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Article

Breindl / Briatte: Copyright Reform in France and the European Union

## **Digital Protest Skills and Online Activism Against Copyright Reform in France and the European Union**

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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, given their high political salience and 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 significantly altered the digital copyright policy field over the years. In France, grassroots movements have turned the passing of digital copyright infringement laws through Parliament into highly controversial episodes. 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 that 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 an 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.

**KEY WORDS:** digital copyright, intellectual property, online mobilization, collective action

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## Introduction

In the past decade, parliaments in industrialized countries have been pressured to adopt harsher 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 law making has resulted in several legislatures adopting such measures, with wide variation 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 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 both in space and time.

This paper draws on two original case studies, researched through interview data and online material. In France, protest groups have actively contested the DADVSI and HADOPI laws on digital copyright and unauthorized online file-sharing during their chaotic route through the French Parliament between 2005 and 2009. At the European level, the reform of the ‘Telecoms Package’ (a set of five directives regulating the European telecommunications market)<sup>1</sup> completed in November 2009 gave rise to an intense Internet-based lobbying effort, carried out by an *ad hoc* coalition of European activists. In both cases, online mobilization was an essential element of political contention for opponents of these legislative projects.

The “politics of intellectual property” has inspired a growing array of scholarship (Haunss and Shadlen 2009). In line with this literature, we show how Internet-based activism carried out by opponents of current intellectual property reforms can substantially affect policy making by disrupting the course of parliamentary law making 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 their campaigning practices. We argue that a major influence on these activist groups is the belief set associated with free

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<sup>1</sup> It focused on competition, radio and television spectrum and the establishment of a European regulatory authority to supervise the telecommunications market, in a separate sixth directive.

and open source software (Kelty 2008, Coleman 2009, Demazière et al. 2009) and with commons-based peer production through online networks that reward transparency, free distribution and open access to information and knowledge (Castells 2001, Benkler 2006, Bollier 2008).

## **The Global Politics of Copyright Reform**

In the past fifteen years, several social movements and activist campaigns have taken issue with the “new enclosures” brought by the reform of intellectual property rights on a global scale (May 2010). Since the adoption of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) in 1995, calls from patent and copyright industries for increased enforcement and protection as a means to support innovation in free trade environments have indeed extended beyond the scope of international organizations to affect the norm production of regional and national legislatures (Sell 2010, Dobusch and Quack 2012). The scope and enforcement of intellectual property have since become highly controversial issues, with governments and nongovernmental organizations challenging dominant trade interests over issues such as access to essential medicines and the preservation of the public domain.

Beyond their initial counter-framing of ‘free trade’ by ‘fair use’ (Sell 2003), protests against intellectual property rights have since evolved into a much broader and global ‘Access to Knowledge’ (A2K) movement that fights not only for ‘fair copyright reform’ but also, for instance, for the protection of traditional knowledge and wider access to generic drugs (Kapczynski 2008, Krikorian and Kapczynski 2010). Hackers, free software associations and digital rights groups, such as the U.S.-based Electronic Frontier Foundation (EFF), feature prominently in the early history of the movement,<sup>2</sup> as do several U.S. legal scholars.

In Europe, the focus of this article, opposition to 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 2010; Karanović 2010). Over the years, activists reported in free software forums and mailing-lists on legal developments in the United States, where opponents were unable to stop the introduction of software patents. The protest that emerged in 2002 in reaction to their planned introduction in European law was one of the first to be specifically directed at EU lawmaking and led the European Parliament to reject a directive for the first time. Just as importantly, it raised awareness among free software

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<sup>2</sup> For a discussion of the connections between the hacker ethic, free and open source software and digital activism, see Breindl (2011).

supporters about the more general threats posed by copyright reform and fostered online mobilization among users and developers (Breindl and Briatte 2009, Karanović 2010). In another attempt to comply with international norms, the European Union passed a copyright directive in 2001 to enforce the World Intellectual Property Organization 'Internet treaties'.<sup>3</sup> The resulting 'INFOSOC' directive, also known as the 'EUCD' or Copyright directive, attracted widespread legal criticism and was also denounced for the unprecedented, aggressive lobbying surrounding its adoption (Hugenholtz 2009). The directive aimed at enforcing anticircumvention (Yu 2006), making it compulsory for all Member States to legislate against the bypassing of the technical protection measures found on audio and video media under the label of 'Digital Rights Management' (DRM). The transposition of the directive later evolved into a fierce political battleground in several European countries such as Germany (Günnewig 2003, Dobusch and Schueßler 2010) and France (Breindl and Briatte 2009).

Over the years, the legislative process in several European countries went from implementing anticircumvention to more general attempts at rolling back copyright 'piracy'. In parallel to expensive and tiresome litigation, representatives from the entertainment industry have invested considerable resources in aggressively lobbying governments to legislate in favor of rights-holders, by granting them the highest possible standards of digital copyright enforcement. As of today, these politics of copyright reform oppose large coalitions of 'copyright maximalists' to a wide community of informed Internet users, some of whom can now claim several years of protest experience. In recent years, the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) by a vote in the European Parliament reflects that new balance of power,<sup>4</sup> as does the success of protests to stall the 'SOPA' and 'PIPA' bills in the United States.<sup>5</sup> Both mobilizations attest to the growing salience and interconnection of copyright conflicts around the world, also materialized in landmark court rulings and the institutionalization of 'Internet issues' in the political landscape.<sup>6</sup>

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<sup>3</sup> The WIPO Copyright Treaty (WCT) and Performances and Phonograms Treaty (WPPT), which were adopted in 1996 and approved by the EU in 2000, also led to the controversial passing of the U.S. Digital Millennium Copyright Act (DMCA) in 1998 despite early opposition from academics and free software developers.

<sup>4</sup> For a legal analysis of ACTA when it was (reluctantly) released as a consolidated draft, see Yu (2010b). The narrative of its downfall in 2011 shares some similarity with that of the Multilateral Agreement of Investment between OECD countries in 1998.

<sup>5</sup> 'SOPA' stands for 'Stop Online Piracy Act' and PIPA stands for 'Protect Intellectual Property Act.' A salient element of protest against the bill was the orchestration of a large-scale Internet blackout that affected top online destinations like Wikipedia and pornography websites in 2012.

<sup>6</sup> The emergence of 'Pirate parties' in several European countries is another outcome of copyright and related digital rights struggles (for example, data retention and privacy), although their electoral impact has been so far negligible outside of countries with low representational thresholds and high activist presence, such as Germany and Sweden.

In order to assist the reader in sorting out the acronym soup of worldwide intellectual property legislation, a summary of relevant bills, laws, and treaties is provided in Table 1. The global challenge of unauthorized file-sharing has been handled differently by legislatures, notably because of the political salience and controversial nature of ‘IP’ lawmaking in these venues over the past decade. The variance in outcomes is illustrated by the high number of bills that have been censored, rejected, stalled or withdrawn, either by elected parliaments or by judicial courts.

#### TABLE 1 ABOUT HERE

This paper focuses on the adoption of intellectual property legislation in the European and in the French parliaments. The reforms that we studied had very different legal outcomes in each legislature, thereby reflecting the current state of copyright politics. In 2009, France was indeed among the early adopters of a ‘three-strikes’ approach to copyright control, dubbed the ‘graduated response’, which threatens suspected copyright infringers with the suspension or termination of Internet access (Yu 2010a). In the following years, similar procedures have been introduced in Europe by the UK and Ireland and are currently under consideration in several other countries, but were also rejected in Germany, Spain, Sweden and most recently Denmark. Whereas the European Commission itself appeared to have been split on the issue, the European Parliament echoed the concerns voiced in many national legislatures by firmly opposing the ‘graduated response’ procedure while voting on the Telecom Package Reform in May 2009.

We explore this research puzzle of varying legislative outcomes in copyright enforcement policy by focusing on the groups who have 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 have 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 politics of intellectual property rights (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 copyright conflicts. The broader literature that we draw on for our analytical framework focuses less on the legal order than it does on the political order and its counterpart, discontent and protest, expressed in large part through the novel opportunities of online mobilization that both theorists and activists have focused on in recent years.

## Analytical Framework

Our analytical framework draws on the study of social movements and contentious politics, on the use of information and communication technologies for protest (see, for example, Earl and Kimport 2011; Anduiza et al. 2012), as well as neo-institutionalist political theory, focusing both on institutional determinants that constrain or provide opportunities for activists and the particular frames and skill sets that they use to challenge digital copyright enforcement regulations. In this paper, we are not so much interested in the emergence or organizational structure of contending groups, which is often the focus of social movement research, than we are in their interactions with decision-makers and subsequent impact on the policy process. This focus on institutional determinants, framing, and skills leads us to consider the extent to which political opportunities, resource mobilization and framing processes can explain how social movements affect specific policy outcomes (see McAdam, McCarthy and Zald 1996).

Our analysis builds upon the concept of *political opportunities* of the copyright policy field. Initially focused on structural factors, such as partisan and interest group cleavage structures (Kriesi 2004), 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 monopolies”<sup>7</sup>, can result in situations characterized 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 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 neo-institutionalist theory. Our inquiry addresses that goal by first examining the institutional determinants of copyright reform, its discursive strategies, and finally the set of skills and repertoires deployed by activists who oppose current copyright reforms.

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<sup>7</sup> 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). See Baumgartner and Jones (1993), cited in Kriesi (2004) and Mochnacki (2009).

## **Institutional Determinants**

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, markets, individuals, and organized collectives (Morgan and Quack 2010). 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,’ in order to protect their rent within the overall state-administered governance regime. Under that assumption, we expand neo-institutionalist frameworks that analyze property rights (see, for example, Campbell and Lindberg 1990) to the ratification of *intellectual* property rights by states, which might assist some economic agents to the detriment of others by shifting the costs and benefits of copyright and patent protection between them. The institutional and procedural settings of parliaments, ministries, and lead executives generate different opportunities and constraints for mobilized interests to affect policy-making processes effectively: 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). Institutions therefore provide opportunities for and constrain protest action at various levels.

Additionally, the *interest structure* of public and private actors involved in intellectual property plays a crucial role in the formation of collective action networks and their influence over the creation and reform of intellectual property law. Haunss and Kohlmorgen (2010) link the existence of successful collective action 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 favored by the entertainment industries in the defense of their already well-entrenched interests.

## **Belief Sets and Frames Associated with Digital Copyright**

The *ideational elements* of policy making, operationalized as discursive devices, provide actors with powerful rhetorical and argumentative repertoires to advance their interests. Studies of intellectual property contention have already underlined the importance of such framing strategies (Haunss and Kohlmorgen 2009; Dobusch and Quack 2012)—or, interchangeably, the production of policy images<sup>8</sup>—for both public and private actors. Civil society activists, in particular, face the double challenge of bridging a wide array of (sometimes antagonist) interests and countering the hegemonic discourse of “copyright as creation”

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<sup>8</sup> See Baumgartner and Jones (1993), cited in Littoz-Monnet (2006, 439-440).



developed at all levels of government.

Digital copyright law 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. Consequently, only a handful of participants in the intellectual property lawmaking process can confidently declare themselves knowledgeable of its technical foundations, whereas other members of the policy community are left to rely on highly incomplete information in order to form their judgment. The resulting uncertainty might 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 simplicity, widespread acceptability, and plausible nature with regard to recent revenue loss in the music industry have made it an apt candidate for becoming the dominant belief among decision makers. Operating under these premises, which Dobusch and Schueßler (2010) call “conservationist” copyright claims, decision makers at all levels of government frequently endorse the claims of “creative industries” supported by salient experts, such as economists and copyright law experts. Furthermore, the entertainment sector enrolls artists with a high media profile into their lobbying campaigns, with the intent to create counter-mobilization effects among their opponents.

Since the mid-1990s, however, opponents to this master frame have 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 with online communication (Currah 2007), contradict the dominant belief set about copyright protection. Digital environments have provided contenders of copyright reform with a robust discursive opportunity structure. “Key legal institutions and their actors,” which are instrumental to the definition and stability of hegemonic discourses (McCammon et al. 2007, 733), have then eroded the master frame of copyright protection by arguing against provisions such as anticircumvention or ‘graduated response’ procedures.

This shift in perspective was initiated by an epistemic community of U.S. law academics<sup>9</sup> and transnational advocacy groups such as the Electronic Frontier Foundation, inspired by ideals of digital freedoms that paralleled alternative licensing initiatives in the free software movement. At present, several transnational movements support free and open access to knowledge resources (Bollier 2008; Dobusch and Quack 2008, Kapczynski 2008). As this belief set has gradually gained in influence, several contending frames to the hegemonic copyright discourse have emerged in the past decade, resulting in frequent protest

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<sup>9</sup> See, for example, Samuelson (1996), and Lessig (2004).

over the direction taken at all levels of government over the issue of digital copyright reform, thereby threatening the policy monopoly of the entertainment sector (Lessig 2004; Patry 2009).

Current discourses about copyright in a digital age feature frames that refer to a perception of the Internet as a public good, the promotion of openness, sharing and creativity, the belief in the advent of a new information economy and claims to apply basic principles of democratic governance to telecommunications (Benkler 2006, Bollier 2008). The rich history of copyright reform has now provided plenty of opportunities for protest groups to expose how this open vision of Internet communication has come under threat from governments and corporate actors in the past decade. As a consequence, several movements have now developed a sufficient knowledge base to regularly report on legal developments pertaining to Internet communication, to offer information on the current state of affairs and its supporters, and to envision alternatives to the status quo. Over the years, some of the protest groups that have engaged in this kind of diagnostic and prognostic framing (Benford and Snow 2000) have remained active, winning over larger audiences as well as growing larger activist bases. Part of that success, we suggest, comes from the social skills and Internet-based protest repertoires that challengers to the status quo have used to diffuse their counter-hegemonic frames.

### **Protest Skills and Digital Network Repertoires**

Our understanding of the *social skills* expressed by protest actors in the field of intellectual property contention is derived from Mochnacki's (2009) study of Canadian law professor and blogger Michael Geist, who successfully mobilized over 20,000 Facebook users against a Canadian copyright reform package in December 2007. Mochnacki shows that Geist's oppositional tactics successfully destabilized 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" (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" (2009, 31). We expect the development of such skills directed at frame manipulation to have a direct influence on the success of protest groups in our case studies.

In order to overcome the logic of collective action and to counterbalance weak economic resources, activists also rely critically on *technical skills* and high levels of digital literacy (Lankshear and Knobel 2008) that allow them to reach large audiences through digital resources like static, dynamic, and collaborative web pages, newsletters, mailing lists, online petitions, and data mining tools.

These resources have been described by Chadwick (2007) as *digital network repertoires*, in reference to Charles Tilly's concept of repertoires of contention (2004), to suggest that several types of organizations have transformed their ways of working under the influence of the Internet. Digital network repertoires serve as identity vectors for protest groups, allow individuals to coalesce at low costs over shared concerns, and 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). Furthermore, as Van Laer and Van Aelst (2009, 232) argue, the Internet at once fulfills a facilitating and a creative function: not only can Internet-based communication significantly reduce the costs of pre-existing practices such as petitioning, it also offers new applications to the act of dissent, as with denial-of-service attacks on Internet servers or 'Internet blackouts.'

We designate the combination of social and technical skills aimed at online collective action as *digital protest skills*. By examining these skills in our case studies, we intend to demonstrate the relevance of a policy approach to the intellectual property process, as well as the heuristic value of an open explanatory framework that covers a wide array of political determinants, from institutions to ideational frames, therefore going beyond formal approaches that focus on modeling parliamentary and interest group behavior through a more restrictive range of goals and payoffs.

## **Case Studies**

Using this common framework of analysis, we present two case studies researched separately using a common set of methods, covering the DADVSI and HADOPI laws in France, and the Telecoms Package Reform at the EU level. The resulting analysis significantly expands earlier work on the French DADVSI law and the European CII Directive (Breindl and Briatte 2009).

## **Data collection**

The main data for this project were collected between January 2008 and April 2010, consisting of 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 are 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 media sources, which

generally expressed a pro-activist, anti-legislation and anti-industry bias, but which also provided the best in-depth coverage of the conflict; these media actively supported activist groups by spreading their material and calling upon their readership to rally to the cause, including through financial donations. News coverage was divided between traditional, mainstream media outlets, which adopted a more nuanced or pro-governmental position, and online media which were more openly supportive of the activists.

Campaigning material and activist discussions were followed and retrieved from 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 activists involved in both processes, as well as with parliamentarians (European MEPs and French MPs), parliamentary assistants, and other key stakeholders.<sup>10</sup>

### **France: 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 by the government in November 2003, it was submitted to Parliament only in December 2005, shortly after the government received a warning from the European Commission for its lack of transposition of the ‘INFOSOC’ Directive. In addition to its anticircumvention provision, the bill complied with the interests of entertainment industries by criminalizing the distribution of file-sharing software, and by inflicting small financial penalties on digital copyright infringers. The bill, however, came under attack from a loose coalition of free software supporters and consumer rights groups, leading to the inclusion of measures that practically authorized circumvention in the name of software interoperability.

The awkward balance of interests reflected in the DADVSI bill after it was passed by both chambers of Parliament in June 2006 crumbled a month later, when the French Constitutional Council delivered its review of the bill at the demand of the parliamentary opposition. In its decision, the Council struck down

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<sup>10</sup> 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. For the European case, seventeen interviews were carried out with activists from several European groups involved in the campaign as well as fourteen interviews of Members of the European Parliament, assistants and advisers. The participants were selected following a purposive sampling strategy. For the French case, seventeen interviews were carried out with activists, French MPs and parliamentary staff. Some French activists who were also active at the European level were interviewed by both authors separately.

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 about the collapse of the already wobbly legal edifice built through long parliamentary debates and intense amendment rounds. At the outset of that tortuous legislative episode, the DADVSI bill that became official law in August 2006 was a suboptimal and implausible legal settlement that left all interests unsatisfied, and that left the status quo virtually unaffected through its unclear and inoperable provisions.

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 unauthorized 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. This time, the bill quickly attracted widespread media attention and caused wider concern, 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, in 2008, the activists behind the EUCD.info initiative had formed a new collective, *La Quadrature du Net* (hereafter, QdN), which spearheaded the opposition to HADOPI. On the whole, their strategy did not radically differ from what had been previously achieved over the DADVSI bill, but the more professional tone of their press releases aimed at more mainstream media coverage.<sup>11</sup> The DADVSI episode also served as a public springboard for free software advocacy groups like APRIL, who now enjoyed a higher public profile and whose membership figures increased significantly.

Repeating recent history in an almost farcical manner, digital copyright reform quickly became a legislative minefield for the French government, as the HADOPI bill gave rise to even more chaotic events during its parliamentary examination. In April 2009, disgruntled MPs on both sides of the National Assembly surprised 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 in 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 spiraled into legislative limbo when the Constitutional Council, once again summoned by the parliamentary opposition to review the provisions of what came to be known as ‘HADOPI 1,’ struck down the ‘graduated response’ procedure as

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<sup>11</sup> QdN has also benefitted from more advanced collaborative web technologies as well as from the active involvement of an in-house intellectual figure (Aigrain 2012).

unconstitutional 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.

Ultimately, a separate ‘HADOPI 2’ bill was introduced and voted on in September 2009, with the intention to enforce an amended ‘graduated response’ mechanism that survived constitutional review later that year. The final legal arrangement settled between the French executive, legislature, and constitutional court is a much more tortuous (and expectedly slower) process that has been plagued with implementation failures, and as of today, its deterrent effect on unauthorized file-sharing has little empirical basis.<sup>12</sup> This brief examination shows that, throughout a long stream of legislative mishaps, dramas and reversals, the entertainment sector failed to secure its preferred options in its struggle against copyright infringers, while the government managed to alienate a sizeable fraction of its own parliamentary majority and generate months of negative media publicity that might have translated into electoral losses in the next presidential election. In that respect, the small but proactive activist groups that engaged in the legislative sabotage of the bills were remarkably successful, in particular the activist collective QdN that emerged and gradually gained in influence throughout the DADVSI and HADOPI legislative sagas.

### **The European Telecoms Package Reform**

Activists started paying attention to the European Telecoms Package Reform in April 2008, following their involvement in the adoption by the European Parliament of a non-legislative resolution on “Cultural industries in Europe.” 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 unauthorized file-sharing, stating: “criminalizing consumers who are not seeking to make a profit is not the right solution to combat digital piracy.”<sup>13</sup> 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

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<sup>12</sup> The current arrangement consists of a two-track sanction system that decouples the identification of Internet users sharing unauthorized content from their effective incrimination in court. This dual system effectively nullifies any short-term threat of massive litigation against infringers.

<sup>13</sup> “Cultural industries in Europe,” non-legal EP Resolution INI/2007/2153 (April 10, 2008).

the five telecommunications directives that comprised the EU Telecommunications Rules of 2002. The reform package addressed a wide variety of issues such as competitiveness, the establishment of a European regulatory authority, and the management of radio and television spectrum. 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 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 its two years of campaigning, QdN, then funded by an Open Society Institute grant and by donations, sought to broaden its audience and form alliances, eventually forming an *ad hoc* coalition with various European digital rights activist groups. Throughout the campaign, contacts were also made with the EFF, with consumer organizations and with like-minded industry stakeholders in the telecommunications sector.<sup>14</sup> Because of the parallels between the French and EU processes, QdN took the lead on civil society opposition to controversial aspects of the package, collaborating with allies inside and outside of the European institutions. QdN-authored press releases, memos 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 safeguarding of network neutrality and on the fight against the ‘graduated response’ procedure. Network neutrality, that is, the preservation of indiscriminate routing of data packets over the Internet, was threatened by several aspects of the Telecom Package Reform, which considered Internet 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 the ‘graduated response’, which rapidly crystallized 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 percent of the European Parliament

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<sup>14</sup> Telecom operators have effectively very little to gain in the monitoring and criminalization of their Internet customer base for the sole benefit of the entertainment industry. The business model of Internet service providers has instead thrived on the ‘mere conduit’ model of limited intermediary liability, as established by the EU E-Commerce Directive of 2000.

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 co-decision procedure. Pressure by member states also opposed the adoption of Amendment 138, as with French president Nicolas Sarkozy’s letter asking the President of the European Commission to remove the amendment from the package on October 2008.<sup>15</sup> 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.

The European Parliament eventually adopted a compromise version of the Amendment 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. The original impact of the amendment was considerably reduced, leaving it open for Member States to implement the ‘graduated response’ or not. In effect, this stopped efforts to automatically extend the French and British models across the EU, just as it added pressure on national legislatures to pledge themselves to protecting civil liberties and a fair judicial process.

Overall, the campaign organized 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 mobilization alerts encouraging European citizens to alert their MEPs against the dangers of the Telecom Package Reform.

## **Analysis**

Digital copyright reform has been instrumental in mobilizing members of the free software community and beyond into parliamentary politics over the last ten to fifteen years. The unusual success of their efforts to oppose harsher intellectual property enforcement standards partly relies on European and national legal requisites, which effectively curbed the (admittedly extravagant) ambitions of the entertainment industry in that domain. However, part of their success also came from the skill set that free software supporters brought to the political arena by

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<sup>15</sup> The letter was leaked to French newspapers in October 2008; *AFP*, “Téléchargement illégal: Bruxelles oppose une fin de non recevoir à Nicolas Sarkozy” (October 7, 2008).



remixing ‘old-fashioned’ party politics with a novel form of ‘Internet politics’ that fed on digital technology, online activism, and the wider ‘Internet culture’ (see for instance Coleman 2009, Breindl 2011)—the result of which was the development of largely original repertoires of collective action.

### **France: 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 set so 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, we analyze below the involvement of skilled activist groups in the lawmaking process and its effects on parliamentary behavior.

#### *Institutional Determinants*

Three institutional factors were set with the intention of guaranteeing a swift vote in the French Parliament. First, copyright reform legislation was assigned to the parliamentary committee in charge of *cultural* affairs, which was expectedly wary of accommodating the needs and demands of French artists and entertainment companies, such as the French-owned Universal Music Group. The DADVSI bill was first drafted by a college of copyright lawyers and industry representatives, whereas the HADOPI bill drew on a report by Denis Olivennes, a former civil servant who was then CEO of the largest French entertainment retail chain.<sup>16</sup> As several insiders observed during interviews and informal discussions with the authors, had the bills been 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 visible in parliamentary work.

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

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<sup>16</sup> *Ars Technica*, “The insanity of France’s anti-file-sharing plan: L’État, c’est l’IFPI” (November 25, 2007).

the EUCD directive into its national legislation. In 2008, the same procedure was invoked, this time as a means to make room 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 for the bills. Sarkozy was leading the majority party at the time of the DADVSI vote, which gave him the potential power to punish dissenting MPs by refusing them the party's support in the next legislative election, scheduled one year later. After his election as president in 2007, Sarkozy directly sponsored the HADOPI bill and mentioned it in several of his most prominent speeches, therefore raising the stakes for dissent among majority MPs.

### *Framing Strategy*

'EUCD.info' designates a collective responsible for creating the eponymous website that served as the quasi-unique source of information on the DADVSI bill in the absence of in-depth coverage by the mainstream media. The 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 of 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, these activists elaborated an argumentative strategy that made ample use of frame bundling (Haunss and Kohlmorgen 2009) and frame bridging (Benford and Snow 2000). They connected anticircumvention to all forms of political concerns, ranging from threats to the independence of national security systems to basic consumer rights, civil liberties, and individual rights to privacy, and the distortion of economic competition within the software industry. Their diagnostic frames simplified the bill through telling metaphors, arguing for instance that DRM were analogous to "a pair of glasses that can read only one sort of books" and that anticircumvention would amount to "throwing children into jail." By doing so, they linked the provisions of the DADVSI bill, initially framed as a mere technical act of legal conformance to international agreements, to perceptible concerns that resonated with virtually all political tendencies (Breindl and Briatte 2009).

The above-mentioned institutional factors immediately fed into the strategy of activist groups, who carefully documented the commixture of industry and government reform proposals into a "balance of interests" (Mochnacki 2009 26) counter-frame that underlined the problematic nature of that relationship with

regard to democratic ideals. Similarly, the short debate times imposed on parliamentarians appeared in the argumentative material distributed by activist groups and in the EUCD.info online petition against the DADVSI bill in 2006, as it raised suspicions of a “confiscation of democratic debate” led by elected representatives.<sup>17</sup> Finally, the pressure exerted on parliamentarians by the government and by industry lobbyists was added to the more general counter-frame of “democratic deficit” that emerged from their presentation of the DADVSI and HADOPI legislative debates.

EUCD.info and QdN activists provided elaborate descriptions during interviews with the authors of their attempts at “frame bundling” (Haunss and Kohlmorgen 2009), which drew substantially from their experiences—described as argumentative “trial-and-error” by one respondent—of previous campaigns (see Breindl and Briatte 2009). The arguments put forward in their campaigning material raised concerns about the consequences of the bills for economic competition and civil liberties, thereby denting the government’s master frame of digital copyright reform by unraveling its technical language into concerns that connected to broader social issues with which MPs and the general public were much more familiar. That strategy was not necessarily a first choice for many free software supporters who preferred to focus on interoperability issues, but activists recalled in a collective interview with one of the authors that they deliberately opted for the larger cause of “saving copyright” instead of merely “saving free software” when debating the strategy behind the EUCD.info initiative. Their efforts led them to translate the intrinsic flaws of digital copyright reform into extrinsic ones 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 implied giving up on essential civil and economic freedoms.

### *Protest Techniques and Skills*

These strategic frames were deployed by EUCD.info and QdN activists 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 was crucial to that endeavor, as the EUCD.info and QdN websites became critical sources of information on the contents and legislative processing of the bills, on which other opponents

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<sup>17</sup> The EUCD.info online petition against the DADVSI bill 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. Interestingly, QdN now explicitly refrains from online petitioning and lists logistic as well as strategic reasons for doing so on its website.

(including fellow activists and online media outlets with larger audiences) could easily bandwagon.<sup>18</sup> Consequently to a small core of activists bearing the costs of mining the bills and then disclosing their results online for free,<sup>19</sup> 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 decentralized 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 larger wave of grassroots protest.

At the outset of the campaign, activists struggled to raise media awareness about the issue. It was only once activists mobilized on the related European Telecoms Package Reform (covered below) that copyright reform attracted widespread coverage in France. Whereas journalists themselves were often pro-activist in substance and tone, prominent mainstream media such as TF1, the country's largest TV channel, were officially supportive of the HADOPI.

The diffusion of EUCD.info and QdN material through online publications as well as through mailing lists, newsletters, and discussion boards also contributed to 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. These efforts at systematic political tracking took collaborative forms already observed in previous campaigns (Karanović 2010, Breindl 2011). Activists carefully monitored 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). 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 oppose 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 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 organized 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

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<sup>18</sup> See, e.g., the “DADVSI for Dummies” guide published online by the *Ligue Odebi* in late 2005.

<sup>19</sup> 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).

was perceived 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 effect of their opposition came through larger initiatives 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.”<sup>20</sup> 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 recalled in an interview with the author, 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.

As they learnt from their successes and failures over time, the EUCD.info and QdN initiatives improved their own legal skills, refined their argumentation and mobilized increasingly sophisticated collaborative technologies, such as wikis and web-based text annotation systems that allow a peer network to comment over common resources, such as draft legislation. Their digital protest skills, which extend from online petitioning to Internet blackouts, have successfully garnered online support on several different media platforms. 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.

## **Europe: Making Sense of the Telecoms Package Reform**

European 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.

### *Institutional Determinants*

The EU institutional system hosts a broadly liberal policy environment and many ideologically diverse groups of varying influence. Within the European Parliament (EP), majorities need to be constantly renegotiated as it is composed of

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<sup>20</sup> *PC INpact*, “La Quadrature? ‘5 gus dans un garage’ pour le cabinet d’Albanel” (March 8, 2009). The quote shortly appeared in an AFP newswire and was later redacted.

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 and a separation of powers at the Community level” (Pollack 1997, 755). The EP in particular “has demonstrated considerable sympathy with the demands of diffuse interests, especially within the relevant parliamentary committees” (ibid.) in a context of continual struggle to maximize its evolving competences under the treaties.

Presented as the expression of the general European interest, the EU is often suspected of being elitist and unresponsive to popular aspirations. The EU stands first for economic integration and its officials generally intervene in legislative affairs on economic grounds rather than to protect civil liberties. New spaces of influence for advocacy and civil society movements have opened up with efforts to democratize the policy-making process, and Internet tools have been largely integrated 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, actors, and issues involved 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, three institutional factors strongly impacted on the outcome of the policy process, starting with the *complexity* of the package itself. One of the essential challenges for all actors involved was to deal with hundreds of amendments to five highly complex directives, which was especially challenging for outsiders who lacked prior knowledge of the directives, and recurrent attempts to discredit their positions.

Second, the involvement of an army of *professional lobbyists* aided by certain member States succeeded in introducing “three-strikes” into a package not directly concerned with intellectual property rights. Helped by French and British conservative MEPs, the intellectual property rights lobby managed to introduce “three-strikes” amendments at committee level, supposedly unnoticed by most MEPs (Cohn-Bendit 2009). Nicolas Sarkozy’s letter to José Manuel Barroso, asking him to remove Amendment 138, aimed at rendering a graduated response mechanism illegal across the EU, is a clear example of pressures by a Member state considered as the most prominent supporter of stronger copyright enforcement in the 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. The second reading 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 MEPs concurred to support a compromise

version of Amendment 138. However, all our interviewees stated that MEPs, especially the French socialists and European liberals, were influenced by the upcoming vote and decided not to take the risk of supporting an unpopular amendment. The original version of Amendment 138 was thus adopted in a chaotic second reading, where some MEPs claim they didn't know on which version of the amendment they voted due to a swift change of voting order decided by the liberal president of the reading. The rise of the Pirate Party, whose Swedish chapter obtained two seats in the 2009 elections, also influenced the positioning of individual MEPs. However, once the Pirate Party got elected into the European parliament, this did not only play in favor of the *ad hoc* coalition. Pirates represented a direct representative of activists' positions as well as a communication and information channel inside the EP. However, divergences of interpretations within the activist community appeared and partially facilitated the adoption of a weak compromise amendment on November 24, 2009. During the last stages of the campaign, activists were divided and adopted diverging interpretations, QdN clinging onto the validity in European law of Amendment 138, without being able to prove it legally. Various supporters did not follow them on that approach.

### *Framing Strategy*

Activists were successful in raising attention towards “three-strikes,” placing the issue on the media-political agenda both for national constituencies and the debate inside the EP. Building upon the recent adoption of the Bono resolution and a declaration against the ‘graduated response’ by the Swedish government, activists argued that the criminalization of consumers was not a solution to copyright infringement. Their criticism of the 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 that it would have on European competition and innovation. Graduated response procedures were not only portrayed as stifling innovation but also as threatening the Internet economy. The construction of meaning was an ongoing activity; as the situation evolved, discourses had to be adapted and new analyses published.

QdN activists argued against repressive approaches to copyright by putting forward notions of openness, sharing, creativity, and individual freedom, rooted in hacker and FLOSS principles. The Internet was portrayed as a public good, and access to the network a “fundamental right” the European Parliament should 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. Arguing that they put the Telecoms Package “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 mobilizations thus served to reinforce their position as a credible, civil society actor.

Similarly to what has been observed in the French DADVSI and HADOPI debates, European protesters actively engaged into diagnostic framing (Benford and Snow 2000) along the lines of civil liberties and democratic safeguards being sacrificed by profit-seeking corporate businesses under the careless watch of largely ignorant political elites. Their prognostic framing focused on the European Parliament and on its historical opposition to other EU institutions, underlining its democratic role as the only directly elected decision-making body, its responsibility in defending citizen interests against enclosure-oriented efforts by private actors, and Member States' attempts at capturing the European process to serve national agendas.

Also in line with the French debates, core activists had a key role in “frame bridging,” making legal terms understandable to ordinary citizens (Haunss and Kohlmorgen 2009). 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. Making sense of what was actually going on in the package took place at various levels. First, activists who were discussing the amendments could rely on computer programming metaphors to read and interpret draft legislation. Second, their interpretations were made public via press releases, often using an alarming tone in order to mobilize citizens and to convince journalists of the importance of the issue.<sup>21</sup> Finally, their interpretation was refined and sustained by further presentations to MEPs.

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 mobilization, especially since MEPs—particularly in committees dealing with economic issues that were primarily concerned by the reform—are less used to civil society input than national MPs. Although no mass demonstration took place outside the European Parliament, activists successfully managed to mobilize citizens to contact MEPs directly. Thanks to this support, the few core activists carrying out “lobbying work” inside the European Parliament were perceived as defending the public interest of a particular, and growing, community. Additionally, activists

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<sup>21</sup> The production of alarming messages and motivational cues within the free software community was helped by the fact that this community faces constant competition from proprietary software companies and therefore spends a lot of time ‘evangelizing’—a common term in free software discussions—its own creations and principles, while also sending public warnings on how patent abuse and monopolistic firm behavior stifle innovation. Media resonance was further helped over the years by increasing attention to patentability and competitiveness in the hi-tech industry, as with the European Commission’s March 2004 ‘Microsoft Decision’ or with the recent Apple/Samsung case.



were perceived as knowledgeable, and able to voice a coherent alternative discourse. However, some MEPs criticized their way of communicating about the package as oversimplifying and misrepresenting a complex piece of legislation (for a detailed analysis of MEPs perception of the campaign, see Breindl 2012). Allies in other member states disagreed at times with the recurrent alarming tone used in the press releases but translated them into their national language(s).

Finally, activists positioned themselves as being the representatives of Internet users and responsible citizens. Within the coalition, QdN managed to brand itself as acting in the defense of a larger constituency. In a parliament where many MEPs receive emails as print-outs on their desks and are not specialized on copyright issues, activists speaking out for a wider community of “Net-citizens” are considered as appropriate interlocutors for some MEPs (mainly left wing and Green MEPs, some Liberals). However, attempts to discredit activists, claims that they were working for U.S. companies, and the impossibility of estimating their supporter base did lower their persuasive power. The community of “Net-citizens” is 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 at the campaign, which one of our interviewees qualified as “parliamentary obstruction.”

### *Protest Techniques and Skills*

Media resonance represented a priority for campaigners. Frequent press releases were sent to as many journalists as possible, profiting from the address books of allies inside the EP. The Internet constituted a medium in itself, yet publishing the information on websites alone was not sufficient to alert people. The strategy was thus to publicize 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 occasionally conducted to spark the interest of media sites, and specialized online news sites such as *Heise.de* or *ZDNet.fr* showed a growing interest in the topic. Citizen journalist news sites such as *Netzpolitik.de* also actively spread the word, the information eventually ending up in the mainstream media. For journalists, the interplay between the French and European legislative agendas increased the salience of the issue; national coverage of the reform influenced the French debate and vice versa.

An essential element for broadening activists’ support base consisted in alliances with insiders in the European Parliament, other stakeholders and activist groups across the EU. Like-minded allies played a crucial role in transmitting information to activists not present fulltime in Brussels. As MEPs have to deal with a multiplicity of matters, both at the European and local level, they generally

specialize 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 crucial to gaining access to confidential information about the evolution of the package, the general attitude of MEPs before a vote, and to observe the moves of opposing lobbyists.

Collaboration with groups across the EU was not as effective as during the software patents campaign (Breindl 2012). Nonetheless, activists from many different countries and groups were active, with QdN being the leading force due to their expertise on copyright issues and the related French debate. The general agreement across these organizations was that each would take care of national controversies and collaborate at the European level. Building on previous campaigning experiences, activists shared a common diagnostic of the importance of EU decision making. Their alliance allowed them to intervene on the national and the EU levels in parallel.

Finally, activists developed a series of open source tools to help and encourage citizens to contact their MEPs. “Political Memory,” which records the voting behavior of MEPs, and “LawTracks,” a tool to compare the various stages of a legislative proposal, are two such tools, much in the fashion of the revision control systems used by software developers. Such tracking tools reflect the underlying philosophy of “doing” and empowerment through technology, providing a wide range of tools and information to convince citizens to act.

## **Conclusion**

This paper has aimed at contributing additional case studies to the existing literature of intellectual property contention in Europe. From a political economy perspective, our findings add to previous research that has found the European Union to be a more liberal decision-making forum than domestic arenas. As shown in Table 2, along with other parallels and discrepancies between our case studies, the EU and especially the European Parliament have proved to be quite open to citizen input, much in contrast to the French policy system. Even though anticircumvention and further enforcement measures were passed at the European level, other initiatives such as software patents (Haunss and Kohlmorgen 2009; 2010) and copyright levies (Littoz-Monnet 2006) were rejected at the European level, while being enforced in countries like France and Germany where rights-holders enjoy higher standards of protection and remuneration than in other Member States. As our comparative study of the DADVSI/HADOPI laws and the Telecom Package Reform shows, the ‘graduated response’ procedure was also

deemed unsatisfactory by European decision-makers 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 substantial opposition from both civil society groups and constitutional courts. While the French DADVSI and HADOPI debates were captured by the combined interests of the entertainment sector and the governing party, the EU telecom reform provided a broader battleground for a more diverse set of interests, including telecommunication operators and Internet service providers, who opposed the inclusion of copyright issues in the package in the first place. However, if telecommunication and network operators were to decide to expand their business models towards content diffusion, this fragile balance between competing interests is likely to gradually collapse towards harsher access and content restrictions.

Each new legislative initiative on intellectual property or Internet related issues provides a new political and discursive opportunity for activists to intervene and consolidate their resistance within and across national borders. 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 industry groups, but who could nevertheless claim a great deal of technical expertise as well as valuable digital protest skills. 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. 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 highly successful at denting the master frame of “copyright as creation” and derailing the course of heavily lobbied legislatures. In both cases, activists successfully combined civil liberties and economic frames, associating the protection of freedom of expression and privacy with Internet innovation and competitiveness. In terms of framing, the European campaign was more successful than the French one in appealing to the European parliament as the (sole) defender of citizen interests, and to citizens themselves as the only actors capable of changing the course of action in a deeply entrenched global conflict.

Both cases reviewed in this article therefore confirm that activists with strong digital protest skills can substantially affect policy making through online and offline repertoires of contention; in particular, the ‘virtual constituencies’ created principally through tight networks of websites dedicated to opposing and tracking a particular issue proved to be very effective in developing a knowledge

base, gathering support, attracting publicity and enrolling supporters into effective, networked acts of contention. Social, technical and argumentative skills were further complemented by political skills acquired through repeated involvement in the policy process. Once deployed in both offline and online environments, these skills have enabled groups of contenders to access 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. Rather than “hacktivism,” the identity of such groups fits well with the notion of “market rebellion,” where activists resort not only to questioning the status quo but also to advancing new business models built on innovative distribution systems of knowledge goods, such as free software and open access initiatives (Rao 2009; see Dobusch and Schueßler 2010; Dobusch and Quack 2012). This trend is also observable, to a minor extent, among the consumer rights organizations that have campaigned against copyright expansion initiatives in Europe since the late 1980s (Littoz-Monnet 2006).

An evident bias of research focusing on digital contention lies in its tendency to over-magnify the successes of online collective action. Our analysis concludes that David does not systematically beat Goliath through Internet-based mobilization, 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.<sup>22</sup> Identically, at the European level, new challenging actors were brought to the fore and given an opportunity to defend their preferences. Online mobilization alone was not sufficient, but was usefully complemented by offline lobbying that benefitted from alliances with like-minded parliamentary actors, consumer groups and businesses. This points to the fact that the current struggle largely transcends the boundaries of the traditional right–left spectrum in addition to shaking the boundaries of digital and online privacy rights. 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

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<sup>22</sup> The newly elected French government did not remove the HADOPI but has announced that it would operate under a restricted budget. The parallel appointment of the recently formed ‘Lescure Commission’ to draft an alternative mechanism that would sustain the French ‘cultural exception’ is a manifestation of the enduring conflict between old and new industry players, which hints at a future round of hard bargains between telecom operators and media rights holders under the watchful eyes of ministerial authorities and civil society organizations.

such events will certainly not fall in short supply, as new legal battlegrounds are already forming at the national and international levels of government.

The longer time frame of intellectual property conflicts should finally lead us to conclude that the commodification of knowledge is a persistent policy issue, and not simply a by-product of digital economies and technology. Our case studies echo past struggles over the private use of recording equipment, such as tapes and cassettes, and the future holds new challenges related to the use of mobile phones, pads or e-books for information consumption. Current events are characterized by higher media salience, which is arguably a critical achievement for activists, journalists, and politicians alike. Indeed, if mobilizing large audiences around the problems and solutions of intellectual property conflicts requires the kind of work that we have described through framing strategies and skills accumulation, then we should expect future protest groups and stakeholders to reuse many of the diagnostics, prognostics and motivational cues produced in recent years.<sup>23</sup>

TABLE 2 AROUND HERE

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<sup>23</sup> We thank an anonymous reviewer for encouraging us to make that point explicit, with reference to the main kinds of frames that social movement studies have identified through the cross-examination of case studies (Benford and Snow 2000).

## **Appendix. Selected Intellectual Property Legislation**

### *International*

**ACTA:** Anti-Counterfeiting Trade Agreement (multilateral and initially covert agreement; likely to include anticircumvention provisions and a ‘graduated response’ procedure).

**TRIPS:** Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (WTO).

**WCT/WPPT:** WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty of the World Intellectual Property Organization (WIPO; part of the United Nations).

### *European Union*

**CII:** Directive on the patentability of computer-implemented inventions (‘software patents’).

**INFOSOC/EUCD:** Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (derived from WIPO WCT/WPPT treaties).

**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.

**TELECOM Package:** Proposal COD/2007/0247 for a common regulatory framework for networks and services, access, interconnection and authorization.

**TELECOM Rules:** Access Directive 2002/19/EC, Authorization Directive 2002/20/EC, Framework Directive 2002/21/EC, Universal Service Directive 2002/22/EC and Privacy Directive 2002/58/EC.

### *United States*

**DMCA:** Digital Millennium Copyright Act, Pub. L. 105-304 (implementation of WCT/WPPT).

**PIPA:** Protect Intellectual Property Act, S. 968 (stalled).

**SOPA:** Stop Online Piracy Act, H.R. 3261 (stalled).

### *France*

**DADVSI:** Loi no.2006-961 du 1er août 2006 relative au droit d’auteur et aux droits voisins dans la société de l’information (partly censored by Constitutional

Council).

**HADOPI 1:** Loi no.2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur Internet (partly censored by Constitutional Council on major clauses).

**HADOPI 2:** Loi no.2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur Internet (partly censored by Constitutional Council on a minor clause).

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**Table 1. Selected Intellectual Property Legislation, 1994–2012**

Year	European Union	France	International & U.S.
1994			TRIPS (WTO)
1996			WCT/WPPT (WIPO)
1998			DMCA (US)
2001	INFOSOC/EUCD		
2002	CII (rejected) TELECOM Rules		
2004	IPRED 1		
2006		DADVSI (censored)	ACTA (unofficial)
2008	Copyright Term extension		ACTA (official)
2009	TELECOM Package	HADOPI 1 (censored) HADOPI 2	
2010	IPRED 2 (withdrawn)		
2011			ACTA (stalled)
2012			SOPA/PIPA (US; stalled)

*Source: authors' selection from published legislation (case law not included). French legislation is denoted as 'censored' when major elements of the bill were deemed unconstitutional. See Appendix for details on each initiative.*

**Table 2. Summary of Key Findings**

	<b>Institutional Determinants</b>	<b>Mobilization frames</b>	<b>Repertoires of contention</b>
<b>France</b>	Pro-entertainment ministry and leading MPs on both political sides  Emergency procedure, party discipline and absenteeism in Parliament  Direct presidential	Concerns about innovation, competitiveness and national interest (defense) in reference to the U.S.  Free software and emergent online business models  Protest over democratic	Mass communication through websites and gradual mainstream media visibility  Open collaboration and participation in online and offline actions, from distributed legal analysis to street demonstrating

	involvement to request MP support and votes	procedures, civil liberties and privacy rights	Digital skills complemented by acquired legal and political skills
	Little to no technical knowledge of the issues at stake among MPs	Calls to arms among pro-active groups of software developers and users, including librarians and academics	Effective rhetoric leading to a small-size veto coalition in Parliament
<b>European Union</b>	Liberal policy system open to organized expertise	Civil rights frame bundled with European competition and innovation frames	Pan-European online campaign linked to intensive lobbying inside the EP
	Complex and highly lobbied package	Views of the EP as a legislative watchdog	Strong media strategy with rapid results
	European elections	Liberal ideals rooted in hacker and free software communities	Successful alliances with insiders in the EP
		Constant motivational framing	‘Political coding’

*Source: authors' selection from a comparison of their respective fieldwork. Several findings triangulate with those summarized in Kohlmorgen and Haunss (2010) and Dobusch and Quack (2012).*