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**SOPA, PIPA, ACTA, TPP: An Alphabet Soup of
Innovation-Stifling Copyright Legislation and Agreements**

Michael A. Carrier



SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements

By Michael A. Carrier*

¶1 In the past few years, proposed copyright legislation and trade agreements have received significant attention. Critics have attacked the secrecy with which trade agreements are negotiated behind closed doors. And they have pointed out concerns with legislation including censorship, a lack of due process, and compromised Internet security. But the effect of these developments on innovation has not received sufficient attention. This article addresses this gap.

¶2 In this article, I discuss the effects of four copyright proposals on innovation: the Stop Online Piracy Act (SOPA), PROTECT IP Act (PIPA), Anti-Counterfeiting Trade Agreement (ACTA), and Trans-Pacific Partnership Agreement (TPP). These proposals contain provisions that would impose copyright liability in a vague and far-reaching manner that would harm innovators, dissuade venture capitalists, and ultimately stifle innovation.

¶3 In this article, I first highlight the most relevant clauses, revealing potential effects on innovation. I then discuss studies that show the benefits of clear law and predictable safe harbors for technologies subject to secondary copyright liability. Finally, based on interviews I conducted with more than thirty leading innovators, venture capitalists, and record label officials, I reveal the harms that result from vague copyright laws.¹

I. THE RELEVANT COPYRIGHT LEGISLATION AND TRADE AGREEMENTS

¶4 This section discusses the provisions of the four proposed laws and trade agreements most relevant to innovation.

A. *Stop Online Piracy Act*

¶5 The Stop Online Piracy Act (SOPA) provides that an Internet site is “dedicated to theft of U.S. property” if it “is marketed by its operator or another acting in concert with that operator for use in, offering goods or services in a manner that engages in, *enables*, or *facilitates*” copyright infringement.²

¶6 This “enable or facilitate” language is broad. It would punish not only sites that themselves directly infringe the copyright laws but also those that help others infringe.

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¹ See Michael A. Carrier, *Copyright and Innovation: The Untold Story*, WIS. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2099876.

² Stop Online Piracy Act, H.R. 3261, 112th Cong. § 103(a)(1)(B) (1st Sess. 2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3261ih/pdf/BILLS-112hr3261ih.pdf> (emphasis added).

And it would do so in a manner expansive enough to target any computer, communication tool, user-generated-content website, search engine, e-mail, and storage locker. Any means making it easier for others to access copyrighted content could be punished. Such a standard could ensnare in its grasp numerous websites and services, including YouTube, Google, Facebook, Flickr, Dropbox, and blogs, each of which could be found to enable or facilitate infringement. In fact, the “entire internet itself” would satisfy this standard.³

¶7 The legislation also imposes more specific requirements. Service providers, search engines, payment network providers, and Internet advertising services must “take technically feasible and reasonable measures” to prevent access to foreign infringing sites.⁴ Such requirements impose additional burdens on actors that could have a tangential relationship to infringement but play an important role in the Internet economy.

¶8 The U.S. House of Representatives considered SOPA in early 2012. But technology companies launched a massive protest against the legislation. Seven thousand websites including Wikipedia shut down on January 18, 2012, and Google received seven million signatures for a petition on its website.⁵ Congress temporarily shelved the legislation, but negotiation on the bill continued.⁶

B. PROTECT IP Act

¶9 The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP Act or PIPA) provides that the Attorney General can sue “an owner or operator of an Internet site dedicated to infringing activities”⁷ A site “dedicated to infringing activities” is one that “has no significant use other than engaging in, enabling, or facilitating” the “reproduction, distribution, or public performance of copyrighted works” in “a manner that constitutes copyright infringement.”⁸

¶10 Upon an initial glance, this would appear to set a higher threshold than SOPA, which requires only the enabling or facilitating of infringement. Here, in contrast, the enabling or facilitating (or engaging in) must be the only significant use of the technology. If there is another significant use, then the technology would not be subject to liability.

³ Mike Masnick, *The Definitive Post on Why SOPA and Protect IP Are Bad, Bad Ideas*, TECHDIRT (Nov. 22, 2011, 11:55 AM), <http://www.techdirt.com/articles/20111122/04254316872/definitive-post-why-sopa-protect-ip-are-bad-bad-ideas.shtml>.

⁴ Stop Online Piracy Act, *supra* note 2, § 102(c)(2)(A)(i), § 102(c)(2)(B), § 102(c)(2)(C)(i), § 102(c)(2)(D)(i).

⁵ Julianne Pepitone, *SOPA Explained: What it is and Why it Matters*, CNNMONEY (Jan. 20, 2012, 12:44 PM), http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm.

⁶ Pamela McClintock, *MPAA Chief Christopher Dodd Says SOPA Debate Isn't Over, Defends Hosting Harvey Weinstein Even as He Attacked Over "Bully"*, THE HOLLYWOOD REPORTER (Apr. 5, 2012, 10:04 AM), <http://www.hollywoodreporter.com/news/mpaa-christopher-dodd-sopa-bully-harvey-weinstein-ratings-308359>.

⁷ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP), S. 968, 112th Cong. § 3(a)(1)(B) (1st Sess. 2011), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112s968rs/pdf/BILLS-112s968rs.pdf>.

⁸ *Id.* at § (2)(7)(A)(i).

¶11 But, as Mike Masnick has explained, the phrasing does not mean that the sites subject to liability have no significant use other than “infringement.” Instead, it means they have no significant use other than “enabling or facilitating infringement.”⁹ Again, this reaches broadly to cover much of the Internet. Even if a site is used only rarely to infringe, “its primary function can still ‘facilitate’ infringement.”¹⁰

¶12 It is also unclear what would suffice to show a “significant” use. Copyright holders could claim that, compared with the infringement made possible by a site, the noninfringing uses are not significant. Copyright holders, who have greater resources and incentives to make these arguments (which I have elsewhere described as an “innovation asymmetry”), would have a high likelihood of success.¹¹

¶13 Like SOPA, PIPA also imposes more specific requirements. The same requirement of taking “technically feasible and reasonable measures” is imposed on information location tools—which refer or link to online locations including “directories, indices, references, pointers, and hypertext links”¹²—as well as Internet advertising services.¹³ Similar duties are imposed on operators of domain name system servers, which must “take the least burdensome technically feasible and reasonable measure,”¹⁴ and financial transaction providers, which are to “take reasonable measures, as expeditiously as reasonable.”¹⁵ As in the SOPA context, such requirements impose burdens on actors that could have a tangential relationship to infringement but play an important role in the Internet economy.

C. Anti-Counterfeiting Trade Agreement¹⁶

¶14 The Anti-Counterfeiting Trade Agreement (ACTA) is a treaty, conducted largely in secret,¹⁷ designed to “address the problem of infringement of intellectual property rights, including infringement taking place in the digital environment.”¹⁸ The United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore signed the

⁹ Mike Masnick, *An Updated Analysis: Why SOPA & PIPA Are A Bad Idea, Dangerous & Unnecessary*, TECHDIRT (Jan. 18, 2012, 7:32 AM), <http://www.techdirt.com/articles/20120117/23002717445/updated-analysis-why-sopa-pipa-are-bad-idea-dangerous-unnecessary.shtml>.

¹⁰ *Id.*

¹¹ See MICHAEL A. CARRIER, *INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW* 128-30 (2009) (explaining that infringing uses are “immediately apparent, quantifiable, and advanced by motivated, well-financed copyright holders” while noninfringing uses are “less tangible and less apparent at the onset of a technology”).

¹² 17 U.S.C. § 512(d).

¹³ PROTECT IP Act of 2011, *supra* note 7, §§ 2(C), 2(D).

¹⁴ *Id.* at § 3(D)(2)(A).

¹⁵ *Id.* § 3(2)(B).

¹⁶ Parts of this section are adapted from Michael A. Carrier, *The Proposed New Copyright Crime of “Aiding and Abetting,”* OUPBLOG (Oct. 28, 2010, 2:30 PM), <http://blog.oup.com/2010/10/copyright-crime/>.

¹⁷ See Letter from Professors of Law to Barack Obama, U.S. Pres. (Oct. 28, 2010) (on file with the Am. Univ. Wash. Coll. of Law, Program on Info. Just. and Intell. Prop.), <http://www.wcl.american.edu/pijip/go/blog-post/over-70-law-profs-call-for-halt-of-acta-negotiation>.

¹⁸ Anti-Counterfeiting Trade Agreement, at E-1, Oct. 1, 2011, 50 I.L.M. 239, 243 (2011).

agreement in October 2011,¹⁹ but in July 2012, the European Parliament rejected ACTA.²⁰

¶15 Under ACTA, parties could face criminal liability for assisting others in engaging in “willful . . . copyright . . . piracy on a commercial scale.”²¹ Such scale includes “commercial activities for direct or indirect economic or commercial advantage.”²² These terms are not defined in ACTA. As a result, any activity that gives an “indirect” commercial advantage could lead to criminal liability.

¶16 Even more concerning, Section 4 of Article 23 would require participating nations to “ensure that criminal liability for aiding and abetting is available.”²³ Such language is at least as broad as the “enabling” or “facilitating” language discussed above. Any party that plays any role in assisting infringement could be liable for criminal liability. These parties could include personal computer manufacturers, a vast array of websites and blogs, and search engine operators. Each of these entities could play a role, however indirect, in contributing to copyright infringement. And to be clear, this is not civil, but criminal, copyright infringement, subjecting defendants to imprisonment.

¶17 Even if copyright’s secondary liability law is not a model of clarity, the tests, at least in theory, are grounded in balanced policies. Judicial tests determine if devices have noninfringing uses; if a party has knowledge and materially contributed to an activity (contributory infringement); if a party has a financial interest and a right to control (vicarious liability); and if it has an intent to induce infringement.²⁴

¶18 Aiding-and-abetting liability lacks such nuance. It is borrowed from criminal law. And it is used to punish those who assisted in a crime, such as getaway drivers, fraudulent check presenters, and cocaine distributors. In the criminal law arena, such liability reaches broadly to deter true criminal conduct.

¶19 In the context of secondary copyright liability, in contrast, such a standard is not appropriate since copyright is subject to competing public policies, and technology companies could be held criminally liable for allowing search, performance, or retrieval. Congress unsuccessfully attempted to impose such liability in 2004 in the proposed Induce Act.²⁵ ACTA would circumvent this failed legislation and dramatically expand secondary liability.

D. *Trans-Pacific Partnership*

¶20 The Trans-Pacific Partnership (TPP) trade agreement has been negotiated among the United States, Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and

¹⁹ OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA), <http://www.ustr.gov/acta/> (last visited June 26, 2012).

²⁰ Press Release, European Parliament, Plenary Session, European Parliament rejects ACTA (July 4, 2012), <http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>.

²¹ ACTA, *supra* note 17, at art. 23, § 1.

²² *Id.*

²³ *Id.* at art. 23, § 4.

²⁴ See *e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Sony v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

²⁵ *Inducing Infringement of Copyrights Act of 2004 (Induce Act)*, S. 2560, 108th Cong. § 2 (2d Sess. 2004) (defining the term “intentionally induces” to mean “intentionally aids, abets, induces, or procures”).

Vietnam.²⁶ At the time this article went to press, the negotiation was being conducted in secret. U.S. Senator Ron Wyden, the Chair of the Senate Finance Subcommittee on Trade (which has jurisdiction over the agreement), “submitted legislation requiring that access be provided to members of Congress and their staff” after “he and his staff were denied access to even the U.S. TPP text proposals submitted during negotiations.”²⁷

¶21 According to a leaked version, the TPP requires participating nations to provide for criminal penalties for willful copyright infringement “on a commercial scale.”²⁸ Commercial scale includes “significant willful copyright or related rights infringements that have no direct or indirect motivation of financial gain” and “willful infringements for purposes of commercial advantage or private financial gain.”²⁹ “Financial gain” is defined broadly as “the receipt or expectation of anything of value.”³⁰ This could include the downloading of a single copyrighted song.

¶22 In other words, criminal liability, which could include jail time or a product’s seizure or forfeiture, could apply in cases of “significant willful” infringement (with that term not defined in the agreement) even if there is no “direct or indirect motivation of financial gain.” Penalizing such infringement (which is not characterized by even the indirect motivation of gain) could have far-reaching consequences. Also reaching expansively could be the conception of willful infringement for receiving (or even expecting) financial gain, which, again, signifies “anything of value.”

¶23 Like ACTA, TPP requires each participating nation to “ensure that criminal liability for aiding and abetting is available under its law.”³¹ As discussed earlier, aiding-and-abetting liability is borrowed from criminal law and lacks the nuance of other doctrines, resulting in an overbroad law that expansively punishes a range of legitimate conduct.

II. BENEFITS OF CLEAR COPYRIGHT LAW

¶24 In contrast to the vague language in the four developments discussed in Part I, clear copyright laws benefit innovation. Part II discusses two recent studies that illustrate the benefits of clear copyright law.

A. Lerner Cablevision Study

¶25 Professor Josh Lerner conducted a study that traced the effects of the Second Circuit’s decision in *Cartoon Network v. Cablevision*, which refused to impose copyright

²⁶ Press Release, Congressman Darrell Issa, *Issa Releases the Trans Pacific Partnership Intellectual Property Rights Chapter on KeepTheWebOPEN.com* (May 15, 2012), http://issa.house.gov/index.php?option=com_content&view=article&id=976:issa-releases-the-trans-pacific-partnership-intellectual-property-rights-chapter-on-keepthewebopencom&catid=63:2011-press-releases (last visited Sept. 15, 2012) [hereinafter *Issa Releases TPP IP Rights Chapter*].

²⁷ Lori Wallach & Todd Tucker, *Public Interest Analysis of Leaked Trans-Pacific Partnership (TPP) Investment Text*, PUBLIC CITIZEN, June 13, 2012, <http://www.citizen.org/documents/Leaked-TPP-Investment-Analysis.pdf>.

²⁸ Trans-Pacific Partnership: Intellectual Property Rights Chapter, Draft Feb. 10, 2011, art. 15 § 1, <http://keepthewebopen.com/tpp>; see also *Issa Releases TPP IP Rights Chapter*, *supra* note 26.

²⁹ *Id.*

³⁰ *Id.* at 29 n.24.

³¹ *Id.* at art. 15 § 4.

liability on a remote storage DVR that allowed customers to record and replay television content.³² The service was different from a DVR located in a user's home in that the central hard drives were located remotely. The court concluded that transmissions made "to a single subscriber using a single unique copy produced by that subscriber . . . are not performances to the public" and thus "do not infringe any exclusive right of public performance."³³

¶26 Professor Lerner found that venture capital investment in cloud computing firms "increased significantly in the U.S. relative to the EU after the *Cablevision* decision."³⁴ Based on the higher investment levels following a decision setting clear, predictable lines, Lerner concluded that "decisions around copyright scope can have significant impacts on investment and innovation."³⁵ In particular, the decision "led to additional incremental investment in U.S. cloud computing companies" that ranged from "\$728 million to approximately \$1.3 billion" in the two-and-a-half years between the decision and the publication of the study.³⁶

B. Booz Investment Study

¶27 In a survey of more than 200 angel investors and venture capitalists investing in digital copyright technologies, Booz & Co. found that "investors prefer a clear regulatory regime to an ambiguous one."³⁷ Eighty percent of angel investors were "uncomfortable investing in an area with an ambiguous regulatory framework," and venture capitalists reported a "negative effect on innovation" from the "current regulatory environment."³⁸ If copyright regulations were "clarified to allow websites to resolve legal disputes quickly," the number of investors would "increase by nearly 111 percent."³⁹ Similarly, reducing penalties for websites acting in good faith would "increase the pool of interested investors by 115 percent."⁴⁰

¶28 The Booz report also found that investors would require an additional return of 20 times their initial investment if websites were more easily prosecuted for copyright infringement.⁴¹ The study concluded that 74% of respondents would prefer an investment in a market with competitors in a weak economy, nearly triple the 26% who would prefer investing in a market with no competitors and a strong economy, but stricter copyright regulations.⁴²

³² *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

³³ *Id.* at 139 (internal quotations omitted).

³⁴ Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* 1 (2011), available at http://www.analysisgroup.com/uploadedFiles/Publishing/Articles/Lerner_Fall2011_Copyright_Policy_VC_Investments.pdf.

³⁵ *Id.* at 23.

³⁶ *Id.* at 23–24.

³⁷ MATTHEW LE MERLE ET AL., *THE IMPACT OF U.S. INTERNET COPYRIGHT REGULATIONS ON EARLY-STAGE INVESTMENT: A QUANTITATIVE STUDY*, BOOZ & CO. 17 (2011), <http://www.booz.com/media/uploads/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>.

³⁸ *Id.*

³⁹ *Id.* at 17.

⁴⁰ *Id.*

⁴¹ *Id.* at 21.

⁴² *Id.*

¶29 An example supporting the Booz study involves the safe harbors of the Digital Millennium Copyright Act (DMCA), which provide clear, navigable lines that have fostered innovation. The safe harbors relieve service providers that fall into four specified categories from liability.⁴³ The notice-and-takedown provisions, for example, have opened the floodgates to sites with user-generated content such as Facebook, YouTube, and Twitter. If not for the safe harbors, services like these “might have been forced to fundamentally alter their operations or might never have launched in the first place.”⁴⁴

III. HARMS FROM VAGUE COPYRIGHT LAW

¶30 In contrast to the benefits of clear law, my research has shown that vague copyright law harms innovation. Pursuant to a Google Research Award, I interviewed more than thirty CEOs, company founders, and vice-presidents from technology companies, the recording industry, and venture capital firms.⁴⁵ These respondents explained the dangers of unclear copyright laws.

A. *Lack of Clarity*

¶31 One innovator agreed that even though “there is so much opportunity in this space,” the “problem” is that the law is “so uncertain,” and “the uncertainty is what stops you from trying to approach that space again.”⁴⁶

¶32 Similarly, one record label official who considers himself a “content person” admitted that “if there is lack of clarity in an area [of copyright law], I am going to defend [enforcement] to the most aggressive interpretation based on my rights.”⁴⁷ In the end, “it’s always going to ultimately end up in favor of the content owners” since they “are going to have more resources and capability to hold the line in a way that’s most favorable to them.”⁴⁸ In fact, the “lack of clarity” in the law “is holding back innovation right now.”⁴⁹

¶33 One innovator likened the uncertainty to “a protection racket” or “the way that I imagine politics work[s] in corrupt countries” where “everything is OK until it’s not OK.”⁵⁰ In those settings, “you do what you want until one day you can’t and they come and your tail light’s broken.”⁵¹ That situation, in which “there isn’t a strong rule of law,” is similar to “the current copyright system” in which it’s “actually impossible to run a fully legal music service.”⁵²

⁴³ See 17 U.S.C. § 512(a) (“transitory digital network communications”); § 512(b) (“system caching”); § 512(c) (“information residing on systems or networks at direction of users”); § 512(d) (“information location tools”).

⁴⁴ Brief of *Amicus Curiae* Google Inc. at 5, *Disney Enterprises, Inc. v. Hotfile Corp.*, No. 11-20427-Civ. (S.D. Fla.), <http://www.scribd.com/doc/85990982/Google-Amicus-Brief-PDF>.

⁴⁵ See Carrier, *The Untold Story*, *supra* note 1, ¶ 1.

⁴⁶ *Id.* at 48.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 50.

⁵¹ *Id.*

⁵² *Id.*

B. *Litigation Business Model*

¶34 The dangers of vague law are even more apparent given record labels' use of litigation as a business model. Copyright lawsuits "aren't necessarily about right or wrong," or "good and evil," or "operating within the spirit or the letter of the law," but instead are "a business strategy."⁵³ The labels achieved "an enormous number of business goals" from the "tremendously effective hammer" of filing suit.⁵⁴

¶35 Especially as employed against startups, lawsuits have an "absolute chilling effect," with their "ultimate success . . . completely irrelevant."⁵⁵ One record label official stated that "even the threat of a lawsuit . . . really does slow down investment in the space."⁵⁶ This respondent was "sure" there were "quite a few" innovative services that "never came to life" because of "the threat of potential lawsuits from content owners."⁵⁷

¶36 These concerns are aggravated by the costs of litigation. One respondent explained that copyright litigation was not "a fair fight" since the labels "have billions of dollars and hundreds of lawyers" and "can fight for years" and "spend you into submission," as compared with "technology innovators," who are "small startups who don't have much money and don't have lawyers."⁵⁸

¶37 Vague laws increase copyright owners' ability to file suit, and even to threaten to file suit. It is nearly impossible for a service to prove (at least to a level to obtain summary judgment) that there is no issue of fact on whether it aids or abets, or enables or facilitates, infringement. The enactment of vague laws will only exacerbate the trend of litigation as a business model.

C. *Napster Case*

¶38 These concerns with vagueness overlap with court decisions such as the *Napster* decision, the first to order the shutdown of a peer-to-peer (p2p) service.⁵⁹ In *Napster*, the Ninth Circuit affirmed the district court's decision that plaintiffs had demonstrated a likelihood of success on claims for contributory infringement and vicarious liability.⁶⁰

¶39 Even though Napster had installed a filter that blocked many copyrighted works, the district court declared that Napster's efforts were "not good enough" until "every effort" was made to "get zero tolerance."⁶¹ Because the "standard" was "to get it down to zero,"⁶² the district court concluded that Napster needed to "disable its file transferring service."⁶³ Napster filed for bankruptcy and shut down in 2002.⁶⁴

⁵³ *Id.* at 42.

⁵⁴ *Id.* at 41.

⁵⁵ *Id.*

⁵⁶ *Id.* at 42.

⁵⁷ *Id.*

⁵⁸ *Id.* at 41.

⁵⁹ *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd* 239 F.3d 1004, 1022 (9th Cir. 2002).

⁶⁰ *Id.* at 918-21.

⁶¹ *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1097 (9th Cir. 2002).

⁶² *Id.*

⁶³ *Id.* at 1096.

⁶⁴ Meghan Collins, *Napster Files for Bankruptcy: Music-swapping Internet Site, Offline Since July 2001, Seeks Chapter 11 Protection*, CNN/MONEY (June 3, 2002, 1:25 PM), http://money.cnn.com/2002/06/03/news/companies/napster_bankrupt/.

¶40 One innovator lamented that “the minute the *Napster* decision came out,” it “put such a chilling effect on everything.”⁶⁵ Another participant, speaking even more broadly, concluded that “from 2000 to 2010, even to this day, there really hasn’t been new innovation in digital music other than iTunes.”⁶⁶ And yet another innovator explained that “lots and lots of ideas” would have come about “that we can’t imagine now.”⁶⁷ It is “inherently hard to quantify” the “new disruptive technologies we’re losing” because “the ones you lose . . . get shut down” and “for every one of those, there are ten new ideas that never get developed” or “never get beyond the napkin stage because people don’t see it as an area where they ought to be investing their time and money.”⁶⁸

¶41 In particular, absent the *Napster* ruling, there “would have been a lot more eyes and attention” and “a lot of innovation” on filtering.⁶⁹ Interoperability barriers “could’ve been mitigated and lifted much earlier by the industry in a way that would have created a much bigger and more vibrant legal market much sooner and would have prevented the industry from being in as bad shape as it’s in right now.”⁷⁰ Moreover, if the court had found that *Napster* was legal, “many more dollars would have gone into different delivery mechanisms to allow consumers easier access.”⁷¹

D. Venture Capital

¶42 The *Napster* decision also had a significant effect on venture capital funding. One venture capitalist (VC) explained that the market “became a wasteland” with “no music deals getting done.”⁷² Another noted that *Napster* “cast a pall over companies getting funded.”⁷³ A third explained that “there was no venture capital going into music companies because there was a lot of debris from companies strewn about.”⁷⁴ In fact, “the graveyard of music companies was just overflowing.”⁷⁵ After *Napster*, it was “a scorched earth kind of place” in which “nobody touched anything.”⁷⁶ As a result, there was a “lost decade after the *Napster* decision.”⁷⁷

¶43 Nor was the *Napster* case unique. There is “no question” that the copyright lawsuits “chased away innovators.”⁷⁸ One respondent explained that “if you want to get a list of innovations that didn’t happen,” there are “at least fifty” companies that “died on the vine.”⁷⁹ By “radically hurt[ing] the level of capital that goes into the sector,” there was “a negative impact on innovation.”⁸⁰

⁶⁵ Carrier, *The Untold Story*, *supra* note 1, at 16.

⁶⁶ *Id.*

⁶⁷ *Id.* at 53.

⁶⁸ *Id.*

⁶⁹ *Id.* at 16.

⁷⁰ *Id.* at 55.

⁷¹ *Id.* at 16-17.

⁷² *Id.* at 22.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 55.

⁷⁹ *Id.*

⁸⁰ *Id.*

¶44 Several respondents explained that many VCs still refuse to invest in digital music. “Even today, most VCs do not want anything to do with content plays.”⁸¹ Another respondent similarly concluded that “today, if you go to a VC and tell them you have a business you want to build around digital music, very very few would listen.”⁸²

E. *Alphabet Soup of Vague Copyright*

¶45 Today’s standards of contributory infringement, vicarious liability, and inducement do not always provide the clearest guidance. And, they have allowed copyright holders to use litigation as a business model, driving startups out of the market and stifling venture capital.

¶46 But this is only an inkling of what we could expect under the vagueness regime hiding behind SOPA, PIPA, ACTA, and TPP. The “aid or abet” and “enable or facilitate” standards are far less predictable than existing U.S. law. In nearly every conceivable setting, they would prevent summary judgment, as startups could not disprove all factual disputes relating to these expansive concepts. And they would allow copyright holders to employ litigation as an even more potent threat to thwart innovators.

¶47 The adoption of such language also would prevent services from taking advantage of current safe harbors such as the *Sony* substantial-noninfringing-use test. In fact, the change would move in the opposite direction of the *Cablevision* and DMCA safe harbors that have fostered innovation.

¶48 In the hands of the entertainment industry, with lawsuits as a business model and a vagueness hook to implement strategy, innovators would face insurmountable hurdles. Given the asymmetry in resources, with large copyright holders often outlasting small technology startups, this change alone would harm innovation. Relatedly, such a change would place an even higher roadblock discouraging venture capitalists, as no startup could promise that its service would not be found liable under these vague standards.

IV. CONCLUSION

¶49 Innovation is the lifeblood of the economy, contributing more to growth than anything else, including price reductions.⁸³ The Internet in particular adds \$2 trillion to the U.S. economy, with the technology sector responsible for millions of jobs.⁸⁴ Given the fragile state of the economy, we should tread lightly before tampering with this powerhouse of economic growth.

¶50 Legislation and agreements like SOPA, PIPA, ACTA, and TPP include broad, vague language that could be used aggressively by copyright holders to stifle innovation. Innovators could not clearly show that their service does not aid, abet, enable, or facilitate

⁸¹ *Id.* at 56.

⁸² *Id.*

⁸³ See CARRIER, *supra* note 11, at 31-33.

⁸⁴ Exec. Report, Nat’l Econ. Council/OSTP, A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs 5 (Sept. 2009) available at <http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation>; Thomas Rogers & Andrew Szamoszegi, *Fair Use in the New Economy*, COMPUTER & COMM’NS INDUS. ASS’N 6 (2010), available at <http://www.cciainet.org/CCIA/files/ccLibraryFiles/Filename/000000000354/fair-use-study-final.pdf>.

infringement, as the Internet itself and countless websites and services could be found liable under such a standard. In short, any government policy concerned with innovation should not include such vague standards.

