

**Copyright between Creativity and Exploitation:
Transnational Mobilization and Private Regulation**

Leonhard Dobusch and Sigrid Quack

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Abstract

In the course of growing economic importance of knowledge and of technological change through the Internet, regulation of property and exploitation rights of intangible goods have increasingly become an issue of transnational contestation. Since the beginning of the twenty-first century these struggles have shifted to market arenas, after having been fought for several decades in political arenas, such as negotiations over the TRIPS- and WIPO-treaties and national legislation. The starting point of this study is the paradoxical observation that an industry coalition, which had very successfully lobbied international organizations, encountered barriers in developing and enforcing private regulation in the marketplace, whereas a civil society coalition proved to be more effective in the market than in the political sphere. The analysis shows that social and political mobilization processes within the market provide an explanation for these differences. Evidence suggests that the success of mobilizing strategies depended not only on material resources but also on the critical question on whether and to what extent collective action frames proved compatible with socially embedded (interaction) practices of individual and collective actors and enabled the creation and utilization of knowledge and culture.

Zusammenfassung

Im Zuge der wachsenden ökonomischen Bedeutung von Wissen sowie technologischer Veränderungen durch das Internet ist die Regulierung von Eigentums- und Nutzungsrechten an nichtstofflichen Gütern vermehrt zum Gegenstand transnationaler Auseinandersetzungen geworden. Wurden diese Konflikte zunächst im politischen Bereich, wie etwa in den Verhandlungen um internationale TRIPS- und WIPO-Verträge und nationale Gesetzgebung ausgetragen, verlagerten sie sich seit Beginn des 21. Jahrhunderts zunehmend in marktlichen Arenen. Die vorliegende Studie nimmt die zunächst paradoxe Beobachtung zum Ausgangspunkt, dass eine im Lobbying internationaler Organisationen sehr erfolgreiche Industriekoalition bei der Entwicklung und Durchsetzung privater Regulierung am Markt auf Hindernisse stieß, während es eine zivilgesellschaftliche Koalition dort effektiver als im politischen Bereich war. Die Analyse zeigt, dass soziale und politische Mobilisierungsprozesse am Markt eine Erklärung für diese Unterschiede liefern. Dabei hing der Erfolg von Mobilisierungsstrategien nicht nur von materiellen Ressourcen, sondern davon ab, ob und in welchem Umfang kollektive Handlungsrahmen anschlussfähig an in soziale Kontexte eingebettete Handlungs- und Interaktionspraktiken individueller und kollektiver Akteure waren und zugleich neue Formen der Schaffung und Nutzung von Wissen und Kultur ermöglichten.

Copyright Law between Creativity and Exploitation: Transnational Mobilization and Private Regulation

Introduction¹

Since the 1970s, the regulation of copyright law and intellectual property rights in general has developed from a very specialized legal field to 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 provided for the first time a regulation regime that was legally binding on all 153 member states of the World Trade Organization (WTO) and contained enforcing mechanisms for intellectual property rights. In social science literature, the development and content of the TRIPS agreement are used to illustrate how a comparatively small industry coalition to protect private property rights successfully asserts 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 (Helfer 2004; Heineke 2006; Matthews 2002; May and Sell 2006; Sell 2003).

The political and social controversies surrounding transnational copyright regulation, which involve “personal intellectual creations” such as literature, works of music, artistic dance, fine arts, photography, film, and also computer programs, have only been given rudimentary study compared to those involving patent law. Although existing studies on TRIPS and the subsequent agreements developed within the World Intellectual Property Organization (WIPO) indicate the existence of similarly intensive industrial lobbying in copyright law, which in this case evolved from a collaboration between American and European content industries in the media business and the pharmaceutical and software industries interested in extending patent law (Matthews 2002; 136; May and Sell 2006: 181ff; Okediji 2009). Yet, at the same time, the social and political lines of conflict were far more complex in the area of copyright law, since the roles of author and copyright owners in this area often diverged, while those of author and user coincided in many ways. This diversity is reflected in a greater heterogeneity of interests and strategies among the various groups of authors, copyright owners, and users (see Cohen 2005). Moreover, conflicts in copyright between industrial and developing countries as well as among industrial ones are to be found not only in the making

¹ We thank Sebastian Haunss, Raymund Werle, and Jonathan Zeitlin for their helpful and constructive comments on an earlier version of this paper.

of law but also to a great degree in the enforcing of law (for example, see Haunss and Kohlmorgen 2009; 2010 for the EU).

Existing social scientific studies present these controversies as conflicts between, on the one side, the authors and copyright owners who are interested in the commercial use of copyright law and, on the other, the interests of private citizens, scholars, and the general public in societally legitimated, noncommercial forms of use of intangible goods (e.g., see Dobusch and Quack 2009; Siegrist 2006; on private copying: Hellberger and Hugenholtz 2007; for the music business: Bach 2004). The studies come to the conclusion that the mobilization of negatively impacted industries, consumers, or citizens groups opposing TRIPS, WIPO treaties, and their translation into EU or national law tended to be too weak, occur too late, or pursue interests too heterogeneous to prevent the passage of these laws.²

However, the passage of this legislation introduced a new phase of political and social conflict in copyright law, which we analyze in this paper. These conflicts were sparked by the attempts of certain sectors in the copyright and content industries to assert comprehensive and mandatory claims to remuneration vis-à-vis collective, usually nonprofit-oriented users (such as public libraries and research institutions) or individual end-users, who had found it steadily easier to gain access to intangible goods in times of electronic media and the Internet. May and Sell (2006: 182-3) view such effort to secure copyright through technological protection measures („Digital Rights Management“, DRM) as the (further) strengthening of copyright provisions and as the annulment of “fair use”³ and other types of free usage, which were still tolerated by the copyright industries before the digital era (see also Bach 2004, and esp. on DRM, Becker 2003 and Rosenblatt 2002). Even though May and Sell thereby acknowledge the importance of private-technological regulation by way of DRM, they discuss and indeed expect a mobilization of opposition first and foremost in the political, i.e. intergovernmental, arena.

² Over time, the mobilization of opposition did indeed grow. 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; Cohen 2005). 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 also formed against the guidelines to implement intellectual property, which also did not achieve any significant changes to the draft (Haunss and Kohlmorgen 2009, 2010).

³ The ‘fair use’ clause in the Anglo-American copyright system has a function much like the various limitations and exceptions to copyright law in continental European, namely, to permit certain socially desirable uses independently from the approval of the copyright owner. Unlike the limitations and exceptions, which are always explicitly codified for each concrete case, ‘fair use’ represents an open-ended clause, so to speak, that is defined case by case in the courts.

Interestingly, on both sides, the conflicts over enforcing copyright shifted to market arenas during the phase under study here. Subsequent to the TRIPS and WIPO agreements, both those advocating and opposing the expansion of private copyright laws and their consequent application in the Internet sought ways to enforce their respective private regulation initiatives among users and to win the support of certain groups of authors. Paradoxically, the strategies for preventing copyright infringements through technical means of copy protection, as advocated by industrial actors who had been highly successful in political lobbying, met with resistance from other market actors (Stefik 2007), whereas a coalition of civil society actors who had been less successful in the political arena succeeded in initiating and spreading an “alternative copyright” using private licensing standards for non-exploitative authors (Dobusch and Quack 2010).

In order to be able to explain this paradoxical finding, we present a model of analysis in the following section that studies the conflicts between opposing interest coalitions from the often neglected aspect of mobilizing uninvolved third parties, sympathetic onlookers, and co-opted adversaries (see Schattschneider 1960 for a basic depiction of mobilization dynamics in political conflicts, and Rucht 2007 for a critical discussion on the research of social movements). We focus chiefly on the framing strategies with which interest coalitions address various groups in an attempt to mobilize support for their aims. Contrary to existing analyses, which are focused primarily on political arenas (Haunss and Kohlmorgen 2009, 2010), we emphasize the market arena. Our findings show that, even there, the success of mobilization strategies depends not only on material resources, but quite substantially on collective action frames and their impact on processes of collective action. Crucial for the resonance of a framing strategy has proved to be whether and to what extent it proves compatible with socially embedded (interaction) practices of individual and collective actors and enables the creation and utilization of knowledge and culture.

Politics and the Market as Arena: Coalitions, Framing-Strategies, and Mobilization

During the course of the last two decades, a cognitive turn has been observable in political science, in that political findings are seen less as the result of material prerequisites, power struggles, or the consequences of distribution. Instead, persuasive and discursive conflicts are being increasingly included in which the political convictions or preferences of actors can change (Nullmeier 2006). Associated with this is, for one, a more differentiated analysis of the political influence of interest groups and social movements. While a few authors, such as Keck and Sikkink (1998), continue to emphasize the different character of economic interest

groups (“business networks”) and social movements (“activist networks”), other researchers, such as Sell and Prakash (2004), argue that these two groups are becoming increasingly less different with regard to their mobilization strategies. Therefore, such researchers propose that a common conceptual roof be used to study the conflicts among these groups as forms of collective action.

Another aspect associated with this new perspective underscores the complexity of many decision-making situations, especially in transnational contexts, which makes it hard for participating actors to determine which aims and strategies benefit them the most. In this vein, Woll (2008) analyses how the interests of industrial enterprises in the area of international trade policy have changed as a result of their interaction with political institutions. Various authors have suggested the idea of abandoning the assumption of economically motivated, homogeneous interest groups and focusing analyses instead on temporary interest coalitions (see, e.g., Roy and Parker-Gwin 1999). However, the concepts of coalitions vary. For Sabatier and Jenkins-Smith (1999: 120), coalitions consist of representatives of various public and private organizations, who share normative and causal convictions to some degree and coordinate their actions to a considerable extent over a period of time. Diani and Bison (2004) emphasize instead the specific objectives and the instrumental character of the cooperation. In the following, we use the term ‘coalition’ in a further sense, one that encompasses both of these aspects while also always referring to a potential internal heterogeneity of interests and thus an inherent fragility.⁴

Lastly, the tendency in political science to focus on interpretative and discursive mechanisms can also be combined with new perspectives in mobilization research; these examine the often overlooked fact that political conflicts are frequently fought out through the mobilization of third parties. As Schattschneider (1960) already emphasized in his classic study, politicalization processes always aim to expand support by incorporating people previously uninvolved (or even opposed). Therefore, the outcome rides heavily on the ability of the two conflicting sides to mobilize. With regard to social movements, Rucht (2007) also shows that depictions of direct confrontation between movements and their adversaries are often misleading because usually the two parties do not directly fight one another; instead their conflict often takes the indirect form of mobilizing third parties.⁵ As expressed in

⁴ From a network perspective, Haunss and Kohlmorgen (2010) study similar phenomena as “collective action networks.”

⁵ “It is time to abandon the simplified image of a two-party struggle between a (unified) movement and its (unified) opponent acting in some kind of social vacuum,” (Rucht 2007: 197).

Schattschneider's motto "watch the crowd" (1960: 3), social and political processes of mobilization are often decisive for what appears at first to be paradoxical or unexpected outcomes of conflicts over transnational regulation.

In the following, we borrow from Nedelmann (1987: 181) to interpret mobilization as attempts by individuals, groups, or organizations to influence the existing distribution of power by swaying preferences, by using communitization processes, or by changing or inspiring practices of uninvolved or adversarial actors to the benefit of one's own aims. This definition itself implies a twofold focus on the action practices of the actors being addressed, on the one side, and the discursive strategies used to mobilize support and aimed at changing action – in the sense of Benford and Snow's (2000: 614) "action-oriented collective action frames" – on the other. Contrary to Nedelmann, we do not limit our scope to interactions among individuals, intermediaries, and governments in the political system but study also political mobilization processes in the market. Research on social movements enables us to build a bridge to approaches of economic sociology that analyze markets as political negotiating systems but have so far placed little importance on informal processes of negotiation with consumer participation.

Particularly important in this context are functional groups that can be mobilized as "quasi-actors" thanks to their common characteristics and experiences (Dahrendorf 1959; Mayntz and Scharpf 1995: 51). Dolata (2003: 31-33) also points out the importance of "non-organized collective actors" in the context of technological standardization. Under what theoretical and empirical conditions do functionally latent groups develop actor qualities and thus become quasi-actors? This question is contingent on history and therefore one that needs to be answered empirically.

The analysis of social movements studying the conditions and processes involved when social groups, as collective actors, attempt to bring about or to prevent societal change (Walder 2009: 394) differentiates in this context between political opportunity structures (Kitschelt 1986; Kriesi 2007), mobilization resources (McAdam 1996) and collective action frames (see Snow 2007).

The concept of political opportunity structures emphasizes that activists and interest groups do not select their aims and strategies in a vacuum but that the political context (as perceived by the actors) influences not only the formulation of problems and grievances but also the protest and mobilization strategies and the opportunities to access the political system (Meyer

2004: 126f). The resource approach stresses the importance of formal organizations as initiators and supporters of social movements, especially in overcoming the difficulties of collective action for diffuse and numerically large groups, as spelled out by Olsen (1968). 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 countermovements (Benford and Snow 2000: 612).

Of these three dimensions, it has especially been the concept of framing – which originated in the broadest sense from the identically named book by Ervin Goffman (1974) – that has spread beyond the study of social movements to other areas of political science in recent decades. According to Goffman, frames are patterns of interpretation that enable individuals to perceive, arrange, and label events in their own personal world and the world in general as part of a socially shared order. Such frames organize social experiences and guide social action. In some political science literature, frames are also understood as cognitive and normative frames, at times even paradigmatic in nature, evidence of which can be found reflected in politics or policies (for an overview, see Surel 2000). However, in this analysis, we focus on active framing *strategies*, which are understood as the deliberate and purposeful process of selecting, emphasizing, and organizing aspects of rather complex contexts according to a certain evaluative or analytical criterion (Daviter 2007: 654). From a perspective in which political conflicts and political competition influence the points of reference, the development, and the use of political ideas and political claims (Schattschneider 1960), framing is not only an important strategy to influence agenda setting but bears on the entire political process and can therefore be linked to the concept of collective action frames from social movement research.

In the sociology of law, legal mobilization using framing strategies is a well-known topic (Burstein 1991). In phases, in which the historical-situational consensus on the balance between societal and private interests breaks down, discursive strategies that legitimize or challenge are particularly relevant in order to close gaps between action practices and the right to act in the perception of those involved. Such legitimizing strategies can range from legal sanctions to justifications of economic and social advantages. However, as Max Weber (1925) already showed in his essay on the claim of and belief in legality, the power alone to enforce laws is rarely enough to guarantee the observance of law permanently. Particularly in the area of international and transnational law, in which polycentric and overlapping

jurisdictions contribute to legal uncertainty and a lack of transparency (Quack 2007, 2010), new laws and treaties could therefore fail to have the mediating and compromise-building impact intended, but instead could cause such unintended effects that they spark protest movements and countermovements with new framing strategies (Staggenborn 1996; Okedeji 2009).

In sum, it can be said that framing strategies, like Goffman's schemas, fulfill 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). 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. Together, these elements serve to mobilize both consensus within the movement and the support from outsiders. (Many frames contain a line of argumentation concerning injustice; others about distinguishing between friend and enemy, as well as the overstated role as the victim; on all points, see Benson and Snow 2000: 615-618).

Until now, research has concentrated heavily on the strategic forms of collective action frames and, in a few exceptional cases, also on their emergent development. The focus was either on the credibility of the movement frames and their advocates or on the attempt to align movement frames with the cognitive and normative schemas of the addressee by way of frame bridging, amplification, extensions, and transformation. Yet at the same time, research on the practical resonance of collective action frames with habitual action patterns has remained rudimentary. Walder (2009: 406) criticizes that social movement research has shown little interest so far in the social situation of the addressee of movement frames. Thus, little is known about the way in which specific personal circumstances or daily practices may prompt people to react positively, indifferently, or negatively when confronted with a movement frame. The same is true for emotions that are encouraged or inhibited upon joining a social movement, such as disappointment, frustration, or euphoria: which social structures or action practices contribute to this or not?

A second neglected aspect, one linked to the fact that the addressee's action practices have been overlooked to date, lies in the area of virtual transnational mobilization. Although transnational interest groups and social movements have increasingly become the subject of

study in recent years, the use of the Internet as an arena of mobilization has been analyzed to date in only a few studies (van de Donk et al. 2004).

For quite a while, a third limitation to the use of the framing concept in social movement research and in political science as a whole lay in the nearly exclusive focus on processes of political negotiation. When framing strategies were raised to explain the dynamics of mobilization, these strategies were directed, as a rule, toward or against actors of the political system. In this context, the impact on public opinion is studied, usually based on the analysis of newspaper articles, from which are derived, in turn, the influences affecting the decisions by politicians. In the field of social movement research, a stronger interest in the impact of discursive strategies in other areas has indeed been observed only just recently, be it the conflicts fought out within the political system but out of the public eye (Haunss and Kohlmorgen 2009) or the diverse social and political struggles over regulating markets in which producers and consumers become the addressees of mobilization processes (see, e.g. Heinz and DeSoucey 2009; Hiatt 2009; Rao 2009; Weber 2004; Jaziji and Doh 2009).

King and Pearce (2010) explain the shift in the orientation of social movements from the political to the market arenas with changes in the opportunity structure. In political areas in which state legislation is dominated by powerful elites or economic interests or in which the state appears increasingly powerless due to internationalization processes, social movement thus direct their activities increasingly toward the market. The authors identify three strategies: campaigns against companies, the creation of transnational systems of private regulation, and the creation of new market alternatives by way of institutional entrepreneurship. In the last strategy, the main objective is to create new categories of producers and consumers, to generate collective identities, and to form new markets. The latent political importance of consumption, investment, and other market transactions is activated by “contentious political action.” In this connection, Teubner (1998: 242) speaks of a “poisoned pill” of political conflict that accompanies the privatization of regulation and that he describes as dialectics between the apolitical character and the re-politicalization of private governance regimes.

Rao (2009) explains such processes in various markets with the help of the concept of “market rebels,” meaning activists who question the status quo in markets. These activists are not only critics (as depicted in political science), they also create collective identities and institutions. Social movements work for social change; they evolve to change markets when normal incentives are not adequate and actors are excluded from the conventional channels

through which they could name or minimize social costs. The challenge facing market rebels is, first, to identify a “hot cause” that evokes emotional responses and creates a sense of community leading to a collective identity among supporters and, second and simultaneously, to use the means of “cool mobilization” for solidifying this identity among the movement’s members and for maintaining their commitment and involvement.

Framing strategies that combine “hot causes” and “cool mobilization” are particularly effective, according to Rao, because they link daily experience with cultural narratives. In order to maintain commitment to the cause and thus the dynamics of mobilization, it is highly important that erstwhile onlookers are invited to try out new behavior and have experiences that are improvisational in nature, seem somehow rebellious and insurgent, and commit people to the movement. This appears to be particularly relevant in the area of interest here, namely, the transnational-private regulation for the production and distribution of intangible information goods, because relatively abstract problems always have to be repeatedly embedded in social interactional networks. Only in this way can participants link these to their own experiences and thereby develop a feeling of belonging to a transnational movement.

The aim of the following study is to examine the degree to which the framing strategies of the two opposing interest coalitions can explain the paradoxical courses of mobilization processes described above. Research on mobilization within a political system has shown that discursive strategies and grassroots forms of organization are able to compensate to a degree for a poor resource supply if the collective action frame is coherent, brings various interest groups together “under one roof,” and is open to new groups of addressees (Haunss and Kohlmorgen 2009, 2010; Sell 2003; Sell and Prakash 2004). However, what counts in the market is performance, not protest – producers and consumers have to become active. Therefore, the interest of the analysis shifts from the construction of action frames to their resonance, from the cognitive-normative dimension to the dimension of practical action. To what degree can the difficulties of transnational mobilization, which have been worked out many times in the literature (Della Porta 1999; Smith 2007; Tarrow 2005), be reduced or transformed by a mobilization strategy linking problem solutions for complex topics to concrete changes of daily actions and practices? If it can be determined that mobilization strategies have such an effect – even though the two coalitions do not start out on equal footing with regard to their available resources and, intensified by this, their channels of access to political arenas – then this finding would also reveal new opportunities for the shaping of transnational markets by civil society in the digital age.

The empirical study on which this paper is based encompasses detailed Internet research of websites and documents that were published by actors of both coalitions in the period from 2001 to 2009, as well as an examination of press reports from the same period. In addition, semi-structured interviews were conducted with representatives of the NGOs Creative Commons and Wikimedia – the organization behind the online encyclopedia Wikipedia – that included both the international organizations as well as their national partner organizations. On the technological management of digital rights, initial exploratory interviews were used with people who attended standardization conferences; these interviews are to be extended and systematized in a coming phase of research. These data sources enabled us to identify general framing strategies and their diagnostic, prognostic, and mobilizing elements for both coalitions.⁶

In order to evaluate the resonance that these strategies had on the attitudes and practices of the addressees, it would be ideal to have detailed survey findings, market research studies, and qualitative interviews. However, such research has only just started and could not be conducted as part of our project due to the limited resources available. Instead, we resort to quantitative and qualitative indicators from existing studies: with regard to the copyright coalition, we use, for one, the official agreements from authors/creators and electronics manufacturers on their participation in and support for the DRM standardization project. For another, we use data on market trends pertaining to the spread of certain music and film formats, as well as press and Internet reports on critical user reactions and contra-mobilization. For the fair use coalition, we refer to statistics on the use of Creative Commons licenses, contributions to Wikipedia, and the contents and downloads to and from commons-based websites like Jamendo and flickr. These are augmented with existing analyses of Internet debates (Hermans 2009) and with virtual ethnography on the attitudes and practices of individual Internet users (Bajde 2010).

Copyright in the Information Age: Regulation and Mobilization

Within the context of the model of knowledge and culture production, which Benkler (2006) calls industrial information economics, a division of labor has been identified at least since Kant (1785) and Fichte (1793) between functional groups, among which publisher/copyright owner, author/creator, and consumer/user represent the most important. These groups are still

⁶ We deliberately selected a qualitative analysis of various materials, because the conflicts that interested us were not necessarily fought out in the media. Therefore, the framing strategies analyzed in the following are more broadly conceived than those frames studied in the classic journal analyses (see Koopmans and Statham 1999; for copyright conflicts, Haunss and Kohlmorgen 2009).

the ones most affected by copyright regulation, even though copyright also covers cinematographic work and computer programs and it is possible today to reproduce nearly all types of work in digital form.

Since the beginning of copyright in the Statute of Anne in 1710 (Feather 1980), national legislatures (and later international legislatures, following the Berne Convention for the Protection of Literary and Artistic Works from 1886) have been responsible for balancing the interests of these functional groups against public interests transcending those of the three groups. For both goals – the achievement of overarching societal aims, such as the advancement of creativity and the production of knowledge, and the balance of interests for all the groups involved – copyright established rights that were temporary and limited in content, yet principally exclusive.

The question concerning the form and scope of copyright protection has again become highly current because of new digital technologies, which changed informational goods from a theoretical ubiquity into a real one for informational goods. For Marks and Turnbull (1999), the technologies in question are, above all, loss-free digital copying, new compression processes, greater bandwidth for more and faster data transfer in the Internet, as well as two-way communication in “peer-to-peer” networks. Benkler (2006) speaks explicitly of the “Internet revolution.” In academic debates, especially in law and economics, the case is put forth for both an expansion and a reduction of copyright from utilitarian as well as natural-law perspectives (Dreier and Nolte 2006): from a natural-law standpoint, the right of authors to their work is contrasted with the right of the public for the freedom of information (Pierson 2007: 12 f.). From a utilitarian perspective, strong copyright protection is argued to be both efficient (see, e.g., Liebowitz and Margolis 2005) and inefficient (see, e.g. Boldrin and Levine 2008).

In the course of these contrasting lines of argumentation, and in part for the purpose of resolving them legalistically, it is usually insinuated that the abovementioned functional groups are interested in shaping copyright (see Bach 2004; for a critical stance, Okediji 2009). Yet such static-stylized ascriptions do not stand up to an empirical test over time: what interest groups actually say and do politically cannot be explained exclusively by functional-structural arguments. Given certain political opportunity structures and mobilization structures, the political motivations and aims of the actors are constituted instead in each of their specific socio-historical contexts and frequently change during the course of political conflicts. Moreover, the technological, economical, and societal changes that favor a

decentralized and networked information economy (Benkler 2006; Castells 1991) also contribute to the creation of new functional groups to be addressed by political and societal processes of mobilization. Therefore, at times the battle lines in conflicts over the appropriate degree of copyright protection actually run through the middle of these functional groups and are subject to historical changes, as will be shown in the following section.

From TRIPS to Napster Shock: The Technological-legal Double Strategy of the Coalition for the Enforcement of Copyright

In many senses, digital technology represents a challenge for the traditional business models that have developed over decades in the industries relying on copyright, including newspaper publishing, general publishing, film studios, music record labels, radio and television broadcasting, and the producers of business and entertainment software (Siwek 2006). First, digitalization makes it possible to distinguish between content and medium – a constellation that is of major importance for the copyrighted content industry since it sells CDs, DVDs, and books, not music, movies, or novels. Second, loss- and lag-free copying of digital contents via personal computers and the Internet enable the swap exchanges mentioned above and other forms of private copying on a massive scale. Third, thanks to sinking production and distribution costs, the creators of content are beginning to make their work accessible directly to the public and thus independently of publishers or record labels (see Dolata 2008 for a description of this technologically induced change in the music industry).

Music industry⁷	Film industry⁸	Software industry⁹	Academic publishers¹⁰
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. 20 th Century Fox)	Hewlett-Packard	John Wiley
	NBC Universal		American Chemical Society
			Blackwell Publishing
			Taylor & Francis

⁷ 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].

⁸ Cf. Handelsblatt, 14 Sept. 2004, <http://www.handelsblatt.com/archiv/sony-setzt-time-warner-mit-mgm-kauf-erneut-stark-zu;790403> [24 April 2009].

⁹ 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].

¹⁰ Global share of the market for vendors in the area of journals for science, technics and medicine (House of Commons 2004: 13).

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

Given the in part stagnating if not sinking levels of turnover and the rising number of Internet downloads of cultural goods, the media industries in the United States have been increasingly concerned since the 1990s about their future competitiveness. Nor have the situations in Europe and Japan been significantly different (Bach 2004). Although the connection between decreasing turnover in the industries and increasing figures on downloading remained controversial,¹¹ 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.

The reaction on the part of the copyright industries (Siwek 2006) was twofold. The development of increasingly sophisticated and uncircumventable copy protection technology (DRM) appeared to be an effective and appealing strategy, compared with the Sisyphus work of litigation to enforce copyright provisions, regardless which kind, in the living rooms of millions of individual consumers. The strategy was particularly appealing because it could be flanked by lobbying for stronger copyright laws. “Flanked” can be taken literally here because the main objective was to legally guarantee DRM technologies and to protect against circumvention. This is a strategy that Bach (2004) calls a “double punch of law and technology” and Kretschmer (2003: 5) succinctly summarizes: “Digital copyright protects the technology that protects the law that was to protect creative material in the first place.”

To justify their analysis of the problem, the leading actors – representatives of the copyright industries (see Table 1) and their financially strong 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 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

¹¹ On his blog, Peter Tschumck provides an overview on the state of research concerning this topic: <http://musikwirtschaftsforschung.wordpress.com/2009/05/25/wie-bose-ist-das-file-sharing-teil-18/> [23 April 2010].

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).

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 download illegally, circumvent copy protection measures, or assist 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; cited in Bach 2004: 8), politicians were especially courted by appealing to their sense of propriety to support the common good through innovation, creativity, and economic growth. Interestingly, the framing strategies of the copyright enforcement coalition offer little positive mobilizing elements worth mentioning with regard to benefits for the consumer. Table 2 summarizes the diagnostic, prognostic, and mobilizing dimensions of the framing strategy used by the copyright coalition.

Following the initial resistance by scholars, librarians, Internet providers, and telecommunications companies in the U.S. Congress (Okediji 2009: 2387), it proved to be a very successful strategy on the international political stage to combine a causal analysis, according to which massive numbers of illegal downloads endangered the economic productivity of entire economies, with proposed solutions, such as DRM technologies with legal protections, within the framework of WIPO, TRIPS/WTO, and OECD. In this case, relative homogeneous and well-organized representatives of the copyright industries, together with actors from the pharmaceutical and biotech industries, succeeded in forming an ad-hoc coalition to strengthen intellectual property rights in general and copyright laws in particular (Bach 2004; Sell 2003) and to assuage the concerns of the Internet providers and telecommunication firms about the possibility of liability.

<i>Framing Dimensions</i>	<i>Description</i>	<i>Examples (Source)</i>
Diagnostic	Massive infringements of copyright hurt industry and the general economy	<p>"As piracy in all its forms, the many countries in which it occurs, and the means to combat it, are described in this report, it is important to take into account the enormous economic harm caused to local right holders and their support network as well as to the U.S. economy." (IIPA)¹²</p> <p>"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)¹³</p>
	Copyright infringements are comparable to trademark and product piracy	<p>"Piracy: Online and on the Street" (RIAA)¹⁴</p> <p>"Pirates are criminals" (IFPI)¹⁵</p>
Prognostic	Expansion of copyright protection benefits business as well as art and culture	<p>"Intellectual property is the oil of the 21st century" (IFPI Lobbying Platform)¹⁶</p> <p>"Without intellectual achievement there is no progress [...] Therefore the value of intellectual property has to be recognized and honored: worldwide and in every form, digital, analog, as an available Product." (ibid.)</p>
	DRM secures the enforcement of copyright and access to cultural goods	"The digital cornucopia – How widespread use of access controls has led to increased access to copyrighted works." (RIAA) ¹⁷
	Education of consumers by way of lecturing and deterrence	<p>"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)¹⁸</p> <p>"In connection with the 3-Step Strategy of Education – Deterrence – Warning, established in 2007, the number of lawsuits has risen continually, so that ... the number of illegal downloads today is below 300 million." (IFPI Germany)¹⁹</p>
Mobilizing	Stronger copyright protection creates innovation and economic growth	"Copyright protection is a vector for growth and key to the success of new information society services and broadband take-up. Further growth, innovation, competitiveness and employment cannot be ensured

¹² Vgl. <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480aa8547> [21.05.2010]

¹³ Vgl. <http://www.riaa.com/faq.php> [21.05.2010]

¹⁴ See <http://www.riaa.com/physicalpiracy.php> [6 April 2010].

¹⁵ See <http://www.heise.de/newsticker/meldung/42431> [27 Aug. 2008] or <http://www.hartabergerecht.de/> [27 Aug. 2008]. Original: "Raubkopierer sind Verbrecher."

¹⁶ See <http://www.geistigeseigentum.com/index.php?m=viewpage&p=35> [6 April 2010]. Original: "Geistiges Eigentum ist das Öl des 21. Jahrhunderts"; "Ohne geistige Leistungen gibt es keinen Fortschritt [...] Der Wert geistigen Eigentums muss deshalb anerkannt und honoriert werden: weltweit und in jeder Form, digital, analog, als greifbares Produkt."

¹⁷ Vgl. United States Copyright Office (2006) Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11 Joint reply comments. <http://www.freedom-to-tinker.com/blog/felten/riaa-says-future-drm-might-threaten-critical-infrastructure-and-potentially-endanger-liv> [21.05.2010]

¹⁸ See http://www.mpaa.org/Issues_EduOutreach.asp [6 April 2010].

¹⁹ See <http://www.musikindustrie.de/10beliebtevorurteile> [6 April 2010]. Original: "Im Rahmen der 2007 etablierten 3-Stufen-Strategie Aufklären – Abschrecken – Abmahnen wurde die Zahl der Verfahren kontinuierlich erhöht, sodaß ... die Zahl der illegalen Downloads heute unter 300 Millionen liegt."

Enforcement of copyright protection supports art and culture	without providing a continuing incentive to invest in the production and distribution of content.” (IVF) ²⁰ “... a dynamic, content-rich, readily accessible, and hassle-free marketplace that excites and engages consumers, while it also compensates those who, for almost a century, have made it possible for American movies, music and other media to entertain and educate audiences around the world.” (Creative Community Organizations) ²¹
Strong protection of copyrights and DRM is beneficial for everyone, including fans and users	“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) ²²

Table 2: Framing Strategies of the Copyright Coalition

The provisions expanding copyright protection that were laid out in TRIPS and broadened even further in the subsequent WIPO treaties are commonly called the “Berne-plus” elements and include the following points (see Pierson et al. 2007):

- Limitations and exceptions to exclusive rights – e.g. the right to private copying or the right to use protected works in research and teaching – have to be limited to certain specified cases that neither conflict with the normal exploitation of the work nor unreasonably prejudice other legitimate interests of the copyright holder (Art. 13 TRIPS).
- The creation of a new right for authors to authorize any communication of their works to the public by wire or wireless means, including making them available to the public at the public’s discretion (e.g. in the Internet as “download,” which is why this is also called the “online right”), a right that serves as the basis for the prosecution also of noncommercial copyright infringements by private users in the Internet (Art. 8 WCT; see also Kretschmer 2003).
- Penalties for circumventing technological protection measures as well as the unauthorized removal or alternation of electronic rights management information (also corresponds with the legal protection of technological measures within the framework of Digital Rights Management; Art. 11 and 12 WCT).

There is a fairly general consensus in the literature that the Berne-plus elements exhibit a one-sided consideration for the interests of copyright owners (see Bach 2004; Helfer 2004; Heineke 2006; Kretschmer 2003; Matthew 2002). One mundane reason for this is the

²⁰ Vgl. http://circa.europa.eu/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/consultation_copyright/international_federation_1/_EN_1.0_&a=d [21.05.2010]

²¹ Vgl. <http://www.dga.org/news/pr-images/2010/Joint-submission-re-IPEC.pdf> [21.05.2010]

²² See <http://web.archive.org/web/20000302230740/www.sdmi.org/> [30 Aug. 2008].

historically late arrival of actors focusing on user rights; so argue, for example, Braithwaite and Drahos (2000: 72; emphasis added L.D./S.Q.): “Consumer organizations have not been players in the globalization of intellectual property. By the time consumer organizations understood the importance of TRIPS, *the ink on it had largely dried.*” However, industry-affiliated associations, like the Licensing Executives Society International (LESI) or the International Association for the Protection of Industrial Property (AIPPI), were involved in the regulatory process in large numbers (ibid.).

Long before these international treaties were cast into national law at the end of the 1990s within the scope of the Digital Millennium Copyright Act (DMCA) in the United States and in the wake of EU copyright guidelines, the abovementioned actors from the copyright industries were simultaneously pursuing the aim of improving the enforcement of copyright by way of technical protection measures. The mastermind in this field is generally held to be Mark Stefik, a researcher at the Xerox Palo Alto Research Center (PARC) who imported the military concept of *trusted systems* – systems with different security levels – into the area of digital goods markets as early as 1994 (appeared in Stefik 1996). In a system combining hardware and software, a central Digital Property Trust (DPT) would individually certify works and their usages and thereby enable the complete commercialization and control of every type of exploitation. Secured cryptographically (e.g. through digital coding) and by means of modules integrated into output devices (so-called Trusted Platform Modules) it would be possible to check whether every usage was covered by the rights to the work and to the desired exploitation (e.g. showing of a film, printing or forwarding a document, etc.) (see Grassmuck 2004).

In order to regulate copyright through trusted systems, however, it is necessary to establish industry-wide standardization. Marks and Turnbull (1999: 11) 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).

The former was established in 1996 by the major film studios (see Table 1) and industry associations like the MPAA in order work out digital encryption systems together with the electronics and computer-hardware manufactures and with the participation of software firms.

The meetings that ensued resembled a loosely coordinated conference of experts who discussed and negotiated standardization alternatives (see Möllering 2010 for a more detailed analysis of such “field configuring” events in lithography technology). Competition and cartel law meant that the stipulations for attending these meetings had to be relatively lax, which resulted in that fact that no restrictions were placed on participating at the CPTWG. Yet it was precisely this openness and informality that caused a lack of transparency in the decision-making process. In the words of one participant: “It was a mystery to me, how decisions were made.”

The interests within this industry initiative were not at all uniform: the desire for the greatest protection possible on the part of copyright owners were rejected 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, cited in Bach 2004: 8). 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 then forced to inform potential end users of the imposed limitations of their products.

Despite internal conflicts over patents, costs, network effects, and interorganizational 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 Linux operating systems. In the small but growing and highly active group of computer users who use free/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). For example, the computer scientist Dave Touretzky (2000) published, in this context, a “Gallery of CSS Descramblers” that gave informed end users ways to circumvent copy protection in situations where previously private copying had been legally tolerated (such as copying to a second device) and was now being blocked by CSS.

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 to the positive reception of 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 it had been 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 RIAA, its Japanese counterpart RIAJ, and the IFPI and 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 Dolata 2008: 17f.; Rosenblatt 2002: 134). The numerous proprietary DRM standards of the various individual manufacturers could be even less successful (Buhse and Günnewig 2005; Pohl 2007) due to economic network effects (Farrell and Saloner 1986), 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. The result was 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 2008).

Except for problems of coordination within the “industry coalition,” a major reason for the poor success of DRM systems in general may well have been their rejection by consumers and users. This is acknowledged by DRM pioneer Stefik (2007): “The situation reflects the core issue that current DRM provides no compelling benefits to consumers.” Not surprisingly, Stefik’s solution for this problem is more and better DRM instead of less. Actually, not only were there no advantages linked to real-existing DRM solutions, but consumers experienced recurring disadvantages and use limitations compared to DRM-free alternatives, of which the most prominent were a smaller selection of player devices and less flexibility with regard to playback, sharing, and the arrangement of music pieces. Consequently, the biggest online retailer, Amazon, also refused to install any form of DRM system for its online-music sales.

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, whose illegal digital downloads were seen as the cause for turnover losses in the industry and as a threat to societal innovation and the general welfare. Whereas political decision-makers in the United States, the European Union, and Japan, as well as representatives of these countries adopted and codified the diagnosis and solution proposals during the course of the negotiations on the TRIPS and WIPO treaties, the efforts to cooperate with electronics and computer-hardware manufacturers in the music business were far less successful than they had been in the movie business. From the beginning, the sore spot in the copyright-enforcement strategy was and continues to be the low level of acceptance on the part of the consumer and the user. A long way off from popularizing the necessity and practicability of DRM standards in the daily use of intangible goods, the strategy provoked a countermobilization by using technological and legal aspects of copyright protection to encroach even into areas of private or socially beneficial use once guaranteed through fair use or exceptional regulations (“limitations and exceptions”). It is this countermovement that we examine in the following section.

Countermovement of the Fair Use Coalition: Standardization and the Dissemination of Alternative Copyright Licenses

Given the fact that the TRIPS agreement had been negotiated in the Uruguay Round of the talks on the General Agreement on Tariffs and Trade (GATT) from 1987 on and that the Free Software Foundation had been founded only two years before as the first copyright-oriented NGO (see Table 3), then it is hardly surprising that the copyright coalition walked all over their adversaries on the political stage. Paradoxically, this success became a catalyst prompting cooperation among initiatives in the area of Internet and copyright and subsequently provided support for the dissemination of alternative copyright licenses. The prerequisite for this was the emergence of (organizational) actors who, with their framing strategies, had recourse to newly created action practices and could use these to address quasi actors.

Founding Year	Organization
1985	Free Software Foundation (www.fsf.org)
1990	Electronic Frontier Foundation (www.eff.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)

Table 3: A selection of transnationally active NGOs focusing on copyright topics

As a result of the abovementioned “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 become possible (Lessig 2004). The most prominent examples are 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 (see Lessig 2001: 50ff.). Such production offers the software that by now has become an alternative to normal proprietary software in all fields of application (Wayner 2002; Weber 2004; Dobusch 2008). In this, the disclosed source code serves as the common jumping-off point for advanced development in the sense of “standing on the shoulders of giants” and takes into account the fact that the creation of intellectual property always represents a measure of input as well as output (see Benkler 2006: 37).

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. It is expected to take another twenty years before alternative licensing, apart from the software quasi-standards, has been established also for audio-, video-, or text documents.

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 meaning “open content.” In addition to this development, organized initiatives critical of copyright laws were launched especially among and around librar(y societ)ies 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). The breakthrough did not come until 2001 when a group of legal scholars at U.S. universities founded the nonprofit organization Creative Commons. Conceived as a “network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area,” this was an “epistemic community” as defined by Haas (1992: 3). This group, centered around Stanford professor Lawrence Lessig, had tried at first to prevent the strengthening of copyright laws like the Copyright Term Extension Act by taking the case before the United States Supreme Court. Only after this effort failed in 2001 (see Dobusch and Quack 2010) did the group turn to its Plan B, namely, to develop private licensing standards that would establish and advance a global commons for digital goods.

While the copyleft principle was the great “institutional innovation” (Rota and Osterloh 2004) of the GPL, Creative Commons developed two further principal innovations. First, the ability to modularize the license enabled authors a greater flexibility with regard to the scope of liberties they were willing to grant users. It is paradoxical that potentialities for new business models are linked to this precisely because of the – not uncontroversial (see Möller 2006) – clause about “noncommercial use.”

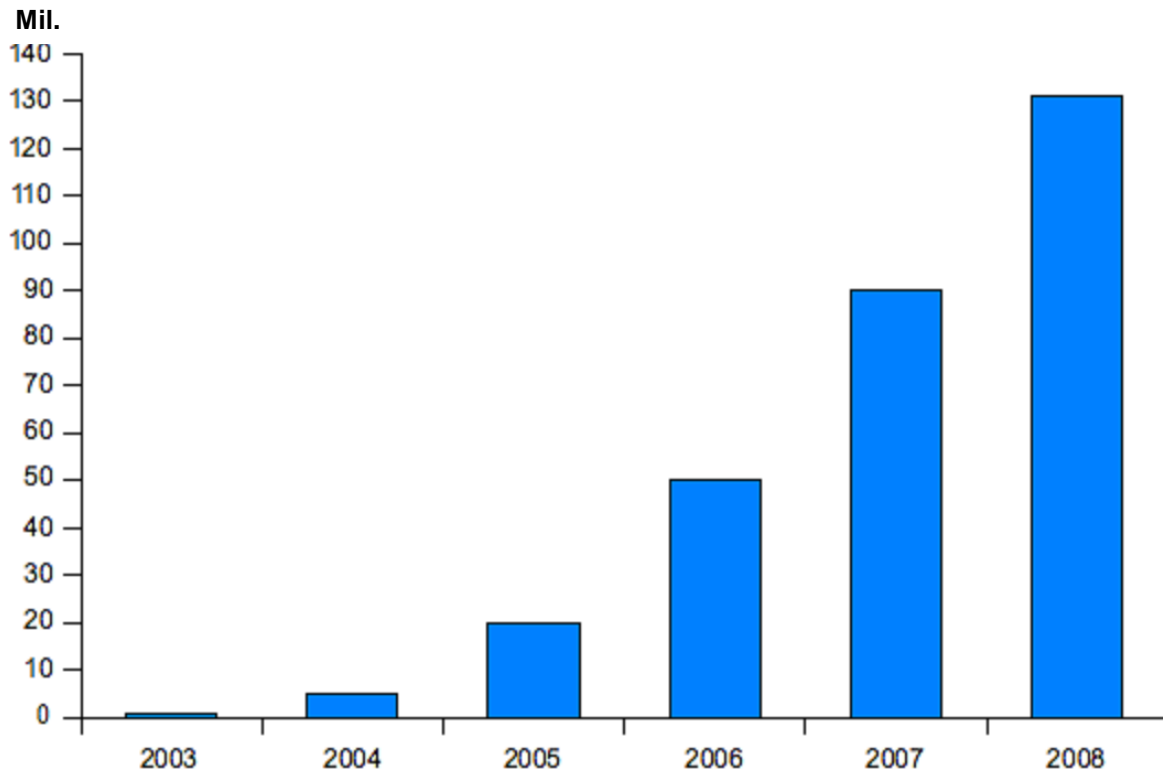


Figure 1: Minimum estimation the number of works licensed by Creative Commons at the end of each year (for 2008: July), see <http://wiki.creativecommons.org/Metrics> [30.08.2008].

Second, Creative Commons quickly shifted its emphasis to the linguistic translation and legal adaptation of their licenses to particular jurisdictions (so-called ‘license porting’) and created in the period from 2003 to 2008 a network of more than 70 partner organizations with localized versions of licenses in more than 50 different countries. In many respects, this franchising parallels that which is discussed in political sociology as bloc recruiting. This is understood as 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, franchising was born more out of the necessity to spread licenses as quickly and widely as possible, but it generated – if at first unintentionally – comparable mobilization effects. Over time, the types of partner organizations associated with Creative Commons changed. At the beginning they were primarily (university) law institutes with experience in the area of software licensing, but as the movement grew, more actors from diverse areas of license application joined and simultaneously attracted more politically motivated activists from the milieu of social movements working for the free access to knowledge. In addition to the previously mentioned movement around free and open source software, these also include the areas of Open Content²³ and Open Access²⁴ that grew out of it. From the publication of

²³ The term ‘Open Content’ is used here as a general term for initiatives that (in part explicitly) use the model of creating and distributing free/open source software to other areas of digital goods, such as audio, video, and text

the first version of the license in December 2002, the scope of content licensed through Creative Commons grew exponentially to an estimated 130 million works by the middle of 2008 (see Figure 1).

This is all the more astonishing since no monetary resources comparable to those of the copyright coalition were available to finance regularly held meetings – similar to the framework of the CPTWG, for example – in order to bring together the very geographically scattered participants for the development and research of standards. Particularly in the initial phase of the transnationalization process, a great deal of the coordination occurred with the help of online forms of communication, such as mailing lists. The subsequent attempt of Creative Commons at least to gather all relevant initiatives together for an annual global “iSummit” was abandoned four years later, in 2009, for cost reasons and replaced with regional meetings. In this connection, the localization of licenses in cooperation with quasi-franchisers serves not only to spread licensing, but also to help tap additional local, material and personnel resources, particularly through regional cooperation partners and activists.²⁵

In the eyes of the actors of the fair use coalition that was evolving from and regrouping around Creative Commons, the encroachment into the creative process by expanding copyright laws represented a problem – for the creatively active individual as well as collaborative-creative groups and societal interaction based on culture and artifacts of knowledge. These actors, led by critical legal scholars with professorships at well-known U.S. universities (see Dobusch and Quack 2010), postulated that the excessive broadening of the rights of copyright holders would hinder access to existing knowledge and works, impede creativity and innovation, and rob society of a great deal of possible enrichment in the areas of culture, knowledge, and business. After the abovementioned constitutional lawsuit in the United States failed, the solution was proposed to establish a commons for culture and knowledge that would be based on private contractual agreements with authors, who could choose from several levels of access rights evolving from the exclusive rights of authors as guaranteed by copyright laws. The author was to decide whether “copyright” or “copyleft” should be applied to the work. The formation of such a freely accessible commons would,

works. The most well-known example for this is the operator of Wikipedia, the Wikimedia Foundation, which coordinates a network of more than 20 local, member-based chapter organizations.

²⁴ Summarized under the term ‘Open Access’ are initiatives and approaches for free access to scientific knowledge, see Mruck et al. (2004) as well as Hanekop and Wittke (2005).

²⁵ An example is the COMMUNIA project, which was proposed to the European Commission under the lead of the European partner organizations of Creative Commons. During the three-year period of the project, the “European Thematic Network on the Digital Public Domain” made possible a number of European meetings among the involved organizations, the number of which grew from the 36 organizations at the beginning to 51 organizations during this period (see <http://communia-project.eu/about> [22 April 2010]).

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 tried out 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 action 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 “producers” (as Bruns 2009 calls the combination of ‘producer’ and ‘user’ in the Internet; in the original German *Produzter*, from *Produzent* and *Nutzer*). The mobilization strategy of the fair use coalition was directed first and foremost to this group. Critical legal and technical experts, many already involved in the free software movement, were approached and convinced to help legally adapt licenses to the various national systems of copyright. Individuals and organizations in the music, film and media, science and education sectors, in library science and journalism – to mention just a few – were recruited; they were encouraged to perform highly visible, symbolic acts and many small daily actions in order to create content, that, taken together, would make the advantages of such knowledge production visible also to the “normal” user, consumer, and citizen, and would encourage them to participate. Even though it was controversial within the coalition, part of the mobilization strategy was also aimed at potential commercial copyright owners of user-generated content in order to demonstrate the applicability of licensing standards also for alternative business models in the area of art and culture.

<i>Framing Dimensions</i>	<i>Description</i>	<i>Examples (Source)</i>
Diagnostic	Stringent copyright hurts business and art and culture in the Internet.	„Copyright for Creativity“: .. While exclusive rights have been adapted and harmonised to meet the challenges of the knowledge economy, copyright’s exceptions are radically out of line with the needs of the modern information society.” (OSI) ²⁶
	Expansion of copyright 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) ²⁷
Prognostic	Alternative copyright licenses encourage creativity by creating a digital commons of freely available	"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

²⁶ Vgl. <https://www.copyright4creativity.eu/bin/view/Main/Declaration> [21.05.2010]

²⁷ Vgl. <http://www.eff.org/wp/unintended-consequences-under-dmca> [21.05.2010]

	digital goods.	legal sharing, use, repurposing, and remixing. “ (Creative Commons) ²⁸
	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) ²⁹
Mobilizing	Use of alternative copyright licenses is the most up-to-date form of digital creativity.	„We stand on the shoulders of giants by revisiting, reusing, and transforming the ideas and works of our peers and predecessors.“ (Creative Commons) ³⁰ “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 Germany) ³¹
	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 Germany) ³² „Remix: Making Art and Commerce Thrive in the Hybrid Economy” (Title of book by Lawrence Lessig, 2008)

Table 4: Framing Strategies of the Fair Use Coalition

From the very beginning, the framing strategy used by the fair use coalition focused primarily on the new functional group of ‘producers,’ which was coalescing in the Internet through huge numbers of daily actions. In the broad spectrum of ways to use, spread, and produce intangible artifacts, these people were viewed as important, trend-setting actors, even more so than the equally widespread users of peer-to-peer file-sharing à la Napster. In the framework of this coalition, Creative Commons frequently succeeded in putting the mass phenomenon of user-generated content (UGC),³³ salient for the changed (self) image of authors and users in the Internet age, at the heart of its mobilization strategy by regenerating works already available as remixes or mash-ups (see Hemmungs Wirtén and Ryman 2009; Lessig 2003, 2008).

While increasing numbers of Internet users are becoming authors in a very self-evident way, these people deviate in one significant aspect from the image of an author that underlies the prevailing copyright legislation: in by far the greatest number of cases, their creatively productive activity lacks any interest in exploiting the work directly; these authors form a steadily growing group of *non-exploiting authors*. This definition does not exclude the

²⁸ Cf. <http://creativecommons.org/about/what-is-cc> [6 April 2010].

²⁹ Cf. <http://wikimediafoundation.org/wiki/Home> [6 April 2010].

³⁰ Cf. http://wiki.creativecommons.org/Legal_Concepts [6 April 2010].

³¹ Cf. <http://de.creativecommons.org/faqs/> [6 April 2010]. Original: “Wir von Creative Commons glauben, dass es bei den Kreativen ein bislang unbefriedigtes Bedürfnis danach gibt, der Welt mitteilen zu können: ‘Some Rights Reserved’ statt ‘All Rights Reserved’.”

³² Cf. <http://de.creativecommons.org/faqs/> [06.04.2010]. Original: “Viele Kreative haben erkannt, dass striktes Beharren auf Ausschließlichkeitsrechten der gewünschten Aufmerksamkeit für ihre Inhalte und deren Verbreitung im Internet oftmals im Wege steht.”

³³ In their report “Participative Weg and User-Created Content: Web 2.0, Wikis and Social Networking,” the OECD defines UGC as “i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort, and iii) which is created outside of professional routines and practices.” Cf. http://www.oecd.org/document/40/0,3343,en_2649_34223_39428648_1_1_1_1,00.html [5 April 2009].

existence of latent exploitation-interests or even negative exploitation-interests – meaning the rejection of exploitation without compensation by a third party. 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 5) as well as a good many of the (millions of) users of video platforms like YouTube (see Bajde 2010).

Contributors*	10	62	791	4.043	21.919	76.163	227.829
Active contributors**	9	28	191	1.225	6.743	20.200	63.950
Very active contributors***	0	2	41	270	1.244	3.468	8.762
Number of articles in English	25	1.900	32.000	128.000	273.000	573.000	1.200.000
Total number of articles	25	1.900	44.000	218.000	696.000	1.800.000	4.300.000

* at least 20 contributions; ** at least 5 contributions last month; *** at least 100 contributions last month

Table 5: Number of contributors to the Wikipedia Encyclopedia from 2001 to 2005 (Data taken from <http://stats.wikimedia.org/EN/Sitemap.htm>, as well as Benkler 2006: 71)

The framing strategy of the fair use coalition has been successful essentially because it used common action 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” and thereby to transform them from a group *in itself* into a group *for itself* (see Mayntz 2010, who refers, in turn, to the Marxian distinction between a class in itself and for itself). 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. Precisely because it occurs on such a massive scale, non-commercially motivated file-sharing eludes to a good part the state’s sanctioning authority and massively influences (criminal) law and technology debates related to the shaping of copyright regulation. Given the estimated 40 million songs that were illegally downloaded in 2008, WIPO Director General Francis Gurry asked whether the issue here was still a matter of “piracy” or instead of a “change in the situation.”³⁴

In sum, it can be said that the (growing) importance of the input for creative processes on the basis of recombining existing works acts as an important framing strategy both to address potential users of Creative Commons licenses as well as to underscore the criticism of recent copyright reforms to politicians. Utilitarian and natural-law lines of argumentation often merge into one: the argued advantages of a lower level of copyright protection for business

³⁴ <http://www.heise.de/newsticker/WIPO-Chef-Das-System-geistigen-Eigentums-ist-massiv-unter-Druck--/meldung/136745> [24 April 2009].

and the economy in general (Benkler 2006; Lessig 2001) correspond with the increasing number of creative opportunities for creative individuals (Lessig 2003). The framing strategy of the fair use coalition, which evolved as a countermovement to the copyright coalition, has proven successful so far, especially with regard to the mobilization of non-exploiting authors and “producers,” whereas its impact in the area of commercial cultural production and in the political arena still has to be seen (for a farsighted treatment of the limits of a mobilization strategy based on personality rights law, see Elkin-Koren 2005).

Discussion and Outlook

In this study, we have examined the social and political conflicts over regulating the ownership and the use of information, knowledge, and culture. Our central interest focused on the conflicts involving copyright that were carried out in the political arena and especially in the market arena following the establishment of a global regime of intellectual property rights by the TRIPS and WIPO agreements and their translation into national law. Although it appeared at the beginning of the twenty-first century as if a comparatively small yet homogeneous group of companies in the copyright industries had gained the upper hand in pursuing their interests in an expansion and enforcement of property rights for writing, music, film, software, and other non-material goods (Bach 2004), less than a decade later the situation is more complex.

The copyright coalition was very successful in fulfilling its aims in the political arena but faced coordination problems when it came to marketing them as a technological standard. By exerting economic pressure on the electronics manufacturers, these problems were overcome in the film and video business, but the coalition’s attempts to introduce DRM to the music market proved ineffectual because of resistance by new market actors and the already established protection-free MP3 standards. These differences illustrate that not all companies were equally interested in the introduction of digital rights management and that the establishment of technical alternatives led in part to a reorientation of business models and strategies.

Even more decisive for the way the conflict over enforcing comprehensive copyright laws unfolded were, however, the unintended effects of the framing strategy selected by the copyright coalition: to depict all forms of access to copyrighted contents, independent of their commercial or private motivation, as damaging to creativity and the general welfare and to place all digital-goods consumers under the general suspicion of theft, made at least some of

these same users, who themselves were more often becoming the creators of intangible goods, receptive to the countermobilization of the newly formed fair use coalition and its action framework Creative Commons. As a copyright adapted to the new digital opportunities, Creative Commons could benefit, in the sense of a ‘cool mobilization,’ from the frustration and alienation experienced by non-exploiting authors, and documented in netnographic studies (e.g. Bajde 2010), in the course of the forced implementation of copyright for contents they created.³⁵

The fair use coalition used primarily intellectual and organizational resources and the support of already established non-profit actors from the fields of academic research and library science in order to initiate a countermovement using a framing strategy based on legal licensing standards. Interestingly, this strategy was, from the start, conceived less as a simple rejection of existing copyright than as the constructive draft for an alternative commons-based copyright. The astonishing impact of this framing strategy on mobilizing users, producers, and ‘producers’ of intangible digital artifacts, in a transnational context that is generally assessed as not conducive for the mobilization of civil society, can be explained by three factors: First, alternative copyright licensing and its accompanying narrative of the “creative commons” can be linked to existing action and interaction practices, such as file-sharing and social networks, of collective and individual actors, who in turn are embedded in the most diverse social contexts. Second, a new social category, the “non-exploiting author,” has taken center stage as the positively cast counterpart to the copyright-exploiting media industry in the strategy for an alternative copyright. Third, the establishment of new creative practices in the area of knowledge and culture, which Rao (2009) calls “cool mobilization,” leads in a performative way to the establishment of an alternative regulatory regime based on private licensing standards.³⁶ In conclusion, it has been shown how an initially diffuse interest coalition, equipped with few material resources, could be relatively successful in the transnational sphere by using specific organizational and framing strategies to mobilize against an interest group that is supposed to be more highly concentrated and have more extensive financial resources at its disposal.

³⁵ Among the occurrences that contributed to the collective experience of frustration are, for example, the deletion of works created by remix and the blockage of user accounts on the video platform You Tube due to (alleged) copyright infringements.

³⁶ Parallels exist here to the debates on the performative utterance of knowledge contents in markets (Callon 1998; MacKenzie et al. 2007). MacKenzie (2006) argues that a mathematical formula, developed for prognosis purposes, significantly influences the development of values of financial investments as a result. The private Creative Commons licenses studied here also “proved” themselves, the more actors refer to them in their decisions on the creation, spread, and use of contents. A further study on the commonalities and differences would be an interesting topic for further research

Moreover, these findings illustrate that, in transnational policy fields, processes of mobilization as well as regulation are more closely interlocked with one another in the political and market arenas than is often assumed. However, in no way does their interaction always resemble a cyclical pendulum swing, as is suggested by the concept of political opportunity structures (King and Pearch 2010) or Hirschmann's ideas (1988) on "dedication and disappointment" about the way citizens vacillate in their orientation between the private and public good. In contrast, our findings indicate the existence both of effects that are mutually reinforcing and those that are mutually weakening. Whereas the neglect of the copyright coalition to incorporate the daily practices of consumers and users in its framing strategy throws a shadow over the societal legitimacy of the international and national copyright legislation passed under its influence, the dynamics propelling the spread of Creative Commons licenses and contents indicate the performative aspects of private regulation, a subject still quite neglected in political science. The adoption of standards contributes to their institutionalization and legitimation and therefore represents itself a form of regulation that future research should take under greater consideration. Thus, mobilization for the use of private standards of regulation has an inherent performative character, which distinguishes it from classic concepts of mobilization within political science on the influencing of political decision-makers and decision-making processes.

Yet this double peer production of publicly accessible content and rules regulating access to a knowledge commons cannot flourish independently from political conditions. The founding of Pirate Parties in various countries and their electoral successes at the EU level as well as in various member states may be interpreted as an indication of the limitations of such private regulation by means of alternative licensing standards. Apparently these alone are not fully sufficient in order to abolish the incongruence experienced by many actors, between non-exploitation-oriented usage practices, or more specifically, between the production of knowledge and culture, on the one side, and copyright regulation, on the other.

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