Framing standards, mobilizing users: Copyright versus fair use in transnational regulation*

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Abstract

In this paper we analyze how politicized conflicts about the regulation of copyright following the agreement on Trade-Related Aspects of Intellectual Property (TRIPS) shifted from the political to the market arena, where two opposing coalitions of actors pursued competing standard-setting initiatives. We find that paradoxically an industry coalition that had successfully lobbied during the TRIPS negotiations for a global copyright protection regime ran into trouble developing and enforcing it via technical standards in the market place, while a loose and emerging civil society coalition defending 'fair use' proved to be more effective to establish private copy-left licenses in the market than it had been before in influencing agenda setting in the political sphere. Drawing on organizational and social movement theory we show that the strategic use

of organizational forms and collective action frames was more decisive for the mobilization of users than material resources, and that the success of collective action frames depended on their compatibility with user practices. Our analysis challenges standard arguments about regime complexity providing more leverage to well-endowed actors by highlighting the transformative dimension of resource mobilization. It also points to strategies of <u>public-private shifting</u> which future studies on regime complexity should better encompass.

Keywords: International regime complexity; intellectual property regulation; standards; implementation politics; mobilization; framing

Introduction

Since the 1970s, the regulation of intellectual property including copyright, patents and trademarks has developed from a very specialized legal field into one of the most controversial areas in international politics. The major reason for this was the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) concluded in 1995, which created for the first time a regulatory regime that was legally binding on all 153 member states of the World Trade Organization (WTO) and contained enforcement mechanisms for intellectual property rights. The current social science literature portrays the TRIPS agreement as driven by a comparatively small industry coalition to protect private property rights, which successfully asserted its interests to the detriment of public interests, particularly those of developing countries, to free access to information and knowledge beneficial to social projects involving health and development policy (Drahos with Braithwaite, 2002; Helfer, 2004, 2007; Matthews, 2002; May and Sell, 2006; Sell, 2003, 2010). Subsequent developments appear to vary between the fields of patent and copyright regulation. In the former, Sell and Prakash (2004) found that a transnational NGO network successfully campaigned for linking TRIPS patent regulation to issues of public health. Yet, the general view on the latter is that mobilization of the negatively impacted industries, consumers and citizens groups tended to be too weak to achieve amendments to the copyright provisions of the TRIPS agreement or to subsequent national copyright regulations (Bach, 2004; Hellberger and Hugenholtz, 2007)[1].

In this paper we analyse a new phase of political and social conflict over copyright that followed the passage of the TRIPS agreement, WIPO treaties and their implementation by national legislation. Interestingly, conflicts over enforcing copyright shifted from the political arena, understood as rule-setting by national legislators and governments as

well as intergovernmental organizations and treaties, to arenas of private standard-setting, i.e. forms of voluntary rule-setting involving non-state actors from business and civil society. This shift, we suggest, was triggered by strategic responses of two opposed interest coalitions to perceived complexities and ambiguities of the international copyright regime: the previously dominant business-based copyright coalition sought to develop standards for the management of digital rights to better enforce existing copyright regulation (Rosenblatt *et al*., 2002; Becker *et al*., 2003; May and Sell, 2006). These attempts were countered by an emerging, initially rather loose fair use coalition of public libraries, newly founded digital rights NGOs and an epistemic community of critical copyright lawyers favouring the copy-left principle and fair use for non-commercial purposes (Okediji, 2000). The standard-setting strategy of this coalition crystalized in the promotion of a unified Creative Commons license for open content (Elkin-Koren, 2005). Paradoxically, the strategies of the industry-based copyright coalition, which had been highly successful in political lobbying, encountered resistance in private standard-setting and implementation (Stefik, 2007), whereas the coalition of civil society actors, which had been less successful in the political arena, succeeded in initiating and spreading an 'alternative copyright' standard among a significant number of producers and users of immaterial goods.[2]

In order to explain this paradoxical finding, we propose studying transnational standardization as a political process. In contrast to IPE studies that deal predominantly with upstream negotiations between powerful actors at the standard-setting stage (Graz and Nölke, 2008; Büthe and Mattli, 2011), we shift attention to political struggles over downstream adoption, acceptance, usage or resistance and rejection of standards by consumers and users. While we build on international regime complexity theory (Alter and Meunier, 2009), we go beyond its exclusive focus on the political arena. In our

analysis we deal with actors that shift strategies from intergovernmental to private regimes, and with implementation politics in markets and other decentralized private arenas. Drawing on research at the intersection of economic, organizational and political sociology (cf. McCarthy and Zald, 1977; Snow and Benfort, 1988; Brunsson and Jacobsson, 2000; Fligstein, 2001), we focus on mobilization strategies that employ organizational and discursive means to address large audiences of potential standard users and analyse their transformative impact on the existing distribution of power. Our findings demonstrate that, within the context of copyright, successful mobilization for standard usage depends both on organizational arrangements fostering coalition-building and negotiation among its members, and on the use of convincing action frames to address not only producers and owners of content but also the large number of consumers and users of immaterial goods.

By empirically studying the question of how weak and peripheral actors can mobilize effectively against resourceful and dominant actors in a specific setting – transnational private standard-setting in the field of copyright during the period 1998-2009 - the paper aims to contribute to broader debates in international political economy. Firstly, it speaks to the growing literature on regime complexity and orchestration deficits (Abott and Snidal 2009a, b; Alter and Meunier, 2009). Our paper illustrates how two interest group coalitions seized on complexities and ambiguities in the TRIPS agreement as an opportunity to promote their political aims through private standard-setting initiatives. It provides illustrative support for the argument that regime shifting from intergovernmental to private arenas can open up new and favourable spaces for weak actors to experiment with alternative forms of regulation. Secondly, the paper adds to recent work on the role of non-elite actors and their everyday practices and choices for the international political economy (Hobson and Seabrooke, 2009). Our results

highlight how the framing of ideas can foster acceptance or lead to rejection of standards by large numbers of non-elite actors. They underline that successful platform standards – whether developed by powerful economic or by focal civil society actors – crucially depend on their day to day usage by many ordinary actors.

In the following, we present our analytical framework, explain the methodological approach of the study and analyse the mobilization processes of copyright coalitions and the counter-mobilization of fair use coalitions. In the conclusion, we discuss broader implications of the study for regime complexity theory and 'everyday political approaches' in international political economy.

Analytical framework

International regime complexity, regime shifting and private regulation

The strategies of both the copyright coalition and the fair use coalition represent strategic responses to tensions arising from the increasing complexity of the international intellectual property rights regime in the post-Trips era[3]. Regime complexity theory provides two propositions which are important here. Firstly, policy domains that 'are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors' and lack hierarchical integration of these rules (Raustiala and Victor, 2004: 279) are likely to give rise to strategies of forum-shopping and regime-shifting (Alter and Meunier, 2009). Helfer (2009: 39) distinguished between forum-shopping, as involving changes in venue with the purpose of reaching a single favourable decision, and regime-shifting, as an 'iterative, longer-term strategy' that aims at 'broadening the policy spaces within which relevant decisions are made and rules are adopted.' Secondly, competing, parallel and overlapping rules in international regime complexes are bound to produce legal

inconsistencies and ambiguities. These, in turn, provide national and local actors with opportunities for different implementation and interpretation strategies. As a consequence, Alter and Meunier (2009: 15f) suggest that scholars need to give more attention to how rules are defined and redefined in the course of their implementation. Under regime complexity, they argue, 'implementation politics' become decisive for the salience and meaning that international agreements gain on the ground. Mosley (2010), for example, shows that domestic regulatory institutions in middle-income countries rendered the adoption of new international rules technically as well politically difficult.

Yet, research on regime-shifting strategies and implementation politics remains incomplete so long as it focuses exclusively on intergovernmental organizations and the role of national governments. While the results provide interesting insights, they neglect the rise of private authority in transnational rule making (Cutler *et al*., 1999) and the role of non-state actors in both private rule setting and rule implementation (Djelic and Sahlin-Andersson, 2006; Graz and Nölke, 2008). We suggest that research should also encompass regime-shifting strategies between public and private regulatory regimes, as well as forum-shopping between different private fora. The advantage of expanding the analysis of regime shifting and implementation politics to private regulation is that it overcomes misleadingly associating political activity in the public sphere, occupied by governments, with non-political activity in the economy and markets (see Cutler *et al*. 1999: 285). Incorporating the strategizing of non-state actors in private arenas into the analysis will provide a more encompassing perspective on political struggles because in the words of Armstrong and Bernstein (2008: 93), 'a great deal of the strategizing of contemporary movements will center on figuring out how to best exploit … contradictions' in multi-layered and polyarchic systems. Above all, it will add a whole range of highly relevant, though so far neglected, channels and mechanism of rule

implementation, including the acceptance or rejection of standards by consumers and users in market-based or other decentralized arenas.

Standardization as a political process

Both initiatives of private regulation investigated in this paper, copyright coalition and the fair use coalition, are attempts at standardizing Internet usage practices via standardized data formats and rights management. As such, they represent a case of transnational standardization which has recently received growing scholarly attention in (international) political economy (Cutler *et al*., 1999; Graz and Nölke, 2008; Abbott and Snidal, 2001, 2009a; Büthe and Mattli, 2011; Graz, 2011; Botzem, 2012) and economic and organizational sociology (Brunsson and Jacobsson, 2000; Tamm Hallström, 2004; Tamm Hallström and Boström, 2010; Timmermanns and Epstein, 2010).

Typically, the term 'standards' is used to identify formalized sets of rules with a high degree of specificity. In principle standards are legally non-binding and hence, voluntary in terms of adoption. This does not mean that standard setting is a neutral process, as assumed by functional approaches. On the contrary, most of the aforementioned authors agree that standardization is a political process. It involves struggles and negotiations between different actor groups over goals, substantial and procedural content of rules and their outcomes. The fact that standards have the potential to transform social relationships, and thereby generate distributive effects (Mattli and Büthe, 2005; Nölke and Perry, 2007), makes them an attractive target for collective actors who want to shape and regulate the social practices of larger audiences for the purpose of achieving private or public goals. Yet authors tend to differ in their focus on specific phases of the standardization process and their understanding of what is 'political'.

Studies in IPE predominantly concentrate on the upstream struggles between established and resourceful actors that concern the substantial and procedural content of standard-setting. In this context, politics refers predominantly to negotiations between actors with given interests about distributional outcomes. Typically technical expertise and financial means are seen as important resources that will influence the outcome of negotiations. In addition, the flow of information, appropriate modes of interest representation, and the complementarity between national and international standard-setting procedures have been identified as factors which enhance or limit the capacity of actors to influence standard-setting (Büthe and Mattli, 2011: 45ff). Yet, interests, identities and resources of actors tend to be seen as structurally defined and relatively static which leaves relatively little room for explaining how weaker actors could gain leverage in such negotiations.

Sociological studies of standardization, while concurring in many aspects with the IPE findings on standard setting, tend to give more attention to the processes involved in downstream implementation (Brunsson and Jacobsson, 2000). Implementation politics, as understood in this context, refers to strategies of standard setters promoting the adoption of their standards, intermediaries facilitating or opposing the diffusion of standards, and broader audiences accepting or resisting the usage of standards (Timmermanns and Epstein, 2010). In addition to adoption by governments covered by IPE scholars, sociological studies include also business organizations, NGOs or other intermediaries (Tamm Hallström, 2004, Tamm Hallström and Boström, 2010) that can incentivize the usage of standards, as well the large number of 'end users' of standards whose decentralized decisions influence the success or failure of a standard. Sociological approaches sensitize us to the fact that the implementation of a standard requires organizational and framing strategies which address 'various roles of users, as

well as their skills, motivations, requirements, tools, and final outcomes' (Timmermanns and Epstein 2010: 79). From this perspective, standardization often involves identity politics in the sense of contestation about distinct beliefs, norms and perceptions (Bartley, 2007; Armstrong and Bernstein, 2008). In so far as standardization includes the social construction of new categories, changing social practices and formation of new collective actors out of dispersed individuals and groups (Malets, 2010), it can potentially transform constellations of interest and influence.

Mobilizing users in markets and in other decentralized arenas

In order to conceptualize the mobilization of standard users, we draw on concepts stemming from political sociology which explicitly deal with processes of the mobilization of previously uninvolved third parties and audiences (McAdam *et al*., 2001; Rucht *et al*., 2004; Tilly, 2004). Following Nedelmann (1987: 181) mobilizing is understood as attempts by individuals, groups, or organizations to influence the existing distribution of power by swaying preferences, by using communication processes, or by changing or inspiring practices of uninvolved or adversarial actors to the benefit of one's own aims. This understanding of mobilization is not necessarily limited to the political sphere. In fact, Jullien and Smith (2011: 369) in their conceptualization of the role of politics in economics refer to 'behaviour that both discursively and interactively seeks to change or reproduce institutions by mobilizing values' (italics omitted). Based on Nedelmann's definition we can identify three dimensions of 'mobilizing for standards': mobilizing actors for standard setting, mobilizing intermediaries to incentivise certain standards, and mobilizing previously uninvolved parties to accept, adopt and use a specific standard.

While mobilizing for standard implementation unfolds to a large extent in markets it is by no means apolitical. In fact, economic sociologists suggest that markets should be

considered as 'political projects' (Fligstein 1996: 157), and understood as socially and politically shaped arenas of social interactions in which rights to goods and services are exchanged for money under conditions of competition (Aspers and Beckert, 2011: 4). According to Fligstein (1996), it is particularly in the formation stage of a market that political action in the market resembles that of social movements. Similarly during periods of market transformation, invaders attempt to re-establish social movement-like conditions in established markets. In addition, Rao (2009) and King and Pearce (2010) have explored how social movements pro-actively sought the support of consumers and users to establish markets for socially desirable product categories (i.e. fair trade products) or to hinder the proliferation of such markets (as in the case of genetically modified food).

However, the diffusion of standards for cultural production in a digital environment is not confined to market mechanisms. Benkler (2006: 3) argues that in a 'networked information economy' 'decentralized individual action – specifically, new and important cooperative and coordinate action carried out through radically distributed, nonmarket mechanisms that do not depend on proprietary strategies' play a much greater role than in the industrial information economy. Berry (2008: 31) similarly suggests that the internet provides an environment for new forms of social practices that become part of decentralised but coordinated political action problematizing the moves of governments and multinational companies towards a global intellectual property regime.

For actors attempting to shape the political space through diffusion of specific standards, mobilizing a large number of individual users in markets and/or decentralized non-market arenas is crucial because it can generate positive network effects (Farrell and Saloner, 1987)[4]. In general, the value of cultural goods available under a specific

standard increases with rising numbers of users of this standard. As membership in the network becomes more valuable more people join. Producers of content will prefer to put their content under a standard that has many users; users will choose a standard under which a lot of relevant content is available. This two-sided network effect generates momentum for the diffusion of a standard. It is through such network and threshold effects that the acceptance and usage of, or the rejection and resistance to, standards can generate unforeseen interpersonal dynamics to the implementation process[5]. Taking into account such network and threshold effects can contribute to a better understanding of how everyday behaviour of many non-elite actors influences large-scale politics. Most prominently, Hobson and Seabrooke (2009: 301) argue that IPE needs to give more consideration to how 'everyday actions as acts by those who are subordinate within a broader power relationship … shape, constitute, and transform the political and economic environments around and beyond them' (italics omitted).

From the literature on social and political mobilization we choose two dimensions of strategizing which have been identified as generating potentially transformative effects by including previously uninvolved audiences and third parties: organizing strategies and framing strategies[6].

Organizing strategies

Just as social movements try to activate a large number of individuals to their cause, mobilization for a standard seeks its adoption and acceptance by large groups of individuals. Even in the digital networked information society, however, mobilization is not simply achieved through similarly acting masses but rather requires intermediary structures. In social movement research, Gerhards and Rucht (1992) have, among others, pointed to the importance of such meso-level processes ('meso-mobilization') and the related organizational and discursive strategies for mobilization processes.

Founding organizations and developing organizational capacities are generally considered to be preconditions and catalysts of mobilizing processes (McCarthy and Zald, 1977; Clemens and Minkoff, 2004). For one, establishing a formal organization or a mobilizing network of organizations not only strengthens stability and public visibility but also helps in mobilizing financial and human resources (Edwards and McCarthy, 2004). For another, organizational contexts provide an arena for political and regulatory conversations between different parts of a social movement. Already Oberschall (1973: 125) has pointed to the mobilizing effects of 'block recruitment', where whole organizations including their members and followers join a movement. The resulting networks of movement organizations fuel mobilization via socialization, structural linkages and decision-making procedures (see Passy, 2003).

Different organizing strategies may foster or hinder the ability to act collectively, even though results are difficult to predict due to contingent organizing trajectories and unintended consequences of intentional actions (Clemens and Minkoff , 2004; Della Porta and Diani, 2006: 145-148). Taken together, literature on mobilizing coalitions and movement organizations is highly relevant for standardization in that it points to the organizational contingency of collective agency in these processes. Research shows that rules and procedures of standard-setting may have inclusionary or exclusionary effects, which in turn influence the momentum of mobilization for standardization (e.g. Schmidt and Werle, 1998: 305-307; Tamm Hallström, 2004). While such organizing strategies effectively aim at the provision of infrastructure for mobilizing, actual mobilization however depends to a large degree on discursive framing strategies, which we deal with in the subsequent section.

Framing strategies

The concept of collective action frames was introduced into the research on social movements in order to analyze the impact that the strategic and communicative use of ideas and meanings had on the emergence, propagation, and dynamics of movements and counter movements (Benford and Snow, 2000: 612). Framing strategies fulfil an interpretative function in that they simplify and condense aspects of social life. They do this in a way that aims to mobilize potential supporters and members, to persuade uninvolved third parties to back the cause, and to demobilize opponents (Snow and Benford, 1988: 198; Benford and Snow 2000: 612).

In this paper, to capture discursive struggles around private regulation, we take the strategic (macro) framing by two interest coalitions[7] as a starting point for analyzing discursive strategies and the (co-) construction of meaning inherent in any social or political conflict (Della Porta and Diani, 2006: 74). The collective action frames of both interest coalitions constitute attempts of convincing potential allies, future standard adopters and the wider public that a certain standard is feasible, sensible and appropriate. As such, these frames offer insights in persuasion strategies targeting both producers and consumers that are applied in social and political struggles for regulating markets via standardization (see, for example, Weber, 2004; Hiatt *et al*. 2009; Rao, 2009; Yaziji and Doh, 2009). The goal is to create new categories of producers and consumers, shape collective identities and build new markets.

In the digital information age, however, mobilizing for private regulation happens not only in market arenas but also in civil society arenas of networked or 'commons-based' production of knowledge (Benkler, 2006; for other areas see Schneiberg and Bartley, 2008). Framing strategies thereby not only target profit-oriented corporations but also societal institutions, non-profit organizations and networks of collaborative production

as well as mere users. Studies on the Internet as a platform and arena for framing strategies are nevertheless rare (for an exception see Van de Donk *et al*., 2004).

Typically, framing strategies comprise three components: 'diagnostic framing' to identify problems and ascribe blame, 'prognostic framing' to suggest a possible solution to the problem or at least a protest strategy, and 'motivational framing' to offer a rationale to outsiders and mobilize their support (Snow and Benford, 1988: 219-211). In applying this distinction, Gerhards und Rucht (1992: 582) claim that not all types of framing are of equal importance in all contexts. In their example of a mere protest strategy, prognostic framing in terms of means and methods for reaching the common goal remain vague or unclear throughout the process. Della Porta and Diani (2006: 77) suggest that developing previously unknown alternatives may open up new visions for collective action.

The parallel to standardization processes is clear. Diffusion of standards depends on whether and to what extent framing strategies of standard setters resonate with the preferences of (potential) standard adopters and users. Compatibility between standard, framing strategy and everyday usage practices is critical for successful standardization. In the extant literature on social movements, however, this connection between framing strategies and day-to-day practices of framing addressees is rarely an issue (see Rao, 2009; Walder, 2009: 406). Similarly, processes of standardization have up to now not been systematically analyzed as an outcome of mobilization processes.

In what follows, we investigate the consequences of organizing and framing strategies for mobilizing in standardization processes. While studies on protest mobilization targeting political actors demonstrate that organizational and discursive strategies may (over-) compensate for weaknesses in terms of financial resources (Sell, 2003; Sell and Prakash, 2004; Haunss and Kohlmorgen, 2009, 2010), no comparable studies exist for

'constructive mobilization' as it is necessary in the realm of standardization processes. This is why we are now looking at the standardization processes of the copyright and the fair use coalition as instances of mobilization and counter-mobilization (Meyer and Staggenborg, 1996).

Method

The study adopts a longitudinal research perspective to capture the effects of mobilization strategies over time. As suggested by Helfer (2009: 41) and Sell (2009) such a perspective is particularly important to identify the advantages and disadvantages of regime complexity for more or less powerful actors. Our frame of analysis captures transnational private standard-setting in the field of copyright during the period 1998-2009.

The empirical research on which this paper is based comprised three parts.

The first and core part of our investigation analyses framing strategies based on key online documents published by focal actors of both coalitions between 1998 and 2009. The rationale for looking exclusively at online documents addressing the broader public and issued directly by the actors themselves is to capture unfiltered attempts of strategically framing the challenges of and potential solutions in private and public copyright regulation. Consequently, we engaged in an in-depth analysis of a selected number of texts chosen with regard to thematic relevance and substance (Phillips and Hardy, 2002; Keller, 2005). Based on an empirical reconstruction of actor constellations and major regulatory conversations (Black, 2002) within the regulatory field (Hoffman, 1999), we selected key online texts from websites of three focal organizational actors of each coalition (International Federation of the Phonographic Industry, Recording Industry Association of America, Motion Picture Association of America and Electronic

Frontier Foundation, Creative Commons, Wikimedia respectively) and examined their diagnostic, prognostic and mobilizing framing. To encompass the temporal dimension of the framing strategies we choose and compared texts published during three time periods: prior to the foundation of the file-sharing platform Napster (1998-2000), during the most heated phase of the Napster debate (2003-2005) as well as post-Napster and after the music industry had announced its dismissal of DRM technologies (2008-2010). While turning to the current webpages to collect texts of the last period, we extracted texts for the previous two periods with the help of the 'wayback machine' (Notess, 2002), a tool provided by the Internet Archive (archive.org).

Second, we undertook an analysis of documents in relation to the <u>copyright</u> and <u>fair use</u> <u>coalitions</u> under study and conducted semi-structured interviews with representatives and activists of both coalitions. These interviews were exploratory in nature and mainly served to provide a general overview of the respective actors and regulation initiatives. In total we did ten expert interviews, seven of which were conducted with members of the fair use coalition.

In the third part of our empirical investigation we tried to reconstruct the mobilization processes of both coalitions based upon publicly available secondary data sources. In order to evaluate the resonance that these strategies had on the attitudes and practices of the addressees, we used official reports by industry and author associations, extant market research on the diffusion of certain music and film formats, statistics on the use of copyright licenses and contributions to Wikipedia. These are augmented with existing analyses of Internet debates (Herman, 2009) and references to works using virtual ethnography on the attitudes and practices of individual Internet users (Bajde, 2010).

The technological-legal double strategy of the <u>copyright coalition</u>

Starting conditions, political context and organizing

The rise of digital technology and the Internet represented a challenge for traditional business models of industries relying on copyright, most prominently film studios, music record labels and the producers of business and entertainment software (Siwek, 2006, see also Table 1). Although the connection between decreasing turnover in the industries and increasing figures on downloading remained controversial, the content industries were relatively quick to establish a cause-and-effect relationship: the rapidly rising number of commercial and private pirates was said to threaten the existence of the industries and to have a negative impact on the innovativeness and productivity of the economy as a whole (Bach, 2004). Industry actors responded with a technological-legal double strategy. Long before TRIPS and WIPO treaties were cast into national law at the end of the 1990s, the abovementioned actors from the copyright industries were simultaneously pursuing a project to establish Digital Rights Management. The mastermind in this field is generally held to be Mark Stefik, a researcher at the Xerox Palo Alto Research Center (PARC) who developed a system combining hardware and software that made it possible to check whether every usage was covered by the copyrights that the user had acquired for the desired exploitation of a given work. In order to regulate copyright through such trusted systems, however, it was necessary to establish industry-wide standardization. Marks and Turnbull (1999: n. p.) state in this regard: 'Effective copy protection requires application of technology and copy protection obligations to all devices and services that are capable of playing back, recording and/or transmitting protected content.' Among the most ambitious attempts at standardization – because they were among the broadest – were those undertaken within the framework of the Copy Protection Technical Working Group (CPTWG), which

focused on video material (Marks and Turnbull, 1999), and the Secure Digital Music Initiative (SDMI) of the music industry (Levy, 2000).

Table 1: Transnational firms that dominate the market in the music, film, and software industries, as well as academic publishing house

Music industry[1]	Film industry[2]	Software industry[3]	Academic publishers[4]
Universal/Polygram	Walt Disney Company	Microsoft	Reed Elsevier
SonyBMG	Warner Bros.	IBM	Thomson
Warner Music Group	Sony Pictures	Oracle	Wolters Kluwer
EMI	Dreamworks	SAP	Springer
	News Corp. (incl. 20th Century Fox)	Hewlett-Packard	John Wiley
	NBC Universal		American Chemical Society
			Blackwell Publishing
			Taylor & Francis

Sources: [1]Cf. IFPI data for 2005 at http://www.ifpi.org/content/section_news/20050802.html [22 April 2009] as well as Heilmann in Handelsblatt, 7 June 2006, found at http://www.handelsblatt.com/unternehmen/it-medien/nachschlag-gefaellig;1089689 [24 April 2009]. [2]Cf. Handelsblatt, 14 Sept. 2004, http://www.handelsblatt.com/archiv/sony-setzt-time-warner-mit-mgm-kauf-erneut-stark-zu;790403 [24 April 2009]. [3]See http://www.heise.de/newsticker/meldung/38792 [28 July 2008] and Gebert, Handelsblatt, 27 July 2004, http://www.handelsblatt.com/archiv/merger-endgames-in-software;767905 [24 April 2009]. [4]Global share of the market for vendors in the area of journals for science, technics and medicine (House of Commons 2004: 13).

Table 2: Selection of transnationally active industry associations with copyright focus

Founding year	Organization
about 1930	Motion Picture Association of America (MPAA) (www.mpaa.org)
1933	International Federation of the Phonographic Industry (IFPI) (www.ifpi.org)
1952	Recording Industry Association of America (RIAA) (www.riaa.com)
1984	International Intellectual Property Alliance (IIPA) (www.iipa.com)

Source: Own composition

The CPTWG was established in 1996 by the major film studios and industry associations like the Motion Picture Association of America (MPAA, see Table 2) in order to work out digital encryption systems in collaboration with electronics and computer-hardware manufactures and software firms. The meetings that ensued resembled a loosely coordinated conference of experts who discussed and negotiated standardization alternatives (see Möllering, 2010 for a similar role of standardization conferences in the field of lithography technology). Competition and cartel law required that the stipulations for attending the meetings had to be relatively lax; consequently no

formal restrictions were place on the participation at the CPTWG. Yet, the most important discussions were conducted in informal meetings which resulted in a perceived lack of transparency in the decision-making process in the view of many participants. In the words of one participant: 'It was a mystery to me, how decisions were made.'

The interests within this industry initiative were rather heterogeneous. The desire for the greatest protection possible on the part of copyright owners was opposed by hardware producers because of the high cost of research and development involved and the problems in gaining consumer acceptance. To sell their devices, however, hardware producers were also dependent on access to content and, in part, on the patents controlled by the film industry (e.g. in the area of DVD technology, see Samuelson, 2003). The conflict of interests sometimes ran right through the major companies themselves. Sony was one such company because it was both a content owner (e.g. Sony Pictures) and a hardware manufacturer. As a rule, Sony sent representatives from each of the respective branches of its business to the meetings. Hardware manufacturers were faced with a dilemma: on the one side they were being pushed to concede to the demands of the content owners for high levels of protection, while on the other, they were sensed that convincing end users of the advantages of digital rights management systems would be difficult.

Despite internal conflicts over patents, costs, network effects, and inter-organizational problems of coordination, the CPTWG produced a series of copy protection standards – especially for DVD-video – and exists still today in its loose, very informal form. The very first CPTWG standard, the Content Scramble System (CSS) which is still found in most DVDs, computer games, and devices, was however strongly criticized shortly after its introduction into the market, because legally purchased DVDs and computer games

could not be played on computers with open source operating systems such as Linux. The open nature of this software was at odds with a copy protection standard requiring secrecy among software producers and hardware manufacturers. In the small but growing and highly active group of computer users who used this open source software, the result was a sense of collective frustration and lively debates on the use of circumvention software. Since the sale and use of such software contradicts the circumvention prohibition of the TRIPS agreement, this led subsequently to numerous cases of (also demonstrative) civil disobedience (see Eschenfelder *et al*., 2005) and then even to legal debate on the relation of DRM to freedom of speech (see Owens and Akalu, 2004).

In the music field, the situation developed somewhat differently insofar as the protection-free MP3 format had already established itself on the market in the mid-1990s, meeting a positive reception by both the end-device manufacturers and the consumers. This format enabled digital music to be compressed and, by the end of the 1990s, had led to the widespread use of Internet-based file-sharing services – headed by Napster, launched in 1999 (Green, 2002) – for exchanging digital music files. Given the already widespread protection-free standards as well as the failed attempt of the Recording Industry Association of America (RIAA) to get the playing devices in question legally banned (Levy, 2000), it was more difficult from the start for content owners and their associations in the music industry to enforce technical standards of copy protection than in the movie and DVD branches of the media industry.

Not long after this, in May 2001, the industries Secure Digital Music Initiative (SDMI) failed. It had been founded in 1998 at the instigation of the Recording Industry Association of America (RIAA), its Japanese counterpart Recording Industry association of Japan (RIAJ), and the International Federation of the Phonographic

Industry (IFPI) and was based on conferences much like the CPTWG. Its failure was due not only to technical problems and a lack of user acceptance, but also to conflicts between copyright owners and the electronics industry (see, among others, Levy, 2000). Less comprehensive DRM projects also proved rather unsuccessful like 'PressPlay' (run as a joint venture by Sony and Universal Music) and 'MusicNet' (in which the other three major labels of the top five at the time participated: EMI, BMG and Warner; see Rosenblatt *et al*., 2002: 134; Dolata, 2009). The numerous proprietary DRM standards of the various individual manufacturers could be even less successful (Pohl, 2007) due to absence of economic network effects (Farrell and Saloner, 1987; Shapiro and Varian, 1999).

The breakthrough for commercial online-music sales and thus simultaneously the tentative end of (comprehensive) DRM initiatives, at least in the music business, was brought about by an actor outside of the music branch, namely, Apple Computers. Under pressure from the major labels, Apple's iTunes Music Store featured DRM restrictions from the beginning. Yet the most important characteristic of these restrictions was the relative ease with which they could be circumvented. Music bought with Apple DRM could be burned onto a CD and thereafter re-imported into the DRM-free MP3 format. This procedure is not completely lossless but was apparently a passable compromise for the great majority of consumers. This resulted in national market shares in digital music sales ranging between 70 and 90 percent for Apple. In 2007, the pro-DRM front of the major labels finally crumbled when EMI announced its decision to forego all copy protection – a path that the other three major labels Universal, Warner, and SonyBMG would soon follow (in its entirety, see Dolata, 2009). Consequently, the biggest online retailer, Amazon, also refused to install any form of DRM system for its online-music sales.

Framing strategy

To justify their analysis of the problem, the leading actors – representatives of the copyright industries and their financially strong and established lobbying organizations, like the Motion Picture Association of America (MPAA), the Recording Industry Association of America (RIAA) or the International Federation of the Phonographic Industry (IFPI) – resorted to a combination of diagnostic, prognostic and mobilizing arguments that enabled them to address various targeted audiences at the same time. For one, the contention that the (general) economy would suffer should copyright law be violated appealed to political actors' sense of protecting the common good and rested on a neoclassical concept of copyright markets (see, e.g., Liebowitz, 2003). For another, the emphasis on aspects of personality rights and the positive effects on the income of creators attempted to win the support of (in particular, prominent) creative individuals. The latter argument aimed not the least at getting the support of copyright collectives and their international umbrella organizations, which have the fiduciary role of representing the claims of authors and owners of related protective rights. One key motive was to negotiate copyright not in an isolated context, but in the very general one of 'intellectual property': each infringement of intellectual property rights – from trademark piracy to counterfeit medication and music file-sharing – was likewise to be branded as piracy, harmful to both the general economy and society (Kur, 2010). The framing strategies are represented in Table 3.

As far as the prognostic dimension of framing strategy goes, the representatives of the copyright coalition proposed three interconnected approaches to the solution, namely, the creation and market dissemination of universally valid DRM standards, the codification of prohibitions against circumventing these standards, and the education of consumers via moralistic appeals, scare campaigns, and court trials against people who

downloaded illegally, circumvented copy protection measures, or assisted such circumvention. While the electronics industry was to mobilize public cooperation by way of instrumental incentives (in the case of the film and DVD industry, this also included the control of patents, see Samuelson, 2003: 43; Bach 2004), the framing strategy of the copyright enforcement coalition offered little positive mobilizing elements worth mentioning with regard to benefits for the consumer.

A major reason for the poor success of DRM systems in general was that the copyright coalition's framing strategy did not point to any positive incentives or advantages for consumers and users. This is acknowledged by DRM pioneer Stefik (2007: 1): 'The situation reflects the core issue that current DRM provides no compelling benefits to consumers'. Actually, not only did framing fail to present any advantages linked to real-existing DRM solutions, it also ignored the recurring consumer experience of disadvantages and usage limitations compared to DRM-free alternatives. The most prominent of these were a smaller selection of player devices and less flexibility with regard to playback, sharing and the arrangement of music tracks.

Moreover, potentially unauthorized access to copyrighted content, independent of its commercial or private motivation, was depicted as damaging to societal innovation and welfare, and consumers of digital goods were placed under a general suspicion of theft. This made some of these users, who were increasingly turning into creators of intangible goods, more receptive to the counter mobilization by the newly formed fair use coalition. In sum it can be said that the various groups being addressed reacted very differently to the framing strategy of the copyright industries to enforce their copyright comprehensively among commercial and private end-users. Efforts to cooperate with electronics and computer-hardware manufacturers in the music business were far less successful than they were in the movie business. Yet, the sore spot in the copyright-

enforcement strategy was and continues to be the low level of acceptance on the part of the consumers and the users. A long way off from popularizing the necessity and practicability of DRM standards in the daily use of intangible goods, the strategy provoked a counter mobilization by using technological and legal aspects of copyright protection to encroach even into areas of private or socially beneficial use hitherto guaranteed through fair use or exceptional regulations ('limitations and exceptions'). It is this countermovement that we examine in the following section.

Table 3: Framing strategies of the copyright coalition

Framing Dimensions	Description	Examples (Source)
Diagnostic	Massive infringements of copyright hurt industry and the general economy	"It's commonly known as piracy, but it's a too benign term that doesn't even begin to adequately describe the toll that music theft takes on the many artists, songwriters, musicians, record label employees and others whose hard work and great talent make music possible." (RIAA)[1]"
		"Worldwide, video piracy costs the American motion picture companies $2.5 billion a year in lost revenues." (MPAA)[2]
		"In the music industry, piracy represents a massive US$4.5 billion illicit enterprise, with ever-closer links to international organised crime." (IFPI)[3]
	Copyright infringements are comparable to trademark and product piracy	"Piracy: Online and on the Street" (RIAA)[4]
		„[U]nauthorised copying and dissemination of copyrighted works is theft, pure and simple " (IFPI)[5]
Prognostic	Expansion of copyright protection benefits business as well as art and culture	"When the U.S. film industry succeeds, everyone benefits. (…) The impact is clear — the global film industry creates more jobs, more entertainment choices and more opportunities for the creative professions. Protecting the original creative works of the film and TV industry from theft benefits everyone." (MPAA)[6]
	DRM secures the enforcement of copyright and access to cultural goods	"Copy protection benefits consumers as well as the industry because without these safeguards, the industry would not be able to release their high-quality digital content for fear of widespread and rampant piracy.".(MPAA)[7]
		„What services does IFPI provide? (…) Developing technical measures to protect copyright (in co-operation with other industries)" (IFPI)[8]
	Education of consumers by way of lecturing and deterrence	"Where the "educational" approach was not successful, cease and desist letters were issued." (IFPI)[9]
		"We are continuing our efforts to educate fans about the value of music and the right ways to acquire it and, when necessary, to enforce our rights through the legal system." (RIAA)[10]
		"To combat copyright infringement, the MPAA is working closely with the United States Chamber of Commerce to educate citizens about piracy's effect on the US economy and the broader American public, The Chamber recently held a "Fight the Fakes" poster contest…" (MPAA)[11]
Mobilizing	Stronger copyright protection creates innovation and economic growth	"Copyright has underpinned an extraordinary modern economic success story, accounting for tens of millions of jobs worldwide. The dramatic growth of the artistic, cultural and other creative industries in today's major economies would have been impossible without the strong levels of copyright protection that those countries have developed over many decades." (IFPI)[12]
		"Working with law enforcement and other entities to safeguard intellectual property rights as a cornerstone of our global information economy[13]
	Enforcement of copyright protection supports art and	"To all artists, 'copyright' is more than a term of intellectual property law that prohibits the unauthorized duplication, performance or distribution of a creative work. To them, "copyright" means the chance to hone their craft,

culture	experiment, create, and thrive." (RIAA)[14]
	"The MPAA works with governments around the world to pursue commonsense solutions that advance innovative consumer choices, while protecting the rights of all who make something of value with their minds, their passion and their unique creative vision." (MPAA)[15]
Strong protection of copyrights and DRM is beneficial for everyone, including fans and users	"We are open to any technology that achieves our dual objectives of expanding consumer choice and protecting intellectual property rights." (MPAA)[16]
	„The specification will answer consumer demand for convenient accessibility to quality digital music, enable copyright protection for artists' work, and enable technology and music companies to build successful businesses." (SDMI)[17]

Sources: [1]http://www.riaa.com/faq.php [21.05.2010]
[2]http://web.archive.org/web/20000815060152/www.mpaa.org/anti-piracy [26.07.2010]
[3]http://replay.waybackmachine.org/20040409094508/http://www.ifpi.org/site-content/copyrightcrea-tivity/what_is_copyright.html [26.07.2010]
[4]http://www.riaa.com/physicalpiracy.php [06.04.2010]
[5]http://replay.waybackmachine.org/20040409094508/http://www.ifpi.org/site-content/copyright-creativity/what_is_copyright.html. [26.07.2010]
[6]http://www.mpaa.org/contentprotection/faq [26.07.2010]
[7]http://web.archive.org/web/20051223120922/mpaa.org/anti-piracy/ [27.07.2010]
[8]http://replay.waybackmachine.org/20040216040733/http://www.ifpi.org/site-content/about/services.html [26.07.2010]
[9]http://replay.waybackmachine.org/19990203020134/http://www.ifpi.org/piracy/internet.html [26.07.2010].
[10]http://www.riaa.com/physicalpiracy.php [26.10.2010]
[11]http://www.mpaa.org/Issues_EduOutreach.asp [06.04.2010]
[12]http://www.ifpi.org/content/section_views/what_is_copyright.html [26.07.2010]
[13]http://www.dga.org/news/pr-images/2010/Joint-submission-re-IPEC.pdf [21.05.2010]
[14]http://replay.waybackmachine.org/20021212010329/http://www.riaa.com/Copyright-What.cfm [26.07.2010]
[15]http://www.mpaa.org/contentprotection [26.07.2010]
[16]http://www.mpaa.org/contentprotection/faq [26.07.2010]
[17]http://web.archive.org/web/20000302230740/www.sdmi.org/ [30.08.2008]. Since the IFPI as well as the RIAA hade been initiators of the (short-lived) SDMI, we have included the SDMI website in our sample of key texts.

Countermovement of the <u>fair use coalition</u>

Starting conditions, political context and organizing

As a result of the 'digital revolution,' we have seen not only the production and

distribution costs for intangible goods drop considerably, but also a multitude of new

decentralized and interactive ways to produce and use cultural goods and scientific

artifacts came into existence (Lessig, 2004). The most prominent examples were the

forms of collaborative production that Benkler (2002) collectively calls 'commons-based peer production,' the results of which constitutes no less than the software backbone of the Internet itself in the form of free/open source software (Lessig, 2001: 50-52). In the context of the free and open source software movement, a whole range of discourses, practices and sub-cultures developed (Berry, 2008). The legal framework for such new forms of commons-based production was established in the software field as early as 1985 by the development of the General Public License (GPL) under the auspices of the Free Software Foundation. This is a licensing standard that by now is used by more than 85 percent of all active free software projects (Benkler, 2006: 64). A key element of GPL is the so-called copyleft clause, which permits the use, distribution, and alteration of source codes as long as these changes are also made available under the same type of license.

Table 4: A selection of transnationally active NGOs focusing on copyright topics

Founding Year	Organization
1985	Free Software Foundation (www.fsf.org)
1990	Electronic Frontier Foundation (www.eff.org)
1995	Consumer Project on Technology (http://www.cptech.org), rebranded as Knowledge Ecology International in 2006 (www.keionline.org)
1998	Open Source Initiative (www.opensource.org)
2001	Creative Commons (creativecommons.org)
2003	Wikimedia Foundation (wikimediafoundation.org/wiki/Home)
2005	iCommons (Creative Commons spin-off; www.icommons.org)
2005	Open Rights Group (www.openrightsgroup.org)
2006	Pirate Parties (www.pp-international.net)
2011	Communia Association (http://www.communia-association.org/)

Source: Own composition

Attempts were made starting in the mid-1990s (e.g. in 1998 by David Wiley) to generalize the open source principle in the direction of 'open content.' In addition to this development, organized initiatives critical of copyright laws were launched especially among and around libraries with the aim of using digital technologies for more open access to works (see, e.g., on the topic of 'digital library,' Kuny and Cleveland, 1998; on 'open access,' Suber, 2003). From these early beginnings, a loose

coalition of non-profit organizations concerned with the threats of copyright extension to rights of fair use and in support of a digital commons gradually emerged (see Table 4). In many ways the fair use coalition built on discourses and practices of the free and open source software movement and extended it to the field of digital cultural production.

The breakthrough did not come until 2001 when a group of legal scholars at U.S. universities founded the non-profit organization Creative Commons. Creative Commons set itself the objective to develop standardized licenses that would enable creative individuals and organizations to easily grant copyright permissions to freely copy, distribute and recombine contents, thereby contributing to a digital commons. While the copyleft principle was the great institutional innovation (Osterloh and Rota, 2007) of the GPL, Creative Commons developed two further major innovations. Firstly, the ability to modularize the license gave authors a greater flexibility with regard to the scope of usage rights they were willing to grant to users. Secondly, Creative Commons quickly shifted its emphasis to the linguistic translation and legal adaptation of their licenses to different national legal jurisdictions (so-called 'license porting').

Creative Commons' approach to transnationalization of their model combined community building with the setting up of an international organizational network (Dobusch and Quack, 2010). This approach emerged out of a series of ad hoc decisions and personal interactions with activists pursuing a similar cause in other countries. Among those foreign nodes, a number had been socialised into the Creative Commons spirit through participation in seminars run by some of the founding members at major American law schools. The Board of Directors of Creative Commons encouraged like-minded individuals with professional legal credentials and a reputation in the copyright debate to become so-called 'project leads'' in their country. These project leads were

typically critical copyright lawyers or experts in open source software with a base in public universities or research institutes. The latter then became 'affiliate institutions' that signed a memorandum of understanding (MOU) with the Creative Commons organization with the intent to 'work together to advance public education, access and the use of knowledge by translating and legally adapting the Creative Commons licenses and/or amendments to the Creative Commons licenses … and to explain the mission and the purpose of Creative Commons' (Creative Commons, n. d.).

As a result, a network with more than 70 partner organizations that established localized versions of Creative Commons licenses in more than 50 different countries was created from 2003 to 2008. A close look at the individuals and at the affiliate organizations involved in translating the licenses shows that transnationalization during the first years (2003-2005) was fueled predominantly by the absorption into the epistemic community of critical open source and internet lawyers from outside the US. The pre-existence in a given country of a free/open source software movement was then and there a clear accelerator of license porting. Even though not all lawyers involved were copyright experts, legal professionals clearly dominated the transnationalizing epistemic community during the early expansion phase of Creative Commons.

Once licenses were in place, the activities of Creative Commons and its affiliates expanded from developing legal tools (which still continued in the form of upgrading and revising license versions in response to feedback from users) to a wider set of tasks related to public advocacy and user mobilization. For example, Creative Commons engaged in courting well-known artists or widely recognized public institutions to adopt their copyright licenses as one strategy to promote them as a standard. At the local and national level, project leads and affiliate organizations became contact-points for loosely coupled individuals and practice groups from many different fields of cultural

production (i.e. music, education, public archives) and provided opportunities for them to engage in shared projects of collaborative production of digital content under the CC license standard. Creative Commons therefore also gave rise to the formation of new groups of actors within the field of digital production, as well as it shaped the common identity of these actors. Project leads in jurisdictions which joined the network after 2005 often came from civil society or educational fields thereby reaching out to potential users from the start.

Advocacy, publicizing and mobilizing quickly yielded fruit. The use of Creative Commons licenses increased exponentially after their release with the double effect of enhancing attractiveness to future potential users and bringing many new individuals and practice groups to the Creative Commons community. This trend towards a broadening of the community was partly fuelled by the building up, globally, of social movements targeting the protection of civil rights to information on the internet and promoting a 'digital and cultural environmentalism.'

In many respects, this process had parallels to what is discussed in political sociology as bloc recruitment. Bloc recruitment refers to the deliberate expansion of a movement and an intensification of the protest dynamics by building coalitions with other existing movement organizations, just as the peace movement did by incorporating the unions (Koopmans, 2007). In the case of Creative Commons, 'license porting' was born out of the necessity to spread licenses as quickly and widely as possible, but it generated – if at first unintentionally – significant mobilization effects. As shown in Figure 1, the volume of content licensed under Creative Commons grew exponentially from the publication of the first version of the license in December 2002 to an estimated 400 million works by the end of 2010.

Figure 1: Estimation of the number of works licensed by Creative Commons
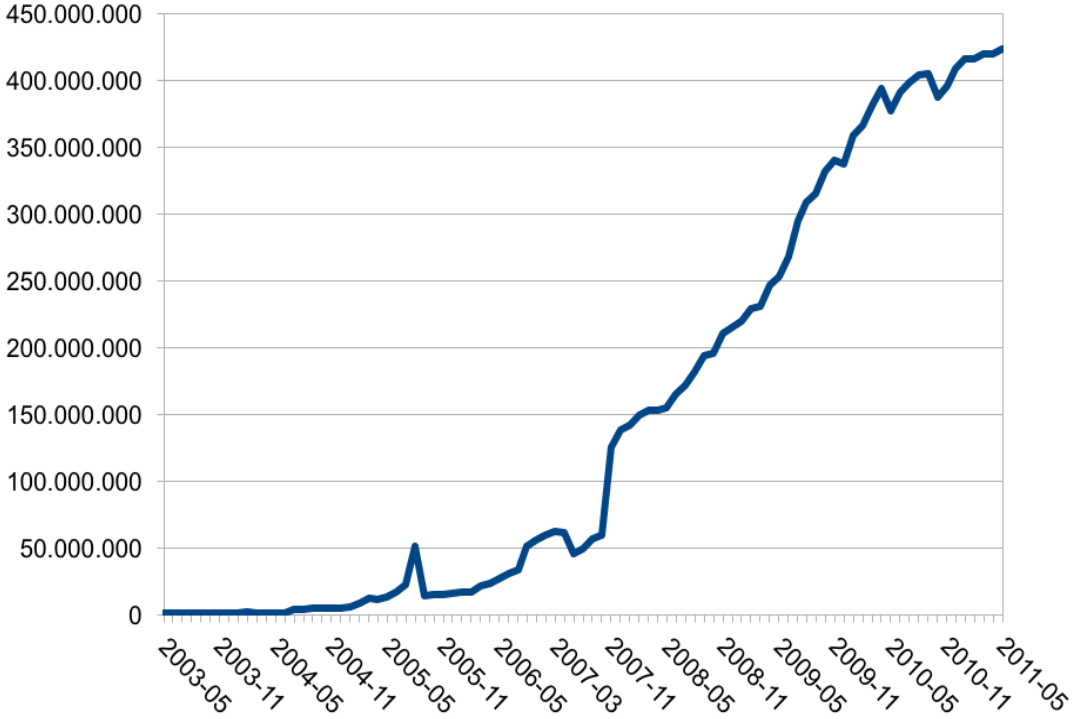
Source: http://wiki.creativecommons.org/Metrics [Nov. 3, 2011]

Creative Commons had become the standard license for open content in the internet, as evidenced by the move of Wikipedia from an open source software license to the use of Creative Commons licenses in 2009. The diffusion of the license, however, did not only result from the transnational organizing strategy but was also spurred by the framing strategies used by the Creative Commons and the fair use coalition surrounding it.

Framing strategies

Members of the fair use coalition that formed around Creative Commons developed, like the copyright coalition, a framing strategy to promote their 'copyleft' principle and support the proliferation of their copyright licenses. This framing strategy also contained diagnostic, prognostic and mobilizing elements, as presented in Table 5. The problem was framed as an inappropriate and undesirable extension of copyright encroaching in and undermining the creativity of individuals as well as of collaborative-creative groups. As a consequence, copyright extension was presented as robbing society of a great deal of possible enrichment in the areas of culture, knowledge, and business. The prognostic dimension highlighted the contribution of 'copyleft' licenses to a public digital commons. The author was to decide whether 'copyright' or 'copyleft' should be applied to the work. The formation of such a freely accessible commons would, according to this prognosis, promote creativity and innovation and permit all members of society free access to knowledge and cultural goods, as had already been demonstrated in the area of software. Therefore, the framing strategy of the fair use coalition represented a counter-frame to that of the copyright coalition with regard both to its diagnosis and its prognosis.

However, what distinguished the framing strategy of this coalition from those common to other types of social movements was the mobilizing element. It was geared less toward protest actions and more toward constructive and performative social practices, because the aim of a globally accessible commons of knowledge, based on the principle of copyleft, could only be realized with the active participation of many sympathizing legal experts, famous artists, and a large number of 'user producers' (mostly contributing content on a non-profit seeking basis).

Table 5: Framing strategies of the fair use coalition

Framing Dimensions	Description	Examples (Source)
Diagnostic	Stringent copyright hurts business and art and culture in the Internet.	"Creativity and innovation rely on a rich heritage of prior intellectual endeavor. (…) But at the same time, expanding intellectual property protection leaves fewer and fewer creative works in the 'public domain' – the body of creative material unfettered by law" (Creative Commons)[1]
		"The Electronic Frontier Foundation (EFF) thinks that innovation is inextricably tied to freedom of speech, and innovators need to be protected from established businesses that use the law to stifle creativity and kill competition." (EFF)[2]
	Expansion of copyright and ban on circumvention hinders access to existing works and thus creativity.	"..anti-circumvention provisions have been used to stifle a wide array of legitimate activities, rather than to stop copyright infringement. As a result, the DMCA has developed into a serious threat to several important public policy priorities…" (EFF)[3]
		„Creativity and innovation rely on a rich heritage of prior intellectual endeavor. We stand on the shoulders of giants by revisiting, reusing, and transforming the ideas and works of our peers and predecessors." (Creative Commons)[4]
Prognostic	Alternative copyright licenses encourage creativity by creating a digital commons of freely available digital goods	"We work to increase the amount of creativity (cultural, educational, and scientific content) in "the commons" – the body of work that is available to the public for free and legal sharing, use, repurposing, and remixing. " (Creative Commons)[5]
	.Commons-based production of knowledge enables free access to digital goods.	„Imagine a world in which every single human being can freely share in the sum of all knowledge. That's our commitment." (Wikimedia)[6]
Mobilizing	Use of alternative copyright licenses is the most up-to-date form of digital creativity.	"We at Creative Commons believe that the creative have an as yet unfulfilled need to be able to announce to the world: 'Some Rights Reserved' instead of 'All Rights Reserved'." (Creative Commons)[7]
		"We are also in the process of creating a library of "open art licenses" that artists can use to authorize distribution of their works online." (EFF)[8]
	Alternative copyright licenses enable new business models	„Many of the creative have come to realize that, by rigorously insisting on the exclusive rights to their work, they often stop the content and its dissemination in the Internet from getting the attention they want." (Creative Commons)[9]
		"One of our central goals is to encourage people to experiment with new ways to promote and market their work. In fact, we designed the noncommercial license option to be a tool to

help people make money from their work, by allowing them to maximize the distribution of their works while keeping control of the commercial aspects of their copyright." (Creative Commons)[10]

Sources: [1]Vgl. https://www.copyright4creativity.eu/bin/view/Main/Declaration [21.05.2010]
[2]Vgl. http://web.archive.org/web/20031205045658/www.eff.org/about/ [26.07.2010]
[3]http://www.eff.org/wp/unintended-consequences-under-dmca [21.05.2010]
[4]http://wiki.creativecommons.org/Legal_Concepts [26.07.2010]
[5]http://creativecommons.org/about/what-is-cc [6 April 2010].
[6]http://wikimediafoundation.org/wiki/Home [6 April 2010].
[7]http://de.creativecommons.org/faqs/ [6 April 2010].
[8]http://web.archive.org/web/20040403204251/www.eff.org/Censorship/ [26.07.2010]
[9]http://de.creativecommons.org/faqs/ [06.04.2010].
[10]http://web.archive.org/web/20031206082930/creativecommons.org/faq [26.07.2010]

From the very beginning, the framing strategy used by the fair use coalition was first and foremost directed to this new group of 'user producers,' which was coalescing in the Internet through huge numbers of everyday practices. In the broad spectrum of ways to use, spread, and produce intangible artefacts, these people were viewed as important, trend-setting actors, even more so than the equally widespread users of peer-to-peer file-sharing. In the framework of this coalition, Creative Commons frequently succeeded in putting the mass phenomenon of user-generated content (UGC), salient for the changed (self) image of authors and creators in the Internet age, at the heart of its mobilization strategy by regenerating works already available as remixes or mash-ups (see Lessig, 2004, 2008; Hemmungs Wirtén and Ryman, 2009).

While increasing numbers of Internet users were becoming authors in a very self-evident way, these people deviated in one significant aspect from the image of an author that underlies the prevailing copyright legislation: in by far the greatest number of cases, the motivation for generating content is not primarily driven by interest of monetary exploitation of their works; these authors form a steadily growing group of

non-exploiting authors. Among those considered as non-exploiting authors are, for example, all individuals who actively contribute to commons-based projects like the free online encyclopedia Wikipedia (see Table 6) as well as a good many of the (millions of) users of video platforms like YouTube (see Bajde, 2010).

Table 6: Number of contributors to the Wikipedia Encyclopedia from 2001 to 2010

	Contributors	Active contributors	Very active contributors	Contributors to German version	Contributors to French version	Contributors to Spanish version	Contributors to Japanese version	Articles in English	Total number of articles
Jan 2001	10	9	-	-	-	-	-	25	25
Oct 2001	233	147	14	13	2	8	-	11.000	13.000
Oct 2002	1322	518	142	129	46	37	2	88.000	115.000
Oct 2003	5.940	2.113	420	981	294	133	206	164.000	328.000
Oct 2004	29.756	10.935	1.951	6.904	1.583	703	1.690	370.000	1.100.000
Oct 2005	94.251	29.754	4.737	18.686	5.554	2.573	3.914	756.000	2.700.000
Oct 2006	288.959	77.027	9.752	38.130	15.337	9.027	11.278	1.400.000	5.400.000
Oct 2007	556.259	89.493	10.919	58.953	26.587	20.472	22.620	2.000.000	8.700.000
Oct 2008	796.811	87.172	10.813	76.762	38.923	32.710	33.396	2.600.000	11.500.000
Oct 2009	1.025.308	86.430	10.798	90.891	50.638	44.946	43.089	3.000.000	14.200.000
Oct 2010	1.237.151	80.462	10.551	104.050	61.867	56.208	51.895	3.500.000	17.100.000

Legend: contributors = at least 20 contributions; active contributors = at least 5 contributions last month; very active contributors = at least 100 contributions last month

Source: Own calculations based on http://stats.wikimedia.org/EN/Sitemap.htm [03 Nov 2011] and Benkler (2006: 71)

The framing strategy of the fair use coalition has been successful essentially because it referred to widespread social practices to integrate both non-exploiting authors and users of commons-based goods or file-sharing software into a collectively experienced, transnational 'community of practice' (Djelic and Quack, 2010; Mayntz, 2010). By way of this shared self-image, they can be mobilized by the fair use coalition; by way of their indirectly coordinated daily actions, they have a regulative impact. It remains to be seen to which extent the framing strategy of the fair use coalition, which evolved as a countermovement to the copyright coalition, will be able to exert equal impact in the area of commercial cultural production (for a farsighted treatment, see Elkin-Koren, 2005).

Conclusion

As a result of the increasing economic value of information and the rapid technological change associated with the Internet, the field of intellectual property rights, and more specifically copyright, has become an arena for highly politicized conflicts over global regulation. In this paper, we explore how the struggles over the implementation and interpretation of international treaties were shifted by two opposing coalitions to transnational private standard-setting. Our analysis started from the paradoxical finding that an initially dispersed group of civil society actors with relative few resources effectively mobilized transnationally in support of a standardized copyright license for 'open content', while a better-resourced industry coalition was less successful in establishing its standards for Digital Rights Management.

Drawing on a sociological conceptualization of mobilization, we have shown that the coalitions' organizing and framing strategies carry us quite far in explaining these different outcomes. Firstly, organizational arrangements mediated social interactions within coalitions, facilitating the emergence of a collective identity in the Creative Commons case as compared to a set of negotiated compromises between particularistic interests in the DRM case. Secondly, collective action frames made a difference in the extent to which potential contributors and users could be mobilized. In sharp contrast to the positive resonance that the fair use coalition achieved with existing and emerging social practices of Internet users, the framing strategy selected by the copyright coalition had unintended and countervailing effects. In sum, the findings of our analysis indicate that the strategic use of organizational forms and collective action frames can be more decisive than material resources for the mobilization of users, and that the success of collective action frames depends on their compatibility with user practices.

While limited to a specific field and period, the results of our study address and contribute to several broader debates. Both organizing and framing can be addressed to elite or non-elite actors. Studies in IPE have analysed how powerful business actors use these strategies to exert their influence, or how weaker civil society actors and activists mobilize the broader public to challenge national governments and international organizations. Our study contributes to a better understanding of an important, yet neglected dimension. It analyses organization and framing strategies that are addressed towards mobilizing a mass of individual citizens and consumers into accepting and using standards. The results underline the importance of the small everyday choices that people make about using or not using specific platform standards for accessing cultural and informational goods. The success of powerful economic actors aiming to establish platform standards depends on the attractiveness of their standards to large numbers of producers and consumers. If they ignore the day to day practices of such audiences they are likely to detract from the success of a standardization project.

The findings of our study also add to discussions over the advantages and disadvantages that regime complexity offers to the mobilization strategies of weaker actors. Helfer (2004: 55) has argued that marginalized states and NGOs can foster their aims by shifting between different intergovernmental regimes. Conversely, Drezner (2009: 69) argued that such moves work more generally in favour of the powerful. Both authors limited their arguments to intergovernmental regimes. We add to this debate by showing that regime shifting from intergovernmental to private governance can also open up new and favourable spaces for weak actors to experiment with alternative forms of regulation. Standardization opens a powerful avenue for implementation politics by 'positive example'. In our study, this was illustrated by the introduction of a visible and practical alternative mode of producing and using content under a 'copyleft' licence.

Many similar examples can be found in other fields of private regulation such as fair trade or socially responsible investment. Politics by 'positive example' typically has a low behavioural threshold for participation and can, once set in motion, produce considerable momentum by rapidly increasing the usage of a standard. Such network effects can be an effective lever through which civil society coalitions can increase their influence on transnational rule setting.

Our study of course has its limitations. This paper analyses one instance of regime shift during the period 1998 – 2009. It is a matter for future research to assess whether the relative success of the fair use coalition will persist and possibly generate spillover effects to international regimes. More critical authors underline the inherent limitations of building an alternative that still depends on intellectual property as a framework (Elkin-Koren, 2005; Berry, 2008) and countervails the 'cat and mouse' politics of powerful industry actors in bi- and multilateral governmental negotiations (Sell, 2009). We would nonetheless argue that implementation politics of the kind undertaken by the fair use coalition have the potential to effect broader political debates through shifts in political identity, public debates and the emergence of new political actors. The rise of Pirate Parties in several European member states and their success in parliamentary elections could be seen as an illustration. The recent decision of the European Court of Justice to privilege privacy rights and the ability of people to freely exchange information over the enforcement of copyright rules by internet service providers might be seen as another indication of a shifting balance in public debates (Phillips, 2011).

Regardless of the more long-term outcomes of the political struggles over implementation through standards, we suggest that scholars studying implementation politics under regime complexity would benefit from including transnational private standardization into their analysis. Since the implementation stage in standard-setting,

as in intergovernmental politics, is critical for determining the effectiveness of regulation, we agree with Hobson and Seabrooke (2009) that more attention should be given to the day to day decision-making of non-elite actors on using rules and standards. Whether by generating resistance to projects from powerful political and business actors, or providing the impetus for active experimenting in new forms of regulation, the social worlds in which actors are embedded in their everyday lives do shape what happens around and beyond them. Sociological studies on the use of international rules and transnational standards could therefore fruitfully complement upstream analysis of regime complexity.

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Notes

[1] In the subfield of copyright, the post-TRIPs period was also a period of protest and resistance. Whereas industrial lobbying faced little public protest regarding copyright law during the course of the TRIPS negotiations, only a few years down the road, during the negotiations on the so-called WIPO Internet treaties (i.e. the WIPO Copyright Treaty and the Performances and Phonograms Treaty), an opposition voiced its demands for fair-use provisions of intellectual property rights (Sell, 2003). However, it was not strong enough to prevent the broad prohibition of circumventing technical copy protection, as we will discuss in a later section. Within the European Union, a campaign formed against the guidelines to implement intellectual property, which also failed to achieve any significant changes to the draft (Haunss and Kohlmorgen, 2009, 2010).

[2] It is however increasingly difficult to draw a distinction between producers and users of immaterial goods when users are routinely interacting and altering content while utilizing and sharing it online.

[3] Regime complexity in the policy domain of intellectual property rights increased in post-TRIPs period (Helfer, 2004, 2009; Sell, 2009). While TRIPS clearly expanded and unified the protection rules of intellectual property rights, it also added the WTO as another forum of rule-making to those already existing in the field of intellectual property regulation (notably the World Intellectual Property Organisation and the Bern, Paris and Rome conventions). More importantly, TRIPS created 'tension points' in other areas, such as human rights or public health, which engendered resistance from developing countries and civil society groups (Helfer 2009: 40). Regime shifting by these actor groups led to the establishment of additional intellectual property regulations in the context of the WHO, UNESCO and FAO which were more favourable to their goals and more accessible for them. The balance of power, however, remained tilted as industrialized countries responded by attempting to expand the protection of intellectual property rights beyond those of TRIPs in their regional and bilateral trade and investment treaties with developing countries (Helfer, 2009; Sell, 2009).

[4] See Granovetter (1978) for the analysis of threshold effects on collective behaviour and Granovetter and Soong (1986) for interpersonal effects on consumption.

[5] From a sociological perspective this can also be perceived as the development of a community of standard users (Djelic and Quack, 2010, forthcoming).

[6] Research on social movements has so far devoted only little attention to standards as outputs of mobilization processes (Guigni, 1998, 2004; Amenta et al., 2010).

[7] Although mobilizing for standards is often – and also in our cases – led by interest coalitions and not by social movements in their narrow sense, these are nevertheless dependent on organizational and discursive strategies to act collectively and to win over previously uninvolved third parties (see Roy and Parker-Gwin, 1999; Diani and Bison, 2004). We follow Sell and Prakash (2004) in conceptualizing strategies of both industry and civil-society coalitions as instances of collective action rather than distinguishing a priori between instrumental and normative orientations (see Keck and Sikkink, 1998).