Digital Network Repertoires and the Contentious Politics of Digital Copyright in France and the European Union

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Abstract

In the past decade, parliaments in industrialized countries have been pressured to adopt more restrictive legislation to prevent unauthorized file sharing and enforce higher standards of digital copyright enforcement over entertainment media and computer software. A complex process of supranational and national lawmaking has resulted in several legislatures adopting such measures, with wide variations in content and implementation.

These policy developments offer an interesting research puzzle, due to their high political salience and to the amount of controversy they have generated. Specifically, the introduction of harsher intellectual property regulations has resulted in intense online and offline collective action by skilled activists who have contributed to altering the digital copyright policy field over the years.

In France, the DADVSI and HADOPI laws on digital copyright infringement have been actively contested by grassroots movements all along their chaotic route through Parliament. Similarly, at the European level, the Telecoms Package Reform has given rise to an intense protest effort, carried by an ad hoc coalition of European activists. In both cases, online mobilization was an essential element of political contention against these legislative initiatives.

In both cases, our analysis shows how online mobilization and contention can substantially affect policy-making by disrupting the course of parliamentary lawmaking at both the national and European levels. We provide an analytical framework to study these processes, as well as a detailed analysis of the frames and digital network repertoires involved in the two cases under scrutiny, with reference to the nascent research agenda formed by the politics of intellectual property.

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1 Introduction

In the past decade, parliaments in industrialized countries have been pressured to adopt more restrictive legislation to prevent unauthorized file sharing and enforce higher standards of intellectual property rights over digital content such as entertainment media and computer software. A complex process of supranational and national lawmaking has resulted in several legislatures adopting such measures, with wide variations in content and implementation (Yu, 2003, 2010a).

These policy developments in intellectual property lawmaking offer an interesting research puzzle, due to their high political salience and to the amount of controversy they have generated. Specifically, the introduction of harsher intellectual property regulations has resulted in intense online collective action by movements endowed with a high level of knowledge and skills in the use of information and communication technologies. The effective success of these movements has been variable through space and time.

This paper draws on two original case studies, researched through interview data and online material. At the European level, the reform of the 'Telecom Package' completed in November 2009 (a set of five directives regulating the European telecommunications market) gave rise to an intense Internet-based lobbying effort, carried by an ad hoc coalition of European activists. Similarly, in France, the DADVSI and HADOPI laws on digital copyright and unauthorised online file-sharing have been actively contested by protest groups during their chaotic route through Parliament. In both cases, online mobilisation was an essential element of political contention for opponents to the legislative projects.

The "politics of intellectual property" have recently attracted a growing array of scholarship (Haunss and Shadlen, 2009). In line with that literature, we show that the Internet-based activism carried by contenders of current intellectual property reforms can substantially affect policy-making by disrupting the course of parliamentary lawmaking at both the national and European levels. We examine the values and motivations of intellectual property rights activists in France and at the European level in order to understand the practices that characterise Internet-based activism in the domain of intellectual property law contention. In that respect, we argue that a major influence in activist groups comes from the belief set associated with free and open source software principles, which reward transparency, free distribution, open participation and access to knowledge.

2 Intellectual property rights activism in Europe

Since the adoption of the World Trade Organization TRIPS agreement in 1994, intellectual property (IP) has gradually emerged as a deeply contentious issue. Resource-rich actors advocating for extended scopes and harsher enforcement of IP by promoting innovation and free trade are in constant opposition to contending groups who opposed the dominant claim on several aspects, such as the defense of essential access to medicines by several

nongovernmental organizations and governments (Sell, 2003). In 1996, an identical strategy was deployed during the adoption of the World Intellectual Property Organization WCT and WPPT treatises, which extended this global script of legitimation to the protection of authors' and related rights by claiming that "proprietary incentives are a critical requirement for knowledge creation", again attracting criticism and widespread protest against the utilitarian, rent-seeking nature of such agreements (Okediji, 2009, 2380). To the free trade frame upheld by the dominant actors, challengers started nonetheless to promote fair use as a counter frame (Sell, 2003). The scene was set, then, for the global contention of intellectual property rights and the "new enclosures" they imposed to national economies on a worldwide scale.[1]

This "rhetorical repertoire" (Halliday et al., 2010) of intellectual property protection extends beyond the scope of international organizations and has affected the norm production of regional and national legislatures (Dobusch and Quack, 2010). In Europe, contention directed at intellectual property rights effectively emerged in 1998 when a coalition of free software supporters resisted the introduction of software patents into European law, finally making their case in July 2005 (Haunss and Kohlmorgen, 2009, 2010, Karanović, 2009). At that stage, discussions and collective action formed through specialized forums and mailing-lists, drawing comparisons between developments in the United States and the future state of free software in Europe. This early incident is also one of the first protests specifically addressed at European lawmaking; most importantly, it initiated a large group of free software supporters to the potential risks of intellectual property legislation, generated widespread mobilization among its user and developer bases, which publicized their actions and positions online (Karanović, 2009, Breindl and Briatte, 2009).

In an attempt to comply with international norms, the European Union passed its own Copyright Directive (known as the EUCD or INFOSOC Directive) in 2001, which attracted widespread legal criticism and was also denounced for the unprecedented, aggressive lobbying initiatives surrounding its adoption (Hugenholtz et al., 2009). The Directive, while cautious not to impede on market competition within the European 'information society' (Littoz-Monnet, 2006, 448), aimed at enforcing anticircumvention, making it compulsory for all Member States to sanction the bypassing of the technical protection measures found on audio and video media under the label of 'Digital Rights Management' (DRM; see Yu, 2006). The transposition of the Directive has since then evolved into a political battleground in several European countries, such as Germany (Günnewig, 2003) and France (Breindl and Briatte, 2009, 13-15). These past struggles were instrumental in connecting concerned individuals around the common issue of intellectual property law, which became a regular topic for discussion on mailing-lists and forums. Both the Software Patents and Copyright Directive campaigns are remembered today as successful uprisings, where David tried to beat Goliath at his own game (and won, in the case of software patents)[2]. Key campaigners

[1] See Haunss and Shadlen (2009), May (2010), Yu (2010b). A summary of relevant intellectual property legislation is provided in Appendix A.

[2] The rejection of the CII directive by the European Parliament in July 2005 was a historical decision for the European Parliament, which rejected a directive for the first time, as well as for the grassroots effort of dedicated software supporters, which successfully countered a massive but awkward industry-lead lobbying effort. However, the ultimate goal of activists was to render illegal software patents at a European level, which

in the battle against software patents portray themselves today as "veteran campaigners", as one interviewee put it, who have lived long enough to see both battles unfold; through these collective events, campaigners acquired not only expertise in intellectual property advocacy, but also "shared beliefs, memories, models, and precedents of previous episodes of popular contention" that "contributed to the shaping of episodes to come" (Kriesi, 2004, 68).

Over the years, the legislative process in several European countries has gradually escalated from anticircumvention to a more general attempt at rolling back "piracy"—a common shorthand for unauthorised file sharing through online websites and networks (Yu, 2003). Since the early 2000s, the widespread availability of broadband Internet access and the development of robust peer-to-peer transmission protocols have made digital copyright infringement trivially simple, gradually giving birth to 'Internet gift economies' that frequently ignore copyright restrictions on digital entertainment goods such as film, music, software and books (Currah, 2007). Due to its low copying and sharing cost as well as its high quality of output, digital media has dramatically raised the stakes of copyright infringement for the industrial producers of entertainment goods, such as film studios and record labels, by reinventing the issue of (mostly profitless) counterfeit on a larger and uncontrollable worldwide scale. Noticing that their "firmly established business models failed to capture rent through the full range of exploitation made possible by digital technologies" (Okediji, 2009, 2380), these industries have engaged into large-scale litigation at all points of the file-sharing process, from individual end-users to file-sharing service providers. In parallel to that expensive and tiresome strategy, representatives from the entertainment industry have also invested considerable resources in aggressivly lobbying governments to legislate in the favour of rights-holders, by granting them the highest possible standards of digital copyright enforcement.

In that context, the contemporary politics of copyright law confront large coalitions of 'copyright maximalists' to a potentially larger community of Internet users, some of whom can claim past experience in countering attempts to expand the scope and enforcement of digital copyright. The ongoing negotiations over the Anti-Counterfeiting Trade Agreement (ACTA) reflect that new balance of power (Yu, 2010b), also observable throughout the adoption of the DADVSI and HADOPI laws, which France passed in 2006 and 2009, and the Telecom Package Reform, adopted at the European level in 2008. This paper focuses on our respective studies of these reforms, which had very different outcomes, thereby reflecting the current state of copyright politics altogether. Indeed, in recent initiatives explicitly aimed at recovering the perceived revenue loss from digital copyright infringement, the failed litigation and anticircumvention strategies of the past have been superseded by the "graduated response," a 'notice-and-takedown' procedure (similar to other 'three-strikes' legal procedures) that suspends or terminates the Internet access or services of suspected copyright infringers (Yu, 2010a).

would have resulted in national transpositions all over the EU and resolved many of the concerns the activists had in the first place. As such, the rejection of the CII directive should be read as a compromise between two opposing actors, even though it is remembered as a very successful mobilisation by activists.

In the last two years, "graduated response" procedures have been adopted in Europe by Ireland, the United Kingdom (through the Digital Economy Bill) and France (through the HADOPI law), and are currently under consideration in several other countries. However, identical schemes have been rejected by Germany, Spain, and Sweden, as well as by Hong Kong and New Zealand in March 2009 (although New Zealand might soon reintroduce it).[3]

Whereas the European Commission itself appeared to be split on the issue, the European Parliament firmly opposed the procedure while voting on the Telecom Package Reform in May 2009, echoing countries like Germany that had voiced concerns about a graduated response scheme being implemented at the European and/or international levels [4]. Accordingly, the behaviour of the entertainment industry has varied over time and space: for instance, while the American music industry announced in 2008 that it was dropping its extensive lawsuit actions, its British counterpart has threatened to pursue that same agressive strategy starting in 2010, following the adoption of the Digital Economy Act.[5].

The global challenge of unauthorised file-sharing was handled in very different ways by European legislatures, as reflected by current variations in national legal outcomes. An even more surprising observation comes from the high political salience and very controversial nature of intellectual property lawmaking in these policy venues in the past decade. This paper explores this research puzzle by focusing on the groups who engaged in protest over digital copyright reforms, by looking at the extent of their influence on the policy-making process, and by investigating the tools and strategies that they deployed to generate opposition to governmental and industrial projects of digital copyright expansion and strengthened enforcement. To that end, this paper draws on recent scholarship in the intellectual rights policy field (Haunss and Shadlen, 2009) to suggest a policy perspective that differs from legal or philosophical frameworks by focusing on the core elements of power at play in intellectual property conflicts.

3 Analytical framework

Our analytical framework builds upon the concept of *political opportunities* of the copyright policy field. While initially focused on structural factors, such as partisan and interest group cleavage structures (Kriesi, 2004, 70), the core set of factors that define political opportunities has been gradually amended to reflect a more dynamic view of political processes like collective action and policy-making. Specifically, the deployment of strategic frames by protest groups, in order to counter the hegemonic discourses that structure "policy monop-

[3] *Torrentfreak*, "Kiwis Scrap Controversial '3 Strikes' Anti-Piracy Law" (23 March 2009), "Digital Economy Bill Passes, File-Sharing Ends Soon" (8 April 2010), "High Court Gives Go Ahead To 3 Strikes in Ireland" (16 April 2010), see alsoPatry (2009), cited in Yu (2010a).

[4] *Der Spiegel*, "Wrangling over Copyright Protection Treaty – Germany Speaks Out against Global Internet Ban for Pirates" (3 March 2010); *The New York Times*, "French Anti-Piracy Proposal Undermines E.U. Telecommunications Overhaul" (7 May 2009).

[5] *Wall Street Journal*, "Music Industry to Abandon Mass Suits" (19 December 2008); *Torrentfreak*, "Music Industry Warns That It May Sue UK File-Sharers", 17 April 2010.

olies"[6], can sometimes succeed in situations characterised by "volatile *discursive opportunities*–opportunities for successful movement framing that derive from relatively short-lived or relatively new ideational elements" (McCammon et al., 2007, 732 (our emphasis)).

We argue hereinafter that these discursive opportunities are crucial to the understanding of contemporary intellectual property contention, and specifically digital copyright reform, where such opportunities to counter the master frame of copyright protection have emerged in the past decade.

Within that framework, our aim is to bring attention to essential determinants of intellectual property policy-making, which broadly fit the main analytical categories of neoinstitutionalist theoryHence, our inquiry pursues a double objective. First,to bring attention to the institutional determinants of copyright reform (section 3.1). Second, to focus on the social skills and discursive strategies of counter-hegemonic actors (section 3.2).

3.1 Institutional determinants of copyright reform

The *institutional determinants* of the policy process apply with full force to the case of intellectual property, which relies on institutions whose origins can be traced back to the late 19th century. Fundamentally, legal arrangements act as governing institutions for states and markets as well as for individuals and organized collectives (Morgan and Quack, 2010). In that regard, the social actors involved in the political economy of intellectual property rights are expected to try to modify the legal and procedural 'rules of the game' that preside over intellectual property, in order to protect their rent within the overall state-administered "governance regime" of intellectual property rights. Under that assumption, we therefore expand Campbell and Lindberg (1990)'s framework to the ratification of *intellectual* property rights by states, which might assist some economic agents at the detriment of others by shifting the costs and benefits of intellectual property protection between them.

As an example of an institutional legacy at work, Bakardjieva Engelbrekt (2007, 91) mentions, for instance, that differences in corporatism can explain why "the reliance on independent administrative authorities with high authoritative status and with mediating, decision-making and rule- making powers" is often perceived as a viable legislative option in France but rarely so in Sweden. Other aspects of French intellectual property, such as the legal structure and inner workings of French copyright collectives, also express a great deal of path dependence (Paris, 2002), which in turn constrains the scope of institutional change imposable by law. Similarly, the institutional and procedural settings of parliaments, ministries and lead executives generate different opportunities and constraints for mobilized interests to effectively affect the -, policy- and law-making processes: parliamentary control mechanisms, for instance, can effectively shape the timing of debates and result in higher or lower amounts of media coverage and partisan conflict (de Wilde, 2009).

[6] See Baumgartner and Jones (1993), cited in Kriesi (2004) and Mochnacki (2009). A policy monopoly exists where "a powerful single idea or logic helps to structure unequal access to policy-making institutions and resources that benefits one policy coalition over others" (Mochnacki, 2009, 7).

The *interest structure* of public and private actors involved in intellectual property conflict plays a crucial role in the formation of collective action networks, and in their respective influence over the creation and reform of intellectual property law. Specifically, Haunss and Kohlmorgen (2010, 258) link the existence of successful collective action networks of intellectual property contention to the development of sound mobilization strategies directed at all potential protesters, which then develop into quasi-grassroots mobilization, in contrast to the professional lobbying strategies favoured by the entertainment industries in the defense of their already well-entrenched interests. Additionally, the consistent concentration of economic resources in the hands of a small number of industry incumbents and subsidiaries is likely to have a direct effect on the amount of leverage that their representatives enjoy with decision-makers.[7] That asymmetry of resources might have, in turn, provided activists with a forceful incentive to build similarly large coalitions and alliances of interests, and to develop the appropriate strategies and identities that will allow them to question the political status quo over copyright reform.

3.2 Social skills and discursive strategies

We then consider our inquiry as oriented towards the understanding of the *social skills* deployed by sociopolitical actors in the field of intellectual property contention. We derive that perspective from Mochnacki (2009)'s study of Canadian law professor and blogger Michael Geist, who successfully mobilized over 20,000 Facebook users against a copyright refrom package in December 2007. Analyzing Geist as an example of a skilled strategic entrepreneur in the institutional field of copyright policy-making, Mochnacki (2009) shows that his oppositional tactics succesfully destabilised the dominant frame of "copyright as protection of rights for creators," by underlining the (previously unproblematic) nature of the industry–government nexus, by decomposing the "privileged Canadian creator/artist status identity" Mochnacki (2009, 26), and by offering a coherent and resilient alternative interpretation of copyright reform that shifted attention from "imbalances in policy outcomes to an imbalance of interest in policy making" Mochnacki (2009, 31). Identically, we expect the development of skills directed at frame manipulation to have a direct influence on the success of opponents to digital copyright reform in our case studies.

The *ideational elements* of policy-makingoperationalized as discursive devices, provide actors with powerful rhetorical devices and argumentative repertoires to advance their interests. Every study of intellectual property contention has underlined the *framing strategies* (Haunss and Kohlmorgen, 2009, Dobusch and Quack, 2010) – or, interchangeably, the production of *policy images*[8] – of both public and private actors. Specifically, as civil society activists face the double challenge of bridging a wide array of (sometimes antagonic) interests and countering the hegemonic discourse of "copyright as creation" developed at all levels of government, their rhetorical skills and strategies are essential to their efforts at

[7] In France, for instance, some trade associations and collecting societies sit on official consultative bodies, are systematically auditioned before parliamentary committees, and have privileged access to parliamentary offices. As we show below, the Europea Parliament is a markedly different form of institutional venue.

[8] See Baumgartner and Jones (1993), cited in Littoz-Monnet (2006, 439-440).

counterframing and legitimating their standpoint when addressing decision-makers. Furthermore, in order to overcome the logic of collective action and counterbalance their poor initial endowment in economic resources, activists often rely on what we call *internet-based repertoires of contention*. Similarly to strategic frames, digital resources such as static, dynamic and collaborative web pages, newsletters and mailing-lists, as well as online petitions and data mining tools, are also identity vectors for protest groups that allow individuals and collectives to coalesce at low costs over shared concerns, and which encourage mobilization by "creating appealing and increasingly convergent forms of online citizen action, fostering distributed trust across horizontally linked citizen groups, fusing subcultural and political discourses, and creating and building upon sedimentary online networks" (Chadwick, 2007, 287). These internet-based repertoires of contention are informed by belief sets associated with digital copyright that challenge the dominant framing of intellectual property rights.

3.3 Belief sets associated to digital copyright

Digital copyright law embodies the efforts of states to redefine some of the fundamental principles under which markets operate in the light of fast technological developments, especially in the case of digital market goods. This iterative and time-consuming process revolves on the arcane knowledge of the relevant legal *and* technological frameworks, which de facto excludes the vast majority of public as well as private actors from gaining a firm understanding of the issue. As a consequence, only a handful of participants to the intellectual property lawmaking process can confidently declare themselves knowledgeable of its highly technical foundations, whereas other members of the policy community are left to rely on very incomplete information to form their judgement. Under such conditions of uncertainty, several cognitive biases can explain why the master frame of digital copyright reform, which promotes copyright as "creation" and addresses copyright infringement as "theft", has been successful among decision-makers: its very simplicity, combined to its widespread acceptability and plausible nature with regard to recent revenue loss in the music industry, made it an apt candidate for becoming the dominant belief among decision-makers.

This master frame, derived from the global script of international organizations such as WIPO and the WTO (see Section 2), constitutes a moral imperative that is pervasive and hierarchically dominant over other objectives within the default belief set of a majority of political elites. Indeed, among various metaphors equating digital copyright infringement to material property theft (as in the case of circumvention as 'breaking and entering' cited by Yu (2006, 36)), industry representatives and decision-makers alike claim a causal link between unauthorised file-sharing and diminished gains for the so-called "creative industries" and for artists.[9] On top of that causal story, further claims by industry-sponsored surveys have enforced the belief that unauthorised file-sharing is liable for job losses in the

[9]The current state of the economics literature is much less assertive about the causal nature of the correlation between unauthorised file-sharing and losses in entertainment revenue; instead, it considers that "the empirical evidence on sales displacement is mixed," and that "the same holds true for the question how artists would respond to weaker monetary incentives." (Oberholzer-Gee and Strumpf, 2009, 24-25).

entertainment sector, therefore linking copyright reform to national employment as well as artistic creation.

Operating under these premises, which Dobusch and Schüßler (2010) call "conservationist" copyright claims, decision-makers at all levels of government have frequently endorsed the claims of "creative industries", often supported by salient experts, such as economists and copyright law experts, in countries like France and Germany where artists enjoy the highest copyright privileges (Littoz-Monnet, 2006, Dobusch and Schüßler, 2010).[10] Furthermore, the entertainment sector has often enrolled artists with a high media profile into their lobbying campaigns, sometimes with countermobilization effects among their opponents.

Since the mid-1990s, however, opponents to this master frame have also argued that "the complexity of creative endeavor in an online environment" (Okediji, 2009, 2392), as well as the rapidly shifting environment of information technologies and cultural practices associated to online communication (Currah, 2007), contradict several components of the dominant belief set about copyright protection. We therefore argue that digital environments have provided contenders of copyright reform with a robust discursive opportunity structure, reinforced by the fact that "key legal institutions and their actors," which are instrumental to the definition and stability of hegemonic discourses (McCammon et al., 2007, 733), have eroded the master frame of copyright protection by arguing against provisions such as anticircumvention or graduated response procedures.

This gradual shift in perspectives, initiated by an epistemic community of prominent American law academics (such as Lawrence Lessig, Pamela Samuelson and Yochai Benkler) and by transnational advocacy groups such as the Electronic Frontier Foundation, has gradually strengthened and connected with the ideals of other movements, most notably the free software movement,[11] and has developed into several transnational movements supporting free and open access to knowledge resources (Bollier, 2008, Dobusch and Quack, 2008, Kapczynski, 2008). As a consequence to the structuration of that new belief set, several contending frames to the hegemonic copyright discourse have emerged in the past decade, resulting in frequent protest over the direction taken by all levels of government over the issue of digital copyright reform, thereby threatening the policy monopoly of the entertainment sector over that issue (Patry, 2009).

Discourses about copyright in a digital age are intrinsically linked to what Castells has coined "the culture of the Internet (...) made up of a technocratic belief in the progress of humans through technology, enacted by communities of hackers thriving on free and open technological creativity, embedded in virtual networks aimed at reinventing society, and ma-

[10] See also Paris (2002) on the history of copyright protection in France, which amounts to the defense of a 'Beaumarchais doctrin' of maximal copyright protection for authors and rights-holders. French officials have also taken a very active role in the promotion and defense of "cultural diversity" in European and international policy venues such as the GATT/WTO in 1993 and UNESCO in 2005.

[11] It is unsurprising that free software supporters would constitute early members of the transnational trend described here, as the status identity of that group (a blend of ICT skills based on shared expertise and collaborative work with a nonprofit and transnational advocacy orientation) is largely consonant with the issues and norms at stake here; see Demazière and Horn (2009).

terialized by money-driven entrepreneurs into the workings of the new economy" (Castells, 2001, 61). The frames put forward by copyright activists generally refer to this perception of the Internet as a public good, the promotion of openness, sharing and creativity, the belief in the advent of a new, information based economy and claims to respect basic principles of democratic governance that stem from the above mentioned communities (Breindl and Houghton, 2010).

Overall, these recent dynamics deployed towards the interpretation of digital copyright have altered the copyright policy field, with variable success in distinct policy venues. Our framework aims at capturing that diversity of outcomes, as well as offering an approach of digital copyright contention through its institutional determinants.

By investigating each of these dimensions in our case studies, we hope to show not only the relevance of a political approach to the intellectual property policy process, but also the heuristic value of an open explanatory framework that covers a wide array of political determinants, therefore going beyond formal approaches that focus on modelling parliamentarian and interest group behaviour through a restricted number of variables and payoffs.

4 Methods

4.1 Case selection

The following sections cover the DADVSI and HADOPI laws in France (researched by FB), and the Telecoms Package Reform at the EU level (researched by YB). A summary of the legislations relevant to both cases appear in Apendix A. Each case was researched separately, and then compared by the authors through the common framework outlined in Section 3, expanding earlier work by both authors on the French DADVSI law and the European CII Directive (Breindl and Briatte, 2009).

4.1.1 The DADVSI and HADOPI laws

The DADVSI and HADOPI laws currently form the backbone of French digital copyright law. While the first of these bills was initially discussed at the executive level in November 2003, it was submitted to Parliament only in December 2005, shortly after the government had received a warning from the European Commission for its lack of transposition of the INFOSOC Directive. At that time, the anticircumvention provision advocated by the bill had already attracted widespread criticism, notably from the EUCD.info collective, whose website figured as a quasi-unique source of information on the DADVSI bill in absence of virtually any coverage by the mainstream media.

The EUCD.info collective was created by free software supporters affiliated with the

French branch of the Free Software Foundation and with another national free software advocacy group, APRIL, which had previously mobilized against software patents but overlooked the INFOSOC Directive. From 2002 onwards, members from EUCD.info and APRIL worked on building an authoritative online source of public information about the contents of the bill, and hired lawyers to help them design amendment proposals. Concomitantly, they elaborated an argumentative strategy that connected anticircumvention to all forms of political concerns, ranging from threats on the independence of national security systems to interoperability and consumer rights, civil liberties and individual rights to privacy, and the distorsion of economic competition within the software industry. That strategy decreased the technicality of the bill through telling metaphors, arguing for instance that DRM were analogs to "a pair of glasses that can read only one sort of books" and that anticircumvention would "throw children into jail". It also bridged the provisions of the DADVSI bill, initially perceived as a mere technical act of legal conformance to international agreements, to much more perceptible social concerns that resonated with virtually all political tendencies represented in Parliament.

After a first round of DADVSI parliamentary debates, free software supporters and consumer rights groups had successfully convinced a small group of MPs to introduce what became Amendments 153 and 154 to the bill, which protected file-sharing under a private copy provision paid for by a 'fair remuneration' fee, known as the "global license" copyright levyBoth amendments, which rendered the bill practically toothless, were adopted through a surprise vote by a handful of members of the French national assembly (MPs) in late December 2005, which an MP retrospectivally described as "the biggest legislative bug in twenty years". In June 2006, at the issue of a second round of parliamentary debates that attracted a fair volume of national and international media attention as well as record levels of industrial lobbying, the French government managed to weigh in on its parliamentary majority to have the bill adopted without these amendments, but with important provisions in favour of interoperability, subsequently denounced as "state-sponsored piracy" by firms like Apple that relied on anticircumvention to protect their digital goods. At that stage, the mark of free software activists on the DADVSI bill showed that the mobilization of EUCD.info and a small consetallation of other groups had successfully derailed parliamentary debates and impeded on the initial plans of the entertainment industry; their online petition against the DADVSI bill had also attracted over 173,000 signatories, becoming the second largest online petition signed in France at the time and attracting a fair share of media attention.

Concurrently, however, the bill also complied with the interests of the entrainment sector by criminalizing the distribution of file-sharing software and by inflicting small financial penalties to digital copyright infringers. The awkward balance of interests reflected by the DADVSI after it was voted by both parts of Parliament in June 2006 was yet to crumble entirely a month later, when the French Constitutional Council delivered its review of the bill at the demand of the paliamentary opposition. In its decision, the Council struck down both the interoperability and penalty schemes of the bill. By ruling circumvention analogous to counterfeit and therefore amenable to criminal charges, the Council eventually brought to collapse the already wobbly legal edifice built throughout long parliamentary debates and

intense amendment rounds. At the outset of that sinuous legislative episode, the DADVSI bill that became official law in August 2006 was a suboptimal and implausible legal settlement that left all interests unsatisfied, leaving the status quo virtually unaffected by its unclear and inoperable provisions on DRM and unauthorised file-sharing. The full episode, however, served as a public springboard for free software advoacy groups like APRIL, who now enjoyed a much higher profile with decision-makers than they did prior to the DADVSI episode, and whose membership figures increased dramatically.

In 2006, the failure of the French right-wing majority to transpose the INFOSOC Directive did not go unnoticed by its party leader, Nicolas Sarkozy. Two years and a presidential election later, Sarkozy quickly embraced the prospect of a new legislative attempt at tackling unauthorised file-sharing, this time contemplating a "graduated response" procedure enforced by an arms' length body, the "High Authority for the Dissemination of Creation and the Protection of Rights on the Internet" ("HADOPI"), as the new weapon of choice against digital copyright infringement. The bill quickly attracted media attention and caused widespread concerns, both at the national level (over concerns about privacy rights and due justice) and at the European level (over concerns about network neutrality). By that time, the activists behind the EUCD.info initiative had formed the *Quadrature du Net* (QDN hereinafter), which then described itself on its website as "a citizen group" concerned by laws that threatened "civil liberties as well as economic and social development in the digital age." On the whole, their strategy did not radically differ from previous years of activity: key information about the multiple flaws and heavily lobbied nature of the HADOPI bill were carefully assembled and quickly distributed online as a stream of press releases complemented by analysis and regular calls to action, in much similar fashion to what had been previously achieved over the DADVSI bill, only in a more professional tone that guaranteed them higher media coverage, and through more advanced collaborative web technologies that further encouraged and enhanced participation by online supporters.

Repeating itself in almost farcical manner, the history of digital copyright reform rapidly became a legislative minefield for the French government, as the HADOPI bill developed into even more chaotic events during its parliamentary examination. In April 2009, disgruntled MPs on both sides of the National Assembly took aback observers and stakeholders alike by rejecting the bill previously agreed on by both chambers, an almost unique event under the French Fifth Republic that forced the government and its parliamentary majority to engage into a new reading of the bill, marked by yet another cascade of hundreds of amendments shortly followed by a final vote in May 2009. The bill itself then spiralled into legislative hell when the Constitutional Council, once again asked by the parliamentary opposition to review the provisions of what came to be known as "HADOPI 1," struck down as unconstitutional the "graduated response" procedure on the grounds that it shifted the burden of proof from the prosecution to suspected copyright infringers, thereby violating the fundamental tenets of presumption of innocence. The Council decision effectively destroyed the fast-track process with maximum deterrent power that the executive and the entertainment sector had wished for, through which rightsholders would have reported cases of illegal file-sharing to a state agency that would then have directly handled Internet access suspension for infringers. Instead, a separate "HADOPI 2" bill was introduced and voted

in September 2009, still with the intention to implement an amended "graduated response" mechanism that survived constitutional review later that year.

The final legal arrangement settled between the French executive, legislature and constitutional courts is a much more serpentine (and expectedly slower) process that involves mandated agents from rightsholders groups reporting to a paralegal commission, the *Commission de Protection des Droits*, an internal element of the HADOPI agency to which it reports while enjoying formal independence from it. Only at that stage can the commission refer cases to judicial courts, which are then asked to rule infringers out of their Internet access. As of today, this process is still plagued with incessant implementation failures, as the HADOPI agency is short of a deal with Internet service providers over the pricing of copyright infringers identification.[12] On top of that, a complaint has been filed with the *Conseil d'État* to have a key aspect of the "graduated response" ruled illegal.[13] Therefore, while it is too early to tell if that last measure will fail like its predecessors, it is safe to conclude that the DADVSI and HADOPI laws have failed to address unauthorised file-sharing in the past decade and will persist in failing to do so in the short term, since the status quo over digital copyright infringement remains pratically unaffected: circumvention and unauthorised file-sharing, while illegal, are hardly threatened by any effective punishment as of today. As a right-wing dissident MP has observed: "A common characteristic to all these bills… is ineffiency. A problem is detected, we get to vote a law with numerous MPs on all sides underlining its stupidity, and we move on to the next bill." (Pasquini, 2009, 203)

This cursory narrative of the DADVSI and HADOPI laws is meant to set the emphasis on the role played by public and private actors in the unusually long and anarchic legislative route of the bills. Throughout that long stream of legislative mishaps, dramas and reversals, the entertainment sector failed to secure its preferred options in its fight against unauthorised file-sharing, while the government managed to alienate a sizeable fraction of its own parliamentary majority and generate months of negative media publicity that might later translate into electoral costs. [14] The legal endpoint of the DADVSI and HADOPI initiatives, which also emphasise the crucial oppositional power of constitutional review in the French lawmaking process, lies in a "graduated response" procedure that is likely to be defective by designin its definite form.[15] Whereas the coalition of industrial representatives was clearly successful in promoting its solutions over the period covered by the DADVSI and HADOPI laws, it faced critical issues in their translation into French law. In that respect, the small but proactive activist groups that engaged into the legislative sabotage of

[12] *PC INpact*, "Hadopi : SFR serait prêt à identifier gratuitement ses abonnes" (12 August 2010).

[13] *Le Monde*, "Un recours en refere menace un decret-clef de l'Hadopi" (12 August 2010).

[14] The immediate costs of the DADVSI and HADOPI legislative incidents have been borne by two of the three ministers of Culture who supervised the bills, as they were removed from office as part of larger ministerial reshufflings and have now left the front scene of politics.

[15] "Defective by Design" is actually the name of an anti-DRM campaign led by the Free Software Foundation. Ironically enough, the most significant legal output of the DADVSI and HADOPI legislative episodes may lie in a short extract the Constitutional Council decision of June 2009, which describes "freedom of access to [online communication services]" as a component of freedom of expression and communication, which is guaranteed as an essential right by Article 11 of the Declaration of Rights of Man and Citizens of 1789. While the DADVSI and HADOPI laws have produced defective instruments against unauthorised file-sharing, they surely have produced an excellent constitutional protection of Internet access and communication.

the bills have been remarkably successful in derailing parliamentary debates and affecting the vote patterns of parliamentarians, on top of which they also managed to bring the international ACTA negotiations and the European Telecom Package Reform into the news cycle, bringing further suspicion over state-led attempts to enforce "graduated response" procedures.

4.1.2 The European Telecoms Package Reform

Activist started paying attention to the Telecoms Package Reform in April 2008, following the adoption by the European Parliament of a non-legislative resolution on "Cultural industries in Europe", generally referred to as the 'Bono Report' after the name of Guy Bono, the French Socialist MEP responsible for the drafting of the resolution by the parliamentary committee on culture and education. The resolution was intrinsically linked to the French HADOPI debates and aimed at developing a policy strategy for European creative industries.

Although such non-binding resolutions have no mandatory effects, the Bono Report was the first position by the European Parliament on unauthorised file-sharing. It stated that "criminalising consumers who are not seeking to make a profit is not the right solution to combat digital piracy" [16]. As such, it clearly opposed the HADOPI bill that was working its way through the French Parliament, a move from which QDN activists could clearly benefit in their national opposition campaign to the bill. It also provided them with a solid political resource to build on at later stages of the Telecoms Package Reform.

On November 13, 2007, the European Commission proposed a reform of the five telecommunications directives that composed the EU Telecommunications Rules of 2002 (listed in Appendix A). The reform package included a wide variety of issues such as competitiveness, the establishment of a European regulatory authority, and the management of radio and television spectrum among others. Intellectual property rights were not supposed to be part of the package at the outset of the reform.

However, on May 13, 2008, QDN activists published a press release titled "Privacy: Film industry pirates european law" in which they argued that amendments to the Privacy and Electronic Communication Directive (generally referred to as the 'E-Privacy' directive) were about to enforce the graduated response procedure at the European level. This was the first of a long string of 31 press releases published by QDN activists during the Telecoms Package Reform, until its final adoption by the European Parliament on November 24, 2009.

Over the two years of campaigning, QDN, funded by an Open Society Institute grant, sought to conclude alliances, eventually forming an ad hoc coalition with various European digital rights organisations, associations, groups and activists concerned by the issues at stake and regular contacts with the US based EFF and consumer organisations throughout the TP campaign. On the net neutrality issue, contacts were also made with like-minded

[16] *Cultural industries in Europe*, non-legal EP Resolution INI/2007/2153 (10 April 2008).

industry stakeholders. Because of the parallels between the French and EU processes in terms of graduated response, QDN naturally took the lead of civil society opposition to controversial aspects of the package, collaborating with allies inside and outside of the European institutions. QDN's press releases, analyses and calls for action were rapidly translated and publicized all over the European internet thanks to this network of activists.

Among the various issues debated in the Telecom Package Reform, QDN activists focused their attention on the safeguard of network neutrality, and on the fight against the graduated response procedure. Network neutrality, i.e. the preservation of indiscriminate routing of content over the Internet, was threatened by several aspects of the Telecom Package Reform, which considered Internet access blocking and filtering for traffic management purposes. Although QDN activists were very active on the network neutrality debate, the most prominent element of their campaign, which attracted relatively widespread media coverage, had to do with their fight against graduated response, which rapidly crystallised around Amendment 138 (initially Art. 8.4.g of the Framework directive). In its original version, the Amendment stated that "no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities." The Amendment was tabled by MEPs from various political groups and countries and was adopted by 88% of the European Parliament on first reading, which furthered the cause of QDN activists against the graduated response procedure still under consideration as part of the French HADOPI bill. Again adopted in a chaotic vote by MEPs on second reading in May 2009, the Amendment was, however, vehemently rejected by the Council of the European Union, the primary co-legislator to the European Parliament under the codecision procedure. Pressures by member states also opposed the adoption of Amendment 138, as shows French president Nicolas Sakozy's letter asking president of the European Commission Barroso to remove the amendment from the package on October 2008.[17] The Amendment was the only issue discussed by both bodies during the conciliation procedure, which delayed the adoption of the Telecom Package Reform by a further five months.

A compromise version of the Amendment was eventually adopted by the European Parliament in November 2009. Nicknamed the 'Internet freedom provision,' the compromise version replaced the requirement for a "prior ruling by the judicial authorities" by the requirement for a "prior fair and impartial procedure," and was moved from Article 8.4 on "instructions to regulatory authorities" to Article 1 on the "scope" of the reform package, which also included a declaration on network neutrality. Overall, the campaign organised by QDN activists around the Telecom Package Reform lasted eighteen months, during which they issued frequent press releases, shared their successive analyses of parliamentary amendments, and issued several calls encouraging European citizens to alert their MEPs against the dangers of the Telecom Package Reform.

[17] The letter appeared in French newspapers in October 2008.

4.2 Data collection

The main data for this project were collected between January 2008 and April 2010 and consist in over a thousand documents for each case (including the relevant legislation and legal documents, parliamentary debates, official reports, press releases, speeches, etc.), of which approximately two thirds of news reports from general and specialized media outlets, as well as blogs, radio shows, and selected video coverage.

Our documentary analysis draws on specialized French media sources, which almost all expressed a strong pro-activist, anti-legislation and anti-industry bias, but which also provided the best in-depth coverage of the conflict[18] Specialized media websites such as *Linuxfr*, *Numerama* (formerly *Ratiatum*) or *PC INpact* were openly hostile to the DADVSI and HADOPI bills and to industrial lobbying at the national and European levels; they actively supported activist groups by spreading their material and calling upon their readership to rally the cause, including through financial donations.[19]. News coverage was divided between traditional, mainstream media outlets adopting a more nuanced or pro-governmental position while online based media were openly supporting the activists. Television programs have not been analyzed for this paper, yet seem to reflect a less investigative and more pro-government position, especially in France where proximity between the ruling elite and the media have attracted frequent criticism.

Campaigning material and activist discussions were followed and retrieved from dedicated mailing-lists, thematic websites and various social media platforms, in order to understand how activists, through their own publications, "draw attention either to a particularly important event or to manage their self-image both internally to the members and to external audiences" (Martin, 2010, 292). Additional insights and data triangulation were obtained through semi-structured, in-depth interviews carried out with the activists involved in both processes, as well as with Members of Parliament (European MEPs and French MPs), parliamentary assistants and other key stakeholders. In the case of the Telecoms Package Reform, interviews were the primary source of data, with seven QDN activists interviewed (some several times), ten in-depth interviews with European allies working on the Telecoms Package and fourteen interviews carried out with MEPs, parliamentary assistants and political advisors inside the European Parliament (some met several times). The authors would like to thank the respondents who accepted to be interviewed shortly after, or during, the events covered in this paper, under conventional confidentiality and anonymity requirements.

At various points of the data collection process, we sketched basic quantitative indicators of media coverage and website centrality in order to estimate the profile of the legislative conflicts in the news cycle, and the respective influence of activist groups within the overall network of contenders. Although these indicators were constructed non-systematically for explorative purposes, they tend to confirm two insights: first, that the DADVSI episode received less attention from the mainstream media than its HADOPI and Telecom Pack-

[18] See Earl et al. (2004) on bias detection in news sources with reference to protest events.

[19] See, e.g., *Numerama*, "La Quadrature du Net a besoin de 70.000 euros" (22 January 2010).

age sequels; and second, that the constellation of activist groups involved in all reforms were clearly dominated by activists from the EUCD.info initiative from 2006 to mid-2008, and then from the QDN initiative from mid-2008 onwards. The two activists who have contributed most actively to both collectives are included in both our respondent sample.

5 Analysis

5.1 Derailing the DADVSI/HADOPI parliamentary debates

The DADVSI and HADOPI laws were first introduced as government-sponsored bills, which enjoy a very high adoption rate in the French bicameral parliament outside of dual executive periods. In both cases, the parliamentary ratification process of the bills had been carefully parametered as to minimize the amount of controversy around the content of the proposals. To explain why the DADVSI and HADOPI parliamentary debates were successfully derailed from their course, we analyse below the involvement of skilled activist groups into the lawmaking process and its effects on parliamentary behaviour.[20]

5.1.1 Institutional determinants

Three institutional factors were set with the intention to guarantee a swift vote in Parliament. First, copyright reform legislation is conventionally attributed to the parliamentary committee in charge of *cultural affairs*, which is expectedly very wary of accomodating the needs and demands of French artists and entertainment companies, such as the French-owned Universal Music Group. Significantly, the DADVSI bill was first drafted by a college of copyright lawyers and industry representatives, whereas the HADOPI bill drew on a report by another industry figure.[21] As several insiders observed during interviews and informal discussions, had the bills be examined by the parliamentary committee in charge of *economic* affairs, stakeholders from the telecommunications sector would have had a louder voice in the lawmaking process, and the respective threats posed by anticircumvention or the "graduated response" on the competitiveness of the free software industry and on the revenues of Internet service providers would have been much more prevalent in the parliamentary workflow.

Second, the length of debates had been reduced to their bare minimum on both bills by the government-invoked "emergency" procedure, which contract debates to one reading per parliamentary chamber. In 2005, when the DADVSI was introduced in Parliament a few days from the end-of-year recess, the procedure was justified by the government with reference to the warning France had received earlier that year from the European Commission

[20] This section revises and expands previous research by Briatte (2008), which greatly benefitted from comments by all contributors in Haunss and Shadlen (2009), but which the author failed to submit in publishable form at the time.

[21] *Ars Technica*, "The insanity of France's anti-file-sharing plan: L'État, c'est IFPI" (25 November 2007).

for failing to transpose the INFOSOC directive into its national legislation. In 2008, the same procedure was invoked, this time as a means to make space in the legislative agenda of both parliamentary chambers.

Third, both the DADVSI and HADOPI bills were directly sponsored by Nicolas Sarkozy, who could effectively coerce the right-wing majority into voting the bills. Sarkozy was leading the majority party at the time of the DADVSI vote, which gave him the potential power to sanction dissenting MPs by refusing them the party's support on the next legislative election, scheduled one year later. After his election as president in 2007, Sarkozy directly sponsored the HADOPI bill, mentioning it in several of his most promninent speeches, therefore raising the stakes for dissent among majority MPs.

5.1.2 Framing strategy

These institutional factors immediately fed into the strategy of activist groups, who carefully documented the collusion of industry and government reform proposals into a "balance of interests" (Mochnacki, 2009, 26) counterframe that underlined the problematic nature of that relationship with regard to democratic ideals. Similarly, the short debate times imposed on Parliament appeared in their argumentative material and in the EUCD.info online petition against the DADVSI bill in 2006, as to raise suspicion about the "confiscation of democratic debate" it created by shunting the examination of the bills by elected representatives. Finally, the pressure exerted on parliamentarians by the government and by industry lobbyists was added to the more general counterframe of "democratic deficit" that emerged from their presentation of the DADVSI and HADOPI legislative debates.

Next to that strategy, EUCD.info and QDN activists gave elaborate descriptions during interviews of their attempts at "frame bundling" (Haunss and Kohlmorgen, 2009), which drew substantially from their experience – described as argumentative "trial-and-error" by one respondent – of previous campaigns. Echoing the opposition to software patents as a threat to "innovation and transfer of knowledge, economic growth and stability, growth of national economies, and competitiveness of SMEs" (Haunss and Kohlmorgen, 2009, 124), the arguments featured in their campaigning material raised concerns about the consequences of the bills for economic competition and civil liberties, therefore denting the master frame of digital copyright reform by unravelling its technical language into broad societal concerns that connected to broader social issues with which MPs and the general public were much more familiar. Interestingly, that strategy was not consensual from the start among free software supporters, who preferred to focus on interoperability issues, but activists recalled that they deliberately opted for the larger cause of "saving copyright" instead of merely "saving free software" when they discussed the strategy behind the EUCD.info initiative. By doing so, they converted the intrinsic flaws of digital copyright reform into extrinsic flaws that carried negative externalities for society at large, hence further undermining the global script of "copyright as creation" by showing that "protecting the artists" and "encouraging creation" as advocated by the DADVSI and HADOPI bills was liable to civil rights, innovation and competitiveness.

5.1.3 Protest techniques and skills

These strategic frames were deployed both online, in order to reach as wide an audience as possible and bring "full transparency" to the contents of the bills, and offline, through individual meetings with MPs and, to a lesser extent, with other key stakeholders. The digital network repertoire directed at opposing the bills (which initially formed among free software supporters, in close resemblance to the oppositional networks to software patents; see Haunss and Kohlmorgen, 2010, Karanović, 2009, 254-255), was crucial to that endeavour, as the EUCD.info and QDN websites became critical nodes of information on the contents and legislative processing of the bills, on which other opponents (including fellow activists and online media outlets with larger audiences) could easily bandwagon.[22] Consequently to a small core of activists bearing the costs of mining the bills and then disclosing their results online for free,[23] the Internet rapidly filled up with publicly available material that could be used to voice concerns against the DADVSI and HADOPI bills, and eventually, the decentralised and formally non-hierarchical nature of the oppositional network that gradually emerged from this online environment helped to convert the micro-staffed EUCD.info and QDN initiatives into a much larger wave of grasroots protest.

Furthermore, the diffusion of EUCD.info and QDN material through online publications as well as through mailing-lists, newsletters and discussion boards did not simply provide these initiatives with an online informational oligopoly over the issue at stake: it also contributed to distribute their campaign effort, attracting passive and active support from outsiders at virtually no cost, notably in the form of additions to their online knowledge base about the bills and about parliamentarians. [24] These efforts at systematic political tracking were also enacted through a careful scrutiny of parliamentary debates, including the live coverage of important votes by several online communities, which generated several thousands of reactions (see, e.g., Pasquini, 2009, 136, reporting over 10,500 comments on just one of these events); in turn, the virtual constituency formed by these accountability initiatives, which were mentioned during parliamentary debates) increased the pressure on MPs to criticize the bills and defect from voting their support to them.

Last, the digital network repertoire deployed by the EUCD.info and QDN initiatives not only fostered short to long term involvement of individuals in the campaign, but also provided "the organizational flexibility required for fast 'repertoire switching' [between

[22] See, e.g., the "DADVSI for Dummies" guide published online by the *Ligue Odebi* in late 2005.

[23] This two-step process is itself highly evocative of the practices of free and open source software development. The analogy was reinforced by one of the core activists behind the EUCD.info and QDN initiatives comparing legal code to software code in an interview, echoing Lawrence Lessig's "code as law" metaphor (see Bollier, 2008, 78).

[24] Interestingly, the systematic aggregation of information about the public stance, voting behaviour and parliamentary attendance of French MPs over the DADVSI and HADOPI bills has fed into several spinoff projects that aim at making the French Parliament more accountable and transparent, in the spirit of the "open democracy" and "access to political knowledge" initiatives that exist in several Anglo-Saxon countries. These projects effectively contrasted with the much more covert lobbying strategy of the industry, which was often slapdash and sometimes blatantly coercive against MPs. This contrast led to the vast production of online satirical material aimed at deriding both governmental and industrial sources, undermining the coalition behind the digital copyright reform master frame.

online and offline campaigning] within a single campaign or from one campaign to the next" (Chadwick, 2007, 284). Indeed, on the one hand, supporters could contribute by joining the online opposition network, through petitioning and spreading campaign material, as well as through a large website shutdown operation organised during the HADOPI debates; they could also positively contribute through financial donations (on which QDN activists currently depend) or through interactions with their local MPs, which activists reported as a highly effective strategy. Whereas EUCD.info and QDN activists enjoyed a high level of credibility with some MPs, who acknowledged them as committed and largely disinterested grassroots experts, the full effects of their opposition came through larger initiatives directed at parliamentarians, where supporters engaged directly with their MPs through emails, phone calls and letters, thereby flooding all political sides with grassroots, constituent alerts about the bills. The strategy was effective enough for some government officials to react by complaining to the press that French MPs were being "flooded by disinformation campaigns led by a minority of libertarian pressure groups," which they disparagingly referred to as "five blokes in a garage doing mass emailing."[25] Because EUCD.info and QDN activists (some of whom were close to ecologist political groups) were indeed perceived to be leftist "hippies" by a fraction of the political class, as a parliamentary staffer explained, the open architecture of their campaign was essential to escape that stigma and reach over to all MPs, in order to cover the full spectrum of the French ruling elite.

These online and offline repertoires of contention endowed the protest effort with different resources. Some of them were (to the activists themselves) surprisingly successful, such as the EUCD.info petition; others, like the DADVSI and HADOPI demonstrations, were less impressive, even though they were instrumental to MPs in publicly signalling their opposition to the bills. Altogether, the campaigning effort sustained by EUCD.info and QDN activists has lasted for several years, allowing them to draw comparisons between past and present protest events. As they learnt from their successes and failures over time, the EUCD.info and QDN initiatives have improved their own legal skills, refined their argumentative cues and mobilised more sophisticated collaborative technologies, such as wikis and web-based text annotation systems that allows a peer network to comment over common resources, such as draft legislation. This has enhanced the efficiency of their open, distributed campaigning effort, thereby paralleling the evolution of "Web 2.0" applications also widspread in free and open source software environments (Demazière and Horn, 2009). Similarly, the media strategy of QDN activists has become more professional, including a larger effort at translating campaign material in English in order to reach international audiences and media. As of today, the EUCD.info and QDN activists have become remarkably skilled activists with enough experience to extend their expertise and protest strategies to several levels of government, as shown by their involvement in the Telecom Package Reform and opposition to the ACTA negotiations.

All in all, the presence of skilled actors and its supporting virtual constituency has profoundly affected the policy field of digital copyright reform. As reflected in our interviews, French MPs with little interest in the initial issues covered by the DADVSI and HADOPI

[25] *PC INpact*, "La Quadrature ? '5 gus dans un garage' pour le cabinet d'Albanel" (8 March 2009). The quote shortly appeared in a newswire by the Agence France Presse.

bills progressively mobilised against them when they felt the general interest (or their constituents' interests) would come under threat if the bills were effectively passed. Several MPs joined forces with EUCD.info and QDN activists, and felt that they were participating in a larger online social movement, one of them reflecting, for instance, that "the additional length of [parliamentary] debates that we managed to provoke favorised the implication of Internet users during the successive session readings of the bill" (Pasquini, 2009, 194). The same learning effects from one campaign to the other are also visible among MPs, some of whom mobilised against both the DADVSI and HADOPI bills, but also against the European CII Directive and against some provisions of the LOPPSI 2 bill, which threatens to introduce Internet filtering as a means of fighting against "cybercriminals" (see Appendix A).

5.2 Making sense of the Telecoms Package Reform

EU policy-making differs largely from national decision-making and is the object of various interpretations by political science and international relations scholars attempting to qualify a system in perpetual evolution (in terms of its territory, institutions and competences).

5.2.1 Institutional determinants

In comparison to France, the European Union is characterized by a liberal policy system. *Politically*, the institutions are ideologically more diverse and flexible. Especially within the European Parliament (EP), majorities need to be constantly renegotiated as it is composed of political groups (not parties) and characterized by shifting majorities (even though the conservative EPP is the main political group). The levels of entry to EU policy-making are multiple, characterized by a "multi-tiered system of territorial governments a separation of powers at the Community level"(Pollack, 1997, 755). Particularly the European Parliament "has demonstrated considerable sympathy with the demands of diffuse interests, especially within the relevant parliamentary committees"(Pollack, 1997, 755), in a context of continual struggle to maximize its evolving competences under the treaties.

Culturally, the European institutions are more open towards third parties with the result that Brussels enjoys the highest density of lobbyists in the world (Dagger and Kambeck, 2007). The EU is characterized by the integration of various socio-economic groups, considered as bearing an essential economical and judiciary function by informing and advising political representatives and contributing to the writing of legal texts (Teuber, 2001). This unrestrained approach to what is euphemistically coined "interest representation" (Greenwood, 2007) is in sharp contrast to the silencing of lobbying in France.

Economically, the European Union holds the exclusive competence for policies in relation to the functioning of the single market (customs, economic and monetary policy, competition law...). Estimations vary yet experts concur that around 2/3 of member states legislation derives from EU policy-making. The European Union is foremost an economical integration. The Charter of Fundamental Rights of the European Union is only legally

binding since the adoption of the Lisbon treaty, just after the adoption of the TP. As a result, MEPs and decision-makers are often more sensitive to economical arguments compared to civil liberties frames.

In terms of *democratic legitimacy*, the EU is criticized by all stakeholders for its democratic deficit. Presented as the expression of the general european interest, the EU is often suspected of being elitist and unresponsive to popular aspirations. The latest example of euroskepticism are the harsh critics raised during the failed ratification process of the constitutional treaty and later on its successor, the treaty of Lisbon (Costa and Magnette, 2007). European policy-making has undergone important changes in order to address its lack of proximity with constituents. New spaces of influence for advocacy and civil society movements have opened up with efforts to democratize the policy making process (Ruzza, 2002). Internet tools have been largely integrated in this strategy to increase transparency and consultation mechanisms with the general aim of encouraging the formation of a European public sphere, whose absence is often deplored (Niesyto, 2009). However, the complexity of channels, directions, actors and issues involved at EU level is such that civil society groups are easily discouraged in a system privileging organized, resource-rich expertise (Greenwood, 2007).

In the case of the Telecoms Package Reform, we distinguish three institutional factors that strongly impacted on the outcome of the policy process. First, the *complexity* of the Telecoms Package (TP) itself. Described as the "heart of European telecommunications regulations" by one activist, the TP consisted of five directives dealing with a wide range of issues (see Section 4.1.2) *not* including intellectual property at the outset of the reform. One of the essential challenges for all actors involved was to deal with hundreds and hundreds of amendments to five highly complex directives. A first hurdle was therefore to make sense of what was actually in the Package, as underlined by one of the leading QDN activists:

> We were in May and so we receive bundles of amendments from the [parliamentary committee on Culture and Education]... Hm? what is this thingy? Telecoms package? So then we stumble upon this monster, this legislative monster. And then my friend looks at this thing and says: there, there, there! Put that next to each other, that gives you the French graduated response! I'm impressed by his analysis skills on this by the way. And so we started publishing on this: graduated response *sneaked into the Telecoms Package* (*said in English during the interview*). And people started to shout: No! you are telling nonsense, it's false, you are lying. So then we started to produce analyses.

This illustrates some central characteristics of activist campaigning: the discovery from scratch of very complex legislative processes and the necessity to prove one's arguments by proposing convincing analyses about the issue and the confrontation with attempts to discredit them by the opposing side.

Second, the involvement of an army of *professional lobbyists* aided by certain member States succeeded to introduce "three-strikes" into a package not directly concerned with

IPRs. Next to US companies interested in the net neutrality debate, the IPR lobby with the help of French and British conservative MEPs managed to introduce "three-strikes" amendments in the IMCO committee, supposedly unnoticed by most MEPs (Pasquini, 2009). However, professional lobbying suffered from "outreaching" itself as argues one longtime digital rights campaigner:

> Civil society exploited the situation that developed to the maximum extend I think. But I don't think that anybody faced with a lobby that had control of a large member state's presidency, of other large member states like Spain and Italy for example, and with the lobbying power and money to swamp the European parliament... a power like that working efficiently cannot conceivably be held back by a group of civil society activists. When they screw up, I mean we were mercilessly devoured, but I can't as much as I'd like to say, you know that we can achieve miracles and turn lead into gold, in that particular circumstance, they really had to... we needed them to work on our side, which they kindly did.

Sarkozy's letter to president of the European Commission Jose Manuel Barosso, asking him to take out amendment 138 from the package is a further example of pressures by Member states, especially France, upon the European policy making process. Member states can be considered as the most prominent interest representatives at EU level.

An institutional determinant that played in favor of civil society actors was *election politics* in addition to internal debates at the national level, among which the French HADOPI debate (see Section 4.1.1). The second reading of the TP on May 6, 2009 was clearly influenced by the upcoming European elections of June 4-7, 2009. An agreement had been reached during the negotiations with the Council and most parties agreed to support a compromise version of amendment 138. However, all interviewees agree that MEPs, especially the French socialists as well as the liberals from ADLE, were influenced by the upcoming vote and decided not to take the risk to vote for an unpopular amendment. The original version of 138 was thus adopted in a chaotic second reading, where some MEPs claim that they didn't know on which version of the amendment they voted due to a swift change of voting order decided by the ADLE president of the reading.

The spectrum of the Pirate Party, whose Swedish chapter obtained one seat in the EP in the 2009 elections, also influenced the positioning of individual MEPs, such as the German liberals for example who were very involved in the controversial debate surrounding the governmental proposal to block child pornography sites in Germany. However, once the Pirate Party got elected into the European parliament, this did not only play in favor of the ad hoc activist coalition. Divergences of interpretations appeared between the Swedish pirate representative and a close collaborator and the French-lead activist group surrounding amendment 138, which partially facilitated the adoption of a weak compromise amendment on November 24, 2009.

5.2.2 Framing strategy

Similarly to the DADVSI and HADOPI debates, activists were successful in raising attention towards "three strikes", placing the issue on the media-political agenda both for national constituencies as well as for the internal debate inside the EP. Building upon the recent adoption of the Bono resolution and a declaration against graduated response by the Swedish government, QdN argued that the criminalization of consumers was not a solution to piracy. Their critic of graduated response was based on the defense of civil rights (especially the right to a fair trial and the presumption of innocence) and the negative consequences it would have on European competition and informational sovereignty. Graduated response was not only portrayed as stifling innovation but also threatening the Internet.

Both at the French and the European level, QDN activists argued against repressive approaches to copyright by putting forward notions of openness, sharing, creativity and individual freedom. As one of their press releases put it: "This text is already outdated and will never be able to stop culture and creation from enriching itself by sharing." The Internet is viewed as a public good, and access to the network a "fundamental right" the EP has to defend. However, they distanced themselves from "Pirates" by not directly putting into question the protection of copyright, but by defending civil rights and branding themselves as watchdogs of the legislative process.

They also played upon the democratic deficit debate and the power struggle between European institutions. Arguing that they put the TP "out of the shadows, into the light", they positioned themselves as a public interest force, increasing the general transparency of an opaque EU policy making process. Citizen mobilisations thus served to reinforce their position as a credible, civil society actor.

Core activists had a key role in what frame theory refers to as "frame bridging", making legal terms understandable to ordinary citizens (Haunss and Kohlmorgen, 2009). However, the construction of meaning is an ongoing activity that never stops, as the situation evolved, discourses had to be adapted and new analyses published.

For most activists supporting the cause but not present in Brussels, public forums and IRC channels were crucial spaces to understand the issues at stake. Asked whether he read all of the amendments to the Telecoms Package Reform, one Swedish activist responded:

> I don't think so. Of course, when we discussed something, I read that thing. I can't say I ever read it from top to bottom and most things I read, I could never understand (*laughs*). Ehm, we have this expression called "EU-speak", which is the language used in the European Union, which to my theory, few human beings can understand. (Itv 37, Brussels, February 2010)

Making sense of what was actually going on in the Package took place at various levels. First, among the activists themselves who discussed the amendments they read and interpreted following their mental reference frame, often relying on computer language to make

sense. Second, the interpretation was made public via press releases, often using an alarming tone, in order to mobilise citizens and to convince journalists of the importance of the issue. Finally, their interpretation was refined and sustained by further facts and analyses presented to MEPs to convince them.

5.2.3 Protest techniques and skills

Media resonance constituted a priority for campaigners. Frequent press releases were sent to as many journalists as possible, profiting from the address books of their allies inside of the EP. The internet itself constituted a media in itself, yet publishing the information on the website alone was not sufficient to alert people. The strategy was thus to publicise the information by posting links and comments all over the Internet, forwarding the information via email, discussing it in forums and building spaces of interaction around the issues at stake. Online protest actions were sometimes conducted – in France – to spark the interest of media sites. Specialised online news sites such as *Heise.de* or *ZDNet.fr* showed a growing interest for the topic. Citizen journalist news websites such as *Netzpolitik.de* were also actively spreading the word, the information eventually ending up in the mainstream media, a strategy that is quite successful as MEPs increasingly realize the importance of online media as argues one political advisor:

> After all, the deputies are interested in the media. Now they understood quite well that there are medias that you don't know if you want. Next to the mainstream media everybody watches and on which everybody dreams to have his picture in front page, you have all this world on the internet. (Itv 10, Brussels, March 2009).

A more conservative MEP however, argued that IT news sites "seem to feed among themselves". For the media, the interplay between the French and European legislative agendas increased the salience of the issue. National coverage of the TP did influence the French debate and vice-versa. If the French print media were largely pro-activist, the most prominent television channels were generally supportive of HADOPI in a struggle between traditional mainstream media and newer types of online media generally positioned against "three-strikes".

In terms of gaining credibility and legitimacy, activists were more successful at the European level than at the French level. This can be explained by various factors. First, MEPs were in general sensitive to citizen mobilisation surrounding the TP, especially since MEPs, in particular in the IMCO and ITRE committees, are less used to civil society input than national MPs. Although no mass demonstration took place outside the EP - as was the case during the software patents directive - activists successfully managed to mobilise citizens to call MEPs or send letters or emails. Thanks to this support, the few core activists carrying out "lobbying work" inside the EP were perceived as defending the public interest

of a particular, and growing, community. As such, the ad hoc coalition successfully distinguished themselves from private interest groups and organised movements as all officials interviewed perceived them as a grassroots ad hoc coalition.

Second, activists were perceived as knowledgeable, able to voice a coherent alternative discourse. Already during the software patent debate, activist programmers were considered as "the industrial world that is emerging," as argued one political advisor, "even if they don't look like anything and have between 20-25 years, that attracts the attention of a deputy, the people at the Commission" .

However, their way of communicating about the telecoms package was perceived as oversimplifying and misrepresenting a complex piece of legislation as a conservative MEP explained during one interview:

> We had to deal very quickly with the fact that they tried to demonize the package right away and said this was a sort of a charter to take people of the internet right away, which it was nothing of the kind. So we were prepared with strong arguments for that and I think which people understood... and they shifted their grounds actually by trying to idealise amendment 138 and 166 as if they were sort of the wholly grail of all things and if you didn't support these... And in a way, this was kind of a replica behind the religious fervor behind the software patents. This was part of the characteristic of the whole thing of sort of theological, iconic status to simplify the proposal to people."

Third, the activists positioned themselves as being the representatives of Internet users and responsible citizens. Within the ad hoc coalition, QdN in particular has successfully managed to brand itself as acting in the defense of a larger constituency. In a place where many MEPs receive their emails as print-outs on their desks and are specialized on particular topics, mostly not interested in copyright issues, activists speaking out for a wider community of "netcitizens" are considered as appropriate interlocutors for some MEPs (mainly left wing and Green MEPs, some Liberals). However, attempts to discredit activists, claims that they are working for US companies and the impossibility to estimate their supporters did lower their persuasive power. One EPP political advisor argues:

> The question is indeed the question of legitimacy. In the sense that they are representing I don't know how many citizens... The other thing (in comparison to BEUC, the European consumer organisation) is for example to say *La Quadrature*, OK, we have several national associations, whatever, and when you speak for example with one person coming from that country "did you hear something about that association?" "– No never". So OK, you can do whatever you want with the figures, you can say that you are representing I don't know how many national associations and you are representing the civil society. The other thing is to have that in concrete.

The community of "netcitizens" is indeed a rather vague constituency. MEPs certainly noticed that citizens were contacting them to express their concern yet their reactions were varied, with some expressing their anger and considering it, as one interviewee observed, as "parliamentary obstruction" .

An essential element for broadening their support base consisted in alliances with insiders in the EP, other stakeholders (like EDPS) and other activist groups across the EU. Like-minded allies inside the EP played a crucial role in transmitting information to activists who were mostly living far away from Brussels. As MEPs have to deal with a multiplicity of matters, both at the european and local level, they generally specialise on certain areas of expertise and, depending on the MEP, rely heavily on the knowledge of their parliamentary assistants. The alliances and communication flows between activists and assistants, advisors or MEPs holding similar positions is a key element explaining the relative success of the movement. Such connections were of course crucial to gain access to confidential information about the evolution of the package, the general attitude of MEPs before a vote and observe the moves of opposing lobbyists.

Collaboration with groups across the EU was not as effective as during the software patents campaign. Nonetheless, activists from many different countries and groups were active on the TP, with QdN being the leading force due to their expertise on copyright issues and their experience with the French HADOPI debate. The general agreement across these organisations was that each would take care of national controversies and collaborate at the European level.

Finally, after having learned about and analysed by themselves many aspects of EU policy making QDN activists developed a series of open source tools to help and encourage citizens to contact their MEPs."Political Memory", which records the voting behaviour of MEPs, and "LawTracks", a tool to compare the various stages of a legislative proposal, are such tools, much in the fashion of the revision control systems used by software developers. Such tracking tools reflect the underlying philosophy of the movement, as a core QDN activist explains:

> "Tools like LawTracks, comparison tools of the various phases of a text, or tools like political memory that try, let's say, to memorize and to make available the action of various Members of Parliament of different countries... I believe there is an innovation component that matches our culture of doing, of action let's say but not to do whatever but to produce, that presumably finds its source in the free software movement but that inhabits a wider space today." (Itv 13, Paris, May 2009)

The strategy thus is to offer a wide range of tools and information to convince citizens to act. However, the way in which citizens get involved is largely left to them. QDN activists do not show much interest in mass demonstrations (a strategy that failed under previous mobilizations); instead, they favour a critical mass of concerned citizens contacting their MEPs, combined with a particular way of lobbying:

> Me, what I like most actually, it's to be a toolbox to allow people to understand what is happening and to allow them to act, to give them the tools to act. So that, lobbyists don't do it. On the contrary, with lobbyists everything is secret. With us, everything is public. So there are fundamental differences here. Lobbyists will never yell at a political representative but always be smiling, nice and all that. [Whereas] us, we literally threatened [an important MEP]. (Itv 12, Berlin, April 2009)

As European decision-making is generally perceived as opaque, QDN activists claimed by their actions to bring the reform process "from the shadows into the light". Their perception of an open and transparent decision making process was somewhat different compared to the way officials inside the European Parliament perceived it. When the information seemed to pertain to public interest, QDN published it on their website regardless of any statement of confidentiality.

6 Conclusion

This paper aimed at contributing additional case studies to the existing literature of intellectual property contention in Europe. From a political economy perspective, our findings cumulate with previous research that found the European Union to be a more liberal decision-making forum than domestic arenas. Even though anticircumvention and further enforcement measures were passed at the European level, other initiatives such as software patents (Haunss and Kohlmorgen, 2009, 2010) or copyright levies (Littoz-Monnet, 2006) were rejected at the European level, while being enforced in countries like France and Germany where rights-holders enjoyed higher standards of protection and remuneration than in other Member States. As our parallel study of the DADVSI/HADOPI laws and Telecom Package Reform shows, the "graduated response" procedure was also deemed unsatsifactory by European decisionmakers concerned with the preservation of network neutrality, while France and several other countries proceeded to implement it in their national legal frameworks, not without facing great opposition from both civil society groups and constitutional courts.

Whereas the contemporary expansion of the international intellectual property regime often amounts to an opposition between the interests of developed and developing countries (Yu, 2009, 15), the recent growth of national and regional copyright regimes in Western, educated, industrialized, rich democracies has confronted civil society groups to the deeply entrenched interests of rent-seeking industries within the entertainment sector. At the national and supranational levels, legislative efforts to strengthen and harmonize the enforcement of intellectual property rights in European countries have been met with fierce opposition by resource-poor actors, whose budgets and membership do not even remotely match those of well-entrenched advocacy groups, but who could neverthless claim a great deal of technical expertise as well as valuable digitel skills. Even though their oppositional strategies have had mixed effects on actual legislative outputs, a counterfactual estimate

of their influence on the policy process suggests that their efforts were nevertheless highly successful at denting the master frame of "copyright as creation" and derailing the course of heavily lobbied legislatures.

Both cases reviewed in this article therefore confirm that activists with strong digital skills can substantially affect policy-making through digital repertoires of contention; specifically, the "virtual constituencies" created principally through tight networks of websites dedicated to opposing a particular issue proved to be very effective in gathering support, attract publicity and enrol supporters into effective, individual acts of contention. Some of the core values of free and open source software, such as transparency and collaborative work, were instrumental in making that course of action appealing to a large base of supporters who significantly impacted the opinions and positions of a critical mass of parliamentarians. More generally, the skills and identities developed by these groups of contenders have successfully enabled them to access some crucial policy venues and to question the state of both copyright and telecommunications laws, turning them into effective objectors of the compromise passed between public officials and private market agents over the organization and distribution of economic gains in these decisionmaking areas. Rather than "hacktivism", the identity of such groups fits well with the notion of "market rebellion", where activists resort not only to question the status quo but also to advance new business models built on innovative distribution systems of knowledge goods, such as free software and open access initiatives (Dobusch and Schüßler, 2010, Dobusch and Quack, 2010). This trend is also observable, to a minor extent, among consumer rights organizations, which have campaigned against copyright expansion initiatives in Europe since the late 1980s (Littoz-Monnet, 2006, 445).

An evident bias of our analysis, however, might reside in their tendency to overmagnify the successes of market rebellion and digital repertoires of contention. Rather, our analysis concludes that David does not systematically beat Goliath through internet-based mobilisation, and that, with regards to intellectual property lawmaking, political institutions remain more sensitive to competing interest groups with higher resources than the ones gathered by the activists we have researched. That said, while the advocacy coalition formed in France by governmental officials and representatives of the entertainment industry did not collapse, it was severely weakened as a result of the DADVSI and HADOPI legislative episodes. Identically, at the European level, new challenging actors were brought to the fore and given an opportunity to expose their preferences. A further understanding of these political dynamics, and of the exact role played by online repertoires of contention in such processes, still has to emerge from the nascent research agenda that is forming over the digital contention of intellectual property law. Empirical cases of such events will certainly not fall in short supply, as new legal battlegrounds are already forming at the national and international levels of government.

A Selected intellectual property legislation

Table 1: Chronological summary of copyright-related initiatives at selected levels of government in the 1990s–2000s

Year	European Union	France	International/U.S.
1994			TRIPS (WTO)
1996			WCT/WPPT (WIPO)
1998			DMCA
2001	INFOSOC/EUCD		
2002	CII (rejected)		
	TELECOM Rules		
2004	IPRED 1		
2006		DADVSI	ACTA (unofficial)
2008	Copyright Term extension		ACTA (official)
2009	TELECOM Package	HADOPI 1	
		HADOPI 2	
2010	IPRED 2 (ongoing)	LOPPSI 2 (ongoing)	ACTA (ongoing)

ACTA: Anti-Counterfeiting Trade Agreement (likely to include anticircumvention provisions and a graduated response procedure; see Yu, 2010b).
CII: Directive on the patentability of computer-implemented inventions.
DADVSI: *Loi no.2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information*.
DMCA: Digital Millennium Copyright Act, Pub. L. 105-304.
HADOPI 1: *Loi no.2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur Internet*
HADOPI 2: *Loi no.2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur Internet*
INFOSOC/EUCD: Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.
IPRED 1: Directive 2004/48/EC on the enforcement of intellectual property rights.
IPRED 2: Proposal COD/2005/0127 for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.
LOPPSI 2: *Loi d'orientation et de programmation pour la performance de la sécurité intérieure* (likely to include include Internet filtering).
TELECOM Package: Proposal COD/2007/0247 for a common regulatory framework for networks and services, access, interconnection and authorisation.
TELECOM Rules: Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Framework Directive 2002/21/EC, Universal Service Directive 2002/22/EC and Privacy Directive 2002/58/EC.
TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization.
WCT/WPPT: WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty of the World Intellectual Property Organization.

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