

The Copyright Dispute: A Transnational Regulatory Struggle

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Abstract

Traditional regulation of copyright has recently been criticized from two opposing angles: While copyright holders and industries bemoan insufficient protection of copyrighted material in the digital era of lossless copying and file-sharing, a diverse coalition of dissident copyright lawyers, artists and activists claims that the prevalent copyright regime hinders new forms of content creation and distribution. In this paper, we compare the resource mobilization of industry-led Digital Rights Management (DRM) initiatives and the Creative Commons copyright licenses project. While the former was, despite the resourcefulness of the actors, fraught with collective action problems, the latter was, despite an originally weak resource position, able to mobilize support from a broad range of civil society groups and users. We conclude that there is something inherently political in the governance of new digital markets which provides opportunities for civil society actors to counterbalance the influence of large companies.

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Introduction

Traditional regulation of copyright in form of international and national legislation has recently been criticized from two opposing angles: On the one hand, copyright holders and industries bemoan insufficient protection of copyrighted material in the digital era of lossless copying and file-sharing. On the other hand, a diverse coalition of dissident copyright lawyers, artists and activists holds the opposite claim that the prevalent copyright regime hinders new forms of content creation and distribution. In their struggle both groups do not restrict their activities to traditional forms of influencing legislation via lobbying and/or protesting but also engage in (partly conflicting) private regulatory endeavours.

Taking the perspective of transnational regulation (Djelic and Quack 2008) and governance (Djelic und Sahlin-Andersson 2006; Graz and Nölke 2008), in this paper we analyze how different groups of actors pursue their goals in different arenas of the transnational “issue field” of copyright (Hoffmann 1999; see Figure 1). While our focus is on non-state actors (Arts 2003) and on (the interrelation of) private regulatory initiatives such as the standardization of Digital Rights Management (DRM) technologies and the standardization of copyright licenses as in the case of Creative Commons, we try to incorporate the reciprocal influence of private and public authority in our analysis. In particular, we are interested in answering the question how different groups of actors through coalitions and organizations mobilized resources and support for their aims and how this in turn shapes the interests and identities of their members and potential adherents. Our argument is that interests, identities and organizational forms interact in ways that make the outcome of mobilization historically contingent. In the particular cases of Digital Rights Management and Creative Commons studied in this paper, organizational forms akin to social movements provided a platform for people interested in open content to interact and use resources in ways which gave rise to collective mobilization of a larger public of supporters, while classical associational forms of interest interpretation of the digital content industry run into considerable problems of collective action.

This result appears puzzling in the first instance since classical studies on collective action would have predicted the opposite outcome: Mancor Olsen (1965), for example, in his seminal study argued that relative small groups would be better equipped for voluntary collective mobilization in the pursuit of their interests whereas the members of large ‘latent’ groups would be very reluctant to engage for collective goals, and hence difficult to mobilize.

In the case of copyright regulation, the users of digital content represent such a large group with latent interests. Though arguments are conceivable that users should have a principle preference for low-threshold copyright regulations, there can be also reasons found why under certain circumstances they might favour technical protection of copyright (see Stefik 2007). Hence, user preferences are not predetermined once for all but rather malleable over time and subject to influences by economic and political mobilisation projects.

Mayntz and Scharpf (1995: 51) refer to this quality of latent groups as „quasi-actors“. Dolata (2003: 31-33) also highlights the importance of mobilising „non-organised collective actors“ in the context of technological standardisation. This raises the question of how to close the gap between the collective action problems described by Olsen and the realities of the millions of users of digital content out there in the global economy.

We build on contributions from various strands of literature to build a conceptual framework for understanding these processes. First, we take serious Albert Hirschman's (1982) critique of Olsen that the appearance of collective actors is always a contingent phenomenon of the specific historical situation.¹ In other words, there is no automatism for interest groups to result in successful mobilisation. Second and foremost, we are building upon research on the organizational component in collective action processes: Analyzing the raising number of members in civil society organizations in the 1970s, Wilson (1995/1973: viii) emphasized formal organizations as a way out of Olson's collective action problem: In particular, associations and other non-profit organizations can provide venues for individual and collective learning and socialisation, thereby laying the basis for interest articulation, identity formation and mobilization (see also Roy and Parker-Gwin 1999). Furthermore, organizations can also provide a focus for preference and identity formation for non-members and larger publics. Diani und Bison (2004: 284) develop this for social movements:

It brings with it a sense of common purpose and shared commitment to a cause, which enables single activists and organizations to regard themselves as inextricably linked to other actors, not necessarily identical but surely compatible, in a broader collective mobilization.

From this we can conclude that the mobilisation of users as „latent actors“ is likely to be an important dimension for the struggle over different copyright conceptions, and that the capacity of different organizational forms to address this challenge should have an effect on how successful specific actor groups will be in shaping copyright regulation.

¹ „A general criticism that can be levelled against the Olson analysis – and against much economic decision theory in general – is that its subjects, while efficient and often even ingenious and devious, are *without a history*.“ (Hirschman 1982: 79, italics by Hirschman)

The following figure provides an overview of the actors involved in the struggle over copyright and the different organizational forms and modes of mobilisation which prevail in the field. Many transnational corporations engage in regulatory processes either directly or through industry associations, as well as informal networks of experts (“epistemic communities”, Haas 1992). As a form of transnational community, the latter can also play a role in the development of civil society organizations, which in turn play a pivotal role for establishing and sustaining social movements (Davis et al. 2005; Dobusch and Quack 2008). Even non-organized groups of people that share certain characteristics may play an important role as recruiting grounds (Dahrendorf 1952) or “quasi-actors” (Mayntz and Scharpf 1995; Dolata 2003). In the remaining part of the paper we will concentrate on industry attempts to orchestrate their strategies through associations and more loose platforms as well as the attempts of opponents of technical standardization to establish an alternative regulatory approach through NGOs and social movements.

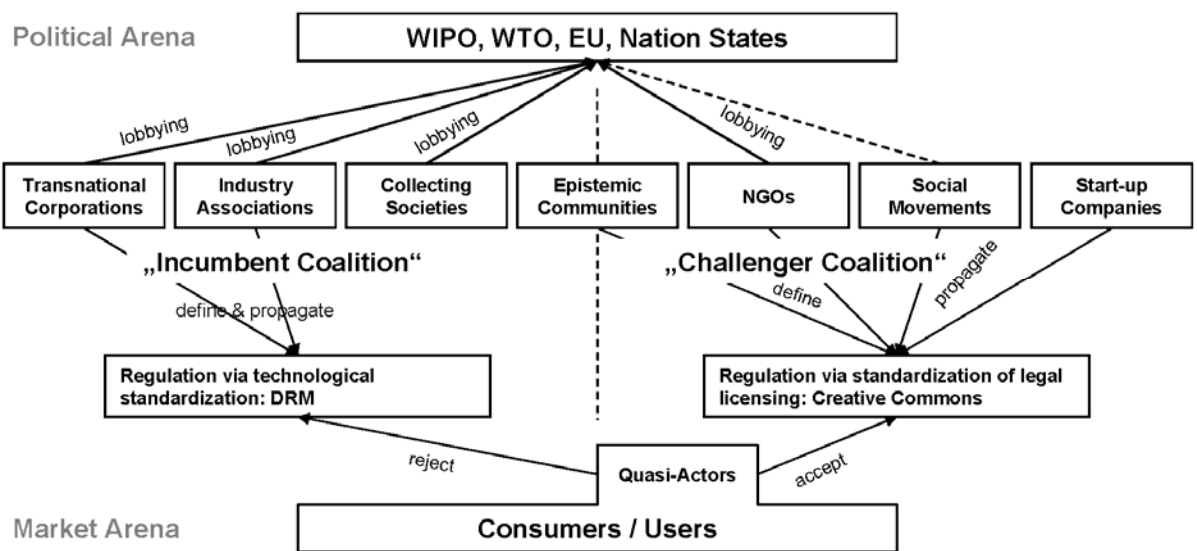


Figure 1: Stylized snapshot of regulatory arenas and actors in the transnational field of copyright regulation

Methods and Data

In conceptualizing copyright regulation as a transnational “issue field” (Hoffmann 1999), we try to identify different regulatory arenas, groups and coalitions of actors as well as different modes of regulation by looking at a broad variety of data: Primary data sources are semi-structured, issue-centred (Witzel 2000) interviews with field actors, mailing-lists and conference archives as well as organizational websites. A major part of the data has been gathered around two empirical cases: In the first case, we investigate regulation via

technological standardization by major corporations and their associations in different copyright industries – mainly consumer electronics, computer manufacturers and content providers. In particular, we look at attempts to compensate for difficulties in copyright enforcement around the “Copy Protection Technical Working Group” (CPTWG) and the “Secure Digital Music Initiative” (SDMI). In the second case, we analyze how the transnational organization “Creative Commons” together with over 60 affiliate partners develop and diffuse a set of standardized copyright licenses that correct for – in their view – overly restrictive copyright law.

Conflicting Private Regulation Processes: Technological vs. License Standardization

When we emphasize private regulation and authority in the field of copyright we do not ignore regulatory developments in the realm of national and international law: In fact, these play a vital role for both conflicting regulatory initiatives we are contrasting in the following section: First, the new anti-circumvention provisions in the TRIPS- and WIPO-Treaties² and their implementation on the (supra-)national level (Helfer 2004; Kretschmer 2005) are *conditio sine qua non* of any technological digital rights management (DRM, see Becker et al. 2003) system put forward by copyright industry incumbents. If circumventing technological protection measures of digital content was not forbidden, no private standardization of DRM technology could prevail (Marks and Turnbull 2000). Second, alternative copyright licenses as provided by the NGO network around Creative Commons not only build upon existing copyright law but are to a certain degree the paradox consequence of the new, post-TRIPS copyright legislation, which many users and supporters of Creative Commons perceive as harmful and overly restrictive (e.g. Lessig 2001, 2004).

While not being independent from classic (inter-)national copyright legislation, the private regulatory initiatives both by industry incumbents and by civil society actors are far from being determined by them. Their success or failure depends on how actors resolve the problem of collective action in building regulation as a public good, which in the case of standardization requires adoption by a significant proportion of consumers or users.

² When we refer to the WIPO copyright treaties, we mean the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonographs Treaty (WPPT), see <http://www.wipo.int/treaties/en/> [accessed: 07 April 2009]

Digital Rights/Restrictions Management: Code is Law

In a paper for a WIPO workshop on implementation issues of the WIPO copyright treaties, industry experts Marks and Turnbull (1999) name four technological developments that “pose the current challenge to protecting works”: (1) digital copying that enables perfect bit-for-bit replication of works at a very high speed; (2) new compression technologies such as MPEG-2 for video and MP3 for audio, which make it “increasingly easier, faster and more convenient to transmit full-length high quality audio and video works over networks such as the Internet”; increases in (3) bandwidth lead to greater capacity for delivering more data more quickly; and (4) networking in the sense of “two-way links from the external world to the home and out again”, today known as peer-to-peer file-sharing. Following this list of technological advances, Marks and Turnbull (1999: 3) delineate what is the worst nightmare for established copyright industries and their business models: “Today an individual consumer with a few thousand dollars of home equipment can make and distribute an unlimited number of high quality unauthorized copies of works.”

As a solution to this challenge, during the 1990s major players in the core copyright industries³ turned to technical protection measures that should “keep honest people honest” (Levy 2000: 20; Marks and Turnbull 1999: 3). As a visionary of so-called Digital Rights Management (DRM)⁴ technologies acted PARC⁵ researcher Mark Stefik, who adapted the military concept of “Trusted Systems” – systems with several different security levels – for the protection of digital goods not later than in 1994⁶ (Grassmuck 2004). He suggests combining hard- (e.g. integration of “trusted platform modules” into output devices) and software (e.g. cryptography and digital watermarks) to certify both digital works and different forms of usage by a central “Digital Property Trust”. This would allow commercializing any form and instance of content usage (e.g. reading, printing or copying a document) and at the same time safeguard against “piracy”. In a way, in Stefik’s model technological architecture (“code”) to a large extent substitutes for legal protection, a phenomenon Lessig describes as “code is law” (1999).

³ In his report on copyright industries Siwek (2006: 7) defines the core as “those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials. These industries include newspapers, books and periodicals, motion pictures, recorded music, music publishing, radio and television broadcasting, and business and entertainment software.”

⁴ Critiques of the concept regularly speak of DRM as “Digital Restrictions Management”, as DRM restricts certain forms of content usage.

⁵ Acronym of “Xerox Palo Alto Research Center”

⁶ Published in Stefik (1996).

An obvious precondition for such “trusted systems” – apart from the above mentioned legal provisions against circumvention – is their industry-wide standardization and adoption. The broadest attempts of standardizing DRM technologies occurred in the realm of the Copy Protection Technical Working Group (CPTWG) and the Secure Digital Music Initiative (SDMI). The former was initiated in 1996 by the trade associations representing the major motion picture studios and consumer electronics manufacturers respectively, and focuses copy protection of video content (Marks and Turnbull 1999: 13).⁷ The latter initiative, SDMI, was created in 1998 by the major recording industry trade associations and the major recording companies. It was their response to the success of the (DRM-free) MP3 format in the context of new peer-to-peer software (“Napster”, Green 2002) and the failure to prevent – by litigation – the shipping of mobile MP3-devices (Marks and Turnbull 1999; Levy 2000).

Both CPTWG and SDMI functioned as standard-setting bodies and exhibit very similar organizational characteristics: *First*, conferences are the predominant mode of coordination and include technical, legal and managerial representatives from all industries involved. Out of these conferences, spin-off working groups on special subjects (e.g. the “Digital Transmission Discussion Group” in the CPTWG or the “Portable Device Working Group” in the SDMI) and more formal regimes of technological licensing (e.g. the 4C Entity, a limited liability corporation formed by IBM, Intel, Matsushita and Toshiba to offer and administer licenses for copy protection technologies) emerged (Marks and Turnbull 1999).

Second, antitrust and anti-cartel laws require relatively informal and open structures as well as standards to be voluntary guidelines. While the CPTWG did not have any restrictions for participation, the SDMI charged a membership fee of \$10.000, but also allowed attendance for societies and associations representing authors, composers, performers, publishers and others (Levy 2000:45).⁸ Coordination via conferences together with very open membership structures led to very intransparent decision making procedures, as a participant of the CPTWG recalls: “It was a mystery to me, how decisions were made.”

Third, in both standard-setting bodies the demand for a maximum level of protection by content providers – above all, the major film studios and major music labels respectively – had to be reconciled with the hardware manufacturer’s concerns regarding implementation costs and marketability. Due to the importance of network and installed base effects,

⁷ These two industries are joined by major corporations of the computer industry. A policy working group, formed in parallel to the technical working group by the same players, did not persevere.

⁸ This ruling, however, excluded consumers, independent artists and labels from participating in SDMI meetings.

consumer acceptance and adoption is crucial for establishing any technological DRM standard (Farrell and Saloner 1986, 1987; Shapiro and Varian 1999).

The first CPTWG standard, the so-called “Content Scramble System” (CSS) for the then new DVD made it to the market but was soon challenged by circumvention software and by political criticism from open source software users, who were not able to play video DVDs on their operating system without such – since the “Digital Millennium Copyright Act” (DMCA) illegal – circumvention software.⁹ After its initial work on CSS, the CPTWG turned to other problems such as standards for recordable DVDs or the protection of content being passed along digital connections between products in consumers’ homes (Marks and Turnbull 1999: 18)

In the markets for music, where the unprotected MP3 format had already been widely adopted, the SDMI did not take the hurdle of marketability: In May 2001, only about two and a half years after its blatantly announced foundation¹⁰, the SDMI silently shut down its activities (Rosenblatt et al. 2002). Various DRM standards developed outside of the SDMI (e.g. “PressPlay” and “MusicNet”)¹¹ did not succeed either, as they failed to establish a sustainable installed base of adopters among both hardware producers and consumers (Buhse und Günnewig 2005; Pohl 2007). After Apple’s success with very light copy protection¹² and a request for DRM-free music by its CEO Steven Jobs (2007), EMI eventually was the first major label to completely abandon DRM protection for its music in consumer markets – a move that was soon followed by the rest of the industry (Dolata 2008). Even for DRM-pioneer Mark Stefik (2007), lacking consumer acceptance is the main reason for the very limited success of DRM technologies in general: „The situation reflects the core issue that current DRM provides no compelling benefits to consumers.“¹³

⁹ The computer scientist Dave Touretzky (2000) put together a “Gallery of CSS Descramblers”. The legal ban of DeCSS in particular led to numerous instances of civil disobedience (Eschenfelder et al. 2005) and discussions of the relationship between DRM and the freedom of expression (see Owens and Akalu 2004).

¹⁰ On its – by now offline – homepage the SDMI described itself as follows: „The Secure Digital Music Initiative brings together the worldwide recording industry and technology companies to develop an open, interoperable architecture and specification for digital music security. The specification will answer consumer demand for convenient accessibility to quality digital music, enable copyright protection for artists’ work, and enable technology and music companies to build successful businesses.“ (see <http://web.archive.org/web/20000-302230740/www.sdmi.org/> [30.08.2008])

¹¹ Based upon DRM technology by Microsoft and RealNetworks, “PressPlay” was a joint venture of Sony and Universal Music, “MusicNet” gathered the other major labels EMI, BMG and Warner (Rosenblatt et al. 2002: 134; see also Dolata 2008: 17)

¹² The DRM in Apple’s iTunes Music Store allowed burning and re-importing CDs in the unprotected MP3 format. This conversion procedure is not completely lossless but was seemingly acceptable for the average consumer.

¹³ Unsurprisingly, Stefik’s solution to this problem is more and better, not less DRM.

Standardization of Legal Licenses: Creative Commons

Proponents of alternative copyright licenses share the basic analysis of Marks and Turnbull (1999) – namely the transformative capacity of digital copying, new compression technologies, increased bandwidth and peer-to-peer networking – but come to completely oppositional conclusions. They see overly strong and long-term copyright protection – either legal or technological – not only as economically inefficient but also as a barrier for creating, remixing and sharing digital goods, especially but not only in new forms of “commons-based peer production” (Benkler 2006).¹⁴ Instead of protection of individual works they seek to maximize a global commons of digital goods as a basis for new derivative works; in a way, their approach resembles the “standing on the shoulders of giants” theme of science. To achieve these goals, they propagate the use of alternative copyright licenses to compensate for – in their view – overly restrictive copyright law and thereby turn it against itself: By applying an alternative copyright license such as a Creative Commons license (see Table 1), creators use their copyright not to protect their own exclusive rights but rather to grant and protect certain freedoms such as the freedom to distribute, to change or even to commercialize a piece of work.

Creative Commons License Modules¹⁵



Attribution: This license lets others distribute, remix, tweak, and build upon a work, even commercially, as long as they give credit to the original creator.



Non-commercial: This license lets others remix, tweak, and build upon a work non-commercially, and although their new works must also acknowledge the creator and be non-commercial, they don't have to license their derivative works on the same terms.



No derivatives: This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the creator.



Share Alike: This license lets others remix, tweak, and build upon a work even for commercial reasons, as long as they give credit and license their new creations under the identical terms.

Table 1: Icons and descriptions of basic Creative Commons license modules

In 1985 the first example of alternative and standardized open content licensing was developed by Richard Stallman to protect the source code of his Unix-clone GNU¹⁶ from

¹⁴ The most prominent examples of commons-based peer production are free/open source software and Wikipedia. In both cases people collaboratively create a digital good, whose status as a “commons” is protected by an alternative copyright license.

¹⁵ See <http://creativecommons.org/about/licenses/> [accessed: 06 April 2009]

being appropriated by any third party (Wayner 2002). Today, his GNU General Public License (GPL) is the de-facto standard in free and open source software development; more than 85 percent of all free/open source software projects – among which the operating system Linux is most well known – apply this or a similar type of license (Benkler 2006: 64). However, standardized open content licensing in domains other than software such as music, film, photo or text did not prevail until about 20 years later. Then, the demand for open content licensing became obvious in the context of Wikipedia’s success: The online encyclopedia is collaboratively developed by hundreds of thousands of contributors (Voss 2005; Benkler 2006) and licensed under the GNU Free Documentation License (GFDL) – a GPL derivative originally designed for software manuals.

The final breakthrough for open content licensing came with the launch of a set of standardized license modules (see Table 1) by the US non-profit organization Creative Commons in December 2002. While built upon copyright law, these licenses – as their GPL role-model – do not seek to maximize control of copyright owners but instead to ease and foster distribution and recombination of published works (Lessig 2004). Differently to previous forms of open content licensing, the standardized modules offer creators more flexibility.¹⁷ The second innovation compared to free/open source software licensing is the development of localized license versions – a process that turned out to be an unexpected “growth strategy”.¹⁸ Founded by an “epistemic community” (Haas 1992) of mainly US copyright lawyers around the Stanford law professor Lawrence Lessig (Dobusch and Quack 2008), Creative Commons managed to translate (“port”) its licenses into more than 40 jurisdictions within no more than five years.

Parallel to the legal and organizational transnationalization of Creative Commons, adoption rates of its licenses experienced exponential growth in various fields of application (see Figure 1); cautious search engine estimates of the total number of Creative Commons licensed works add up to about 130 million by mid-2008.¹⁹

¹⁶ “GNU” is a recursive acronym and stands for „GNU’s Not Unix“. Stallman started the GNU project after AT&T had declared the previously open Unix source code to be proprietary and closed (Weber 2004)..

¹⁷ This flexibility, however, is not uncontested, as critics see in fragmentation between incompatibly licensed content a new barrier for the creation of derivative works. The non-commercial license module in particular was and still is controversial (see Möller 2006).

¹⁸ The head of the Finnish Creative Commons project, which was the second to port the licenses into its local jurisdiction, described the rationale behind license porting as a “growth strategy [...], a way to grow fast, [to] get the community interested in the whole process.”

¹⁹ See <http://wiki.creativecommons.org/Metrics> [accessed: 30 August.2008]

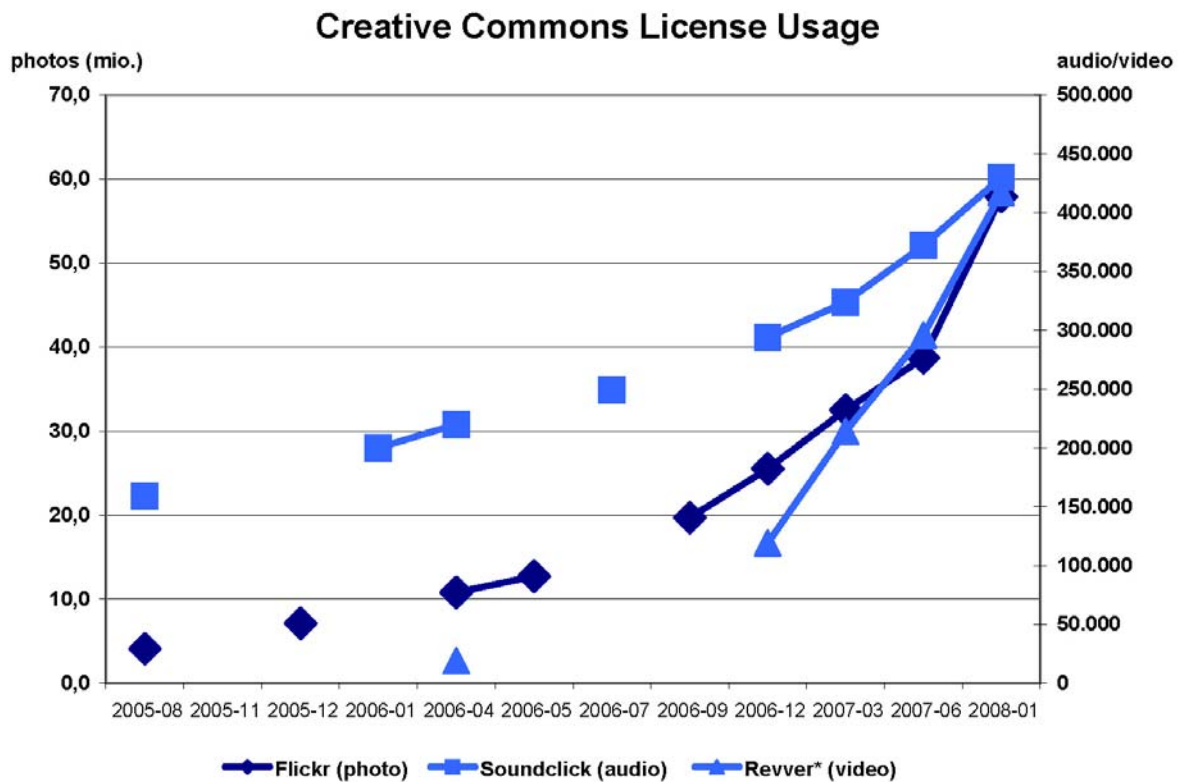


Figure 2: Usage of Creative Commons licenses in different fields of application by number of works available in three content hosting services. (*Revver is an overestimate, probably the total number of uploads; data obtained from http://wiki.creativecommons.org/License_statistics [June 26, 2008])

For porting the licenses into other jurisdictions and for promoting the licenses among creators, Creative Commons teamed up with local affiliate partners. In all jurisdiction projects, one affiliate is responsible for the legal translation of the license (“legal project lead”) and – in the majority of jurisdiction projects – another one predominantly deals with the community of license users (“public project lead”). This distinction is in part reflected by the type of affiliate organizations: Most legal project leads are university law schools – often departments with prior experience in free/open source software licensing – and law firms, whereas many public project leads are non-governmental organizations with political motives. The former not only port the licenses into their jurisdiction but also participate in further development of the licenses at special meetings and conferences for lawyers. The latter are best characterized as social movement organizations (Zald and Ash 1966), which perceive themselves as being part of a global “environmentalist movement for culture,” as Creative Commons founder Lawrence Lessig put it.²⁰

²⁰ The head of the German public project lead “newthinking communication” – a hybrid between political non-governmental organization and for-profit company – expands on the similarities to traditional environmentalism by differentiating between mere license users and himself as a more conscious activist: “There is probably a gut feeling of supporting a good cause – comparable to many people who don’t know exactly the consequences of

The relationship between the focal Creative Commons organization and its affiliates is probably best described as a form of “political franchising”: The affiliate organizations and Creative Commons sign a “Memorandum of Understanding” (MoU) that predominantly deals with Creative Commons as a brand. License porting procedures in turn are standardized but not formally regulated. All other aspects of the affiliates’ work such as local events, funding or thematic priorities are up to them to decide. As a result, different jurisdiction projects focus different fields of application, for example the education sector (Austria), digital archiving (Taiwan), video and film (Poland) or music (Spain and Germany). Theoretically, this combination of a focal organization and a multitude of very autonomous partner organizations is similar to what is called “strategic network” in the realm of business and management studies (Sydow 1992; Jarillo 1993).

Discussion and Conclusion

Comparing the two forms of copyright regulation – standardization of DRM technology and of copyright licenses – reveals an enormous level of contingency within the respective regulatory processes. (see Table 2).

	CPTWG / SDMI	Creative Commons
Field related characteristics		
<i>Internal front lines</i>	<ul style="list-style-type: none"> ▪ Content providers vs. hardware manufacturers 	<ul style="list-style-type: none"> ▪ Copyright radicals/abolitionists vs. copyright reformists
<i>Perceived Threat</i>	<ul style="list-style-type: none"> ▪ Large scale copyright infringement (“piracy”) 	<ul style="list-style-type: none"> ▪ Industry controlled DRM regime
Relation to copyright legislation	<ul style="list-style-type: none"> ▪ Complement and expand copyright protection 	<ul style="list-style-type: none"> ▪ Neutralize or alleviate copyright protection
<i>Allies</i>	<ul style="list-style-type: none"> ▪ Established artists ▪ Copyright collectives 	<ul style="list-style-type: none"> ▪ Selected, avantgardistic artists ▪ Quasi actors (filesharing scene, users of commons-based services)
Organizational characteristics		
<i>Dominant Actors</i>	<ul style="list-style-type: none"> ▪ Transnational corporations ▪ Trade associations 	<ul style="list-style-type: none"> ▪ Social movement organizations ▪ Epistemic lawyer community
<i>Resources</i>	<ul style="list-style-type: none"> ▪ Financial resources ▪ Political lobbying power 	<ul style="list-style-type: none"> ▪ Grassroots activism ▪ Political identity and motivation
<i>Modes of coordination</i>	<ul style="list-style-type: none"> ▪ Informal (CPTWG) and formal (SDMI) standard setting bodies ▪ Conferences 	<ul style="list-style-type: none"> ▪ Formal standard setting organization ▪ Mailing lists ▪ Conferences
<i>Selection of regulatory alternative</i>	<ul style="list-style-type: none"> ▪ Negotiation among experts and market competition 	<ul style="list-style-type: none"> ▪ Negotiation among experts

Table 2: Comparison of private copyright regulation initiatives

energy saving but know that it helps preserve our environment. Similarly, using Creative Commons licenses preserves or cultivates an information ecology, a sustainable handling of digital resources. I am aware of this relationship but I assume the majority is not.”

Just looking at the idiosyncrasies of the copyright field (see first half of Table 3) probably cannot explain why Creative Commons was more effective than their industry-led counterparts in dealing with antagonistic groups of actors and their interests in the course of their respective regulatory endeavour: *First*, in both cases, internal front lines divided different interest groups; while conflicting economical interests separate content providers and hardware manufacturers on the industry side, there are also several conflicting approaches of how to best challenge restrictive copyright and DRM on the other side. In fact, copyright radicals like pirate parties²¹ or copyright abolitionists (see Boldrin and Levine 2008 for a recent example) have always questioned Creative Commons' reformist approach as eventually stabilizing and strengthening copyright law. *Second*, again in both cases, an external threat initiated and fostered collaborative action. While DRM standardization together with political lobbying for stronger copyright protection clearly was a reaction to the challenge posed by file-sharing and online "piracy", Creative Commons in turn was a counter-reaction to these very developments. *Third*, established artists and copyright collectives participated in (campaigns for) DRM standardization while Creative Commons could count on selected groups of dissident or avantgardistic artists as well as on the rapidly growing number of users of commons-based services.²²

So, while both regulatory endeavours had to cope with comparable challenges, they addressed them within completely different organizational frameworks (see second half of Table 3). Different carrier organizations – large transnational corporations and trade associations on the one hand, a network of relatively small non-profit organizations on the other hand – not only go along with different sets of resources (e.g. financial resources vs. grassroots activism) but also require different modes of coordination: Due to budget constraints of Creative Commons' mostly non-profit partner-organizations, conferences and meetings play a much weaker role for coordinating the standard-setting process compared to the much more frequent meetings of the CPTWG or SDMI working groups.²³ As a substitute for personal meetings, license developers and users around Creative Commons rely mostly on discussions via mailing-lists or participate predominantly in regional meetings. As can be seen by looking at the data derived from Creative Commons mailing-lists in Table 3, a substantial amount of communication occurs both on transnational and on jurisdiction specific mailing-lists.

²¹ Pirate parties have been formally established in more than 20 countries, see <http://www.pp-international.net/> [accessed: 07 April 2009]

²² This group of "mere" users of commons-based services such as Wikipedia or Linux can be conceptualized as a "quasi-actor" in the sense of Mayntz and Scharpf (1996) and Dolata (2003).

²³ In the beginning, the CPTWG met nearly weekly and drew participants from the U.S., Japan and Europe, before it later on switched over to monthly meetings (Marks and Turnbull 1999).

Contrariwise, a CPTWG participant described the usage of the single mailing-list as merely administrative, such as for scheduling presentations.

	<i>Mailing lists</i>	<i>Posts</i>	<i>Active User*</i>
<i>Total</i>	59	35.952	3.834
<i>Transnational</i>	15	17.297	1.696
<i>Jurisdiction specific</i>	44	18.655	2.129

* users that have made at least one post; overestimate due to multiple registration by individual users

Table 3: Posts and active users on openly accessible Creative Commons mailing-lists from 2002 to 2008 (October).

When it comes to decision making neither of the two approaches under study is very transparent or formalized. A major difference, however, is the degree of (market) competition between different standards: While corporate interests and antitrust law (Levy 2000) led to competing development of DRM standards – partially even in the market as in the example of PressPlay and MusicNet (Rosenblatt et al. 2002) –, Creative Commons licenses are developed centrally by an increasingly transnational community of copyright experts. At least so far, this group was very fast in reacting to and incorporating criticism in new license versions or by the development special purpose licenses.²⁴ Even more, after initial scepticism and due to series of confidence-building measures,²⁵ the Free Software Foundation (FSF) has agreed to make its GFDL compatible to the Creative Commons “Attribution Share Alike” license, which further reduces license competition and at the same time significantly increases the amount of Creative Commons licensed content. So, one could speculate that the political origin of Creative Commons and the political nature of many affiliate organizations made it better equipped for managing a political process of negotiating regulation.

Conclusions

Evaluating difficulties and success of private regulatory initiatives on both sides of the aisle in the field of transnational copyright regulation leads us to the following key findings: First, private regulatory initiatives of one group of actors may be a reaction to and thus an (unintended) consequence of another attempt of – private or public – regulation. Second, private regulation requires building upon and responding to users’ practices more immediately than classic regulation. In the copyright field, compatibility of regulatory efforts

²⁴ Not only has Creative Commons after five years already arrived at license number 3.0 but it has also released a special public domain license (CC0) and a version optimized for commercial use (CC+).

²⁵ For example, then Creative Commons CEO Lawrence Lessig regularly acknowledged and emphasized the impact and importance of the Free Software Foundation in general and Richard Stallman in particular on his blog, see for example http://www.lessig.org/blog/2006/09/fsfs_important_step.html and http://www.lessig.org/blog/2008/11/enormously_important_news_from.html [both accessed: 07 April 2009]

with new and booming modes of distribution (e.g. file-sharing) or creation (e.g. remixing) are essential for acceptance and usage, which directly constitute regulatory legitimacy. Third, echoing Teubner's (1998) "dialectics of private governance", processes of private regulation in the market arena cannot overcome the inherently political nature of regulatory processes. Establishing a prosperous market is not only both means and end of private regulatory endeavours but is also a public political good.

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