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Rethinking Copyright Harmonization

CLARK D. ASAY*

For nearly half a century, the United States has been one of the main proponents of harmonizing the world’s copyright laws. To that end, the U.S. government has worked diligently to persuade (and, in some cases, bully) most of the world’s countries to adopt copyright standards that resemble those found in the United States. The primary reason for this push to harmonize the world’s copyright laws is simple: the United States has long been a net exporter of copyrighted works, and so the U.S. government has sought to ensure that other countries provide U.S. authors with the same economic rights those authors enjoy at home.

But that rather simple calculus in favor of copyright harmonization has changed. Today, the U.S. government must also take into account the interests of its technology sector in determining its positions on both domestic and international copyright law efforts. This is because technology providers are also a significant export of the United States, and their copyright interests do not always align with those of large copyright owners. For instance, many of those technology companies, including Google and Twitter, use copyrighted works as a vital part of providing their technological services, including by way of exhibiting copyrighted content at the direction of their users, in response to user searches, or as part of services such as Google News. Consequently, continuing to ratchet up worldwide copyright standards through international harmonization may often negatively affect the interests of such companies by restricting their ability to use copyrighted works liberally within their services. In short, with these new technological entrants, the political economy of copyright harmonization has significantly changed, and those changes are poised to exert considerable influence on copyright’s global future.

In this Article, I map out the key players in copyright’s new political economy, and I grapple with how their often-divergent interests are likely to affect global copyright law and policy making going forward. I then examine the European Union’s newly minted Copyright Directive as an example of these divergent forces at play within the United States, Europe, and elsewhere. Finally, I assess whether the altered political economy of copyright harmonization is a positive or negative development.

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In early 2019, the European Union (EU) dropped a copyright bombshell on the rest of the world with passage of a new Copyright Directive (the “Directive”). According to some, the Directive will change the internet as we know it—and not in a good way. It does so by increasing the costs and risks for online services that use or host third-party copyrighted content.


2. Id. (referencing opponents of the Directive who claim it will lead to online censorship); Matthew Lesh, Europe’s Censorious New Copyright Directive Is the End of the Internet as We Know It, FOUND. ECON. EDUC. (Mar. 27, 2019), https://fee.org/articles/europes-censorious-new-copyright-directive-is-the-end-of-the-internet-as-we-know-it/ [https://perma.cc/CHA7-665E] (“The European Parliament’s approval of the Copyright Directive today is the end of the internet as we know it.”).

3. Lesh, supra note 2 (indicating that the Directive will raise the costs of providing a hosted service such that only the large tech companies will be able to afford to provide such services).
provides that allow users to post content online—think YouTube, Facebook, or Twitter—can be directly liable for the infringing activities of their users.4
Furthermore, the Directive imposes a tax on online service providers when their sites display more than “very short extracts” of copyrighted content, whether as part of search results or a service such as Google News.5 These heightened costs and risks, some worry, will result in increased censorship, less online innovation, and fewer parties willing to create and deploy worthwhile online services altogether.6 And while the Directive does not directly apply in the United States, major U.S. technology companies may implement European-driven changes worldwide as a matter of practical necessity, as many have done in response to recent EU privacy laws.7

These copyright changes stand in stark contrast to longstanding copyright practices in the United States.8 For instance, in the United States, courts have repeatedly found that online displays of copyrighted extracts, in response to search queries or otherwise, are permissible under copyright’s fair use doctrine.9

9. See, e.g., Katz v. Google Inc., 802 F.3d 1178, 1184 (11th Cir. 2015) (holding that online display of copyrighted photograph was fair use); Authors Guild v. Google, Inc., 804 F.3d 202, 225 (2d Cir. 2015) (holding that Google’s display of snippets of copyrighted text in response to search queries was fair use); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (holding that Google’s display of thumbnail versions of copyrighted
Furthermore, online service providers typically are not directly liable for the infringing activities of their users and enjoy a “safe harbor” from copyright liability arising from their users’ activities under the Digital Millennium Copyright Act (DMCA), so long as certain conditions are met.\textsuperscript{10}

The Directive, and the potential rupture it represents between U.S. and EU copyright practices, is particularly striking in light of what has otherwise been the trend: significant copyright harmonization between the two jurisdictions.\textsuperscript{11} Over time, the copyright regimes of Europe and the United States have grown to increasingly resemble each other through a series of international copyright treaties.\textsuperscript{12} And though important copyright differences remain, these treaties have laid the groundwork for a number of “minimum standards” that make copyright laws in two of the world’s most important markets highly similar in many important respects.\textsuperscript{13}

Is the Directive a minor detour on the road to continued copyright harmonization? Or does it represent a new normal as the two jurisdictions increasingly diverge on copyright (and other) matters?\textsuperscript{14} The copyright harmonization/divergence question matters for a number of reasons. For example, proponents of harmonization argue that harmonizing copyright practices has improved the economic prospects of millions of American copyright owners who sell and license their intellectual goods abroad.\textsuperscript{15} If American copyright owners can no longer depend on the copyright content in response to search queries was fair use). To be clear, none of this is to say that any and all online displays of copyrighted content constitute fair use, just that fair use is a possibility in the United States, depending on the specifics of the use.

\begin{itemize}
\item 12. \textit{Id.} at 118.
\item 15. \textit{See Nimmer, supra} note 13, at 215–16 (discussing how American copyright owners lost billions of dollars in revenue prior to joining the Berne Convention); Barbara A. Ringer, \textit{The Role of the United States in International Copyright—Past, Present, and Future}, 56 \textit{GEO. L.J.} 1050, 1051 (1968) (describing the United States’ initial reluctance to harmonize its copyright laws with those of other major jurisdictions as “short-sighted,” particularly in light of the fact that the United States ultimately became the world’s biggest exporter of copyrighted goods).
\end{itemize}
standards abroad that they enjoy at home, their economic prospects may diminish in ways that harm creative output and the economic well-being of creative parties.\(^{16}\)

On the other hand, opponents of harmonization argue that it can act as a roadblock to copyright fulfilling its constitutional purpose of “promot[ing] the Progress of Science and useful Arts.”\(^{17}\) This utilitarian philosophy views copyright as a means to an end—creative output that benefits society—rather than an end itself.\(^{18}\) But as the United States increasingly binds itself to international copyright standards, U.S. copyright policymakers become less able to experiment with copyright in an effort to determine what set of laws and policies best achieves copyright’s constitutional purposes.\(^{19}\)

To assess whether the Directive is merely a blip on the copyright harmonization radar, or instead represents a more permanent detour, this Article turns to the history of what prompted copyright harmonization in the first place. In truth, for nearly two centuries, the United States was a copyright harmonization laggard\(^{20}\) and only came to the harmonization table once Congress became fully convinced that the country’s economic interests were clearly aligned with the harmonization project.\(^{21}\) Those economic interests were largely those of the country’s various content owners, who exported large numbers of intellectual goods to foreign jurisdictions but without the same copyright guarantees—and economic rights—as they enjoyed at home.\(^{22}\) Hence, once the United States joined Europe as a net exporter of copyrighted goods, its desire to protect its nationals in foreign markets motivated it to join the copyright

\(^{16}\) See Nimmer, supra note 13, at 215–16.

\(^{17}\) Crews, supra note 11, at 118, 132 (“[T]his harmonization also has brought distinct change to U.S. law in ways contrary to the fundamental purposes of copyright law and its social objectives.”); see Christopher Sprigman, Reform(ali(z)ing Copyright, 57 STAN. L. REV. 485 (2004) (arguing in favor of reintroducing copyright formalities, a casualty of harmonization, to help enable copyright to serve its purposes).


\(^{19}\) See Karyn Temple Claggett, The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms, 40 COLUM. J.L. & ARTS 345 (2017) (discussing some of this opposition to harmonization and the reasons for it); Dennis S. Karjala, Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study, 12 EUR. INT’L PROP. REV. 531 (1994) (discussing the cons of harmonizing copyright terms); Dennis S. Karjala, United States Adherence to the Berne Convention and Copyright Protection of Information-Based Technologies, 28 JURIMETRICS J. 147 (1988) (discussing this concern in the context of new technologies).

\(^{20}\) Ringer, supra note 15, at 1051 (discussing the United States’ slow embrace of harmonization as “shortsighted”).


\(^{22}\) Id. at 171 (indicating that, at the time of joining the Berne Convention, the United States had annually run over a $1 billion trade surplus in copyrighted goods and arguing that the trade surplus would have been even higher had the United States joined the Berne Convention earlier).
harmonization project.\textsuperscript{23} By doing so, the United States was in a better position to ensure copyright protections for its own nationals abroad as well as to help craft international copyright standards going forward.\textsuperscript{24}

But new economic interests have arisen over the years, and those interests are clearly at play in the Directive’s passage. It is no accident, after all, that U.S.-based tech behemoths such as Google, Facebook, and Twitter are the most likely to feel the Directive’s impact.\textsuperscript{25} Indeed, these companies appear to be the Directive’s clear target, as European lawmakers have grown increasingly unsettled with the tech giants’ dominance and influence in European affairs.\textsuperscript{26}

These same companies, however, represent significant U.S.-based economic interests.\textsuperscript{27} When the United States took the final steps in the 1970s and '80s to join the international copyright harmonization project, Silicon Valley as we know it today was still in its infancy.\textsuperscript{28} The area was home to important technological developments then (and earlier).\textsuperscript{29} But it has been only more recently when Silicon Valley giants such as Google, Facebook, Twitter, Apple, and others have wielded the kind of political and economic influence that they do today.\textsuperscript{30} And these tech companies’

\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} See Ringer, supra note 15 (discussing these rationales for joining the harmonization project while lamenting that the United States did not join earlier).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Olivia Solon & Sabrina Siddiqui, Forget Wall Street—Silicon Valley Is the New
\end{itemize}
interests often fail to align with those of large content owners, whose desires for greater copyright protections carried the day when copyright harmonization first got off the ground in the United States. Hence, any ongoing copyright harmonization must take these new influences into account. And these influences may make ongoing harmonization—as well as maintaining the status quo—less likely, and perhaps, in some respects, less desirable.

Part I provides a brief history of how the United States came to join the international copyright harmonization project. Its basic point is that the United States did so primarily due to the economic interests of its largest content owners, and that, at the time, those interests went largely unchallenged. Part II then examines how the relatively straightforward economic rationale in favor of copyright harmonization in the 1970s and '80s has become less clear in our new technological age. First, technology and content creation and consumption have become so intertwined that ratcheting up copyright harmonization may often stymie the purposes of copyright. Second, the technology companies behind the technological advancements bring a new set of economic interests—and powerful ones at that—which must figure into any discussions of ongoing copyright harmonization. The political economy of copyright harmonization has thus changed, and this Article maps out how. Part III then examines the Directive as an example of these new divergent forces at play. In light of the first three Parts’ discussions, Part IV turns to whether, and to what extent, copyright harmonization is a normatively desirable thing going forward.

I. ON THE ROAD TO HARMONIZATION

Others have chronicled how the United States eventually came to join the international community in promoting international copyright harmonization. This Part provides a brief overview of some of that history in order to set up Part II’s discussion of how the rationales in support of harmonization in the 1970s and '80s have changed with the ascent of Silicon Valley and its new digital ecosystems. In fact, in some ways the rise of Silicon Valley, and how that rise changes the copyright harmonization economic calculus, is foreshadowed in the United States’ early opposition to copyright harmonization, as discussed below.

A. The United States’ Early Opposition to Harmonization

Early in its history, the United States was strongly opposed to international copyright harmonization. It was not alone in this attitude. Initially, most countries
denied foreign authors copyright protections and showed little interest in harmonizing copyright standards worldwide. The economic reason for this early lack of interest was relatively straightforward: there wasn’t a great need for it because most authors distributed their works almost exclusively within their own borders. Hence, nation-states at the time denied copyright protection to foreign authors with very few negative consequences at home or abroad.

That international mood began to change in the early nineteenth century as the publishing industries across the globe grew, which facilitated the printing and distribution of copyrighted works worldwide. At that point, the “more intellectually-advanced nations” began pushing for greater international copyright harmonization in order to better protect their authors abroad. That enlightened approach to copyright harmonization was thus grounded in economic self-interest, as these countries tended to export significant numbers of intellectual goods that, absent copyright harmonization, were left unprotected. In other words, the lack of international copyright standards meant that other countries often imported and printed foreign literature at a very low cost to themselves—basically, the cost of printing the works—but at a very high cost to the foreign authors in the form of lost revenues.

Early harmonization efforts typically took the form of bilateral and multilateral treaties between countries that stipulated, above all, “national treatment”—foreign authors should receive whatever protections the host country provided to its own nationals, and vice-versa. A few countries, including France, eventually took the rather magnanimous step of granting copyright protection to all authors, regardless of nationality or reciprocal obligations. But by and large, harmonization efforts during the nineteenth century relied on reciprocal national treatment as the foundation for any bilateral or multilateral copyright arrangements.

The most important agreement to develop during the late nineteenth century was the Berne Convention. In fact, it remains the foundation of international copyright harmonization to this day. First executed in 1886 and revised multiple times since, the Convention stipulated national treatment for all members of the Convention. Later revisions to the Convention also began the process of more substantive

35. Harry G. Henn, The Quest for International Copyright Protection, 39 CORNELL L.Q. 43, 43 (1953) (“Until a century ago, the general rule, with a few standout exceptions, was that domestic works were eligible for protection and foreign works were not.”).

36. Id.
37. Id. at 43–44.
38. Id.
39. Id. at 44.
40. See id.
41. See id. at 43–44.
42. Id. at 44–46.
43. Id. at 45.
44. Id. at 45–48.
45. H.R. REP. NO. 101-735, at 10 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6941 (describing the Berne Convention as the world’s “most important” copyright agreement).
47. Id.
harmonization by requiring signatories to adhere to a set of minimum copyright requirements, including copyright’s scope and duration, copyright owners’ economic rights, and so-called “moral rights.”

But even as most of the rest of the world began harmonizing their copyright standards through adherence to the Berne Convention, the United States remained a conspicuous holdout. As mentioned briefly above, the United States’ early opposition to international copyright harmonization was unexceptional, as most countries shared it. This opposition was the mirror image of the reasoning behind many of the European countries’ growing desires to harmonize copyright standards worldwide: unlike these European countries, which were net exporters of creative works, early on the United States was a net importer of literature and art—particularly English works. Hence, withholding copyright protection from foreign authors meant that the U.S. publishing industry could reprint foreign authors’ works far more cheaply than if copyright applied. In turn, the U.S. consuming public could access those same reprints at steep discounts.

It should be noted that early American authors and artists also suffered from the lack of international copyright harmonization. The United States’ denial of copyright to foreign authors meant that most foreign jurisdictions similarly denied American authors copyright in their works. And at home, American authors had difficulty competing against the immense popularity of cheap foreign reprints from the likes of Charles Dickens and Sir Walter Scott. Nevertheless, American authors could do little about the situation because of the economic realities of the time—exports of American literature paled in comparison to imports of foreign literature, meaning that international copyright harmonization simply made little economic

48. Id. at 46–47. Moral rights, such as the right to attribution, find their provenance in natural rights theories of copyright, rather than more typical incentive-based theories. Stephanie Plamondon Bair, Rational Faith: The Utility of Fairness in Copyright, 97 B.U. L. REV. 1487, 1495 (2017).


50. See supra notes 34–37 and accompanying text.


52. Ringer, supra note 15, at 1051–52 (“Domestic printers and publishers were unwilling to give up their ready markets for unauthorized reprints, [and] the local ‘piratical’ copies were cheap in quality as well as price.”).


54. Zorina Khan, Copyright Piracy and Development: United States Evidence in the Nineteenth Century, 1 REV. ECON. INST. 1, 6–7 (2008) (describing efforts by both American and foreign authors to persuade the United States government to harmonize its copyright laws to global standards during the nineteenth century).

55. Henn, supra note 35, at 52 (indicating that as a result of the United States granting limited copyright protections to foreign authors, “other nations were understandably reluctant to protect American works”).

sense from an overall American trade surplus perspective.  
Indeed, at the time, the publishing industry in the United States had much greater economic and political clout than the relatively sparse artistic class. The publishing industry insisted that copyright protection for foreign authors would do it in, and some accounts suggest that some of the largest publishers of today owe much of their early success to the U.S. government’s early denial of copyright to foreign authors. The Constitution’s newly minted freedom of the press lent support to the publishing class’s arguments against international copyright harmonization.

Furthermore, the recently enacted Constitution, while giving Congress the power to enact copyright laws, did not require it to do so, instead indicating that copyright, if granted, should serve the goal of “promot[ing] the Progress of Science and useful Arts.” Rather than a natural right that all citizens enjoyed, copyright was thus only an instrumental right insofar as Congress chose to grant it. Hence, for both foreign and national authors alike, copyright in the early American experiment was simply not as robust as it would later come to be. Consequently, from an early American perspective, international copyright harmonization, if not out of the question, was certainly on the fringe.

57. Tyler T. Ochoa, Protection for Works of Foreign Origin Under the 1909 Copyright Act, 26 Santa Clara Computer & High Tech. L.J. 285, 288–89 (2010) (indicating that the national interest favored no copyright protection for foreign authors, even at the cost of American authors receiving no protection abroad, because so few American authors exported significant numbers of works, while the United States imported significant numbers of foreign works).

58. See, e.g., Khan, supra note 51 (indicating that early on in the United States, copyright protection was of less importance than other forms of intellectual property protection for a number of reasons, including the fact that “in a democracy the claims of the public and the wish to foster freedom of expression were paramount,” such that “pragmatic concerns were likely of greater importance than the arts”); Hudon, supra note 56, at 1160 (discussing how the publishing industry and related labor unions helped lobby against and delay international copyright standards in the United States for over a century).

59. Ringer, supra note 15, at 1055 (“U.S. copyright protection to foreign authors attracted strong opposition, principally by American printing and publishing interests who believed that their livelihood depended upon cheap reprints of English books.”).

60. Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898, at 441 (1999) (discussing how the early publishing industry in New York City got a major boost from the denial of copyright protection for foreign authors).

61. See, e.g., Khan, supra note 51 (indicating that copyright took a backseat to other values in early American history).


63. Shubha Ghosh, Deprivatizing Copyright, 54 Case W. Res. L. Rev. 387, 439 (2003) (“[C]opyright in the United States was viewed in instrumental terms from the very beginning.”).

64. See Neil W. Netanel, Why Has Copyright Expanded? Analysis and Critique, in 6 New Directions in Copyright Law 3 (Fiona Macmillan ed., 2008) (discussing the ways in which copyright law in the United States has expanded over the years).

65. Hudon, supra note 56, at 1158–60 (discussing efforts to mobilize support for international copyright harmonization in the United States during much of the nineteenth century, but to no avail).
This early copyright stance—with some claiming that the United States even celebrated piracy—did not sit well with foreign authors and their government supporters. Renowned English author Charles Dickens was famously incensed that the United States failed to guarantee him rights in his works, and he made that consternation clear during a highly publicized trip to the United States in the early 1840s. But his displeasure was to no avail.

B. Harmonization Creep

Despite the early opposition to copyright harmonization, that stance steadily softened, particularly toward the end of the nineteenth century. Though the United States opted against joining the Berne Convention when it first formed in 1886, five years later, Congress passed the International Copyright Act of 1891, which granted foreign authors at least some copyright protections for the first time. These protections, however, proved mostly illusory. Congress thus went back to the drawing board shortly thereafter, further liberalizing its copyright laws for foreign authors in the 1909 Copyright Act. But the 1909 Act still fell far short of the international copyright norms as reflected in the Berne Convention.

Domestic agitation for greater international copyright harmonization continued into the early and mid-twentieth century. But the United States remained recalcitrant to Berne-style harmonization well into the twentieth century. From 1891 until 1952, the United States “relied on a series of bilateral agreements to protect its copyright interests internationally.” These, however, quickly became

70. Nimmer, supra note 13, at 212 (discussing the United States’ accession to the Chace Act).
71. Ringer, supra note 15, at 1056–58 (discussing the strict requirement of domestic manufacture of foreign works as one of the reasons why the 1891 Act largely failed to protect foreign authors).
72. Id.
73. Id.
74. Id.
76. Id.
inadequate as advancements in communication technologies rendered national boundaries increasingly porous.\textsuperscript{78}

In 1952, the United States for the first time moved to a multilateral copyright harmonization approach by helping spearhead the Universal Copyright Convention (UCC).\textsuperscript{79} At the time, the UCC was viewed as an alternative to Berne that allowed countries such as the United States to maintain some of their non-Berne-compliant copyright standards while still providing some of the benefits of multilateral copyright law harmonization.\textsuperscript{80} But the UCC’s days were numbered.\textsuperscript{81} Indeed, even as the United States helped launch the UCC, the U.S. government largely viewed the UCC as a temporary bridge to its eventual accession to the Berne Convention.\textsuperscript{82} That bridge would provide the United States with some of the benefits of harmonization in the interim—greater protection of its creative classes abroad—while also giving the country more time to work out the obstacles in its copyright laws that prevented it from full Berne participation.\textsuperscript{83}

Indeed, the discrepancies between U.S. copyright law and Berne’s copyright standards, not economic considerations, had steadily become the main hurdle to the United States joining the Berne Convention.\textsuperscript{84} During the twentieth century, the United States had become the largest exporter of copyrighted goods in the world.\textsuperscript{85} This reality meant that, like its European predecessors, the United States’ economic interests now also appeared to strongly favor international copyright harmonization.\textsuperscript{86} Otherwise, its creative classes would face greater difficulty reaping, internationally, where they sowed.\textsuperscript{87} The United States would also continue to be deprived of a copyright policymaking leadership role so long as it remained outside
of the world’s most important copyright treaty, a worry U.S. lawmakers had voiced for some time.\textsuperscript{88} In the 1970s, Congress began the project of joining Berne in earnest when it passed the 1976 Copyright Act, making the most significant alterations to its copyright laws since the 1909 Act.\textsuperscript{89} First, the 1976 Act aligned the copyright term in the United States to the minimum copyright term stipulated under the Berne Convention.\textsuperscript{90} Prior to the 1976 Act, copyright protection in the United States could only last up to fifty-six years so long as the copyright owner satisfied a number of formalities, including renewing the initial twenty-eight-year term.\textsuperscript{91} Following the 1976 Act’s amendments, in most cases, the copyright term commenced upon creation of the work and lasted until fifty years after the author’s decease.\textsuperscript{92}

Second, the 1976 Act also limited some of the harshness of U.S. copyright laws’ so-called “formalities.”\textsuperscript{93} These formalities, such as providing a copyright notice on a work and registering it with the Copyright Office, were requirements under U.S. copyright law.\textsuperscript{94} And, importantly, failing to satisfy them meant that works entered into the public domain, free for all to use.\textsuperscript{95} But the Berne Convention required that parties provide copyright to authors without any such formalities as conditions of copyright protection.\textsuperscript{96} The 1976 Act relaxed some of the rigidity of these formalities by, for instance, giving authors a five-year “cure” period if they initially failed to attach a copyright notice to their works.\textsuperscript{97} The 1976 Act also explicitly made the registration requirement “not a condition of copyright protection.”\textsuperscript{98}

Third, and importantly, the 1976 Act gutted (and ultimately sunsetted) the so-called “manufacturing clause” of U.S. copyright law.\textsuperscript{99} This clause had required foreign authors wishing to obtain copyright protection in the United States to print any English-language materials in the United States rather than abroad.\textsuperscript{100} The 1976 Act’s gutting of this requirement is significant in part because it is another clear indication that the United States’ economic interests vis-à-vis copyright had dramatically changed by the mid- to late-twentieth century.\textsuperscript{101} The United States originally enacted the manufacturing clause in the late nineteenth century to protect its fledgling printing and publishing industries from foreign competition.\textsuperscript{102}

\begin{itemize}
  \item \textsuperscript{88} \textit{Id.} at 178–79.
  \item \textsuperscript{89} Leaffer, \textit{supra} note 77, at 384 (indicating that the Copyright Act of 1976 “eliminated many of the impediments to Berne adherence”).
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} \textit{Id.}
  \item \textsuperscript{93} \textit{Id.}
  \item \textsuperscript{94} \textit{Id.}
  \item \textsuperscript{95} \textit{Id.}
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{97} \textit{Id.}
  \item \textsuperscript{98} \textit{Id.} at 207.
  \item \textsuperscript{99} \textit{Id.}
  \item \textsuperscript{100} \textit{Id.}
  \item \textsuperscript{101} Sherman, \textit{supra} note 79, at 1167.
  \item \textsuperscript{102} See \textit{supra} notes 58–61 and accompanying text; \textit{see also} Malcolm Baldrige, \textit{The ‘Manufacturing Clause’: After 95 Years, Let It Die}, \textit{Wash. Post} (July 16, 1986),
\end{itemize}
discussed above, early on, these industries led the way in terms of copyright policymaking. But from at least the mid-twentieth century onward, these industries appeared to no longer need the copyright stilts that Congress had provided them. Instead, the American creative classes demanded full-fledged international copyright protection for their many exports of copyrighted works. On that front, the 1976 Act didn’t go as far as the Berne Convention required. But it significantly paved the way for the United States to eventually join Berne.

C. Joining Berne et al.

The United States reached its long-anticipated Berne destination in 1988. As discussed above, the economic rationales in favor of joining Berne had been in place since at least the early twentieth century. Yet reforming U.S. copyright law to comply with Berne had proven to be no easy task. The 1976 Act removed some of the most significant hurdles. And the Berne Convention Implementation Act of 1988 (BCIA) helped remove a few remaining ones.

The most important step the BCIA took in this regard was to fully remove any formalities as a condition of copyright. As discussed, the 1976 Act reduced much of the formalities’ harshness by making failing to comply with them less fatal to a work’s copyright status. But even after the 1976 Act, some of these formalities technically remained conditions of copyright protection. The BCIA finished the job the 1976 Act had started by eliminating copyright notice as a condition of copyright. This meant that an otherwise eligible work was subject to copyright

https://www.washingtonpost.com/archive/politics/1986/07/16/the-manufacturing-clause-after-95-years-let-it-die/8bee1fd7-2933-442b-b556-44ebebef3f91/?utm_term=.5d455fccc5-44 [https://perma.cc/H9YA-CZS8] (discussing the Clause’s history).

103. See Sherman, supra note 79, at 1162–67 (discussing the publishing and printing industries lack of need of the manufacturing clause by the mid-twentieth century).

104. Id.

105. See id.

106. Gabay, supra note 90, at 207–17 (detailing a number of remaining obstacles in U.S. copyright law to the United States joining the Berne Convention).

107. Hatch, supra note 21, at 171 (discussing the United States’ accession to the Berne Convention).

108. Id. at 171–72; see supra notes 84–87 and accompanying text.


111. See supra notes 93–98 and accompanying text.

112. Id.

113. Hatch, supra note 21, at 192–95 (discussing how the BCIA changed U.S. copyright law in this regard). Note that despite no longer being a condition of copyright in the United States, including a copyright notice still brings some advantages under the law. See U.S. COPYRIGHT OFFICE, CIRCULAR 3: COPYRIGHT NOTICE (2017), https://www.copyright.gov/circs
protection upon creation, regardless of the presence of a copyright notice.\textsuperscript{114} For foreign authors, the 1976 Act also eliminated registration as a prerequisite for enforcing their copyrights in U.S. courts.\textsuperscript{115} With these changes, the United States was primed for Berne membership.\textsuperscript{116}

Moral rights were another long-standing hurdle to Berne membership.\textsuperscript{117} Moral rights come in a number of flavors, but the most important are the rights to attribution and integrity of a work.\textsuperscript{118} The right of attribution generally ensures that authors have the right to be credited for their works, prohibits others from claiming credit for their works, and guarantees that authors can choose to publish their works anonymously or pseudonymously.\textsuperscript{119} The right of integrity, meanwhile, at a minimum, allows authors to prevent others from altering their works in ways that injure their honor or reputation; defined more expansively, the right prevents acts that “mistreat[] an expression of the artist’s personality, affect[] his artistic identity, personality, and honor, and thus impair[] a legally protected personality interest.”\textsuperscript{120} In some jurisdictions that have implemented such rights, authors cannot even waive these rights, though they can contractually agree to forgo asserting them.\textsuperscript{121} These moral rights are in addition to copyright law’s more typical “economic rights,” such as the rights to prevent third parties from copying, distributing, modifying, performing, and displaying one’s work.\textsuperscript{122}

The Berne Convention stipulates that members of the Convention must provide authors with the rights of attribution and integrity of a work under members’ domestic laws.\textsuperscript{123} Prior to the BCIA, most believed that U.S. law lacked any such protections and that, consequently, the United States would have to significantly alter its laws to comply with Berne’s moral rights imperatives.\textsuperscript{124} But in the run-up to the BCIA, U.S. lawmakers got creative, determining that U.S. federal and state laws already provided authors with adequate protections, at least insofar as the Berne Convention required.\textsuperscript{125} Hence, the BCIA failed to provide for additional moral rights

\textsuperscript{114}. See 17 U.S.C. § 302(a) (1976) (granting copyright protection upon creation of the work in a fixed, tangible medium for more than a cursory time period).
\textsuperscript{115}. Hatch, \textit{supra} note 21, at 192–95.
\textsuperscript{116}. \textit{Id}.
\textsuperscript{118}. \textit{Id}. at 12.
\textsuperscript{119}. \textit{Id}.
\textsuperscript{120}. \textit{Id}. at 13.
\textsuperscript{121}. \textit{Id}. at 11–12, 12 n.45.
\textsuperscript{122}. See \textit{id}. at 6–7.
\textsuperscript{123}. See Gerald Dworkin, \textit{The Moral Right of the Author: Moral Rights and the Common Law Countries}, 19 Colum.-VLA J.L. & Arts 229, 230 (1995) (discussing these requirements as well as other moral rights that many jurisdictions implement).
\textsuperscript{125}. Hatch, \textit{supra} note 21, at 184–90 (describing Congress’s treatment of the moral rights issue in the BCIA). \textit{But see} Edward J. Damich, \textit{The Visual Artists Rights Act of 1990: Toward
because Congress determined, at the time, then-current U.S. law already satisfied Berne’s requirements on that front.\textsuperscript{126}

Despite this position, two years later, the United States formally granted some limited moral rights for certain types of works and authors with the passage of the Visual Artists Rights Act of 1990 (VARA).\textsuperscript{127} The BCIA’s creative solution to the moral rights conundrum had failed to satisfy many at home and abroad.\textsuperscript{128} VARA represented the United States’ begrudging moral rights mea culpa,\textsuperscript{129} though even with its passage, some believe the United States still falls short on the moral rights front.\textsuperscript{130}

Since the United States’ Berne ascension and its immediate VARA aftermath, the United States has been (mostly) full steam ahead with additional international copyright harmonization efforts.\textsuperscript{131} In the early 1990s, the United States helped spearhead the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as part of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{132} The TRIPS Agreement incorporated many of the most important terms of the Berne Convention and added additional copyright harmonization standards for all World Trade Organization members.\textsuperscript{133} These additions to the Berne Convention’s standards led some to refer to the TRIPS Agreement’s copyright provisions as “Berne-plus.”\textsuperscript{134} The terms of the TRIPS Agreement were and remain a tough pill for many developing countries to swallow, but the United States was


\textsuperscript{126} Hatch, supra note 21, at 184–90. This creative solution to the moral rights issue again owes some of its genesis to the publishing industry, which lobbied Congress against implementing more robust moral rights provisions due to a perception that those rights would significantly interfere with their economic interests. The entertainment industry also worried that more robust moral rights could negatively affect their modes of doing business. \textit{Id.} at 184.


\textsuperscript{128} Damich, supra note 125 (discussing some of this dissatisfaction).

\textsuperscript{129} See \textit{id.} at 946–47 (discussing Congress’s enactment of VARA in response to dissatisfaction over how the BCIA failed to formally implement moral rights).

\textsuperscript{130} KWALL, supra note 127.

\textsuperscript{131} Susy Frankel, \textit{WTO Application of “the Customary Rules of Interpretation of Public International Law” to Intellectual Property}, 46 VA. J’L L. 365, 370 (2006) (discussing how developed countries such as the United States pushed hard for additional harmonization agreements in the late 1990s in order to maintain their comparative advantage in the production and trade of intellectual goods).


\textsuperscript{134} Id. at 199.
adamant that they be included in the Uruguay Round of GATT so as to better protect U.S. authors and artists against international piracy of their copyrighted works.135

Shortly after the TRIPS Agreement went into effect in 1995, the United States was back at it again, helping craft and push two additional copyright treaties through the World Intellectual Property Organization (WIPO).136 Enacted in 1996, these WIPO treaties provided for additional measures aimed at combatting piracy in digital and online contexts.137 In particular, one of these treaties, the WIPO Copyright Treaty, requires all treaty parties to provide for “adequate legal protection and effective legal remedies against the ‘circumvention of . . . technological measures’” that copyright owners use to protect digital versions of their works.138 In implementing these treaties via domestic legislation, the United States went beyond the treaties’ actual requirements in hopes of convincing “other countries to adopt similarly strong standards.”139

The United States has also exceeded the requirements of Berne and TRIPS in its domestic copyright laws by, for instance, passing the so-called Sonny Bono Act in 1998, which extended the duration of copyright protection in the United States to the life of the author plus seventy years.140 The United States did so in part to ensure greater protections of its creative classes abroad, as well as to continue to position itself as a leader in international copyright harmonization efforts.141 The Supreme Court has repeatedly sanctioned Congress’s expansive approach to international copyright harmonization, finding the Sonny Bono Act constitutional as well as other controversial domestic copyright changes made in pursuance of international copyright harmonization.142

135. Yu, supra note 132 (discussing how the TRIPS Agreement came to be).
137. Lukas Feiler, Separation of Ownership and the Authorization to Use Personal Computers: Unintended Effects of EU and US Law on IT Security, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 135 (2011) (discussing the purpose of one of these treaties, the WIPO Copyright Treaty).
138. Id. (quoting WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, at 10 (1997)).
Most recently, the Trump administration revisited the North American Free Trade Agreement by negotiating a new U.S.-Mexico-Canada Agreement to replace it.\(^{143}\) Among other things, the Agreement seeks to combat international piracy of American copyrighted works by strengthening border measures.\(^{144}\) The Agreement also requires Canada and Mexico to lengthen the duration of copyright to match the copyright term that U.S. law provides.\(^{145}\)

Hence, despite a significant delay in joining the international copyright harmonization project, since joining that effort the United States has become one of its most ardent supporters and leaders. It has spearheaded key international agreements aimed at bolstering copyright protections worldwide, all in an effort to better protect its creative classes abroad.

As discussed throughout, the primary reasons for this harmonization change of heart were in large part altered economic and political interests. The United States had become the biggest exporter of intellectual goods, including copyrighted goods, in the world. Its filmmakers, authors, and other artists produced some of the most popular works worldwide, yet the country remained outside of the international copyright order. Furthermore, the protectionist copyright policies enacted to protect the printing and publishing industries were no longer needed. Hence, in order to ensure that American content owners were able to reap the economic dividends of their copyrighted works abroad, while also ensuring that the United States was in a better position to shape international copyright law going forward, the United States ultimately joined the international copyright harmonization project. Rather than a profound philosophical change of heart, therefore, the United States’ political and economic interests ultimately propelled it into joining its copyright fortunes with the vast majority of the rest of the world.

This point is relevant to the overall discussion of international copyright harmonization: while philosophical considerations may certainly influence how Congress and courts implement copyright law and policy, political and economic considerations are often a key, and sometimes the most important, motivator, as legal realists and critical legal studies scholars have long suggested.\(^{146}\)


\(^{144}\) See Jonathan Hudis & Laura S. Buchanan, \textit{Quarles & Brady LLP, The IP Implications of the USMCA: Who Needs to Do What}, BILATERALS.ORG (Jan. 10, 2019), https://www.bilaterals.org/?the-ip-implications-of-the-usmca&lang=en [https://perma.cc/C54D-JKF3] (discussing the Agreement’s terms and indicating that Canada and Mexico are the parties to the Agreement who are primarily required to change their laws to be in compliance with U.S. copyright law).


\(^{146}\) See, e.g., Carys J. Craig, \textit{Critical Copyright Law and the Politics of “IP,”} in
Indeed, new political and economic realities may soon alter the United States’ recent infatuation with international copyright harmonization efforts, at least in their current hue. This may be so not because the country’s creative classes have any less interest in expansive copyright protections worldwide—their interests very much remain intact.147 Rather, the growing involvement of U.S. tech companies in the world of copyright has altered the economic and political calculus of international copyright harmonization. The next Part examines how.

II. THE SEEDS OF COPYRIGHT DISHARMONY

Despite the United States’ recent embrace of international copyright harmonization, there have always been some who believe that harmonization doesn’t necessarily serve the United States’ economic and political interests.148 That dissonance has added credence today, as the economic and political rationales of the 1970s and ‘80s in support of copyright harmonization have significantly changed with the ascent of Silicon Valley.

A. The Rise of Silicon Valley

When the term was first coined, “Silicon Valley” was still a relatively sleepy community far outside the limelight.149 But since the early 1970s, when Silicon Valley first emerged in public consciousness,150 California’s tech hub has become a phenomenon that other parts of the United States,151 as well as other areas of the


148. Cf. Hugh C. Hansen, International Copyright: An Unorthodox Analysis, 29 VAND. J. TRANSNAT’L L. 579, 586–87 (1996) (critiquing copyright harmonization evangelists such as the U.S. and Europe). See generally Crews, supra note 11 (arguing that harmonization has pushed the United States to pass laws that fail to comply with copyright’s constitutional mandate).


150. See ajwdct, Who Coined the Term Silicon Valley?, SIGCIS (Aug. 31, 2013, 1:25 PM), https://www.sigcisis.org/node/422 [https://perma.cc/2F42-UP2S] (discussing how Don Hoefler is usually credited with coining the term in an article about the area in the early 1970s, but suggesting that the term was used even earlier than Hoefler’s use).

151. See, e.g., Casey Wright, Five Things to Know About Silicon Slopes, HUFFPOST (Dec. 11, 2017, 12:09 PM), https://www.huffpost.com/entry/five-things-to-know-about-silicon-
world, have tried to emulate. That rise, incidentally, has much to do with copyright law and policy, including looming copyright harmonization questions.

How Silicon Valley came to be is something others have chronicled, and this Article need not rehearse that entire history to make its basic point: Silicon Valley tech companies such as Google, Facebook, Apple, and others have become some of the wealthiest companies in the world. And with that wealth, these tech behemoths have become some of the most significant economic and political players in the United States and elsewhere.

This reality matters with respect to copyright law and policy, including ongoing harmonization efforts, because the U.S. tech community in Silicon Valley and beyond doesn’t always share the same interests as those of large copyright owners. As discussed above, Congress followed large copyright owners’ leads when it ultimately joined the international copyright harmonization project in the late twentieth century. But recall that, early on, the economic interests of the fledgling publishing and printing industries had largely dictated the United States’ oppositional stance to international copyright harmonization. It was only once those industries no longer needed Congress’s help, and American copyright owners flooded the world with their works, that the United States reversed its copyright harmonization course.

Today’s technology companies are in some ways similar to the early publishing and printing industries of the United States: they derive significant economic returns from liberal uses of copyrighted content, and expansive copyright doctrines can interfere with those interests. And while copyright owners and technology companies’ interests sometimes align, even in those situations the relationships are far from straightforward. The following Sections explore in greater depth this tumultuous relationship and what it all may mean for international copyright harmonization efforts going forward.

B. Copyright Symbiosis

In today’s world, copyright owners and the tech community often have a symbiotic relationship: the tech companies depend on the availability of third-party copyrighted content within their services to attract users, and the copyright owners

slopes_b_5a2eb682e4b04cb297c2aed8 [https://perma.cc/NN6W-A3NS] (discussing a tech area in Utah known as the “Silicon Slopes”).


154. Solon & Siddiqui, supra note 30 (discussing the rise of Silicon Valley’s political influence in U.S. politics).

155. See supra Sections I.B–C.

156. See supra Section I.A.

157. See supra Part I.
depend on the services to reach new audiences. Think of Apple’s iTunes and its successor apps. These services are heavily dependent on third-party copyright owners making their content available on the services for those services to be attractive to Apple’s users. And at least some copyright owners have benefited from such services, which provide easier access to content through the search, suggestion, and other technologies that the services incorporate. Furthermore, as more and more people flock to a service, the phenomenon of network effects means that failing to make one’s copyrighted content available on the service can be a death knell to the copyright owner’s economic prospects.

This symbiosis does not mean that each side’s copyright interests are the same. In fact, as will be discussed below, this symbiosis is often the basis for much copyright conflict between the two sides; they are typically viewed as foes rather than friends when it comes to copyright issues. Yet it is important to discuss briefly how the interdependence between tech platforms and copyright owners may sometimes lead to common copyright interests, because those common copyright interests, in addition to the copyright disharmony between the two sides, are likely to influence international copyright harmonization efforts going forward.

The truth is that neither side’s copyright interests are perfectly dichotomous. Even when it is possible to identify situations that would appear to favor a particular

158. See generally Asay, supra note 31 (discussing this interdependence).
163. See, e.g., Lital Helman, Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement, 19 TEX. INTELL. PROP. L.J. 111, 125–28 (2010) (discussing aggressive litigation tactics taken by copyright owners against technology providers); Jiarui Liu, Copyright Complements and Piracy-Induced Deadweight Loss, 90 IND. L.J. 1011, 1020–21 (2015) (discussing how digital technologies have resulted in increased piracy, making it more difficult for copyright owners to earn economic returns, particularly if complementary products don’t make up the shortfall).
copyright position for one side or the other, countervailing considerations may also come into play such that it is difficult to predict what copyright positions a side will adopt. Yet it remains important to roughly sketch out what those considerations may be in order to better understand how they are likely to affect the future political economy of copyright harmonization efforts.

The most obvious situation where both tech platforms and copyright owners have some overlap in copyright interests is when copyright advances both sides’ economic goals. For copyright owners, this may be nearly always, even in situations where financial gain was not their primary motive for creating the copyrighted work.164 Predominant copyright theory posits that copyright serves creative parties’ economic interests by enabling them to better recoup their costs of creation.165 For instance, many creators may be loath to undertake the time and expense necessary to create socially valuable things because, without copyright, they lack a clear means by which to profit from their efforts.166 Copyright, by providing creators an avenue by which to profit, thus serves as an incentive for them to create and distribute their works.167 And even when creative parties didn’t need the copyright incentive for their creative efforts to take place, copyright’s economic prospects may nonetheless often lead copyright owners to favor and enforce strong copyright protections.168 Hence, because copyright provides creators with economic opportunities when their works are deployed on technological services, many copyright owners—perhaps most—will rationally favor strong copyright protections when their works are so deployed.169

164. Indeed, it is nearly indisputable that many people engage in creative activities without the need for extrinsic rewards such as intellectual property rights. See Mark McGuinness, Lesson 21: What Motivation Does to Your Creativity, 21ST CENTURY CREATIVE FOUND. COURSE, https://lateralaction.com/motivation-creativity/ [https://perma.cc/QCT9-F8RV] (discussing a significant amount of research showing that intrinsic motivations, rather than extrinsic ones, such as intellectual property rights, yield better creative outcomes). Yet once a party has created something, often their attitudes and motives regarding that created thing change. See Clark D. Asay, Patent Schisms, 104 IOWA L. REV. 45, 46–47 (2018) (discussing this phenomenon in the patent context).


167. Thomas M. Byron, On Copyright and Scientific Theory, 34 SANTA CLARA HIGH TECH. L.J. 1, 25 (2017) (“The utilitarian theory operates on a premise of exchange—by granting artists, musicians, authors, and other creators certain economic incentives in their work, those creators will be more likely to create and circulate their work.”).

168. See Asay, supra note 164, at 66–70.

169. Copyright owners often employ economic rhetoric in their suits against infringers to protect interests beyond simply economic ones. Andrew Gilden, Copyright’s Market Gibberish, 94 WASH. L. REV. 1019, 1020–21 (2019) (discussing some of the noneconomic interests that copyright owners regularly protect with copyright rights).
Furthermore, copyright owners may often favor copyright and its associated rights to protect interests beyond simply economic ones.\textsuperscript{170} For instance, a growing number of scholars point to copyright owners utilizing their rights to protect noneconomic interests.\textsuperscript{171} Hence, in addition to the economic rationales favoring copyright protection, copyright owners have other noneconomic purposes for favoring robust copyright protections.

For tech providers, copyright may at times serve their economic interests by enabling them to better recoup their costs of \textit{technological} creation.\textsuperscript{172} Over the years, many technology companies have pursued technological development aimed at making access to and use of copyrighted works more convenient and multifaceted.\textsuperscript{173} Yet developing technological means to access and use copyrighted works can be costly.\textsuperscript{174} One significant means by which some technology providers recoup their costs of technological creation is by charging for access to their services and the copyrighted works available through them.\textsuperscript{175} With copyright applying to the available works, charging for those services is more feasible and in some cases even necessary.\textsuperscript{176} Hence, when copyright serves as an incentive to complementary creativity and innovation, technology providers, like copyright owners, may favor robust copyright protections in order to better promote their economic interests.

A common business model in the digital space helps illustrate these common copyright interests. When Apple, Amazon, Google, Netflix, and others charge for access to music, movies, and other forms of third-party content available through their services, the copyright owner obtains an economic return from that service because their content is subject to copyright.\textsuperscript{177} Without copyright in place, for instance, the services could just redeploys the content on their services without any

\textsuperscript{170} Id.
\textsuperscript{171}Id.; Clark D. Asay, \textit{Ex Post Incentives and IP in Garcia v. Google and Beyond}, 67 \textit{Stan. L. Rev. Online} 37 (2014) (discussing a particular case in which a woman attempted to use copyright to protect her reputation and, ultimately, her life); Eric Goldman & Jessica Silbey, \textit{Copyright’s Memory Hole}, 2019 \textit{B.Y.U. L. Rev.} 929 (discussing how copyright owners sometimes use copyright to protect reputation and privacy).
\textsuperscript{172} Asay, \textit{supra} note 31, at 199–208 (discussing how copyright indirectly incentivizes many tech companies to create a variety of technological services making use of copyrighted works).
\textsuperscript{173} Id.
\textsuperscript{175} Though technology providers can certainly charge for their services absent the presence of copyright, for those services whose primary utility is accessing and using music, film, and other forms of content, the presence of copyright more readily justifies charging users for access to the service.
\textsuperscript{176} Asay, \textit{supra} note 31, at 204–05.
\textsuperscript{177} See generally Kristelia A. Garcia, \textit{Penalty Default Licenses: A Case for Uncertainty}, 89 N.Y.U. L. Rev. 1117 (2014) (discussing unexpected ways in which copyright may lead to economic returns for copyright holders, using music copyright as an example).
legal obligation to the work’s creator. Copyright puts the creator in the driver’s seat, allowing them to reap where they have sown.

Copyright can also serve the economic interests of the digital service providers in these scenarios. Admittedly, the economic interests of the service providers are more complicated than those of the copyright owners because the service providers have a variety of other economic considerations that may change their overall economic calculus, as will be discussed in greater detail below. But when service providers in these scenarios take a cut of the charge that the copyright owner levied, or otherwise charge for the service on the basis of copyrighted works being available through it, copyright serves at least some of the service providers’ economic interests as well. Hence, in such circumstances, copyright would appear to play a beneficial economic role for both sides.

Some scholars have labeled these types of intellectual property incentives as “ex ante” or “backward-looking,” meaning that copyright is meant to “influence behavior that occurs before the right comes into being.” Another long line of theory, sometimes referred to as “ex post” or “forward-looking” theories of intellectual property, argues that proprietary rights can be helpful to incentivize further development of creations after they come into being, including by way of facilitating economically beneficial relationships between copyright owners and

178. See Ashley Packard, Copyright Term Extensions, the Public Domain and Intertextuality Intertwined, 10 J. INTELL. PROP. L. 1, 14–22 (2002) (discussing what the public domain consists of).
179. Stan Liebowitz, The Case for Copyright, 24 GEO. MASON L. REV. 907, 908 (2017) (“Copyright allows the producers of creative works to reap the rewards that come from their own efforts, providing a basis for ownership rights that seems stronger than that for other forms of property.”).
180. See infra Section II.C.
185. Lemley, supra note 183.
186. Id.
187. Duffy, supra note 184, at 440.
Hence, the economic interests of both copyright holders and digital service providers may be aligned when copyright serves to promote economically beneficial relationships between the two sides.

In the music industry, for instance, copyright may help reduce the risks that record labels and music publishers face when deciding whether to finance, market, and distribute music to the world at large. Copyright may thus play a facilitator’s role in bringing musicians and third-party intermediaries together in economically beneficial relationships. Admittedly, characterizing these types of incentives as ex ante or ex post can be difficult, because one can reasonably view these types of ex post developments as something both parties would consider ex ante in deciding whether to enter the music business in the first place. But regardless of how one characterizes these incentives, copyright would appear to play an important role in bringing both sides together in economically beneficial exchanges.

Similarly, copyright may facilitate economically beneficial transactions between copyright owners and the digital service providers that provide access to their copyrighted content. As with third-party intermediaries in the music world, the presence of copyright may instill greater confidence in the technology providers that their investments in making the copyrighted works accessible through their technological platforms will result in economic returns. Among other reasons, this may be so because copyright means that only those who are able to secure the same copyright permissions will be in a position to offer similar technological services. Amazon Music derives benefits from copyright, for instance, because no one can offer a similar service without first securing copyright licenses from all relevant

188. See, e.g., Jonathan M. Barnett, Copyright Without Creators, 9 Rev. L. & Econ. 389, 391 (2013) (arguing that copyright helps intermediaries such as record labels and music publishers reduce their business risks); Jeremy de Beer, Making Copyright Markets Work for Creators, Consumers and the Public Interest, in What if We Could Reimagine Copyright? 147, 154 (Rebecca Giblin & Kimberlee Weatherall eds., 2017) (discussing the role of copyright as a property right in facilitating efficient marketplace transactions); Edmund W. Kitch, The Nature and Function of the Patent System, 20 J.L. & Econ. 265 (1977) (arguing that granting patents early on in the innovation process serves to incentivize patent holders to further develop those patent interests, including by way of third-party transactions); Stephen Yelderman, Coordination-Focused Patent Policy, 96 B.U. L. Rev. 1565 (2016) (discussing these strands of theory in the patent context).

189. See supra note 188.

190. See supra note 188.

191. See, e.g., Michael J. Burstein, Reply—Commercialization Without Exchange, 92 Tex. L. Rev. See Also 45, 45 (2014) (arguing that distinguishing between ex ante and ex post incentives is largely illusory because innovation “is a process, not an event,” and appropriability problems can arise all throughout that process).

192. See id. at 46–49.

193. See Barnett, supra note 188.

copyright owners, which is no simple task.\textsuperscript{195} Hence, copyright and its economic prospects may embolden both sides to pursue mutually beneficial relationships with one another.

Copyright may also facilitate mutually beneficial exchanges by reducing transaction costs as the two sides determine how best to deploy content on the digital services.\textsuperscript{196} A long line of thinking suggests that proprietary rights such as copyright can help reduce transaction costs and thus facilitate arms-length agreements between distinct parties.\textsuperscript{197} One way copyright may serve this role is by providing stronger remedial options than contract alone is able to provide.\textsuperscript{198} Indeed, contractual incompleteness can lead to all sorts of risks that parties wishing to consummate an arms-length agreement may wish to avoid.\textsuperscript{199} Proprietary rights such as copyright can help mitigate those risks, thereby helping smooth the path to successful interparty transactions.\textsuperscript{200} Hence, because copyright provides a more secure basis for transactions, it may often help reduce transaction costs and thereby bring copyright owners and digital tech providers together in mutually beneficial relationships. And this role of copyright may lead both copyright owners and digital technology providers to favor copyright protections—at least in some form.

\textbf{C. Copyright Paradise Lost}

This relatively rosy picture of copyright symbiosis can quickly disintegrate, however. In most cases, copyright owners have very good reasons to support robust copyright protections, at least until they become the target of a copyright infringement claim themselves.\textsuperscript{201} But for digital service providers, the copyright question is much less straightforward. Or, in some situations, it is straightforward, just in direct opposition to the interests of copyright owners. And these multifaceted copyright interests of technology providers are likely to influence copyright harmonization efforts going forward given the political and economic clout of the

\begin{itemize}
\item \textsuperscript{195} See de Beer, supra note 188.
\item \textsuperscript{196} For the canonical article on transaction cost economics, see R. H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937) (discussing the role of transaction costs in structuring economic activity and the boundaries of firms).
\item \textsuperscript{197} See Burk & McDonnell, supra note 194, at 583–90 (reviewing some of this literature).
\item \textsuperscript{198} See, e.g., Robert P. Merges, A Transactional View of Property Rights, 20 BERKELEY TECH. L.J. 1477, 1486, 1488, 1519 (2005) (arguing that property rights can help reduce transaction costs by providing stronger remedial options than contract does).
\item \textsuperscript{199} See Oliver E. Williamson, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985) (discussing in detail the problems that may arise because of contractual incompleteness); Oliver E. Williamson, THE MECHANISMS OF GOVERNANCE (1996) (same); see also Oliver Hart, Firms, Contracts, and Financial Structure (1995) (discussing how proprietary rights, or residual control of property rights, may help solve of the problems associated with contractual incompleteness).
\item \textsuperscript{200} Merges, supra note 198, at 1486, 1519 (discussing the role of patent rights in helping facilitate interfirm transactions).
\item \textsuperscript{201} For a recent example in the music industry of how this can happen as courts expand copyright protections, see Brink Lindsey, The Blurred Lines of Copyright Infringement, CATO INST. (July 19, 2017, 11:16 AM), https://www.cato.org/blog/blurred-lines-copyright-infringement [https://perma.cc/BSGX-MQMY].
\end{itemize}
U.S. tech community, which is unlikely to diminish anytime soon. Of course, the tech community is not a monolith. Early-stage tech providers do not necessarily share the same interests—including copyright interests—as larger incumbents. Furthermore, digital technology providers vary in the types of services they provide in relation to copyrighted content, and those variances can matter with respect to how different providers view copyright law and policy.

Hence, in order to better map out the copyright interests of U.S. technology providers, I distinguish among tech companies along two important dimensions: a company’s stage of maturation, and its overall business model as it relates to copyrighted content. Naturally these categorizations are somewhat fluid since not all tech providers in a particular category will share identical copyright interests. It nonetheless remains helpful to distinguish among tech companies in these ways as a means by which to identify broader trends as they relate to copyright.

1. Technology Provider Maturity
   a. The Young Guns

In general, early-stage technology companies are more likely to disfavor expansive copyright protections than are their later-stage counterparts. This is so for several reasons. One is that start-up companies are less able to stomach copyright’s costs. Copyright compliance is expensive, and that expense increases as copyright protection expands. For instance, obtaining copyright permissions from third parties can be costly, and early-stage entities are less likely to have sufficient capital to pay those costs. Furthermore, the ability to pay decreases even more as copyright expands, since such growth entails greater value over which start-up providers will have to account.

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203. See, e.g., Clark D. Asay, Artificial Stupidity, 61 WM. & MARY L. REV. 1187 (2020) (discussing how intellectual property decisions differ as between large and smaller incumbents, and the effects those choices may have in the artificial intelligence industry).

204. This is because for most start-ups, access to capital sufficient to pay those costs is no simple thing. See, e.g., American Tech Giants Are Making Life Tough for Start-ups, ECONOMIST (June 2, 2018), https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-start-ups [https://perma.cc/XY8S-LCGW] (pointing to research showing that it “has become harder for start-ups to secure a first financing round”).

205. See, e.g., Copyright Compliance in Private Companies: Challenges and Solutions, WIPO MAG. (June 2011), https://www.wipo.int/wipo_magazine/en/2011/03/article_0007.html [https://perma.cc/X5BC-WV27] (detailing some of the significant time and costs that internally monitoring copyright issues at a company can entail).

companies must bargain. Implementing internal processes to ensure copyright compliance is also expensive; compliance becomes even more so as copyright protections grow.

These costs can quickly become overwhelming for many cash-strapped start-up companies. Because it is not feasible for many start-up technology providers to take them on successfully, in some cases risk-seeking, early-stage companies may simply dispense with dealing with copyright issues altogether in the hopes that their ultimate business successes eventually make up for whatever copyright liabilities they incur.

Prior to being acquired by Google, YouTube was a prime example of this type of copyright mentality. The company depended on hosting third-party copyrighted content on its video sharing site to make it a commercial success. Yet developing the necessary technology for the site was costly enough. Clearing copyright rights for the hosted third-party content and implementing appropriate internal safeguards to prevent copyright infringement would have only added to the cost. The founders thus took a rather flippant approach to copyright issues, as later exposed in copyright litigation, hoping instead that their technological successes would ultimately trump whatever copyright problems they eventually encountered. And their gamble paid off in the billions of dollars.

But it doesn’t always work out that way. Indeed, for other start-up technology providers, taking on similar levels of copyright risk is simply impossible. They must

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208. See id.; Copyright Compliance in Private Companies, supra note 205; Casselman, supra note 206 (indicating that increased regulations increase the costs of business for start-ups in ways that may stifle entrepreneurship).


210. See, e.g., Jeff Atwood, YouTube: The Big Copyright Lie, CODING HORTOR (Oct. 7, 2007), https://blog.codinghorror.com/youtube-the-big-copyright-lie/ [https://perma.cc/5E7T-D45M] (indicating that despite YouTube’s formal policies to the contrary, “[v]irtually everything of interest on YouTube is copyrighted content”).

211. Lawler, supra note 174 (noting that the company spent over $11.5 million to “grow its user base big enough to become attractive to Google”).


either pay the costs of compliance, which for many is unthinkable, or halt operations altogether.\textsuperscript{215} The costs of copyright compliance thus weigh much more heavily on the minds of technology start-up founders than of more established marketplace participants, in ways that make them much more likely to disfavor expansive turns in copyright law.

A related, important reason that early-stage companies are more likely to disfavor expansive copyright doctrines than their more mature counterparts relates to technological innovation. Early-stage companies are typically considered more innovative than larger incumbents.\textsuperscript{216} Indeed, the purpose behind many technology start-ups is to introduce some new and useful technology that the market lacks.\textsuperscript{217} This means that early-stage technology companies frequently deploy third-party copyrighted works within their services in new and innovative ways.\textsuperscript{218} And while those new services may excite users, these services also often raise novel, untested copyright questions.\textsuperscript{219} Expansive copyright protections, either via the courts or Congress, are therefore more likely to affect start-up companies negatively, because those protections may undermine start-up technology providers’ ability to provide their innovative services.\textsuperscript{220}

Of course, early-stage technology providers may in some sense favor copyright when it comes to their own technology and content. Software is subject to copyright protection,\textsuperscript{221} and start-up technology providers are often in dire need of some infringement verdict levied against VidAngel, a technology start-up).


\textsuperscript{216}. See, e.g., Andreas Bubenzer-Paim, \textit{Innovation Isn’t Just for Start-ups: How Big Companies Can Tap Their Creative Power}, \textit{FORBES} (Apr. 19, 2018, 7:45 AM), https://www.forbes.com/sites/forbestechcouncil/2018/04/19/innovation-isnt-just-for-startups-how-big-companies-can-tap-their-creative-power/?sh=2049f11a686b [https://perma.cc/BM68-3VDY] (discussing ways in which large corporations are seeking to emulate start-ups so as to replicate their levels of innovation).

\textsuperscript{217}. Ron Ashkenas, \textit{Can a Big Company Innovate Like a Start-Up?}, \textit{HARV. BUS. REV.} (Jan 25, 2011), https://hbr.org/2011/01/can-a-big-company-innovate-lik.html [https://perma.cc/8H43-TSGZ] (arguing that start-ups have “a totally different psychology and motivation than those in established firms,” which leads them to pursue risky but exciting new innovations).

\textsuperscript{218}. Gaurav Singhal & Ananya Dhuddu, \textit{Copyright Infringement—A Start-up Killer}, \textit{YOURSTORY} (Jan. 22, 2015), https://yourstory.com/2015/01/copyright-infringement [https://perma.cc/32JK-U7AF] (discussing a number of U.S. start-up companies whose services used copyrighted material in new and innovative ways, but which ultimately ran into significant legal troubles as a result).

\textsuperscript{219}. \textit{Id.}

\textsuperscript{220}. See, e.g., Michael A. Carrier, \textit{Copyright and Innovation: The Untold Story}, 2012 \textit{WISC. L. REV.} 891 (discussing the negative repercussions for innovation in the field of peer-to-peer file-sharing technology once courts applied copyright in a way that rendered providers of such technology liable for copyright infringement).

protections for their technological innovations. But for today’s early-stage technology companies, even copyright in this context is much less important, at least in the traditional economic sense. Most modern technologies are built on free and open-source software (FOSS). While FOSS is still subject to copyright, the licensing terms that apply to FOSS make earning revenues off the software itself difficult. Instead, economic opportunities typically lie in the products and services that FOSS makes possible. Hence, while early-stage technology providers may look to copyright to protect their own technology, the reality is that better protections are typically found in other areas of the law.

Again, none of this is to claim that early-stage companies uniformly disfavor expansive copyright protections, or that expansive copyright protections will affect each in the same way. In some cases, expansive copyright protections may put particular start-up technology providers in an advantageous economic position relative to their competitors. Nonetheless, in general, the steep costs of copyright compliance are relatively more burdensome to start-ups than they are to more established companies. Increasing those costs through copyright expansions can thus put a real damper on a technology start-up’s chances of success—in some cases even forcing the company to shutter its operations. Furthermore, the innovative purposes of many of these companies mean they are often pushing the boundaries of what users can do with copyrighted works, and thereby also pushing the boundaries of existing copyright doctrines. Expansive turns in copyright law can thus threaten their very existence.


225. *Id.*

226. This can change, however, if copyright is interpreted to protect functional elements of the software services. See generally Pamela Samuelson, *Staking the Boundaries of Software Copyrights in the Shadow of Patents*, 71 FLA. L. REV. 243 (2019) (discussing some of the dangers of such a move).


228. Harroch, supra note 222 (discussing how many start-ups elect to avoid dealing with intellectual property issues due to the time and costs required to do so effectively).
b. The Copyright Veterans

Compared to technological upstarts, mature technology providers typically have a cozier relationship with third-party copyrighted works used within their services. The reasons for this are the mirror image of the reasons start-ups face greater difficulties in navigating expansive copyright protections: mature companies are better able to bear the costs of copyright compliance, and they are often less innovative than start-ups in their uses of copyrighted works.

First, unlike early-stage technology providers, larger companies simply have greater access to capital markets such that they can pay the costs of monitoring and clearing copyright rights. In part because of that greater access to capital, as well as their higher visibility in general, such tech providers are more likely targets for copyright infringement suits if they fail to pay attention to copyright issues. Indeed, in order to mitigate these risks, larger companies typically implement internal processes to ensure compliance with third-party copyright rights. Hence, because they face greater risks of being sued and have the means by which to clear copyright rights, they are more likely to do so. And while this doesn’t mean large U.S. technology providers favor expansive copyright protections, it does mean that they are typically in a better position to navigate such rights than their cash-strapped, early-stage counterparts.

In fact, though large U.S. technology companies have by and large opposed the recent copyright expansions in Europe, some commentators argue that they are precisely the parties that will benefit the most from them. This may be so because the large technology providers are in a better financial position to navigate the new regulations, whereas for start-up technology providers, those regulations present a
significant hurdle—in some cases, an insurmountable one. The implication, according to some, is that these and other recent regulations unintentionally help solidify the already-dominant market power many larger companies enjoy. Hence, while many of these incumbent technology providers may technically oppose expansive copyright protections, the reality is that those same protections may increase their advantages vis-à-vis their early-stage counterparts, despite whatever last-minute exceptions for start-up companies that legislators included.

Market supremacy considerations manifest themselves in the second reason many larger technology providers may be better able to tolerate broader copyright protections than their younger counterparts: they are typically less innovative than start-up technology providers. Indeed, many incumbent technology providers spend much of their time and money trying to protect their legacy products rather than introducing innovative new services. Since those legacy products have typically passed whatever copyright tests they once faced—either in the courts, via contract, or both—copyright is less of a threat to them. Copyright can thus prove to be a boon to larger industry incumbents when its broad application thwarts innovative, upstart competitors who seek to introduce new services in the marketplace.

234. Id.; Jonathan Keane, How European Startups Are Grappling with the EU’s Copyright Reforms, TECH.EU, https://tech.eu/features/14478/startups-eu-copyright-reforms/ [https://perma.cc/WV7C-A352] (discussing some of the problems for start-ups that the new regulations pose).


236. For a summary of an exception crafted for start-ups in the final version of the recent EU Copyright Directive, see Start-ups Speak Up: Why We Support the Copyright Directive, ARTICLE13.ORG (Mar. 22, 2019), https://www.article13.org/blog/start-ups-speak-up-why-we-support-the-copyright-directive [https://perma.cc/HP7D-RR9G]. For why the exception doesn’t really protect start-ups that well, see Doctorow, supra note 233.


239. See Eriq Gardner, Fox and Dish Debate What Aereo Ruling Means for Place-Shifting Technology, HOLLYWOOD REP. (June 27, 2014, 2:05 PM), https://www.hollywoodreporter
Some large technology providers may also have a more sympathetic relationship to copyright because they are increasingly large copyright owners themselves. Netflix and Amazon, for instance, have built out their own content offerings, with some of those offerings having become wildly popular.²⁴⁰ Hence, these newfound business interests also push some traditional technology providers to favor copyright protections more than they perhaps have in the past.

None of this is to say that mature technology providers favor expansive copyright for third-party works. Shrinking copyright may often serve their economic interests because that shrinkage may mean they have greater latitude with how they utilize third-party works within their services.²⁴¹ Furthermore, at times, mature technology companies also push the boundaries of copyright law when deploying new and innovative services; Google Books is one such recent example.²⁴²

Nonetheless, while both small and large technology providers may in the abstract disfavor expansive copyright protections, overall larger, well-resourced technology providers are more likely to benefit from broader copyright protections than are technology upstarts. Larger technology providers are typically better equipped to navigate expansive copyright protections, and those protections may actually give them significant leverage vis-à-vis technology upstarts unable to overcome copyright’s gauntlet. Some risk-seeking companies such as a young YouTube may simply forge ahead, while other start-up companies may either founder or seek shelter under the haven of a larger incumbent. And when either of those outcomes happens, expansive copyright may play the unintended role of increasing market concentration.

2. Technology Provider Service

Another important dimension along which technology providers differ is the type of service they offer as it relates to third-party copyrighted content. In this regard, I generally split technology providers into two groups. Note that these two groupings can be quite fluid, with some technology providers fitting squarely within both groups. Nonetheless, developing this taxonomy helps us better understand where copyright interests may lie.

²⁴⁰ Brian Barrett, *Amazon and Netflix Look to Their Own Shows as the Key to World Domination*, WIRE (Dec. 17, 2016, 7:00 AM), https://www.wired.com/2016/12/amazon-netflix-look-shows-key-world-domination/ [https://perma.cc/KM9C-RLEC].


Members of the first group, which I will refer to as “Incidental Service Providers,” derive economic returns from their services by means other than charging directly for the third-party content itself. Third-party copyrighted works, though vital to Incidental Service Providers, are also in some sense incidental to them. Google Search falls within this first category. While a third-party copyrighted work may be what a user ultimately retrieves using the service, often the user did not set out to find that particular work when initiating the search, though users may sometimes use the service to find specific copyrighted works. But the point remains that the service’s main purpose is to provide users the ability to sift through vast amounts of information, not necessarily to consume specific copyrighted works.

Advertising revenue is the most popular vehicle for earning economic returns in this category, and many of Google’s services are prime examples of it. Google News and Google Search, for instance, serve up links to third-party copyrighted content as part of those services, yet their revenues from the services are derived primarily from advertising within their services, rather than directly licensing the retrieved content.

Members of the second group, which I will refer to as “Consumptive Service Providers,” are those where copyrighted content is more clearly the direct source of their economic returns. Netflix, for instance, is primarily about delivering access to content that a user wishes to consume (and for which they must pay). Amazon Music, Spotify, and Pandora are similarly focused on delivering specific copyrighted content to their users. Consumptive Service Providers thus earn economic returns directly from the content itself, whether it be through subscriptions, pay per download, or surrounding advertising. Copyrighted content is, in essence, the service.

Of course, one might reasonably argue that with services such as Google News, the content is the service, too. Indeed, this seems to be the crux of EU regulators’ decision to tax such services as part of the Copyright Directive, as discussed more in Part III below. Yet it is also reasonable to view services such as Google News as simply curated search results; the full content is not provided on the service, with users needing to click through the headlines if they wish to consume the work in its entirety. Google News, like its Google Search sibling, is instead a means for users

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245. Id.

246. Id.

to discover copyrighted works that interest them.\textsuperscript{248} The service’s primary function is one of identification; for full access, a user must go elsewhere.

Consumptive Service Providers are more likely to be amenable to robust copyright protections than Incidental Service Providers for a number of reasons. First, copyright puts them in a better position to charge users for access to their services.\textsuperscript{249} Second, copyright may put them at an advantage vis-à-vis competitors unable to secure the same copyright permissions as they have.\textsuperscript{250} Finally, many of these Consumptive Service Providers also have content offerings of their own, thus adding another weight to the copyright ledger.\textsuperscript{251}

On the other hand, Consumptive Service Providers may disfavor expansive copyright protections because rights clearance becomes even more costly than it already was. Consumptive Service Providers such as Pandora, for instance, already face an uphill battle in earning a profit from their services, and the costs of clearing copyrights are a major reason why.\textsuperscript{252} Expanding copyright protections can eat into such services’ already fragile profit margins.\textsuperscript{253} Furthermore, Consumptive Service Providers that primarily rely on users to populate their services with content are more likely to disfavor expansive copyright protections, since corralling users’ activities can be expensive and, in some cases, impractical.\textsuperscript{254}

Incidental Service Providers are the most likely to disfavor expansive copyright doctrines. The primary reason is simple: while Incidental Service Providers make plenty of money in relation to the copyrighted works through advertising or otherwise, having to pay for their incidental uses of those works would significantly cut into their profit margins.\textsuperscript{255} Furthermore, because their services’ primary goals focus on things other than actually consuming the copyrighted works, they are more likely to believe that paying for those uses is unjustified.\textsuperscript{256}
Combining these two dimensions helps further identify how copyright positions may play out in years to come. For instance, while Incidental Service Providers may generally disfavor expansive copyright protections, more mature Incidental Service Providers may find such protections at least tolerable because they can help solidify the mature Incidental Service Providers’ market position vis-à-vis smaller upstarts. Google is an example of one such company that, while publicly arguing against such copyright changes, may also ultimately find them to their advantage. Younger Incidental Service Providers will naturally oppose expansive copyright doctrines, which not only put them at a disadvantage vis-à-vis their larger counterparts, but may also prevent them from ever getting off the ground.

Google, ironically, is also an example of a mature Consumptive Service Provider with services such as Google Music and YouTube TV. Again, the company may generally disfavor increasing copyright protections because doing so makes its content licenses more costly and, in the case of YouTube, copyright compliance more expensive. On the other hand, its preexisting contractual relationships with major content owners and ability to pay suggest that increasing copyright protections may help solidify its market position vis-à-vis younger startups. Indeed, many young Consumptive Service Providers face an uphill battle in having enough capital to appropriately address copyright issues, and expanding copyright protections only makes the problem that much more significant. Because of these issues, in some cases they simply dispense with dealing with copyright issues altogether. Ironically, a younger YouTube, before being acquired by Google, is one such example.

Below I have built a table that helps visualize these different copyright interests.

<table>
<thead>
<tr>
<th>Consumptive Service Provider</th>
<th>Early-Stage</th>
<th>Late-Stage</th>
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<tbody>
<tr>
<td></td>
<td>- Copyright, particularly expansive applications of the law, imposes significant burdens</td>
<td>- Copyright imposes manageable burdens and is an assumed cost of doing business, though expansive applications of copyright law increase those burdens and are likely to be disfavored</td>
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<tr>
<td></td>
<td>- But copyright costs are more likely to be considered a cost of doing business and thus to some extent acceptable</td>
<td>- Copyright can advantage them vis-à-vis younger competitors and with regard to their own content offerings</td>
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</table>

Early-Stage | Late-Stage
---|---
**Incidental Service Providers**
- Copyright, particularly expansive applications of the law, imposes significant burdens
- Copyright costs are less likely to be considered a cost of doing business and thus are less likely to be acceptable
- Copyright imposes manageable burdens, though expansive applications of copyright law increase those burdens
- Copyright costs are less likely to be considered a cost of doing business and thus are more likely to be disfavored
- Copyright can advantage them vis-à-vis younger competitors

**D. Copyright Harmonization Redux**

What do these varied copyright interests mean with respect to international copyright harmonization efforts going forward? One simple takeaway is that, from the United States’ perspective, it is not as straightforward as it once was. In the 1970s and 1980s, when the United States finally fully joined the international harmonization project, Silicon Valley was barely a thing and was certainly not the economic and political powerhouse that it is today.258 The interests of large copyright holders easily carried that day.259

But the U.S. tech community has enormous influence in today’s world—some believe too much260—and that influence includes its views on copyright, because so many of these services utilize third-party copyrighted content within them. Large copyright owners still have significant influence, but the U.S. tech sector has recently shown that its weight can carry the day in a legislative matchup with large copyright owners.261

As we have just seen, broadly speaking, the U.S. tech sector may be said to generally disfavor expansions of copyright protections. Hence, insofar as copyright harmonization efforts focus on expanding copyright protections, as they normally do,262 the United States may abandon ship as it clings to its tech community anchor. There is no guarantee that this will be the case—discontent with the tech community,

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258. See supra Part I.

259. See supra Part I.


262. See generally Crews, supra note 11 (discussing some of the increases in copyright protection that harmonization efforts have brought to U.S. law).
particularly the most powerful of the bunch, is growing even within the United States. Yet it seems unlikely that the U.S. tech community’s influence will diminish anytime soon.

But in assessing that possible influence, it is important to remember which parts of the U.S. tech sector are most likely to throw their weight around. First, the tech behemoths, not the upstarts, are those whose influence is most likely to be felt. Early-stage tech companies do not have the economic and political clout of their larger counterparts, and so their views are less likely to surface in copyright law and policy discussions. And while more mature tech companies may share a general distaste for expansive copyright protections, we have also seen that copyright expansions are at least more tolerable to them and may sometimes even provide them advantages.

Second, it is more likely to be Incidental Service Providers, rather than Consumptive Service Providers, who oppose expansive turns in copyright harmonization efforts. Consumptive Service Providers may certainly oppose copyright expansions that force them to pay for parts of their services that they previously offered without restriction. And for Consumptive Service Providers that heavily rely on user-generated content, copyright expansions may be particularly distasteful. But remember that copyright provides many Consumptive Service Providers a more direct means by which to charge users for their services. Furthermore, late-stage Consumptive Service Providers in particular may find copyright expansions to be to their advantage, both vis-à-vis early-stage competitors and with respect to their ever-growing catalogues of homegrown content offerings.

Incidental Service Providers, on the other hand, will typically have very little reason to favor copyright harmonization efforts that expand copyright protections. This is so because they do not view their services as primarily focused on delivering specific copyrighted works to their users, and they typically do not directly monetize the copyrighted works users come across using their services. Hence, if expansions in copyright law did force them to pay for the copyrighted works that can show up within their services, those costs could significantly cut into their profit margins. This is not to say that copyright may not sometimes benefit Incidental Service Providers—we have seen that mature Incidental Service Providers in particular may ultimately gain from copyright protections that help throttle their early-stage competitors. But for many mature Incidental Service Providers, the immediate costs of copyright compliance are likely to weigh more heavily in their corporate minds than the speculative benefits of any such copyright advantage.

Hence, it is most likely to be late-stage Incidental Service Providers that push against harmonization efforts aimed at increasing copyright protections. Mature Consumptive Service Providers are more likely to sit on the sidelines, or even, in some cases, to favor expansive turns in copyright law. Meanwhile, early-stage companies across the board are likely to have little say in the matter. And while late-stage tech companies’ interests may sometimes align with those of their early-stage counterparts, at other times they do not. This misalignment can have significant negative market effects, as I will discuss further in Part IV below. For now, Part III turns to examining the recent EU Copyright Directive as an important case study of

263. Selyukh, supra note 260.
some of these new tech influences at play in current copyright law and policy discussions.

III. THE EU COPYRIGHT DIRECTIVE

Technically, the EU Copyright Directive is not an effort in international copyright harmonization, at least outside of Europe. But it is relevant to future international copyright harmonization efforts between the United States and Europe, and perhaps elsewhere, because its passage puts into clearer perspective the economic forces relevant to any such future efforts.

Those economic forces consist primarily of technology companies and copyright owners. As discussed above, these two camps sometimes have common interests, but at other times they can be at loggerheads as the technology companies’ services utilize copyrighted works in a variety of ways. In the Directive’s case, conflict between the two sides is more readily apparent than is harmony. Indeed, as will be discussed in greater detail below, EU regulators passed the Directive largely as a means by which to redistribute copyright-related wealth from large U.S. tech companies to European copyright owners. Many European regulators feel that these companies’ services make significant profits on the backs of European copyright owners without adequately recompensing them, and the Directive was meant in part to fix this perceived problem.

The below Sections first lay out the basics of the most controversial parts of the Directive, followed by a discussion of the economic and political rationales for and against their passage.

A. The Directive’s Basics

The Directive’s two most controversial parts consist of the so-called “upload filter” and “link tax” provisions. While some may dispute these terms’ accuracy, I will nonetheless use them for ease of reference.

The link tax requires online purveyors of information to pay a fee when those parties preview copyrighted content exceeding “very short extracts” within their services. The most frequently discussed examples are services such as Google

264. See supra Part II.
266. Id.
News and Google Search—each preview of third-party content that goes beyond a “very short extract” would require Google to pay the fee.\(^{269}\) In response to backlash, EU lawmakers clarified in the final text that the link tax does not apply to “legitimate private and noncommercial use[s] of press publications by individual users,” nor to “mere hyperlinks . . . accompanied by individual words.”\(^{270}\) Despite these clarifications, the link tax applies to a number of common practices of displaying portions of copyrighted content online that have long been viewed as acceptable, within both the United States and Europe.\(^{271}\)

Google has claimed that it will need to shutter its Google News service in Europe if the tax applies, and possibly adjust its practices worldwide, too.\(^{272}\) In order to avoid the tax, internet search providers, including Google, would also need to significantly scale back search results in Europe and potentially elsewhere, in ways that would undoubtedly make internet search results less useful to consumers.\(^{273}\)

The Directive’s other main point of contention, the so-called upload filter, would make sites such as YouTube directly liable for copyright infringement when users of the services upload infringing content onto their services.\(^{274}\) Currently, most countries typically apply indirect liability standards to services that host infringing content at the direction of their users; jurisdictions also often provide services with some sort of liability “safe harbor” so long as the services comply with certain requirements (such as removing infringing content once they are notified of it).\(^{275}\)

Prior to the Directive’s passage, Europe provided similar immunities to technology service providers.\(^{276}\) The Directive effectively revoked those safe harbors for commercial online service providers that host user-generated content.\(^{277}\)

Some worry that the only way sites such as YouTube will be able to continue in the post-Directive environment is to screen everything users upload to their sites and

\(^{269}\) Id.


\(^{271}\) See generally Lindsay Marks, Note, Can Copyright Save the U.S. News Industry?: Applying the 2016 European Union Proposal to the United States, 46 AIPLA Q.J. 61 (2018) (discussing some of this history).

\(^{272}\) Deamer, supra note 268.


\(^{276}\) Id.

\(^{277}\) Id.
to actively take down third-party content that its algorithms identify as potentially infringing. Indeed, risk aversion may make this possibility a near certainty. Somewhat ironically, YouTube already does filter everything uploaded to the site, having developed its own filtering system over the years at significant cost. The upload provision may thus pose a bigger hurdle to competitive service providers, who would have to either develop their own filtering technologies or license them from a third-party provider. The costs of either route are high, thus lending some credence to the concern that the upload filter provision, though targeting YouTube, actually puts the company at a significant advantage vis-à-vis possible competitors.

In fact, the worry that the Directive’s link tax and upload filter could make it more difficult for European startups to compete with the likes of Google and Facebook led EU regulators to include the so-called “Smart Exception” in the Directive’s final text. This provision exempts start-up companies less than three years old and that fall below certain revenue and usage thresholds from the Directive’s provisions. This last-minute exception appears to be the direct result of intense lobbying from European business interests concerned that the Directive would negatively affect their ability to compete with large U.S. tech companies.

281. Bridy, supra note 275.
283. Start-ups Speak Up, supra note 236.
284. Id.
Importantly, each EU member must transpose the Directive into its own body of national law; the Directive is not a directly applicable regulation. This means that variation among the different EU members will almost certainly exist in terms of how they implement the Directive’s provisions, including the link tax and upload filter provisions. Google and others have already redirected their lobbying efforts from the EU level to national governments. Some EU members, such as France, have already passed legislation implementing the Directive. EU members that have not yet done so have until June of 2021 to put in place their own implementing legislation.

B. The Directive’s Motives

As mentioned above, the Directive appears to have been largely motivated as a means by which to redistribute wealth from large U.S. tech companies to EU copyright holders, including musicians, film producers, and press publishers. More generally, EU regulators have grown increasingly wary of the power and influence many large U.S. tech companies wield in Europe, and the Directive is seen by some as just one of several recent efforts to rein them in.

Upon passage of the Directive, for instance, European Parliament President Antonio Tajani indicated that its passage puts “an end to the existing digital Wild West” where “[U.S. w]eb giants have been able to benefit from content created in Europe by . . . transferring huge profits to the U.S.” French Culture Minister

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287. Id.

288. Meyer, supra note 257 (highlighting Google’s statement following passage of the Directive that “we look forward to working with policy makers, publishers, creators and rights holders as EU member states move to implement these new rules”).


293. Raf Casert, US Tech Giants Targeted in European Parliament Online Copyright Bill,
Franck Riester expressed similar sentiments, suggesting that “‘[t]he EU message is clear . . . [e]veryone intervening on the European market must respect our common preferences, whether it is copyright or fiscal rules’ that require America’s tech companies to pay more taxes in Europe.”

Others spoke of “monopolistic American companies” that unfairly made huge profits on the backs of Europeans, while others expressed hopes that the Directive would finally help achieve “fair pay for European creatives.”

Of course, many of the targeted technology companies resisted the Directive’s passage. Google purportedly spent millions of dollars in an effort to prevent the Directive’s passage, to no avail. Other tech giants, including Facebook and Amazon, also engaged in heavy lobbying against the Directive’s implementation.

U.S. companies like Twitter also face a crossroads with the Directive’s passage, as their services frequently preview and display copyrighted content at the direction of its users, meaning that both the link tax and upload filter provisions will affect them.

Importantly, it is no coincidence that some of the fiercest resistance to the Directive came from Incidental Service Providers such as Google and Facebook. As discussed above, for many of their services, these companies do not directly monetize copyrighted content, meaning that the Directive’s upload filter and link tax provisions threaten to cut into their ad-generated profits. And even in cases where these companies act as Consumptive Service Providers by directly monetizing copyrighted content, services such as YouTube rely enough on user-generated content that the Directive’s upload filter provision threatens to raise their costs as well.

But compared to Incidental Service Providers, Consumptive Service Providers were generally much less vocal in their opposition to the Directive. Some, such as the Wikimedia Foundation, were and remain staunch opponents of the Directive, primarily because their services rely so heavily on user-generated content.

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294. Id.

295. Id.


297. Id.

298. Id.


300. See supra Section II.C.

301. Davenport, supra note 254.
others, including Spotify and Apple, may actually gain from the Directive’s passage by forcing their competitors, particularly Google, to pay more for the services that they offer. ³⁰² Hence, as discussed above, while Consumptive Service Providers may not always favor copyright expansions, sometimes they may. ³⁰³ Or even when they do not necessarily favor copyright expansions, they may end up benefiting from them in the end. ³⁰⁴

As significant as the lobbying efforts of many U.S. tech giants were, those of large European copyright owners are said to have dwarfed them. ³⁰⁵ Indeed, according to some reports, large European copyright owners and their advocates appear to have been granted greater access to European regulators in the runup to the Directive’s passage than anyone else. ³⁰⁶ And, not coincidentally, their interests ultimately won out.

The Directive thus nicely illustrates the new political economy of international copyright harmonization and the different interests shaping it. On the one hand, the pro-copyright interests of copyright owners will continue to play a significant role, particularly in jurisdictions that boast a strong copyright industry. In the case of the Directive, the interests of large copyright owners carried the day, in large part because Europe has a robust copyright industry whose interests coincided with the national interests of the jurisdiction, Europe, where the Directive was being considered.

On the other hand, the often-opposing copyright interests of technology service providers play an increasingly important role in copyright law and policy debates worldwide. Even in the case of the Directive, the lobbying efforts of large U.S. technology companies are said to have made the Directive’s eventual outcome far from guaranteed. ³⁰⁷ Furthermore, as discussed above, the technology sector within Europe itself exerted significant influence on the Directive’s final text by helping secure exceptions for start-up technology companies.

Hence, as we move forward from the Directive into new possible harmonization efforts, these dynamics are likely to play out in a variety of ways. Below I have charted out generally how different jurisdictions are likely to view international copyright harmonization efforts in accordance with the strength (or weakness) of their copyright and technology industries.

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³⁰³ *See supra* Section II.C.
³⁰⁴ *See supra* Section II.C.
³⁰⁵ *See* Deamer, *supra* note 268.
³⁰⁶ *Id.*
³⁰⁷ *See Copyright Directive, supra* note 296.
Table 2. Mapping the New Political Economy of Copyright Harmonization

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<td>Jurisdiction is more likely to exhibit preferences for</td>
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<tr>
<td>Industry</td>
<td>more balanced positions on copyright</td>
<td>stronger copyright protections</td>
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<tr>
<td>Weak Copyright</td>
<td>Jurisdiction is more likely to exhibit preferences for weaker copyright protections</td>
<td>Jurisdiction, lacking any clear winners, is more likely to</td>
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The United States is an example of a jurisdiction with both strong technology and copyright industries. Within the United States, this dynamic plays out as judges and legislators grapple with how best to construct copyright laws; the result is often an attempt to balance the competing interests of the two sides. On the international stage, these interests may also sometimes counterbalance each other. In the Directive’s case, for instance, U.S. copyright owners rode the coattails of their European counterparts in pushing for provisions that would help their economic cause, particularly the upload filter and its focus on forcing YouTube to pay more for copyrighted music. On the other side of the equation, large U.S. technology companies exerted significant influence on the overall legislative process, even if they did not ultimately obtain their desired result. Going forward, the United States’ involvement in any copyright harmonization efforts will depend on to what extent either interest is implicated by the proposed measures, as discussed more fully in Part IV below.

As the Directive’s passage makes clear, Europe is an example of a jurisdiction with a strong copyright lobby but somewhat nascent technology industry. The copyright industry thus carried the day, and even spearheaded the legislative charge toward strengthening copyright owners in their struggles to wrest some of copyright’s economic pie from technological service providers making use of their copyrighted works. Europe did give its nascent technology sector a nod of the head with the Directive’s limited exception for start-up companies. But ultimately, Europe’s strong copyright lobby, combined with the absence of a strong European technological counterbalance, resulted in an expansion of copyright laws that would almost certainly fail in the United States because of its counterbalancing interests.

The next part briefly explores some of the more important implications of this new political economy of international copyright harmonization.

308. See, e.g., Amanda Reid, Copyright Policy as Catalyst and Barrier to Innovation and Free Expression, 68 CATH. U. L. REV. 33 (2019) (discussing these tensions).
309. Smirke, supra note 302.
IV. INTERNATIONAL COPYRIGHT LAW’S FUTURE

These emerging dynamics in copyright law and policy are likely to have several important implications for international copyright harmonization efforts going forward. I consider several of those possibilities below.

A. More Go-It-Alone National Copyright Laws?

For over thirty years, copyright harmonization has been the norm as the United States and Europe have pushed the rest of the world to adopt a set of common copyright standards. The result is that nearly all major jurisdictions have adopted copyright laws that in important respects mimic those of both the United States and Europe.

But with the new political economy of copyright law and the divergent forces shaping it, harmonization efforts may increasingly give way to more go-it-alone copyright approaches. The Directive is a clear example of this possible trend emerging. Indeed, harmonization on the issues that the Directive addresses was essentially out of the question, because the Directive so clearly sought to promote European copyright owner interests at the expense of those of large U.S. technology companies. As different jurisdictions exhibit varying combinations of copyright industry and technology industry interests, more copyright clashes seem likely. And if such clashes do arise, go-it-alone copyright laws may become the new norm.

If increasingly more jurisdictions chart their own copyright paths, that may yield some benefits. For example, scholars have argued that in response to harmonization’s demands, the United States has reformed its copyright laws in a number of unproductive ways, all in contravention to copyright law’s utilitarian constitutional purpose. If the United States were freed from the demands of international copyright harmonization, it may be able to pursue a more rational copyright law and policy that better aligns with copyright’s purposes. And although future decreases in harmonization do nothing to free jurisdictions from the copyright obligations to which they have already agreed, those obligations are often vague enough to provide jurisdictions with significant copyright wiggle room.

For instance, the U.S. copyright regime differs from many others in that it includes the fair use defense to copyright infringement claims. This defense allows courts to balance a number of factors in determining that an otherwise infringing act is permissible. U.S. courts grant the fair use defense when, in their estimation,
prohibiting the complained-of activity would “stifle the very creativity which [copyright] law is designed to foster.” Fair use is by far the most important defense to claims of copyright infringement and enables a number of important uses of copyrighted material in the United States, including news reporting, parodies, educational uses, and others.

Both European and U.S. commentators have long questioned whether the fair use doctrine is compatible with the United States’ international copyright treaty obligations. Other jurisdictions, including many countries in Europe, often have more clearly delineated exceptions to copyright infringement. The fair use defense, in contrast, is more open-ended and, some claim, indeterminate. It may thus fail to satisfy the Berne Convention and TRIPS’ requirements that any limitations and exceptions in national copyright laws only pertain to “certain special cases” that neither interfere with “a normal exploitation” of copyrighted works nor “unreasonably prejudice the legitimate interests” of copyright holders.

Despite these objections to the fair use defense, there are plausible arguments that the defense does, in fact, align with the United States’ treaty obligations. At the time the United States joined the Berne Convention, after all, fair use was deemed to comport with the United States’ commitments under the treaty. And since that time, a growing amount of support and adoption of fair use-like doctrines in other jurisdictions suggest that fair use and international copyright harmonization standards can coexist. Indeed, as noted, those harmonization obligations themselves are somewhat open-ended, thus allowing the United States to retain the important fair use defense within its corpus of copyright law.

Hence, if the United States were to verge off the copyright harmonization path and pursue more go-it-alone copyright law and policymaking going forward, it may be able to use fair use and other copyright doctrines to better balance the interests of copyright holders and technology providers than additional harmonization efforts would yield. In fact, U.S. courts have often relied on the fair use defense to balance the interests of copyright holders and technology providers. For instance, the U.S. Supreme Court utilized the fair use defense to permit early VCRs, despite their capacity to allow for significant amounts of copyright infringement, and that early ruling has paved the way for additional technological uses of copyrighted works.

316. Id. at 577.
320. Id.
321. Id.
322. Id. (reviewing and rejecting these arguments).
323. Id.
324. Id.
325. Id.; Yu, supra note 314.
materials. Circuit courts have relied on the fair use defense in allowing search engines to display copyrightable material in response to user queries and software developers to use copyrighted materials for data-mining purposes. In an important recent case, the Second Circuit relied on fair use in determining that Google’s copying of millions of copyrighted works for use in its Google Books service was permissible.

Hence, going forward, a lack of harmonization on these and other copyright controversies may allow the United States to pursue a more rational copyright law and policy in light of its own copyright political economy. And it may do so in spite of existing harmonization obligations, given those obligations’ perceived flexibility.

Despite these possible benefits, go-it-alone approaches may undercut some of the understated possibilities of harmonization. For instance, it is true that harmonization efforts have historically focused on expanding copyright protections. But this was so because the interests of large copyright owners went largely unopposed in those efforts, so copyright expansion was the natural result. Yet the new political economy of copyright law and policy consists of additional important entrants—technology providers—and harmonization efforts could be used in the future to better balance the interests of both copyright owners and technology service providers on a worldwide basis. Naturally, jurisdictions such as the EU may oppose those efforts if they were led by the United States and reflected the political economy of U.S. copyright law and policy as opposed to their own. But at least being at the same table would allow jurisdictions some chance of avoiding the entirely nationalistic approaches that are otherwise likely to result. Compromise may fail to fully satisfy any of the participating jurisdictions and the copyright and technological interests that they represent. But it may also result in more balanced, rational solutions to international copyright issues going forward. Indeed, the need for harmonization may have never been greater as the state of technological advancement continues to make borders more porous.

The 1996 World Intellectual Property Organization (WIPO) Copyright Treaty and its aftermath is an example of harmonization where both copyright and technological interests came into play. Preceding the Treaty, copyright owners across the globe worried that digital technologies were eroding their ability to profit from their creative efforts. The Treaty thus provided them with a number of additional rights so as to ensure that creative parties had sufficient means to protect their works and

328. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007).
329. A.V. ex rel. Vanderhye v. IParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).
330. Authors Guild v. Google, Inc., 804 F.3d 202, 225 (2d Cir. 2015) (holding that Google’s display of snippets of copyrighted text in response to search queries was fair use).
331. See supra Part I.
332. See supra Part I.
thereby profit. But technological service providers were similarly worried that copyright liability could pose an insurmountable hurdle to operating services where users supplied much of the content. Hence, the United States, Europe, and other jurisdictions, often in connection with or shortly following their WIPO Treaty implementation efforts, enacted safe harbor protections for technology providers so long as they satisfied certain conditions. Ironically, it is those same safe harbors that the EU, with its most recent Copyright Directive, effectively revoked. Hence, while harmonization may at times limit jurisdictions’ abilities to enact rational copyright laws, it can also help limit the global irrationality of national go-it-alone copyright lawmaking.

Go-it-alone approaches may also hinder cross-border exchanges in cultural works. Indeed, one of the oft-stated goals of harmonization is to facilitate commercial activity between and among different jurisdictions by reducing the friction that dissimilar copyright standards otherwise introduce. If disparities grow in copyright standards among different jurisdictions, the result may very well be a reduction in cross-border cultural exchanges.

Yet despite harmonization’s potential for limiting go-it-alone copyright irrationality, countries may still use harmonization to help achieve national copyright ambitions (and thereby pursue some form of global copyright irrationality). The United States, for instance, has only recently promoted new copyright harmonization among Canada, the United States, and Mexico, with the focus being to increase the term of copyright to match that found in the United States, as well as additional measures aimed at combatting cross-border piracy. The United States has also recently increased pressure on other jurisdictions to conform their copyright standards to those of the United States.

These harmonization efforts in pursuit of national ambitions demonstrate several things. First, in some foreign jurisdictions lacking a strong U.S. technological presence, the interests of U.S. copyright owners may play an outsized role in influencing the U.S. government’s harmonization efforts. To illustrate: the United

335. Id.
336. Id.
338. Adams, supra note 337.
339. See supra Part I (discussing this rationale).
341. Ernesto Van der Sar, Tech Companies Warn U.S. Against Harmful Copyright Laws Worldwide, TORRENTFREAK (Nov. 8, 2019), https://torrentfreak.com/tech-companies-warn-us-against-harmful-copyright-laws-worldwide-191109/ [https://perma.cc/SYT3-PRK5] (discussing large tech companies’ efforts to influence the U.S. Trade Representative to exert pressure on a number of countries to adjust their copyright laws to be more in line with U.S. standards).
States and Australia have a free trade agreement in place, and that agreement includes numerous copyright-related provisions. But most of these focus on improving the economic prospects of copyright owners. The agreement does nominally include protections for internet service providers, but Australia has implemented those protections in such a way as to favor its domestic providers at the expense of U.S. technology companies. As a result, Google and others do not operate many of their services in Australia, even if they would like to. The consequence is that the United States’ harmonization efforts in such jurisdictions are often largely one-sided. In Australia, for instance, the U.S. government does not appear to have exerted much pressure on that country’s government to improve copyright protections for large U.S. technology companies, despite Australia arguably being out of compliance with the free trade agreement for some time and persistent lobbying from the U.S. technology sector.

Second and related, for some goals of copyright harmonization, technology service providers simply have little interest in the outcome and thus fail to provide a counterweight at all. In the case of the recently enacted NAFTA replacement, for instance, increasing the duration of copyright is hardly the type of issue to get the technological sector up in arms because it already faces the same standard at home (and may even benefit from it). In fact, having a uniform standard worldwide may in some respects be preferable.

Hence, from the United States’ perspective, more go-it-alone copyright lawmaking presents both advantages and disadvantages. On the one hand, it provides U.S. lawmakers with a greater ability to shape copyright in accordance with copyright’s U.S. political economy. Arguably the United States already enjoys such leeway under its existing international copyright obligations. But freed from additional international strictures, the United States may be in a better position to pursue other changes that better conform its copyright laws to their constitutional purposes.

On the other hand, the United States clearly has many international interests, including the fate of its technological and copyright sectors abroad. Copyright harmonization on issues that affect both its copyright holders and technology providers may be the best route for the United States to ensure that all of its interests are protected in jurisdictions that may otherwise elevate one group over the other— the Directive is such an example where the United States’ technological sector was given short shrift. And while the United States cannot force other jurisdictions to discuss harmonization efforts when those jurisdictions prefer a go-it-alone approach

343. Id.
345. Id.
346. See id.
due to their distinct copyright political economies, such distinctions have not prevented harmonization efforts in the past. Yet in the past, the advanced economies of the world teamed up to promote harmonization. They made copyright concessions to less developed countries to get them on board, while also making certain economic and political benefits contingent on less developed countries agreeing to copyright harmonization standards. The difference now is that arguably the two biggest past promoters of copyright harmonization may be diverging in how they believe copyright issues involving technological services should be handled. With that copyright marriage now broken, go-it-alone approaches present both advantages and disadvantages in terms of the future of international and domestic copyright law and policy.

B. Harmonization by Another Name?

Another possible implication of copyright’s changing political economy is that jurisdictions such as Europe and the United States may seek to push their harmonization preferences onto the rest of the world unilaterally rather than through multilateral efforts. For instance, as discussed above, one view of the Directive is that it is simply a go-it-alone approach to copyright law and policy; Europe’s copyright political economy meant that harmonization was unlikely, and so Europe pursued its own copyright law and policy path. But another view is that a significant purpose of the Directive was to unilaterally push Europe’s copyright preferences onto the rest of the world, without having to compromise with other jurisdictions on its preferences.

For instance, although the Directive technically only applies in Europe, it may often affect how companies implement practices worldwide. This may be so because it is often more efficient and practical for organizations to have a worldwide standard; having disparate practices within a single organization can create more headaches than they are worth. Google, for instance, once the company adjusts its copyright practices in accordance with the Directive’s requirements, may decide to implement similar practices worldwide because having different standards from one jurisdiction to the next can make administering those standards difficult. Hence, EU lawmakers may have enacted the Directive both to settle important copyright disputes at home while also believing that their domestic efforts would help harmonize worldwide practices in accordance with their copyright preferences.

Indeed, the Directive may also influence other jurisdictions to adopt similar measures in their own bodies of copyright law. In fact, U.S. copyright owners have already begun to point to the Directive in support of their arguments that U.S.

347. See supra Part I.
348. See supra Part III.
349. See, e.g., Julie Brill, Microsoft’s Commitment to GDPR, Privacy and Putting Customers in Control of Their Own Data, MICROSOFT ON THE ISSUES (May 21, 2018), https://blogs.microsoft.com/on-the-issues/2018/05/21/microsfts-commitment-to-gdpr-privacy-and-putting-customers-in-control-of-their-own-data/ [https://perma.cc/KSS5-2Y5A] (discussing Microsoft’s decision to implement new European privacy laws globally, despite those laws only applying in Europe or to data collected about Europeans).
lawmakers should enact similar reforms at home.\footnote{See Gus Rossi, The Copyright Directive Is SOPA Part 2, and It’s Coming for Your Internet, PUBLIC KNOWLEDGE (Apr. 8, 2019), https://www.publicknowledge.org/blog/the-copyright-directive-is-sopa-part-2-and-its-coming-for-your-internet/ [https://perma.cc/2KH5-89BA] (discussing a push in the United States from large copyright holders to enact something similar to the Copyright Directive).} Hence, though EU lawmakers certainly cannot guarantee that their domestic copyright efforts will result in similar changes abroad, the fact that their efforts have spawned similar conversations in the United States (and perhaps elsewhere) suggests at least some success on that score.

Europe has some experience with this type of unilateral global-standard setting. For instance, it has recently experienced success in unilateral harmonization efforts in the privacy law domain, when it passed the General Data Privacy Regulation (GDPR) in May 2018.\footnote{See generally Danny Palmer, What Is GDPR? Everything You Need to Know About the New General Data Protection Regulations, ZDNET (May 17, 2019, 1:33 PM), https://www.zdnet.com/article/gdpr-an-executive-guide-to-what-you-need-to-know/ [https://perma.cc/8HGH-GWWT].} The GDPR is a complicated new privacy regulation, and for purposes of this Article, I need not get too much into its weeds. Suffice it to say that the new law is affecting privacy standards across the globe, all without the EU having to compromise with third-party jurisdictions on its privacy preferences.

For instance, though the EU obviously cannot unilaterally legislate for the rest of the world, the GDPR’s passage ensured worldwide privacy ramifications. It did so in part by making the GDPR apply to anyone who targets and collects information about Europeans.\footnote{Jaclyn Jaeger, Understanding the Territorial Scope of the GDPR, COMPLIANCE WEEK (Jan. 10, 2019, 7:00 AM), https://www.complianceweek.com/understanding-the-territorial-scope-of-the-gdpr/24693.article [https://perma.cc/JZN9-ZUS6].} While EU regulators obviously cannot enforce the GDPR in U.S. courts, they can go after U.S. tech companies with a European presence for hefty fines, who turn out to be one of the GDPR’s primary targets.\footnote{Paul Roberts, US Firms May Be Early Targets of GDPR, DIGITAL GUARDIAN (Dec. 7, 2017), https://digitalguardian.com/blog/us-firms-may-be-early-targets-gdpr [https://perma.cc/CV2Q-DDKX].}

Indeed, in enacting these new protections, European legislators were clearly not only concerned with privacy standards at home, but with how information about European residents was handled around the globe.\footnote{Id.} In fact, European policymakers have long bemoaned the lax privacy standards in the United States in particular,\footnote{See generally Paul M. Schwartz, The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures, 126 HARV. L. REV. 1966 (2013).} and EU courts have similarly found that privacy and data protection standards in the United States fall far below those found in Europe, even before the EU’s recent privacy enhancements.\footnote{Amar Toor, Landmark EU Ruling Says US Privacy Protections Are Inadequate, THE VERGE (Oct. 6, 2015, 4:53 AM), https://www.theverge.com/2015/10/6/9460465/european-court-facebook-safe-harbor-ruling-data-transfer [https://perma.cc/56CY-V7DQ].}

So far, the result is that many U.S. technology companies are considering adopting the GDPR on a worldwide basis, with several, including Apple and
Microsoft, already committing to worldwide GDPR compliance.\textsuperscript{357} Because adopting GDPR compliance on a worldwide basis is in some respects more efficient and practical, it seems likely that many other U.S. technology companies will eventually follow suit.\textsuperscript{358}

But the GDPR is not only affecting global corporations’ privacy practices. It is also leading jurisdictions the world over to consider adopting similar standards. Indeed, since the GDPR’s passage, jurisdictions across the world, including the United States, have either adopted or are considering adopting regulations similar to the GDPR.\textsuperscript{359} Some U.S. states, including California and Nevada, have adopted more stringent privacy protections in the GDPR’s wake.\textsuperscript{360} Hence, with the GDPR, Europe was able to promote its vision for privacy standards worldwide, all without having to compromise with other jurisdictions having different views of what worldwide privacy standards should be.

Of course, unilateral action may not always work out this way. Sometimes unilateral action may result in other jurisdictions going in the opposite direction rather than a widespread embrace of the policy preferences. But at least in some domains, including particular copyright issues, unilateral action may ultimately prove successful. Time will tell whether the Copyright Directive will prove so in influencing the adoption of similar copyright reforms in the United States and elsewhere. The U.S. Copyright Office recently concluded a study of issues relating to areas of copyright law that the Copyright Directive addresses.\textsuperscript{361} And though the United States may not follow Europe’s lead, the Copyright Directive is at least proving to be an important source of discussion in those deliberations.\textsuperscript{362}

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CONCLUSION

For decades, copyright harmonization has been the norm between Europe and the United States, two of the most influential jurisdictions on intellectual property (and other) matters. Yet their copyright marriage appears to be coming to an end, as copyright’s once predictable international political economy has splintered with new technological entrants. This Article has examined Europe’s new Copyright Directive as an illustration of these new divergent forces at work.

What is to come? Go-it-alone approaches to copyright law and policy may be picking up steam and may even present some possible advantages. But copyright’s new political economy suggests that continued harmonization may be the best way to avoid significant pockets of national copyright irrationality.

Or, the chosen way forward may be covert harmonization efforts disguised as go-it-alone copyright law and policymaking. Indeed, the Copyright Directive may ultimately help harmonize the world’s laws around particular approaches to digital copyright issues. But that all likely depends on how the new political economy of copyright develops over time, both in the United States and elsewhere. Importantly, this Article has mapped out the main players in that new calculus, including how different combinations of those players are likely to affect worldwide copyright law and policy making efforts going forward.