

## Access and control. The political economy of online copyright enforcement in the European Union

Meyer, Trisha

*Published in:*  
9th Annual GigaNet Symposium

*Publication date:*  
2014

*Document Version:*  
Final published version

[Link to publication](#)

*Citation for published version (APA):*  
Meyer, T. (2014). Access and control. The political economy of online copyright enforcement in the European Union. In *9th Annual GigaNet Symposium* (pp. 1-17)

### General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

**“Access and Control. The Political Economy of  
Online Copyright Enforcement in the European Union”**

*Trisha Meyer*

*Institute for European Studies, iMinds-SMIT*

*Vrije Universiteit Brussel*

---

Abstract

---

This paper presents the main results of this author’s doctoral research on recent policy initiatives dealing with the online enforcement of copyright in the European Union. Strong online copyright enforcement is subject to intense policy debates in the European Union. Of the five policy initiatives analyzed, two pass into law (2009 French and 2010 UK graduated response laws), two result in stalemates (2008 Creative Content Online and 2010 E-Commerce Directive consultations) and one is rejected (2011 Anti-Counterfeiting Trade Agreement). At the level of the European Union, online copyright enforcement policies hardly change. At the level of certain member states however, strong enforcement policies are adopted. This paper claims that the outcome of the policy initiatives is determined by an intricate interplay of ideas, discourses, interests and institutions. Policy stakeholders compete to see their ideas and interests adopted into policy. This study argues that their views on creativity and knowledge and stances on the role of copyright and the Internet in society determine their ideas and interests on online copyright enforcement. Analysis of the cases also reveals that the meager outcome of the online copyright enforcement initiatives at the level of the European Union is due to the lack of common interests between the media and Internet & technology industries. Currently, the Internet & technology industries have little incentive to proactively enforce copyright online. At the same time, the cases indicate that civil society actors succeed in giving pushback on online copyright enforcement policies. In the Anti-Counterfeiting Trade Agreement, they even reverse European Union plans. Finally, stakeholders cunningly choose institutional rules and settings that favor their views. In the online copyright enforcement debate, copyright is often portrayed as opposed to intermediary liability rules and fundamental rights. This picture is painted too starkly black and white, but it is true that the role of Internet intermediaries in intervening in their networks is at the crux of the debate today. This study raises concern about the use of monitoring, blocking and filtering technology to regulate the availability of creative content.

---

## Introduction

---

Copyright is difficult to enforce on the Internet. While copyright seeks to protect creative content, the Internet encourages widespread distribution. *This paper provides insight into the results of this author's doctoral research on recent policy initiatives dealing with the online enforcement of copyright in the European Union (EU).* I ask how and why these policies have developed. Of the five policy initiatives analyzed, two pass into law (2009 French and 2010 UK graduated response laws), two result in stalemates (2008 EU Creative Content Online and 2010 E-Commerce Directive consultations) and one is rejected (2011 Anti-Counterfeiting Trade Agreement). Strong online copyright enforcement is heavily contested in the European Union.

Building on the theory of political economy of communications, this paper views online copyright enforcement as a renewed manifestation of the struggle between domination and resistance in a capitalist market system. Online copyright enforcement is about upholding the rights and interests of copyright holders to commercialize creative content on the Internet. Underlying the online copyright enforcement debate are differing opinions on how to create, innovate and disseminate knowledge for the best of society. As a result, property and community based opinions are often juxtaposed. At the same time, there is a need to analyze online copyright enforcement within the wider discussion on Internet governance. Online copyright enforcement policy initiatives consistently encourage closer involvement of Internet intermediaries through the monitoring, blocking and filtering of creative content online. Technology reflects the values and choices of its designers, regulators and users. The Internet built with open, unfettered communication in mind, provides exciting opportunities for creativity, collaboration and freedom of expression. However neither technology nor policy are neutral. Therefore careful consideration is needed on how and why we regulate access and control on the Internet.

The doctoral research presented in this paper operationalizes the theory of political economy of communications into an framework that includes ideas, discourses, interests and institutions as the main components of its analysis. Indeed the paper claims that the outcome of EU online copyright enforcement policy initiatives is determined by an intricate interplay of ideas, discourses, interests and institutions. In this paper, I present the main research approach, questions and results of the doctoral thesis. The research results section is structured to formulate a brief response to each of the study's questions.

---

## Research Approach and Questions

---

As mentioned, this paper draws on the *theory of political economy of communications (PEC)*. The central question in the political economy of communications regarding the Internet is, in essence, how to make money from content online. The theory perceives online copyright enforcement as a

struggle between market actors to gain the upper hand. The media industries seek to stay afloat by enforcing exclusive rights to reproduce, distribute and make their creative content available online. However in the digital and online environment, copyright as a means of creating scarcity is undermined. The Internet and technology industries have an interest to protect their own intellectual property rights, but equally gain from widespread distribution of content online. They are hesitant to enforce the rights of the media industries. For both industries, the value of content is primarily economic rather than social. The political economy of communications argues that content on the Internet is increasingly commodified — it is perceived a product to buy and sell. This study contends that while market interests are important, there is more at play in the online copyright enforcement debate. The theory of *political economy of communications grapples with the “open character” of the Internet*. In its original design the Internet encourages decentralization, flexibility, interoperability and cooperation (Castells, 2001; Lessig, 2006; Zittrain, 2008). The Internet was built with open, unfettered communication in mind, and has renewed hopes for alternative ways of creating knowledge and culture based on community sharing rather than market exchange. I argue that *the online copyright enforcement debate is about resistance to the copyright model of the media industries not only in terms of stakeholders’ interests, but also their rationales for copyright and the Internet*. Along these same lines, I find in PEC that there is a lack of attention for the possibilities that the Internet’s design permits for strong online copyright enforcement. Rights holders call to fight fire with fire — to use technology to regulate the availability of content it encourages. This perspective on technology is fairly narrow and focuses on threats. There is no regard for the Internet’s added value to democracy through the facilitation of free speech, deliberation between citizens, and community building. I believe that *investigating the online copyright enforcement debate is important because it contributes to the framing and definition of the Internet’s functions and values*.

In order to operationalize and evaluate these theoretical insights, I developed a framework in the doctoral thesis based on the analysis of ideas, interests, institutions and discourses present in policy. The framework provides a holistic explanation of selected online copyright enforcement policies in the European Union. It is important to note that the outcome is not clear. Online copyright enforcement is a contested area and there is a need for a thick description to understand how stakeholders interact under which circumstances and how policy developments play themselves out. The main research question of the doctoral study is *how and why selected policies in the European Union dealing with the online enforcement of copyright have developed*. Through my analysis I reveal explanatory factors for the events taking place, but I do not wish to infer causality. I contribute to the theory of political economy of communications by researching how and why ideas, interests, institutions and discourses play a role in online copyright enforcement policies. Answers to the five sub-research questions of this study, set out in the box below, provide rich and valuable insight into the divergence in policy opinions and results. The emphasis is on the perceptions of actors, on recovering “the individual and shared meanings that motivated actors to do what they did” (Wendt, 1998, p. 102). I can only give a partial answer to the last two sub-research questions

based on the empirical evidence of my research. The questions are included because they refer to the study's theory on why it is important to investigate online copyright enforcement in the first place. The problems, solutions and goals presented and adopted, the views on knowledge creation and technological governance advocated, the stakeholder coalitions formed and the institutional rules and settings chosen in policy all shape the future governance of the Internet. My purpose is to elucidate the contention in the debate, thereby hoping to clarify opportunities and pitfalls and contribute to a way forward.

#### *Research questions*

How and why have selected policies in the European Union dealing with the online enforcement of copyright developed?

- Which actors are involved with which ideas and interests?
- Which discourses are used in these policies to argue different ideas and interests?
- Which institutional rules and settings are chosen to develop these policies?
- Do these policies affect the control of creative content on the Internet?
- Do these policies form a possible threat to the “open character” of the Internet?

I selected five policy initiatives for analysis in this study. The case studies focus on online copyright enforcement policy proposals in the European Union after the implementation of the 2004 Intellectual Property Rights (IPR) Enforcement Directive (European Parliament & Council, 2004). The IPR Enforcement Directive is the last piece of EU legislation passed dealing with copyright enforcement. It is a starting point that all case studies have in common. Further the selected case studies cover international, EU and member state policy proposals. They deal with enhanced cooperation, increased involvement of Internet intermediaries and monitoring of Internet users.

- *2008 European Commission public consultation on Creative Content Online* (European Commission, 2008): policy actors provide a wide range of views on stakeholder cooperation, graduated response in France, and filtering measures. The policy proposal was non-legislative and had a limited outcome.
- *2010-2012 European Parliament debates on the Anti-Counterfeiting Trade Agreement (ACTA, 2011 Accession Ongoing)*: this Treaty deals with international cooperation on IPR enforcement. In 2012 the European Parliament refused to give its consent to ACTA, in effect prohibiting its ratification by the European Union.
- *2010 European Commission public consultation on the E-Commerce Directive* (European Commission, 2010): the E-Commerce Directive stipulates the conditions for limiting the liability of intermediary service providers when illegal activity or content is present on their networks (European Parliament & Council, 2000). Stakeholders express opinions on the interpretation of the liability provisions, notice and takedown procedures, filtering measures, and investment in law enforcement. This policy proposal also had a limited outcome.

- *2009 and 2010 proposals to adopt graduated response in France and the United Kingdom* (French Parliament, 2009a, 2009b; UK Parliament, 2010). In graduated response, the monitoring of Internet users is considered an educational measure to change peer-to-peer (P2P) file-sharing behavior. France and the United Kingdom were the first EU member states to pass legislation supplementing the IPR Enforcement Directive. In both countries the adoption of graduated response has been controversial.

---

## Research Results

---

### **Actors, Ideas and Interests**

Copyright grants rights holders exclusive rights to reproduce, distribute and make creative content available. This means of cultural production and distribution by creating (artificial) scarcity provides a reward for labor and an incentive to invest in uncertain circumstances. At the same time copyright has always been contested. It has needed to evolve with the advent of each new technology. In the online environment, tensions between the economic and social values of creative content are particularly exposed. Information continues to be capitalized and commoditized, yet the design of the Internet encourages a “social ecology of information” — the production and distribution of creative content that draws on the work of many, is not driven by market incentives, and seeks to provide benefits for society (Winseck, 2011). *The struggle between proprietarian and communitarian cultural production and distribution is central to current policy debates on online copyright enforcement. It is about the domination of and resistance to copyright as a traditional means of cultural production and distribution.* Stakeholders compete for the adoption of their ideas and interests in public policy. Broadly rights holders advocate the high protection of intellectual property rights and the rule of law on the Internet, while Internet activists and industry call for the high protection of fundamental rights and the reform of intellectual property rights. It is important to state that not all stakeholders within the media industries share common problem definitions, policy solutions and goals. Some even support alternative ways of cultural production and distribution based on sharing. They tend to behave differently depending on their position in the economy and media value chain. Moreover Internet and technology companies are economic actors. They too operate on a capitalist modus operandi to increase profitability. Finally, economic interests alone do not determine public policy. Civil society successfully mobilizes Internet users with few resources. They vote with their feet — and their tweet.

In terms of actors, the empirical evidence brought to light in this doctoral research shows that rights holders in general, and content producers, content distributors, private broadcasters, author & performer organizations, collective rights management societies and film funds in particular, share common ideas and interests in favor of strong online copyright enforcement. Exceptions are some publishers, game developers, author & performer organizations and collective rights management

societies who express negative, nuanced or alternative views. Publishers for instance indicate that they fear the repercussions of blocking and filtering measures on their right to freedom of the press. Further, civil society, fixed/mobile telecoms and cable operators, Internet service providers, online service providers, consumers electronics companies and other stakeholders such as select political organizations, legal professionals, public intellectuals, hospitality associations, museums, libraries and universities share common ideas and interests against strong online copyright enforcement. Internet activists and industry form a de facto coalition to limit the involvement of Internet intermediaries in the fight against online piracy. Exceptions identified in the case studies are software providers who have their feet firmly grounded in both the technology and media worlds and are split in their views. Moreover French fixed/mobile telecoms and cable operators and Internet service providers, who had previously consented to combatting online piracy, express views that are favorable to graduated response. Lastly, the case studies demonstrate divided opinions among EU, French and UK public authorities. *There is no agreement among policy makers on how to define problems, policy solutions and goals related to online copyright infringement.* At the EU level, this was painfully clear in ACTA. Except in their explicit defense of the Anti-Counterfeiting Trade Agreement, the European Commission and Council tend to seek the middle ground between polarized views on online copyright enforcement. Within the European Parliament, the ALDE, Green/EFA, GUE/NGL and S&D political groups oppose the international treaty. The European Data Protection Supervisor and the European Economic and Social Committee emphasize the value of the Internet for society. At the member state level, the French and UK government support graduated response and their Parliaments adopt the enforcement measures. However this does not denote consensus. In France, the Constitutional Council, the Data Protection Authority (CNIL), the Regulatory Authority for Electronic Communications and Post (ARCEP) and some Parliamentarians are critical in their opinions. In the United Kingdom, the regulator and competition authority for the communications industries Ofcom, the Parliament Committee on Human Rights and some Parliamentarians express reserve. In the case studies, nuanced views often pertain to the proposed means and strength (rather than the principle) of online copyright enforcement. The policy outcome of the lack of agreement on online copyright enforcement is not a status quo, but a stalemate at the EU level and strong enforcement in the selected member states.

In terms of ideas and interests, the case studies and interviews expose how polarized views on online copyright enforcement are in the European Union. Across coalitions, stakeholders agree on three mere points. First, they commonly argue that a multi-pronged approach is necessary to deal with copyright in the online environment. Stakeholders disagree however on the prioritization and details of these policy solutions. In line with the Creative Content Online public consultation, recommendations include the development of legal offers, educational initiatives, streamlined enforcement of legal rights and increased Internet intermediary cooperation. Second, policy stakeholders stress that filtering measures are not a panacea. Filtering is still considered a bridge too far in the current policy environment. This statement is encouraging from the viewpoint of technological governance, but also somewhat inconsistent with media stakeholders' call for closer

intermediary involvement. Third, stakeholders agree that public policy should lead to innovation, creativity and economic growth, that the liability provisions in the E-Commerce Directive should be clarified, and that a rich and diverse culture should be maintained in France. Of course how to achieve these objectives is a different matter.

Proponents of strong online copyright enforcement advocate that massive online piracy is the main policy problem at hand. They call for urgent intervention, deeming future investments in creative content in danger. These stakeholders consider that the appropriate and necessary policy solution is to increase the responsibility of Internet intermediaries to tackle online piracy. They stress that intermediaries play a role in the digital media value chain and have a duty of care to limit infringements on their networks. In France and the UK, graduated response is deemed pedagogical and preventative, balancing the rights and interests of copyright holders and Internet users. Proponents of strong online copyright enforcement aim for the respect and defense of intellectual property rights and the establishment of rule of law on the Internet.

Opponents underline the problems of proposed policy solutions. Privatized online enforcement endangers limited intermediary liability and fundamental rights, stifling innovation and creativity. Further these stakeholders object to filtering measures on technical, economic, legal and societal grounds. ACTA and graduated response are considered disproportionate and lacking in democratic and judicial safeguards. Opponents of strong online copyright enforcement aim for the defense of fundamental rights and the reform of intellectual property rights. The open design of the Internet is deemed important for providing access to knowledge and culture and encouraging accountable and proportionate rule of law.

## **Discourses**

It is relevant to look beyond ideas and interests to discourses as well, because language frames and sets the tone for the whole policy process. Indeed it determines the scope of available problem definitions, policy solutions and goals. Discourses are central to the creation and representation of meaning — the role of copyright, technology and the Internet are being (re)defined in online copyright enforcement policies.

*The policy debates in the selected case studies center around existing legal rules and are economically framed.* First, copyright is juxtaposed to limited liability and fundamental rights. Proponents of strong online copyright enforcement describe Internet service providers as gatekeepers in the online world. They point to the increasing harm of IPR infringements and advocate a shared responsibility for Internet intermediaries. However opponents of strong online copyright enforcement deem that Internet service providers are being pushed to become private judges in the favor of particular industrial actors. They argue that the proposed online copyright enforcement measures threaten the freedom of the Internet and citizens. Unfortunately my analysis confirms Jessica Reyman's (2009, p. 24) statement that stakeholders do not make "a clear



distinction between a free pass to consume entertainment products and the freedom to access, build on, and contribute to an information commons.” Second, discourses on online copyright enforcement stress the economics of creative content online. Public authorities in particular emphasize the importance of the digital economy and the need to restore balance between rights and interests for innovation, creativity and economic growth. I believe this limits the scope for discussions on social requirements of copyright. It is worth highlighting that the French discourse is distinct in this regard. French stakeholders advocate the cultural exception — the protection of culture from unbridled capitalism.

The empirical evidence of this doctoral research shows that *views on knowledge and cultural creation are not used to win arguments in policy debates on online copyright enforcement in the EU*. Interestingly *stakeholders’ emblematic issues and story lines rather relate to the intervening role of Internet intermediaries and thus to the functioning of the Internet*. This can in part be explained by one of the selection criteria for the case studies, namely the fact that policy initiatives had to include technical means of enforcement to be considered for the study. Nonetheless it would seem that Internet activists and industry find it easier to agree on common positions related to Internet governance than to knowledge creation. Stakeholders’ views on knowledge creation remain important, because, although not present in discourse, they underlie stakeholders’ views on online copyright enforcement.

Further in order to understand who gains productive power in online copyright enforcement, this study has analyzed the reproduction of discourses. In the previous section I described the discourse coalitions identified across the selected case studies: rights holders vs. Internet activists and industry. Actors gather around language to advocate common ideas and interests. It is important to specify that discourse coalitions are loose in nature. Stakeholders within a particular coalition are not necessarily in full agreement. For instance I noted nuances within the media industries, and between the Internet and technology industries and civil society. In the doctoral thesis I also researched the structuration and institutionalization of discourse. These pertain to the reproduction of discourse by government or Parliament officials and departments, and to the embedding of discourse into legal and supporting policy documents respectively. The empirical results indicate little change. With the exception of ACTA, there is no shift in discourse among policymakers or in policy. The European Parliament’s rejection of the Anti-Counterfeiting Trade Agreement is this study’s anomaly. MEPs adopt anti-ACTA discourses, shifting the language and the outcome of the policy. In the other case studies only fairly minor changes to proposed ideas could be identified. The European Commission and Council tread carefully, aiming for a multi-pronged approach to deal with online copyright infringement. Throughout all EU case studies the Commission consistently emphasizes wide availability of creative content as a policy goal. The public consultations on Creative Content Online and the E-Commerce Directive did not result in change. Further there is opposition to graduated response in the French and UK parliaments, but in the end both endorse the policy measure. The proposed and adopted policy discourses and goals remain the same. Stakeholders are however successful in providing policy nuance. For instance in France, the final

laws include a judicial procedure and commitments to legal offers, research and awareness raising. Moreover references to filtering and blocking are largely removed. Thus in terms of reproduction of discourses, there is no clear discursive winner in EU online copyright enforcement policies. Proponents of strong online copyright enforcement see their views adopted in graduated response; opponents win on ACTA; neither gain traction in the public consultations on Creative Content Online and the Future of the E-Commerce Directive. This investigation into online copyright enforcement discourse also teaches us that there is room for resistance and change — incremental, or as we experienced in ACTA, even radical. At the same time we need to recognize that this lack of a discursive dominance has not meant a status quo in policy. Despite the divergence of views manifest in stakeholder responses to the Creative Content Online consultation, the European Commission and Council seek strong online copyright enforcement action in the Anti-Counterfeiting Trade Agreement. Although ACTA may not have fundamentally altered the EU ‘*acquis communautaire*’, it would have served as a symbolic case for strong online copyright enforcement. Most importantly graduated response is adopted in France and the United Kingdom. *A stalemate occurs at the EU level, but strong online copyright enforcement measures are passed at the national level. The policy field in the European Union is fragmented and in flux.*

## **Institutions**

In terms of institutions, the political economy of communications analyzes “how structures are produced and reproduced by human agents who act through the medium of these structures” (Mosco, 2009, p. 220). I interpret institutions as the policy legacy and the political and legal reality in which online copyright enforcement policies develop.

Policy stakeholders endeavor to influence the institutional rules and settings surrounding the use of creative content on the Internet. They present their views at an international, European Union and member state level. All three levels are included in the selected case studies. Proponents of strong online copyright enforcement push for policies on enhanced cooperation, increased involvement of Internet intermediaries and the monitoring of Internet users. So ACTA is international and aimed at IPR enforcement cooperation. The E-Commerce Directive is European and relates to intermediary liability. The graduated response initiatives are national and target Internet user behavior. At the same time we notice that the media industries are looking beyond public intervention, seeking private arrangements on online copyright enforcement. The negotiations in the UK to implement a voluntary graduated response scheme is one such example.

New policy initiatives need to operate within the framework of existing institutional rules and settings. Along with discourse, this limits the scope of possible regulatory action. At the same time stakeholders have the ability to select rules and settings in advocating their ideas and interests on online copyright enforcement. Indeed in the previous sections, I have noted that much argumentation in the online copyright enforcement debate is based on copyright, limited liability

and fundamental rights law. Further, ACTA was negotiated as a multilateral trade agreement outside the established structures of the WTO and WIPO. Opponents criticize this choice. Equally however, the entry into force of the Lisbon Treaty meant that new consent rules applied in trade negotiations. This enabled the Parliament, a democratically elected public authority, to effectively veto the ratification of ACTA in the European Union. Moreover, ACTA caused a massive public outcry. Interview respondents describe this civil society action as the coming of age of a new lobbying power. In ACTA and the Digital Economy Act, concerns over democratic accountability and transparency take central stage. Further institutional rules play an important role in the UK case study as well. Here new rules on managing public money have caused further delay in the implementation of the Digital Economy Act. In France and the UK, the graduated response laws were subject to sped-up policymaking processes. Lastly, stakeholders play creatively with the timing of action. For instance, past French policies on broadband and copyright paved the way for the adoption of HADOPI. Indeed HADOPI was the French government's reaction to years of lenient broadband policies and the final result of past failures to adopt graduated response. Moreover the evaluation of HADOPI after the election of French President Hollande is not surprising either. In ACTA's aftermath, the Copyright in the Information Society and the IPR Enforcement Directives will not be revised before the European elections in May 2014. Copyright enforcement and reform are deemed politically too sensitive. These various examples illustrate that public policy is never neutral. *Within the structure of existing institutional rules and settings on online copyright enforcement, stakeholders advocate their recommendations for new institutional rules and settings, hoping to gain compulsory and institutional power in the process.*

## **Control of Creative Content**

As previously noted, my empirical investigation cannot fully answer the last two sub-research questions of this thesis. The case study analysis does not look at changes in the control of creative content or the architecture of the Internet directly. Rather it deals with stakeholder views on these matters. The questions are included because they provide clues as to why online copyright enforcement policies develop. The answers to these questions are mainly theoretical.

From the perspective of the political economy of communications, online copyright enforcement policies are about protecting existing business models. The media industries seek to commercialize creative content on the Internet. For this purpose they protect their content with copyright through the imposition of scarcity. Notice and takedown procedures, filtering and blocking injunctions are technical means of controlling creative content. Online copyright enforcement policies are about the defense and protection of copyright as a means of generating revenue on the Internet. They quite narrowly portray copyright as an opportunity and the Internet as a threat for profit making in the media industries. Studying the development of online copyright enforcement policies is important because ways of thinking about cultural production and distribution on the Internet are solidified through the policymaking process. The empirical results of this doctoral thesis show that the

adoption of new policies has proven difficult in the European Union. This is due to renewed critique of the principles and practices of copyright spurred on by opportunities provided by the digital and online environment.

TyAnna Herrington (2001) explains that there are three views on knowledge creation: objective, subjective and transactional. Contenders of objective knowledge creation are positivist, preferring evidence obtained in a scientific manner. Supporters of subjective knowledge creation are expressivist and Romantic, viewing truth as being produced by “the lone author”. Advocates of transactional knowledge creation stress the interaction between subject, object and community. In online copyright enforcement policies, proprietary and communitarian views of authorship and control of creative content are juxtaposed. In simple terms it comes down to the rationales that stakeholders give for the existence and use of copyright and the Internet. The bases for copyright are natural law, economic incentive and social requirements. The reasons for the Internet are pursuit of science, technological sharing, social interaction & symbolic belonging and entrepreneurship.

In the selected case studies, economic and social rationales for copyright and the Internet are dominant. The empirical results reveal that *when proposed and adopted, online copyright enforcement policies emphasize copyright as an economic incentive and the Internet as a vehicle for entrepreneurship. However it is also clear that resistance is strong. Civil society and other stakeholders continually question these views, stressing copyright and the Internet’s role in society.* Indeed on the one hand copyright is described as the intellectual currency for the EU economy, as an incentive to create and a reward for labor. On the other hand the need to provide access to and sharing of knowledge and culture is underlined. Interestingly in ACTA, stakeholders link open access to knowledge to open and democratic societies. Some few policy actors highlight copyright as a fundamental right. In France, the intrinsic and exceptional value of art and culture is at the forefront of the policymaking debate. In general however, I have been surprised how little stakeholders use the rationale of copyright as a natural and moral right to property in the case studies. Further on the one hand, the Internet is seen as stimulating innovation, employment and economic growth. On the other hand, the Internet’s potential as a venue for political and cultural discourse and as a provider for access to knowledge is valued. In Creative Content Online, some also defend the open and flexible architecture of the Internet, arguing for its role in the pursuit of science. Lastly in France and the UK, stakeholders describe the Internet as revolutionary and unstoppable, denoting a certain fear of technology. These stakeholders argue for applying the same rules online as offline. Thus although not present in discourse, online copyright enforcement policymaking has become an arena for battling out views on the role of copyright and the Internet in society. When adopted, online copyright enforcement policies endorse control of creative content on the Internet.

## “Open Character” of the Internet

Finally, the design of the Internet encourages openness. Indeed in the early stages of the Internet’s development, interoperability, cooperation, flexibility and decentralization were deemed important to build a distributed, responsive and resilient network (Castells, 2001; Lessig, 2006; Zittrain, 2008). Throughout the doctoral thesis, I contend that the openness of the Internet is worth preserving. It challenges control of creative content, but also brings about exciting opportunities for science and society. Moreover I argue that technology is not neutral. Laura DeNardis (2010, p. 1) states that, the architecture of the Internet “is not external to politics and culture but, rather, deeply embeds the values and policy decisions that ultimately structure how we access information, how innovation will proceed, and how we exercise individual freedom online.” For this reason we need to be cautious how we regulate through technology. Regulating through technology to monitor and shape Internet behavior for copyright purposes has wide repercussions. Importantly *in online copyright enforcement policies there are many calls for tighter control by Internet intermediaries* — this can change the open character of the Internet. Regulation through technology means regulation of technology. In my thesis I have sought to show how Internet technology is governed in the field of online copyright enforcement.

The push in online copyright enforcement is to involve technological actors more closely in regulating a problem enabled by the technology. To my surprise, surveillance is not questioned in the examined cases, despite the structural power it grants to those monitoring. Further notice and takedown procedures and suspension of Internet access are permitted as long as procedural safeguards are in place. Filtering measures are regarded with more skepticism. Lastly, proponents of strong online copyright enforcement advocate further use of blocking injunctions and cooperation of new online intermediaries. Deploying the architecture of the Internet for the enforcement of copyright entails a privatization of governance. I am not opposed to regulation through technology, but deem them measures of very last resort. It is crucial that stakeholders involved in discussions on online copyright enforcement are attentive to the broader picture, both regarding *the causes of change in the creative industries and the effects that existing and proposed policies have on fundamental rights and Internet governance*. First, copyright infringement is not the only factor affecting the creative industries. There are multiple problems and multiple solutions. In my view the enforcement and reform of copyright go hand in hand. Second, I believe initiatives should always include strong fundamental rights safeguards. Although I am not in favor of graduated response on grounds of its blasé approach to the surveillance of Internet users, the built-in procedural safeguards, especially in the French case, significantly tone down the policy measure. Third, being attentive to the broader picture implies a critical reflection on the interlinkages with other forms of Internet governance, such as cyber-security, child protection and net neutrality — because as stated above, Internet governance reflects our ideas and interests on access to information, innovation and individual freedom online.

A final way in which I have sought to better understand the interaction between online copyright enforcement and technological governance is by mapping stakeholder views onto proposed models of Internet governance. Lawrence Solum (2009) identifies five governance models advocated for the Internet: (i) cyberspace and spontaneous ordering, (ii) transnational institutions and international organizations, (iii) code and Internet architecture, (iv) national governments and law, and (v) market and economics. There is divergence between the models in terms of the level of governance, the stakeholders involved, and the means of governing the Internet. Considering our discussion so far, it is not surprising that proponents of strong online copyright enforcement support the national governments and law governance model. These stakeholders do not make a distinction between online and offline activities. They consider that principles underlying the legislation should be transposed onto the Internet and the nation state is the main regulatory actor (Paré, 2003; Solum, 2009). On the contrary, opponents of strong online copyright enforcement defend the code and Internet architecture governance model. They point to the technical, economic, legal and societal difficulties of regulating through technology. Lastly, some few stakeholders argue that online copyright enforcement and Internet governance are matters for transnational institutions and international organizations. *There is no agreement among policy actors on the appropriate model to govern the Internet. My case studies confirm that there is continuous pressure, but equally resistance, to shift away from the Internet's original cooperative, interoperable, flexible and decentralized design.* Much remains at stake in the upcoming years. From a political economy of communications perspective, it is crucial to lay bare the underlying reasons for governing the Internet — in order to counter abuses of power when we see them.

---

## Conclusion

---

### **Online Copyright Enforcement Policies in the European Union**

As the answers to this study's five sub-research questions reveal, it is a combination of ideas, interests, institutions and discourses that determine how and why online copyright enforcement policies have developed in the European Union. My aim has not been to determine causality or even which factor matters most. In fact a framework comprising of ideas, interests, institutions and discourses would have been too broad for that. Rather I have provided a thick description to prove that *ideas, interests and institutions do not work in exclusion. They are deeply intertwined.* Nuance is necessary in understanding and developing online copyright enforcement policies. For instance, while the public consultation on Creative Content Online is a good example of the polarization in terms of the problem definitions, policy solutions and goals on online copyright infringement (ideas and interests), the very nature of the non-legislative initiative encourages this wide range of contributions (institutions). Further, at first glance the Anti-Counterfeiting Trade Agreement seems a battle of institutional rules and settings (institutions). Equally however, the European Commission confesses that they communicated and framed the Treaty quite poorly in the European

policymaking debate (discourses). Nonetheless I do not want to leave the reader with an incoherent, fragmented view of the online copyright enforcement tapestry. Taking a few more steps back, what are *this study's essential insights* from the perspectives of ideas, interests, institutions, discourses and political economy of communications?

In terms of ideas, interests, institutions and discourses — first, it is clear that ideas and discourses play a central role in this contentious policy area. There is no agreement on the problem definitions and policy solutions for copyright in the online environment. Stakeholders compete to see their views and framing adopted in policy. Their *approach to knowledge creation and stance on the role of copyright and the Internet in society* determine their view on the level and type of regulatory action required on online copyright enforcement. At the same time stakeholders have to adjust their discourses to *proposed and adopted online copyright enforcement laws which tend to be economic rather than social in outlook*.

Second, the empirical evidence shows that the media industries and the Internet & technology industries have little in common on online copyright enforcement. *Large economic interests are opposed*, engraining the stalemate at the EU level. The question is what happens when interests align and private arrangements are found. Who will tread the middle ground? The media industries succeed at the member state level. Graduated response is adopted, albeit in a watered down version. Equally however, ACTA teaches us that civil society can be surprisingly successful in mobilizing citizens to demand a U-turn on planned policy. In this instance combined online and offline campaigning proved effective. Moreover the European Commission endeavors to remove barriers in the EU digital single market. *The positions of the Internet and technology industries and policy makers seem pivotal*.

Lastly, the policy legacy and the political and legal reality of an online copyright enforcement initiative limit the scope of possible regulatory action. The case studies indicate that *stakeholders select institutional rules and settings that support their views best*. Proponents of strong online copyright enforcement advocate use of technology to regulate, because it grants direct and compulsory power. Precisely because of the Internet's embeddedness in our lives, opponents have been wary of its regulatory use. In online copyright enforcement — and in other areas of Internet governance (think of Edward Snowden's cyber-security leaks) — *there is a desire to monitor and shape Internet user behavior through private actors*.

In terms of the political economy of communications — there are also three points to highlight. First, online copyright infringement is only one reason for loss in the media industries, and the scarcity imposed by the media industries on creative content is contested on the Internet. The analyzed policy initiatives need to be seen in *the context of wider change for the media industries in the online environment*. David Hesmondhalgh (2007) indicates that there are difficulties inherent to the media industries: they are risky businesses, continually struggle to balance creative and commercial functions, experience high production costs yet low reproduction costs, and produce semi-public goods. Ways in which the media industries seek to counter these threats are by building

a repertoire, forming tight alliances within and between industries, imposing artificial scarcity on products, developing easy-to-replicate formats of stars, genres and serials, and loosely controlling creators while tightly controlling distribution and marketing. The resistance to the media industries' model of content production and distribution is not unique to the online environment. Balancing between commerce and creativity is an art. *The Internet provides a new outlet for stakeholders seeking alternatives. In the online environment there is renewed hope for a society that emphasizes autonomy and equality in and through culture* (Sunder, 2006; Tian, 2009). Indeed copyright and the Internet give rise to different views on knowledge creation and culture. While copyright aims to protect, the Internet promotes access to content. The political economy of communications encourages policymakers not only to seek the best way forward for innovation and economic growth, but also to take into account the opportunities that the Internet's open character provides for creativity, collaboration and freedom of expression. The Internet has been shown to act as an agent for economic, social and cultural change.

However and this is the second point, the Internet can also be a recipient of change. Lawrence Lessig (2003, 2004, 2006) contends that capitalist values increasingly dominate the online environment, encroaching on the rationales of other Internet user groups and bearing negative consequences for innovation and democracy. *Online copyright enforcement policies are about commercializing creative content on the Internet.* Proponents of strong online copyright enforcement stress copyright and the Internet's economic rationales. These stakeholders also advocate greater control of creative content through technological governance. From a political economy of communications perspective, this should not be considered a trifle. On the one hand, digital surveillance and technology codify the views and values of those regulating. Digital surveillance and technology don't just help us in our daily activities, they also actively construct them. On the other hand, online copyright enforcement policies contribute to the young and moldable governance of the Internet. Jim Rogers (2013, p. 198) states that, "*the law is as significant in shaping the outcome of a new media as is the technology itself.*" Technology is neither neutral nor fixed. In this regard, it is remarkable that in every stakeholder debate on closer intermediary involvement analyzed in this study, filtering measures, although proposed, were considered a bridge too far — disproportionate in the fight against online copyright infringement.

Lastly, this doctoral study observes a polarization of stakeholder opinions and a fragmentation of policy initiatives on online copyright enforcement. In the vacuum of agreement at the EU level, certain member states have taken their own policy action. PEC scholar Robin Mansell (2012) argues that we need a new social imaginary of the Internet. There will always be a dialectic of co-optation and resistance to the media industries' model of cultural production and distribution. At the same time, it is important to realize that multiple structures and knowledges are possible. The Internet and copyright, abundance and scarcity can co-exist. Interview respondent David Touve (Assistant Professor at the University of Virginia, 2013) deems that, "*we can move beyond polarization only after we believe that the interesting story to be told (or heard or read) is the one that involves the nuances that lead to collaboration and compromise. Many people make money by*



*way of polarization, however.*” This study supports these views and is an endeavor to provide a detailed, non-polarized analysis on the online copyright enforcement debate in the European Union.

---

## References

---

- Australia, Canada, the European Union and its member states, Japan, the Kingdom of Morocco, New Zealand, et al. (2011 Accession Ongoing). *Anti-Counterfeiting Trade Agreement*.
- Castells, M. (2001). *The Internet Galaxy: Reflections on the Internet, Business, and Society*. Oxford and New York: Oxford University Press.
- DeNardis, L. (2010). *The Emerging Field of Internet Governance*. New Haven: Yale Law School.
- European Commission. (2008). *COM(2007) 836 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market*. Brussels: European Commission.
- European Commission. (2010). *Public Consultation on the Future of Electronic Commerce in the Internal Market and the Implementation of the Directive on Electronic Commerce (2000/31/EC)*. Brussels: European Commission.
- European Parliament & Council. (2000). *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market*.
- European Parliament & Council. (2004). *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights*.
- French Parliament. (2009a). *Loi n° 2009-669 du 12 Juin 2009 favorisant la Diffusion et la Protection de la Création sur Internet*.
- French Parliament. (2009b). *Loi n° 2009-1311 du 28 Octobre 2009 relative à la Protection Pénale de la Propriété Littéraire et Artistique sur Internet*.
- Herrington, T. (2001). *Controlling Voices: Intellectual Property, Humanistic Studies, and the Internet*. Carbondale and Edwardsville: Southern Illinois University Press.
- Hesmondhalgh, D. (2007). *Cultural Industries. 2nd Edition*. London: Sage.
- Lessig, L. (2003). *The Future of Ideas. The Fate of the Commons in a Connected World. Reprint Edition*. New York: Random House.
- Lessig, L. (2004). *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press.
- Lessig, L. (2006). *Code: And Other Laws of Cyberspace, Version 2.0*. New York: Basic Books.

- Mansell, R. (2012). *Imagining the Internet: Communication, Innovation and Governance*. Oxford: Oxford University Press.
- Mosco, V. (2009). *The Political Economy of Communication* (2nd ed.). London & Thousand Oaks: Sage.
- Paré, D. (2003). *Internet Governance in Transition. Who Is the Master of This Domain?* Lanham: Rowman & Littlefield Publishers.
- Reyman, J. (2009). *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture*. New York: Routledge.
- Rogers, J. (2013). *The Death and Life of the Music Industry in the Digital Age*. London: Bloomsbury.
- Solum, L. (2009). Models of Internet Governance. In L. Bygrave & J. Bing (Eds.), *Internet Governance. Infrastructure and Institutions* (pp. 48-91). Oxford: Oxford University Press.
- Sunder, M. (2006). IP<sup>3</sup>. *Stanford Law Review*, 59(2), 257-332.
- Tian, Y. (2009). *Re-thinking Intellectual Property: The Political Economy of Copyright Protection in the Digital Era*. New York: Routledge.
- UK Parliament. (2010). *Digital Economy Act 2010*.
- Wendt, A. (1998). On Constitution and Causation in International Relations. *Review of International Studies*, 24, 101-118.
- Winseck, D. (2011). The Political Economies of Media and the Transformation of the Global Media Industries. In D. Winseck & D. Y. Jin (Eds.), *The Political Economies of Media. The Transformation of the Global Media Industries* (pp. 3-48). London & New York: Bloomsbury Academic.
- Zittrain, J. (2008). *Future of the Internet - And How to Stop It*. London: Yale University Press.

---

### Short Bio

---

Trisha Meyer conducts postdoctoral research at the Institute for European Studies (IES) and the center for Studies on Media, Information and Telecommunication (iMinds-SMIT) of the Vrije Universiteit Brussel (VUB). She holds a Doctorate in Media and Communication Studies. Her research is focused on online copyright enforcement in the EU. In particular Trisha investigates the role of ideas, interests, institutions and discourses in policy-making processes, and the outcome of the policies on future Internet governance. Trisha has published her research in the *Journal of Information Policy*, *Surveillance & Society* and *info*. Her research interests include EU advocacy and policy making, intellectual property rights, Internet governance, surveillance, political economic theory and discourse analysis. Her extended biography can be found at [be.linkedin.com/pub/trisha-meyer/25/7a0/593/](https://www.linkedin.com/pub/trisha-meyer/25/7a0/593/).