



FINDING THE TREASURE WITHOUT WALKING THE PLANK¹: THE CRITICAL NEED FOR PROPERLY TAILORED ANTI-PIRACY LAWS

Phil Portantino*

I. THE PROMO: AN INTRODUCTION TO AN INDUSTRY IN CRISIS

The events of 2007, with some dramatic tweaking, could have made a terrific summer blockbuster. The lives of thousands stood still as a Guild declared war on a powerful Alliance. As the conflict raged on, it affected the lives of countless American heroes. Jack Bauer² and Chuck Bartowski³ both disappeared for over a year. David and Conan revealed

¹ DISCLAIMER: Due to the subjects discussed, this article shamelessly employs metaphors and references to popular television shows and films. Reader discretion is advised.

* J.D. Candidate, 2014, Rutgers School of Law – Camden. B.A., The Catholic University of America, 2011. To my parents, thank you for your unwavering support in everything I do, except for my Minor in Philosophy; you kind of dropped the ball with that one. To my editing team, I appreciate all of your effort and dedication, and am deeply humbled to have had the opportunity to distract you from far more important work.

² '24' *Postponed By Writers Strike*, FOX NEWS (Nov. 8, 2007), <http://www.foxnews.com/story/0,2933,309397,00.html>.

³ Joel Keller, *NBC Post-strike: Some Series Return Soon, Chuck, Life, Heroes Return in the Fall*, HUFFPOST TV (Feb. 13, 2008, 6:02 PM), www.aoltv.com/2008/02/13/nbc-post-strike-some-series-return-chuck-life-heroes-return/.

their inner “barbarians” to the world.⁴ The American public went months without knowing the fate of a group of lost castaways⁵ and beloved office workers.⁶ The devastation spared no one.

Poetic license aside, the 2007 Writers Strike was a tremendously important event for the entertainment industry (and not just because NBC’s “Heroes” never fully recovered from it). The disagreement between the Writers Guild of America (WGA) and the Alliance of Motion Picture and Television Producers (AMPTP) was demonstrative of an industry-wide uncertainty—an uncertainty that still threatens today’s established television giants. “New Media” was the conflict’s nucleic issue, and to this day its potential is simultaneously feared and revered.⁷ While the underlying industrial motives require close analysis, the overly simplistic conclusion is that the AMPTP doubted its ability to replace the entertainment industry’s existing business model with one that could succeed in an industry dominated by New Media.⁸ In light of this doubt, the studios and networks forcefully objected to adapting the WGA’s Minimum Basic Agreement (MBA) to cover New Media content, leading to the decision to strike.⁹

There are arguably two factors driving the industry’s fear of New Media. The first is the natural protectionist response that is triggered when industrial progress threatens established firms. This alone, however, is not a prohibitive factor for the

⁴ Ben McGrath, *Dept. of Labor Strike Beards*, THE NEW YORKER, Jan. 7, 2008, available at http://www.newyorker.com/talk/2008/01/07/080107ta_talk_mcgrath.

⁵ Sheila Marikar, *Big Question for ‘Lost’: Will Short Season Help or Hurt?*, ABC NEWS (Jan. 31, 2008), <http://abcnews.go.com/Entertainment/story?id=4217839&page=1#.ULJmg4Z1jCY>.

⁶ *Bad Day at “The Office” as Strike Halts Taping*, NBC NEWS, (Nov. 7, 2007, 8:32 PM), http://www.msnbc.msn.com/id/21570821/ns/businessus_business/t/bad-day-office-strike-halts-taping/#.ULJmfoZ1jCY.

⁷ Bernadette A. Safrath, Comment, *How Improvements in Technology Have Affected the Entertainment Industry: Writers and Actors Fight for Compensation*, 26 TOURO L. REV. 115, 116 (2010).

⁸ *Id.* at 123.

⁹ *Id.* at 121.

entertainment industry, as is demonstrated by its history. Indeed, had this been the only factor motivating the industry's resistance, television's traditional business practices might have already been deserted. Unfortunately, one cannot discuss the modernization of the entertainment industry without the dark, ominous cloud of "Piracy" looming overhead.

The threat of "Internet Piracy" is considered by most networks the primary concern of moving their content to New Media.¹⁰ Piracy was the inevitable effect of traditional media meeting New Media, and it remains the principal obstruction to the industry's acceptance of media's progress. While piracy's success and its detrimental effects on the industry deserve appropriate analysis, it is safe to say that the individual networks and studios that comprise the AMPTP strongly support further means of protecting their property interests in the digital age. As recently as 2011, the AMPTP and others in the industry threw their full support behind two pieces of legislation that were meant to do just that: the Stop Online Piracy Act (SOPA) and the Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PIPA). However, after significant public outcry over questions of fair-use and free speech, Congress effectively killed the bills.

The ideal future and the principal goal should be to create a digital environment that will entice the established entertainment industry to fully embrace New Media and the culture that has formed around it. Assuming for now that the rise of internet piracy is the primary obstacle to obtaining this goal, efforts need to focus on tailoring current copyright law to attack that obstacle, aggressively but appropriately. To aid in those efforts, this article is structured in a specific way.¹¹ Section II will establish foundation, by summarizing the current structure of the industry and its historical trends, in order to better understand its future behavior. To adequately grasp the

¹⁰ See Brett Danaher et al., *Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy*, 29 MKTG. SCI. 1138, 1138 (2010) (quoting James Gianopulos, Co-Chairman, Twentieth Century Fox, stating, "We can't compete with free. That's an economic paradigm that doesn't work.").

¹¹ WARNING: SPOILER ALERT

ultimate goal, section III must discuss the current convergence between traditional and New Media, and discuss the industrial benefits of embracing the trend, specifically focusing on the television industry. Section IV must establish an appropriately comprehensive assessment of the piracy problem and how it prevents reaching the digital promised-land. Finally, section V will provide a critical analysis of the final language of the failed SOPA and PIPA bills to demonstrate that the most recent efforts to amend the copyright laws were inappropriately tailored to achieve the principal goal.

II. THE EXPOSITION – INDUSTRY BASICS AND BEHAVIORS

A. ENTERTAINMENT’S WORKING FORMULA

While it is alluring to assume that “entertainment” is a pure, unstructured expression of creativity and art, commercial television has long relied on a structured, two-pronged formula to create a successful industry. The combined practices of “content creation” and “content distribution” created a dominating business model for the major networks.¹² This dual model formed naturally as media progressed from early radio programming to present day broadcast television. While both practices were an integral part of media from its beginning, it was not until the networks internalized control over both that our modern understanding of the entertainment industry emerged. The following is a brief overview of each practice’s history and current incarnation in the television industry.

1. The Art of Content Creation

As the name suggests, content creation simply refers to investing in the creation, development, and production of new programming.¹³ Nowadays, it would be difficult to perceive

¹² Lisa Lapan, Comment, *Network Television and the Digital Threat*, 16 UCLA ENT. L. REV. 343, 344 (2009).

¹³ *Id.*

content creation as something less than a fundamental component for a major network. The content is the network's product after all.

Surprisingly, however, the early days of entertainment saw limited involvement by the networks in the creation of the content they distributed. The major television networks we know today (i.e. NBC, ABC, CBS) developed from early radio giants.¹⁴ The modern NBC network first formed through a series of mergers and acquisitions, resulting in the outright ownership of ten radio stations across the country.¹⁵ During the early days of radio, the content might have been confused with very long, regularly scheduled commercials with an above-average entertainment value. The reason for this is the fact that the networks were not creating the content; the advertisers were.¹⁶ Each broadcasting day was divided into entertainment "hours," and time slots were sold to individual advertising agencies that produced entertainment programs and integrated commercial advertising, before sending the content to the networks for distribution.¹⁷

The original model continued into the early days of television, until it was no longer feasible for the advertising agencies to control content creation. By the early 1950s, the significant costs of television had taken its toll on the industry's traditional practice, and the networks were forced to take over the creation of regular programming.¹⁸ With this development, the advertising agencies resorted to single-sponsorship of programs, such as "Texaco Star Theater,"¹⁹ before that practice

¹⁴ CHRISTOPHER H. STERLING & JOHN MICHAEL KITROSS, *STAY TUNED: A HISTORY OF AMERICAN BROADCASTING* 116 (Linda Bathgate ed., 3d ed. 2002).

¹⁵ *Id.* at 116–19.

¹⁶ *Id.* at 178 ("The [advertising] agency created both the ads and programs, contracted for talent and studio facilities . . . to produce programs . . . with integrated commercials . . . Madison Avenue had all but total control over network prime time and daytime programming.").

¹⁷ *Id.* at 177–78.

¹⁸ *Id.* at 178.

¹⁹ TEXACO STAR THEATER, <http://www.texacostartheater.com/> (last visited Jan. 28, 2014).

also became too expensive.²⁰ Presently, the network enjoys considerably more control over the content it airs, as it shoulders most of the necessary production cost for each project it agrees to air.²¹ In fact, the development of any one program is wholly controlled by a single media conglomerate that exercises control over both the studio creating the content and the network that will air it.²²

2. The Pitch of Content Distribution

Much like its counterpart, content distribution is self-explanatory. The network is responsible for making its original and licensed content available to the public audience. Unlike content creation, however, the paradigm of content distribution has not changed much since the networks were first conceived in radio's heyday. Network content is delivered to the audience in a constant, predetermined stream.²³ That is to say, content is continuously delivered to the audience, but the audience has no control over which content it receives. This approach has dominated the industry, not just because of the market benefits, but also because it was what technology feasibly allowed. Technologically, up until the digital era, content distribution was still operating on the unilateral "transmission-reception" model, which was birthed at the dawn of broadcasting.²⁴

However, it would be unforgivable to make a Jan Brady²⁵ out of the traditional model's benefits to modern networks. While technology speaks to where the distribution model came from,

²⁰ STERLING & KITROSS, *supra* note 14, at 178.

²¹ AMANDA D. LOTZ, *Introduction* to BEYOND PRIME TIME: TELEVISION PROGRAMMING IN THE POST-NETWORK ERA 3 (Amanda D. Lotz ed., 2009).

²² *Id.*

²³ Lapan, *supra* note 12, at 345.

²⁴ STERLING & KITROSS, *supra* note 14, at 33–38 (explaining the fundamental development and limitations of transmitters and receivers).

²⁵ Jan Brady was a character on the classic American television program, "The Brady Bunch," which ran from 1969–1974. Jan was meant to be a representation of the quintessential "middle-child"—often out of place, insecure, underappreciated, and overlooked.

the market benefits shed light on the industry's desire to adhere to it in the future. The traditional model, which is also known as "appointment viewing," opposes audience control over the distributed content; the audience has access only to its desired content when the network chooses to air it.²⁶ The traditional "appointment viewing" model has two market benefits to it: control over timing and control over location. First, control over when content is shown allows the network to maximize advertising revenues by selling times that correspond with the largest audiences.²⁷ Second, control over where content is shown allows the network to approve distribution to specific geographical areas, making licensing agreements more valuable.²⁸ The benefits of this model would, understandably, be well-worth preserving in the mind of industry leaders.

B. AN INDUSTRY BUILT ON PROGRESS

When the natural progress of an industry threatens the established operational model, it is common for the existing industry to ignore the development, or even actively undermine it. One could imagine a "best case scenario" where an industry performs an "Elmer Fudd" styled tip-toe,²⁹ slowly inching forward, overcoming the disruption by slowly adapting to the progress. Conversely, in a "worst case scenario," the industry might adopt a search-and-destroy method, becoming the "Wile E. Coyote" to progress's "Road Runner."³⁰ The fact is, even the most successful industry leader is capable of falling behind by failing to adapt to progress that disrupts its business model.³¹

²⁶ Lapan, *supra* note 12, at 345.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Image Of Elmer Fudd Tip-toeing*, http://3.bp.blogspot.com/_-E_Socp-ies/TAUPqjIZnDI/AAAAAAAAADcs/uSpFN3ePi1Q/s1600/elmer.jpg (last visited Jan. 28 2014).

³⁰ *Image Of Coyote Hunting Road Runner*, <http://yesteryearremembered.com/wp-content/uploads/2011/06/road-runner-wile-e.-coyote.jpg> (last visited Jan. 28, 2014).

³¹ CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* 32 (1997).

This is not always malicious or hostile behavior; sometimes it simply involves an inability to internalize any progress that does not sustain the current industry practices.³²

To its credit, the entertainment industry has proven the exception to this behavior at times by demonstrating a willingness to internalize disruptive progress. The most dramatic example of this behavior would be the major developments that accompanied the transition from radio to television. The changes were swift and substantial. By 1945, the four major broadcasting networks controlled 95% of all national radio stations, positioning them to act on the growing proposals for national television networks.³³ Before the end of the decade, it became clear to most that the “Golden Age of Radio” would soon be a nostalgic origin story in an exciting future dominated by television.³⁴ Most importantly, the surprising enthusiasts leading the charge to ditch the old and embrace the new were the already established major radio networks.

The existing industry players were in the optimal position to develop the new medium for a number of reasons, all of which they recognized. First and foremost, the networks were established and ready to act when the time came.³⁵ When television revealed itself as a new market, the radio networks were poised to shift personnel, funding, and expertise from one medium to the next.³⁶ Second, creating a successful industry from a new form of media would doubtlessly be expensive. New technology and networks required installation, and the investments required would create a substantial loss in the early years.³⁷ The established networks were in a position to absorb these losses and invest for the long term.³⁸ More than sixty

³² See *id.* “In established firms, expected rewards, in their turn, drive allocation of resources toward sustaining innovations and away from disruptive ones.” *Id.*

³³ STERLING & KITTROSS, *supra* note 14, at 283.

³⁴ *Id.* at 284–85.

³⁵ *Id.* at 287.

³⁶ *Id.*

³⁷ *Id.*

years later, the television networks again find themselves positioned to take advantage of monumental changes in media. If the success of the first transition is any indication, the industry would be justified in fighting to remove any obstacles preventing a repeat performance.

III. “BUT WHAT’S MY MOTIVATION?”³⁹ – THE RISE AND BENEFITS OF CONVERGENCE CULTURE

Hulu.com, an online video service launched in 2007 by NBCUniversal, operates under the slogan “Watch your favorites. Anytime. For free.”⁴⁰ Leave it to the geniuses at Hulu to come up with the pithiest way to explain the tangible benefits of the culture that has formed around the rising New Media. However, for our purposes, it is important to explore how those benefits transfer to the networks in order to accept this transformative culture as “the future” of entertainment. This section will attempt to illuminate the value of New Media, with a particular focus on the culture that accompanied it, known as “convergence culture.” This section will explore this concept of convergence, further elaborate its potential benefit to the consumers, and clarify how the entertainment industry can exploit the changes that accompany convergence to create a new and sustainable business model for the future.

³⁸ In particular, the major broadcasters at the time were in positions to, either, construct “owned & operated” stations in selected markets (NBC & ABC), or buy the limited selection of stations that emerged in the early days of television (CBS). *Id.* at 288. Without this capability the rise of national networks would not have been possible.

³⁹ This alludes to a well-known quote by Alfred Hitchcock: “When an actor comes to me and wants to discuss his character, I say, ‘It’s in the script.’ If he says, ‘But what’s my motivation?’, I say, ‘Your salary’.” See EVE LIGHT HOTHANER, *HOLLYWOOD DRIVE: WHAT IT TAKES TO BREAK IN, HANG IN & MAKE IT IN THE ENTERTAINMENT INDUSTRY* 334 (2005).

⁴⁰ See *Digital Media – Hulu – Watch Your Favorites. Anytime. For Free*, NBCUNIVERSAL, http://www.nbcumv.com/mediavillage/digitalmedia/freehtml?path=contents/html/DigitalMedia/Hulu_fh.xml (last visited Jan. 28, 2014).

A. GRASPING THE CULTURE OF CONVERGENCE

In its simplest form, convergence is the current process of technological development, which will result in the combination of television and computers into a single device for consumers.⁴¹ However, convergence is anything but “simple,” as is demonstrated by its frequent label as a “culture.” Henry Jenkins, a scholar in various aspects of media and popular culture, believes that convergence encompasses more than a technological singularity and affects much more than our TV sets.⁴² In his eyes, “convergence” can indicate a technological, industrial, cultural, or social transformation; however, the interpretation depends on who is asked.⁴³

Perhaps it’s because of the multiple subjective interpretations of the concept that Jenkins sees the convergence movement primarily as a transformation in the individual’s perception of his or her connection with others.⁴⁴ Therefore, the rise of New Media was accompanied by a variety of societal benefits, which varied based on the individual users. As a result, as Web 2.0 grew with a generation, a culture grew around it based on consumer participation, interactivity, connectivity, and openness.⁴⁵

Convergence has powerful cultural connotations.⁴⁶ Convergence offers unimaginable technological advancements.⁴⁷

⁴¹ Lapan, *supra* note 12, at 360.

⁴² HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 2 (2006).

⁴³ *Id.* at 2–3.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 179. “Web 2.0” is a term used to describe a “revitalization of the digital economy.” This period saw the rise of online enterprises that built successful business operations based on the concepts that would dominate in the rising convergence culture.

⁴⁶ See Malin Wahlberg, *YouTube Commemoration: Private Grief and Communal Consolation*, in THE YOUTUBE READER 218, 218 (Pelle Snickars & Patrick Vonderau eds., 2009) (discussing a growing cultural trend to use digital media to create video memorials and be comforted on a larger scale).

⁴⁷ See Pelle Snickars, *The Archival Cloud*, in THE YOUTUBE READER 292, 293 (Pelle Snickars & Patrick Vonderau eds., 2009) (explaining the relationship

Convergence creates new societal perceptions.⁴⁸ However, the question remains how this cultural development manifests in tangible and beneficial changes in entertainment and media. Of the many implications associated with the ongoing convergence of new and traditional media, it should not be difficult to identify the bottom-line: the industry's bottom-line. The fact is, due to these cultural and technological developments, television advertising revenue could explode in an industry dominated by New Media. Three factors support such an assessment. First, there is an evident preference for New Media as a means to meet the market demand. Second, New Media's most significant convergence qualities—interactivity and connectivity—create the environment necessary to create and grow valuable fan cultures (a.k.a. “fandoms”). Lastly, the nature of digital content and advertising shifts the value from the time-slot to the audience, which in turn gives the network further freedom when funding their programming.

B. “THAT’S MY SPOT”:⁴⁹ CONVERGENCE AND AUDIENCE DEMAND

To say that New Media has the potential to change audience behavior would be like saying that Pinky and the Brain occasionally entertain the possibility of world-domination.⁵⁰

between digital video sites and advancements in the massive digital storage and distribution made possible by “cloud computing”).

⁴⁸ See Patricia G. Lange, *Videos of Affinity on YouTube*, in THE YOUTUBE READER 70, 71 (Pelle Snickars & Patrick Vonderau eds., 2009) (detailing the rise of digital videos meant to create “feelings of connections between people” by “establish[ing] communicative connections . . . [between] members of a social network”).

⁴⁹ Quoting Sheldon Cooper (played by actor Jim Parsons) in the popular CBS television comedy *The Big Bang Theory* (Warner Bros. Television television broadcast 2007–present). This reoccurring joke refers to Sheldon’s obsessive protection of his spot on the couch, which exceeds all rational thought (despite his attempt to justify it). His territorial behavior often damages his social standing with his friends, and ultimately himself. Unfortunately, lest something substantial is accomplished, the Entertainment Industry might soon make the same damaging mistake.

⁵⁰ *Pinky and the Brain* (Warner Bros. Entm’t 1995–98). *Pinky and the Brain* was a beloved children’s cartoon that aired on the WB from 1995 to 1998,

The technological possibilities afforded by developments in digital media shed light on two realities concerning the relationship between consumers and the entertainment industry: consumer demand exists in spades, and traditional media is not the best way to satisfy it.

One advantage the entertainment industry has over other industries is that consumer demand for its product is relatively constant.⁵¹ The demand rests on several factors, none of which can be controlled, enhanced, or diminished by any one player in the industry.⁵² Indeed, plain common sense tells us that no single television program can satisfy a single consumer's desire to be entertained.

That being said, it is apparent that digital entertainment is uniquely capable of meeting the aforementioned demand. However, before delving into how digital entertainment is better suited, it is important to put this reality into perspective. On this point, nothing speaks louder than numbers, which show an audience exodus that would impress Charlton Heston.⁵³ In the past few years, the major television networks have seen a significant decline in viewership, while audiences for digital content have exploded.⁵⁴ There has been a 27% increase in

which followed the adventures of two white lab mice. In every episode, one mouse, named "Pinky," would ask the other, "Brain," what they were going to do that night. Without fail, Brain would respond, "the same thing we do every night Pinky—try to take over the world!" *Id.*

⁵¹ Jonathan Handel, *Uneasy Lies The Head That Wears The Crown: Why Content's Kingdom Is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597, 610 (2009).

⁵² See *id.* Demand for entertainment largely relies on (1) the cost of that entertainment to the consumer and (2) the amount of leisure time the consumer has to devote to the entertainment. *Id.* These factors are unlikely to be affected by studio action. *Id.*

⁵³ See THE TEN COMMANDMENTS (Paramount Pictures 1956) (Charlton Heston plays the role of Moses in a feature length depiction of the biblical exodus of the Jewish people out of Egypt and into the Promised Land).

⁵⁴ Surely, a significant influence on this decline has been the rise of cable television and the availability of hundreds of channels. However, the effects of cable TV have been felt by the major networks for decades, while more recent declines are likely associated with more recent influences, such as the rise of online content.

viewership of digital content in the last year, with 35% of users claiming to have seen at least one television program online and 20% watching primetime programming online regularly.⁵⁵ Most significantly, 50% of online consumers use streaming content as a means to watch missed television programming, while 50% of online consumers use it as a substitute for watching content through traditional programming.⁵⁶

This striking increase in the use of online content draws attention to some of the inherent characteristics of New Media, which are better suited to meeting consumer demands. One of the most foundational of these characteristics is the markedly smaller transactional costs.⁵⁷ The nature of digital content allows for the quick and cheap production of programming and its easy and inexpensive distribution.⁵⁸ Digital distribution is global and instantaneous, with virtually zero marginal cost.⁵⁹ This cheap production translates to cheap consumption. As the cost of distribution declines, the product's inherent value declines, and competition drives the cost of the product closer to the value.⁶⁰

Just as significant as the lower costs, New Media affords a previously unseen level of freedom to the consumer.⁶¹ This

⁵⁵ Lapan, *supra* note 12, at 355–56.

⁵⁶ *Id.* at 356.

⁵⁷ Handel, *supra* note 51, at 612–13.

⁵⁸ New Media's ability to facilitate the creation and distribution of content was noted in 2008, when TV Director Doug Liman remarked that the developments of New Media could all but replace traditional studio production. Patrick Vonderau, *Writers Becoming Users: YouTube Hype and the Writer's Strike*, in *THE YOUTUBE READER* 108, 110 (Pelle Snickars & Patrick Vonderau eds., 2009) (“[I]f the last strike was remembered for the studios attempting to show they could create programming without writers, this would be ‘the strike where the writers show they can do it without the studios.’”).

⁵⁹ Lapan, *supra* note 12, at 346.

⁶⁰ Handel, *supra* note 51, at 612–13.

⁶¹ That is to say that the lower distribution cost is ideally suited to meet the desire for lower consumer cost, which is one factor driving consumer demand. On the other hand, the availability of digital content allows consumers to view content at their convenience, which is the other factor driving consumer demand.

quality of online video stands out as the most striking contrast with traditional media. As was discussed earlier, traditional content distribution relies on “appointment viewing.”⁶² Under this model consumers were forced to adjust the demands of their life to ensure that their leisure time coincided with the timing of their desired content. The nature of New Media completely dispels these consumer limitations. On-demand viewing is a major advantage in New Media, allowing the audience to select the content they wish to see, at the time they are free to see it.⁶³ In an industry that consistently sees unmet consumer demand, New Media provides the solution by ensuring that content is available whenever the consumer is free to view it.

C. CULTIVATING FANDOMS

A medium that can provide a culture based on consumer participation, interaction, and connection on a massive scale carries with it the potential for the most enthusiastic fans since Ralphie received his “Little Orphan Annie Decoder Ring.”⁶⁴ Television content can live or die depending on the loyalty of its fans. Indeed, because a strong fan base is so critical to a program’s long-term survival, the industry has taken to classifying viewers based on their level of devotion to a particular show.⁶⁵ The most devoted fans—those the industry refers to as “Loyals”⁶⁶—carry tremendous economic value to the

⁶² Lapan, *supra* note 12, at 345.

⁶³ *Id.* at 346.

⁶⁴ A CHRISTMAS STORY (Metro-Goldwyn-Mayer 1983) (depicting a common practice of early radio programs, after the film’s main character receives a promotional toy that allows him to participate in a secret meeting of “Annie’s Secret Circle” and decode “Annie’s Secret Message”).

⁶⁵ JENKINS, *supra* note 42, at 74.

⁶⁶ *Id.* Loyals are not just television fanatics. They are particular about the series they watch and form long-term commitments to those programs. *Id.* Loyals do not simply watch shows; they watch series. *Id.* And while they tend to watch fewer hours of television than the general public, their consistent dedication to particular programs makes them the ideal target for advertisers.

major networks.⁶⁷ However, in the past, a program's ability to form a strong base of Loyals was limited by appointment viewing.⁶⁸ Since appointment viewing restricts access to the content, it follows that it also limits the potential audience size, which in turn limits the size of any potential "fandom."⁶⁹

Due to the availability it provides, New Media does not suffer from the same audience limitations that traditional media does. However, what is more important is the presence of basic social networking capabilities in many New Media sources.⁷⁰ These capabilities allow individual viewers to "identify as a group with shared interests."⁷¹ By allowing users to share videos and comments, form groups and friendships, and compare novel work based on the original content, New Media sources provide networks with Loyal-plantations, complete with the tools and environment necessary to cultivate strong fan cultures.⁷²

⁶⁷ *Id.*

According to a study done by Initiative Media, the average network program was identified as a 'favorite series' by only 6 percent of its viewers. But, in some cases, as many as 50 or 60 percent of views may rank a program as their favorites. Early evidence suggests that these loyals have a higher rate of brand recall . . . [and] are twice as likely to pay attention to advertisements and two to three times more likely to remember product categories than more casual viewers . . . [A]dvertisers are increasingly realizing that they may be better advised investing their dollars behind shows that have a high favorability . . . [and] the media industry is trying to generate content that will attract loyals . . .

Id.

⁶⁸ Lapan, *supra* note 12, at 345.

⁶⁹ The network practice of dictating when the audience can receive the desired content obviously excludes audience members who are not capable of viewing that programming during the scheduled time. *Id.*

⁷⁰ Rick Prelinger, *The Appearance of Archives*, in *THE YOUTUBE READER* 268, 271–72 (Pelle Snickars & Patrick Vonderau eds., 2009).

⁷¹ *Id.* at 272.

⁷² *Id.*

D. DON DRAPER'S⁷³ DREAM COME TRUE

Historical advertising trends may surprise most lay-persons. Many people would assume that the transition from radio to television in the 1950s caused a decline in advertising revenue, at least at first. The networks were spending a great deal of money facilitating this transition after all, and as a new medium it would be reasonable to believe that the advertisers would be hesitant. Indeed, this could not be further from reality. The development of traditional media demonstrated—immediately and dramatically—the financial potential of adapting to technological and cultural developments. Between 1952 and 1960, television's share of advertising expenditures increased by 6 percent.⁷⁴ This may appear to be anemic growth over an eight-year period, but when translated into profits, television's income from advertisements increased by \$1.146 billion dollars.⁷⁵

Moreover, while the growth of television advertising exploded, the gentle decline of radio advertising cushioned any financial blow. In fact, while radio's share of advertising expenditures declined from 1952 to 1960 by 3%, the increase in advertising across the board actually resulted in a growth in profits by \$68 million.⁷⁶ The history of the major networks demonstrates that they are capable of dramatically breaking into new markets, without a significantly painful decline of the older practices.

The essential component underlying television advertising lies in knowing how to target the audience. In order to maximize advertising revenue, television networks have sought to provide advertising agencies two key elements: the right viewers and the most viewers. This industry practice developed naturally as advertising agencies sought to target time slots based on audience demographics and “primetime”

⁷³ “Don Draper” is played by actor Jon Hamm and is the main character from the popular AMC program *Mad Men*, which centers on the work of an advertising agency in the mid-twentieth century. *Mad Men* (AMC Studios television broadcast 2007–present).

⁷⁴ STERLING & KITROSS, *supra* note 14, at 362.

⁷⁵ *Id.*

⁷⁶ *Id.*

programming.⁷⁷ The former developed during the 1950s, as the Nielsen⁷⁸ research data became more reliable, allowing advertisers to demand detailed information regarding the audience demographic for each program.⁷⁹ Knowing the age, sex, race, marital status, and average income of the television audience of any given program was considered “crucial to product sales decisions.”⁸⁰ For example, “when research demonstrated that many children watched the Lucille Ball program, a tobacco company sponsor dropped the program . . . [because] it did not reach enough smokers to pay off.”⁸¹ Ultimately, because advertisers became focused on who their products were reaching—not just how many people they were reaching—a network’s ability to form an accurate picture of each program’s audience could translate into setting higher prices for particular advertisers.

Of course, to attract advertisers, television networks must be able to deliver the largest audience possible (hopefully without having to construct “Satellite-Five”).⁸² This business necessity is the basis for the entertainment concept of “prime time.” Prime time refers to those timeslots during the broadcasting schedule

⁷⁷ See *id.* at 179, 385.

⁷⁸ Nielson Media Research is a leading organization in television audience sampling. Presently, through the use of Nielsen People Meters (NPMs), the group collects demographic data and viewership trends representative of the national television audience. As of 2004, the Nielsen group had NPMs in over 5,000 American households. Ron Shachar & Bharat N. Anand, *The Effectiveness and Targeting of Television Advertising*, J. ECON. & MGMT. STRATEGY 363, 366–67 (2004).

⁷⁹ STERLING & KITROSS, *supra* note 14, at 384–85.

⁸⁰ *Id.* at 385.

⁸¹ *Id.* at 364.

⁸² “Satellite Five” is a plot device used in three episodes of the show “Doctor Who.” See *Doctor Who: Bad Wolf* (BBC television broadcast June 11, 2005). In one of those episodes, Satellite Five is a space station that broadcasts programs of such mind-numbing depravity that the citizens of the Fourth Great and Bountiful Human Empire have become enslaved by their televisions. See *id.* While this is a scary thought for most, it is possible the episode’s premise was derived from an unknown network’s plans to solve the inherent problems of “appointment viewing.”

that see the greatest volume of television viewers.⁸³ According to Nielson, traditional prime time falls between eight and eleven o'clock in the evening and is further broken into small sub-periods according to age group.⁸⁴ This time period is so critical to successfully optimizing advertising revenue that a network's success or failure for a given season often centers on an analysis of its sales during prime time.⁸⁵ This obsession with prime time performance has led to an oddly inflated financial arrangement. As all the networks are competing for a larger piece of the prime time audience, they constantly struggle to create more inclusive programs of the greatest quality.⁸⁶ Consequently, the television programs scheduled in the prime time slots are also the programs with the most expensive budgets.⁸⁷ However, as the nature of traditional television limited the number of commercial slots during these evening prime time hours, networks that could attract the largest prime time audience could charge much higher commercial fees for advertising.⁸⁸

Television advertising in the digital age has the potential to optimize audience targeting while bringing the financial limitations of the traditional "prime time" practice under control. Some believe that one of New Media's most dramatic effects on traditional television will be making prime time programming obsolete.⁸⁹ The key to prime time's value is the

⁸³ *Prime Time*, THE MUSEUM OF BROADCAST COMMUNICATIONS, <http://www.museum.tv/eotv/primetime.htm> (last visited Jan. 28, 2014).

⁸⁴ *What Time is Really Primetime*, NIELSEN (Sept. 13, 2011), <http://www.nielsen.com/us/en/newswire/2011/what-time-is-really-primetime.html>.

⁸⁵ See Joe Flint, *ABC and the Art of Selling Ad Time*, L.A. TIMES (June 9, 2010, 5:52 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/abc-makes-gains-in-ad-sales.html> (assessing the success of ABC's 2009–10 season, largely through a comparison of prime time advertising sales).

⁸⁶ LOTZ, *supra* note 22, at 2.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Tiffany Vogt, *The Collapse of Primetime Television: Where Are Television Shows Going Wrong*, THE TV ADDICT.COM (Feb. 23, 2012), <http://www.thetvaddict.com/2012/02/23/the-collapse-of-primetime-television-where-are-television-shows-going-wrong/>.

concept of appointment viewing. Appointment viewing is responsible for the synchronization of networks' highest-quality programming with the optimal viewing hours. But New Media's "time-shifting" capability displaces the notion of "optimal viewing hours" and, consequently, the feasibility of appointment viewing.⁹⁰ With New Media, time does not restrict the composition of the audience, and viewers become free to select their programs based on the quality of the content, rather than its compatibility with their schedule.⁹¹ In such a market, networks are not compelled to pump funding into the three-to-six programs that air during prime time each night; instead they would be free to spread the funding around, since the television audience can select program they like, rather than programs that are conveniently scheduled.

While the notion of prime time becomes a relic in industry dominated by New Media, the emerging convergence culture is an advertiser's dream come true, in so far that it has the potential to perfect demographic targeting. New Media is interactive in a way traditional media is not. In 2007, consumer interactivity was at an all-time high; 43% of all media time was spent with interactive channels.⁹² Advertisers and content providers are realizing that "[d]igital advertising can be both more targeted and more trackable, resulting in a higher return on marketing investment."⁹³ "Digital has clearly changed the game,"⁹⁴ and Hulu is clearly winning that game. Featuring seventeen different types of advertisement formats to choose from, Hulu.com has designed each ad to let the advertisers know

⁹⁰ Lapan, *supra* note 12, 345–46 ("Technology began to erode the appointment viewing model '[T]ime-shifting' devices . . . allow viewers to record a television program and replay it at their convenience").

⁹¹ Vogt, *supra* note 89.

⁹² Joe Burton, *A Marketer's Guide to Understanding the Economics of Digital Compared to Traditional Advertising and Media Services*, AM. ASS'N ADVER. AGENCIES, INC., 8 (2009), available at <https://ams.aaaa.org/eweb/upload/catalog/pdfs/mg18.pdf> (citing a North American Technology Benchmark Survey from 2007).

⁹³ *Id.*

⁹⁴ *Id.*

which programs are delivering their desired consumers.⁹⁵ For example, one format offers the ability to “track an event,” which “provide[s] [the advertiser] as much or as little information on each user’s experience as [it] desire[s].”⁹⁶ Ultimately, while New Media devalues the “time slot,” it increases the value of the content. Absent the notion of “prime time,” there is no longer a need to focus on creating three-to-six high quality shows to fight with the other networks over the available audience during those hours; instead, the financial benefit lies in creating as many quality shows as possible to meet all possible fan-bases.

IV. THE ANTAGONIST: BATTEN-DOWN THE DIGITAL HATCHES

A. HISTORIC INFLUENCES ON DIGITAL PIRACY AND ANTI-PIRACY LEGISLATION

Since the earliest commercial use of water-ways, industry has been plagued with the rise of ship based thieves **[FAST-FORWARD]** . . . And thus began the First Barbary War between the U.S. and **[FAST-FORWARD]** . . . And thus was quashed the Martian-traders Rebellion of 3023 **[REWIND]** . . .

.

⁹⁵ See *Specs - Hulu Advertising*, HULU.COM, <http://www.hulu.com/advertising/specs> (last visited Jan. 28, 2014). For example, the site’s “Ad Selector” option provides the viewer with the ability to choose the advertisement they want to see, which tells the advertiser whether or not the program attracts their consumers. *Specs: Ad Selector*, HULU, <http://www.hulu.com/advertising/specs/ad-selector> (last visited Jan. 28, 2014). The “Social Connect” option is a common feature for websites now, but would allow the viewer to share advertisements they liked on their social networking pages, making successful consumer targeting exponentially more valuable to the advertiser. *Specs: Social Connect*, HULU, <http://www.hulu.com/advertising/specs/social-connect> (last visited Jan. 28, 2014). “Branded Entertainment Selector” allows the viewer to select “whether to watch a long-form commercial, or to view the show with standard commercial breaks,” providing further information about each program’s audience to the advertiser. *Specs: Branded Entertainment Selector*, HULU, <http://www.hulu.com/advertising/specs/branded-entertainment-selector> (last visited Jan. 28, 2014).

⁹⁶ Tom Tate, *Interstitial Element Guidelines*, HULU (Nov. 29, 2012), <https://hulu.box.com/hulupiselementguidelines>.

Television piracy is not a particularly new phenomenon. Traditionally, one common legal approach to television piracy was to define the practice by the actions of those on the receiving end. That is to say, the “pirates” were those individuals that sought to receive television programming that they had not paid for.⁹⁷ Consequently, even when the perpetrator was merely providing the ability to receive the free content, the law would penalize the attempt to assist with the reception of the content;⁹⁸ this approach punishes the facilitator as a middle-man, not as a primary evildoer in its own right.⁹⁹ For the law, the true crime was consuming the content and, extending from this, “assist[ing] in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so . . . by law.”¹⁰⁰

With each development in media, the entertainment industry has been faced with the challenge of piracy. The anti-piracy laws established in the final decades of the twentieth-century were used to protect the content providers from the unauthorized use of cable programming and satellite services.¹⁰¹ This prohibition extended to those people or organizations that provided the ability to receive the content without authorization. Yet, despite the well-laid foundation, the public reacts in violent opposition when this statutory language is translated into the realm of New Media. In fact, the outrage has been recognized as a generational response.¹⁰² There is an obvious explanation for this generational divide; the outraged generation was raised in a convergence culture. Consumers in the digital age have

⁹⁷ See Carlson S. Walker, Comment, *A La Carte Television: A Solution To Online Piracy?*, 20 COMM'LAW CONSPECTUS 471, 474 (2011) (citing *Cont'l Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1047 (9th Cir. 1997)).

⁹⁸ *Cont'l Cablevision, Inc.*, 124 F.3d at 1047.

⁹⁹ As we will see, this approach has not changed. Modern piracy legislation, such as SOPA and PIPA, continue to punish “facilitators” as middle-men; an approach that is incompatible with the most beneficial qualities of New Media.

¹⁰⁰ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 633, 98 Stat. 2279 (1984).

¹⁰¹ Walker, *supra* note 97, at 475–76.

¹⁰² Handel, *supra* note 51, at 614.

developed a fundamentally different emotional connection with New Media. Convergence creates a form of media that acts not only as a source of entertainment, but also as a forum for socialization and a means of participation with groups that form around the entertainment. Restrictions on the consumption of digital content are often seen as limitations on this culture.

B. THE DREAD PIRATE ROBERTS¹⁰³ WITH A HIGH-SPEED CONNECTION

Although many forms of entertainment piracy exist today due to the technological advancements of the digital age, modern television piracy exists primarily in two forms: peer-to-peer file sharing (P2P) and streaming video.¹⁰⁴ P2P, at its core, allows intending infringers to do three things. First, it allows users of “torrent sites”¹⁰⁵ to make digital copies of movies and television shows, which are on their own computers, available for copying by other users on the site.¹⁰⁶ Second, it allows intending infringers to search the computers of other users for files, including copies of movies and television shows.¹⁰⁷ Finally, it facilitates the transfer of exact copies of files, including copies of movies and television shows, from one computer to another.¹⁰⁸ In a nutshell, P2P allows the infringer to retrieve an entire television show or film from another user and store it on his or her own hard-drive.¹⁰⁹

¹⁰³ THE PRINCESS BRIDE (20th Century Fox 1987) (referring to a character who is so feared and mysterious that invoking his name is enough to elicit the desired reaction).

¹⁰⁴ Walker, *supra* note 98, at 478.

¹⁰⁵ *Id.*

¹⁰⁶ *Types of Content Theft*, MOTION PICTURE ASS’N OF AM., INC., <http://www.mpa.org/contentprotection/types-of-content-theft> (last visited Jan. 28, 2014).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Walker, *supra* note 98, at 478.

Streaming video, on the other hand, is a little more complicated. One form of streaming video actually comes in the form of live television.¹¹⁰ This is done either through a Unicast site that streams the video to the viewer from a centralized server or through a peer-to-peer network that streams the content from user-to-user.¹¹¹ However, on a broader scale, streaming video piracy simply refers to any unauthorized viewing of content by streaming video from a host site.¹¹² Typically, an infringing site can perform one of two actions. The site is either a “host site” or an “indexing (or linking) site.” A host site provides the streaming content to the viewer. Unlike P2P file-sharing, the video file is not downloaded onto the viewer’s hard-drive.¹¹³ The host site streams the video from its servers directly to the viewer’s web-browser. In contrast, indexing sites do not provide the unauthorized videos. Instead, a linking site provides a directory of hyperlinks, which allows the user to access additional sites that host their desired content.¹¹⁴

There are some advocates who suggest that online piracy is a relatively benign issue. Indeed, some argue that it is actually beneficial, or, at least, that its societal benefits outweigh any harm done to the industry. One such argument typically involves the assertion that piracy would improve the quality of films and television, since consumers would be more likely to pay to watch high quality content immediately, rather than wait for a free pirated version.¹¹⁵ However, this belief proves baseless when one considers that the top pirated television program of 2012 was HBO’s “Game of Thrones,”¹¹⁶ a show that received

¹¹⁰ *Id.* at 479.

¹¹¹ *Id.*

¹¹² *Types of Content Theft*, *supra* note 106.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Seamus Light, *Why Internet Piracy May Actually Benefit America*, POLICYMIC (July 2, 2012), <http://www.policymic.com/articles /10548/why-internet-piracy-may-actually-benefit-america>.

¹¹⁶ *Game Of Thrones Tops TV Show Internet Piracy Chart*, BBC NEWS: TECHNOLOGY (Dec. 24, 2012, 7:56 PM), <http://www.bbc.co.uk/>

thirteen Primetime Emmy Award nominations the year before.¹¹⁷

Others suggest that making pirated copies available has the potential to help the television and film industries. These individuals argue that there is an “additive” benefit to free online content; in other words, they believe that, as free content increases in availability, it acts as a promotion for the copyright holders and increases the likelihood that consumers will pay for additional content.¹¹⁸ However, this trend is more common in other forms of media and has not translated well into the television and film industries.¹¹⁹

When all other arguments fail, there is always a plethora of angry users who try to rationalize a sense of entitlement. These users tend not to be media, legal, or industry scholars. However, despite the overwhelming potential, the development of Web 2.0 and the effects of the convergence culture have created a generational zeitgeist that struggles with the concept of copyright protection to an extreme and exasperating extent.¹²⁰ The inevitable result of a culture based on great openness is a natural hostility toward any attempt to restrict.

news/technology-20836739 (citing *Game Of Thrones Most Pirated TV-Show of 2012*, TORRENTFREAK (Dec. 23, 2012), <http://torrentfreak.com/game-of-thrones-most-pirated-tv-show-of-2012-121223/> (reporting that a single episode of the show was illegally downloaded 4,280,000 times, which is slightly higher than the reported audience in the United States)).

¹¹⁷ James Hibberd, *Emmy Nominations 2011: 'Boardwalk Empire,' 'Game of Thrones' Score Drama Series Nods*, ENT. WEEKLY (July 14, 2011, 8:42 AM), <http://insidetv.ew.com/2011/07/14/emmy-nominations-2011/>.

¹¹⁸ OpenRightsGroup, *Gaiman On Copyright Piracy And The Web*, YOUTUBE (Feb. 3, 2011), http://www.youtube.com/watch?feature=player_embedded&v=oQkyt1wXNII#! (featuring poet Neil Gaiman discussing his increase in book sales as his content was made available online through pirated copies).

¹¹⁹ Lapan, *supra* note 12, at 356.

¹²⁰ See David Pogue, *The Generational Divide In Copyright Morality*, THE N.Y. TIMES (Dec. 20, 2007, 12:30 PM), <http://pogue.blogs.nytimes.com/2007/12/20/the-generational-divide-in-copyright-morality/> (detailing the author's experience when posing a series of hypotheticals to a group of 500 people, where only two people acknowledge a moral dilemma in downloading an illegal copy of a movie or show, based entirely on the desire to own it).

The inevitable result of a culture based on great connectivity is a natural hostility toward any separation. This is by way of saying that any attempt in the future to secure copyrighted content online must be mindful that the public has certain expectations of the digital landscape, and any future solution to the problem must limit the extent to which these expectations are altered.

C. PLUNDERING TELEVISION: PIRACY'S ADVERSE FINANCIAL EFFECTS

Undoubtedly, piracy's financial effects on the current industry are significant. We have seen a statistically significant and growing preference for New Media as a source for entertainment content.¹²¹ In a presentation to a Future of Television Conference, President of Magid Advisors, Mike Vorhaus, reported that 92% of internet users use their personal computers for weekly entertainment, and 35% claim to watch less television because of it.¹²² Pirated content is widely available and easily accessible, drawing viewers away from the structured format of traditional television.¹²³ Moreover, the proliferation of pirated content has exploded in recent years.¹²⁴

Consumer preference for New Media's advantages, plus the availability of pirated content, has led to significant financial detriments. According to the Motion Picture Association of

¹²¹ Lapan, *supra* note 12, at 355–56.

¹²² See Jacqueline Emigh, *Analysts: Consumers Drop TV, Turn To Internet For Entertainment*, BETANEWS (Nov. 25, 2008), <http://betanews.com/2008/11/25/analysts-consumers-drop-tv-turn-to-internet-for-entertainment/>.

For the sake of full-disclosure, these reports included many forms of "entertainment," and not just streaming video. Also, the entertainment would include the limited sources of legitimate online content, such as Hulu. However, based on the actual financial detriment to the entertainment industry, it would be safe to assume that a substantial percentage of those polled were receiving pirated content.

¹²³ See Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up Pursuit*, WALL ST. J. (Mar. 4, 2013), <http://online.wsj.com/article/SB10001424127887324906004578292232028509990.html>.

¹²⁴ See *id.* ("The antipiracy and security firm Irdeto, which works with some of the content companies, said that in 2009 it detected 5.4 billion instances of pirated content online, from movies and television shows to videogames. Last year, that number jumped to more than 14 billion.").

America (MPAA) in a letter stating its support for the SOPA and PIPA legislation, the U.S. economy has lost more than \$58 billion a year due to content theft, and more than 373,000 jobs.¹²⁵ The impact has been felt individually by the industry's top media firms.¹²⁶ These losses act as a significant deterrence for networks contemplating competition in this new market.¹²⁷

V. SOPA & PIPA – THE LAWS WE DESERVE BUT NOT THE LAWS WE NEED RIGHT NOW

At this point, all of our characters are in place for the story to play out. The entertainment industry has recognized the financial incentive of New Media and the on-going convergence movement. However, it is afraid of the risks it faces by directly competing with internet piracy, absent a new means of combating piracy and limiting its own losses. In 2011, through the United States Congress, the industry went searching for just such a means. The resulting bills, SOPA and PIPA, created great controversy and would become so reviled that, on January 18, 2012, 7,000 websites would participate in a twenty-four hour blackout.¹²⁸

¹²⁵ Statement For Immediate Release, MPAA, MPAA Statement On Strong Showing Of Support For Stop Online Piracy Act (Dec. 16, 2011), *available at* <http://www.mpa.org/resources/5a0a212e-c86b-4e9a-abf1-2734a15862cd.pdf> (citing STEPHEN E. SIWEK, INST. FOR POL'Y INNOVATION, THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY, POL'Y REP. 189 (2007), *available at* http://www.ipi.org/docLib/20120515_CopyrightPiracy.pdf).

¹²⁶ Stewart, *supra* note 123. While NBCUniversal's profits have increased, piracy has contributed to individualized project failures. *Id.* The company was forced to shut down its Spanish home-entertainment unit following a 62% decline in revenue over two years; a loss the company attributes to online piracy. *Id.*

¹²⁷ It should be remembered that disincentive is largely owed to the current limitations of traditional media and the benefits of New Media. As was discussed earlier, New Media better meets the consumer demand than traditional media, since it offers the potential for free 'on-demand' content.

¹²⁸ Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTELL. PROP. 21, 22 (2013).

The two pieces of legislation drew a broad range of criticism, all of which were fairly academic in nature. Many activists sought to rile up angry mobs of lay-persons by focusing on the potential free speech implications.¹²⁹ These arguments were particularly fond of the use of farfetched hypotheticals and ill-fitting metaphors.¹³⁰ Those skeptics with some knowledge of existing copyright law suggested that these bills were a death blow to the principles of Fair Use; an attempt to make it clear to those who are less informed that the legislation was meant to inconvenience and hurt them, and all other “fair users.”¹³¹ Some critics were genuinely concerned about the well-being of the entertainment industry but chose to focus on the legislative language that would discourage the broader concept of “innovation” in the digital age.¹³² While there is merit to every argument—with some limitations—they often fall short of recognizing that there is an invaluable advantage to creating a legal structure that would encourage uniting the industry’s money and experience with New Media’s financial, technological, cultural, and social potential.

However, at the time the bills were shelved, it was clear from the legislative language that Congress was creating a “will they or won’t they” relationship between the industry and New Media that could exasperate even the most devoted *Friends* fan.¹³³

¹²⁹ See, e.g., Derek Broes, *Why Should You Fear SOPA and PIPA?*, FORBES (Karen Kotchar ed., Jan. 20, 2012, 11:14 PM) <http://www.forbes.com/sites/Derekbroses/2012/01/20/why-should-you-fear-sopa-and-pipa/>.

¹³⁰ See *id.* (suggesting the possibility of the U.S. Government shutting down the Huffington Post’s website for political reasons); see also James Gattuso & Paul Rosenzweig, *Free Speech: An Unintended Victim of Protect IP and SOPA?*, THE FOUNDRY (Jan. 18, 2012, 6:00 AM), <http://blog.heritage.org/2012/01/18/free-speech-an-unintended-victim-of-protect-ip-and-sopa/> (making an analogy to shutting down Rand McNally for showing illegal activity on their maps).

¹³¹ See Will Greenwald, *SOPA Extends the Battle Against Fair Use*, PCMAG (Jan. 18, 2012), <http://www.pcmag.com/article2/0,2817,2398993,00.asp>.

¹³² See Carrier, *supra* note 128, at 21.

¹³³ The television show “Friends,” which aired on NBC from 1994–2004, became notorious for its inability to reconcile the romantic relationship between two of its main characters, Ross and Rachel. The show kept them apart for ten seasons before bringing them together in the series finale, making them the quintessential “will they or won’t they” couple. Rebecca Lewis, *Ross and Rachel on ‘Friends’ Might Not Have Got Back Together*, ENTMT WISE (Oct. 23, 2012),

A. THE LEGISLATIVE MOTIVATION

SOPA was introduced to the House of Representatives on October 26, 2011, by Representative Lamar Smith of Texas.¹³⁴ Several months earlier, Senator Patrick Leahy of Vermont had introduced its counterpart in the Senate.¹³⁵ As has been recognized, the purpose and enforcement provisions within these bills are unforgivably vague.¹³⁶ However, while a close examination will reveal the damaging effects of this vagueness, it should be acknowledged that it was the result of aggressive industry lobbying efforts. Between 2010 and 2011, the entire entertainment industry spent more than \$233 million on lobbying efforts in Washington, D.C.¹³⁷ The drafters, sponsors, and co-sponsors of this legislation were fully informed regarding the concerns plaguing the top networks and were aware of the desired action.

Those concerns manifested in the introduction of SOPA and PIPA—each with a stated purpose. Unfortunately, considering our own objective up until this point, the goals of the bills were highly discouraging, as they seemed to ignore the inherent value of New Media. Prior to introducing the bill, Representative Smith had drawn the battle-lines between the “intellectual property industries” and “online theft of America’s intellectual property.”¹³⁸ Foreshadowing the coming of SOPA, Smith

<http://www.entertainmentwise.com/photos/91985/1/Ross-And-Rachel-On-Friends-Might-Not-Have-Got-Back-Together>.

¹³⁴ Stop Online Piracy Act of 2011, H.R. 3261, 112th Cong. (1st Sess. 2011).

¹³⁵ Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011 (PROTECT IP), S. 968, 112th Cong. (1st Sess. 2011).

¹³⁶ See Carrier, *supra* note 128, at 27.

¹³⁷ Compare *Lobbying TV/Movies/Music Industry Profile, 2010*, OPENSECRETS, <http://www.opensecrets.org/lobby/indusclient.php?id=B02&year=2010> (last visited Jan. 28, 2014), with *Lobbying TV/Movies/Music Industry Profile, 2011*, OPENSECRETS, <http://www.opensecrets.org/lobby/indusclient.php?id=B02&year=2011> (last visited Jan. 28, 2014) (showing \$110 million spent in 2010 and \$122 million spent in 2011 from an industry that includes all film, television, and music contributors).

¹³⁸ Press Release, U.S. Senator for VT Patrick Leahy, Senate, House Judiciary Committee Focus On Fighting Online Infringement (Apr. 4, 2011),

asserted the need for a new means of “combat[ing] theft, marketing and distribution of America’s intellectual property”¹³⁹ Before there was even a bill to fight over, Smith had made it clear who the enemy was: the internet’s thieves. The industry made something, the internet was letting thieves take it, and something had to be done. The result was SOPA, which was puzzlingly motivated by the vague, yet ambitious goal of “promot[ing] prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property.”¹⁴⁰ It would take the imagination of Fred Rogers to construe this language in a way that would take the welfare of New Media into consideration.¹⁴¹

The activities preceding the introduction of PIPA create similar concerns. More than a month before he introduced the legislation, Senator Leahy explained to reporters that the current problems with the entertainment industry can be traced to “[o]nline infringement” of American intellectual property.¹⁴² Pitting the industry and the government against the evils of internet thievery, Senator Leahy laid the ground work, and he followed up with a bill whose purpose was somehow vaguer than its House counterpart. PIPA’s aim was “to prevent online threats to economic creativity and theft of intellectual property, and other purposes.”¹⁴³ The good Senator looked out across the battlefield to the dark world of the internet and saw an army of

available at www.leahy.senate.gov/press/senate-house-judiciary-committee-leaders-focus-on-fighting-online-infringement (quoting a statement made by Representative Smith during the press conference).

¹³⁹ *Id.*

¹⁴⁰ H.R. 3261.

¹⁴¹ See *Mr. Rogers’ Neighborhood, Mr. Rogers: Imagination* (Family Communications, Inc. program aired 1968-2001) available at http://www.fredrogerscenter.org/resources/toolkit/activities/childrens-television-play/#video_3. Mr. Fred Rogers was a beloved children’s show host, who preached the importance of imagination for many years. I suspect that SOPA and PIPA would have proven to be incredible successes in Mr. Rogers’ “Neighborhood of Make-Believe.” *Id.*

¹⁴² Press Release, U.S. Senator for VT Patrick Leahy, *supra* note 139.

¹⁴³ S. 968.

online villains charging down an innocent and vulnerable industry.

The provided rationale behind new legislation is rarely meaningful, often containing more flash than real substance. However, at the very least, the above statements afford some insight into the minds of the bills' drafters and supporters. It is difficult to speculate about the legal controversies that could arise from the hypothetical enforcement of two bills that were never enacted; however, it is safe to say that a court would likely acknowledge that the language used to describe their purpose suggests that they meant to combat the evils that arise from the uncontrolled world created by New Media.

B. THE BILLS' FINAL LANGUAGE

To properly analyze each piece of legislation and, more importantly, determine whether they would successfully encourage enthusiastic industry engagement with New Media, we must answer three questions: (1) Who does the bill target?; (2) Who does the bill empower?; and (3) What actions does the bill seek to restrict or eliminate?

1. Who is the target?

Many of the commentators, both proponents and opponents of SOPA and PIPA, have said the legislation primarily targeted "rogue websites."¹⁴⁴ It is unclear why the term "rogue" was used; perhaps it was an attempt to elicit feelings of dread, while failing to realize that it is likely to conjure images of loveable hooligans, such as Han Solo and Mal Reynolds.¹⁴⁵ However, the

¹⁴⁴ See Press Release, United States House of Representatives Judiciary Committee, Myth vs. Fact: Stop Online Piracy Act (Jan. 18, 2012), available at http://judiciary.house.gov/issues/Rogue%20Websites/011812_SOPA%20Myth%20vs%20Fact.pdf; see also 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; Opinion L.A., *Dueling Story Lines for PIPA, SOPA and 'Foreign Rogue Websites'*, L.A. TIMES (Jan. 19, 2012, 11:42 PM), <http://opinion.latimes.com/opinionla/2012/01/pipa-and-sopa-the-lobbying-battle.html>.

¹⁴⁵ See *Han Solo Description*, STAR WARS, <http://starwars.com/explore/encyclopedia/characters/hansolo/> (last visited

final language in two of SOPA's more controversial provisions suggests two alternative descriptions of targeted websites. The first is found in Section 102, and provides that the Section is meant to "prevent U.S. support of *foreign infringing sites*."¹⁴⁶ The bill attempts to define the language, and does so using broad and vague terminology. To qualify as a foreign infringing site the website must: (1) be directed at and used by users in the United States, (2) be "committing or facilitating" the violation of current copyright law, and (3) meet the requirements that would subject it to seizure by the Justice Department, if the site were a domestic Internet site.¹⁴⁷

In the alternative, the language in Section 103 of SOPA targets "sites dedicated to theft of U.S. property."¹⁴⁸ Analyzing whether a website is dedicated to the theft of U.S. property is somewhat more complicated than the steps provided in Section 102. For Section 103 to apply, the website must again be directed at and used by users in the United States.¹⁴⁹ Next, one of two factors must be met. Either:

the U.S.-directed site is primarily designed or operated for the purpose of, has only limited purpose *or use other than*, or is marketed by its operator . . . for use in, offering goods . . . in a manner that engages in, enables or facilitates . . . a violation of . . . [existing intellectual property laws] . . .¹⁵⁰

OR

the operator of the U.S.-directed site . . . has taken, deliberate actions to avoid confirming a high

Jan. 28, 2014); *Malcolm Reynolds*, WIKI.COM, http://firefly.wikia.com/wiki/Malcolm_Reynolds (last visited Jan. 28, 2014).

¹⁴⁶ H.R. 3261, § 102 (emphasis added).

¹⁴⁷ *Id.* §102(a)(1)–(3).

¹⁴⁸ *Id.* § 103.

¹⁴⁹ *Id.* § 103(a)(1)(A).

¹⁵⁰ *Id.* § 103(a)(1)(B)(i)(I)–(III) (emphasis added).

probability of *the use of* the . . . site to carry out acts that constitute a violation of [existing intellectual property laws] . . . or . . . has promoted [the site's] *use to carry out* acts that constitute a violation of [existing intellectual property laws].¹⁵¹

Essentially, a website might be characterized as “dedicated to theft of U.S. property” based on the uses of the site and/or the actions taken by the operator of the website.

Similar to Section 103 of SOPA, PIPA targets websites based on the uses of the websites and/or the actions of their operators. The language of the act targets “[i]nternet sites dedicated to infringing activities.”¹⁵² This terminology is defined very broadly in the act, and applies to any website that: has no *significant use* other than engaging in, enabling, or facilitating . . . [violation of existing copyright law] . . . [or] is designed, operated, or marketed by its operator . . . and facts . . . suggest *is used, primarily* as a means for engaging in, enabling, or facilitating the [violation of existing copyright law].¹⁵³

The “no significant use other than” language fails to create a stricter standard since the act applies not just to sites that are significantly used to infringe copyright, but also to sites that are significantly used in “enabling or facilitating” eventual infringement.¹⁵⁴

One criticism that seems to be universally shared by the opponents of SOPA and PIPA is that the language is so broad and so vague that it is particularly difficult to speculate which websites the bills will apply to. Some suggest that the language is so broad that it would extend beyond foreign websites and

¹⁵¹ H.R. 3261, § 103(a)(1)(B)(ii)(I)–(II) (emphasis added).

¹⁵² See generally S. 968.

¹⁵³ *Id.* § 2(7)(A)–(B) (emphasis added).

¹⁵⁴ Carrier, *supra* note 128, at 23 (citing to Mike Masnick, *An Updated Analysis: Why SOPA & PIPA Are a Bad Idea, Dangerous & Unnecessary*, TECHDIRT (Jan. 18, 2012, 7:32 PM), <http://www.techdirt.com/articles/20120117/23002717445/updated-analysis-why-sopa-pipa-are-bad-idea-dangerous-unnecessary.shtml>).

would impact websites established domestically as well.¹⁵⁵ Others claim that the “facilitate” language is so vague that it would apply to legitimate sites and business;¹⁵⁶ some go as far as suggesting that it could apply to the “entire internet itself.”¹⁵⁷ While these are legitimate concerns, the language of these sections is specific enough to determine that the bills target websites in a way that is counterproductive for the purpose of achieving enthusiastic acceptance of New Media by the entertainment industry.

2. Who has the power?

Both SOPA and PIPA empower the U.S. Attorney General, using similar language, to take certain actions against the registrant of a domain name or the owner or operator of a website,¹⁵⁸ in order to fight the rise of “[i]nternet site[s] dedicated to infringing activities,” “foreign infringing sites,” “sites dedicated to theft of U.S. property,” and “rogue websites.”¹⁵⁹ These actions are injunctive and include requesting that a court “issue a temporary restraining order, a preliminary injunction, or an injunction . . . to cease and desist from undertaking any further activity as a foreign infringing site.”¹⁶⁰

Each bill also allows the Attorney General to require further action from third-parties, with prior approval from a court. Under SOPA, the Attorney General would be able to force service providers to prevent users in the United States from

¹⁵⁵ See Mike Masnick, *The Myth That SOPA/PIPA Only Impact ‘Foreign Sites’*, TECHDIRT (Dec. 22, 2011, 5:19 AM), <http://www.techdirt.com/articles/20111220/03135817138/myth-that-sopapipa-only-impact-foreign-sites.shtml>.

¹⁵⁶ See Chloe Albanesius, *Top 5 Objections to SOPA, PIPA*, PCMAG (Jan. 18, 2012, 8:00 AM), <http://www.pcmag.com/article2/0,2817,2399008,00.asp>.

¹⁵⁷ Carrier, *supra* note 129, at 22 (quoting 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/2011122/04254316872/definitive-post-why-sopa-protect-ip-are-bad-bad-ideas.shtml>).

¹⁵⁸ H.R. 3261 § 102(b)(5); S. 968 § 3(b)(1).

¹⁵⁹ H.R. 3261 §§ 102–103; S. 968 §§ 2–3.

¹⁶⁰ H.R. 3261 § 102(b)(5); *see* S. 968 § 3(b)(1).

accessing infringing sites, search engines (e.g. Google) to stop providing direct links to those sites, payment networks (e.g. PayPal) to stop all payment transactions to such infringing sites, and internet advertisers to stop providing all advertisements to the infringing site.¹⁶¹ Similarly, PIPA would effectively allow the Attorney General to require similar actions from the same third-parties.¹⁶²

While it is hardly surprising that this copyright legislation would grant powers to the Attorney General, SOPA and PIPA would have taken a surprising step by awarding certain “qualifying plaintiffs” a private cause of action when their intellectual property has been infringed.¹⁶³ Under both bills, a “qualifying plaintiff” is simply defined as an intellectual property holder that has been “harmed by the activities” of an infringing website.¹⁶⁴ If an intellectual property holder can show that they qualify, they are capable of asking a court for many of same injunctive measures available to the Attorney General.¹⁶⁵

It is not difficult to understand why many in the industry would advocate for a private right of action. Their interests and intellectual property rights are at stake, and they feel entitled to a right to take action to protect them. However, upon closer scrutiny, it is unlikely that a new legal weapon is conducive to

¹⁶¹ H.R. 3261 § 102(c)(2)(A)–(D).

¹⁶² S. 968 § 3(d)(2)(A)–(D).

¹⁶³ See Mike Belleville, Note & Comment, *IP Wars: SOPA, PIPA, and the Fight Over Online Piracy*, 26 TEMP. INT’L & COMP. L.J. 303, 319 (2012); Dana Smith, *What Warner’s Recklessness Says About SOPA*, PUB. KNOWLEDGE (Nov. 11, 2011), <http://publicknowledge.org/blog/what-warners-recklessness-says-about-sopa> (“SOPA . . . would create a new private cause of action that allows a person or company to sue a website that is ‘dedicated to the theft of U.S. property.’”).

¹⁶⁴ See H.R. 3261 § 103(a)(2); see also S. 968 § 2(11)(b).

¹⁶⁵ Compare H.R. 3261 § 102(b)(5), and § 102(c)(2)(A)–(D) (providing that, under certain circumstances, the Attorney General may file for a court order against a registrant of a domain name or the owner or operator of a foreign infringing site), with § 103(c)(5), and § 103(d)(2)(A)–(B) (providing that, under certain circumstances, a private intellectual property holder may file for a court order against a domain name registry, operator of an infringing site, financial transaction provider, and online advertising provider).

creating a mutually beneficial connection between New Media and the industry.

3. Which Activities Are Prohibited?

Much of the pertinent language regarding forbidden activities has been discussed already, since determining whether a website is targeted largely depends on the actions they have taken. Again, SOPA and PIPA use much of the same language when outlining the prohibited actions—the same indiscernible language. The legislative language would have targeted two types of activities: direct infringement and indirect infringement.

Under SOPA, the bill would have targeted direct infringement by a website's owner or operator, by branding the site a "foreign infringing site" for "committing . . . criminal violations punishable under [existing copyright law]."¹⁶⁶ Under this language, injunctive action would be taken against the site's owner or operator, or the site's DNS registrant, should the owner or operator use the website to, for example, "knowingly traffic[] in a counterfeit label" that is meant to be affixed to "a motion picture or other audiovisual work,"¹⁶⁷ or "without the consent of the performer . . . knowingly and for the purposes of commercial advantage or private financial gain . . . traffics in any copy [of sounds and images of a live musical performance]."¹⁶⁸ In other words, the wrongful conduct is self-sustained and exists in the website's actions, regardless of any third parties.

Provisions forbidding acts of infringement committed directly by the website and its owner or operator were not particularly controversial, possibly because they were sparse and did not significantly expand the current state of copyright law. However, opponents primarily objected to the provisions

¹⁶⁶ H.R. 3261 § 102(a)(2).

¹⁶⁷ 18 U.S.C. § 2318(a)(1)(A)(iii) (2010). Section 102(a)(2) of SOPA would label a website a "foreign infringing site" if it commits an act in violation of this statute. H.R. 3261 § 102(a)(2).

¹⁶⁸ 18 U.S.C. § 2319A(a)(3) (2008). Section 102(a)(2) of SOPA would label a website a "foreign infringing site" if it commits an act in violation of this statute. H.R. 3261 § 102(a)(2).

regarding indirect infringement by websites.¹⁶⁹ Unlike the language prohibiting direct infringement, indirect infringement relies on the website's connection to a third-party's wrongful conduct. These provisions would brand a website as an infringing website if it was being used in a way that "enables or facilitates" the violation of intellectual property laws.¹⁷⁰

Many commentators have acknowledged that this language creates a disturbing amount of uncertainty, considering it is unclear which actions would bring a website under scrutiny. These criticisms again stem from the truly unforgiveable vagueness present in both bills.¹⁷¹ While it is unclear what is meant by "enables or facilitates," there is enough clarity to recognize that the operator's intentions or actions could be entirely irrelevant under such a statute; regardless of how the website was intended to be used, if users are disrespecting that intention for illicit purposes, it is the owner or operator that is punished under these acts.

C. THESE AREN'T THE [LAWS] YOU'RE LOOKING FOR

Truthfully, until these bills or versions of them are signed into law, and the courts have the opportunity to interpret the language, the breadth of their vague provisions will remain

¹⁶⁹ See, e.g., Carrier, *supra* note 128, at 21–22 ("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 . . . [any] means making it easier for others to access copyright content could be punished."); Chris Heald, *Why SOPA Is Dangerous*, MASHABLE (Jan. 17, 2012), <http://mashable.com/2012/01/17/sopa-dangerous-opinion/> ("[T]he really scary thing here is that there isn't any qualification that the site be solely for the purpose of theft, only that it facilitate it.").

¹⁷⁰ H.R. 3261 § 103(a)(1)(B)(i)(I)–(III); S. 968 § 2(7)(A).

¹⁷¹ See Carrier, *supra* note 128, at 27 ("'[T]here 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.'"); see also Charlotte Hsu, *SOPA's Vague Language Could Lead to Wide Restrictions on Information Available on the Internet, UB Expert Says*, UNIV. OF BUFFALO (Jan. 18, 2012), <http://www.buffalo.edu/news/releases/2012/01/SOPAs-vague-language.html> (quoting Law Professor Mark Bartholomew ("How are we supposed to know when a rogue website is 100 percent bad? Maybe they just have a couple of things that are infringing. Should a search engine really be required to block all access to that website?")).

unclear. That being said, even after a cursory analysis of the pertinent language, it is abundantly clear that SOPA and PIPA, as written, would have failed to encourage the mutually beneficial synthesis of the entertainment industry and New Media. While it is likely that the broad language would have provided means to target those websites that actively perpetuate illegal piracy, it also would have incentivized the industry to resist the changes of New Media by diluting the benefits of convergence culture and providing members of the industry with a means of active resistance.

SOPA and PIPA are representative of the traditional approach to anti-piracy laws; the legislative language echoes back to the days of cracked satellite boxes and split cable wires. Anti-piracy legislation has previously been drafted by using the individual consumer as a starting point.¹⁷² Consequently, it was easy to expand the legislation to broadly include anyone that assisted the consumer in receiving unauthorized content.¹⁷³ This approach was appropriate for earlier forms of television media, which used boxes that flowed constant content to consumers, who had no control, interaction, or connection with the source. Restricting how the consumer received the content was nothing more than a financial inconvenience, as there was no significant alteration to how they interacted with the media (because there was no interaction).

It is plain to see that this same approach is present in the language of SOPA and PIPA, since the principal restrictions on the owners and operators of the websites necessitates envisioning the users of those sites. However, the qualities which give New Media significant value to the industry also make this traditional approach to piracy untenable. New Media can spawn fans that are so devoted that they teeter somewhere between obsessive cheerleaders and zealous idol-worshippers.¹⁷⁴ New Media can provide enough information to advertisers for them to create precision marketing campaigns that target

¹⁷² 47 U.S.C. § 553(a)(1); *see also* Walker, *supra* note 98, at 474.

¹⁷³ *See* 47 U.S.C. § 553(a)(1).

¹⁷⁴ *See* Tim Surette, *TV's Craziest Fan Bases . . . With Video Proof*, TV.COM (Mar. 10, 2010), <http://www.tv.com/news/tvs-craziest-fan-bases-with-video-proof--21826/>.

groups, through their television content, with more specificity than ever. However, these benefits rely on the encouragement of New Media's connectivity and interactivity. These features cannot thrive under a structure that punishes a website's operator based on the improper use of his services. In order to reap the benefits of such a structure, innovators must be encouraged to find new ways to connect people and involve audiences in the many micro-cultures that form around television content. Growth and participation in this innovative process would be critically reduced if those involved feared that their services might eventually be misused.

Furthermore, on top of diluting the financial opportunities offered by New Media, the legislation effectively arms the industry by giving "qualifying plaintiffs" a private cause of action.¹⁷⁵ Undoubtedly, such a right will lead to an increase in litigation, which will likely harm more than just those malicious websites seeking to profit from infringement activities. As others have noted, litigation has significant adverse consequences on innovators, regardless of any actual wrongdoing.¹⁷⁶ Even if the entertainment industry was unable to claim victory against a website's owner/operator under the new provisions, the ability to threaten litigation can scare away the critical investors that Web 2.0 innovators rely on.¹⁷⁷ While the goal should be to encourage industry leaders to compete in the realm of New Media, by taking advantage of and investing in the opportunities it offers, the private cause of action presents an alternative option to the industry. The inherent message in these provisions echoes their legislative purpose and the statements made by the Congressmen supporting the bills; the world they envision is a battle between traditional and New Media. This vision cannot be reconciled with the desired union of the two.

¹⁷⁵ H.R. 3261 § 103(a)(2); S. 968 §2(11)(b).

¹⁷⁶ See MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW 132-33 (2009).

¹⁷⁷ *Id.* at 133.

VI. CONCLUSION

After the entertainment industry spent millions pushing for stronger anti-piracy legislation, the resulting bills flopped worse than ABC's "Cavemen."¹⁷⁸ The ensuing criticisms explored the rights of internet users, the benefits of a free internet, and the increasingly loud demands of industry consumers. Yet, none of these complaints are persuasive because they fail to mind their audience. The SOPA and PIPA legislation was conceived from industry's influence and was born for industry's benefit. There will be another congressional attempt to pass anti-piracy legislation, possibly even versions of the same bills. And while Congress will be the actors, the industry will motivate the action. Shaping that motivation is the crucial goal.

Industry players must realize that SOPA and PIPA, as they were written, were not in their own best interest. If properly capitalized, New Media presents the opportunity to grow and meet consumer demands at levels that were previously impossible, while also improving content quality and advertising efficiency. The bills were structured in a way that would limit the growth of the most beneficial convergence qualities, while militarizing the industry against further developments in New Media.

Undoubtedly, something must be done to hobble the growth and strength of internet piracy; however, missing a legislative opportunity to create a safe and motivating digital environment would be tantamount to industrial negligence. While discussions of freedom and fairness are never bad, presently they carry little worth. Ultimately, the vital truth is that the industry will not be long for this world if it insists on demanding and supporting legislation that treats the natural progress of media as an enemy invasion, rather than a beckoning promised land.

¹⁷⁸ *TV's Biggest Flops Of The Last Five Years*, ACCESS HOLLYWOOD (Oct. 15, 2011, 1:25 PM), http://www.accesshollywood.com/tvs-biggest-flops-of-the-last-five-years_article_55206 (ranking the show about GEICO's Caveman mascot as the biggest flop in the last five years, after it was cancelled after airing six episodes).