



INTERNET LAW SESSION 3

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**WELCOME BACK TO TRANSNATIONAL INTERNET
LAW!**

TODAY'S OVERVIEW

1. Introduction to domain names and ICANN
2. Intellectual Property and the Internet

PART I

INTRODUCTION TO
ICANN AND DOMAIN
NAMES

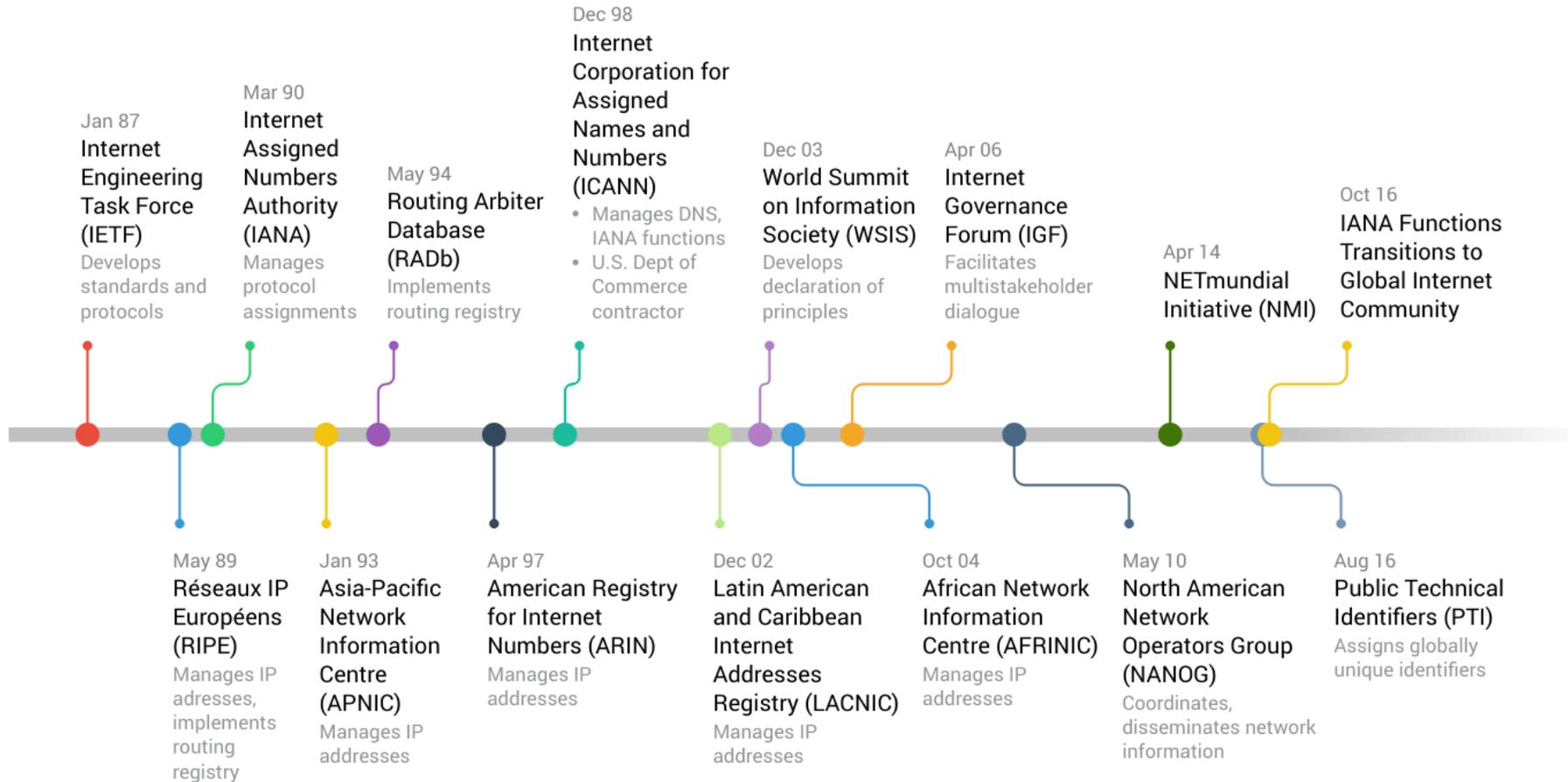
MULTISTAKEHOLDERISM VS MULTILATERALISM

Multilateralism: traditional approach to governing global issues via international law and international organisations e.g. ITU in telecoms -> legal rules and formal procedures



Multistakeholderism – (originally) informal, organic ways in which the Internet had been managed since its birth – governed by a community of interest (technical experts, users, network operators, government regulators etc) -> deliberation and rough consensus > ICANN

Internet governance timeline



LOTS OF INTERNET GOVERNANCE ACRONYMS/JARGON

- DNS = domain name system
- IANA = Internet Assigned Numbers Authority
- ICANN = Internet Corporation for Assigned Names and Numbers
- IDN = Internationalised Domain Name
- IETF = Internet Engineering Task Force
- NTIA = National Telecommunications and Information Administration of the US Department of Commerce
- TLD = top level domain name
 - ccTLD = country code top level domain name e.g. .uk
 - gTLDs = generic top level domain names e.g. .com, .edu
- UDRP = Universal Dispute Resolution Policy

- www.google.com -> .com is a generic top level domain name = gTLD
- www.strath.ac.uk -> .uk is a country top level domain name (ccTLD)
- Initially most domain names were one of a few gTLDs e.g. .com, .edu., .gov, .net and ccTLDs
- New TLDs released since 2012:
 - More generic ones e.g. .wine, .shop, .club
 - Geographical e.g. .LONDON, .AMSTERDAM
 - Community based e.g. .eco, .HOTEL, .ART
 - Brand e.g. .CHANEL, .BBC
 - For more info: https://icannwiki.org/New_gTLD_Program
- Another round of TLDs scheduled to be released in the next couple of years

DIFFERENT KINDS OF DOMAIN NAMES

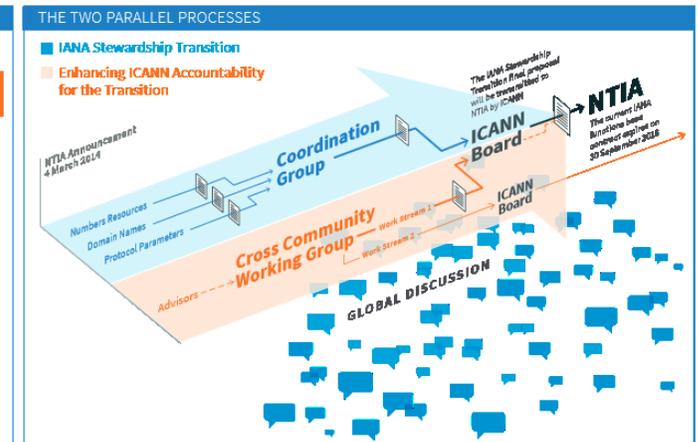
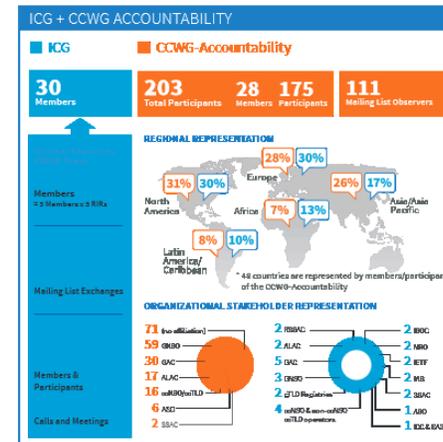
DOMAIN NAME GOVERNANCE

- Prior to 1998, one person, Dr Jon Postel, a researcher based in Californian universities, performed this function pursuant to a contract with the US Government
- from 1998 ICANN was formed to govern the international domain name allocation
- <https://www.youtube.com/watch?v=IJY5xJKPhjA>
- ICANN's legal form is a non-profit corporation registered in the US State of California known as a §501(c)(3) non-profit corporation
- ICANN operated from 1998 to 2016 pursuant to a contract with the US Government agency NTIA (no statute or international treaty)
- In practice, US control of the root function – but not clear where it derived this authority from/scope of authority



IANA TRANSITION

- In 2016, US government allowed its contract with ICANN re IANA functions to lapse
- Now, transition out of this contract to ICANN's independent management of the naming and numbering function aka 'IANA transition':
 - Generation and assignment of new top-level domains
 - Ensure that web addresses correspond to correct website
 - Designation of who can hear disputes related to domain names
- Various references to 'private' management of IANA function/multistakeholder management
- See for more info: <https://www.internetsociety.org/iana-transition/>



HOW ARE DOMAIN NAMES ALLOCATED?

Go with GoDaddy



Award-winning, 24/7 sales & support

Not sure what you need? That's why we have hundreds of smart, friendly web pros waiting by the phone. Just call (480) 505-8877



More names at better prices

We have 100's of domains to choose from, not to mention prices that other companies only dream about.



We're the world's leading domain registrar

With over 17 million happy customers and 71 million domains under management, we know how to set you up for success online.

- Depends on the domain you want i.e. whether a generic TLD, country TLD – or one of the new TLDs
- Domain name registrars – must be accredited by domain name authorities
- For a usually small fee you can register a domain name with a registrar and there is no prior check/screening aside from a search to see that the domain is available

COUNTRY LEVEL TLDS DISPUTE RESOLUTION



IANA delegated management of ccTLDs to designated country managers, which generally operate them in accordance with local policies



For each ccTLD, there is a dispute resolution mechanism in place, usually based on ICANN's UDRP



Which organisation is the manager of the ccTLD in your jurisdiction?

SOURCES OF DOMAIN NAME DISPUTES

- When a business name or trade mark is registered as a domain name by someone else
- Cybersquatting: profiting from registering others' names or trade marks with the intent of either selling them to the company or using the domain name to attract traffic to your website.
- Typosquatting: registering domain names that are very similar to other companies' names or trademarks but with typographical errors or the addition of a number of letters for click-through revenue or fraud purposes
- Issue: interests of the company/trade mark owner vs potential free speech and competition concerns
- Problems arise if parties are located in different jurisdictions to each other/domain name registrar

GENERIC DOMAIN NAME DISPUTE SETTLEMENT MECHANISMS

- Problem of cross-jurisdictional parties/time for courts to hear disputes
- When ICANN was set up in 1998, it was responsible for managing generic TLDs and issued a dispute resolution policy (UDRP) in 1999
- Domain name dispute resolution providers:
 - World Intellectual Property Organization (WIPO) – Geneva, Switzerland
 - National Arbitration Forum/the Forum - US
 - Asian Domain Name Dispute Resolution Centre – Hong Kong
 - Arab Center for Domain Name Dispute Resolution - Jordan
 - The Czech Arbitration Court Arbitration Center for Internet Disputes (CACACID) – Czech Rep

WHY USE THESE MECHANISMS

- Most domain name disputes are resolved under the UDRP or similar policies.
- Why? Speed, convenience, cost
- Most proceedings are handled on-line and are resolved within two to three months.
- The filing fees are between US\$500 and US\$1,500
- Registrars are required to lock a domain name as soon as a dispute is filed.
- BUT – parties are not excluded from starting court proceedings by the UDRP

HOW TO WIN A UDRP DISPUTE

UDRP Para 4(a), disputes may be commenced when

(i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and

(ii) you have no rights or legitimate interests in respect of the domain name; and

(iii) your domain name has been registered and is being used in bad faith.

3 elements a complainant must prove to win a UDRP dispute

2 remedies in Para 4(i):

- Cancellation of disputed domain name (2% of WIPO disputes)
- Transfer of disputed domain name to complainant (85% of WIPO disputes)

DEFICIENCIES OF UDRP



Need to show registration was ‘in bad faith’



Need for updates – but difficult to achieve given competing interests of ICANN stakeholders and need for consensus



No tribunal to which decisions of UDRP panels can be appealed; decisions of previous panels not binding on later panels (no doctrine of precedent although a ‘general consensus’ on some issues has been achieved)



WIPO Jurisprudential Overview of WIPO Panel Views on Selected UDRP Questions – in its 3rd edition – attempts to identify consistency and consensus among UDRP decisions but not binding

NEW GENERIC TLDS



- In 2013, ICAAN introduced a Uniform Rapid Suspension (URS) for new gTLDs
- does not apply to the traditional gTLDs such as .com, .net and .org.
- The URS is designed for the clearest cases of trade mark abuse with a higher burden of proof on the complainant.
- If the complaint is successful the domain name will be suspended.

ONGOING ISSUES

- Absolute power of ICANN over the root – it can create and destroy TLDs inc ccTLDs
- Criticism and fan pages – free speech concerns
- UDRP is too US-centric? Reflects USian legal culture?
- UDRP and other similar policies for ccTLD give too much weight to TM owners' interests over registrants' interests?
- UDRP gives more rights to TM owners than under the domestic TM law of some countries e.g. re tarnishment of TMs?
- Evidentiary presumptions which favour TM owners over registrants?
- Relationship between 'complainant friendliness' of (some) dispute resolution providers and providers' income vs 'less partial' courts?

SOME RECENT DOMAIN NAME ISSUES: .IR



- *Weinstein vs Islamic Republic of Iran* – US court case
- Application to seize property belonging to the Iranian State for compensation for terrorist acts under US law
- Argument that ccTLDs are property, attempt to seize .ir domain from ICANN
- Argument not upheld by a US appellate court as it would impair ICANN's role in internet governance
- More on this:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575450

.CAT AND THE SPAIN-CATALONIA INDEPENDENCE ISSUE

- In 2017, the government Catalonia, an autonomous province of Spain with a devolved government held an independence referendum which the Spain state declared illegal
- As an attempt to prevent/impair the referendum, federal police raided the .CAT domain registry puntCAT involving the ‘seizure of computers, the arrest of its head of IT for sedition, and the deletion of domains promoting the October 1 referendum, such as refoctl.cat’
- See more: <https://www.eff.org/deeplinks/2017/09/cat-domain-casualty-catalonian-independence-crackdown>



Mr. Göran Marby
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers

17 September 2017

Re: .cat domain name judicial seizure warrant

Dear Mr. Marby,

Fundació puntCAT wants to inform ICANN that on September 15th Spanish judicial authorities issued a seizure warrant that forces Fundació puntCAT, as the .cat TLD Registry operator, to block all .cat domain names that may contain any kind of information about the forthcoming independence referendum to be held in Catalonia on October 1st.

While Fundació puntCAT understands national jurisdiction and law enforcement matters are not within ICANN's purview, we believe there are causes for concern for the ICANN community at large given the unprecedented and absolute scope of this blocking request.

Spanish judicial authorities are ordering .cat to conduct censorship duties, as the judicial order received by puntCAT places the burden of blocking domain names based on the content they may contain on the Registry operator. We are being requested to censor content and suppress freedom of speech in the .cat domain names. This compromises the obligations we have as gTLD Registry operator towards the .cat community, and may put in jeopardy our position as the steward of the catalan speaking community on the Internet.

We are seriously concerned about the legal implications of this order, and about the consequences the .cat community may suffer.


Eduard Marín Lineros
CEO Fundació puntCAT

.EU AND BREXIT



- Proposal to cancel registrations of .eu domains with a UK registrant after the UK leaves the European Union
- They will not be eligible to register .eu domains, re-register them and current .eu domains may be cancelled!
- See: https://www.theregister.co.uk/2018/03/29/eu_dump_s_300000_ukowned_domains_into_brexit_bin/

KEY POINTS



Domain names might be a bit dull and technical but they are also very political and commercially important



The trajectory of domain name governance evidences the globalisation of the Internet and (superficial?) lessening of US dominance



More formalisation of procedures



But issues remain e.g. corporate control of domains esp via trade marks; relationship between ICANN and domestic and international law; role of ccTLDs in politically charged situations



QUESTIONS?



INTRODUCTION TO IP LAW



- IP is the area of law providing (quasi) property rights/exclusivity over intangible assets to incentivise creation and invention
- Traditional rights:
 - Copyright
 - Patents
 - Trade marks
 - (in civil law systems: moral rights)
- 'Newer rights':
 - Trade secrets
 - Design rights (design patents in the US)
 - Computer programs
 - Databases
 - Biotech innovations
 - (in common law systems: moral rights)

INTERNATIONALISATION OF IP



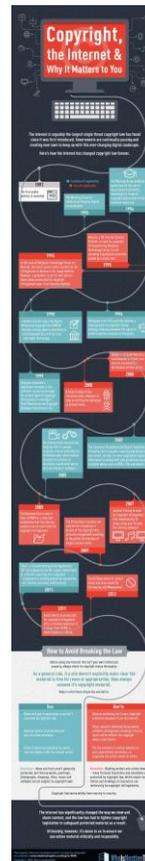
- IP has been a fairly internationalised area of law through international treaties, eg:
 - WIPO Treaties:
 - Paris Convention (patents and TMs) 1883/1967
 - Berne Convention (copyright) 1886
 - WTO TRIPS agreement
- Arguably these treaties set fairly ‘minimal’ standards of harmonization – room for interpretation/divergence in national laws

COPYRIGHT: GENERAL

- Traditionally a right over creative works in material form to authorise or prohibit certain acts relating to the work e.g. reproduction, distribution and communication to the public
- Subject-matter of copyright greatly expanded in many jurisdictions to cover e.g. computer software in some cases
- Term of protection: life plus 70 years (UK, Italy etc)
- Registration not necessary



COPYRIGHT AND THE INTERNET – US TIMELINE



See: <https://www.whoishostingthis.com/blog/2014/11/03/copyright-internet-and-you/>

DECENTRALISATION AND DISSEMINATION



- Digitisation of cultural products: music, movies, books etc
- Decentralised nature of the Internet
- Possibility to acquire, copy and disseminate material in much easier ways than before
- For cultural industries, lack of embrace of new technology until too late

1990S DEVELOPMENTS



Early litigation in various jurisdictions esp US



Development of WIPO Internet Treaties (1996):

[WIPO Copyright Treaty](#)

[WIPO Performances and Phonograms Treaty](#)



Landmark: [US Digital Millennium Copyright Act 1998](#)

Intermediary liability 'safe harbour' and notice and takedown mechanism

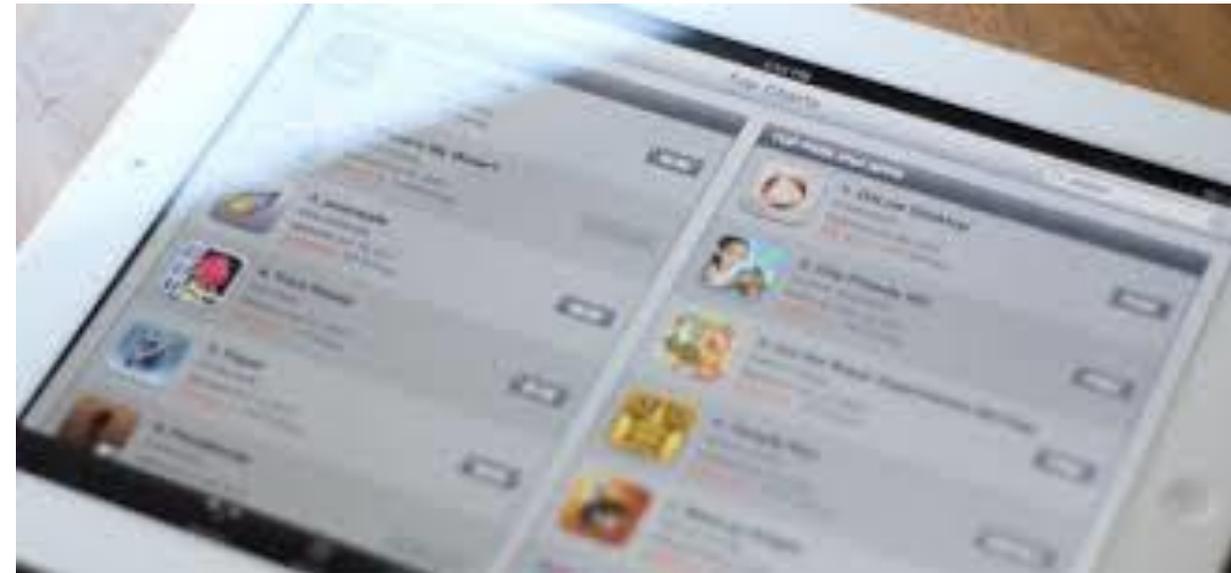
Replicated to varying degrees in other jurisdictions e.g. [Art 14 of the E-Commerce Directive in the EU \(2000\)](#)

MORE CHANGES IN BUSINESS PRACTICES

Streaming services – better availability, convenience, quality/safety



Transition to more 'closed' smartphone systems e.g. Apple



AGAIN – US LAW VERY IMPORTANT IN THIS AREA – FAIR USE

Fair use - US law, s 107 Copyright Act

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Other systems

- Usually more restrictive than fair use
- In UK, ‘fair dealing’ – various categories of activities which you can do without the copyright owner’s permission e.g. quotation

KEY DIFFERENCES:

Fair use is open-ended versus the more restrictive list of fair dealing instances

GOOGLE AND FAIR USE

- Would it have been possible for Google to emerge in a jurisdiction which didn't have fair use exceptions?
 - Google Cache
 - Google Books – see [Rimmer \(2017\)](#)

The screenshot shows a Google search for "wherefore art thou romeo" on the Google Books platform. The search bar at the top contains the query and a search icon. Below the search bar, there are navigation icons for search, zoom, print, and share, along with buttons for "Add to my library" and "Write review".

The search results show "Result 1 of 14 in this book for wherefore art thou romeo" with links for "Previous", "Next", and "View all". The book title is "William Shakespeare's Romeo and Juliet" by Harold Bloom. A red button says "GET PRINT BOOK". Below that, it says "No eBook available" and lists retailers: Amazon.com, Barnes&Noble.com, Books-A-Million, and IndieBound. There is a "Find in a library" link and "All sellers »".

The book cover is visible, showing the title "INTERPRETATIONS" and a rating of "G+1" with "0" reviews, "2 Reviews", and a "Write review" link. Below the cover, the title "William Shakespeare's Romeo and Juliet" is displayed, followed by "By Harold Bloom". A search bar at the bottom of the book page contains "wherefore art thou rom" and a "Go" button. A link "About this book" is at the bottom left.

The main content area shows a table of contents with the following entries:

Wherefore Art Thou Tereu?	
Juliet and the Legacy of Rape	91
<i>Robert N. Watson and Stephen Dickey</i>	
"Bodied Forth": Spectator, Stage, and Actor in the Early Modern Theater	121
<i>Jennifer A. Low</i>	

Below the table of contents, a message states: "Some pages are omitted from this book preview." At the bottom of the preview, the text "A Thing Like Death": Sleeping Potions and Poisons is visible.

COPYRIGHT SUMMARY



We also see issues of US legal culture, private intermediaries' role and jurisdiction here in copyright



Perhaps less infringement or not such a pressing issue now compared to 10 years ago



But copyright remains an important aspect of Internet Law – see new EU Directive

DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

- Attempt to modernise copyright law in the EU
- <https://www.youtube.com/watch?v=Jz7W7jyibVE>
- <https://www.youtube.com/watch?v=bTvWeJJ02hE>
- <https://www.youtube.com/watch?v=MAqjBDh6GY4>

What are the arguments in favour of the new Copyright Directive?

What are the arguments against it?



THANK YOU

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