policy follows this process, which is criticized for “de-politicization,” or taking national interests and participation out of policy-making (Ladrech, 2010, p. 145). Political parties are then left without a voice on policy issues, which leads to a reduction in EP election participation among citizens who feel disenfranchised (Ladrech, 2010, p. 145). Simultaneously, national parliaments are weakened in the E.U. system because of their marginal representation in policies at the supra-national level (Ladrech, 2010, pp. 71-75). National courts are also influenced, though not mandated, by European Court of Justice (ECJ) decisions, and Europeanization in national law occurs through the implementation of ECJ precedents (Ladrech, 2010, pp. 129-131). For instance, the ECJ can settle disputes between parties that object to the implementation of directives in member states. Chapter III of this dissertation overviews the ECJ’s decision-making process through the example of *Promusicae v. Telefónica*, wherein the ECJ was referred by Spanish courts to decide whether or not Spain’s implementation of the E-Commerce and Copyright Directives was appropriate (Leistner, 2009, pp. 870-871).

A lack of democratic influence at the national level transforms the agendas and mobilization techniques of political parties, interest groups, and movements. Strategies that re-politicize policy issues and force the highest levels of the European Union to confront politics and national interests are desirable, and the Europeanization of political parties involves the adoption of these strategies. In particular, political agendas that are critical of the European Union's decision-making processes tend to be popular domestically, and so successful national parties are often vocally disapproving of the European Union's remote decision-making process (Ladrech, 2010, p. 131). Green parties in the European Union, for instance, link their core issues of social justice, environmentalism, and grassroots democracy with a critique of the E.U. policy-making process (Bomberg, 2002, p. 44). Greens also organize transnationally to successfully politicize issues such as opposition to genetically modified organisms and food safety (Bomberg, 2002, p. 34). European Green parties, which developed from environmental social movements, Europeanize by becoming competent in the workings of the European Union, forming coalitions, and adopting anti-integration positions; these groups often work with interest groups or social movements that share their positions in order to further their goals (Ladrech, 2010, p. 132).

Interest groups and social movements are Europeanized through a decision-making process that includes deciding how to best mobilize and use resources throughout multiple levels of governance. Resource rich business associations and corporations usually prefer to pool their resources at the European level where influence will be more resonant throughout the European Union, but they still target national capitals to a lesser

extent (Ladrech, 2010, p. 154). Conflicts over information policy reflect how interest groups prefer to promote policy interests. For example in a push for patent reform, the IP industry directly participated in drafting and consultation phases of the legislative process and directly lobbied prominent members of the EP (Haunss & Kohlmorgan, 2009, p. 116). This direct, traditional lobbying is in contrast to the mobilization tactics of the social movement groups that protested patent reform. Social movements have to overcome what Edwards and McCarthy (2006, p. 118), in a theoretical description of resource mobilization by social movements, refer to as resource inequality. Overcoming resource inequality for digital rights and A2K activists meant conducting media outreach, alliances with sympathetic software companies, grassroots lobbying, public awareness seminars, and academic research to stand against patent reform (Haunss & Kohlmorgan, 2009, p. 116; Aigrain, 2010, p. 169). Social movements rarely have the financial resources or political clout to directly lobby in Brussels to the extent that resource-rich industrial actors do (Ladrech, 2010, p. 155). To make up for this resource deficit, social movements will engage in grassroots organization and identify with local and national cultures through outreach and public media campaigns (Ladrech, 2010, p. 155). Protest politics are also a potential resource for social movements when they have no voice in decision-making (Wallace et al., 2010, pp. 155-159). In a breakdown of how social movement groups respond to Europeanization, Ladrech (2010, p. 158) refers to “Europrotests” as protests that are either directly targeted at the European Union or targeted at member states’ implementation of E.U. policies. An example of this type of protest comes from anti-globalization movements that form alliances across Europe and

lead protest marches through Brussels over issues such as agricultural policy (Della Porta, 2007, pp. 194-195).

Europeanization can resist more than just national policy and sometimes acts as a buffer against globalization: Europeanization is not simply the process of Europe being absorbed by globalization (Bretherton & Mannin, 2013, p. 10). E.U. privacy policy is a vivid example of European resistance to influential globalization procedures such as an E-commerce infrastructure that exploits surveillance. The European Union's 1995 Data Protection Directive asserts privacy as a human right and puts restrictions on the collection and access of individual data (Heisenberg & Fandel, 2004). Despite the initial protests of the U.S. government and multinationals, the European Union was able to implement its privacy policies and influence a global standard of data protection, analysis, and collection (Heisenberg & Fandel, 2004, pp. 120-121). The European Union's privacy policies most directly affect Europeans, but do provide a net benefit to foreign citizens by influencing multinationals to treat all personal data according to E.U. requirements (Heisenberg & Fandel, 2004, pp. 120-121). Data protection may potentially suppress the growth of the information technology sector that drives globalization, and so the European Union's directive places the right to privacy over the immediate priorities of global trade and information flows (Long & Quek, 2002, pp. 325-326). Europeanized privacy policy runs counter to the common assumptions of globalization, while also projecting the European Union's policy preferences abroad (Heisenberg & Fandel, 2004, pp. 127-128).

Where the European Union has resisted the marketization of personal information, it has embraced the information policy regime that transforms communication, information, and cultural products into commodities. The information policy regime enables the creation of global copyright standards, as described by Birnhack (2000). Birnhack (2000) argued that global copyright standards are the product of the international commodification of information and expansion of copyright law. Global copyright standards can only function with enforcement mechanisms and are the impetus for the IPR GPR. Global copyright is solidified through multi-lateral treaties, lateral pressures, and free trade agreements (Birnhack, 2000, pp. 505-506). Europeanization processes support global copyright standards through market regulation that strengthens the interests of IP industries. The European Union is not a passive agent in the acceleration of global copyright, though, and European copyright law does separate itself in areas where its privacy conflicts with IPR and in traditions such as moral rights. The next section of this chapter discusses how the European copyright system underlies, influences, and differs from the developing global copyright regime. It also describes the effects of Europeanization on copyright law, and how this situates the European Union in the IPR GPR.

The European Union and Copyright

European nations played a significant historical role in the evolution of intellectual property rights. This section that the European Union is expanding intellectual property in order to create an information society that enables the free movement of goods and services across European borders. The expansion of IP is part of the gradual expansion

of international IP prohibitions and global structures of capitalism, but the regionalized make-up of the European Union and the diversity of national information policy manufactures tensions in the growth of intellectual property standards across Europe. Information policy that enhances and harmonizes the IP systems of member states takes place through proposals and directives. These policies force member states to redirect state power in order to strengthen the market objectives of the European Union. State power includes market regulation, the legal system, policing, surveillance, education, and the distribution of rights (Fuchs, 2008, pp. 77-81), and all of these powers are directed by the European Union to promote the Europeanized information society. However, the effort at a fluid information society is complicated by the European Union's commitment to privacy, the difficulties of harmonizing policy across member states, the limitations of the European Union's powers, and A2K politics and activism. Despite these complications, though, the European Union still perceives the benefits of its commoditized information society as worth the costs, and continues to push for the maximization of IPR across member states. The most important directive in terms of implications for this dissertation, the 2000 European Directive on Copyright in the Information Society (InfoSoc), is described in the most depth at the close of the section.

The Berne Convention and the Formation of International IP Norms

European nations set the internationalization of copyright law in motion with an 1886 trade agreement, the Berne Convention for the Protection of Literary and Artistic Works (Johns, 2009, p. 284). The agreement is significant to the political economy of communication because it established the first major international copyright regime.

Berne is also significant to this study because of the aspects of copyright that it prioritized and the way that the signatories framed the IP debate. Prior to the agreement, national copyright systems were flourishing in European nations due to industrial advances in publishing (Drahoš, 2002, p. 32). Internationally, though, protections were not strong, and publishers throughout European nations were printing works from other nations (Drahoš, 2002, p. 32). Gradually, European nations began making bilateral agreements with one another to protect each other's copyrights and ensure the flow of royalties; this copyright cooperation across Europe eventually led to the Berne Agreement (Drahoš, 2002, p. 32). In the Berne negotiations, stakeholder discourse primarily focused on the "immutable rights of authors" and protecting works of creative genius, but the process was actually driven by the trade agendas and economic interests of the nations involved (Drahoš, 2002, p. 32.) The trade and economic interests underlying Berne expanded and safeguarded the flow of resources and commodities across Europe. Additionally, components of the modern IP agenda, such as minimum term limits and moral rights, stem from Berne. The terms of the treaty were expanded to eventually cover radio, cable, and satellite communications, which makes Berne the groundwork for the function of international IP trade (Drahoš, 2002, pp. 76-77).

The Convention created a multilateral copyright agreement that required signatories to recognize each other's copyright policies and to institute minimum copyright term limits (Drahoš, 2002, pp. 32-33; Khan, 2008, p. 58.) Revisions to the treaty would expand moral rights, or the ability of an author to control the modification of a work even when a work is licensed to a third party (Burger, 1988, p. 14). Copyright law

across Europe prioritized the rights and autonomy of the author and viewed the social benefits of the creation of art and scientific discovery as a positive side effect (Birnhack, 2006, p. 520). Moral rights are a distinctive policy from continental Europe, and were exported to Berne signatories and several nations globally (Drahos, 2002, pp. 32-33). In addition to establishing moral rights, Berne was also updated in the early 20th century to extend copyright protections to the life of the author plus fifty years. Those extensions would come to cover various new media as Berne was updated throughout the century to keep pace with technological developments such as recording and broadcasting (Burger, 1988, p. 14). Each successive draft and update of Berne brought with it higher sets of copyright standards (Drahos, 2002, p. 75).

Beyond Berne: Building Information Policy in the European Union

The Berne Convention significantly shaped the future of copyright law and demonstrated European nations' incremental harmonization of information as a commodity for trade. Until the late 20th century, Europe was at the forefront of implementing and exporting strong copyright laws. The United States, in the run-up to the WTO and TRIPS, eventually signed on to Berne in 1988 after a century of not being able to meet Berne's copyright standards and concern that Berne accession would violate the U.S. Constitution's standard of enacting copyright for the benefit of the public (Burger, 1988, p. 81). By then, the European Community was taking steps to compete with the United States in the information sector. A 1988 Green Paper, *Copyright and the Challenges of Technology*, focused on how the European community needed to harmonize national copyright policies and extend copyright protections for cable and

satellite services, emerging computer technologies, and databases (Seville, 2009, p. 24). The Green Paper expressed fear that digital copies could lead to piracy and concern with the advanced U.S. software industry, and debate over the paper led to a consensus that authors' rights and copyright term extensions should be addressed (Seville, 2009, pp. 24-27). The paper concluded that standardization of copyright policy was a "matter of urgency" due to advances in communication technology (Commission of the European Communities [EC], 1988, p. 200). The Green Paper was a blueprint for the future of IPR across Europe, but hard measures for implementation were not available until the early 1990s. The signing of the Maastricht Treaty and the formation of the European Union would grant the Commission power over IP law and the ability to negotiate treaties independently of member states and other branches of the E.U. government. The standardization of the European Union's intellectual property policy became part of the EC's mission to promote the common market through free movement of goods and services and free competition (Seville, 2009, p. 46). Copyright legislation in particular became a tool for fostering market integration (Seville, 2009, p. 46). Signing on to international treaties was also part of the effort to standardize copyrights. The European Union became a signatory to the WTO in 1994 and is also part of the 1996 WIPO Copyright Treaty. The European Union additionally began to pass directives and outline new policies in the 1990s that furthered IP expansion.

The 1991 Software Directive, for instance, creates a universal definition of software and extended Berne copyright protections to computer programs (Seville, 2009, pp. 27-28). This definition stresses "originality" and protects the rights of the program's

“author,” thus making moral rights the standard for software across the European Union (Mazziotti, 2008, pp. 47-48). Moral rights are extended by the Rental Rights Directive, which gives artists, authors, and performers some control over the rental and lending rights of their work. Copyrights were further strengthened with 1995’s Term Directive, which clarified, redefined, and standardized copyright limits across the European Union.

1995 was also the year that another government report, *Copyright and Related Rights in the Information Society*, laid the legislative groundwork for new copyright rules that would attempt to ensure that free trade across the internal market was not hindered by complications arising from digitization of existing works and online innovations (Commission of the European Communities [EC], 1995). The paper is a blueprint for a digital Europe and proposes ideas and directives that would build digital copyright rules and norms in the European Union. The 1995 government report called for copyright protections over databases, DRM initiatives, and stronger laws regarding online copyright infringement (Mazziotti, 2008, p. 51). The report also offered updated IP initiatives that were built around controlling digital technologies and harmonizing the laws surrounding them as they emerged and advanced across the European Union. Not long after drafting the 1995 report, the European Union enacted many of its proposals through adoption of the 1996 WIPO Copyright Treaty (Mazziotti, 2008, p. 51). WIPO, a UN agency, proposed the treaty to expand the Berne Convention to address digital IP; the treaty goes beyond TRIPS by requiring signatories to institute DRM initiatives to block the circumvention of locks on digital media (Birnhack, 2000, pp. 512-513). The

European Union passed two directives to comply with the WIPO Copyright Treaty, including the Database Directive and InfoSoc (Birnhack, 2000, p. 514).

The 1996 Directive on the Legal Protection of Databases, or Database Directive, defines databases as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means,” and gives database creators exclusive rights to reproduction, modification, and translation (Seville, 2009, pp. 43-44). Additionally, the Directive does not allow nations to use standards of originality to protect databases in order to make protections more expansive (Mazziotti, 2008, pp. 47-48). The Directive was widely criticized as being anti-competitive for facilitating expansive database protection, spurring monopolies of information, and failing at its primary goal of spurring database growth and innovation (Seville, 2009, p. 44). In addition to the Database Directive, another important directive guiding the European Union’s digital copyright standards is the 2000 E-Commerce Directive, which mimics U.S.-style safe harbor protections for Internet Service Providers (ISPs) (Seville, 2009, p. 48). These safe harbor protections prevent ISPs or websites from liability from information transmitted over their networks as long as the ISP or website is plausibly ignorant of any illegal activity being conducted (Seville, 2009, p. 48). When informed of potentially infringing activity, though, the content provider is required to proceed with a “notice-and-takedown” procedure that removes the content and notifies the Internet user as to why the content was removed (Seville, 2009, p. 48). Notice-and-takedown procedures are often critiqued because copyright holders can have content removed without legitimate claims to copyright infringement (Seville, 2009, p.

49). The importance of the E-Commerce Directive is stressed in Chapter III, where I describe how the music industry's complaints about the Spanish telecommunication sector's implementation of notice-and-takedown led to complaints from the IIPA and unilateral U.S. pressures toward Spain for copyright reform.

The European Union Directive on Copyright in the Information Society, or InfoSoc, was created in 2001 and implementation among member states was required by December of 2002 (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [InfoSoc], 2001, p. 19). In what would become commonplace with IP directives issued by the Commission, the EC came under intense scrutiny for being influenced by U.S. interest groups representing copyright industries, while ignoring or blocking input from the EP and member states (Hugenholtz, 2000, p. 501). Although InfoSoc was initially to implement treaties that the EC signed with WIPO, the directive went well beyond the parameters of WIPO's recommendations. The expressed goal of the directive was to create the "establishment of an internal market and the institution of a system ensuring" competition through the harmonization of the "legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property" (InfoSoc, 2001, p. 10). The harmonization of copyright was to "take a basis of a high level of protection" and member states were to recognize IP as an "integral part of property" (InfoSoc, 2001, p. 11). The two primary achievements of InfoSoc were the creation of a "right of reproduction" and the implementation of DRM standards. The right of

reproduction orders member states to provide copyright holders with the right to authorize or prohibit reproduction by any means or in any form, including written works, performances, music, film, and broadcasts (InfoSoc, 2001, p. 16). The right of reproduction, then, established guidelines for the presence of copyrighted works on the Internet.

InfoSoc provides optional fair use provisions for member states. An E.U. member is allowed to make exceptions for news broadcasts and services, libraries and museums, educational and scientific purposes, disability services, and an array of other non-commercial activities traditionally protected by fair use (InfoSoc, 2001, pp. 16-17). However, all fair use provisions are completely optional for member states (InfoSoc, 2001, p. 16), and InfoSoc provides guidelines for limiting copyrights in any manner. Additionally, the DRM provisions of InfoSoc trump fair use or other copyright exceptions (InfoSoc, 2001, p. 17). Member states implementing InfoSoc have to make the circumvention of digital locks illegal for any purpose except private, individual, non-commercial use (InfoSoc, 2001, p. 17). The DRM protections also outlaw both the behavior of the individual user that bypasses the locks and the manufacture of the DRM circumventing technology (InfoSoc, 2001, pp. 17-18). However, InfoSoc only offers broad definitions of circumvention and never states what anti-circumvention technology actually is. The directive states that “[t]echnological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorized by the rightholders” (InfoSoc, 2001, p. 14), but does not engage in any deeper analysis of what form the technological development will take. The broad

definitions throughout InfoSoc have led to uneven implementation of the directive (Mazziotti, 2008, p. 51). For instance, Danish law only protects anti-circumvention technology that prevents copying, so DRM that only prevents access is not protected (Mazziotti, 2008, p. 75). Additionally, Hungarian law ignores InfoSoc's demands that anti-circumvention is protected even in cases where copyrights are not violated and allows DRM circumvention for non-commercial use (Mazziotti, 2008, p. 75). The directive also fails to harmonize copyright across the European Union because it never defines standards of originality and allows member states to maintain their established definitions of copyrights (Mazziotti, 2008, p. 75). The directive also provides over 20 categories of optional exceptions for member states in regard to copyright and related rights, including the broadly worded "certain other cases of minor importance where exceptions or limitations already exist under national law" (InfoSoc, 2001, pp. 16-17). The many exceptions contributed further to InfoSoc poorly meeting its aim of a harmonized legal framework for copyright (Mazziotti, 2008, p. 113).

The primary problems with InfoSoc, then, was that there was too much involvement in its creation from IP industry stakeholders, too little representation in its creation from the EP and member states, and it was highly ineffective in its goal of harmonizing copyright policy. A broader criticism of InfoSoc, though, is of the directive's vision of increasing competition within the common market through a directive that implements DRM and commodifies the digital commons through restrictions on sharing and communication. As noted in Chapter I's discussion of DRM criticism from Litman (2001), Vaidhyanathan (2001), Lessig (2004), and May and Sell (2006), anti-

circumvention measures are argued to erode fair use and the digital commons by restricting access to information and culture. DRM standards are inherently anti-A2K because they erode access to knowledge by expanding private ownership and eroding spaces for public access. Competing visions of copyright call for more robust exceptions for fair use and the facilitation of a digital commons that is curated through greater consumer participation in the law-making process (Yu, 2006, p. 18).

Despite the criticisms, InfoSoc remains near the core of E.U. information policy and is in place along with the Software and Database Directives to expand property rights online. The European Union's information policy directives have expanded Berne to address computer programs, commercial databases, and DRM protections. Much of this policy-making was with the assistance of interest groups that lobbied the European Union to move beyond WIPO's IP standards and offer broad protections for IPR. The next set of directives and agreements discussed regard policymaking that uses the states' power of criminal sanctions, policing, and surveillance to protect IPR.

IPRED, IPRED2, and ACTA: Criminalizing IP Infringement

The Intellectual Property Enforcement Directive, or IPRED, dealt with the harmonization of IPR enforcement. IPRED was enacted in 2004 and is rooted in 1998 and 2000 EC reports that continue the argument that piracy and counterfeiting are looming and growing threats to the common market (Agarwal, 2010, pp. 800-801). These reports demonstrate the European Union's push for information policy that tightly enforces IP access. Through the 1998 and 2000 recommendations, the European Union was formalizing its mission to harmonize criminal IP measures through E.U. directives

and TRIPS-Plus trade agreements. The mission was implemented in the European Union with IPRED and later expanded to the global policy arena with ACTA.

The 1998 EC report states that even though piracy and counterfeiting are difficult to quantify, police and customs reports and estimations from professional organizations are evidence that the problem is increasing (EC, 1998, p. 9). Using the police and customs reports, the EC claims that 100,000 jobs were lost throughout the 1990s due to piracy and counterfeiting, and noted that the dangers to the audio-visual, software, and music industries are among the greatest (EC, 1998, p. 7). IPRED was an attempt to combat the loss of jobs and capital. The 1998 paper argued that the international community's efforts to fight counterfeiting and piracy were not enough and stronger enforcement was needed (EC, 1998, p. 2). The 1998 paper does distinguish differences in the severity of counterfeiting and piracy's origins and effects, but does little to distinguish different legal measures to combat the activities. Piracy and counterfeiting are lumped together as criminal activities that should receive the same legal treatment. Counterfeiting, the unauthorized replication of trademarks, labels, or packaging of goods for commercial profit (Agarwal, 2010, p. 801), is branded as an extension of organized crime that should be addressed with strong criminal and policing measures (EC, 1998, p. 2). Piracy, the unauthorized recording, copying, or broadcasting of an item protected by IP for the purpose of commercial gain (Agarwal, 2010, p. 801), is never expressly associated with organized crime, but the Commission also never disassociates piracy from the black markets that underlie counterfeiting. Piracy is thus implicated as a danger related to organized crime that must be stamped out with criminal enforcement measures. The

term “counterfeiting and piracy” recurs throughout the document, and the two are addressed as a joint economic and social problem. The social problems range from concerns that counterfeit medicines will endanger lives to the complication that counterfeited and pirated goods may be of an inferior quality and deceive consumers (Agarwal, 2010, p. 803). Discourse surrounding the social problem of inferior goods is evidenced in a 2012 press release from the European Police Office (EuroPol). The press release is in regard to EuroPol’s cooperation with the United States in Operation InOurSites, which is detailed in the next chapter as an international police effort to seize websites suspected of peddling infringing goods. EuroPol stated that the some of the websites it seized “duped consumers into unknowingly buying counterfeit goods as part of the holiday shopping season” (Europol, 2012, para. 2). Undercover agents purchased “professional sports jerseys, DVD sets, cologne, and a variety of clothing, jewelry and luxury goods from online retailers” before seizing the domains (Europol, 2012, para. 3).

The 1998 EC report also called for industry to monitor counterfeiting and piracy and for state actors to then build enforcement mechanisms around the industrial reports (EC, 1998, p. 16). The creation of enforcement mechanisms would include E.U.-wide financial support for training police and government agencies to combat counterfeiting and piracy (EC, 1998, p. 16). The paper also supported consumer education about counterfeiting and piracy (EC, 1998, p. 16). An example of the consumer education priority is evident in EuroPol’s aforementioned Operation InOurSites press release, which explained that when people visit the seized web domains they will “find a banner

that notifies them of the seizure and educates them about the federal crime of willful copyright infringement” (EuroPol, 1998, para. 7).

Beyond describing the economic and social need for new laws to restrain counterfeiting and piracy, the 1998 report also critiques TRIPS for giving too much latitude to individual nations in IP governance (EC, 1998, p. 20). The paper instead calls for increased international harmonization of criminal enforcement. The exemptions that TRIPS provides would be eliminated by the European Union, and criminal sanctions, injunctions, faster civil and judicial proceedings, international evidence sharing, and laws that force infringers to identify the providers of counterfeited and pirated goods would be standardized across member states (EC, 1998, p. 18-20). The TRIPS-Plus measures were formalized with IPRED.

IPRED’s initial goal was to end disparities in E.U. national enforcement and deal with the problems of piracy and counterfeiting through criminal enforcement measures (Agarwal, 2010, p. 797). IPRED included criminal sanctions for copyright infringement, but these were eventually replaced with civil and administrative sanctions due to the objections of several member states (Agarwal, 2010, p. 798). IPRED allows IPR holders to request the destruction of infringing goods and manufacturing operations, allows judicial injunctions on infringers, and provides rights holders with lost profits and legal damages in select cases (Agarwal, 2010, p. 798). The directive also promotes criminal enforcement measures such as search and seizure and freezing the bank accounts of those accused of infringing intellectual property and creates a “right of information” that requires ISPs to reveal information about alleged infringers to rights holders (Hinze,

2004). IPRED applies to “any infringement of intellectual property rights” and fails to distinguish between intentional commercial infringement and unintentional noncommercial infringement (Agarwal, 2010, p. 799). Furthermore, the mere charge of infringement is enough to activate IPRED provisions, so alleged infringers are considered guilty until proven innocent (Hinze, 2004). Partly because of the law’s breadth and lack of well-defined terminology, IPRED still has not been implemented among several member states (Agarwal, 2010, p. 799): Only five member states implemented the law by its 2006 deadline (von Ahsen, 2012, p. 5). However, the directive is still in effect and eventual adoption is mandatory across the European Union. Though the original intent of IPRED—uniform criminal measures against IP infringement—was initially rejected, the European Commission is still driven by the criminal measures agenda outlined in the 1998 Green Paper. It is also notable that IPRED, like any E.U. directive, only sets minimum standards, and member states are allowed to go beyond the directive. Indeed, with the European Union’s push for tighter IPR controls and the ideology on display in the Green Papers, member states are encouraged to surpass IPRED. The legislation is a potential stepping stone for criminal measures.

The sequel to IPRED, IPRED2, contains the reintroduction of greater criminal sanctions toward copyright violations. The directive was defeated at the EP level and has yet to be re-introduced (Logan & Burkart, 2013, p. 70), but it is significant because it signifies the continued efforts and failures of the EC to create criminal copyright prohibitions. The directive was resisted by the telecommunication sector, auto-parts

makers, generic drug makers, and civil society groups ranging from librarians to open software groups (Foundation for Information Policy Research, 2006, para. 2). As with previous copyright directives, the IP industry worked closely with the Commission in drafting the criminal measures that appear in IPRED2 (Shadlen & Haunss, 2009, p. 118); the International Federation of the Phonographic Industry (IFPI) used direct lobbying to encourage an expansive criminalization of copyright infringement that included file sharing (Shadlen & Haunss, 2009, p. 118). IPRED2 is justified under the premise that IP infringement is detrimental to the economic and social well-being of the European Union and criminal sanctions are necessary to protect from infringers (Agarwal, 2010, pp. 802-803). The text of IPRED2 situates TRIPS as a starting point for IP harmonization, and states that IPRED is valuable but that criminal enforcement is necessary (EC, 1998, sect. 2, para. 4). IPRED2 was approved by the European Parliament and passed on to the EC in 2007, but the directive became sidelined due to accusations from civil liberties groups and member states that the criminal enforcement measures required by the legislation overstepped the power of the EC to regulate criminal law in member states (Foundation for a Free Information Infrastructure, 2005).

The proposal was also greeted widely with protests and questions as to the EC's authority and competence in matters of legislating digital copyrights. Initial drafts criminalized "any intentional infringement of an intellectual property right on a commercial scale" and offered up to four years imprisonment for an individual violation (Agarwal, 2010, p. 808). IPRED2's opposition argued that the terms "aiding," "abetting," "incitement," and "commercial scale" were ill-defined and ripe for abuse

against individuals (Agarwal, 2010, p. 810). There was also concern over the authority that IPRED2 gave rights holders to pursue litigation and criminal investigations. In particular, it was unnecessary for a complaint to be filed in order for a case to begin, and member states were required to allow IP holders to assist police authorities in investigations (Agarwal, 2010, p. 808). The proposed text of the directive suggested that it was necessary to have rights holders involved in investigations because intellectual property infringement investigations are “very difficult” to carry out and so there is a need for “the active participation of the victims, or representatives” of the rights holder to confirm that goods are counterfeited (EC, 2005, p. 49). There was also continued concern by IP experts within member states as to whether or not the European Union had the authority to order member states to impose criminal sanctions on copyright (Agarwal, 2010, p. 811).

All of the problems enumerated above regarding IPRED2’s criminalization efforts led to their eventual sidelining (Jyrkkiö, 2010), but the legislation remains noteworthy for its expansive aims and for the struggles that it produced within international civil society and the E.U. legislature. Interest groups and social movement organizations remained at the center of the criminalization debate in the European Union, and both multinational media industries and A2K advocates used lobbying, political influence, legal arguments, and public discourse in the struggle over information policy. While the European Commission would like to impose standards for criminal liability for copyright and trademark infringement, criminalization is, as Chapter III’s discussion of Spain’s *Ley Sinde* law attests, a controversial issue among some member states and not an easily

Europeanized legal norm. The European Union would likely prefer to increase criminal measures to stay in sync with the United States, which views such enforcement as a strong priority (Weatherall, 2011, p. 868). The United States codified criminal liability to Internet users accused of infringement through the No Electronic Theft Act of 1999 and has worked, with mixed success, for the global expansion of criminalization; for example, in 2009 the United States lost an argument before the WTO that China's thresholds for criminal liability for counterfeiting and piracy was in violation of TRIPS (Weatherall, 2011, p. 868).

Frustrations over the perceived shortcomings of TRIPS by the United States and the failure of intellectual property directives in the European Union led to a movement toward the internationalization of new TRIPS-Plus standards. The proposed Anti-Counterfeiting Trade Agreement (ACTA) was one such TRIPS-Plus agreement that was met with protest and eventually sidelined. ACTA was initially proposed by the United States Trade Representative to curb global counterfeiting and piracy (USTR, March 2010). The trade negotiations initially included the United States, European Union, Japan, South Korea, Canada, New Zealand, Singapore, and Morocco (EC, 2010). The goal was to create a global coalition that could sufficiently police counterfeiting and piracy more broadly than TRIPS or WIPO (Weatherall, 2011, p. 843). ACTA was criticized by social movement and political activists across Europe for its secretive development, adherence to corporate interests, and anti-A2K policy measures (Burkart & Logan, 2013, pp. 72-73). Its most controversial policy measures included graduated response laws, which ban Internet users for alleged infringement with little or no judicial

oversight; these policies order ISPs to ban Internet users at the behest of third-party copyright holders (Burkart & Logan, 2013, p. 72). Reaction to the graduated response model was large part of what drove the ACTA protests. Another component that fuelled the protests was that ACTA fit into the narrative of democratic deficits facilitated by an overreach from Brussels (Burkart, 2014, p. 14). The trade agreement was eventually rejected by the EP under the weight of the political protest (Burkart, 2014, p. 13). As with IPRED2, the criminal enforcement measures supported by ACTA were unable to be legitimated internationally and represent the structural challenges to implementing digital copyright prohibitions on an international level.

ACTA and IPRED2 represent the problem of the lack of democratic representation in information policymaking and showcase the difficulty of IP governance through international institutions. The lack of democratic support for the maximization of IPR leads governments to supranational law and policy that is often constructed in secret and side-by-side with IP industries. International information policy becomes a tool for redirecting the power of the state toward the enforcement of global capitalism and the specific interests of multinational corporations. With both ACTA and IPRED2, the level of misfit was too high for either effort to be successfully implemented on an E.U.-wide scale, but many of their aims have been taken in at the national level. The United Kingdom and France have both implemented InfoSoc and IPRED with legislation that goes well beyond either directive. Both sets of law could potentially ban people from the Internet over alleged digital infringement and fund mandatory so-called piracy education programs (Ryan & Heintl, 2010). These national laws do have international

implications, particularly when the USTR pressures other European governments, including Spain, to adopt the French and British standards (Hinze, 2010, para. 3).

ACTA fell apart in Europe due to activist coalitions, street protests, and political coalitions in the EP, and IPRED2's failure was based on the inability of the Commission to institute ill-defined criminal sanctions across the European Union. Both faced opposition from A2K organizations and activists and the telecommunication and technology sector, and in these cases, the opposition was enough to temporarily slow the growth of IP prohibitions. However, A2K activism and objections from the private sector are often not enough to stop the escalation of the law, especially when the policy agenda is transformed from one of intellectual property to one of national security. The Data Retention Directive was passed in 2006 in a rush to enhance security after the 2004 bombing in Madrid, and was passed despite massive protests at the national and E.U.-levels (Larsson, 2011a, p. 46). The directive mandated that telephone companies and ISPs retained all user data in order to use that data to stop "serious crime" (Larsson, 2011b, p. 20). The definition of serious crime is left to member states, however, and the European Court of Justice has ruled that the Data Retention Directive's "serious crime" requirement does not preclude member states from passing laws that force ISPs to supply information about subscribers that have allegedly infringed copyright (Crijns, 2012). The Data Retention Directive is a piece of the expanding boundaries of cybercrime discussed in Chapter I and further examined in Chapter III's discussion on international police enforcement of IPR. The Directive is an example of a piggyback policy in which law and legislation meant to deal with issues such as terrorism, child

pornography, organized crime, or counterfeit drugs is affixed by IPR holders to increase prohibitions related to digital copyright infringement. Piggybacking is a danger in broad directives and trade agreements that seek to prohibit a wide range of behaviors with criminal remedies, as evidenced by the interest group lobbying that occurs to keep digital copyright infringement as a major component of these policies. The Data Retention Directive was ideal for piggyback policy since it was rushed through on the heels of terror and was marketed as a remedy for more substantive security goals than IPRED2 or ACTA.

The success of the European Union's efforts at Europeanizing copyright infringement through soft and hard policies has been mixed, but the European Union is clearly gradually moving in the direction of more copyright maximalism. The prohibition regime on digital copyrights is difficult to implement across the European Union due to hesitancy to grant the European Union the authority to impose criminal law, social movement groups that effectively articulate A2K priorities, and privacy norms in the European Union. The Data Retention Directive did manage to remove layers of privacy protection in the European telecommunication system, however, and individual nations including the United Kingdom and France have embraced criminalization through national laws including the British Digital Economy Act and the French HADOPI, which are discussed in the next chapter. In the next section, I conclude with a description of the trajectory of European copyright standards and enforcement.

European Copyright Law and the Limits of the IPR GPR

Birnhack (2000) described the expansion of global copyright standards as “emerging from a few mega-corporations that captured international organizations and managed to channel their business models through international treaties, provisions of which would later be incorporated into national legal systems” (p. 494). The business models are then protected by the state. The capitalist ideology that underpins the internationalization of copyright standards views efficiency of the free market above all other priorities, including speech and privacy (Birnhack, 2000, p. 494). The regime consists of multi-, bi-, and unilateral treaties and agreements that broaden the scope of IP and enhance enforcement. The European Union is a structural component of this regime as a signatory of TRIPS and WIPO’s copyright treaties and through its promotions of TRIPS-Plus agreements like ACTA. E.U. policy works to further commodify information, culture, and communication by expanding IPR and enhancing state and private enforcement of the law globally and regionally. At the regional level, the European Union acts through mandates and directives handed down to member states. For the European Union to speak with one voice to other nations, IGOs, and corporate stakeholders, it needs copyright harmonization among member states. The challenge for European copyright standards, though, is Europeanizing copyright norms in several different member states populated with citizens that often distrust the European Union’s legitimacy. The importance of privacy in the European Union makes digital copyright law, which relies on data collection and surveillance, difficult to impose on member states. The same EC that wants to criminalize digital infringement and give ISPs the

responsibility to police users is the legislative body that supports a “right to be forgotten” online (Rosen, 2012, p. 89). This right theoretically forces private entities like Google to remove all digital references of an individual from the Internet (Rosen, 2012, p. 89), and was put into practice in 2014 after an ECJ ruling (Arthur, 2014). Strong privacy norms were uploaded from European nations into the European Community from its earliest days, and these values complicate the push for increased prohibitions over online activities. European copyright ambitions, then, are marked by an impetus to criminalize digital infringement and allow the private sector to take a prominent role in targeting Internet users, but are also bound by a need to honor the privacy of European citizens. In this system, free speech is secondary to free trade, but privacy is still a valued human right that has its place in the European Union’s vision for an information society. Privacy is a structural constraint to the expanded commodification of information and culture in the European Union. The process of balancing European norms of privacy and speech with restrictive copyright policies are difficult, as shown through the difficulties and barriers facing some of the policy proposals by the European Union described in this chapter.

Jakobsson and Stiernstedt (2012) argue in a political economic assessment of E.U. media policy that media policy discourse in the European Union is beginning to reject the assertions of media industries that stronger copyrights are necessary to protect creativity and economic interests (p. 51). The authors describe the practice of digital enclosure as a state and corporate effort to expand private rights into the cultural commons and “enclose, privatize and commercialize” online social production through

policies that define the Internet as an economic platform (p. 49). The authors acknowledge WIPO's role in resisting the enclosure of the commons, but take account of other stakeholders, as well. For instance, the Computer & Communications Industry Association, a trade organization that includes Facebook, Google, and Yahoo, actively supports more flexible digital copyright standards (Jakobsson & Stiernstedt, 2012, pp. 51-52). At the E.U. level, Jakobsson and Stiernstedt (2012) are encouraged by E.U. politicians and propose legislation that emphasizes the need for openness as opposed to enclosures in expanding the economic opportunities of the European information economy (p. 52). Jakobsson and Stiernstedt's assertion that E.U. media policy is on a path toward innovative reform rather than upward to maximalism may be overstated when contrasted with E.U. policy increase of European IP prohibitions, but their assessment is nevertheless important in identifying the European Union's structural constraints in advancing surveillance, digital enclosures, and criminal online copyright enforcement. The European Union has strong civic norms toward the protection of privacy and data retention that may constrain its ability to enforce maximalist digital copyright laws. A *Wired* article on the influence of the Pirate Party's political platform, for instance, reported that the European Union is turning a corner in its emphasis on civic concerns within information policy: The report itemizes a series of events including the establishment of net neutrality, British copyright reform, the defeat of the TRIPS-plus trade agreement ACTA, greater protections against Internet bans, and new privacy protections that indicate a pro-A2K direction for European information policy (Geere, 2014). I argue in the case analysis that emerging, A2K-influenced policies in the

European Union may only be an obstacle for IPR prohibitions, as the structures and institutions that support maximalist IP law are still in place and influential in Europe. The stakeholders I identify in the analysis are still pushing for anti-A2K policies in the IP sector, and I determine in the case analysis that while the forward trajectory maximalist copyright policies have been tempered at times, the so-called “range wars of the Internet” (Boyle, 2009, p. 31) over digital copyrights are ongoing. The E.U. information policy research that informs the case studies offer perspectives into these range wars.

The criminalization efforts and heightened importance of copyright protections in the European Union differ dramatically between member states, and this disparity leads to problems like the slow adoption of IPRED. Additionally, the political and social protests that derailed IPRED2 and ACTA, and that met the Data Retention Directive with mass protests, are evidence of obstacles that prevent the European Union from being able to fully commit to a prohibition regime on IPR. There is resistance to criminalization measures throughout Europe to a greater degree than is seen in the United States (Weatherall, 2011, p. 849), and the question of the European Union’s authority in such matters is contested (Agarwal, 2010). On the other hand, EuroPol already coordinates with the United States and other governments in censoring websites that are alleged to promote copyright infringement (Europol, 2012) and individual nations including the United Kingdom and France are more than ready to embrace prohibition models to deal with digital copyright infringement (Burkart & Logan, 2013, pp. 73-75). In addition to passing criminal measures in its InfoSoc adoption, the United

Kingdom has also interpreted its extradition treaty with the United States as permission to extradite citizens for inducement to infringe (Prodhan, 2012). Other member states, though, are more hesitant or outright resistant to maximalist digital copyright policy. One of these hesitant nations is Spain, whose difficulties in adopting IP prohibitions are described in Chapter III. The next section reviews the complexities of Europeanization and serves as an introduction to the third chapter.

Conclusion

Europe's long and influential history in the creation of IPR is rooted in the Berne Convention and the development of intellectual property rights throughout the 20th century. Leading into the 21st century, discrepancies remain in regards to the way that certain laws are enacted within nations, despite the fact that the European Union and its member states are participants in the major international treaties that govern global copyright. This chapter analyzed the state and trajectory of E.U. information policy through a discussion of Europeanization and the history of such policies in the European Union. I argued that criminalization is a primary goal of the European Union with digital copyright policy. However, the results of this push for copyright maximization have been complicated due to resistance from social movement groups and the perception by member states that these directives are guilty of an overreach of the European Union's powers. These problems complicate E.U.-wide harmonization of IP law, which was demonstrated by the poor implantation of InfoSoc and IPRED among member states. Additionally, the European Union's multi-level governance and

democratic deficits lead to significant political and social movements that may resist the its policy-making mechanisms.

The next chapter evaluates the European Union's efforts at stronger copyright prohibitions through a critical legal historical analysis of significant cases. The cases include an overview of the U.S. police coordination that launched the IPR GPR, the international takedown of the private file sharing site OiNK's Pink Palace, and efforts to grow copyright enforcement in Spain. Many of the actions taken by the actors in the cases are dependent on E.U. processes, recommendations, and directives that were described in detail in this chapter. The manner in which the cases unfold is directly related to processes of Europeanization and the European Union's legislative efforts to harmonize the common market. The cases are also constrained by the political economic factors of commodification and spatialization addressed in Chapter I. Chapter III also breaks down the methods used to analyze the case studies and enumerates the stakeholders in the struggle over information policy in the European Union. The discussion that closes the chapter connects the cases with the difficulties of harmonizing prohibitions across the European Union, and I argue that the challenges to E.U. copyright enforcement exemplify the problems of the IPR GPR.

CHAPTER III

CASE STUDIES

Overview

Chapter III is a historical analysis of the emergence of international prohibitions targeting digital copyrights. The first section bridges Chapter I's literature review with the case studies by offering an overview of research and findings in the field of information policy and digital copyright studies that are similar to the analysis presented in the review. I identify laws, legislation, and other cases that were concurrent to the events described in this chapter's analysis in order to better situate and stress the generalizability of my case research. The second section describes the methodology of the research and stresses critical legal traditions from Hutchinson (1989) and Gordon (1989) and case study methods developed by Gerring (2007). In the third section I then offer the framework for a stakeholder analysis based on Majchrzak's (1984) recommendations for stakeholder analysis in policy research and enumerate the stakeholders within the cases. The fourth section consists of the actual case studies, which are presented as a critical legal history of the development of the European implementation of the IPR GPR. The section opens with a discussion of a series of police raids that began international prohibitions over digital copyrights; the discussion of the raids begins with the U.S.-led Operation Buccaneer and ends with a discussion of the MegaUpload siege in New Zealand. After describing the emergence of criminal enforcement of digital copyrights based on U.S. standards, in a fifth and final section I

describe how the enforcements developed in Europe with an examination of two cases. I first review the case of OiNK's Pink Palace; OiNK was the first torrent-related case in the United Kingdom and involved international seizures, extradition, and a major criminal trial. I detail OiNK because it is representative of several other similar raids that occurred around Europe in the 2000s. The second case that I analyze, that of the copyright law *Ley Sinde* that was secretively woven into an economic reform bill, is actually a documentation of years of debate and struggle surrounding copyright reform in Spain from 2007-2014. In researching the Spanish case, I overview digital copyright policy through a discussion of Spain's copyright laws, legal norms, and major court decisions. I also overview the U.S. seizure of peer-to-peer websites in Spain by the United States in order to emphasize the presence of international IP prohibitions and the divergence in Spanish and U.S. standards of IP enforcement. While Spanish case is unique to the historical circumstances in Spain, the case is highly comparable to the struggles of other European nations dealing with pressures from the European Union and United States to ratchet up digital copyright laws during a period of economic collapse and emerging A2K activism.

I conclude with a discussion section, arguing that in lieu of the two cases, it is clear that police enforcement and criminalization of copyright law is increasing, but implementation of the IP prohibition regime is inconsistent and the legitimacy of its governance is contested. The discussion highlights the historical and theoretical importance of the cases, which are addressed further in Chapter IV.

The section immediately following bridges the political theory described in Chapter I and the enumeration of E.U. processes and policy mechanisms in Chapter II with information policy studies emphasizing European developments and cases; its purpose is to spatially and temporally situate the OiNK and *Ley Sinde* cases within a generalizable framework of European IP prohibitions.

Multi-Stakeholderism, Policy Laundering and Policy Transfer as Policy Features

Undermining IPR Legitimacy

The OiNK and *Ley Sinde* cases are referenced in this chapter as historical instances of the progression of the European Union's IPR prohibition regime. The cases are analyzed to assess the question of how the European prohibition regime influences the legitimacy and governance of IPR. The European Union is, in Sarikakis' (2012) analysis of legitimacy and governance, a state-like formation that operates alongside states, economic actors, and legal, regulatory, normative, and cultural institutions in the formation of institutional functions and the creation of policy regimes (p. 143). Sarikakis (2012) argues that the legitimacy problem that arises with E.U. governance is the lack of democratic input into leadership and the multi-stakeholder approach to governance (p. 149). The multi-stakeholder approach is problematic because it removes policy-making authority from national governments in favor of multilateral organizations and the private sector. The transfer of policy away from the state is a part of E.U. harmonization and is done at the E.U. level through directives (Sarikakis, 2012, p. 150). Policy transfer is not the only obstacle to the legitimacy of E.U. governance, though, and Sarikakis (2012) also points to the problem of policy laundering (p. 149).

Policy laundering occurs in IP policy when specific laws to strengthen IP are inserted into larger, potentially unrelated legislative packages (Sarikakis, 2012, p. 150).

Sarikakis discusses policy laundering in the context of several media policies, including *Ley Sinde*. I specifically incorporate the policy laundering critique into the case study later in the chapter, but it is noteworthy how widespread the practice is. For instance, Sarikakis discusses how the Council of Europe's Convention on Cybercrime, initially assembled to address security concerns, became "a checklist for data preservation requests, procedures, and legal frameworks" that was heavily influenced by the United States and media industry influence (p. 150). ACTA and the French law HADOPI's graduated response measures for copyright infringement and a rule inserted into the United Kingdom's Digital Economy Act (DEA) to force ISPs to shut down infringing websites are also addressed by Sarikakis (2012) as laundered policy (pp. 151-152).

ACTA, HADOPI, and the DEA are spatially and temporally related to the OiNK and *Ley Sinde* cases and are rooted in many of the same law and policy initiatives from the same stakeholders described in this chapter's analysis. According to Sarikakis (2012), the laundered policy found in IP trade agreements and legislation lacks legitimacy because it bypasses democratic and parliamentary institutions and gives control of legal formation to non-voting, non-representative actors (p. 150). The *Ley Sinde* case continues and builds on Sarikakis' discussion of policy laundering as a problem for media governance.

Larsson's (2011a; 2011b) critique of the legitimacy of European digital copyright policy furthers the discussion of policy transfer, the phenomenon that was discussed in Chapter II in terms of the Data Retention Directive being created with the stated purpose

of stopping terrorism but becoming a tool for the surveillance and control of file sharing. Larsson also engages in an analysis of policy's relation to social norms. As discussed in Chapter I, the legitimacy of prohibition enforcement requires the alignment of legal and social norms (Andreas & Nadelmann, 2006, p. 22). Larsson identifies previous data and conducted survey research in Sweden to conclude that file sharing is viewed as normatively legitimate within the European Union and that prohibitions are generally obeyed only out of fear of punishment (2011b, p. 129; 2012, pp. 1015-1016). Larsson (2011b) notes that a problem with the divergence in legal and social norms is that legal enforcement has to be strengthened in order to properly function, since many Internet users have no moral qualms about file sharing (p. 129). Larsson does not directly address what the enforcement mechanisms are or the police institutions that regulate enforcement. The case studies in this chapter elaborate on the expansion of enforcement through analyses of police institutions and their influence on prohibition mechanisms.

The emphasis on enforcement mechanisms has appeared elsewhere in information policy literature. Burkart and Andersson (2013) use the metaphor of gunboat diplomacy to describe the United States' strategy of threatening discourse and secretive negotiations in ratcheting up global IP enforcement (p. 134). The authors describe an increasingly unilateral approach by the United States to protect its multi-billion dollar media, culture, and services trade agenda through the Special 301 and through trade agreements including ACTA (Burkart & Andersson, 2013). The Special 301, as described in Chapter I's discussion on the history of IP prohibitions, contains the Watch List of

countries that the USTR is pressuring to reform IP law (Drahos, 2002, p. 96). Sell (2010), in an article critical of the IPR provisions in ACTA, notes that Special 301 is used to enhance the global enforcement of IPR. Sell (2010) describes how police institutions including the World Customs Organization (WCO) and Interpol that have a role in establishing and enforcing international IP policy. Both the WCO and Interpol appear as stakeholders throughout this chapter's research, and I expand on Sell's analysis with a discussion of numerous other police actors involved in prohibition enforcement.

Situating the Case Research: Concurrent Cases

Previous research on E.U. information policy and digital copyright disputes is useful for historically situating the case studies in this chapter, identifying concurrent digital copyright-related events in the European Union, and emphasizing the role of relevant stakeholders. I selected OiNK and *Ley Sinde* because I found them to be representative of E.U. processes of prohibition implementation and because the events within the cases are generalizable in regard to similar cases across the European Union. The three most relevant cases that run concurrent to OiNK and *Ley Sinde* within the European Union are Sweden's The Pirate Bay, the United Kingdom's DEA and France's HADOPI. The three are mentioned consistently throughout the case studies, so it is important to offer a brief summary here.

The Pirate Bay

Of the three, The Pirate Bay is the largest scale case in relation to the IP prohibition regime because of the judicial and police involvement in the case and the use of criminal

enforcement and extradition in prosecuting the site's founders. I discussed The Pirate Bay briefly in the first chapter in terms of its place in the A2K spectrum as an actor openly opposed to digital copyright law and defiant toward media industry's legal threats. The site has been the addressed in several IP policy studies (Bogdan, 2010; Larsson, 2011a; Andersson, 2014; Burkart, 2014) and is a fundamental illustration of global prohibitions on digital copyrights. The Pirate Bay was founded in 2003 as an ad-financed BitTorrent tracker (Andersson, 2014, p. 132). BitTorrent is a type of file sharing protocol that allows users to download files, or torrents, from multiple other downloaders at the same time, enabling a quick, efficient method of sending and receiving data (Choi & Perez, 2007). In 2006, fifty police officers raided The Pirate Bay's servers and hundreds of other servers belonging to its hosting company (Andersson, 2014, p. 133). The Pirate Bay raid is the largest and most explicit example of the IPR prohibition regime in action until the MegaUpload case described below in the case studies. As Andersson (2014) outlines, a Swedish public broadcaster revealed U.S. pressure and lobbying from the MPAA as the impetus for the raid (p. 136). The Pirate Bay takedown inspired articles and profiles across the popular press, and the trial of its founders made international headlines (Andersson, 2014, p. 133). The site's founders, known as "The Pirate Bay Four," were unable because of Swedish law to be extradited to the United States despite efforts from the plaintiffs to hold the trial in the United States (Burkart, 2014, p. 64). U.S. pressure on Sweden to reform its copyright system was later revealed by WikiLeaks in 2010 during its "CableGate" dump of diplomatic documents (Andersson, 2014, p. 136). The same release of diplomatic cables

revealed U.S. pressure on Spain to reform its copyright legislation, and I detail the backlash to the cables in the discussion of *Ley Sinde* below. At the time of this writing, The Pirate Bay still serves as an index for torrents. The Pirate Bay is important to the analysis of the European IP prohibition regime not only because of the police force and international pressures used to shut down the site and arrest the founders, but also because of its link to the Pirate Party. The Pirate Party, a political party, emerged in 2006 after the Pirate Bay raid with an A2K platform and a strong emphasis on digital rights (Burkart, 2014, p. 17). Though the successes of the party appear to be on the decline, the “pirate politics” that emerged from the movement have become more mainstream in European political discourse (Geere, 2014, para. 1) and have been adopted by the larger European Green Party (Burkart, 2014, p. 145).

The DEA and HADOPI

The Digital Economy Act and HADOPI are also discussed throughout this chapter as concurrent events to the critical legal timeline given in the case studies. The two initiatives are primarily discussed throughout this chapter as examples of what the United States considers to be ideal policy when recommending copyright reform through unilateral pressures to other countries. Several IP policy researchers (Meyer, Audenhove, & Morganti, 2009; Sarikakis, 2012; Burkart & Logan, 2013) have discussed the two policies in tandem because they both emerged around 2009 and were both initially viewed as frameworks for graduated response systems. HADOPI, an acronym from the French “Law Promoting the Distribution and Protection of Creative Works on the Internet,” is best known for its graduated response measures (Meyer, Audenhove, &

Morganti, 2009, p. 16). The initial proposal for the law did not include any judicial review and would allow users to be banned from the Internet after three warnings, but mobilization within civil society pressured the law to be changed to require a judge to order the Internet blockages (Meyer & van Audenhove, 2012, p. 268). The law was passed in 2009 and establishes the HADOPI authority to send warnings to Internet users accused of infringement. In contrast to HADOPI, Britain's Digital Economy Act was part of a larger piece of legislation. The legislation, Digital Britain, was designed to facilitate the growth of the U.K.'s digital economy (Meyer, Audenhove, & Morganti, 2009, p. 29). The DEA was, to borrow Sarikakis' (2012) term, "laundered policy" inserted into Digital Britain at the behest of media industries. The policy did not initiate a graduated response system, but left the U.K.'s Office of Communications the option of instilling such a system if it found that the Act was ineffective in stemming infringement (Burkart & Logan, 2013, p. 75). The Digital Economy Act requires ISPs to notify Internet users if their accounts are suspected of digital infringement and requires the ISP to maintain the user data of individuals who receive the warning; the initial version of the bill gave the Office of Communications the authority to block websites and discipline ISPs for failure to comply with the law's requirements (Meyer, Audenhove, & Morganti, 2009, p. 23). The requirements for ISPs included tracking infringement, slowing the speeds of suspected infringers, and halting their service (Burkart, 2014, p. 108). The DEA was heavily debated across the United Kingdom (Burkart, 2014, p. 108) and was eventually attenuated through reforms (Masons, 2014, para. 1). In 2014, after years of complications, the DEA was effectively abandoned for a market regulatory and

education scheme that involved cooperation with ISPs and various media trade groups in the United Kingdom (Masons, 2014, para. 4). While the DEA was never fully implemented, it is still relevant to this case because it was, in its original framework, a model openly supported by the USTR in its unilateral pressures against Spain, and because the impetus for the law is directly related to the aftermath of the OiNK case. Additionally, the shift to market regulation of digital copyright infringement in the United Kingdom could actually be equally as problematic from an A2K perspective, though the British case is outside the scope of this study.

The case studies developed here coincide with the aforementioned events in Sweden, France, and the United Kingdom, and are connected to those events through shared experiences of Europeanization and regional and international pressures to adopt stronger IP law. The focus in these studies is on enforcement mechanisms and EC, U.S., and IP industry pressures to instill enforcement mechanisms where they do not already exist or have historically diverged from the framework of the IPR prohibition regime. Before developing the case studies, I introduce the methodology for the study and describe the stakeholder analysis.

Critical Legal Methodology

The methodology that I implement to highlight the cases' theoretical significance is a critical legal analysis of the history of the IPR GPR and an examination of two case studies. Critical legal studies is, as discussed in Chapter I, a methodology for exploring the relationship between power and law in society, particularly how the law is construed as a legitimizing mechanism for the powerful (Hutchinson, 1989, p. 3). The critical legal

methodology is used in this chapter as a tool for analyzing power imbalances within stakeholder dynamics and IP policies and enforcement. I also use the methodology to address international IP governance through a critical spectrum that recognizes the power imbalances in the formation and administration of legal laws and norms.

The critical legal paradigm has been used to assess how U.S. law legitimizes racism (Freeman, 1989), various leftist critiques of the development of contract law (Mensch, 1989), and, more closely related to this dissertation, the development of intellectual property law (May & Sell, 2006). The critical tradition holds that legal systems should be described in terms of their responsiveness to social needs, and historical analyses in this practice tend to view how the law is engineered to protect elite interests (Gordon, 1989, pp. 81-83). I evaluate the IP prohibition regime to determine if it is based in institutions and norms that privilege powerful stakeholders over other groups and, if so, analyze critical legal solutions to change the status quo regarding digital copyright enforcement. I also analyze the capability of international institutions to substantively address problems of inequality in the law. The construction of IP law as a tool for legitimating the business models of media industries has been discussed in the analysis of digital copyrights by Larsson (2011a, p. 25), and I build on this critique by evaluating how IP prohibitions are used as tools to legitimize the economic and political interests of the IP industries and the United States. I also use critical legal studies to address perceptions of democratic deficits through an analysis of how IP policymaking is opaque and divorced from democratic procedures.

I am also aware of two major critiques of critical legal studies from both liberal legal and leftist thought. Liberal legal critique of critical legal studies is that the field lacks functional solutions to problems and is overly critical of the law as a tool of oppression (Hutchinson, 1989; Hunt, 1999). I acknowledge the first critique by only offering carefully constructed solutions to legitimacy contentions that exist within the IPR GPR. The second critique is addressed by stressing the importance of liberal legal ideals of freedom of expression and a human right to access information and knowledge, and expand on the value these ideals in the discussion below on A2K policy discourse. Another set of critiques toward the critical legal methodology comes from leftist scholars that are wary of an over-emphasis on legalism in critical thought (Brown & Halley, 2002). I agree with this critique insofar as it recognizes problems of identity and power that exist outside of legal mechanisms, but solutions to those problems are beyond the scope of this study.

Critical legal analysis is used here to examine the emergence of international prohibitions on digital copyrights and to apply the political economic theory described in Chapter I, particularly the concepts of commodification and spatialization, to the cases. The OiNK case, for instance, is heavily influenced by perceptions of not only the control of commodified cultural goods by the law, but also the enclosure of a digital commons where music creators and aficionados shared and discussed the art. In the *Ley Sinde* case, the spatialization of IP prohibitions and the Europeanization of copyright law are integral to the disputes between the stakeholders. Additionally, throughout the critical history I demonstrate with the cases studies, I build on the argument that the IPR GPR is

part of a system of international governance that seeks to expand and protect commodities and harmonize international standards of IP law. Structuration, Mosco's (2009) third aspect of the political economy of communication that describes how social systems are mutually constituted through human agency (p. 185), is not directly addressed in this analysis even though it offers an explanation for how social movements bring together individuals across boundaries of identity (Mosco, 2009, p. 203). The *Ley Sinde* case does involve social movement politics and activism, but the unique contribution of this study is its critique of regime governance of IP prohibitions. The theoretical underpinnings the student-led *Indignado* movement that arose in Spain after *Ley Sinde* is addressed and debated exhaustively by Castells (2012), Gerbaudo (2012), Martin and Urquizo-Sancho (2012) and Postill (2013). I refer to their works throughout the study when explaining the sociological and communicative motivations of the social movements and activism in Spain. All accounts regard the movement as highly networked through communication technology and capable mass online mobilization through social media, though, as I discuss in the stakeholder enumeration, Castells (2012) and Gerbaudo (2012) differ in their interpretation of leadership within the movement. If I were to include structuration in the case analysis, I would potentially replicate findings from the previous authors that the *Indignado* movement was a networked collective of activists in Spain converging online and on the ground to protest common market initiatives in a time of economic crisis. The replication of findings, within the scope of the study, would potentially limit the unique contributions of the

critical legal analysis of the policy laundering and leak of diplomatic cables that I examine throughout the study.

I map the history of IP prohibitions in order to chart the escalation of copyright criminalization and its impacts within the European Union. The underlying reasons for IP prohibitions—trade agreements, E.U. directives, U.S. pressure, and the economic impact of copyright infringement—are examined in each case. Following the case study recommendations of Gerring (2007), I utilize the cases as tools for contextualizing, narrativizing, and categorizing phenomena that occur within the cases. An advantage to studying the OiNK and *Ley Sinde* cases is that they are important markers in global copyright prohibitions and are similar to other spatially and temporally congruent events across the European Union, and also because of data availability. The generalizability and data availability of the cases allow this research to remain narrow in scope while capturing the depth of GPR issues across the European Union. The cases that I study are representative of the political economic and communicative trends described throughout this dissertation. The cases broaden the analysis of the stakeholders by documenting the pressure that the European Union, United States, and the culture industry places on weaker actors, policy formation, law enforcement, and resistance from social movement and activists.

Since I am observing emergent phenomena, the historical impact of the cases is still developing. However, the cases do offer an opportunity for contextualizing issues of IP governance within states, regions, and international regimes. This case analysis also offers an opportunity for description and observation of copyright contestation. I

distinguish the legal, political, social, and cultural results of the cases for an overview of how international copyright prohibitions are developing across Europe. In particular, I look for evidence of a global prohibition regime as defined by Andreas and Nadelmann (2009) that includes the discursive, regulatory, and legal mechanisms that create legal prohibitions (p. 3). I also explore the presence of criminalization measures, public education campaigns, censorship, surveillance, and resistance that is evident in the emergence of a modern prohibition regime as described by Andreas and Nadelmann (2009, pp. 3-5). I search for elements of global prohibition regime in digital copyright prohibitions in part to more fully interpret the cases, but also to determine the actual value of the GPR model in studying information policy, digital copyrights, and regimes as compared to established models of information policy, IP harmonization, Europeanization, or other legal paradigms. I evaluate the value of GPR theory in the study of IP policy in Chapter IV. In the next section, I distinguish the process for stakeholder categorization and enumerate the stakeholders.

Overview of the Stakeholders

The stakeholder categorization is based on the research conducted for the case studies and previous work by other authors related to information policy and digital copyrights. I categorize the stakeholders as follows: the European Union, the United States, the British government, the Spanish government, IGOs, IP industries, the telecommunication sector, police institutions, A2K public interest groups, social movement groups and activists, and p2p sites. Each stakeholder is categorized based on their policy interests regarding digital IP and each is described in this section. Not every

stakeholder fits neatly into each category, and the differences between each segment of actors is evaluated. In order to trace the phenomena that are occurring in the cases, I use strategies of stakeholder analysis as defined by Majchrzak (1984). These strategies involve a historical approach in examining the debates, conflicts, and results of the policies. Stakeholders are grouped by their attitudes, motives, and interests toward the policies put forward (Majchrzak, 1984, p. 76). The power of each group of stakeholders is analyzed through a description of available resources, the ability to mobilize and access to primary decision makers (Majchrzak, 1984, p. 77). Majchrzak (1984) suggests that groups of stakeholders are placed into hierarchies that include representatives of the state at the top, and others grouped on the basis of power and influence among the decision makers (p. 77-79). Below, I have provided a sub-section for each stakeholder.

Stakeholders Representing the European Union

A history of the political composition and legislative framework of the European Union was offered in Chapter II. As noted in the previous chapter, the European Union is continuously working to expand its Common Market through directives that harmonize intellectual property policy throughout each member state. The unelected European Commission is consistently in support of greater protections for IP in order to expand the information economy of the European Union. The EC planned to double the European Union's 2012 revenue of online goods and services €311.6 billion (\$417 billion) by 2015, and proposed that part of the plan to meet this goal was to increase its anti-piracy agenda by requiring ISPs to police users and ban copyright infringers from the Internet (EC, 2012a). IPR prohibition regime tools such as amplifying digital

copyright policing through proposing directives including IPRED2 and entering into TRIPS-plus agreements including ACTA are illustrations of the EC's desire for a largely commodified Internet with marginal consideration for the resources of a digital commons. The EC's positions on and proposals for digital copyright laws are occasionally hindered through protests from A2K groups and political pressure from within the European Parliament, as was the case with the Pirate Party's influence within the EP in assisting with the European Union's rejection of ACTA (Burkart & Logan, 2013, p. 73). The European Union's foundation for digital copyright policies in the form of its Software, E-Commerce, Copyright, and IP Enforcement Directives are in place, however, and member states are required to implement each directive as a bare minimum for copyright policy.

The democratic deficit inherent in the EC can lead to discontent and disillusionment among national citizens when they perceive that Brussels has overreached its authority (Ladrech, 2010, p. 7). The anger over democratic deficits and violations of sovereignty is demonstrated in the *Ley Sinde* case later in this chapter, where the protests over proposed copyright prohibitions are encompassed by a greater social movement protesting E.U.-backed austerity measures throughout Spain (Pegeura, 2010; Morell, 2012; Postill, 2014). While a more thorough analysis of the economic crisis is beyond the scope of this dissertation, the influence of the 2008 global financial collapse in E.U. and Spanish politics cannot be understated in throughout the *Ley Sinde* case. The EC's primary concern within the case is pressuring Spain to reform its overall economy, and concerns over the upward ratchet of its copyright laws are minimal. As I demonstrate in

the case study, the EC is the most powerful stakeholder in regard to pressuring Spain to implement economic and legal reforms.

During the Spanish case, the European Court of Justice is also mentioned as an actor influencing the direction of copyright reforms. The role of the ECJ as it relates to the case study is ensuring that E.U. directives are applied equally throughout all member states.

Stakeholders Representing U.S. Trade Interests

Chapters I and II described in depth the role of the United States in establishing international intellectual property laws and policies. I argue throughout the dissertation that the United States and its dominance in the WTO-TRIPS negotiations are responsible for the emergence of the IPR GPR. The United States' priorities in the case studies are based on its will to protect the entertainment industry's contributions to the U.S. economy. In 2005, near the time that the case studies begin, the entertainment industries accounted for \$9.5 billion of the United States' positive trade surplus (Burkart & Andersson, 2013, p. 134). The economic importance of IP industries to the United States cannot be understated in the analysis of how the USTR and U.S. Ambassador to Spain approached unilateral pressures at the time of the case studies. The United States is highly attentive to the recommendations of industry lobbyists in formulating suggestions for IP prohibitions and in recommending copyright legislation to other nations.

Police Agencies and Organizations

The other primary U.S. stakeholders analyzed throughout the critical history of digital copyright prohibitions and the case studies are U.S. enforcement agencies including the FBI, Department of Justice, and the Department of Homeland Security. These four institutions underpin the United States' implementation of police enforcement in the international IP prohibition regime. The FBI is directly involved in the enforcement of IPR, and, on its website, warns of the growing threat of IP crime due to "rise of digital technologies and Internet file sharing networks" and notes that it works internationally with the private sector and law enforcement agencies (Federal Bureau of Investigation, n.d., para. 2). The Department of Justice maintains a Task Force on Intellectual Property that claims to serve "as an engine of policy development to address the evolving technological and legal landscape" of IP crime (United States Department of Justice [U.S. DOJ], n.d., para. 3). The task force also focuses on "the links between IP crime and international organized crime" (U.S. DOJ, n.d., para. 2). The Department of Homeland Security oversees another task force called the National Intellectual Property Rights Center (IPR Center). On its website, the IPR Center states that it "stands at the forefront of the U.S. government's response to global intellectual property theft" and uses its expertise to "to share information, develop initiatives, coordinate enforcement actions, and conduct investigations related to IP theft" (IPR Center, 2014, para. 2). The IPR Center partners with several national and transnational police organizations, including Interpol and the World Customs Organization. Interpol appears throughout the case studies as assisting in several U.S.-led enforcement operations and as working with the British police and the U.K.'s Hi-Tech Crime Unit during the OiNK raids. The

OiNK case also examines the Dutch Fiscal Information and Investigation Service (FIOD ECD). FIOD ECD is an elite Dutch task force that primarily focuses on financing, money laundering, and fraud associated with organized crime and terrorism (International Monetary Fund, 2011, p. 34).

I focus on areas of emphasis from GPR and cybercrime theory when analyzing the enforcement stakeholders. Andreas and Nadelmann (2006) argued that GPRs require resources and dedication to international governance and cooperation, legal regimes, and investment in law enforcement coalitions (pp. 22-28). How national stakeholders support and invest in enforcement regimes is noted throughout the study, particularly in light of economic troubles facing Spain. I also focus on the problem of police enforcement of digital activities described in the cybercrime literature reviewed in Chapter I. Leman-Langlois (2008) warned that the composition of cybercrime enforcement leads to extreme police measures that are out of proportion with the suspected crimes and individuals (pp. 4-5). The examples of the various U.S.-led operations, the MegaUpload raid, and the OiNK raids and prosecution given in the case studies and history of the IPR GPR here are analyzed for examples of disproportionate policing measures. The primary reason that disproportionate policing occurs is because international policing is dependent on the standardization of police procedures and the harmonization of criminal enforcement regimes (Lemieux, 2010, p. 5; Leman-Langlois, 2008, pp. 4-5). The cases analyze how police tactic harmonization and the use of primarily anti-terror and organized crime agencies like the U.S. Department of Homeland Security and Dutch FIOS ECD implement standardized procedures to enforce

digital copyright law. I also noted literature in Chapter I describing the difficulty of using criminal enforcement to manage digital copyrights on the Internet due to the socially legitimated attitudes toward file sharing, and the OiNK case analyzes how pro-OiNK stakeholders ignored and bypassed the police activities against the Pink Palace.

Intellectual Property Industry Stakeholders

Numerous representatives of the IP industries are analyzed throughout the cases. These include trade groups previously mentioned throughout the dissertation—the RIAA, MPAA, IFPI, and the IIPA—and several others that serve the same function of lobbying for coalitions of rights holders. The stakeholders introduced in this chapter include two IIPA members—the Business Software Alliance (BSA) and the Entertainment Software Association—in addition to the British Recorded Music Industry (BPI), and three Spanish IP coalitions. The Spanish coalitions include the music trade association Promusicae, the MPAA-supported Federation for the Protection of Intellectual Property, and the umbrella IP industry collective of the Coalition of Content Creators. The lobbying and policy influence of these organizations is analyzed throughout this chapter.

Telecommunication Sector Stakeholders

The telecommunication sector actors that are addressed in the cases are examined for their role as ISPs. These organizations have a vested interest in moderate digital copyright prohibitions because they thrive off of the distribution content (Andersson, 2014, p. 17). Laws that force telecommunication industries to police users or ban file sharers are generally opposed in the telecommunication sector because such laws

endanger profits. The telecommunication sector is larger, wealthier, and more influential than any of the A2K stakeholders enumerated here, so it is arguable that they are the most significant stakeholders in limiting digital copyright enforcement. Technology companies such as Google and Yahoo and streaming services such as Netflix are similarly invested in open distribution standards (Jakobsson and Stiernstedt, 2012, pp. 51-52; Andersson, 2014, p. 17), but are not present in the stakeholder analysis because, outside of a comment about Google's influence from the Spanish Minister of Culture to a U.S. Ambassador when justifying the reasoning behind Spain's refusal to implement criminal copyright enforcement, I found no outward evidence of their contributions to the cases.

The primary telecommunication stakeholder explored in this study is Spain's *Telefónica*. *Telefónica* is the oldest and largest telecommunication and broadband provider in Spain, and was its public sector telecommunication monopolist until being fully liberalized in 1997 (Bel & Trillas, 2005, p. 26). The company is currently the third largest telecommunication company in the world and maintains a strong presence throughout Latin America and Europe (Powell, 2010, pp. 2-3). The company is also a member of RedTel, a trade association made up of Spanish telecoms Vodafone, ONO, and Orange. RedTel is a noteworthy stakeholder in the *Ley Sinde* case because the trade group uses its considerable resources and influence to resist laws requiring them to police ISP users through surveillance and data collection and reject proposals from the IP industries for graduated response laws in Spain. The analysis of the

telecommunication companies focuses on their stakeholder power and interests in negotiations for new copyright laws in Spain.

The U.K. Government

The U.K. government is not a central stakeholder during the OiNK case, but the events after the case including the emergence of the Digital Economy Act and the creation of new IP task forces are analyzed. U.K. government stakeholders operate closely with intellectual property industry in drafting IP law and enforcing copyright violations. The Crown Prosecution Service, the English and Welsh authority for prosecuting criminal cases, is shown to operate as an intermediary for the entertainment industry during the failed OiNK prosecutions.

The Spanish Government

Spanish government stakeholders primarily include Spain's former Prime Minister José Zapatero and former Minister of Culture Ángeles González-Sinde. In the cases, I describe the pressure that these two politicians face to enact copyright prohibitions, and analyze how the two are influenced by and interact with the other stakeholders. The actions of both the Prime Minister and Minister of Culture are described within the framework of the exceptional economic crisis affecting Spain and competing pressures from various stakeholders to address both the crisis and copyright enforcement.

A2K Public Interest Groups

Throughout the cases, I analyze the arguments and preferred policy models of the A2K public interest groups. I also examine their role within the policymaking process in order to address issues of transparency and policy laundering in the creation of IP

policies. A2K non-governmental organizations analyzed here include the U.S.-based Electronic Frontier Foundation (EFF), Public Knowledge, and the Center for Democracy and Technology. Throughout the cases, these organizations condemn the actions of governments, lawmakers, and police organizations in enacting what the A2K groups consider to be unjust, detrimental, and illegitimate copyright policies that favor the interests of IP industry stakeholders. The organizations act through press releases and blog posts, provide legal defenses for accused infringers after the OiNK raids and *RojaDirecta* seizure, present amici briefs, and attempt to advise policymakers. In the course of events during the *Ley Sinde* case, the public interest group Sustainable Net is formed to represent the interests of bloggers, tech lawyers, artists, and other activists to protest proposed changes to Spain's copyright laws (Horten, 2011, p. 176). Another major Spanish public interest group is the *Asociación de Internautas* (Association of Internet Users), referred to throughout this chapter as *Internautas*. *Internautas* were established in 1998 and have been an influential enough actor in Spanish Internet politics to be granted a "seat at the table" during policy and legislative debates (Horten, 2011, p. 167). The group can be differentiated from the U.S.-based interest groups in that it is willing to break the law through tactics such as launching DDoS attacks, which temporarily disable websites, on stakeholders in support of stronger copyright laws (Postill, 2014, p. 4). *Internautas* also has close ties with the social movement groups described below.

A2K in the Periphery: Social Movement and Activist Stakeholders

The Spanish case focuses on the disputes between the United States, A2K organizations and activists and Spanish politicians, courts, and lawmakers. An examination of social movements and activism related to the financial collapse in Spain during the cases is, like the economic collapse itself, outside of the scope of this study. However, the actions of activist groups, particularly Spain's *Indignado* movement, overlap and contribute to the protests against *Ley Sinde*. At the movement's height in 2011, the *Indignado* protests reached 2.2 million people (Castells, 2012, p. 114) and the movement was organizing sit-ins, occupying major city centers in Barcelona and Madrid, and mobilizing supporters through social media on the ground and in the physical headquarters of established public interest groups (Gerbaudo, 2012; Postill, 2014). Authors including Castells (2012) and Gerbaudo (2012) have detailed the *Indignado* movement alongside research on the Occupy Movement and the Arab Spring. Castells (2012) argued that the *Indignados* were a leaderless, decentralized networked coalition that was based in communication networks and materialized in the streets of Madrid. Gerbaudo (2012) countered that while Spain's thriving digital culture, extensive Internet access, and social media mobilization facilitated and organized the *Indignados*, the movement was highly structured, centralized, and led by various established organizations and prominent activists (p. 100). Gerbaudo's assertions on the organization and centralized leadership of the *Indignados* inform the research I conduct more clearly than does Castells' (2012) portrayal of the movement as a loosely networked, leaderless collective because throughout the *Ley Sinde* case, I identify movement leaders in the form of groups including *Internautas*, *No Les Votes* and

Sustainable Net. I stress that *Internautas* and other actors in the *Ley Sinde* protests were forerunners of the *Indignados* and held leadership roles in the build up to the 2011 protests. Within the breadth of this research, I am primarily focusing on the *Indignado*'s emphasis on digital rights issues and the extent to which A2K public interest groups and networks protesting *Ley Sinde* contributed to the mass activist mobilization across Spain in 2011.

The online and street protests in Spain were also assisted by Anonymous, the leaderless hacktivist collective described in Chapter I as a contributor to A2K activism. I trace the actions of Anonymous in Spain during the protests in regard to its role in coordinating demonstrations and spreading information about *Ley Sinde*. WikiLeaks is also relevant to the Spanish case, and I use information from their leak of diplomatic cables to outline the communication between the U.S. and Spanish governments in coordinating copyright reform. WikiLeaks is not a stakeholder in the sense that anyone involved in the organization was involved in policy debates or protest movements, but its role in providing, as Burkart & Andersson (2013) describe, “visibility, transparency and influence” (p. 143) to negotiations over copyright police is highlighted in the *Ley Sinde* case.

p2p Websites and Services

Both the OiNK and *Ley Sinde* case are related to controversy over p2p websites and technology. I describe the underlying technology behind file sharing and streaming sites and also analyze the websites and their owners, operators, and communities as stakeholders. OiNK's Pink Palace, for instance, promoted itself as a non-profit service

that used all donations to upkeep the website, and its community worked meticulously to build and curate OiNK's index of media files (Socanathan, 2011, p. 38). Other p2p stakeholders, including the *RojaDirecta*, attempt to profit from advertising revenue (McSherry, 2011, para. 2) and are not concerned with cultivating a community. Throughout the cases, I find that the metaphor of "piracy" is applied to all p2p sites indiscriminately, and criminal enforcement organizations view p2p services including OiNK, ShareMula.com, MegaUpload, and the *RojaDirecta* to be responsible for copyright infringement with the primary intent to profit. I also stress how law enforcement agencies view the proprietors of these websites as criminal leaders. An early example of law enforcement's focus on criminal leaders in digital copyright cases is given in the critical history section before the case studies, which describes the prosecution of individuals involved with the group DrinkOrDie.

IGOs

The WTO and WIPO are important stakeholders in the IP prohibition regime and their influence was addressed in depth throughout the first two chapters. However, neither organization displays direct involvement throughout the case studies. TRIPS and WIPO's direction in international copyright law underlie the events of the cases, though, and the impact of IGOs in copyright prohibitions is reintroduced in the discussion section after the cases. The cases and the historical trajectory that leads to them are described in the next section.

OiNK's Pink Palace

The first part of this section is an overview of the emergence of the IPR GPR's enforcement of digital copyrights. The prohibition regime's attention to copyright fully developed through the U.S. DOJ and FBI's Operation Buccaneer and subsequent operations. After discussing the U.S. operations, I briefly overview the MegaUpload raid in New Zealand to illustrate the escalation of international prohibitions on digital copyright and use of police enforcement to stem infringement. The MegaUpload example is not, I argue, currently replicable in the European Union due to institutional protections regarding civil liberties and civic freedom. The European Union's potential for implementing the IPR GPR is described throughout the two case studies. The OiNK case demonstrates the criminal enforcement of digital copyrights in the European Union, whereas the *Ley Sinde* case focuses on the attempted implementation of prohibition measures in Spain and the backlash to the proposed measures. Both cases involve a critical analysis of the stakeholders enumerated earlier in this chapter, and I follow the cases with a comparative analysis of case results and stakeholder dynamics.

Precursors to the OiNK Action

I discussed previously that while the European Berne Convention developed the international trade of intellectual property, the United States overtook Europe as the primary supporter and beneficiary of IP in its development of an informationalized economy. The United States was the core nation in the development of trade law regimes in the form of GATT, the WTO, and the WTO's TRIPS. In addition to being at the forefront of multi-lateral measures to globalize standards for IP policy, the United States also pressured other nations to increase IP protections through unilateral pressures

from the USTR and its Special 301 List. The 301 is heavily influenced by the recommendations of the IIPA, and so media industries are heavily involved in the “gunboat diplomacy” (Burkart & Andersson, 2013) that pressures nations to adopt heightened IP standards. At the domestic U.S. level, the RIAA took the first major steps against “digital piracy” in 1999 with the lawsuit against Napster. Napster was a peer-to-peer file sharing service that allowed users to upload files to its servers to be downloaded by other users (Fagin, Pasquale, & Weatherall, 2002, p. 460). Napster differed from BitTorrent sites like The Pirate Bay because Napster stored user files on its own server instead of merely acting as a search directory for files indexed elsewhere. Napster, as a centralized database of infringing files, was able to be prosecuted civilly by the record companies using established U.S. copyright law (Fagin, Pasquale, & Weatherall, 2002, p. 460). In a later U.S. case, *Metro-Goldwyn Meyer v. Grokster, Ltd.*, the U.S. Supreme Court addressed file sharing services that did not directly host infringing files and instead simply supplied file sharing software to users (Hancock, 2006, p. 199). The major precedent from the Grokster case came in the Court’s decision that Grokster was a service that provided “inducement to infringe” by encouraging individuals to violate copyrights (Hancock, 2006, p. 198). Implementation of the inducement doctrine later became a key demand of the United States in unilateral IP negotiations with other nations; Spain’s lack of inducement standards lead to the international legal troubles of the *RojaDirecta*. I detail *RojaDirecta*’s struggles in the *Ley Sinde* case, but here it is important to note that both Napster and Grokster were instances of civil prosecution that ended the operation of both sites. No large-scale criminal enforcement is evident in

either case. Concurrent to *RIAA v. Napster*, however, the FBI and U.S. DOJ were preparing the first international criminal enforcement of IP law.

In 2001, Operation Buccaneer was the first major international action for the enforcement of digital IP (Urbas, 2007, p. 20). The operation is noteworthy not only because it is the original cross-border police digital copyright enforcement, but also due to its success and precedent. The raids led to multiple computer seizures, jail sentences, fines, and cases of extradition in several nations (Urbas, 2007, p. 20). While Buccaneer primarily targeted individuals working with warez sites, which specialize in circumventing DRM in digital media to enable software and other media to be distributed freely online, the operation created a precedent for police actions that would soon after be used against individual file sharers and online communities as well. Operation Buccaneer was the beginning of the IPR GPR's expansion to digital copyright enforcement, and it asserted the role of police organizations as engaged institutions in the governance of international IP.

Buccaneer was led by the U.S. DOJ and the United States Customs Service (Urbas, 2007, p. 210). It included cooperation with government officials and police in the United Kingdom, Sweden, Australia, Finland, and Norway and also led to computer seizures in Canada and the Netherlands (Urbas, 2007, p. 210). The raids also relied heavily on cooperation from universities, notably MIT, UCLA, Duke, the Rochester Institute of Technology, and Norway's University of Twente (Koning, 2001). Over 130 seizures were carried out and dozens of corporate executives, network administrators, and college students were arrested for uploading software, movies, music, and other

digital media to the Internet (Lemos, 2001, para. 8). Over 40 criminal convictions resulted from the raids, many of which were of individuals involved with the warez collective DrinkOrDie (U.S. DOJ, 2007). Government and police organizations promoted the Business Software Alliance's claims that software companies in the United States lost \$2.6 billion to piracy in 2000 (Nguyen, 2007, para. 3). According to the BSA, the people uploading files to the Internet were as damaging to the industry as those selling illegal physical copies of DVDs, CDs, and other physical media around the globe (Nguyen, 2007, para. 3). The BSA, then, was claiming the need for enclosure of digital spaces in order to protect its commodified goods. The BSA's distinction of digital infringement as equal to physical infringement is legally significant because criminal copyright is based on the intent of someone to either make a profit from infringing materials or to intentionally enable someone else to make a profit (Natividad, 2008, p. 479). If hackers are working through warez sites merely to develop hacking skills, share information or cultural goods, or even to protest the practices of software and entertainment industries, they are not criminally liable. Criminal liability for the hackers was dependent on the legal assertion that their activities were occurring in violation of property rights and not as part of communicative activity within a cultural commons; thus it was important for the BSA to argue this distinction. A central part of criminal copyright infringement are the ideas of theft and piracy, and courts need to be convinced that the individuals engaged in hacking and file sharing are doing so for profit (Natividad, 2008, p. 479). The successful criminal copyright cases in *Buccaneer* made the claim that people were profiting from stolen goods (Urbas, 2007, p. 20).

The most publicized case in the DrinkOrDie crackdown was that of Hew Griffiths, an Australian national accused of being a co-leader in the warez group (Urbas, 2007, p. 16). Griffiths was arrested by the Australian Federal Police and placed in a Sydney prison for three years before being extradited to the United States for violating U.S. copyright law (Nguyen, 2007). Griffiths pleaded guilty in a Virginia court to criminal copyright violations and conspiracy to commit copyright infringement and was sentenced to 51 months in prison in 2007 before being returned to Australia six months later (Martin, 2012). The extradition was possible because of bilateral treaties between the United States and Australia, including the U.S.-Australia Free Trade Agreement that enhanced Australia's copyright protections (Ackland, 2007). For his part, Griffiths claimed that U.S. officials were acting as proxies for the multinational software companies Adobe Systems and Microsoft, which was why his jail sentence was so severe (Martin, 2012). In the OiNK case described below, lawyers for OiNK defendants made similar accusations toward the British government as being proxies for the music industry (Curtis, 2010, para. 4). Griffiths claimed that U.S. Customs officials and upward of 20 police officers raided his workplace, confiscated computers, and arrested him (Parker, 2002). Other intellectual property and legal scholars and activists criticized the Australian government for the extradition, as Griffiths had never set foot in the United States and could have easily been tried for similar crimes in Australia (Weatherall, 2007). A former Supreme Court Justice in New South Wales also criticized the extradition, expressing that while IP infringement is a grave crime, Australia should

not extradite its citizens over the commercial interests of foreign nations (Nguyen, 2007).

In addition to Griffiths, Christopher Tresco, an MIT economics graduate student, received three years in prison for violating the U.S. Copyright Act with DrinkOrDie (Winstein, 2002, sect. 2, para. 4). Four British members of the warez scene were sent to prison for multiple years after being arrested by the United Kingdom's National Hi-Tech Crime Unit during Buccaneer (Urbas, 2007, pp. 215-216), and several students at the Dutch University of Twente were also arrested for copyright infringement (Koning, 2001). In the time since the raids, the U.S. DOJ has increased its calls for extradition due to copyright infringement and made attempts to extradite individuals from the United Kingdom and elsewhere for running file sharing and streaming services (Manhire, 2012; Walker, 2012); furthermore it launched a Joint Strategic Plan in 2010 to increase collaborative raids and extradition by working with other nations, Interpol, and the World Customs Organization (JOINT, 2010, p. 15). In the immediate aftermath of Operation Buccaneer, the United States conducted several other such "Operations," most notably Operation Fastlink in 2004.

Operation Fastlink was another FBI/DOJ joint operation in coordination with Belgium, Denmark, France, Germany, Hungary, Israel, the Netherlands, Singapore, Sweden, and the United Kingdom (U.S. DOJ, 2004, para. 1). The FBI and DOJ heralded the operation as the largest global operation to combat online piracy (U.S. DOJ, 2004, para. 1). Investigations were assisted by the BSA, RIAA, MPAA, and the Entertainment Software Association (U.S. DOJ, 2004, para. 10). The operation led to the seizure of

120 computers and dozens of investigations and arrests in every participating nation, and the closure of several major warez and file sharing sites (Natividad, 2008, p. 482).

Fastlink also provided the RIAA with the first ever criminal conviction for music piracy against a member of the Apocalypse Production Crew (RIAA, 2008). Apocalypse specialized in uploading leaked copies of music before their official release date, and one member was convicted in the United States for conspiracy to commit copyright infringement and was given five years in prison (RIAA, 2008, para. 3). This case laid the groundwork for future criminal prosecutions against early release sites, including OiNK's Pink Palace.

Criticisms of both the efficacy and the legitimacy of the international piracy operations abound. While the U.S. government asserted that DrinkOrDie was the crown jewel of Operation Buccaneer and one of the "oldest and most security conscious piracy groups" (U.S. DOJ, 2001, para. 5), many software experts and A2K advocates were skeptical of the DOJ's claims, noting that it was made up primarily of students testing their code cracking abilities (Lemos, 2001, sect. 2, para. 3). Additionally, the \$50 million estimate of the worth of the software and entertainment dispersed by DrinkOrDie assumed that all of the pirated media would have been purchased legitimately (Nguyen, 2007). Critics further argued that Fastlink's role as a major entity in the warez scene was vastly overstated, and was being used being dramatized by the feds to enhance the narrative of police efficacy (Manjoo, 2001). A *Wired* article critical of the raid noted that of over 40,000 cracked software releases during a seven month span, barely over 400 were from DrinkOrDie (Manjoo, 2001). *Wired* claimed that DrinkOrDie was "small

potatoes” in the software cracking world, and that the raids did little to address digital piracy (Manjoo, 2001, para. 5). The skeptic discourse of *Wired*’s and of warez developers themselves is in stark contrast to the formal pronouncements of U.S. Customs and the FBI, which accused DrinkOrDie of being a “notorious elite Internet piracy organization” (Manjoo, 2001, para. 9) and asserted that “whether committed with a gun or a keyboard—theft is theft” (U.S. DOJ, 2007, para. 1). One U.S. Customs official claimed of warez groups that their members “believe in a free Internet. They don’t want any rules or any laws that inhibit what they do” (Lemos, 2001, December 12, sect. 2, para. 4). The Customs official’s idea of a “free Internet” is different from notions of Internet freedom engaged within the A2K community of advocates and activists that emphasize the need for a communicative commons and freedom to create online, and betrays a central difficulty encountered by global prohibition regimes. Namely, police organizations are ill equipped to deal with problems that fall outside the dichotomy of crime and punishment and tend to categorize individuals engaging in prohibited activities as morally deficient criminals (Andreas & Nadelmann, 2009, pp. 11-12). The international police tactics used in Buccaneer, Fastlink and similar operations eliminated a few actors in the warez scene, but took no steps to address the alleged social problem of free distribution of software and entertainment media. The international legitimacy of U.S.-coordinated cybercrime operations were questioned by technology publications, software experts, and activists due to their extremity and perceived ineffectiveness (Manjoo, 2001). The operation system involves the leadership of the United State’s police institutions in conjunction with various national and international police

organizations. As a tool in the governance of international IP, the social legitimacy of the international legal norms that allow U.S. enforcement leadership and extradition can be critiqued because of its dependence on foreign and supra-national institutions to arrest people for threatening the business model of media industries.

The IP operations of U.S. police organizations created a foundation for a global prohibition regime over digital piracy that included coordination across the European Union and other strategic allies, particularly Australia. In the years since the Operation system was launched, Australia's neighbor across the Tasman Sea, New Zealand, embraced the U.S.-led IPR GPR. New Zealand's willingness to cooperate with the United States is exemplified in the raid that shut down the popular cyber locker site MegaUpload. MegaUpload was a massive cyberlocker website, meaning that the site hosted files uploaded by users and allowed other users to search and download its directory (Martin & Newhall, 2013, p. 106). The FBI installed used digital surveillance to monitor the communications of MegaUpload operators, including Skype correspondence, for five years before the eventual raid (Martin & Newhall, 2013, p. 149). A federal court in Virginia, where MegaUpload's web hosting service was located, ordered the seizure of eighteen web addresses associated with MegaUpload (Raymond, 2013, pp. 377-378). The investigation into the site culminated with a New Zealand police raid, directed by the U.S. DOJ, of MegaUpload founder Kim Dotcom's \$24 million mansion. The raid included police with paramilitary gear, tactical firearms, dog units, and a helicopter (Martin & Newhall, 2013, p. 102). Dotcom was found in a safe room and put into a police van, where he was told that he was being arrested for

“copyright infringement” (Martin & Newhall, 2013, p. 102). The actual charges against MegaUpload’s operators included copyright infringement, crimes related to aiding and abetting copyright infringement, criminal conspiracy, and fraud (Martin & Newhall, 2013, p. 116).

Dotcom would later comment to the Financial Times that the raid “used the same number of helicopters and a few less people in the Osama bin Laden raid” in order to present him as a “criminal mastermind” (Pilling, 2013, sect. 2, para. 4). The “aiding and abetting” charges were pressed under the logic that MegaUpload served to help infringers distribute copyrighted media, and the fraud charges stem from MegaUpload allegedly lying to copyright owners about removing copyrighted material upon request (Martin & Newhall, 2013, p. 116). Hong Kong Customs froze \$39 million in MegaUpload, Ltd.’s assets and MegaUpload operators were subsequently arrested in Holland and New Zealand (Martin & Newhall, 2013, p. 135). As an example of the European limitations to IP criminal enforcement and the inconsistencies in E.U. member state enforcement mechanisms discussed throughout this chapter, one of MegaUpload’s founders escaped to his home country of Germany because it does not allow extradition to the United States (Martin & Newhall, 2013, p. 135). Dotcom is still awaiting extradition to the United States, though, and was widely accused in New Zealand of trying to avoid extradition by having founded a digital rights-based political party called “The Internet Party” to help unseat New Zealand’s Prime Minister and gain political protection (Wilson, 2014, para. 1). The party failed to make any parliamentary gains in New Zealand’s 2014 elections (Wilson, 2014).

The reasoning behind MegaUpload's criminal investigation and subsequent raid is straightforward. The surveillance required to build evidence against MegaUpload's operators could not be achieved through civil litigation (Martin & Newhall, 2013, p. 146). Additionally, extradition can only be achieved through criminal charges, and since most file sharing and streaming services are located outside of the United States, extradition is deemed necessary by the U.S. government (Martin & Newhall, 2013, p. 145). The MegaUpload raid and litigation is problematic in regard to the treatment of the non-infringing content uploaded to the website, and the raid did invoke the criticism of individuals and activists from a variety of backgrounds. Many MegaUpload users complained that they used the site for storing photos, home videos, original music, developing and distributing phone applications, distributing content in the public domain, and other legal uses (Brodkin, 2012). Popular comment and dissent against the seizures ranged from Apple co-founder Steve Wozniak comparing the seizure to "shut[ing] down the post office" for crimes committed through the mail (Sandoval, 2012, para. 2) to Anonymous launching DDOS against the U.S. DOJ, FBI, and Universal Music, among others (C. Williams, 2012, para. 1).

Digital rights organization Public Knowledge condemned the MegaUpload seizure for causing too much "collateral damage" by seizing many servers that hosted legal, non-infringing content (Rangath, 2012, para. 5). In a legal analysis of copyright related seizures, Raymond (2013) identifies the seizure of lawful communications, information, and personal creative works as a form of "over capture" that places undue burden on individual users (p. 369). Raymond (2013) argues that a balance between ISPs, content

providers, IPR holders, and individual users is central to creating fair and effective governance of digital copyrights (p. 383). Working against Raymond's recommendations, however, is the problem of enclosure and the commodification of digital spaces. The DOJ and FBI's indiscriminate seizure of MegaUpload's servers and subsequent statements from courts that the U.S. government has no intention of returning legal material demonstrates that for the enforcement agencies, the importance of MegaUpload as a digital commons for individuals to share legal communications was secondary to its ability to facilitate copyright infringement. The cyberlocker is part of a commodified space where property rights govern opportunities and limitations for communication. The problem of over capture as a consequence of commodification and enclosure is evident in the seizure of OiNK's *Pink Palace*, detailed in the next section, which is rooted in U.K. legal and enforcement mechanisms and occurred five years before the MegaUpload raids.

OiNK's Pink Palace: An Introduction to the Case

The case of OiNK's Pink Palace was chosen because it highlights the disparity between law enforcement and policymakers and life and culture as experienced online. As an invitation-only music-oriented BitTorrent tracker that specialized in high quality audio formats and required users to share in order to download, OiNK contained a vibrant community of music fanatics, industry insiders, and musicians. One famous user, Trent Reznor of the band Nine Inch Nails, hailed OiNK's massive music selection, quality audio formats, DRM-free files and early releases as being far superior to anything he had encountered in retail or legal digital stores like iTunes or Amazon

(Westhoff, 2007, para. 3). When OiNK was shut down by the IFPI, BPI, and Interpol in 2007, the site's users and owners were branded as criminals and pirates, news outlets were reminded of the toll that file sharing takes on the music industry, and criminal charges were pressed against users and administrators (O'Connell, 2007). In the wake of the OiNK raids, copycat websites emerged and criticism of the takedown emerged online from former users, digital rights groups, and activists (Jones, 2007). The case analysis of OiNK summarizes the infrastructure and culture of the site, details the takedown and the legal actions taken afterward, and evaluates the conflict between file sharers, law enforcement, and the music industry.

As source material, the OiNK case study utilizes journalistic accounts of the case, most considerably from profiles in *Wired* (Phan, 2007) and *New York Magazine* (Day, 2007). I also apply a timeline of the events and aftermath of the raid from a previous case study in communication studies on OiNK conducted by Sockanathan (2011). In addition to OiNK, its operators, and its users, the primary stakeholders in the case include the IFPI and BPI (as supporting the raid and criminal charges against OiNK operators and users), the British police, Interpol, and the Dutch FIOD ECD special task force as enforcement agents. The case demonstrates the spatialization of copyright enforcement across the European Union, the difficulty of copyright criminalization, and the influence of the recording industry on legal actions against websites. The case also displays the inefficiency of closing down file sharing websites by blocking user access and physical seizures; the failure to successfully prosecute OiNK's stakeholders is associated with the U.K. government's move toward the Digital Economy Act.

OiNK's emergence and closure: The Pink Palace under siege. OiNK's Pink Palace was launched in 2004 by then-20 year old British programmer Alan Ellis (Carraway, 2012, pp. 576-577). The site relied on the BitTorrent file sharing protocol for users to upload and download music, software applications, e-books, and comics (Sockanathan, 2011, pp. 18-19). Movies, games, and pornography were banned from OiNK (Phan, 2007, para. 10). At its peak, OiNK had 180,000 members (Phan, 2007, para. 10). OiNK was a private BitTorrent tracker, meaning that users had to register with the site after accepting an invitation (Carraway, 2012, p. 577). Keeping a tracker private is partly done to help sites avoid anti-piracy crackdowns, but also to help maintain a high quality of content that is devoid of spamming and computer viruses (Andersson, 2014, p. 103). Invitations to OiNK were heavily sought after in online message forums and chatrooms around the web, and selling invites was strictly forbidden by administrators (Sockanathan, 2011, pp. 18-19). Invites could only be given out by OiNK users after users accrued a high ratio of materials downloaded to materials uploaded (Sockanathan, 2011, p. 19). OiNK's entire system of rules and sharing practices was based on ratio requirements. If users did not maintain a high enough ratio, they were banned from the site (Phan, 2007, para. 3). If a user invited someone to OiNK and the new member abused the ratio system, both the inviter and the invitee were banned (Phan, 2007, para. 3). Ratio could not be bought or sold with money, and could only be accrued through sharing (Phan, 2007, para. 3). The Pink Palace's ratio system was notoriously particular, and many users were banned for not meeting ratio requirements (Phan, 2007, para. 9). However, the underlying construction of OiNK's

sharing economy was not abnormal for a file sharing site. Communication research has often recognized the sharing economies of file sharing websites and software (Lessig, 2008; Carraway, 2012; Andersson, 2014), and while OiNK's requirements were more strict than other sites, it was not particularly different from sharing systems researched elsewhere. Lessig (2008), for instance, defined sharing economies as environments where "access to culture is regulated not by price, but by a complex set of social relations" that are "insulted by the simplicity of price" (p. 145). Indeed, the social relations required to access culture on OiNK were, as described below, bizarrely complex. OiNK took donations for server maintenance and rental space, but giving money gave donors no special privileges (Phan, 2007, para. 3). Requesting special privileges in return for donations would result in a user being banned (Phan, 2007, para. 3).

OiNK's administrators went to great lengths to keep the site discreet, going so far as to remove attempts to create a Wikipedia page and avoiding talking to press (Kravetz, 2010, para. 3). Users were required to have "cute" avatars such an image of a stuffed animal or pet, and civility was strictly enforced in the site's message boards and chatrooms (Sockanathan, 2011, pp. 336, 340). The site was reputed for the depth and variety of its music selection, and had very strict rules regarding audio quality (Sockanathan, 2011, p. 20). Administrators would not allow any music files to be uploaded that were not of a higher quality than those found in Apple's iTunes store or any other legal music store at the time, and there were strict rules regarding file labeling and presentation (Phan, 2007, para. 2). OiNK's audio quality standards led one *Wired*

journalist to liken them to a “persnickety record store clerk” (Phan, 2007, para. 2), and users were frequently kicked out for violations. A *New York Magazine* feature on OiNK echoed the sentiments of many users with the statement that OiNK was “the greatest record store of all time, filled with not-yet-released albums, obscure live performances, the rarest of B-sides, and a fabulous bonus—everything was free” (Day, 2007, p. 1). The early releases were largely provided by industry insiders, meaning that journalists, studio employees, and musicians were uploading pre-released albums on the Internet and linking them directly to OiNK (Day, 2007, p. 2). Record companies also used OiNK as a means to promote albums (Lightfoot, 2010, para. 3). These users were part of the community that made OiNK’s Pink Palace an enormous, meticulously managed digital music *bibliothèque* with an infrastructure and catalog depth that rivaled any legal alternative (Sockanathan, 2011, p. 24). The site was rooted in the users’ propensity for sharing, systematizing and classifying files, filling holes in the library, reporting violations, and other efforts at infrastructure maintenance (Sockanathan, 2011, p. 35).

The site was monetarily free, but extremely labor intensive and users had to earn continued membership through their own shared work. OiNK ran on social capital and relied on the sharing and reciprocity of its users. It was a user-driven service that was only sustainable because of the demand for an extensive digital music catalog that was not being offered by other p2p and retail sites. Sockanathan (2011), assessing OiNK from a cultural perspective, surveyed various OiNK users and found a collection of fans and musicians that turned to the invite-only torrent site because they were tired of the record industry’s price fixing, iTunes’ relatively poor quality, lack of selection and

disrespect for musicians (pp. 35-37). OiNK's Pink Palace was an online forum where communal labor was used to create a commons for file sharing and communication about culture, fandom, and a massive digital library project.

However, OiNK's contribution to the digital commons was not highly regarded by the rights holders that saw music, software, and literature that they owned openly traded amongst 180,000 users. For media industries, OiNK was, in the words of an IFPI official, "central to the illegal distribution of prerelease music online...this was not a case of friends sharing music for pleasure. This was a worldwide network that got hold of music they did not own the rights to and posted it online" (O'Connell, 2007, para. 3). The IFPI's statement is a condemnation of OiNK's sharing economy as a criminal enterprise whose purpose was to steal cultural commodities. After a two-year investigation by the IFPI and BPI, OiNK's servers were raided in the Netherlands and the site's founder, Alan Ellis, and six British OiNK users were arrested in the United Kingdom (O'Connell, para. 2). The raid was named Operation Ark Royal and included cooperation with British and Dutch police and Interpol (O'Connell, 2007, para. 3). Visitors to the site after the raid were greeted with a graphic from the IFPI and BPI warning of a criminal investigation into user identities (O'Connell, 2008, para. 3). Ellis' home, place of employment, and father's home were all raided by police, along with several buildings in Amsterdam over the period of a week (O'Connell, para. 3). The Dutch police unit responsible for the raid was the Fiscal Investigation Unit of the Dutch Police, or FIOD ECD (Day, 2007, para. 3). FIOD ECD is an elite Dutch task force that primarily focuses on financing, money laundering, and fraud associated with organized

crime and terrorism (International Monetary Fund, 2011, p. 34). This task force seized OiNK's servers and \$300,000 in donations which British police claimed made the site "highly lucrative" (O'Connell, para. 3). From a perspective evaluating prohibition regime development, the use of FIOD ECD is significant because it signifies that Dutch police were using resources developed for high financial and violent crime to focus on enforcing IP prohibitions in cooperation with British enforcement agencies. The sweeps on OiNK's servers are similar to the Pirate Bay raid by dozens of Swedish police and the paramilitary raid of MegaUpload's Kim Dotcom's mansion, in that enforcement was carried out with large quantities police resources. The police were also acting at the insistence of the IFPI and BPI (O'Connell, 2007, para. 2). In Chapters I and II, I explained the influence of media industries on trade agreements, national laws, the USTR, and E.U. directives, and the OiNK case demonstrates how that influence expands to police organizations by showing the extent of enforcement used to protect IP from distribution within a digital commons. In Chapter I, I relayed Leman-Langlois' (2012) description of how multinationals and trade groups create a discourse regarding the impact of and intent behind piracy, and the discourse is passed on and ingrained into police organizations (pp. 4-6). The phenomena of media industry discourse on copyright infringement being passed along to police organizations is evident in that, according to Sockanathan (2011), police insisted after the raid that OiNK was a for-profit enterprise, in spite of no evidence that the seized donations were being used for anything but site maintenance (p. 38). The accusations of piracy and theft from the IFPI, BPI, and police agencies presumes that the possibility of OiNK's proprietors running a file sharing site

for the purpose of non-commodified cultural exchange is preposterous. A prosecutor representing the British government in the case claimed that OiNK was a “cash cow” and that it was “common sense” that Alan Ellis was engaging in criminal activity (Lightfoot, 2010, para. 9). The assumption of criminal infringement that the prosecutor supported was the undoing of the OiNK prosecutions, as there was not enough evidence of criminal wrongdoing for any of the prosecutions to result in convictions (Curtis, 2010, sect. 3, para. 1).

Resolution: OiNK and its piglets. Ellis was charged with conspiracy to defraud the music industry and was found not guilty after a ten-day trial in 2010 (Wray, 2010, para. 1). The court agreed with Ellis’ defense that he was simply trying to further his skills as a programmer through OiNK and never profited directly from donations to the website (Wray, 2010, para. 2). The court also found evidence that IFPI members used OiNK to promote their own releases (Lightfoot, 2010, para. 12). The OiNK users that were arrested were cleared of all or most charges, as well, and found to have no link to or relationship with Ellis (Cheng, 2010, para. 1). The users were arrested for uploading pre-release music to the site, and one 17 year-old uploader was arrested for sharing three albums that he downloaded from other websites (Curtis, 2010, para. 3). This user’s parents’ house was raided and their computers seized (Curtis, para. 2). The charge included “distributing copyrighted material so as to prejudicially affect the copyright holder” (Curtis, 2010, para. 3), which was punishable by up to ten years imprisonment. The teenager’s case was dismissed after the IFPI failed to provide evidence that the music was even copyrighted (Curtis, 2010, para. 3). The user’s lawyer complained that

the case should have been civil and not criminal and that the IFPI was setting out to make an example out of file sharers (Curtis, para. 1). The lawyer also accused the Crown Prosecution Service of acting as a proxy for the IFPI and BPI (Curtis, 2010, para. 4). The other OiNK uploaders were all sentenced to 50 to 180 hours of community service or given a £500 (\$800) fine (Breihan, 2010, para. 2).

The music industry bemoaned the failure of the prosecutions. *The Guardian*, in an article dubbing OiNK the “British Pirate Bay,” quoted a BPI representative as saying the verdict was “hugely disappointing” (Wray, 2010, para. 5). The representative pointed to the allegation that over 20 million files were shared on OiNK, the claim that copyright infringement was costing thousands of British jobs, and the estimated £414 (\$700) million that file sharing cost the U.K. music industry in 2006 alone (Wray, para. 7). The IFPI and BPI also used the failure to prosecute the OiNK arrestees as evidence that copyright law in the United Kingdom needed to be strengthened (Wray, para. 7).

While media industries perceived OiNK as a disruption in the accumulation of capital and responded with the legal and police force of the state, users of the Pink Palace likewise responded with counterarguments and protests on blogs and social media. Two memorial blogs were set up for OiNK’s supporters and former users and were used to raise funds for Ellis’ legal defense (Socokanathan, 2011, p. 34). These blogs also hosted a large volume of fan created art in support of OiNK and were home to dozens of articles defending OiNK and waxing nostalgic about its past (Socokanathan, p. 34). *TorrentFreak*, a popular pro-file sharing and digital privacy site, reported that The Pirate Bay was to launch a replacement for OiNK called “BOiNK” (van der Sar, 2007).

The Pirate Bay soon canceled its plans when two other OiNK replacements, What.cd and Waffles.fm, were launched as nearly identical substitutes for OiNK (Jones, 2007).

These “piglets” were born just days after OiNK was shut down and nearly two and a half years before the OiNK case was resolved. Both sites were still up and running at the time of this writing. The launch of Waffles.fm and What.cd are indicative of what the BitTorrent news blog *TorrentFreak* refers to as the media industry’s “hydra” problem of growth and replication (Jones, para. 3), and what commentary on other technology sites like *Ars Technica* refer to as part of a futile game of “whac-a-mole” (Anderson, 2007). Sockanathan’s (2011) analysis of OiNK argues that it is the organizational infrastructure of OiNK’s users and curators, not the site itself or its programmers, that are disruptive to media industries (p. 35). These users appreciate the potential of organizing and sharing media online and bypass laws that forbid such activity. Andersson (2014) warns researchers not to look too deeply into private trackers similar to OiNK as unified communities or activist collectives (p. 77). Rather, the users utilize the trackers and obey the rules because it offers them access to media that they could otherwise not access due to price, availability, or the quality of marketed versions (Andersson, 2014, pp. 76-77, 103). Andersson (2014) found that users are content to utilize file sharing sites until legal alternatives arise that can match the depth of content available in the private trackers (p. 76). Andersson’s (2014) research specifically notes how Spotify, the advertising and subscription-supported streaming music service, is an example of a practical alternative to file sharing that could stem illegal activity (p. 45). However, no

such legal alternative exists that can accommodate the users of private trackers' desire for high-quality, meticulously catalogued audio collections.

The normalization of file sharing among users is problematic for IP prohibitions because, as Andreas and Nadelmann (2006) argued, prohibitions for activities that are supported by strong social norms are unlikely to meaningfully reduce an activity (p. 22). The rush to establish copycat sites immediately after the international efforts to shut down OiNK demonstrate a potential weakness of using law enforcement to eliminate file sharing sites, and the failure to successfully prosecute any of the parties involved shows the limitations on the recording industry's ability in the United Kingdom to criminalize file sharing. In the months after OiNK, the United Kingdom did attempt to increase its IP prohibitions through the Digital Economy Act, which would criminalize file sharing (Giblin, 2014, p. 166). The Act was passed in 2010, but as I discussed earlier in this chapter, the DEA was never fully implemented. The inability of the United Kingdom to implement IPRED through its Digital Economy Act also hints at the political economic limitations of E.U. member states to implement IP prohibition mechanisms. However, the transnational coordination of police organizations in shutting down the physical means for operating an individual website was demonstrated fully through the British and Dutch raids on OiNK and affiliated parties. OiNK's Pink Palace served as an arc in the cycle of contention existing between IP prohibitions and file sharers. Additionally, the United Kingdom did establish a permanent IP task force in 2012—the Police Intellectual Property Crime Unit—that has cracked down on numerous websites allegedly hosting copyrighted materials (Solon, 2013, para. 1). The crackdown by the

British task force is called Operation Creative and has conducted numerous website seizures and physical raids to enforce copyright prohibitions (Solon, 2013). While IP legislation appears to have stalled in the United Kingdom, copyright police have taken a more active role as stakeholders in intellectual property governance. For the United Kingdom, then, addressing the governance of IP enforcement through the concept of a prohibition regime is especially useful, as digital copyright enforcement is currently based on the creation of new police agencies rather than the enactment of new information policy.

The next case, regarding Spain's *Ley Sinde* law, also illustrates the escalation of digital copyright prohibitions and democratic and legitimacy issues that appear during battles over media production and distribution. Where the case of OiNK focused on police and prosecutorial actions against file sharers and the political economic conflict between peer-to-peer web communities and the music industry, the Spanish case is a case of information policy laundering and implementation that directly addresses problems of Europeanization, harmonization, and activism in efforts to expand the IPR GPR through the European Union.

The *Ley Sinde* and the Digital Copyright Struggle in Spain

The *Ley Sinde* case traces the digital copyright prohibitions, court cases, and activist reaction that occurred in the lead-up and aftermath of the Spanish law from 2007 to 2014. Previous communication research on this case was conducted by Sarikakis (2014), who framed *Ley Sinde* in terms of the problem of policy laundering. *Ley Sinde*, or the Sinde Law, was discreetly and hastily added to a larger economic reform bill, thus

creating widespread concern over the democratic legitimacy of the law (Sarikakis, 2014, para. 2). The case was also studied by Horten (2011) in a larger historical critique of digital copyright law. I refer to Horten's timeline of the case throughout the study. I primarily focus on the larger issue of digital copyright prohibition emergence in Spain, but also emphasize the case of the *RojaDirecta*, a Spanish sports streaming website and BitTorrent tracker.

RojaDirecta is important to this research because it demonstrates the difficulty of enforcing international copyright through purely civil measures. *RojaDirecta*'s web domains were seized through the U.S. DOJ and Homeland Security's Operation InOurSites, and the civil case that followed was questioned in much activist commentary that regarded InOurSites as an overreach of U.S. power (Anderson, 2012). *RojaDirecta* is also relevant because it addresses a type of digital copyright infringement—streaming—that is technologically different than the forms of file sharing I have previously addressed in this chapter. Streaming involves the live broadcasting of a television event (Mellis, 2008, p. 264). A streaming site's servers, owners, and users are typically highly dispersed internationally, and media streams are often sourced from Russia and China, where copyright litigation is difficult (Mellis, 2008, p. 265). The challenges in prosecuting the Spanish streaming site provide evidence of legal difficulties that temper the spatialization of international copyright enforcement.

The *Ley Sinde* case follows how the EC, United States, and media industries pressure states into adopting global copyright standards and the resistance that organizes against this adoption. I chose the Spanish case because it typifies the escalation of copyright

laws that occurred throughout the European Union in this period of time. It also illustrates the challenges of Europeanizing copyright norms across divergent European cultures, in particular the difficulty of instituting copyright prohibitions in a nation where norms strongly conflict with proposed legislation. I begin with a brief background of the Spanish government and the political, economic, and social crisis in Spain during the time of the case.

A background of Spanish digital copyright laws and contestations. At a time when the European Commission was promoting IPRED2, and torrent sites like The Pirate Bay and OiNK were being shut down by international coalitions of police across Europe, the practice of file sharing was still relatively protected in Spain. While Spain was an early signatory of IPRED and in good standing with other IP-related E.U. directives and international treaties, the legal measures that it instituted to protect rights holders tended to only follow the minimum requirements of its obligations to the European Union and international community (Sarakakis, 2014, sect. 4, para. 2). Additionally, the Attorney General of Spain released an official statement in 2006 to judges, law enforcement, and prosecutors that file sharing was only illegal if it was committed with a profit motive and to the direct detriment of a third party (Horten, 2011, p. 151). This statement from the Attorney General's office had no legal authority, but was released in the wake of several Spanish court decisions regarding file sharing and was widely interpreted by the courts as a government endorsement for the legality of file sharing (IIPA, 2011). Users engaging in peer-to-peer downloading were widely considered by Spanish courts to be making private copies as opposed to stealing for

profit; additionally, the Attorney General's statement considered file sharing to be strictly a matter of civil jurisdiction and stated that criminal prosecutions for file sharing would be overstepping Spain's "minimum intervention" standards for law enforcement (Horten, 2011, p. 152). For example, in the immediate aftermath of the Attorney General's statement, a criminal case filed by Columbia TriStar Home Video, the Spanish music industry trade group Promusicae had its criminal case against the file sharing site Sharemula.com dismissed (Peguera, 2010, para. 72). Sharemula operated similarly to BitTorrent sites like The Pirate Bay and OiNK in that it was a website offering a decentralized index of files for users, but the actual files were hosted on p2p networks. The judge ruled that Sharemula merely acted as an intermediary and was not guilty of a "non-authorized act of communication" by posting an index to files (Peguera, 2010, para. 73). The judge further stated that Sharemula.com's profits came from advertisements, not from download fees or subscription, so the website was not actually profiting from file sharing (Peguera, 2010, para. 74). With no claim to commercial infringement, the criminal cases against file sharing sites could not go forward in Spain. Over thirty cases similar to Sharemula.com were dismissed in Spain between 2007 and 2008, which included every criminal file sharing case except for two in which the defendants plead guilty (Peguera, 2010, para. 73-74). The judicial interpretations of Spain's copyright law in Sharemula and other criminal copyright cases acted as a buffer against the commodification of the digital commons by protecting online spaces for sharing information. The Spanish cases are in stark contrast to the United States' Grokster ruling and the precedent of "inducement to infringe," in that the Spanish cases

considered the indexes to be neutral and not an incentive for theft (Hancock, 2006, p. 199).

Another significant feature of digital copyright law in Spain was 1987's Tax for Private Copy—later known as the Digital Canon—which levied a tax on CDs, blank tapes, digital music devices, and other material goods used for copyright copyrighted materials that was then redistributed to IPR holders (Sarikakis & Rodriguez-Amat, 2014, sect. 4, para. 7). The Digital Canon provided compensation for IP holders when their work was downloaded (Horten, 2011, p. 156). Spain had a rich history of levying special taxes on material goods used for copying, which led to a powerful system of consumer advocacy groups that resisted laws against digital downloading and streaming (Horten, 2011, pp. 156-157). Combined with the Attorney General's statements on file sharing, the Digital Canon gave digital rights groups in Spain a strong standing on in regard to resisting regulation on digital copying. Trade groups representing the IP industries, however, viewed Spanish copyright law as disastrous (Horten, 2011, p. 158). For instance, the IFPI criticized Spain's Internet piracy problem in its 2010 Digital Piracy Report, claiming that the "victims" of Spain's lax copyright laws were "local acts" (IFPI, 2010, p. 6). The IFPI claimed that Spain's "state-sponsored apathy" toward piracy has led to the near-death of Spanish music industry, and cites a drop in sales of local music in Spain (IFPI, 2010, p. 19). Similarly, the IIPA, in its 2008 Special 301 recommendations to the USTR, claimed that 1.1 billion illegal music downloads occurred in Spain in 2007 (IIPA, 2008, p. 3). The IIPA further claimed that 240 million illegal film downloads occurred in 2007, and that music sales in Spain fell nearly 59%

from \$807 million to \$331 million between 2001 to 2007 (IIPA, 2009, p. 303.) The Entertainment Software Association's contribution to the IIPA's report noted that 50 million video games were illegally downloaded (IIPA, 2009, p. 350). The BSA claimed that software downloads were negligible in the context of Western Europe, but was concerned about street piracy (IIPA, 2009, p. 350). The street piracy problem in Spain was also of concern to the IIPA, but it considered police cooperation among the entertainment industry and the Spanish police to be positive, with 4,636 people arrested in 2007 for selling illegal compact discs (IIPA, 2008, p. 51). In contrast, only one online-related raid was reported, which regarded police action against a warez ring (IIPA, 2008, p. 51). The IIPA also lamented the difficulty of IPR prosecutions in Spain, and accused Spain of not fully implementing various E.U. directives (IIPA, 2009, p. 160); the IIPA claimed that Spain was lacking in its implementation of the Copyright Directive because it failed to clarify its laws against circumvention devices (IIPA, 2008, p. 349).

The IIPA also accused Spain of being in violation of the IP Enforcement Directive because it did not fully adhere to the so-called right of information, discussed earlier in the IPRED analysis, which allows rights holders to identify copyright infringers by obtaining information about infringements (IIPA, 2008, p. 352). In Spanish law, only criminal violations—those of a commercial scale—are included in the right of information (IIPA, 2008, p. 352). Criminal charges were necessary for legal access to the broadband data of Spanish Internet users. Civil cases against file sharing in Spain were then difficult to prosecute, then, because specific information involving the accused

infringer's online activities were not allowed in the court (Horten, 2011, p. 152). The IIPA expressed its frustration with the difficulty of prosecuting for infringement in Spain by noting that the "fundamental principle" of the right of information is that only ISPs, not individual users, should be held to a commercial scale standard (IIPA, 2008, p. 352). However, the right of information as written in the IPRED is more ambiguous than the IIPA claims. The text of IPRED states that after a "a justified and proportionate request" by the IP holder, judicial authorities may order that information about the origin and distribution of allegedly infringing material "be provided by the infringer and/or any other person" who was involved in infringement on a commercial scale (European Commission, 2004, sect. 5). The IIPA believed the phrase "and/or any other person" meant that the copyright infringer, *in addition to* any affiliated person infringing on a commercial scale, be the subject of a court order. In contrast, Spanish lawmakers interpreted the right of information to mean that the alleged copyright thief was only criminally liable when *also* infringing on a commercial scale. In practice, the difference in Spain and the IIPA's interpretation of the right of information means that Spanish courts could hold a website criminally liable for copyright infringement if the site hosted copyrighted material, but the user of that website was not subject to the right of information unless the user was profiting from downloads. The difference in interpretation led to fundamental disagreements on how the right to information functioned in Spain.

The demands of rights holders that Spain needed to create laws to force ISPs to hand over the identity and usage records of customers also suffered a defeat at the E.U. level

in a case that was referred from Spain: The recording industry failed to convince the European Court of Justice of the argument that Spain was not upholding E.U. directives in the 2008 case of *Promusicae v. Telefónica*. In the *Telefónica* case, the European Court of Justice settled a suit between Spain's largest music trade group and its largest ISP over demands from *Promusicae* that *Telefónica* release the information of users of the internationally popular file sharing site Kazaa (Coudert & Welkers, 2008, p. 51). The ECJ determined that neither the Information Society Directive nor the E-Commerce Directive mandated that member states are obliged to create laws that force ISPs to disclose identifying information about users of peer-to-peer networks in civil cases (Leistner, 2009, pp. 870-871). The ECJ instead determined that it was the responsibility of member states to determine how to balance the European Union's privacy and data protection standards with obligations to protect private property online (Leistner, 2008, p. 870). The decision then put the impetus on IPR trade groups to lobby member state governments directly in order to change IP law to the benefit of the recording industry. For *Promusicae* and the Spanish recording industry, the decision was exceptionally problematic because it dealt directly with the Spanish government's unwillingness to force *Telefónica* to collect and distribute user data.

The IIPA accused Spain of being in violation of other aspects of the E-Commerce Directive besides alleged infringer identification. The group also accused Spain of not implementing the notice-and-takedown procedures required by the directive (IIPA, 2008, p. 352). As discussed in Chapter II's section on the E-Commerce Directive and its similarities to the DMCA, notice-and-takedown procedures allow a rights holder to alert

an ISP or website that infringing content is being made available, and the ISP or website is then required to take down the material. The complaint of Spain's slack implementation of notice-and-takedown was that, due to pressure from ISPs and digital rights groups during Spain's adoption of the E-Commerce Directive, only the courts were allowed to process complaints about copyright infringement (IIPA, 2008, p. 352). The judicial review—that is, approval from a judge before taking down material—required by Spain's notice-and-takedown guidelines was based on constitutional safeguards surrounding information and speech (IIPA, 2008, p. 352). The IIPA considered Spain's implementation of the Directive to be too lax, and wanted fewer burdens on rights holders to get infringing materials removed.

The solutions offered by the IIPA for digital piracy in Spain were for the government to be more “transparent and cooperative” with copyright industry groups and to implement graduated response laws (IIPA, 2008, p. 352). The recommendations would be adopted by the USTR in its Special 301 Report's section on Spain. Additionally, Spanish peer-to-peer sites were also targeted by the United States in its international anti-piracy enforcement operations. The police action taken against the Spanish streaming site *RojaDirecta* and the subsequent civil case against the site reveals the process of information policy's spatialization and the challenges of enforcing global prohibitions.

The legal struggles surrounding the streaming and peer-to-peer sports site *RojaDirecta* as part of the larger Operation InOurSites gives perspective as to how the IP industry and the U.S. government worked around Spanish copyright law.

***RojaDirecta* and Operation InOurSites: Seizing the Red Directory.** The *RojaDirecta* is a sporting event streaming directory and BitTorrent site based in Spain. The site allows individuals to post links to live streams of sporting events for users to search for and access. Much of the sporting content is not under copyright, but the site does link to live pay-per-views and sporting events owned by sports organizations around the globe. These organizations typically have contracts with major television networks and cable and satellite companies to host their content. The National Football League's television contracts were worth \$27 billion in 2013 (Badenhausen, 2013), for instance, and the league also had a deal with a satellite provider for another billion dollars in the same year (Glover & Baker, 2013). According to a 2007 European Commission report on sports, sport encompasses 3.2% of the European Union's GDP and 15% of its labor force (Sports Rights Owners Coalition, 2007, para. 2). For sporting leagues and broadcasters, illegal streams are viewed as a direct threat to broadcast revenue models (Mellis, 2008, p. 261).

One Spanish sports television rights holder, Audiovisual Sports, sued *RojaDirecta* in 2007 for copyright violations (McSherry, 2011). Echoing the sentiments of the Spanish Attorney General that I described in the previous section, the judge in the case dismissed the suit because *RojaDirecta* did not actually host the files or streams of the sporting events in question (McSherry, 2011). *RojaDirecta* was, in effect, only an intermediary and not responsible for any infringement in question. The *RojaDirecta* suit was dismissed after the Sharemula.com precedent protecting intermediary websites from liability for copyright infringing linked material (Horten, 2011, p. 152). The Spanish

legal system's unwillingness to prosecute intermediaries led to frustration in the United States, which targeted Spanish websites in an international police operation.

Operation InOurSites was conducted by the U.S. government to shut down multiple sports p2p and streaming sites with no judicial review (Sellars, 2011). The operation was conducted in three phases, the largest of which was conducted to reduce streaming services in advance of the National Football League's 2011 Super Bowl (Sellars, 2011, p. 12). The third phase of the operation included the confiscation of two of *RojaDirecta*'s domain names, <http://rojadirecta.com> and <http://rojadirecta.net>. Visitors to these domains after the raid were greeted with a web page adorned with the bronze, bald eagle-adorned insignia of the U.S. DOJ, U.S. Customs, and the Department of Homeland Security (Sellars, 2011, p. 13). The web pages also included a message that Homeland Security's Immigration and Customs Enforcement unit seized the site pursuant to a warrant issued by a U.S. federal court; the seizure banner also warned that "willful copyright infringement is a federal crime" that can result in five years in prison and several hundred thousand dollars in fines (Sellars, 2011, p. 13). In an affidavit that led to the warrants to seize the sites, a federal agent argued that seizures were the most effective way to prevent the sites from being used for illegal activity (Sellars, 2011). Criticism of the legality, effectiveness and ethics of the raid appeared on various technology blogs online (Sellars, 2011). Criticism also came from NGOs including the digital rights group Public Knowledge, which argued that the raid represented the "constant expansion of copyright enforcement laws" that has created "a system where website owners are effectively treated as guilty until proven innocent" (Anderson, 2012,

para. 11). The Electronic Frontier Foundation condemned the seizures for being an unconstitutional, ineffective overreach of copyright enforcement that was a waste of the Department of Homeland Security's resources (McSherry, 2010). The EFF also pointed to multiple seized websites that neither hosted nor linked to any infringing content (McSherry, 2010, para. 2). The lack of judicial review in the operation led to, the EFF argued, a reckless approach to law enforcement that was comfortable with the collateral damage of taking down several legal websites in order to shut down infringing services (McSherry, 2010).

In a legal analysis of the seizures, Sellars (2011) identified three primary criticisms of the raids, including free speech issues, copyright overreach, and the impracticality of prosecution. The free speech critique is that the non-infringing speech found on *RojaDirecta* and other seized sites, chat rooms, discussion boards, and blogs unrelated to infringement were entirely removed (Sellars, 2011, p. 11). The other problem from a legal free speech standpoint is that the lack of judicial review potentially violated U.S. First Amendment guidelines toward prior restraint, which is considered a form of censorship on speech that has not yet taken place or been adjudicated upon (Sellars, 2011, p. 20). Enforcement agencies may view copyright infringement as a strictly commercial enterprise not subject to speech protections, but Sellars (2011) counters that speech protections for copyright infringements are increasingly common in U.S. courts (p. 22). As discussed earlier, the Spanish courts already considered the actions of the *RojaDirecta* to be a protected form of communication. The dispute of whether or not a website that indexes links to potentially infringing material is afforded free speech

protections or is considered to be engaging in commercial activity can be identified as part of the larger tensions in the formation of information policy. In Chapter I, I discussed Braman's (2004) conceptualization of information policy as a commodity or as a cultural force, and of information as a private or public resource (pp. 35, 37). In the seizures of Operation InOurSites, U.S. enforcement stakeholders were approaching information in the form of websites as private commercial entities in violation of IPR. The Spanish courts, by contrast, viewed these websites as public spaces for depositing information.

Sellars (2011) also pointed to the practical technological problems of the seizures (p. 27). InOurSites only seized individual domains, so the owners of the websites were able to relocate to different domains (Sellars, 2011, p. 27). For instance, *RojaDirecta* relocated from its .com and .net domains to a Montenegrin address (<http://RojaDirecta.me>), thus giving users an easy route to bypass the seizure (Anderson, 2011). After tech blogs reported on InOurSites and revealed the new domain names of seized sites, many saw a notable uptick in traffic (Sellars, 2011, p. 24). In terms of copyright overreach, Sellars (2011) notes that many of the sites, by not themselves hosting copyrighted content or encouraging copyright infringement and cooperating with the United States' Digital Millennium Copyright Act, were not in violation of copyrights (pp. 25-26). *RojaDirecta*'s parent company, Puerto 80, was one of many site owners seized by InOurSites to challenge the seizure in court and allege prior restraint against the U.S. government. In an amicus brief in defense of Puerto 80, the EFF, Public Knowledge, and the Center for Democracy and Technology (2011) argued that the

Spanish court's decision in favor of RojaDirecta.com should have prevented the United States from seizing the domain (p. 14). The digital rights groups claimed that *RojaDirecta* should have been protected from the seizures because while foreign decisions are not binding to the U.S. judiciary, there are "exceptionally high standards" for ignoring foreign judgments that were neither met nor applied in the Puerto 80 case (*Puerto 80 Projects, S.L.U. v. United States of America*, Department of Homeland Security and Immigration and Customs, 2011b, p. 14). Generally, bypassing foreign judgments in the United States requires evidence that the foreign court is not in a competent jurisdiction and that "the laws and public policy of the forum state and the rights of its residents will not be violated" (*Puerto 80 Projects, S.L.U. v. United States of America*, Department of Homeland Security and Immigration and Customs, 2011b, p. 13). Whether or not a U.S. court would have decided the case differently than the foreign court is considered irrelevant (*Puerto 80 Projects, S.L.U. v. United States of America*, Department of Homeland Security and Immigration and Customs, 2011b, p. 13). The argument that the U.S. government did not have the authority to seize the website was rejected by enforcement agencies both in the courts and in public. A DOJ lawyer in support of the raids stated in an interview that "[t]he fact that a country doesn't protect intellectual property is no excuse to just give them free reign to do whatever they want" (Anderson, 2011b, para. 7).

In 2012, the U.S. government, after defeat in a case in which a federal court ruled that webmasters are not responsible for copyrighted videos embedded by others on their sites, gave up the courtroom battle against Puerto 80 and sent a letter to a New York

federal court requesting that the *RojaDirecta* case be dismissed (Singel, 2011). *RojaDirecta* was one of several sites that were returned by the United States in response to litigation against Operation InOurSites, but many others never protested the seizures and thus were never restored (Singel, 2011). The U.S. DOJ considered the operation successful, and noted that 81 of the seized sites shut down with no objections (Anderson, 2012, para. 9). Public Knowledge, as part of its criticism of the InOurSites seizures, noted that the U.S. government was not responsible for any financial harms incurred by *RojaDirecta* and other returned domains (Anderson, 2012, para. 7). Public Knowledge further complained that no barriers existed to the U.S. government's ability to seize websites and that in copyright cases, infringers are "guilty until proven innocent" and that the federal government has no incentive to cease raids (Anderson, 2012, para. 7).

Outside of its borders, too, the U.S. government was still working with the IP industries and the European Union to change copyright laws in Spain. Many of the changes encouraged were designed specifically to make it easier to eliminate sites like *RojaDirecta* and Sharemula.com by making linking sites criminal and quickly removing them from the web. In the next section, I describe those lobbying efforts through a secondary analysis of the development of Spanish laws and popular protest toward the proposed revisions to the Spanish copyright system. I begin with a description of economic and political realities in Spain leading up to copyright reform.

Spanish leadership in a time of crisis. The Socialist Worker's Party's José Luis Rodríguez Zapatero became prime minister of Spain in an upset victory over the center-right Popular Party days after the March 11, 2004 terrorist attacks in Madrid (Chari,

2004, p. 955). Zapatero's campaign was based on increasing housing and removing Spanish troops from Iraq (Chari, 2004, p. 955). His party remained popular until the 2008 global financial crisis created mass unemployment in Spain (Godina & Molina, 2011, p. 6). Youth unemployment in Spain reached a staggering 41% in Spain in 2010 (Gerbaudo, 2012, p. 78) and reached 51.5% by 2012 ("Eurozone crisis explained," 2012). Spain's overall unemployment was the highest in the European Union at 24.3%, with one in four Spaniards at risk for poverty ("Eurozone crisis explained," 2012). Unlike elsewhere in the European Union and in the United States, Spain's financial sector was not immediately affected by the crash, and so Zapatero denied that there was an economic problem in Spain despite the collapse of its labor market (Gordino, & Molina, 2011, p. 6). The denial eroded Zapatero's popularity, which waned further in 2010 after the government began cutting social services due to pressure from the European Union and European financial institutions to adopt austerity policies (Martín & Urquizo-Sancho, 2012, p. 351). Zapatero was widely regarded by critics as a puppet for Brussels and too eager to succumb to European Union pressures to implement the reduction of labor rights and cuts in public spending in order to secure bailouts for Spain's banks (Gerbaudo, 2012, p. 78). The financial collapse and the onset of policy reform caused unrest across Spain in the form of trade union protests and a growing student-led youth activist movement that culminated in 2011 (Martín & Urquizo-Sancho, 2012, p. 351). The next section describes the lead-up to the mass protests and eventual ouster of the Zapatero's Socialist party, with *Ley Sinde* and issues related to copyright reform at the forefront of the analysis. I describe how a prodigious free culture scene,

the unpopularity of the Spanish government, and economic and political frustration in Spain and perceptions of democratic deficits created a perfect storm for protest when the government tried to ratchet up its copyright laws. I begin by continuing the earlier discussion of U.S. and IP industry pressures on Spain to strengthen its copyright standards.

Ley Sinde, WikiLeaks, and the birth of a movement. The United States worked to further the IIPA's recommendations for copyright reform in Spain by lobbying at the national and local levels of government. Between 2004 and 2010, U.S. officials visited the Spanish ministries of culture and industry to advise the copyright revisions suggested by the MPAA, including renouncing the Spanish Attorney General's official statement on digital copyrights and creating a graduated response system (Horten, 2011, p. 162). The bilateral discussions also included pushes from the United States for Spain to revise privacy and E-commerce laws to make it easier for websites to be taken offline and site owners to be prosecuted for copyright infringement (Horten, 2011, p. 162). The United States insisted that copyright infringement have more "personal consequences" including arrests and Internet service bans (Horten, 2011, pp. 162-163). At the local level, the U.S. Embassy held frequent meetings with Spanish officials and conducted "educational initiatives" about best practices in digital copyright policy (Horten, 2011, p. 162). Horten (2011), in an analysis of U.S. lobbying in Spain, describes these luncheons as involving U.S. officials informing rights holders and telecom representatives that the United States was working in their interests to stop copyright infringement and that greater cooperation between the two nations was needed to stop infringement (p. 162).

Frustrated with the slow pace of bilateral discussions, in 2008 the United States decided to increase pressure by putting Spain on the Special 301 list (USTR, 2008, p. 42). As discussed earlier in this chapter and in Chapter I, the Special 301 is the United States' mechanism for pressuring nations to adopt recommendations for IP reform. The list is heavily influenced by recommendations from the IIPA, and the USTR's 301 complaints against Spain in 2008 include the IIPA's 2008 grievances against the Attorney General's defense of intermediary websites and the lack of requirements for ISPs to provide user identity and online activity to aid civil prosecutions. The USTR also accused Spain of having the worst Internet copyright infringement problem in Europe (USTR, 2008, p. 43), and later editions of the report would attack the Spanish Attorney General's comments on digital copyright violations and expressed concern that Spain would be too slow in prosecuting infringers (USTR, 2011, p. 40). The USTR's 2011 Special 301 lamented Spain's lack of criminal enforcement procedures, and expressed a desire to continue working with Spain on the implementation of enhanced police efforts to tackle IPR infringement (USTR, 2011, p. 43). The new police efforts were to include new branches of the Ministry of Interior, Civil Guard, and National Police to administer "Internet piracy enforcement" (IIPA, 2011, pp. 2-3).

In response to the initial 2008 Special 301 listing, Spain formed a bilateral commission with the United States to discuss and monitor its progress in changing its copyright policy (Horten, 2011, p. 165). In the commission talks, Spanish officials explained that they were worried about implementing graduated response because the ruling Zapatero government was too weak to handle the backlash from citizens'

advocacy groups and digital rights organizations (Horten, 2011, p. 166). The United States called on Spain to implement a more active approach to copyright reform in spite of these protests, and so the Spanish government called for talks between the telecommunications and content industries to draft policies to combat Internet piracy (Horten, 2011, p. 167). A 2009 diplomatic cable leaked by WikiLeaks in 2011 describes how the negotiations between the telecoms and rights holders fell apart. In a section titled “Moving Towards a Graduated Response System,” the cable confirms that the Spanish government was handing off its piracy policing to the private sector because it was worried about crafting a graduated response system of its own (“Internet Piracy in Spain: Suspension Of Private-Sector Negotiations,” 2009). The two groups in charge of drafting policy were RedTel and the Coalition of Creators and Content Industries, made up of a prominent Spanish copyright licensing agency, the recorded music association *Promusicae*, and the MPAA-backed Federation for the Protection of Intellectual Property, which represents Spanish film and entertainment software interests (“Internet Piracy in Spain,” 2011, para. 3). According to the leaked cables, the two sides were incapable of reaching an agreement. RedTel wanted rights holders to make copyrighted material available online so that the ISPs could include the material with their own services, but the Coalition refused this offer, in large part because the MPAA was worried about anti-trust issues in the United States if they offered content exclusively to Spanish ISPs (“Internet Piracy in Spain,” 2011, para. 4). The Coalition, in turn, was pushing for a graduated response system that RedTel was hesitant to endorse. RedTel agreed with the Coalition to request that the government amend its E-commerce laws to

implement a graduated response regime and to remove obstacles hindering rights holders from successful civil procedures against “internet pirates” (“Internet Piracy in Spain,” 2011, para. 4). In its final draft of policy recommendations, though, RedTel turned away from all of the Coalition’s requests and insisted that while the ISPs would send warning letters to people accused of infringing, no individual’s service would be disconnected (“Internet Piracy in Spain,” para. 4). As such, the negotiations fell apart and the Spanish government was forced to approach the problem of copyright reform without mutual agreement from the IP and telecommunication sectors. The Ministry of Culture was hopeful that upcoming European Parliament elections and graduated response laws in France would persuade RedTel to alter its stance in support of Internet disconnections (“Internet Piracy in Spain,” para. 10).

Soon after the Coalition/RedTel negotiations fell apart, the new minister of culture, Ángeles González-Sinde, was appointed, leading to the hardening of Spain’s stance on copyright reform (Horten, 2011, p. 167). González-Sinde’s appointment was considered a victory by the United States for its unilateral pressures (Horten, 2011, p. 168). One of the leaked diplomatic cables praised González-Sinde’s appearance at a major Spanish movie awards ceremony in which she pronounced that while “times are tough everywhere,” the Spanish movie industry was in a particularly extreme crisis and copyright reform was needed to save the film trade (“Madrid Economic Weekly, April 6-17,” 2009, para. 1). Leaked cables also revealed González-Sinde’s eagerness to work with the U.S. government for copyright reform, and the authors of the cables encouraged the U.S. government to leverage her influence, stating:

It is in our interest to support her efforts, and post recommends that we do so through arranging visits, meetings, and/or video conferences with experts in the coming months. Her receptivity also gives us an opportunity during Spain's E.U. presidency to influence developments beyond Spain. ("New Culture Minister on Fight Against Internet Piracy," 2009, para. 5)

In the same document that calls on the United States to work with González-Sinde, the U.S. government also dismisses the opposition as "pro-piracy," including the Spanish digital rights group Association of Internet Users, or *Internautas* ("New Culture Minister on Fight Against Internet Piracy," 2009, para. 4). *Internautas* is a vocal A2K organization founded in Spain in 1998 that is dedicated to activist and legal action against copyright overreach by the IP industries; *Internautas* was well-known for challenging copyright law in Spain and protesting efforts to strengthen IPR at the time that it was being criticized by the United States (Horten, 2011, p. 167). In the stakeholder enumeration earlier in the chapter, I described *Internautas* as an A2K organization that offers policy recommendations and engages in online and digital activism. The group occupied a major role in the eventual *Ley Sinde* protests, and the group also coordinated with other activist stakeholders during the larger protests against the Zapatero government and economic policies (Postill, 2013, p. 10).

The *Internautas* are also a major stakeholder in Spain's longstanding A2K movement (Morell, 2012, p. 387). The movement was described by Postill (2014) in an ethnographic study of social movements in Spain as thriving throughout Barcelona and Madrid and including "law firms specialized in digital commons, the world's largest

WiFi network (guiffi.net), free software communities, journalistic and blogging initiatives ... publishing houses” and a strong programming and hacking culture(p. 6). *Internautas*’ presence within the A2K community would continuously help it mobilize Spanish activism in protest of government policy. In 2004 and 2008, the group mobilized against changes to Spain’s digital canon (Postill, 2013, p. 10), which, as described earlier in the chapter, imposed a tax on media products that was redistributed to rights holders (Sarikakis & Rodriguez-Amat, 2014, sect. 4, para. 7). *Internautas* was legitimated as a stakeholder in Spanish politics in that it was regularly invited to government seminars to discuss information policy issues (Horton, 2011, p. 154).

The U.S. diplomatic cables offered continuous updates on González-Sinde’s efforts at copyright reform and detailed how the U.S. government and MPAA were working with her to create new anti-piracy legislation. In October 2009, ahead of a meeting between Zapatero and the Obama administration in the United States, an Inter-Ministerial Commission was formed within the Spanish government to address digital IP violations in Spain; the MPAA and RIAA had been putting pressure on U.S. officials to address Internet piracy with Zapatero, and IP policy talks took place throughout the visit (Horten, 2011, p. 171). At the same time in Spain, the Coalition of Creators released a list of 200 websites that it claimed were engaging in online piracy, and the government used this list for the public relations benefit of claiming that any legislation it passed would only target those particular sites (Horten, 2011, p. 172). Soon after, the Spanish government went through with its first major efforts stop digital piracy in Spain.

The SEA. The Sustainable Economy Act (SEA) was introduced as the first major effort to reform the ailing Spanish economy (Sarikakis & Rodriguez-Amat, 2014, sect. 5, para. 1). The Act was introduced to take meaningful measures to combat recession through renewable energy and the digitization of public administration (Sarikakis & Rodriguez-Amat, sect. 5, para. 1). Woven into this bill was a series of anti-digital piracy measures that came to be collectively referenced as “*Ley Sinde*” (Horten, 2011, p. 170). In a critical analysis of *Ley Sinde*, Sarikakis and Rodriguez-Amat (2014) describe its inclusion in the Act as policy laundering (sect. 6, para. 2), which I have discussed here as proposed laws that disguise unpopular policies in larger, seemingly unrelated legislation and rush them into law with little public scrutiny. Policy laundering is increasingly common in the information policy sector, where strong civil liberties and digital rights groups are able to hinder the efforts of international political and private pressures to regulate and commodify digital spaces (Sarikakis & Rodriguez-Amat, 2014, sect. 6, para. 1). With the strength of A2K organizations including *Internautas*, a strong sector of consumer’s rights advocates, and the Spanish Attorney General’s support of p2p intermediary sites, a laundered policy was perhaps the only policy that was going to be able to amplify digital copyright standards in Spain. Due to the difficulty of strengthening the law through transparent legislative processes, *Ley Sinde* was inserted into the SEA in a series of short annexes distributed throughout the Act (Horten, 2011, p. 172). The annexes were revisions to Spain’s law implementing the E-Commerce Directive (Peguera, 2011, p. 164). The E-Commerce Directive, which is discussed in Chapter II as containing the European Union’s guidelines for safe harbor provisions to

keep ISPs from being held liable for illegal user activity also gives member states the option of requiring ISPs to store user information and release it in the instance of alleged illegal activity (Seville, 2009, p. 48). Under *Ley Sinde*, Spain would institute the optional guidelines and require ISPs to hand user data over to a Commission of Intellectual Property (Sarikakis & Rodriguez-Amat, 2014, sect. 6, para. 2). As noted in the ECJ's decision in *Promusicae v. Telefónica*, member states are able but not obligated to make user identification demands of ISPs. Whereas the *Telefónica* case was viewed as a defeat by the music industry in the direct aftermath of the decision because it did not force the telecommunication company to reveal user information, *Ley Sinde* would make the ECJ's decision beneficial to rights holders by mandating user identification. Despite their earlier objections to the procedures, telecommunications stakeholders did not object to the new requirements, and RedTel was supportive of user identification so long as no graduated response measures were implemented; this change of opinion from the ISPs was due to previous negotiations with the Ministry of Culture and the IP industries (Horten, 2011, p. 169).

Ley Sinde's overarching purpose was to establish the Commission of Intellectual Property. The Commission is made up of appointees from the Ministry of Education, Culture, and Sports (Sarikakis & Rodriguez-Amat, sect. 6, para. 2). The creation and structure of the Commission of Intellectual Property is informed by phenomena discussed previously in this dissertation. As noted in Chapter I's literature review during the discussion of TRIPS and the USTR, intellectual property commissions are a staple of anti-piracy initiatives recommended by the United States and IIPA (Drahos, 2002, p.

95). Additionally, education campaigns to teach students and citizens in general about copyright infringement from an industry perspective are a common demand of the IP industry (Drahos, 2002, p. 127), and this demand is reflected in the Spanish Commission through the Ministry of Education, Culture, and Sports appointment. The Commission's powers include the authority to enact preventative measures to stop infringement, including starting judiciary procedures and shutting down Internet access to a firm or individual with final approval from a judge (Sarikakis & Rodriguez-Amat, 2014, sect. 6, para. 3). The Commission can also request that an appeals court block online content that the Commission finds to be in violation of IP law (Sarikakis & Rodriguez-Amat, 2014, sect. 6, para. 3). Notably, the judicial review was only implemented after protesters argued that seizures would be unconstitutional without judicial approval (Horten, 2011, p. 175).

In addition to constitutional obstacles, complaints from news media and activists contended that the Commission's takedown orders could be in violation of the Spanish rights to freedom of expression and privacy (Peguera, 2010, p. 164). The release of a public draft of the SEA on December 1, 2009, led to immediate protest from Spain's consumer and digital rights groups. The *Internautas* reacted with the rapid release of a manifesto of digital rights for Spanish citizens that denounced *Ley Sinde* for trampling civil liberties, hindering innovation, creating legal uncertainty, and privileging authors over other citizens (Doctorow, 2009, para. 3). The manifesto also included calls for a guarantee of net neutrality—the principle that regulations and ISPs do not prioritize broadband allocation among online content or applications—by the Spanish government

and a Spanish IPR overhaul to “ensure a society of knowledge, promote the public domain and limit abuses from copyright organizations” (Doctorow, 2009, para. 10). *Internautas’* manifesto ends with a call for more public debate and consultation with relevant parties during the lawmaking process (Doctorow, 2009, para. 11). The manifesto was posted to Facebook and garnered 240,000 comments in 24 hours, and feeds related to the protest were among Twitter’s most shared conversations globally (Morell, 2012, p. 390). *Ley Sinde’s* early draft was criticized on popular technology blogs including BoingBoing (Doctorow, 2009) and Ars Technica (Anderson, 2010), as well as from A2K stakeholders such as the Electronic Frontier Foundation (Hinze, 2011) and Public Knowledge (Tasker, 2012). The websites and NGOs categorized the response to *Ley Sinde* within the context of activism against national copyright measures in the United States, United Kingdom, France, and Sweden and regional protests against E.U. directives and reforms.

The level of attention and protest had the immediate effect of putting Minister González-Sinde on the defensive; she appeared in front of the Spanish senate to assure that criminalization was not part of her proposal, that the Sustainable Economy Act was in compliance with the E.U. directives, and that her primary intent was to protect creators (Horten, 2011, p. 174). Yet social media and street protests emerged despite her assurances (Horten, 2011, p. 175). Prime Minister Zapatero responded on television by reiterating that no websites would be cut off, freedom of expression was in no way under fire, and IP infringement was a large problem for Spain (Horten, 2011, p. 175). Zapatero was also under tremendous pressure from the European Union and international financial

institutions to take immediate action to address Spain's economic crisis, and was unwilling to risk delaying or even failing to pass the Sustainable Economy Act due to objections over copyright reform (Horten, 2011, p. 175). A revised draft of SEA, released in January 2010, added a judicial review clause that required the Commission of Intellectual Property to seek the approval of a judge before removing online content. After the revised draft, a copyright complaint would move through *Ley Sinde* as follows: First, the Commission of Intellectual Property would be told by a rights holder that a site is infringing (Peguera, 2010, p. 165). If the Commission agreed with the complaint, the Commission would tell an appeals judge that the site is infringing on copyright and needs to be taken down. The judge would then review the complaint, but would be not allowed to question the merits or validity of the copyright infringement in the case (Peguera, 2010, p. 165). Rather than analyze whether or not infringement occurred, the judge's only duty is to weigh the importance of the copyright infringement with the rights to expression and information (Peguera, 2010, p. 165). The judge can then approve or disapprove, but not modify, the Commission's request for blocking material (Peguera, 2010, p. 165). Peguera (2010) describes this system as "peculiar" because judicial review is removed from the actual accusation of copyright infringement and because it makes the Commission the absolute authority on deciding whether or not a work is infringing (p. 166). The Spanish government and IP industries, which, as I have documented earlier in this chapter, had little success proving copyright infringement in Spanish courts, could now rely on the Commission to take down websites while only dealing with a relatively weak review system.

Growing protest. The revisions implementing limited judicial review in *Ley Sinde* were not enough to stem the protests. Sustainable Net, a protest group made up of bloggers, lawyers, artists, and other activists, was formed to combat *Ley Sinde* (Horten, 2011, p. 176). The group formed alliances with the *Internautas* and the programmers collective Hacktavistas (Horten, 2011, p. 176). These groups facilitated intense Internet activism against *Ley Sinde*, and worked to create negative attention toward the law's purpose and potential misuse (Horten, 2011, p. 175). The extent of influence that this A2K activism had on the political process is unclear, but González-Sinde did react immediately by reaching out to the U.S. Embassy for assistance in passing the law (Horten, 2011, p. 176).

According to leaked diplomatic cables, in February 2010, the U.S. Ambassador Alan Solomont visited González-Sinde to “discuss bilateral cooperation on cultural issues, intellectual property rights, and draft legislation that would enhance the government's ability to combat digital piracy” (“Spain: Ambassador’s Meeting with Minister of Culture Angeles González-Sinde,” 2010, para. 1). During the meeting, the politicians discussed how to implement the law and what strategies could be used to make sure that it passed in full. The U.S. Ambassador told González-Sinde that the U.S. government wanted González-Sinde’s legislation to move into law with no weakening amendments (“Spain: Ambassador’s Meeting,” 2010, para. 5). The Ambassador also noted that the RIAA did not approve of González-Sinde’s proposal, because it did not criminalize individual file sharers on p2p sites (“Spain: Ambassador’s Meeting,” 2010, para. 5). *Ley Sinde* did not take the step of criminalizing individuals as the United Kingdom and

France were doing with IP industry-backed legislation including the Digital Economy Act and HADOPI during the same period, and so the United States was not satisfied with the law. González-Sinde stressed to the U.S. Ambassador that Spain's plans for an anti-piracy law were not as ambitious as the graduated response systems in France and the United Kingdom ("Spain: Ambassador's Meeting," 2010, para. 4). She further noted that "attempts to regulate Internet activity are of intense interest to young people, the media, and companies like Google" ("Spain: Ambassador's Meeting," 2010, para. 4), so criminal copyright legislation for digital infringement would be difficult to push forward. The Minister of Culture bemoaned the "free culture" movement in Spain and stated that most politicians were ignorant of the impact of digital piracy ("Spain: Ambassador's Meeting," 2010, para. 5). However, she noted that the problem was "unsustainable" ("Spain: Ambassador's Meeting," 2010, para. 5) and that the government had to deal with it immediately. She doubted that the Zapatero government was capable of handling the problem, though, and requested that the United States reach out to legislators in the opposition parties in case they were to take the 2011 election ("Spain: Ambassador's Meeting," 2010, para. 5). The Embassy, however, was already meeting with the opposition, and had met with the right-wing Popular Party's leader Mariano Rajoy and his Chief of Cabinet a month earlier to discuss, in order, "Afghanistan, Iran, IPR, the Spanish economy, and Latin America" ("Ambassador Solomont's January 21, 2010, Meeting With Spanish Opposition Leader Mariano Rajoy," 2010, para. 1). The Ambassador told Rajoy that IPR in Spain is a major concern of the U.S. film and music industries, and emphasized that the head of the MPAA had

spoken with him just the day before over concerns of Spanish copyright infringement (“Ambassador Solomont’s January 21, 2010, Meeting,” 2010, para. 5). He also noted that he was told by a group of Warner Brother’s executives that DVD sales in Spain were “down by 80 percent” (“Ambassador Solomont’s January 21, 2010, Meeting,” 2010, para. 5). Rajoy expressed concern over the problem but noted the vocal Internet activism in the country and stated that the Popular Party was seeking “appropriate judicial safeguards for shutting down websites” and the “the appropriate balance between IPR protection and freedom of expression” (“Ambassador Solomont’s January 21, 2010, Meeting,” 2010, para. 5).

WikiLeaks and mass protests. After the initial diplomatic meetings between the U.S. Ambassador and González-Sinde, the Sustainable Economy Bill moved forward throughout 2010. In the midst of a volatile social and political atmosphere in Spain frequented by mass protests against the government, the European Union, and the broader specter of global capitalism, *Ley Sinde* continued to be a target for Spain’s digital rights movement (Hughes, 2011, p. 410). The protests were still occurring on the streets, on social media, on the front pages of major newspapers and in the form of cyber attacks against the major political parties of Spain and politicians that supported *Ley Sinde* (Morell, 2012, p. 390). The protests against *Ley Sinde* hit their stride in December 2010 in the weeks before the final version of the bill was set to pass during the holiday season (Horten, 2011, p. 177). It was during this period that WikiLeaks released its massive document dump of U.S. diplomatic cables. The various meetings between the United States and Spanish political leaders was documented on the front page of Spain’s

largest newspaper, *El Pais*, with accusations that the entirety of *Ley Sinde* was the product of U.S. government in response to lobbying from the MPAA and RIAA (Hughes, 2011, p. 410). *Ley Sinde* and its U.S. backing became an international news story appearing in the pages of *The New York Times*, *Der Spiegel*, and *The Washington Post*, and regional and activist media jumped on the story (Horten, 2011, p. 174). The narrative of *Ley Sinde* was at once folded into a larger international A2K activism and anti-globalization movements. In Spain, the WikiLeaks releases fueled the fires of protest against the government and all of its major political parties (Postill, 2013). Sustainable Net, the *Internautas* and Hacktivistas all launched extensive viral campaigns and street protests after the leaks were revealed (Horten, 2011, p. 174). A group of technology lawyers launched an online mobilization against the bill under the banner “*Ley Sinde-Biden*,” named so as a joking reference to the United States’ vice president due to the U.S. involvement in its creation (Postill, 2014, p. 3). Anonymous also became involved after the WikiLeaks revelations, and were highly visible throughout *Ley Sinde*-related protests and online campaigns during the protests (Postill, 2014, p. 5). Additionally, Sustainable Net announced that they were given only five days notice to review the final version of the Sustainable Economy Act in the government’s efforts to keep the public and social movement organizations out of the review process, which led to frustrations over the accountability of the legislation (Horten, 2011, p. 179).

Due to the increase in protests, EC pressures on the Zapatero government to hurry and pass the SEA and an unwillingness of smaller political parties in Spain’s parliament to support the law for fear of electoral backlash, *Ley Sinde* annexes were removed

entirely from the Sustainable Economy Act (Horten, 2011, p. 179; “Government knocked back in bid to pass “Sinde Law’ in Congress,” 2010). The removal was hailed as a victory for digital rights in Spain by activists, but *Ley Sinde* was soon revived under a political compromise (Horten, 2011, p. 180). The law passed the Spanish Congress in February with a minor change to the judicial process of blocking a website. The new process required a judicial ruling before ISPs could be ordered to block content (Horten, 2011, p. 180). The law was approved by the European Commission, but it was never put into regulatory form by the Zapatero government (Horten, 2011, p. 180). In effect, *Ley Sinde* was not enforced. The stalemate displeased both rights holders and activists (Horten, 2011, p. 181). A movement to boycott all the major political parties in Spain was created by activist groups, called *No Les Votes* (Gerbaudo, 2012, p. 78). *No Les Votes* was supported by Anonymous activism and several regional grassroots online activist groups to continue protests on a larger scale (Postill, 2014, p. 5). The movement included traditional journalism, online activism, street protests, and distributed denial of service attacks; the tactics used were diverse, wide ranging, and representative of the variety of traditional NGOs and activist groups and radical hacktivist collectives (Postill, 2014, p. 5). An early protest against the bill occurred at Spain’s motion picture awards, which included a speech by González-Sinde on the importance of protecting copyrights in Spain. During this speech, hundreds of Anonymous protesters congregated outside of the ceremony and, wearing their signature Guy Fawkes’ masks, jeered at González-Sinde (Williams, 2012, para. 13). Anonymous would later discover and reveal the home addresses and phone numbers of González-Sinde, her eventual replacement in the

Cabinet, and several prominent Spanish actors and directors that supported *Ley Sinde* (Belinchon, 2012).

No Les Votes' and Anonymous' protests culminated in May 2011 when the groups orchestrated a demonstration against *Ley Sinde* in Madrid (Postill, 2014, p. 5). The May protests were rooted in and based on A2K activism and anti-*Ley Sinde* sentiment in Spain, but soon grew much larger and encompassed discontent over Spain's labor crisis (Morell, 2012, p. 390). Gerbaudo (2012), in an analysis of the May 2010 movement, noted how the protests emerged from the systems of networked communication created by organizations and activists against *Ley Sinde*. *No Les Votes* built an infrastructure of social media groups and blogs that united local, national, and international activist groups that were able to mobilize online and in public spaces (Gerbaudo, 2012, pp. 80-81). The infrastructure was easily shared with and appropriated by activists to protest Spain's broader crisis (Gerbaudo, 2012, p. 81). The May 15 protests soon grew to encompass other areas of political, economic, and social discontent, and 30,000 protesters were marching in Madrid by the end of the month (Postill, 2014, p. 5). The May protests marked the birth of the student-led *Indignado* movement in Spain. The *Indignado* movement was rooted in economic and political discontent aimed at what its members perceived as corrupt, anti-democratic Spanish and E.U. institutions (Gerbaudo, 2012, p. 77; Castells, 2012, pp. 136-137). The *Indignados* were started through social networking and mobile services, but eventually coordinated and centralized on the ground. Most importantly to the research conducted here, however, is that the *Indignados* were an outgrowth of Spain's free culture movement that was mobilized by

A2K public interest groups against *Ley Sinde* (Castells, 2012; Gerbaudo, 2012; Morell, 2012).

15M movement. The *Indignados*, *No Les Votes*, Anonymous protesters, *Internautas*, and other social movement groups were united in questioning the sovereignty and legitimacy of governance in Spain and the actions of a Spanish political system heavily influenced by U.S. economic interests, E.U. mandates and international capitalism. The protest movement became known as the 15M movement because the mass protests began on May 15 (Morell, 2012; Postill, 2014). *Ley Sinde* was important in forming the 15M movement because the social media infrastructure and communication tactics of A2K groups and activists protesting the copyright law laid the groundwork for digital communication throughout the larger protests. Spain's A2K movement was heavily involved with the protests on social networks, mobile applications, and on the ground (Hughes, 2011; Morell, 2012; Postill, 2014). The 15M movement would end up a politically significant activist coalition in Spain and its influence would gain exposure from mainstream outlets including cable and newspapers (Gerbaudo, 2012, pp. 95-97). The movement and general discontent it represented were influential during the course of the 2011 elections, which saw the ouster of Zapatero's Socialists (Martin & Urquizo-Sancho, 2012, p. 352).

In November 2011, the Zapatero government was defeated in the polls and the Popular Party's Mariano Rajoy took over as prime minister (Martin & Urquizo-Sancho, 2012, p. 359). Zapatero refused to approve enforcement of *Ley Sinde* in his final Cabinet meeting on December 16, citing opposition from social networks that had

appeared prior to the meeting (Fraguas, 2012, para. 6). *El Pais*, Spain's largest newspaper, published a leaked letter from U.S. Ambassador Solomont to Zapatero that derided the former prime minister for not passing *Ley Sinde* (Fraguas, 2012). The Ambassador accused Zapatero of failing to "[finish] the job out of political reasons, to the detriment of Spain's reputation and economy" (Fraguas, 2012, para. 3). The Ambassador then threatened that the United States may upgrade Spain's status on the USTR's 301 list, which would set off US sanctions against Spain (Fraguas, 2012, para. 4). The Popular Party had spoken out against *Ley Sinde* prior to the elections, but one of Prime Minister Rajoy's first tasks in office was to heed the United States' warning and begin the regulatory enforcement of *Ley Sinde* on December 30, 2011 ("Government knocked back in bid to pass "'Sinde Law' in Congress," 2010, para. 5). Spain was removed from the 2011 Special 301 report in light of the decision ("US takes Spain off piracy blacklist," 2012, para. 9). The USTR's goodwill toward Spain did not last long, however. In 2013, the IIPA recommended that Spain be put back on the list and claimed that the Commission of Intellectual Property was slow and ineffectual (IIPA, 2013, p. 1). The IIPA also claimed that only two websites had been taken down by the Commission, and that 80 complaints were outstanding (IIPA, 2013, p. 1). Additionally, the report also cited data that 87% of Internet users in Spain still downloaded copyrighted films, music, software, and video games (IIPA, 2013, pp. 236-238). In response, the USTR's 2013 Special 301 announced that it was not yet putting Spain back on the list but needed to work with its government to strengthen digital copyright laws and regulations (USTR, 2013, p. 7). Facing a new round of U.S. threats, the Spanish government announced new

legislation that jails for up to six years anyone charged with making a profit from a website by linking to copyrighted material, larger fines for infringing content providers, and measures to speed up the process by which the Commission of Intellectual Property can take down websites (“Spain readies hefty jail terms over internet piracy,” 2014, para. 1). These new measures would finally criminalize linking sites and give Spanish enforcement agencies the authority to shut down sites like *RojaDirecta* and others that were previously protected under Spanish law.

Discussion

The discussion of the cases expands the conceptualization of the IPR GPR, draws on key findings, and cross-analyzes the cases, acting as a bridge into Chapter IV, which qualifies the historical importance of the case studies and expands on theoretical frameworks integrated throughout the dissertation. I begin by revisiting the concept of global prohibition regimes, which Andreas and Nadelmann (2006) identify as occurring when unilateral and bilateral law enforcement measures are inadequate in the face of criminal activity that transcends borders (pp. 18-19). The case analysis in this chapter, which demonstrates how stakeholders contest the governance of IPR, is consistent with Andreas and Nadelmann’s framework due to the prominence of the United States, national governments, and IP industries in establishing prohibitions. In Chapter I, I also situated the IPR GPR as a smaller functional regime in the boundaries of a larger economic regime, and stated that the IP prohibition regime was parallel to what Braman (2004) identified as an information policy regime. The case analysis in this chapter supports the notion, as discussed in Chapter 1, that the IPR GPR exists alongside the

information policy regime, which is built around policymaking initiatives that define information as commodities in order to control and manage digital networks of information and communication. The difference is important because In Braman's (2007) analysis, information policy deprofessionalizes digital IP related activities by applying laws created for disputes between firms and publishers to individual behavior (p. 162). The IPR prohibition regime is, in contrast, expanding the authority of police agencies to identify more actions as criminal. Laws and legislation born from information policy—the regulatory mechanisms that control the flow of communication and social interaction—are often ignored by police agencies participating in the arena of cybercrime enforcement. A prominent observation in the case analyses was the extent to which Lemay-Langlois' (2012) argument (detailed in Chapter I) that police authority to crack down on cybercrimes is wide, ill-defined and operates across borders with or without permission from national governments (p. 3-4) is applicable to digital copyright prohibitions. The OiNK case in particular demonstrates how an international police effort that included British Police, Interpol, and a Dutch anti-terrorism and organized crime task force can be deployed to crack down on digital copyright violations. Although the criminal charges against OiNK administrators were dismissed and subsequent U.K. legislation that would criminalize file sharing failed implementation, the police agencies involved continue to use seizures, raids, arrests, and extraditions to crack down on p2p networks. The United Kingdom even created an IP task force in 2012 to increase its criminal enforcement of file sharing, despite the U.K.'s inability to pass legislation legitimating criminal copyright enforcement (Solon, 2013, para. 1).

Similarly, the U.S. DOJ, Homeland Security, and Customs are willing to seize domains in European countries where the websites are legal and face no repercussions despite such seizures being rejected by U.S. courts.

The application of the GPR theory to digital copyright enforcement is appropriate for this research because the prohibition regime concept creates an opportunity for the study of IP in which police agencies are centralized. The application of the theory also emphasizes the extent to which the criminal enforcement of IPR continues Sell's (2010) upward ratchet even as the DEA, ACTA, IPRED2, and other TRIPS-Plus proposals fail to gain ground at national and international levels. The IPR GPR exists partially outside of E.U. efforts at Europeanization and harmonization of intellectual property because prohibition enforcement is dependent on the standardization of police procedures that, following Johns' (2012) history of IP enforcement, cluster together criminal categories of digital piracy, money laundering, terrorism, and organized crime (p. 6).

Internationally coordinated IP enforcement described in the case analysis from the United States, United Kingdom, Dutch, New Zealand, other nations' police agencies, as well as international agencies such as Interpol and the WCO, demonstrates the presence and significance of an international prohibition regime in the governance of digital copyrights.

GPRs are not only made of police agencies, however, and do depend on international legal institutions and trade agreements to be effective (Andreas & Nadelmann, 2006).

TRIPS is the starting point of the IPR GPR in that it expanded the commodification of information, communication, and culture through international enforcement mechanisms

(Andreas & Nadelmann, 2006; May & Sell, 2006), and information policy detailed throughout this dissertation continued the evolution of the prohibition regime. In the European Union, the directives described in Chapter II formed a European baseline for digital copyright laws through expanding protections for software and databases, digital rights management, the right of information, and civil remedies for online copyright violations. In terms of United States and European Commission demands for a solidified criminal enforcement regime for digital copyright prohibitions, though, the European Union's information policy regime falls short of creating criminal prohibitions against peer-to-peer activity. The reasons it is difficult to create criminal prohibitions, including protests from the telecommunication and technology sectors, A2K activism, incompatibility with existing laws, and standards of privacy and free speech, are detailed throughout the dissertation and in Chapter III's cases in particular. The IPR GPR's most evident problem that can affect its democratic legitimacy found within the case studies, though, is that police organizations are expanding cybercrime enforcement into areas where criminal activity is not identified by the law. The social movement and legal reactions to United Kingdom's Operation Ark Royal to seize OiNK's Pink Palace and the United States' Operation InOurSites illustrate how police enforcement is out of sync with both the legal and social norms that govern digital copyright laws and online communication. Both cases were rife with heavy-handed statements from police, government, and IP industry stakeholders that the arrests and seizures were in regard to criminals who profited from illegal activities that cost billions of dollars in damage to the global economy. The pro-enforcement statements were countered by an array of

A2K groups, legal experts, and blogs that claimed that the enforcement was out of proportion and in some cases illegal. In the case analysis, the courts sided with legal arguments that reflected those of the critics of police enforcement. However, no measures were taken at the policy or judicial levels to moderate this enforcement. The inconsistencies between police enforcement and legal and social norms were initially enumerated here in Chapter I's discussion of cybercrime theory. Lemieux (2010) noted that hybrid forms of police enforcement using digital surveillance and seizures as well as international raids and arrests often stem from broad prohibitions that are out of sync with social norms (p. 5). Socially legitimated activities such as file sharing and streaming are difficult to address through police agencies designed to capture criminals and stop crime. Indeed, the OiNK and *Ley Sinde* cases demonstrate that cybercrime theorists (Leman-Langlois, 2012; Lemieux, 2010; Yar, 2005) and information policy researchers (Larsson, 2011b; Andersson, 2014) are correct to argue that sharing and streaming entertainment media online are socially legitimated activities for many Internet users. The legitimacy of sharing and streaming create a difficulty for the IP prohibition regime's governance, which, following Andreas and Nadelmann (2006), is unlikely to find success using criminal enforcement tactics toward normatively accepted activities (pp. 20-21). The OiNK case draws on the difficulties of enforcement by revealing the discrepancies in the perception of what OiNK's Pink Palace meant to users and how its existence was interpreted by law enforcement. For users, the site was an extensive, meticulously organized library of high-quality music, hard-to-find rarities, and early releases that was managed through the labor and donations of its members.

Ellis and other administrators claimed that all donations only went to maintaining the site, and the courts could find no evidence otherwise. Yet for the music industry, prosecutors, and law enforcement, the site could only be conceived through a lens that envisaged file sharing as the pure theft of cultural commodities and the practice of operating a file sharing site for the sake of sharpening programming skills and creating a digital commons for audiophiles to be in defiance of “common sense” (Lightfoot, 2010, para. 9). With the disparity in the norms of OiNK users and the discourse of criminal enforcement, it is noteworthy that OiNK’s piglets, What.cd and Waffles.fm, still exist as of this writing and are larger than OiNK was in its prime.

The OiNK case addresses the research question of how the legitimacy of IPR governance is affected by a prohibition regime by demonstrating how internationally coordinated police measures to shut down the Pink Palace and hold administrators criminally accountable led to accusations of police overreach from critics, led to no successful prosecutions, and inspired the creation of copycat sites. In contrast, the *Ley Sinde* case addresses broader issues of democratic deficits and social unrest in Spain due to the mutual simultaneous shaping of the 2008 global financial collapse, a subsequent national labor collapse, and perceptions that the Spanish government’s decision making was dependent on the outside demands of the EC and United States. As a stakeholder, the EC’s primary role in the *Ley Sinde* case was to pressure the Zapatero government to adopt economic reform. The European Commission’s concerns with Spain were based on the dangers its economic situation posed to the European Union and not with its implementation of stronger IP laws. Additionally, the ECJ in *Promusicae v. Telefónica*

showed no objection to Spain's copyright system as it related to the E-Commerce and Copyright Directives. The United States and the entertainment industry were the primary stakeholders pressuring Spanish leadership for changes to its copyright system, then, and the Zapatero government, after it failed to launder the *Ley Sinde* law into economic policy, was hesitant to upset the telecommunication sector, public interest groups, and the many activists protesting the law. The Minister of Culture González-Sinde was ardent in her support for *Ley Sinde*, but was upfront with the U.S. Ambassador about refusing to try and implement criminal enforcement measures that went beyond the civil stipulations of *Ley Sinde* due to protests from telecommunication and technology companies and A2K groups including *Internatutas* ("Spain: Ambassador's Meeting," 2010). *Ley Sinde*'s guidelines of giving IP holders the right to demand Internet user information and the creation of the Spanish Commission of Intellectual Property were resisted by A2K stakeholders, but had been agreed to by the telecommunication industry in early talks between RedTel and the IP industry. However, complaints from lawyers and activists were enough to bring limited judicial review into the procedures of the Commission of Intellectual Property (Horten, 2011, p. 174).

WikiLeaks was a very significant stakeholder in the *Ley Sinde* case. The value of the diplomatic leaks were stressed by Burkart and Andersson (2014) in their analysis of how the cables provided transparency to ACTA and the implementation of IPRED in Sweden, and the results of WikiLeaks' whistleblowing was similarly impactful in the Spanish case. The debate over *Ley Sinde* was possible only because WikiLeaks exposed

the government's efforts at policy laundering. The WikiLeaks revelations of González-Sinde's negotiations with the United States and the acquiescence of the Zapatero government in masking *Ley Sinde* within the Sustainable Economy Act was also symbolic of the broader perception among Spaniards that the Spanish government was taking orders from Brussels and Washington. The contents of the U.S. diplomatic cables were publicized and criticized in the pages of *El Pais*, across Spain, and in international news outlets (Hughes, 2011, p. 410), which sparked further discontent with *Ley Sinde* and the secretive manner in which it was fashioned. The long-standing free culture movement in Spain was able to garner much support against the law, and pressures from protesters in addition to Zapatero's unpopularity as elections neared and pressure from the EC to hurry and implement the SEA did manage to temporarily sideline the law. The *Ley Sinde* protests were also engulfed by the larger protests in Spain, and the infrastructure of activism put in place by *Internautas*, *No Les Votes*, Sustainable Net and other A2K stakeholders assisted in the larger *Indignado* protests. While *Ley Sinde* was far from the primary motivation behind Spain's 15M movement, the case analysis displayed how the upward ratchet of IP law and the process of policy laundering can enhance democratic deficits and hurt the legitimacy of governance in a region such as Spain where there was already discontent toward the government and international institutions.

The findings in the case analyses suggest that IP governance is poorly implemented within the framework of a global prohibition regime and the legitimacy of the regime is highly contested in Spain, which has a longstanding and active free culture movement

and a moderate approach to copyright. Throughout the European Union, as identified in Chapter II's analysis of IPRED2 and ACTA, historical and legal standards of privacy and free speech curtail the implementation of criminal IP enforcement standards that commodify digital sharing and communication through surveillance and censorship. Additionally, the process of policy laundering and secretive negotiations between the IP industry and governments was ineffective in not only *Ley Sinde* but also in the United Kingdom's Digital Economy Act. Without the framework for maximalist IP law to guide information policy, though, governments and IP industries turn to police agencies to use cybercrime enforcement standards to regulate the governance of digital copyrights. The U.S. government is also still pushing for the international implementation of stronger IPR, as noted with the United States' latest round of 301 pressures on Spain. The Spanish government appears to be working with the United States in developing stronger IPR, as well ("Spain readies hefty jail terms," 2014, para. 1). Resistance from the telecommunication and technology sectors and from A2K activism does slow the international adoption of the IPR GPR, but the perceived economic imperative for the United States, European Union, and IP industries to bolster intellectual property rights is responsible for the continued growth of the prohibition regime.

The next chapter concludes the research with an analysis of the historical importance of the adoption of the prohibition regime with an emphasis on the legitimacy of IP governance. I revisit the concepts of regime theory, information policy and the international political economy of communication in order to emphasize the

contributions of this study to theoretical understandings of intellectual property.

Something about the literature and critical analysis? I also offer suggestions for further study and reflect on the historical significance of the cases.

CHAPTER IV

CONCLUSION

Overview

The premise of this dissertation is that the international regulation of intellectual property is increasingly under the governance of a prohibition regime, and that the implementation of the regime has made it necessary to rethink questions of how legitimacy is negotiated in political conflicts. The concept of the IPR GPR was presented in the first chapter as a theoretical framework for addressing the information policy's regulation of information over digital networks and the expanding involvement of police agencies and criminal enforcement in information regulation. The digital copyright based raids, seizures, arrests and extraditions described throughout this dissertation demonstrate that information policy research should address the amplification of cybercrime initiatives among state and international police institutions. The cases in the third chapter suggest that the legitimacy IP governance, particularly the governance of digital copyrights, is dysfunctional when negotiated by political actors through a prohibition regime. In this concluding chapter, I expand on the dysfunctions of the regime by engaging with the core concepts and theories presented throughout the dissertation in light of the findings. I begin by returning to the concepts of governance, legitimacy and regimes before moving to a discussion of this study's findings in regard to the political economy of IP enforcement. I then contribute to debates in the literature regarding policy laundering and cybercrime. I then expand on how the critical legal

methodology that guided the case analysis informed the findings, and discuss an alternative legal liberal approach. The implications of prohibition enforcement for the A2K actors and policies are then discussed, and I close by describing limitations of the study and suggestions for future research.

Governance and Legitimacy in the European Union IP Prohibitions

The findings from this study demonstrate that the legitimacy of international prohibitions on digital copyrights was hindered by the European Union's democratic deficits. Legitimacy in liberal democracies is linked with democratic representation, and so the democratic deficits implicit in the framework of the European Union weaken perceptions of the legitimacy of E.U. governance (Mather, 1999, p. 277). International governance is beyond the oversight of singular governments, and so it leads to the creation and regulation of supra-national bodies like the E.U., international institutions and regimes (Sarikakis, 2012, p. 148). The IPR GPR is a functional regime based on the convergence of interests among core states and industries to control the commodification of knowledge by strengthening intellectual property rights. The IP prohibition regime was constructed through processes of globalization, trade agreements and IGO formation and was solidified with TRIPS. TRIPS set the floor for global IPR standards and was followed by United States' laws and European Union directives that steadily increased the minimum requirements for IP protection. The problems associated with the regime's governance are related to normative resistance to its regulatory measures and the lack of democratic legitimacy of its international composition. In the European Union, the regulatory mechanisms governing IP are actualized through trade agreements, directives

and processes of Europeanization. In the *Ley Sinde* case, I noted that processes of Europeanization were primarily operating in the background through previous IP directives, and that stakeholders most involved in pressuring Spain to increase its IP measures were the United States and IP industries. Nonetheless, the difficulty of Europeanization is emphasized in the protest against *Ley Sinde*. WikiLeaks' *Ley Sinde* revelations were compound with pre-existing animosity in Spain toward the Zapatero government for succumbing EC and international pressures to implement austerity policies (Gerbaudo, 2012). In effect, the leaks of United States diplomatic cables detailing pressures on Spain to insert industry-backed copyright policy into an economic reform bill demanded by the EC created outrage and enhanced the perception that the Spanish government had succumbed to outside interests and international institutions. The policy laundering of *Ley Sinde* into the Sustainable Economy Act also damaged perceptions of the legitimacy of the copyright law through the implication that *Ley Sinde* was being hidden from public view in order to ease its implementation into law with little debate over its policy procedures.

Policy laundering is common feature in the emergence of digital copyright policy and occurred with *Ley Sinde*, the Digital Economy Act, France's HADOPI and ACTA (Sarikakis & Rodriguez-Amat, 2014, sect. 4, para. 7). The *Ley Sinde* case addressed the problem of policy laundering as a tool to pass copyright laws and enforcement measures where policymakers deem popular support too difficult or burdensome to achieve. Minister Gonzalez-Sinde warned the U.S. ambassador that copyright reform would be unpopular in Spain due to the nation's history of moderate copyright laws, normative

support of digital downloads, past legal precedents, thriving free culture and consumer rights groups and powerful telecommunication sector and refused to support measures for graduated response or criminal enforcement (“New Culture Minister on Fight Against Internet Piracy, 2009, para. 4). The economic pressure for Spanish copyright reform from the U.S. and IP industries was still strong enough to pressure Spain into significant copyright reform, though, and *Ley Sinde* was integrated into Spain’s Sustainable Economy Act. The Spanish government was convinced that *Ley Sinde* would assist in the protection of the 800,000 employees and the four percent of its GDP represented by its copyright sector (“Government knocked back in bid to pass “Sinde Law’ in Congress,” 2010, para. 6), and used policy laundering in an attempt to bypass objections to the law. The policy laundering process, possibly as much as the provisions of *Ley Sinde*, enhanced poor perceptions of legitimacy toward copyright laws and Spanish politicians. To illustrate, the *No Les Votes* movement was not geared solely toward the removal of *Ley Sinde* from SEA; rather, its mission was to stop votes for major political parties because of *Ley Sinde*’s policy implications, the anti-democratic process in which *Ley Sinde* was inserted into SEA, and the corruption of the government in its inability to stand up to foreign and corporate interests (“Manifesto,” 2011). The populist impulses of *No Les Votes* were seamlessly translated into the growing opposition against the Spanish government, and effectively inserted copyright reform into the agenda of protests opposing neoliberal economic initiatives and a labor crisis (Gerbaudo, 2012, p. 78). The policy laundering common in the establishment of IP

prohibitions, then, damaged the legitimacy of IP reform in Spain by affiliating *Ley Sinde* with government failure and corruption.

In addition to spurring the creation of *No Les Votes*, the controversy over WikiLeaks' *Ley Sinde* revelations influenced protests from *Internautas*, created the group Sustainable Net to lobby for A2K principles in Spanish IP law, caused Anonymous protests and DDoS attacks, and gathered international criticism from the national and international press (Horten, 2011, p. 242), technology blogosphere (Doctorow, 2009; Anderson, 2010) and activist organizations (Hinze, 2011; Tasker, 2012). News outlets including *The Guardian* compared *Ley Sinde* to the United States' SOPA (Rushe, 2012), which failed to be implemented due to protests from technology companies and activists. The reaction to the *Ley Sinde* case was pieced into a narrative of international protests against an alphabet soup of IP reform proposals including ACTA, SOPA, HADOPI and the Digital Economy Act (Horten, 2011, p. 174). Importantly, the inclusion of *Ley Sinde* into the anti-IP reform narrative occurred despite the fact that *Ley Sinde*'s measures to facilitate website closure adopted no criminal measures or graduated response proposals at any stage during the policy's development. The protests against *Ley Sinde* did focus on its measures to coordinate online enclosures through the commodification of digital spaces once protected by Spanish law, but the rejection of the copyright law by A2K organizations and activists was also due to the anti-democratic, secretive measures used to propose and implement the law. A common criticism of *Ley Sinde* was that it was part of a model of IP governance that relies almost solely on industry lobbying, lateral pressures, international trade agreements and E.U.

directives to control and prohibit the distribution of information online (Doctorow, 2009; Anderson, 2011; Hinze, 2011; “Manifesto,” 2011). The protests, then, were in part a rejection of the legitimacy of the authority of institutions and norms that empower the international prohibition regime on intellectual property. The spatialization of copyright norms and the European harmonization of copyright law were challenged through *Ley Sinde*’s activist criticism and protest.

Although *Ley Sinde* was eventually implemented, it did not meet the standards demanded by the IIPA and USTR (IIPA, 2013, p. 1; USTR, 2014, p. 7). The perception of the law’s weak standards led to a continuation of the cycle of United States pressure for IP reform that has led to proposed law to give criminal enforcement authority to its Intellectual Property Commission (“Spain readies hefty jail terms over internet piracy,” 2014, para. 1). The effects of the new law are uncertain, but the announcement of the measures comes as protesters still fill Spanish streets (“Spain Spanish anti-austerity protests continue,” 2014). The spatialization of global IP prohibitions as measures to enforce international digital copyrights is still an uneven process.

The next section revisits the case of OiNK’s Pink Palace and discusses the spatialization of criminal copyright enforcement, the enclosure of digital spaces and the failures of commodified cultural mechanisms to offer services provided by file sharing and streaming services.

OiNK and the Legitimacy of Norms and IP Prohibitions

The focus on legitimacy within this study was in part due to the relationship between legitimacy and prohibitions. Activities that are widely seen as legitimate are likely to

resist prohibition policy and enforcement (Andreas & Nadelmann, 2006), and the peer-to-peer activities of file sharing and streaming are consistent with social norms, particularly, as argued by Larsson (2011b) and evidenced within the case studies, throughout the European Union. The problem of prohibitions that are not parallel to social norms was first discussed in Chapter I's discussion of cybercrime theory. I discussed Lemman-Langlois's (2012) discussion of cybercrime policy that criminalizes routine, habitual online activity. The findings in the OiNK case advance cybercrime studies by demonstrating that administrators and users of the site widely considered their file sharing activities to be normal and the digital music library they were creating to be an asset for cataloging audio files that were often not available through legal channels (Day, 2007, p. 1). Additionally, Lemman-Langlois (2012) discussed how the security software association Symantec was distributing reports to police agencies that claimed, using questionable data, that nearly \$400 billion lost per year globally due to cybercrime (pp. 5-6). The essence of Lemman-Langlois' (2012) argument was that private companies use faulty and exaggerated data to create a hysteria among police organizations over all manner of cybercrime, from serious issues of fraud to mundane issues of borrowing a neighbor's WiFi (p. 7). The consequence of private sector educational outreach toward police in regard to cybercrime encourages, in terms of digital copyrights, an opposition understanding of Internet users and police organizations over the norms of file sharing. The police involved in the OiNK raid, for instance, involved British police, Interpol and the Dutch anti-terror and organized crime task force FIOD ECD, all of whom had been informed of the site's illegal activities by the IFPI (O'Connell, 2007). The result of the

raid was the closure of OiNK, but also a failed criminal trial in which none of the arrestees were convicted and confusion among the lawyers and judges in the case as to why criminal and not civil procedures were taking place (Wray, 2010; Curtis, 2010). The closure also led to immediate calls from The Pirate Bay to reopen the site, and the eventual establishment of two copycat websites (Jones, 2007). Criminal enforcement in the OiNK case failed to result in any convictions and inspired even larger duplicates, but police enforcement was not scaled back after OiNK. The U.K. created a new IP task force to crack down on file sharing and streaming (Solon, 2013, para. 1) and began its initiative for the Digital Economy Act. The DEA was laundered into a larger economic bill and eventually sidelined, but the police force continues to operate (Solon, 2013). The resulting system for criminal enforcement of copyright, then, is that enforcement is transferred to police organizations that use seizures, raids, surveillance and arrests to aggressively prevent file sharing and streaming.

The political economic implications of cybercrime enforcement to address digital copyrights are rooted in Strange's (1994) observation that the social, political and economic interests of the most powerful actors in the international system are reflected in international governance (p. 84). International trade agreements and standards for IP law have not yet supported the imperative of core states to implement criminal enforcement throughout the information policy regime, but police agencies are able to coordinate internationally to crack down on peer-to-peer websites and services. Police agencies, then, are able to carry out the policy imperatives of the United States and intellectual property industries that demand the commodification of knowledge online.

Police coordination is also used to crackdown on outlaw websites like OiNK in efforts to enclose the digital commons. One problem with the OiNK closure, though, was that many of its most salient features—high audio quality for music and expansive, precise database—has yet to be replicated through the market (Sockanathan, 2011, pp. 35-37). Criminal enforcement, then, did not address the central problem of OiNK, which was that there was no commercial alternative to its services. The failure of criminal enforcement facilitated the replication of OiNK through the duplicate services. The finding that the crackdown on OiNK did little to end the phenomenon of private, elite torrent trackers supports a central claim of GPR theory, which is that activities that require more extensive efforts than criminal enforcement to shut down are poorly addressed through prohibition regimes (Andreas & Nadelmann, 2006, p. 20). Similarly to OiNK, the sports streaming sites including RojaDirecta described in Chapter II fill a social want—remote access to sports—that is often denied through legal means (Mellis, 2008, p. 265). As police agencies are increasingly able to enforce intellectual property under an expanding umbrella of cybercrime, the commodification of cultural goods and services fails to replace digital spaces for sharing culture and results in what Boyle (2008) referred to as the “underutilization of information” (p. 228).

Comparing and Contrasting of Liberal Legal and Critical Legal Solutions

I used a critical legal methodology in this study that situated the institutions and norms within the IP prohibition regime as guided by the actions of stakeholders. The conclusions that I reach through the critical methodology are that the trajectory of IP prohibitions is governed through laws crafted and supported by multilateral

organizations, states, police institutions and industry stakeholders, and that stakeholders representing other interests have to engage in social movement processes in order to prevent stronger IPR legislation from passing at the international and national levels. Even after IP laws are slowed or halted through protest or legal obstacles such as judicial review or privacy standards, though, government and IP stakeholders still push for an upward ratchet to intellectual property law. The continuation of the upward ratchet is important to note because its perpetuation demonstrates that even though the DEA was never fully implemented and *Ley Sinde* never adopted criminal measures, these policies are not demonstrative of a system of governance wherein democratic efforts to stop undesirable law consistently prevails. The inability of criminal measures to be implemented at various instances described throughout the study constitutes a temporary setback for the IPR GPR. There are continued efforts at policy laundering and policy transfer through new policies and trade agreements (USTR, 2014), continued lateral pressures for criminal copyright law (“Spain readies hefty jail terms over internet piracy,” 2014, para. 1), and continued expansion of police task forces that over capture lawful communications, personal information and creative works (Raymond, 2013). The findings in the Spanish case support the critical legal argument that the continued push for criminal IP prohibitions is because the IP prohibition regime exists as a set of institutions and norms that functions to protect established market interests, commodify information and networks of communication, and protects those priorities through police enforcement. When the prohibition regime fails to implement the IP policies that it supports, it continues proposing and expanding IPR because to do so is a core function

of the regime. The problem, from a critical legal perspective, is that the IPR GPR uses regulatory mechanisms, information policy and the coercive power of police force to increase IP prohibitions. A balance of interest created through legal and judicial instruments is difficult to achieve when the institutions and norms of the regime are committed to a regulatory system that uses law and policy as tools to protect private IP interests within the United States and for the European common market.

Despite the difficulty of reforming the international IP agenda to stop supporting an end goal of criminal enforcement, it is useful to evaluate the liberal legal alternatives to the IPR GPR in order to analyze how a juridical balance of interests would operate as an alternative to the prohibition regime. Benkler (2010) typifies the liberal legal approach to digital copyright reform through arguments that to increase individual freedom within a networked information economy, laws should cultivate the production of information, knowledge and culture by offering greater protections for a digital commons (p. 175). After all, in networked systems, individuals frequently communicate and create online, and individual reproduction of content is a normalized behavior (Benkler, 2006, p. 3). In the European Union, Benkler's (2010) preferred approach already existed in Spain prior to *Ley Sinde*. Spain was applying its own, legitimated interpretation of digital copyright laws as required by the minimum standards of European directives, and, as demonstrated by *Promusicae v. Telefónica*, was permitted to do so within the European Union (Leistner, 2009). Copyright infringement was a problem for IP industries, though (IFPI, 2010, p. 19), and attempts to alleviate Spanish digital piracy while acknowledging its digital culture could have been acknowledged through open, democratic fora. Instead,

attempts to change Spanish law were made through discreet lateral coordination between industry coalitions, U.S. and Spanish officials, the latter of which were threatened with Special 301 measures if they failed to comply with U.S. demands. The United States and Spain initially refused to negotiate with public interest groups like *Internautas*, who were labeled pro-piracy activists by the Minister of Culture (“New Culture Minister on Fight Against Internet Piracy,” 2009, para. 4). The United States ignored the opinions of Spanish courts and even U.S. courts, in the case of *Puerto 80 v. United States of America*, and insisted that Spain strengthen its copyright laws under the threat of lateral pressures. The U.S. attempts to alter Spanish law created the breakdown in perceptions of legitimacy in Spain, but could have possibly been avoided through open, transparent discourse between the U.S. and Spain over IP trade issues.

A balance of juridical interests is easier to address in the OiNK case. In terms of a liberal legal system of rights, Ellis and the other OiNK defendants should have been tried civilly for damages inflicted upon the music industry based on concentrated efforts to uncover the true financial harms caused by digital copyright infringement. The criminal trial led to accusations that corrupt British prosecutors were acting as proxies for the IFPI and BPI (Curtis, 2010, para. 4) and harmed perceptions of the legitimacy of the law. The failure of the Digital Economy Act in the years after the OiNK raid suggest that the British legislative system is able to effectively balance the rights of individuals and market interests, but the establishment of an IP task force (Solon, 2013) demonstrates that the logic of institutions and norms in the United Kingdom still favors stakeholders that support digital copyright enforcement through elements of crime

control. The legal solution to reign in police forces is to create more accountability for police agencies in enforcing digital IP law in order to reduce instances of over capture that stifle expression and communication. It would also be useful to establish legal standards at the United Kingdom or international level that allow criminal enforcement of copyrights in situations where police can provide evidence to a judicial authority linking file sharing web sites directly to the terrorism, organized crime or money laundering that file sharing is often associated with in international trade agreements and U.S. and E.U. reports (Johns, 2012, p. 6). Ending criminal enforcement in all but cases of links to greater crimes and recommending that the United Kingdom work to implement new laws and legislation that, unlike the DEA, offer greater protections to a digital commons while still giving the state the authority to shut down or perhaps offer a form of notice-and-takedown procedures that incorporate judicial review to file sharing sites like OiNK are reasonable goals for A2K advocates and policymakers seeking to promote legal standards for digital copyrights that support individual freedoms and protect market interests.

The critical legal analysis to IPR prohibition enforcement also supports legal tactics that could strengthen a digital commons, support IP law that is more moderate than what the USTR or criminal enforcement legislation calls for, and reform the way that trade negotiations are conducted in regard to IP reform. The critical interpretation of this study's findings, however, focus more on the need to abandon governance through institutional norms that promote digital copyright criminalization, policy laundering and aggressive, standardized police tactics to establish an international prohibition regime.

The problems with the governance of IP through a prohibition regime cannot address the lack of legitimacy in the system solely through legal reforms, as the findings support the idea that the law supported by the regime is political in nature and manipulated by multilateral institutions, the United States, European Commission and IP industries to protect markets. For the OiNK case, the problem was not the legal implications of OiNK's services or the degree to which its users and owners were prosecuted and how users of the site responded. The problem with the Pink Palace were the assumptions and arguments by police that it was a for-profit criminal enterprise, the lack of consideration by the courts of any alternative use for the website outside of theft, and the contradiction between the normative values of its users and the values of the legal system that shut it down. The case represents an inability of IP prohibitions to regulate the social norms and values that create file sharing websites like OiNK and a divide between file sharers and policymakers in terms of what the function of file sharing and streaming sites are. The difference in understanding is not purely legal, but normative, and movements to reform or disassemble the international IP prohibition regime should account for the fact that IP law is intertwined with the normative and institutional preferences of powerful stakeholders. The upward ratchet of IP is an institutional and normative mechanism more so than a purely legal instrument.

The next section provides suggestions for how A2K advocates can frame arguments for IP reform in a manner that stresses the importance of both a juridical balance of interests and acknowledges the behavior and regulatory preferences of the stakeholders that create the law.

A2K Responses to the IP Prohibition Regime

A2K is united by the metaphor of a cultural environmentalism that emphasizes the importance of an ecology encompassing the landscape of information, creative works, and knowledge (Boyle, 2008, pp. xi-xv). International prohibitions on intellectual property threaten the information ecology not only through the practice of manufacturing laws that enclose the commons and support the commodification of culture, but also by disrupting the discussion regarding the balance of access to knowledge with market interests. By transferring policy enforcement to police organizations, debate over the need for a more robust public domain or the preservation of the cultural ecology that A2K advocates were able to successfully initiate within WIPO (Netanel, 2009; Latiff, 2010) is transferred to police organizations with broad agendas to prevent digital crimes and little public accountability (Leman-Langlois, 2008, pp. 4-5). It is important for A2K researchers and advocates, then, to stress the problem of the police enforcement of digital copyright law and the role of prohibition enforcement in the international governance of digital copyrights. The OiNK and Megaupload examples, in addition to large Pirate Bay raid described by Andersson, (2014, p. 133), demonstrate an upward ratchet not only of copyright law but also of copyright enforcement. If areas within the digital commons becomes not only enclosed and commodified but also criminalized, the goals of the A2K movement to establish spaces for creative practice and cultural participation may succeed in arenas such as WIPO (Latiff, 2010), and contribute to the prevention of legislation and trade agreements including ACTA and IPRED2 (Argawal, 2010), but fail to prevent international police organizations that use aggressive measures

to prevent online flows of information. A2K research should recognize the power of institutions in creating and enforcing the law and openly challenge the hierarchical norms of IP governance through concerted political efforts. Legal reform should be sought after to the extent that it allows the A2K movement to enhance its political strategies for social reform.

A2K research should also address the broad mandates of police organizations to tackle cybercrime and should emphasize that while it may be necessary to prevent the wholesale theft of cultural goods over file sharing networks, police strategies the surveillance procedures and paramilitary raids applied to terrorism and organized crime are perhaps extreme when applied to file sharing and streaming services such as OiNK. The tendency of police organizations to harmonize enforcement measures and standardize tactics for fighting crime (Lemieux, 2010, p. 5) create extreme IP enforcement measures that are contrary to the A2K movement's commitment toward simple, transparent and carefully crafted information policy that encourages the growth of creativity and innovation (Cohen, 2012, p. 14).

Further Implications, Suggestions for Future Research and Limitations

The limitations to the study concern its spatial limitations within the European Union and temporal limitations regarding analysis of current events that are too recent to receive proper historical scrutiny. The interdisciplinary approach also limited an ability to focus on the findings through one particular theoretical lens. A study specific to social movements or cybercrime would have taken into account more thorough perspectives and detail. The dissertation could have also benefited from cultural and

sociological perspectives that describe how criminal enforcement affects the individual and group propensity for innovation and creativity.

The primary contribution that I offer to the study of communication and information policy is the identification and examination of the role of criminal enforcement in the international political economy of communication. The international IPR prohibition regime is a theoretical contribution information policy and media studies that opens opportunities for further research into how police organizations contribute to the decision-making processes that govern intellectual property. The implications of both cases include the observation that enforcement and copyright reform alone is not enough to address the social norms and activities related to digital downloading and streaming. The critical legal analysis of the cases provides a framework for understanding intellectual property not simply as systems of laws, but as normative institutional frameworks that influence access to knowledge, information and culture. The solution to digital copyright infringement involves more elaborate measures that cannot be offered within the confines of a prohibition regime, and those potential measures should be a focus of future study.

The cases and the interdisciplinary approach also lead to several other avenues for future research beyond addressing normative behaviors online. Most importantly, further research should extend the analysis of cybercrime discourse within the field of communication studies. Police organizations, through IP prohibitions, have a large role in the governance of international communication and their influence and agendas should be analyzed in greater detail. Additionally, current and future developments in IP

legislation that purports to create international frameworks for criminal enforcement of digital copyright infringement, such as the oncoming Trans-Pacific Partnership (USTR, 2014), should be studied. Research should also move outside of the European Union. One observation arising from this dissertation is that Spain, an E.U. member state and TRIPS signatory, has great difficulty in implementing the right to information measures required by Ley Sinde. How, then, is digital copyright enforcement to be efficiently implemented in developing nations and, particularly, China? Finally, future communication research should focus on the interests of the telecommunication and technology sectors in resisting IP prohibitions. In this research, *Telefónica* was addressed as a major stakeholder against criminal copyright enforcement, but more study should be conducted in regard to how other members of the telecommunication sector and companies including Google manage enforcement. The political economy of communication stresses that the private sector is the most powerful stakeholder in telecommunication policy (Mosco, 2009), and so further research is necessary to understand what a framework for the digital commons or an open Internet is under the influence of telecommunication and technology companies.

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