



Copyright's Media Theory and the Internet: The Case of the Chilling Effects Doctrine

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ABSTRACT (EN): Despite copyright's expansion into new online spheres and technological contexts, and the increasingly interdisciplinary nature of copyright scholarship, intellectual property scholars, particularly those interested in digital copyright, have offered little exploration of methodology and methodological issues, and scholarship offers even fewer methodological investigations and debates. This area of Internet-related legal research remains, like others, without established "texts, theories, and methodologies." This chapter aims to help fill some of that void, by offering an exploration of the problems that can arise when applying certain legal doctrines to online contexts, through a case study of the "chilling effects doctrine" — a legal doctrine that holds that certain laws and regulatory schemes can "chill" or deter people from engaging in certain kinds of legal (and possibly desirable) activities — and its emergence or "transplantation" into debates about copyright enforcement online. The case study provides a helpful point of entry into a broader methodological discussion about applying legal norms to media. Specifically, the author draws on insights from other disciplines and research fields to unpack and scrutinize the chilling effects doctrine and its methodological, empirical, and normative assumptions.

RÉSUMÉ (FR): Malgré l'expansion du droit d'auteur dans les nouvelles sphères de l'Internet et de la technologie, et de la nature interdisciplinaire de la recherche en droit d'auteur, les spécialistes du droit de la propriété intellectuelle, particulièrement ceux intéressés par le droit d'auteur numérique,

n'ont que peu exploré la question de la méthodologie et des problèmes méthodologiques, et les publications savantes révèlent encore moins d'études et de débats méthodologiques. Ce domaine de la recherche juridique reliée à l'Internet, comme d'autres, demeure toujours sans « textes, théories et méthodologies » établies. Ce chapitre essaie de combler partiellement ce vide, en explorant les problèmes qui peuvent survenir lorsqu'on applique certaines doctrines juridiques au contexte de l'Internet, à l'aide d'une étude de cas de la « théorie de l'effet paralysant » — une théorie juridique qui explique que certains régimes législatifs et réglementaires peuvent « paralyser » les gens ou les décourager de prendre part à certaines activités légales (qui pourraient être désirables) — en tant que phénomène émergent ou « transplanté » dans les débats relatifs à la mise en application du droit d'auteur en ligne. Cette étude de cas apporte un point de départ utile à une discussion méthodologique plus large sur l'application des normes légales aux médias. Plus particulièrement, l'auteur tire des enseignements d'autres disciplines et champs de recherche pour analyser et examiner la théorie de l'effet paralysant et ses présupposés méthodologiques, empiriques et normatifs.

A. INTRODUCTION

With the notion that law is an autonomous discipline in decline since the 1960s,¹ legal research has become more “cosmopolitan.”² That is, legal research has — albeit slowly and certainly not uniformly³ — become more comparative, interdisciplinary, globally concerned, and, at the same time, more cautious about the limits of legal reasoning and its application to different, including “foreign,” contexts.⁴

A good example of this evolution is the continuing debate over “legal transplants” within comparative legal scholarship.⁵ Though comparative

1 Richard A Posner, “The Decline of Law as an Autonomous Discipline: 1962–1987” (1987) 100:4 Harv L Rev 761.

2 Michele Graziadei, “Legal Transplants and the Frontiers of Legal Knowledge” (2009) 10:2 Theoretical Inq L 693 at 694.

3 Douglas W Vick, “Interdisciplinarity and the Discipline of Law” (2004) 31:2 JL & Soc’y 163 at 163–64, discussing tensions between those advocating interdisciplinary and doctrinalist approaches in legal research; Brian Bix, “Law as an Autonomous Discipline” in Peter Cane & Mark Tushnet, eds, *The Oxford Handbook of Legal Studies* (Oxford: OUP, 2003) 975 at 981–83, noting differences across different legal jurisdictions, particularly the United States as compared to Europe.

4 *Ibid* at 981–83; see, also, Graziadei, above note 2 at 694.

5 See, generally, Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law*, 3d ed, translated by Tony Weir (Oxford: Oxford University Press, 1998); Alan Watson, *Legal*

law continues to grow as a branch of legal research, there are countervailing tensions. Once law is understood as a product of “legal culture,” including a culture’s distinct social and cultural assumptions, lawyers and scholars must not only be cautious when “transplanting” or importing legal norms into different legal cultures and jurisdictions, but also articulate and defend a sound methodology in doing so, particularly in light of the mixed results legal transplants have had in international legal reform efforts.⁶

Legal scholars have arguably not shown the same normative, empirical, and methodological caution when dealing with communications media. Indeed, the notion of a “legal transplant,” and the attendant empirical, normative, and methodological risks that legal transplanting raises, provide a useful framework for understanding how similar methodological problems may arise when legal scholars, with little thought or prudence, import, apply, or transplant legal norms and doctrines to online and Internet-related contexts.⁷ Yet, while the Internet has spawned a new and still growing body of work — often referred to as “cyberlaw scholarship” — that explores how traditional laws and legal norms like intellectual property should apply to the Internet and its related technologies,⁸ the closest thing to a methodological debate within “cyberlaw” is the now tiresome spat over whether it constitutes a distinct field of study or not.⁹ And despite copyright’s ex-

Transplants: An Approach to Comparative Law (Atlanta: University of Georgia Press, 1974); Pierre Legrand, *Le Droit Comparé*, 2d ed (Paris: Presses Universitaires de France, 2006). See also James Q Whitman, “The Neo-Romantic Turn” in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003).

- 6 See Randall Peerenboom, “Toward a Methodology for Successful Transplants” (2012) at 1, online: Social Sciences Research Network http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1981887. See also Graziadei, above note 2 at 697–700, canvassing the substantive and methodological evolution of literature on legal transplants.
- 7 Indeed, the notion of unpacking the underlying methodological and normative assumptions of copyright law, for example, is not new. See Dan Burk, “Method and Madness in Copyright Law” (2007) 2007:3 Utah L Rev 587.
- 8 See, e.g., Paul Schiff Berman, “Introduction” in Paul Schiff Berman, ed, *Law and Society Approaches to Cyberspace* (Burlington, VT: Ashgate, 2007) xi at xiii–xix, discussing different “generations” of cyberlaw scholarship; Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Va L Rev 2043 at 2044, n3. I have elsewhere explored some aspects of this body of scholarship, including its evolution and emerging paradigms. See Jonathon W Penney, “Understanding the New Virtualist Paradigm” (2009) 12 J Internet L 3, discussing the evolution of cyberlaw scholarship and the role of perspective; Jonathon W Penney, “Virtual Inequality: Challenges for the Net’s Lost Founding Value” (2012) 10:3 Nw J Tech & IP 209 at 220–21.
- 9 See Berman, above note 8 at xiv; Frank H Easterbrook, “Cyberspace and the Law of the Horse” (1996) U Chi Legal F 207 at 208, arguing that cyberlaw is simply law involving

pansion into new online spheres and technological contexts,¹⁰ and the increasingly interdisciplinary nature of copyright scholarship,¹¹ intellectual property scholars, particularly those interested in digital copyright, have offered little more. This of area of Internet-related legal research remains, like others, without established “texts, theories, and methodologies.”¹²

This chapter aims to help fill some of that void in the literature, by offering an exploration of the problems that can arise when applying certain legal doctrines to online contexts, without careful consideration for implicit normative and empirical assumptions those legal doctrines may harbour. This exploration will be through a case study of the “chilling effects doctrine” as a “legal transplant” into debates about copyright enforcement online. The chilling effects doctrine (CED), a legal doctrine that holds that certain laws and regulatory schemes can “chill” or deter people from engaging in certain kinds of legal (and possibly desirable) activities,¹³ is commonly raised in digital copyright scholarship to criticize the detrimental impact that copyright enforcement in online contexts has on Internet speech, expression, and other legal online activities.¹⁴ Here, the case provides a helpful point of entry into a broader methodological discussion about applying

technology, like the Law of the Horse. See also Joseph H Sommer, “Against Cyberlaw” (2000) 15:3 Berkeley Tech LJ 1145 at 1147, arguing that cyberlaw is “nonexistent”; Lawrence Lessig, “The Law of the Horse: What Cyberlaw Might Teach” (1999) 113:2 Harv L Rev 501, responding to both.

- 10 Neil W Netanel, “Why Has Copyright Expanded? Analysis and Critique” in Fiona MacMillan, ed, *New Directions in Copyright Law*, vol 6 (Cheltenham: Edward Elgar Publishing, 2007) 3 at 3.
- 11 Eva Hemmungs Wirtén, “Don’t Fence Me In’: Travels on the Public Domain” in Fiona MacMillan, ed, *New Directions in Copyright Law*, vol 6 (Cheltenham: Edward Elgar Publishing, 2007) 112 at 112, and 112 n 1.
- 12 John Monberg, “Science and Technology Studies Approaches to Internet Research” (2005) 21:4 The Information Society 281 at 281.
- 13 Julie E Cohen, “A Right to Read Anonymously: A Closer Look at ‘Copyright Management’ in Cyberspace” (1996) 28 Conn L Rev 981 at 1010, 1014, and 1039.
- 14 See, e.g., Jason Sheets, “Copyright Misused: The Impact of the DMCA Anti-Circumvention Measures on Fair & Innovative Markets” (2000) 23 Hastings Comm & Ent LJ 1; Pamela Samuelson, “Anticircumvention Rules: Threat to Science” (2001) 293 Science 2028 at 2029; Derek J Schaffner, “The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation” (2005) 14:1 Cornell JL & Pub Pol’y 145; Joseph P Liu, “The DMCA and the Regulation of Scientific Research” (2003) 18:2 Berkeley Tech LJ 501; Jennifer M Urban & Laura Quilter, “Efficient Process or ‘Chilling Effects’? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act” (2006) 22:4 Santa Clara Computer & High Tech LJ 621; Wendy Seltzer, “Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment” (2010) 24:1 Harvard JL & Tech 171.

legal norms to media. Specifically, I draw on insights from other disciplines and research fields to unpack and scrutinize the CED and its assumptions, to question not necessarily the overall efficacy of the CED itself—there is evidence, for example, of regulatory chilling effects in other contexts like traditional news organizations—but rather its application in online contexts. In the end, I hope to make the broader point that copyright—and laws more generally—embody not only certain cultural assumptions and social theories, but also implicit theories about communications media like the Internet, and how people interact with them. These implicit media theories and assumptions, when not addressed or accounted for, can raise theoretical, normative, empirical, and methodological risks.

In Section B, I briefly draw an analogy between the application of the CED in online contexts and the notion of “legal transplants” in comparative legal studies as a means to think critically about the methodological risks when applying legal doctrines to the Internet. I then provide some background into the CED, including its origins in United States constitutional law, its movement to other contexts, and, briefly, how it has been applied in relation to digital copyright and online contexts. This sets the stage for a broader analysis in Sections C and D, where I unpack the hidden assumptions underlying the CED, and then draw on other fields of research—specifically computer mediated communications, online ethnographic research, and institutional theory—to show how those assumptions are not necessarily sound. In Section E, I conclude with some future directions for research, including suggestions for how lawyers and scholars can minimize these research problems and methodological risks.

B. THE CHILLING EFFECTS DOCTRINE

1) A Different Kind of Legal Transplant

The notion of a “legal transplant,” as earlier stated, provides a useful metaphor and framework for understanding the normative, empirical, and methodological issues that arise when legal doctrines are “transplanted” into online and Internet-related contexts. Indeed, just as legal norms—including intellectual property¹⁵—have been shown to embody or reflect the implicit social and cultural assumptions of the legal jurisdiction in which they

15 Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998).

evolved and developed, legal doctrines also harbour implicit assumptions about communications media. Given that legal doctrines developed in relation to traditional forms of media in offline contexts, it makes sense they would deploy implicit theories and assumptions about communications media, and how people interact with them. The CED, I will argue, is one such example, which has implications for how it might be applied to online contexts where there are unique or differing norms about communications and rule-following — whether these norms make the online communities *culturally distinct* or not — in a way that complicates the doctrine’s application.

2) Some Background

The idea of legal or regulatory “chilling effects” gained its earliest (or earliest most prominent) expression in traditional free speech law in the United States. The assertion that a law might “chill” free speech or related activities was first articulated by the US Supreme Court in the 1952 case *Wieman v Updegraff*¹⁶ and a few years later, given its most popular formulation in terms of chilling effects on free expression, by Justice William Brennan in a 1965 case *Dombrowski v Pfister*.¹⁷ At issue was a sweeping “anti-communist” Louisiana state law being used to prosecute civil rights workers in the state. Justice Brennan, writing for the Court, went on to find:

This overly broad statute also creates a “danger zone” within which protected expression may be inhibited. *Cf. Speiser v. Randall*, 357 U.S. 513, 526 So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.¹⁸

The Court ultimately found that the law was an unconstitutional abridgement of the civil rights workers’ First Amendment rights, the main provision of the US Constitution that protects freedom of speech and the press.¹⁹

Often referred to by lawyers as the “chilling effects doctrine,” the doctrine was a “legal transplant” long before the Internet appeared. Indeed, the

16 *Wieman v Updegraff*, 344 US 183 (1952).

17 *Dombrowski v Pfister*, 380 US 479 (1965).

18 *Ibid* at 494.

19 Frederick Schauer, “Fear, Risk, and the First Amendment: Unraveling the ‘Chilling Effect’” (1978) 58:5 BUL Rev 685 at 685.

CED has appeared repeatedly not only in a broad array of US judicial decisions from the 1960s onward, but also has been transplanted and adopted by adventuresome judges around the world, including Canada, Australia, and the United Kingdom.²⁰ Yet, today, perhaps its most predominant application (or transplant) has been in the context of digital copyright. It is this form of the CED that I will be dealing with here.

3) Chilling Effects Doctrine, Digital Copyright, and the Internet

The notion of legal or regulatory “chilling effects” arises within the global context of increasingly complex Internet regulation and governance.²¹ Shifting away from earlier more obvious and direct means of regulating, such as Internet censorship laws or broad-based filtering, many states, including some in the west, have developed more subtle and sophisticated means for Internet regulation — what Ronald Deibert and Rafal Rohozinski call “next generation” regulatory methods like surveillance or intermediary liability — which rely heavily on creating and proliferating regulatory norms to deter targeted activities, like cyber-crime or intellectual property infringement.²²

This has led to a diverse body of legal scholarship applying the chilling effects doctrine to numerous Internet-related laws and contexts, including laws providing for Internet surveillance and online defamation.²³ But perhaps the most common context in which the CED arises in legal scholarship is in relation to copyright enforcement online. And, within this context, the most popular target for “chilling effects” criticisms is the United States *Digital Millennium Copyright Act (DMCA)*,²⁴ which relies on a complex scheme of intermediary liability and third-party content policing to deter illegal online copying and file sharing.

20 Andrew T Kenyon, “Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore, and Australia” (2010) 4 *Int'l J Comm* 440 at 442.

21 Mathias Klang, “Virtual Censorship: Controlling the Public Sphere” in Jacques Berleur, Markku I Nurminen, & John Impagliazzo, eds, *Social Informatics: an Information Society For All? In Remembrance of Rob Kling* (New York: Springer, 2006) 185 at 189.

22 Ronald Deibert & Rafal Rohozinski, “Beyond Denial: Introducing Next Generation Information Controls” in Ronald Deibert et al, eds, *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (Cambridge, Mass.: MIT Press) 3 at 6.

23 Klang, above note 21 at 189.

24 *Digital Millennium Copyright Act*, 112 Stat 2860 (1998) (DMCA).

Central to the DMCA's scheme are "take-down" notices. When a copyright holder believes a third-party online service provider (OSP) — like Google or Twitter — is hosting material that infringes her copyright, she sends a DMCA take-down notice outlining her legal claim and demanding the OSP take down the offending material or face legal liability. Under the DMCA, once OSPs receive such notice, they must remove the infringing material or risk secondary liability for hosting material that directly infringes copyrights. They must also provide notice to the user who originally posted the content that it has been removed. There are two potential kinds of "chilling effects" at work here: one, where content is being removed after-the-fact as a result of targeted DMCA take-down notices (think of this as content chill); and, two, the more common concern, that the Internet user is "chilled," or self-censors his or her future speech, as a result of receiving a take-down notice. Though both of these kinds of chill are, arguably, at play, it is the latter form that has received the most attention from critics, who have argued that the DMCA regulatory regime, under which take-down notices can be sent to large numbers of online service providers with few costs, has a chilling effect on Internet speech and expression that is entirely legal.²⁵ In other words, despite the fact that there are very few, if any, systematic or empirical studies that examine how legal norms like the chilling effects doctrine may operate or apply in online contexts,²⁶ this has not stopped intellectual property lawyers and copyright scholars from applying the chilling effects doctrine to digital copyright issues and debates, most predominantly, mechanisms for copyright enforcement online. In the next section, I provide some reason to believe this may not be a sound practice, substantively or methodologically.

C. UNPACKING AND UNDERSTANDING THE DOCTRINE'S ASSUMPTIONS

Having given some sense of the chilling effects doctrine's background, and its relationship to digital copyright scholarship, I want to unpack its theoretical framework and assumptions. In the most basic sense, the chilling ef-

25 Sheets, above note 14; Samuelson, above note 14; Schaffner, above note 14; Liu, above note 14; Urban & Quilter, above note 14; Seltzer, above note 14.

26 Wyatt Ditzler, Michael Zimmer, & Tomas Lipinski, "DMCA Take-down Notices on Campus: A Case Study" (Paper delivered at the iConference, University of Illinois, October 2010) [unpublished].

fects doctrine describes a form of deterrence. That is, it is concerned about how a law, for whatever reason, deters a kind of activity, in this case, speech or expression. Though it is the person being deterred, it makes sense to speak of their “activity as being chilled.”²⁷ Like most kinds of deterrence, the chilling effect of a law is based on the threat of legal punishment, which in the case of copyright infringement can include fines, statutory damages, and even imprisonment. If you break or transgress the law, it says you will receive the prescribed punishment. People will avoid breaking or transgressing the law in question, so the theory goes, to avoid the punishment. When a law’s threat of punishment deters or chills certain kinds of speech or expression, then that is the chilling effects doctrine at work.

Yet, laws rely on more than just formal legal processes and punishment to deter; they also rely on social norms and stigma.²⁸ That is, because a law is enacted or approved by the broader public or community, then breaking the law — beyond whatever formal punishment follows — will also be met with social disapproval within that broader community. The social stigma attached to legal transgression also deters.²⁹

The CED is different from just legal deterrence, however, because it has negative connotations. The central idea underlying CED-based criticisms of a law — like the *DMCA* — is that it is not just deterring an illegal or unwanted activity, but is also deterring or chilling other activities that are both legal and desirable; in the context of chilling effects and digital copyright enforcement, this legal and desirous activity is free and open Internet speech and expression.³⁰ This chilling effect on legal activity is due to inherent uncertainty and costs within the legal process itself — laws may be too vague or overly broad and hard to define, thus catching legitimate activities within its scope. Or the costs of defending legitimate activities against legal attack may be too great.³¹ Whatever the reason, the law’s deterrence of legitimate and desirable activities, like speech, is its chilling effect.

Here lies one of the CED’s more obvious normative assumptions — that more speech and expression is better than less. And chilling more speech is undesirable. This normative assumption might offer one angle of cri-

27 Schauer, above note 19 at 689.

28 See, generally, Harold G Grasmick & Lynn Appleton “Legal Punishment and Social Stigma: A Comparison of Two Deterrence Models” (1977) 58 *Social Science Quarterly* 15.

29 *Ibid.*

30 Schauer, above note 19 at 690–92.

31 *Ibid.* at 700.

tique — that the CED embodies an American ethos about the value of absolute free speech — but for our purposes, I am more interested in exploring two other assumptions inherent in the CED, which are more theoretical and empirical, apparent from our discussion of the CED and its theoretical framework. These assumptions are related and, as will be seen later, are important to understanding how the CED may or may not be useful in an online context.

The first is that the CED assumes an informed, deliberative, and rational form of speech and expression. By informed, I mean that in order to be chilled or deterred from speaking or expressing something, the person or entity must, at the very least, be informed about the law in question, including its scope and the punishment involved. If the person or entity speaking had no knowledge of the law, they would not be deterred by its potential application to their expression.

The speech or expression must also be deliberative and rational. That is, the CED assumes that the speaker does a cost-benefit analysis before speaking; and taking into account the potential for punishment and social stigma, or the economic costs of defending conduct in a legal process, the person or entity decides that the costs of speaking outweigh the benefits. The CED assumes the speaker undergoes this rational and deliberative process and is deterred or chilled from acting or speaking. The CED assumes a rational and deliberative speaker in another sense too, like a blogger who receives a *DMCA* “take-down” notice for a post and decides to refrain from posting on that topic or similar topics ever again. The CED thus assumes that the speaker is rational and will act to avoid punishment and social stigma. An irrational, uninhibited, or unthinking speaker likely would not be chilled because they would not necessarily care about, or avoid, punishment or social stigma.

A second central theoretical and empirical assumption of the CED concerns the norm-following behaviour of the speaker. Assuming the speaker is informed, deliberative, and rational, the CED also makes assumptions about what set of norms the speaker will consider. That is, it assumes that the speaker is concerned with the norms of the broader community, and will aim to follow them; the speaker would be concerned about legal norms embodied in the law that might apply to his or her speech or expression, and also with the stigma attached to breaching social norms with his or her community. And these norms would weigh against speaking, leading to a chilling effect.

Of course, neither of these are necessarily unreasonable assumptions, particularly in traditional contexts for speech, expression, and media. In fact, they may, in a sense, disclose a potential *institutional* bias in the CED. Unlike an individual, a media company or publisher may very well undertake a cost-benefit analysis of publishing a story in the face of potential legal claims based in libel. And such an entity might also have access to legal advice and institutional experience, rendering the process to decide to publish (or speak and express) an informed, rational, and deliberative one. In other words, CED harbours, from another angle, an assumption of institutional capacity.

These assumptions suggest a kind of implicit media theory within the CED, that being, people engage in rational and deliberative speech online, pursue norm-following behaviour in ways similar to offline contexts, and, arguably, have the institutional capacity to carry out a cost-benefit analysis of the merits of speaking, publishing, or carrying out some other activity online. In the next section, I explore these assumptions in relation to insights from three fields of research: computer-mediated communications scholarship, online ethnography, and institutional theory.

D. TESTING THE DOCTRINE'S ASSUMPTIONS

Drawing on social science research concerning the Internet, I examine whether the CED's assumptions necessarily hold true in online contexts in relation to speech and expression. The first assumption was that the CED assumes a kind of informed, rational, and deliberative speech or expression, where the speaker considers the cost-benefit analysis of speaking, and, finding costs are too great, elects not to speak. The question, then, is whether this is an accurate reflection or description of online speech, expression, and communication.

1) Online Speech: Informed, Deliberative, and Rational?

Is online speech and expression as informed, deliberative, and rational as the CED assumes? Though there are few, if any, studies measuring the CED in an online context, there has been a growing body of scholarship on computer-mediated communication, which explores the nature and impact of online communication. This research is relevant, since speech and expression on the Internet is a form of computer-mediated communication, as it

is mediated by computers, networks, and related technology. The lessons of computer-mediated communication research may tell us something about how the CED works in an online context.

Two positions have dominated computer-mediated communication scholarly debates.³² The first is that online communications is less social and more impersonal, uninhibited. Early research, which formed the foundation of the “Social Presence” and “Cues Filtered Out” theories, found that compared to face-to-face communication, the lack of facial and other contextual cues in computer-mediated communication led to less personal and effective communication, and more uninhibited behaviour.³³ That is, the “technological features of [computer-mediated communication] trigger psychological states and processes that result in a situation of weak norms and social constraints and more deregulated behavior in the form of uninhibited communication.”³⁴

The second position, known mainly for the Social Information Processing (SIP) theory, takes a different view. Proponents of this theory argue that social presence theories relied on computer-mediated communication experiments that failed to take into account time pressures. Social information processing theory research suggests that the lack of cues in computer-mediated communication promote uninhibited and deregulated communication only when coupled with short time constraints; and over longer periods, computer-mediated communication is just as personal, deliberative, and regulated as face-to-face communications.³⁵ With enough time, computer-mediated communication and face-to-face communications show little difference.

So what might all of this tell us about CED and its assumptions concerning speech and expression online? First, at the very least, the CED ought not to be transplanted in an uncritical or blanket and overreaching fashion to online contexts. The computer-mediated communication research based around social presence and cues filtered out theories suggest that online communication — which obviously includes speech and expression — is not necessarily informed, rational, and deliberative. Moreover, SIP theory

32 Joseph B Walther, Tracey Loh, & Laura Granka, “Let Me Count the Ways: The Interchange of Verbal and Nonverbal Cues in Computer-Mediated and Face-to-Face Affinity” (2005) 24:1 *Journal of Language and Social Psychology* 36 at 36–37.

33 Elizabeth V Hobman et al, “The Expression of Conflict in Computer-Mediated and Face-To-Face Groups” (2002) 33:4 *Small Group Research* 439 at 440–41.

34 *Ibid* at 442 [reference omitted].

35 *Ibid* at 442; Joseph B Walther, “Computer-mediated communication: Impersonal, Interpersonal, and Hypersocial Interaction” (1996) 23 *Communication Research* 3.

research suggests that time constraints play a central role in promoting this kind of uninhibited and deregulated speech. But instantaneous forms of communication, like instant messaging (IM) or one-to-many forms like Twitter, are becoming more and more popular on the Internet.³⁶ On SIP theory, such communications are more synchronous allowing for less time for non-verbal communication, thus also promoting the kind of uninhibited and deregulated speech noted in social presence and cues filtered out studies.

In other words, contrary to what the CED assumes, speech, expression, and communication are not necessarily informed, deliberative, and rational in online contexts, particularly where communication is instantaneous. The chilling effects doctrine seems to have less relevance, or application, in these online contexts, given that people are less likely to censor themselves due to rational consideration or fear of legal sanction.

Yet, that is not the end of the story. The chilling effects doctrine would appear to have even greater relevance to *some* forms of online speech and expression, compared to even offline speech and communication. Again, computer-mediated communication research, particularly SIP theory, provides the basis for this insight. Though, as noted, Internet communications, including speech and expression, is moving toward more instantaneous communication (and, with video streaming, computer-mediated communication with more social and non-verbal cues), a great deal of computer-mediated communication on the Internet is far from instantaneous and synchronous. Rather, it is asynchronous allowing much greater periods of time for rational deliberation and cost-benefit analysis before speaking, or, as on the web and certain web forums, posting. This type of asynchronous computer-mediated communication is precisely the kind that SIP theory contemplates providing more effective and less deregulated communication.³⁷

Speech and expression on the world wide web is an excellent example of this kind of asynchronous computer-mediated communication. In web discussion forums, participants can take whatever time they wish before posting to a discussion thread, or responding to arguments from other posters. Blogs are another example of this. Before posting an item, a blogger

36 Mark Tremayne et al, "Perceived Authority and Communication Channel: Experiments with Instant Messaging" (2008) 28 *Social Science Computer Review* 178 at 178; Antonio Marturano, "The Ethics of Online Social Networks — an Introduction" (2011) 16 *International Review of Information Ethics* 3 at 3.

37 *Ibid*; Walther, above note 35 at 26.

can take a lengthy amount of time to decide whether the item might attract social disapproval or might infringe on some law, such as the *DMCA*.

Social media often involve platforms for mixed kinds of computer-mediated communications. For example, Twitter — where links to copyrighted material can easily be propagated to large numbers of followers — is arguably a kind of micro-blogging, though potentially instantaneous and fast moving, and also allows for a measure of asynchronous communication as a Twitter user has time to contemplate before writing a tweet (though this, arguably, could be exaggerated, as the rapid-style of Twitter’s “tweet stream” means that a Twitter user has a limited period of time to offer a timely response to a topic or Twitter discussion). Facebook too offers both asynchronous communications (Facebook messaging) but more instantaneous communication possibilities (live chat and status updates). YouTube, arguably, is more asynchronous, as a YouTube user has plenty of time to consider the implications of creating, uploading, and distributing a video via YouTube channels.

With speech and expression in these online contexts, chilling effects may be greater or magnified not only compared to other online contexts. In some instances, it may even be so as compared to offline contexts as well. In short, the CED must not be applied in a blanket or uncritical fashion to “the Internet” or all online contexts, as attention to details about the specific online context will have implications for how relevant the notion of legal or regulatory chilling effects will be.

2) Online Communications and Norm Following Behaviour

A second assumption of the CED concerned the norm following behaviour of the speaker. Assuming the speaker is informed, deliberative, and rational, it was also earlier noted that the CED likewise implicitly assumes that speakers are concerned with the norms of the broader community, and will aim to follow them. That is, a speaker would be concerned about legal norms embodied in the law that might apply to his or her speech or expression, and also with the stigma attached to breaching social norms with his or her community. And these norms would weight against speaking, leading to a chilling effect.

Online environments, and how people interact with them, also complicate this assumption. Ethnographic research on virtual worlds, as well as insights offered by computer-mediated communication studies, show that the

emergence of norms within online and virtual communities complicates the norm following behaviour of people in these contexts. Several virtual world ethnographic studies, for example, show that while people often follow “real world” conventions in online contexts — as the CED would have to assume — they often do so inconsistently.³⁸

One way of explaining this inconsistency might be drawn from the insights of computer-mediated communication research: social individuation/deindividuation or SIDE theory. This theory aims to explain norm following behaviour in online contexts; it holds that because computer-mediated communication, particularly on the Internet, lacks non-verbal social and environmental communication cues, people seek out norms in order to ensure acceptance among their peers.³⁹ The idea underlying the theory is that there is a tension between our personal and social identities, with the latter often driving us to adopt the behaviour of our peers in online contexts to fit in.⁴⁰ In one study, students were more likely to seek acceptance among peers and thus express opinions deemed “unacceptable” to faculty when using computer-mediated communication.⁴¹

Of course, this is not an exhaustive look at research on point. Rather, the purpose was to show how research in these areas complicate the CED's assumptions about the norms that people will follow when speaking, communicating, or expressing themselves. The CED assumed that people are primarily concerned with the norms of the “real world” community, and the laws that may deter the person from speaking. But these studies indicate that the development of norms in online contexts provides an additional layer, or in some contexts multiple layers, of norms that the speaker may consider before speaking or expressing him or herself. People may consider both online and offline norms when deciding whether to speak or express themselves; and in some cases, as the SIDE model suggests, there may be cases where people online will conform more to online group norms, and discount real world ones, to seek peer approval. Indeed, there is even the broader normative question, that goes beyond the scope of this article,

38 Ralph Schroeder, *Being There Together: Social Interaction in Shared Virtual Environments* (Oxford: Oxford University Press, 2011) at 213–14, discussing how people may not adhere to typical norms like religious ones in online contexts in the same way they do in other contexts.

39 See, generally, Andrew F Wood & Matthew J Smith, *Online Communication: Linking Technology, Identity, & Culture*, 2d ed (Mahwah, NJ: Lawrence Erlbaum Associates, 2005).

40 *Ibid.*

41 *Ibid* at 86.

about the legitimacy of legal norms and assumptions of doctrines like the CED (and their application) when the norms of online communities differ so much. Again, the relevance and applicability of the CED depends on the nature and context of the online activity.

3) Institutional Theory and the Private Enforcement of Legal Norms

A final point concerns the relationship between institutions and the CED—the doctrine’s assumption that online actors engage in cost-benefit assessments to decide whether to speak or act in the face of a potential legal threat means that institutions—be they public institutions, commercial enterprises or organizations—may be less likely “chilled” or deterred by legal threats. This is because they would have access to legal advice, institutional experience, and other mitigating resources, rendering any decision to speak, publish, or act, much more informed, rational, and deliberative. I call this an implicit institutional bias in CED, but, in truth, this bias is applicable to offline contexts as much as the Internet (and may not always hold true in either context, as individuals and institutions have many different motivations for speaking or Internet posting, which may or may not include a concern about legal liabilities or threats).

There is another way that institutional concerns affect the application of the CED to the Internet and online contexts. Earlier, I noted how state governments are increasingly relying on more sophisticated “next generation” regulatory methods, which often involve complex statutory schemes that deploy regulatory norms like intermediary liability—that is, a regime that imposes legal duties and responsibilities on third parties or intermediaries as a means to enforce legal rights or interests.⁴² The *DMCA* is a great example of such an intermediary liability regime, since it relies on private actors—online hosts and service providers—to enforce intellectual property claims (received via *DMCA* take-down notices).

However, the inclusion of private institutional actors in the enforcement equation raises a whole host of potential complications, most notably the inconsistent application and enforcement of laws and legal norms. First, institutional and organizational theory and research has convincingly shown that organizations and institutions tend towards path dependency,

42 Deibert & Rohozinski, above note 22, at 6.

that is, self-reinforcing behaviour that resists change while “dramatically” narrowing the scope of the organization or institution’s action over time.⁴³ Second, organizational research suggests that national cultures (including, presumably, national legal cultures) plays a minimal role in constraining organizational culture, leaving organizations and institutions with more discretion and freedom to determine what organizational cultural conventions and practices should be entrenched or standardized.⁴⁴

Following the insights of institutional and organizational theory and research, if the *DMCA*, and similar Internet intellectual property-based intermediary liability regimes can have a chilling effect on entirely legal online speech and other behaviour, then the scope, magnitude, and consistency of those chilling effects may turn, in many cases, on what private entity, company, or organization is involved, and their accompanying organizational culture, and the many self-reinforcing processes that preserve and entrench organizational norms. Indeed, the *DMCA*, and other intermediary liability regimes, operate based on what Graham Dinwoodie calls a “private ordering” framework, whereby actors in the private sphere make important decisions about how and when to enforce legal norms and other public goods and values.⁴⁵ Some companies, to take one example, may take intellectual property rights more seriously than another; while others will assume the importance of battling cyber-crime, with little interest in policing intellectual property.⁴⁶ The regulatory response, and any potential chilling effects, could be under-enforced or over-enforced depending on the specific private institution or organization. In other words, the CED’s application to Internet-related contexts is much more complicated and problematic than lawyers and legal scholars have previously let on.

43 Georg Schreyögg & Jörg Sydow, “Organizational Path Dependence: A Process View” (2011) 32:3 *Organization Studies* 321 at 323. See also W Richard Scott, “Institutional Theory: Contributing to a Theoretical Research Program” in Ken G Smith & Michael A Hitt, eds, *Great Minds in Management: The Process of Theory Development* (Oxford: Oxford University Press, 2005).

44 Barry Gerhart, “How Much Does National Culture Constrain Organizational Culture?” (2008) 5:2 *Management and Organization Review* 241 at 255.

45 See, generally, Graeme B Dinwoodie, “Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring” (2004) 160:1 *Journal of Institutional and Theoretical Economics* 161.

46 The idea is not far-fetched. Google, for example, has a unique corporate culture in its approach to copyright, both in terms of its business ventures, as well as its legal responsibilities to enforce such rights. See generally Aurelio Lopez-Tarruella, ed, *Google and the Law: Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models* (The Hague: Asser Press, 2012).

E. DIRECTIONS FORWARD

It is generally assumed that law and legal doctrines, as a product of a specific legal culture, include or incorporate certain implicit social, political, and cultural assumptions. This essay has attempted to illustrate, through a case study of the chilling effects doctrine as applied to Internet contexts, how such legal doctrines, specifically one common to digital copyright scholarship, also reflect implicit theories about communications media and how people interact with, and communicate through, those media. Those implicit media theories and assumptions are not inherently problematic, and, in fact, offer insights not just about “chilling effects” as a legal idea, but also the nature and development of copyright law itself; for the implicit assumptions about media inherent in the many legal doctrines of copyright law might be said to reflect or embody copyright’s own media theory. Of course, a proper exploration of “copyright’s media theory” goes beyond the scope of this chapter, but is certainly worth pursuing in future research.

This being said, such hidden or implicit media theories and assumptions can also pose serious substantive and methodological risks if left unaddressed. Here, drawing on insights from several different fields, I have tried to show how the media theory implicit in the chilling effects doctrine either does not necessarily hold true in online contexts or, at the very least, complicates the doctrine’s application to activities online. These risks can lead not only to incorrect conclusions, false hypotheses, and overall inaccurate research findings, but also to bad public policy: it is impossible to determine whether regulatory schemes like the *DMCA* achieve an appropriate balance between the rights of copyright holders and other public goods like free expression, if we are not attentive to the assumptions and nuances of applying legal doctrines, like the *CED*, to online contexts.

Though such normative, empirical, and methodological risks probably cannot be entirely avoided, there are steps that intellectual property and “cyberlaw” scholars involved with Internet-related legal scholarship can take, going forward, to minimize such risks. First, legal scholars must do a better job of examining and unpacking the theoretical, empirical, and normative assumptions of the legal doctrines with which they are working, particularly where they wish to “transplant” those doctrines to online contexts. This includes not only cultural, social, and political assumptions, but also assumptions relating to media and how people interact with such media. Second, they need to spend more time investigating what other disciplines

and fields of research have to say about the legal doctrines at stake, including any implicit media theories or assumptions. In this case, several of the CED's implicit assumptions proved shaky in light of insights from computer-mediated communication research, online ethnographic research, and institutional/organizational theory. Of course, the examination of other fields in this chapter was far from an exhaustive review; the point, stated earlier, was simply to illustrate the importance and value in seeking guidance beyond legal research.

Thankfully, these additional efforts have benefits for legal scholarship beyond the purpose of seeking out diverse research fields for multidisciplinary insights and methodological guidance. As Michele Graziadei has pointed out, the study of "legal transplants" and the attendant methodological issues and debates, "broadens our understanding of crucial aspects of the law, including those that raise questions of justice."⁴⁷ Such an approach would help send a signal to other fields and disciplines that intellectual property scholarship, and legal research more generally, has freed itself from narrow and idiosyncratic methodological debates of the past, and is embarking on a rich, new, interdisciplinary path.

47 See also Graziadei, above note 2 at 695.