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NORTH AMERICAN DIGITAL COPYRIGHT, REGIONAL GOVERNANCE, AND THE PERSISTENCE OF VARIATION[1]

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In 1994, Canada, the United States, and Mexico implemented the North American Free Trade Agreement (NAFTA), designed to provide a framework for the governance of a North American economy. One of the most significant parts of the agreement was Chapter 17, dealing with intellectual property (IP) and designed to bring Mexican IP law into line with that of the United States —Canadian IP law was already substantially similar to that of the U.S. Referring to the copyright sections of Chapter 17,[2] Acheson and Maule (1996) describe the treaty as one step in the continuing harmonization of North American copyright law, itself embedded in a process of global harmonization spearheaded by the 1995 Agreement on the Trade-Related Aspects of Intellectual Property (TRIPS) at the World Trade Organization (WTO).

While NAFTA certainly reoriented Mexican copyright law from a traditional focus on copyright as a human right protecting authors from such things as false attribution and ensuring the integrity of works (known as moral rights) toward a greater (U.S.-like) focus on copyright as an economic right accruing to owners —as opposed to creators— it has not ushered in a "North American" copyright regime. Neither has Mexico and Canada's tighter incorporation into the economic orbit of the regional and global hegemon led to the wholesale adoption of U.S.-desired copyright policies —all the stranger because since the mid-1980s, the United States has placed IP and copyright policy at the heart of its international economic agenda.[3] Instead, somewhat ironically, NAFTA has allowed Canada and Mexico (and the U.S.) some leeway to pursue independent copyright policies, within a global copyright regime shaped largely by the United States. Over 15 years after NAFTA came into effect, domestic factors continue to be at least as significant as U.S.-based pressures for harmonization in the making of copyright policy.

Using a historical institutionalist perspective, which emphasizes historical contingency and institutional persistence, this article examines the North American implementation of two U.S.-backed treaties: the World Intellectual Property Orga-

[1] This article is based on the author's dissertation. For a copy of the dissertation (in English only, unfortunately), please contact the author at bhaggart@gmail.com.

[2] Copyright is the form of intellectual property that regulates the reproduction of literary and artistic works, although over the past several decades it has been expanded to cover things like databases and computer programs. The other types of intellectual property are patents, trademarks, and trade secrets.

[3] Copyright and IP are now part of all U.S. bilateral, plurilateral, and multilateral trade agreements.

nization (WIPO) Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT), jointly known as the WIPO Internet treaties. The aim is to demonstrate the subtle regional dynamics and dominant domestic politics that have led the three countries to adopt very different policies based on the same treaty. Referring specifically to the most controversial part of these treaties, the provision of legal protection for digital locks placed on digital products (such as ebooks, movies, MP3s, and computer programs), it argues that the three countries' differential implementation of the treaties is the result of NAFTA's guarantee of market access and the persistence of domestic copyright and parliamentary institutions. NAFTA provides a kind of "negative governance" that allows domestic political dynamics to determine largely what acts are made legal or illegal with respect to digital lockbreaking. As a consequence, domestic institutional, political, economic, and cultural factors have led to each country defining differently what is considered criminal when it comes to digital copyright.

This article is divided into four sections. The first provides a brief overview of historical institutionalism, particularly as a way to think about regional governance, while the second provides a very brief overview of copyright, the requirements of the Internet treaties, and the specific way in which the three North American countries have —or have not— implemented the treaties. The third section analyzes the implementation process and policy dynamics in the three countries. And the fourth section then offers some overall comments and conclusions.

Historical Institutionalism

The claims and objectives of historical institutionalism (HI) are modest: "that relationships between political agency, large-scale societal processes, normative democratic prescriptions, existing institutional arrangements, and institutional development are complex and that knowledge about the functioning of formally organized institutions adds to our understanding of continuity and change in democratic contexts" (Olsen, 2009: 26). In HI, institutions are seen as semi-persistent "constraints or rules that induce stability in human interaction" (Voss, 2001: 7561) and structure individuals and groups' interactions with each other and with broader social forces. Actors pursue strategic self-interests, partly shaped by the institutional "rules of the game," and encounter institutions both as constraints on action and as rules that can be modified by the actors themselves.[4] Change in HI is not driven wholly from on high (structuralism) or below (individualism/atomism), but emerges through the interaction of both within an institutional structure whose rules and procedures shape it.

[4] One way to think of this is by introducing time into one's analysis, as in Archer's "morphogenic" analytic approach (1995). In the initial time period, actors confront institutions as pre-existing rules. In the second period, however, they can work to modify these rules, so that the rules have been changed in the third period. The choice of time periods is made for analytical purposes; in reality, actors continually make and remake institutions.

Key to HI is the concept of "path dependence," which refers to the claim that the initial establishment of an institution is highly sensitive to historical contingency, in which small, early events can have large future consequences (Katznelson, 2003: 291; Pierson and Skocpol, 2002: 599). Once established, institutions structure future actions, resulting not so much in institutional stasis, but, rather, "constrained innovation" (Campbell, 2004: 8) and institutional persistence: "preceding steps in a particular direction induce further movement in the same direction" (Pierson, 2000: 251-252). Understanding what leads to path dependence or divergence from a path requires paying attention to "who is invested in what particular arrangements, how is it sustained over time, how other groups not invested in the institution are kept out," and what might impair this form of reproduction and lead to change (Thelen, 1999: 391).

An HI approach therefore starts with the relevant institutions and asks how they structure and constitute actors. It also requires identifying the underlying processes that support these institutions, including the various paradigms and public sentiments that support or undermine them, and the frames and programs that are deployed by interested actors in order to promote their perspective. Attention must be paid to the —potentially conflicting— logics of competing and complementary institutions, as well as to changes in these institutional supports over time, either as the result of exogenous or endogenous shocks. HI also requires the identification of the relevant actors, their interests, resources and strategies employed.

A mid-range theory (or method [Armstrong and Bulmer, 1998: 50]) potentially compatible with general or structural theories of politics (Pollack, 2004: 154; Mahoney and Rueschemeyer, 2003: 7) that emphasizes how historical contingency can lead to different outcomes in structurally similar cases, it is particularly well suited to understanding regional development, in which regional institutions are often imposed on pre-existing institutional set-ups that can affect its future course. In the case of regional analysis, criticisms of HI —that it potentially overstates the uniqueness of a specific case (Immergut, 1998: 27), is "biased in favor of cross-national variation" (Pontusson, 1995: 129), or does better explaining stability rather than change (see, e.g., Peters, Pierre, and King, 2005)— are strengths, not weaknesses. While they may be considered problems for those seeking generalizable regionalism theories (for a summary, see Hurrell, 1995), they may also be seen as presenting a high hurdle for claims regarding the emergence of regional governance.

North American Regional Institutions and Actors

Institutionally, NAFTA has played two roles. First, it has a profound effect on Mexican copyright law.[5] Previously, Mexican copyright (or *derechos de autor*, literally

[5] NAFTA's copyright sections were designed primarily to bring Mexican copyright policy into line with that of the United States; Canadian copyright law, already substantially similar to U.S. copyright policy, was not affected by NAFTA.

"authors' rights") law and the domestic institutions supporting it had been mainly concerned with protecting authors' moral rights in their works. As part of the overall NAFTA deal, itself rooted in the neoliberal model that replaced Mexico's discredited import-substitution-industrialization model (Golob, 2003), Mexico agreed to U.S. demands that it restructure its copyright regime to emphasize copyright as an economic right available to publishers, distributors, and other middlemen, including foreign companies, rather than just authors. It therefore expanded the number, type, and focus of Mexican groups with a stake in the copyright debate.

Second, NAFTA has, somewhat ironically, constrained the ability of the United States to influence its neighbors' economic and copyright policy. Since the mid-1980s, the United States has used trade agreements as its main tool to convince other countries to change their IP and copyright laws, effectively trading market access for legal changes. This was how the United States managed to change the path of Mexican copyright law.

This change is not insignificant: altering the focus of Mexican copyright (discussed below) influences the outcome of future policy debates. This change, however, came at the price of a reduced U.S. ability to directly influence Mexican —and Canadian— copyright policy: with NAFTA and secure market access in place, the United States could no longer use the carrot of increased market access or the stick of reduced access to convince Mexico or Canada to change its laws. Instead, the U.S. government (a regional actor in this sense) has had to resort to deploying diplomatic pressure via its embassies, its content industries (such as Hollywood and the music industry, themselves global players with interests in Canada and Mexico), and through the Special 301 process, an annual (though largely toothless) review of other countries' IP policies.

With respect to actors, the U.S. government and the content industries (mainly U.S.-based) can be thought of regional actors, though in reality it is more accurate to say that they are deploying a global strategy within North America (Clarkson, 2008). There is little or no evidence of regional civil society groups and little cross-border cooperation beyond information sharing. Indeed, Mexico's nascent copyright civil society groups have stronger links to Spain and the rest of Latin and South America than they do to groups in the U.S. or Canada.

In the presence of few regional actors and limited regional institutions, domestic institutions could be expected to dominate the copyright debate in the three countries. This is, indeed, the case.

The 1996 WIPO Internet Treaties And Technological Protection Measures

On December 20, 1996, Canada, Mexico, and the United States joined over 60 other countries in adopting the Internet treaties. The treaties were a U.S.-driven response (Samuelson, 1997) to the challenges posed to copyright policy in a digital age: how to enforce copyright law given technology (personal computers and the In-

ternet) that allowed individuals to easily and inexpensively reproduce and distribute anything that could be converted into zeroes and ones.

One of the responses, covered in the treaty, involved extending legal protections to digital locks, known as technological protection measures (TPMs). TPMs control the access and use of the work that it has locked down. For example, someone can place a TPM on a PDF file that requires the user to input a password before the work can be copied or altered. Or a TPM on a song or a movie can limit the number of times it is played, on what machines it can be played, or how many times it can be copied, if at all.

As these examples show, while TPMs can limit copymaking (which copyright also does), their uses can also extend to attempts at market control (e.g., making some works useable only on some machines) and interfering with existing user rights under copyright (among other issues see, for example, de Beer, 2005 and 2009; Samuelson, 2003; Kerr, Maurushat, and Tacit, 2002-2003; Litman, 2006; and Gillespie, 2007). For example, every copyright law allows copying for academic purposes. However, a password-protected PDF that prevents an academic from copying a paragraph from that document is a (small) restriction on her legal rights. These digital locks can have similar effects when placed on works already in the public domain.[6]

From the copyright owner's perspective, TPMs have a significant drawback: they can be broken, often quite easily. As a result, they are unable to fully lock down digital content. In response, copyright owners have sought to make it illegal to break TPMs. Such legal protection presents a difficult policy issue: how to ensure that such protection does not interfere with users' right to break locks when the locks have nothing to do with copyright or to exercise their rights under copyright law.

During the Internet treaties negotiations, the United States, backed by its content industries, pushed for a ban on the sale of all devices that could circumvent digital locks, a "maximalist" position that would have provided strong protection to copyright owners' works, but with the major negative effect of making it impossible for non-hackers to access the tools needed to exercise their legal and legitimate rights (Samuelson, 1997). This position has the potential to render impotent the user-creator-owner balances that have been negotiated into copyright law over centuries. TPMs protected too strongly allow those who control the locks to set the conditions of use, potentially far beyond those allowed by copyright law. At its worst, legal protection of TPMs has the potential to effectively privatize copyright law in the hands of those who control the digital locks.

However, as the result of objections by developing countries and U.S. consumer-electronics industries (who make their living by providing access to copyrighted works), the final wording required only that signatories

[6] Copyright is a right limited in time: after a certain period (generally speaking, the life of the author plus 50 years in Canada; life plus 70 years in the United States; and life plus 100 years in Mexico), a work is said to enter into the "public domain" and be freely copiable by anyone without permission or payment.

> provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law. (WCT Article 11; WPPT Article 18 uses the same language with respect to performers and phonogram producers.)

A "minimalist" interpretation of these provisions would make it a crime to break a digital lock only if it is done for the purpose, or with the effect of, violating an underlying copyright. While there is some controversy over this language, particularly the meaning of "adequate" and "effective" (see, e.g., Ricketson and Ginsburg. 2006; Tawfik, 2005: 80), the treaties provide countries with significant leeway in interpreting how strong protection should be, and seem to limit it only to copyright, and not meaning it to be an expansive right.[7]

Country Choices

The United States

The three North American countries have implemented the treaties in different ways. In 1998, the United States passed the Digital Millennium Copyright Act (DMCA), a "maximalist" interpretation of the treaties. DMCA Section 1201, subject to certain limitations, protects a TPM that restricts access and use in the service of a copyright owner's rights. What makes the DMCA a maximalist interpretation of the WIPO Internet treaties is that it forbids people to "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof," that would allow individuals to circumvent TPMs designed to control access or limit copying of a work, if the following criteria are met:

- The device is primarily designed for this purpose,
- It has only limited commercially significance other than to circumvent TPMs, or
- It is marketed as such a circumvention device (DMCA 1201[a][2] and 1201 [a][3][B]).

Despite the language in section 1201 (b)(2)(B), this blanket ban would also have the effect of reducing access to circumvention devices for non-infringing purposes having nothing to do with copyright or for fair-use purposes. Furthermore, these criteria are "rather vague and ambiguous," and "could create significant uncertainty for manufacturers and distributors of consumer electronics, telecommunications, computing equipment, and commercial software" (Kerr, Maurushat, and Tacit, 2002-

[7] That said, proponents of U.S.-style TPM protection argue that strong protection is needed for the law to "adequately" and "effectively" protect copyright owners' rights.

2003: 66). Since then, the U.S. government and its industries have aggressively sought the implementation of DMCA-type rules by other countries, including Canada and Mexico.

Canada

In Canada and Mexico, the situation is more complicated. Canada, following public hearings and studies in 2001-2002, attempted to implement the treaties twice. In 2005, a minority Liberal government proposed a "minimalist" law, Bill C-60, which would have made it illegal to break a TPM only for the purposes of infringing the underlying copyright; trade in circumvention devices was ignored (Banks and Kitching, 2005). The bill died on the Order Paper when the January 2006 election was called. In 2007/2008, the Conservative government proposed a bill (C-61) that would have largely copied the TPM provisions of the U.S. DMCA. However, its introduction to Parliament was delayed for six months by an unexpected public-grassroots outcry during a particularly sensitive period in which the minority Conservative government could not be sure that it could control the House of Commons (Haggart, n.d.); the delay was enough to make it fall victim, like the Liberal's bill, to an election call in September 2008. In 2009, the government held hearings into copyright reform and reaffirmed its commitment to copyright reform in the March 3, 2010, Speech from the Throne, but as of late March 2010, no bill has yet been introduced.

Mexico

As part of a comprehensive reform of its copyright law instigated by its NAFTA obligations, Mexico provided limited legal protection for TPMs in 1997, but only for those protecting computer software. In language similar to that which would be drafted into the 1998 U.S. DMCA, Article 112 of the Federal Copyright Law (LFDA) prohibits "the importation, manufacture, distribution, and use of equipment or services intended to eliminate the technical protection of computer programs, of transmissions across the spectrum of electromagnetic and telecommunications networks and programs' electronic elements," while Article 231(V) imposes criminal sanctions on the importation, sale, or lease of any program or the performance of any act that would have as its purpose the deactivation of the protective electronic controls of computer software. Violation of these articles is punishable by imprisonment of three to ten years and a fine of 2 000 to 20 000 times the daily minimum wage. Furthermore, while the LFDA does not define circumvention, a non-paper presented at WIPO by the National Copyright Institute (Indautor), Mexico's copyright authority, suggests that it is only an issue when the underlying copyright or author's rights have been infringed (Indautor, 2008). A 2003 copyright reform bill was silent on TPMs and WIPO treaty implementation generally.

Explaining Implementation

The United States

U.S. copyright policymaking is a pragmatist's game, involving tradeoffs among various interest groups that have a seat at the table. As Litman documents extensively (2006), since the early 1900s, copyright law reform has involved inter-industry negotiations overseen by a state that acts as arbiter, ratifying the consensus reached by the players. As a result, copyright law reflects the interests and relative economic and political strength of those who have been invited to the table, although legislation is crafted in such a way as to offer narrow exceptions to win the support of the various groups involved. Generally speaking, this process is friendly to the *status quo*: already-established groups have the advantage over upstarts, specific interests (i.e., industries) generally outclass the overall "public interest," and every invited guest does better than the wallflowers.

In U.S. copyright policy, the content industries, particularly the motion picture and music industries, deploy the most politically influential lobbyists, a fact reflected in the general bias of the U.S. copyright industry and in the DMCA itself. As two economists critical of copyright argue, Congress has been "bought and paid for" by a content industry (Boldrin and Levine, 2008: 251) that has, for example, in a separate 1998 bill, received retroactive term-of-protection extensions. The U.S. Constitution requires that copyright (and IP generally) "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." A retroactive extension of rights to cover already-created works cannot possibly induce future innovation, meaning that this bill, the Sonny Bono Copyright Term Extension Act, cannot be characterized as anything but pure rent-seeking by the content industries, who own the vast majority of copyrights.

The DMCA conformed generally to this picture of inter-industry bargaining overseen by a generally copyright-friendly Congress. In Litman's definitive account of the political process that led to the DMCA , she describes what ended up being a "hodgepodge," reflecting competing views expressed by the various Congressional committees (that often held divergent views on what the law should do) and the stakeholders these committees represented.

Generally speaking, however, the TPM provisions were of the maximalist kind desired by the content industries. Groups critical of legal protection of TPMs (research libraries, the consumer-electronics industry, and a group of academics and lawyers concerned with "fair use" issues)[8] each received limited exceptions, including a "Rule-making process" that would require the Librarian of Congress to review the legislation every three years to determine whether further exemptions should be added to this list. (The DMCA overall represented a compromise between the con-

[8] Fair use refers to the user rights in copyright law that allow for the making of copies for an open-ended list of activities deemed to be in the public interest.

tent industries, which wanted legal protection for TPMs and the powerful telecommunications lobby, which in turn wanted (and received) protection from liability for the infringing acts of its customers [Litman, 2006].) However, the blanket ban on the manufacture and traffic in circumvention devices has been criticized for effectively making it impossible for those lacking the technological savvy to build programs to break digital locks —i.e., most people— to exercise their rights under the Copyright Act (see, e.g., Electronic Frontier Foundation [EFF] [2010] for an overview of the effects of this section of the DMCA).

In the end, the TPM language of the DMCA was determined almost exclusively by domestic U.S. politics. The open language of the Internet treaties, while much more permissive than that originally sought by the United States —that language was eventually incorporated into the DMCA — both avoided constraining the U.S. policymaking process in any way and allowed the United States to continue, in good faith, to promote its maximalist approach to copyright (i.e., the DMCA) to other countries as *the* legitimate way that the Internet treaties should be implemented.

Canada

Of the three countries, Canadian copyright policies are the most complex, involving a somewhat unique bureaucratic setup, a weak "domestic" lobby for copyright reform, anti-American sentiments and, since the early 2000s and especially since December 1997, the politicization of what has traditionally been seen as a technical, commercial law. Taken together, these factors explain both the continued non-implementation of the treaties and why both maximalist and minimalist copyright bills have been introduced (but not passed).

Canada's domestic copyright-policymaking institutions are biased toward compromise.[9] Unusually, copyright is the joint responsibility of two departments, the Department of Industry and the Department of Canadian Heritage, each with conflicting —and sometimes diametrically opposed— mandates. Generally speaking, performers, writers, and other creators, and, most importantly, industry groups like the Canadian Recording Industry Association (CRIA), see Heritage Canada as their voice (Doern and Sharaput, 2000: 24); and Industry Canada represents the technology industries, which traditionally represent consumers, business, and investors, from the point of view of wishing to increase Canadian productivity and innovation. The vigor with which each bureaucracy defends its mandate often interferes with the timely pursuit of reform, even when their respective ministers are ostensibly in agreement about what should be done (Haggart, n.d.).

This tendency to balance largely explains the 2005 bill. As Doyle documents thoroughly (2006), the bill was the result of strenuous lobbying by CRIA of the Department of Canadian Heritage and its then-minister, Sheila Copps. However,

[9] This chapter's focus on framework policy of necessity puts to one side the other ministries and quasi-governmental agencies that also affect actual policy.

despite Copps's clout in the Liberal party as a senior minister, the strength of the eventual bill's TPM regulations were mitigated by users and other interest groups, traditionally represented by the Department of Industry.

The 2007/2008 bill and its delay demonstrate the complex role of the United States and civil society in the Canadian copyright debate, especially in the context of a minority Parliament. The decision to pursue DMCA-style TPM rules was purely political, the result of pressure from a Prime Minister's Office (PMO) intent on passing a U.S.-friendly law. As Michele Austin, then-Industry Minister Maxime Bernier's (2006-2007) chief of staff, recounts, "The Prime Minister's Office's position was, move quickly, satisfy the United States." When the two ministers responsible protested for political and technical reasons, the PMO replied "'We don't care what you do, as long as the U.S. is satisfied'" (Haggart, n.d.).

U.S. pressure on Canada to implement the WIPO Internet treaties predates the Conservative government. For several years, Canada has faced "considerable" U.S. pressure to ratify the treaties quickly with legislation modeled on the U.S. DMCA (Tawfik, 2005: 79). It has been mentioned by successive U.S. Ambassadors to Canada, and Canada continues to be mentioned on the U.S. Special 301 Watch List (and the higher-level "Priority Watch List" in 2009) of countries with IP laws it deems inadequate. That said, possible reasons for the PMO's position include a desire to demonstrate that the new Conservative government was more U.S.-friendly than its Liberal predecessor and, more proximately, U.S. insistence in August 2007, within the context of the Security and Prosperity Partnership of North America (SPP), that it would not discuss border-related impediments to Canadian access to the U.S. market if Canada did not move on the copyright file (Geist, 2008). The resulting bill's inclusion suggests the importance of linkages to U.S. success in getting other countries to undertake U.S.-friendly copyright reform, as well as the central role the Prime Minister's Office plays in making policy generally.

The resulting bill largely reflected the DMCA position on TPMs. However, the ensuing controversy emphasized how the issue had been politicized. First, in 2006, a group of musicians representing a Who's Who of Canadian musicians, including Steven Page, formerly of the Barenaked Ladies, Avril Lavigne, and Sarah McLachlan, formed the Canadian Music Creators' Coalition (www.musiccreators.ca) to argue for a "balanced" copyright system that does not punish their fans. This placed them in conflict with the CRIA, which, although it represents the recording industry and not recording artists, had traditionally legitimized its calls for stronger copyright protection by claiming it would benefit artists. The emergence of the CMCC made it difficult for CRIA to argue for stronger copyright based on appeals to cultural nationalism; similarly, the 2006 split of independent Canadian record companies from CRIA (CBC, 2006) further complicated its claims that stronger copyright laws are in Canada's (as opposed to some foreign companies') interest.

Grassroots opposition to the bill, instigated by a Facebook group, Fair Copyright for Canada, started by University of Ottawa law professor Michael Geist, picked up on these themes. Appealing both to policy arguments and emotion, opponents denounced the "born in the U.S.A." copyright bill (thus appealing to a current of

anti-Americanism) and calling for public hearings to determine what a balanced "made in Canada" bill should look like. In the end, this opposition was sufficient to delay the bill's introduction from December 2007 to June 2008, though its ultimate fate was decided when the government fell in September 2008.

The public opposition, however, has had a lasting effect. Within Parliament, the leftist New Democratic Party has actively embraced calls for balanced copyright laws where before, like all parties, it had seen copyright only in terms of granting stronger rights for artists. (The centrist Liberal party's position is currently unclear, while the separatist Bloc Québécois is in favor of stronger copyright protection, seeing it, as does Mexico, as a way to protect Quebec culture.) Furthermore, in the summer of 2009, the Conservative government reversed its opposition to public consultations and held a series of them on copyright reform across the country, including implementation of the Internet treaties.

The success of public opposition in delaying the bill is likely due to the fact that in December 2007 it was unclear how strong the opposition parties, particularly the Liberals, were. Facing a particularly contentious vote on whether to continue Canada's military involvement in the Afghan war in the winter 2008 session, the Conservative government, when confronted with unexpected public opposition, decided that discretion was the better part of valor and delayed the introduction of the bill. Whether such opposition would be successful going forward is unclear. However, the significant lesson from the ongoing Canadian case is that the diametrically opposed Liberal and Conservative bills demonstrate that U.S.-style protection of TPMs in Canada is not a foregone conclusion: if the possibility that Canada will implement DMCA-style TPM provisions has not disappeared, it has certainly been reduced (Haggart, n.d.).

Mexico

The explanation for why Mexico has yet to extend TPM protection in any form to non-software digital works is quite straightforward, involving a relative lack of interest in the issue from the main groups involved in making Mexican copyright policy. Until 2009, creators, represented in Mexico by collective management associations (discussed below), the copyright industries, the U.S. government, whose interests are aligned with the U.S.-based copyright industries, and Mexican copyright authorities have been much more concerned with traditional large-scale, commercial unauthorized copying of physical CDs, DVDs and books, which remains endemic in Mexico. Broadband Internet penetration rates in Mexico remain low compared to its northern neighbors, meaning that the scale of unauthorized online digital copying has been treated as a secondary issue.

With respect to those parts of the treaties that have been implemented, most importantly TPM protection with respect to computer software, U.S. pressure related to the negotiation and implementation of NAFTA and the fact that, for the U.S., software protection was seen as a pressing issue (Schmidt, 2009). This finding is

in keeping with traditional U.S. policy to link market access with IP reform. That the treaties were not implemented in 2003 and have yet to be implemented despite continuous demands from the U.S. government and industries (United States Trade Representative, 1989-2009; International Intellectual Property Alliance, 2005-2010) indicates both the extent to which U.S.-based industries and the U.S. government saw them as secondary, as well as the fact that the United States is unable to dictate the pace of reforms without a compelling carrot and stick.

There are indications that within the next five years (i.e., by 2015), as Mexican broadband penetration increases, Mexico will implement the treaties, and while these things are never certain, the institutional, political, and socioeconomic factors influencing the development of Mexican copyright, make conditions favorable for the adoption of U.S.-style rules regarding TPMs. Current official Mexican views on copyright incorporate the traditional view that it is an author's right that should be maximized, downplaying users' rights. For example, Indautor sees its role primarily as protecting and maximizing authors' and owners' rights. Since a new head of Indautor was hired in 2007, it has indicated a desire to implement the treaties; furthermore, its wave of hirings from the copyright industries suggests a certain comfort level with U.S. views on TPMs (Haggart, n.d.).

Furthermore, with the blessing of Indautor and the Mexican Institute for Industrial Property (IMPI), which enforces the commercial aspects of Mexico's copyright law, the main stakeholders in Mexican copyright policymaking, the collective management associations and the copyright industries have formed a Coalition for Legal Access to Culture (Notimex, 2009), with the goal of reaching common positions on issues of mutual concern. This alliance is significant given that historically Mexican copyright law has been treated, as in the United States, as a technical, apolitical matter best left to negotiations among the various parties, overseen by the government. Such a coalition would be unlikely in Canada, where copyright policy is viewed primarily not as a domestic-policy concern, but of greatest interest and value to foreign (i.e., U.S.) companies. While the groups involved in the Mexican coalition see TPM implementation as a secondary issue —more important for them is implementing rules governing the liability of Internet service providers for copyright violations carried out by their customers— the fact that these groups have called for the Internet treaties' full implementation, combined with their pursuit of "maximalist" copyright policies, further suggests sympathy with U.S.-style TPM rules.

With no other major groups opposed to strong TPM protection in Mexico, potential public interest is a wild card. Presently, copyright is not a pressing public issue, since inexpensive bootlegged works are freely available everywhere, and only about 9.8 percent of Mexican households had broadband Internet access in 2008 (Organization for Economic Cooperation and Development Broadband Portal, 2009). However, if awareness grows, digital copyright in general could easily become politicized, as it has in Canada. Already, some Mexican academics are trying to draw attention to the perils of maximalist copyright for access to information and culture. For example, the first Mexican academic book dealing with these issues

was published in June 2009 (López Cuenca and Ramírez Pedrajo, 2009: 346); and in March 2010, the Spanish Cultural Center hosted a three-day workshop, "Communities, Free Culture, and Intellectual Property," as part of the 2010 Mexico Festival, an annual arts and culture festival held in Mexico City.

Politicians also seem to be paying greater attention to copyright as an innovation and economic —rather than purely cultural— issue. In October 2008, the president of the Senate Science and Technology Commission, Francisco Castellón Fonseca, from the left-leaning PRD, argued to consider regulating copyright for its cultural and economic effects, since it has the potential to generate as much or more revenues than industrial property (i.e., patents) (Comisión de Ciencia y Tecnología del Senado de México, 2008). In March 2010, he criticized negotiations over the Anti-Counterfeiting Trade Agreement (ACTA), which at the time of writing of this chapter was being negotiated in secret among a host of developing countries, for its potential effects on individual freedoms (Castellón Fonseca, 2010).

However, whether copyright will become sufficiently politicized to affect traditional inter-industry negotiations remains unclear.

Analysis and Conclusion

An examination of these three mini-case studies through the lens of historical institutionalism demonstrates the extent to which the Canadian, U.S., and Mexican decisions to implement —or not— the Internet treaties, and the manner of implementation, have been shaped primarily by domestic, not regional, politics. They reveal no evidence of any strong regional institutional or regional-actor influences. To the extent that any clearly North American dynamic is at work, it involves a) NAFTA as a restraint on the U.S. ability to refuse its neighbors access to its markets if its policy proposals are not adopted; b) the U.S. and its industries as significant actors in the making of Canadian and Mexican public policy; and c) the degree to which NAFTA reshaped the Mexican copyright landscape, giving voice to actors who otherwise would not have been as important, and potentially affecting the course of future legislative reform. All of these dynamics, however, would probably be observed in U.S. relations with any country with which it has a trade agreement since the United States is at the center of what is a global, not regional, copyright regime. In short, NAFTA has not led to the regionalization of North American copyright regimes, which continue to be shaped significantly by domestic politics.

Domestically, each country is characterized by a unique constellation of interest groups, as well as the institutional frameworks in which they operate, leading unsurprisingly to situations in which what is considered legal in one country is illegal in another. One interesting point that emerges from this analysis is the extent to which the copyright debate in the United States is relatively self-contained, while those in Mexico and Canada are affected by U.S.-based actors promoting U.S.-derived solutions. Not only are the two countries responding to initiatives from a U.S.-influenced treaty, but actors in both countries also couch their arguments

for and against TPM protection in terms of the U.S. DMCA. This state of affairs reinforces the extent to which copyright policy in Mexico and Canada is driven, though not dictated by, the United States.

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