Copyright Lawmaking and Public Choice: 
From Legislative Battles to Private Ordering

Yafit Lev-Aretz

On January 18th, 2012, millions of people awakened to an Internet that was not quite right. Encyclopedia giant Wikipedia, news-sharing platform Reddit, and many others blocked access to content in a 24-hour strike to symbolize their opposition to two anti-piracy Bills: The Stop Online Piracy Act (SOPA) and its Senate companion, the Protect IP Act (PIPA). Hundreds of thousands of websites took part in the strike during which some were effectively closed, while others featured information about the Bills and directed users to action centers to communicate their worries to Congress. Users zealously responded and fulminated against the Bills through posts on social networks, online petitions, emails and phone calls to Congress. The protest was unanimously hailed as successful, as the stated positions by members of Congress on SOPA and PIPA shifted overnight from 80 for and 31 against to 55 for and 205 against.

Two relatively recent developments have paved the way for the overwhelming success of the SOPA/PIPA backlash – the tech lobby becoming stronger and successfully countering the traditionally dominant entertainment lobby in Washington, and social networks lowering coordination costs for users wishing to mobilize into political action. The ability to organize a large crowd with diffuse interests into an effective political action as seen in the SOPA/PIPA protest challenges a broad array of copyright scholars using public choice theory to demonstrate the disproportionate influence that corporate copyright holders have had on copyright lawmaking. While the public choice theory argument has not been unanimously agreed with, the claim that the copyright industry has had an excessively forceful position in drafting copyright legislation could hardly be confuted – that is, until recently. Recently, the SOPA/PIPA protest highlighted what many view as a shift towards a new political calculus in copyright lawmaking. Contrary to those voices, I argue that since the applauding display of the power of the public in the SOPA/PIPA case was of a unique context, it is too soon to part ways with the public choice model of copyright lawmaking. Specific characteristics of the SOPA/PIPA protest indicate that the public should be looked at as a ‘sleeping giant,’ who may or may not be awaken to actively participate in copyright legislative debates.

Furthermore, I claim that even if the public could mobilize into action more frequently, the growing tendency of dominant industry players to explore non-legislative venues to restructure copyright law through private ordering essentially actualizes a large-scale copyright regime away from the public eye. With the public rarely cognizant of those arrangements, its ability to review them and consequently to oppose them is far more limited. While little-discussed in
legal commentary, cross-industry partnerships (e.g., business partnership between rightholders and broadband providers) bear significant consequences for users, as those partnerships often yield direct effect over users’ actions and legal status without them being fully aware to the governing arrangement’s details. Cross-industry partnerships also make perfect economic sense for corporate players, and they can be as influential and effective as public legislation, without the fear of a prospective public backlash.