

# Conflicts About Intellectual Property Claims<sup>\*</sup>

## The Role and Function of Collective Action Networks

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### 1. Introduction

Intellectual Property Rights (IPRs) have become an increasingly contentious issue over the last two decades. Conflicts have been most visible in five policy fields:

In the area of the *green biotechnology* the interests of the manufacturers of genetically modified seeds stand against interests of local farmers, whose traditional practice of keeping part of their harvest for resowing interferes with the patent protection of genetically modified plants. Conflicts have developed as well about the possibility of patenting indigenous plants (Sell 2002).

Political controversies can also be observed around the question of the *patent protection for pharmaceuticals*. In many developing countries, and in particular in sub-Saharan Africa, intellectual property rights stand frequently against public interests to provide affordable medicine supplies for large parts of the population, especially in the context of the HIV/AIDS crisis.

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A third conflict area has developed around the so-called red biotechnologies, i.e. the *genetic engineering within the field of medicine*. Contested here is the relationship between economic interests, moral and ethic norms when it comes to questions of the patentability of genetic sequences of higher life forms.

Conflicts have developed as well with regard of *access and use of copyrighted works*. A growing movement that has most recently led to the foundation of so called pirate parties in several European countries is questioning whether the current copyright regime unfairly restricts access to cultural works while at the same time, legal frameworks to criminalize unauthorized copying and distribution of music and videos are being strengthened.

And finally *software patents* have become a site of conflict where not only different business models but also different vision of the knowledge society clash.

While in the majority of these conflicts the conflict line still runs between the north and south, IP regulation has also become a contentious issue in the northern hemisphere. IP issues there no longer only attract the attention of the rights-holders. Instead law-makers are increasingly confronted with opposition from civil society and sometimes even business organizations. But despite their increased political visibility not much is known about the social and political processes that lie beneath these conflicts. Which actors are involved in these conflicts? How do they position themselves in these conflicts? Do these conflicts follow the classical left/right or north/south divide? Which regulatory models do different actors implicitly or explicitly propagate? Which coalitions are forged?

To get a better picture of the structure and dynamics of IP conflicts we have decided to focus our attention on »pure« IP conflicts, i.e. conflicts in which the appropriateness of the equation »more protection of intellectual property = better economic performance« is not challenged through the introduction of »other« normative and ethical considerations like food security, public health, conservation, and bio-diversity, but in which the validity of the equation itself is questioned.

More specifically we have analyzed the conflicts around two recent EU directives – the first EU directive on the enforcement of intellectual property rights (IPRED 1) and EU directive on the patentability of computer-implemented inventions (Softwarepatent Directive). The study aims to explain why in the first case the decision making process

followed the dominant maximalist rights culture, while in the second case the arguments of the proponents of alternative regulation modes have been heard. We argue that dynamic relational aspects are crucial to understand the structure of the conflicts and to explain their outcomes. It is important to take a closer look at the relations between the actors and at the characteristics of the networks. Therefore, we examine collective action networks, coalitions, and – additionally – framing processes. We will show that the structure of the action networks has an impact on the decision making processes and on the actors' chances to influence this process.

## **2. IP Conflicts**

Conventional wisdom in the economic literature is that OECD countries profit most from strong IPRs (Maskus 2000). One would therefore expect to find only relatively low levels of contention around IPR issues in these countries. And indeed, until recently this generally was the case. Copyright, patent regulation and other areas of IP legislation usually have not been strongly disputed. Internationally the major conflict line ran between the Global North and the South, as the latter tended to consider strong IPRs as development barriers. But in the last decade this picture has become significantly more complex.

IP issues have increasingly become international issues as regulatory authority has shifted away from the national level to trans- and supranational institutions like the World Intellectual Property Organization (WIPO) and the 1994 agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The dominant regulatory frameworks embodied in these institutions and agreements follows a »maximalist rights culture« (Boyle 2004: 2) that has led to the continuous expansion in breath, scope, and durations of intellectual property protection over the last 30 years. The basic assumption of this dominant model is that more protection of intellectual property rights leads to more innovation and thus to more economic growth and competitiveness (Fischer 1999, Schneider 2005).

But with the growing economic and political importance of IPRs we are witnessing a growing number of conflicts as well. Especially the TRIPs agreement has raised the general political awareness on IP issues. Some authors claim that conflicts around IPRs have become »one of the keys areas of conflict in the global political economy« (Sell und May 2001: 467) over the last 20 years.

More and more actors from academia, politics and civil society have started to take a closer look at the societal profits and costs of the current IP regime. They have begun to ask questions about whether, indeed, society as a whole would profit from strong IPRs or whether only a limited number of economic players will benefit. NGOs have campaigned against strong IPRs in the pharmaceutical industry because they would effectively function as a barrier against access to affordable medicine in the Global South (Drahos and Braithwaite 2003; Hein 2007; Hein and Kohlmorgen 2007; Sell 2002). And a strong group of developing countries<sup>1</sup> is trying to redress some TRIPS issues via the introduction of a »development agenda« at the World Intellectual Property Organization (WIPO).

The conflicts we analyze here have developed between 1997 and 2005 around two proposed EU directives. The actors involved were the European institutions, national parliaments, international organizations, single firms and business associations, NGOs and social movement organizations (SMOs). In all actor categories there was disagreement towards the proposed IP regulations. We had business associations lobbying for and against the directives, national governments against and in favor of the directives, support and opposition in the European Parliament and even disagreement in the Commission. Considering the fact that our case deals with IP policies in a transnational/supranational setting, where different actors have tried to influence the European policy making process, three areas of research seemed to be promising to search for clues that could explain the development and outcomes of the two conflicts?

## **2.1. IP in the knowledge economy**

Research on IP policies from a social science perspective is scarce and focuses mostly on the TRIPS agreement. In contrast, a large number of studies from a legal or economic perspective has addressed IPRs national and transnational IP policies in general and myriads of specialized legal aspects. But as Bakels and Hugenholtz have pointed out this research has one major flaw: »The abundance of opinions, promises, theories, fears and concerns expressed about the patent system into the course of literally centuries is by no means matched by factual data« (Bakels and Hugenholtz 2002: 18 f.). Our knowledge about the consequences and costs of different IP strategies is still rather lim-

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<sup>1</sup> The so called »Friends of Development« (FoD) consist of Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, Uruguay and Venezuela.

ited if we look beyond single firms at national economies, national societies, and even more transnational social and economic structures. Maskus (2000) suggests that there is a curvilinear relation between economic development and the strength of IP protection and that incentives for strong IP protection fall as countries develop their industrial infrastructure and only rise after reaching a certain threshold of economic productivity. But his data reflects only the status quo and his projection implicitly implies that countries usually will become IP exporters during their economic development.

Moreover the existing research literature focuses almost exclusively on the perspective of IP rights holders. They do not account for the social costs of monopolies or the economic and social opportunities of alternative strategies of knowledge regulation.

The social costs of strong IP regimes are usually addressed only from an activist's perspective, when NGOs like Oxfam, Médecins sans Frontières, the Electronic Frontier Foundation, the Third World Network and others point to consequences of current IP regimes in the form of high – and for many countries in the Global South, unaffordable – prices for medicine, seeds, or software (Drahos and Mayne 2002).

Existing literature on IP policies helps us to understand the rationale of the existing IP regulation system, describes how this system has developed, gives us an insight in the rights holders' perspective and a glimpse on the conflictuality of IP when it comes to food security and health issues. Meanwhile it also outlines alternative models of IP governance.<sup>2</sup> However, it does not explain how actors advocate for alternative IP protection strategies or open access models and how they achieve acceptance for the and establish them.

## **2.2. Interest Groups in the European Polity**

Both our conflicts were characterized by intense lobbying and political mobilizations. An avenue to look for explanations for the outcomes of the conflicts would therefore be the sizable literature on interest groups in Europe. This literature was initially dominated by the question whether neo(corporatist) or pluralist structures of interest representation would develop in Europe (Eichener and Voelzkow 1994; Eising and Kohler-Koch 1994; Mazey and Richardson 1993; Streeck and Schmitter 1994). In the meantime a

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2 For example, in the field of health the Commission on Intellectual Property Rights, Innovation and Public Health gathered many experts, who produced papers and a final report, which provide alternatives to the current system of international IP protection see: <http://www.who.int/intellectualproperty/en/>

large agreement exists that neither model can sufficiently describe the specific arrangements in the European Union. The complex multi-level system of European governance rather combines supranational and intergovernmental elements of decision making and is shaped by a strong functional segmentation, where the possibilities of interest groups differ decidedly from existing national and international settings (Benz 2003, 2004; Eising 2004; Hooghe and Marks 2001; Kohler-Koch 1997, 1999; Marks, Hooghe and Blank 1996; Scharpf 2002). As an action and governance system *sui generis* it is characterized by a multiplication of the negotiation arenas.

Following Olsons (Olson 1968) classical theorem that incentives to invest resources in the realization of collective goods diminishes with group size, studies on interest representation in Europe usually assume that small groups with specific interests or individual large firms have the best chances influence policies (Eising and Kohler-Koch 1994). This general asymmetry should be even more pronounced at the European level as interest representation there requires actors to be active on multiple levels of the multi-level governance system simultaneously. A prerequisite that requires resources usually available only to national states and large, mostly transnational, firms (Bennett 1999; Bennett 1997; Bouwen 2002; Buholzer 1998; Eising 2004; Grande 1996; Kohler-Koch 1996; Kohler-Koch, Conzelmann and Knodt 2004).

Studies from an exchange theory perspective (Bouwen 2002, 2004) largely support this argument, stating that influence depends on the actor's ability to provide the specific critical access good for the respective institution (expert knowledge, information about the European and domestic encompassing interest) which large firms and national or European associations are able to provide best. Others stress that the duration of mutual relationships with European institutions is a critical factor (Broscheid and Coen 2003; Eising 2004). Again resourceful actors are in a better position to establish continuous contacts with the relevant European institutions.

The mainstream of research on interest groups in Europe clearly sees public and social interests as well as small and middle enterprises (SMEs) in a disadvantaged position compared to international firms and large business associations. They usually neither have the necessary resources to establish a continuous presence in Brussels nor can they satisfy the specific information and knowledge needs of the two most powerful European institutions, the Council of the European Union and the Commission (Burns 2004; Hayes-Renshaw and Wallace 1997). Peterson and Bomberg summarize accordingly that »the European Union is a ›mobiliser of bias‹ not only in favour of states, but also in

favour of private interests that are most powerful at the state level« (Peterson and Bomberg 1999: 27). In contrast, consumers, workers or civil society groups would be structurally disadvantaged in this setting.

It is argued that these groups might compensate their structurally weak position with politicizing contentious issues (Beyers 2004; Kohler-Koch 1997), but until now no systematic research has founded this proposition.

The strength of interest group research is that it helps us to understand the structural unevenness of the political playing field. It shows how the resourcefulness of an actor usually corresponds with its ability to get its interests heard, or more precise how different key resources matter at different levels of the European governance system. Over all, the EU literature focuses mainly on strong actors and elite interaction (Imig and Tarrow 2001) and is not well suited to explain the occasional success of actors that are regarded in this perspective as weak. Moreover, actors are regarded as strong or weak mainly because of their resources. This static view ignores the possibility that in some conflicts relational aspects may be more important than actor characteristics, and that in these conflicts not the attributes of different actors but the structure and dynamics of networks of interaction might explain success or failure.

### **2.3. Social Movements and Protest in Europe**

Social movements research adds exactly these two perspectives. Its focus is mostly on so called weak actors and it pays close attention to networks of interaction in mobilization processes. For our cases four aspects that have been addressed from different strands of social movement research are important:

1. Studies from the political opportunity structure perspective (Kriesi 1995; McAdam 1996; Tarrow 1994; Tilly 1978) claim that the relative openness or closure of the political system, the stability of political alignments, the availability of elite allies and the state's capacity and propensity for repression structure the chances for social movements to influence decision making processes. In European policy conflicts it would therefore be advisable to look for alliance structures, especially with strong allies, and to analyze political differences between the European institutions.
2. Proponents of the framing approach (Benford and Snow 2000; Gamson, Fireman and Rytina 1982; Snow and Benford 1988; Snow et al. 1986) highlight that the discursive level – besides sufficient resources – has to be taken into account to explain success o

failure of social movements. To mobilize a relevant number of adherents social movements have to construct collective action frames that join diagnosis and solution of a problem convincingly together. Especially for weak actors the construction of persuasive master frames is a central element to counter their lack of resources.

3. Constructivists go even further and stress in their research the necessity of developing a collective identity as a prerequisite of collective action (Gamson 1992; Haunss 2004; Melucci 1995, 1996). Following this line of thought weak actors should therefore try not to act as a (lose) coalition of individual interest but to construct some sort of collective identity that allows them to identify the field of opportunities and constraints of their action and that holds them together as a collective actor.

4. And finally studies that conceptualize social movements as collective action networks (Diani 2003) direct our attention to the various interactions that form what is often erroneously perceived as a single collective actor.

#### **2.4. The dynamics of interaction in IP conflicts**

Traditional research on interest groups explains the capacities of mostly economic actors to influence policies on the basis of their static characteristics. Using attributes like financial and informational resources, power potentials and governance capacities existing studies conclude that general and social interests and also small and mediums-sized enterprises are structurally disadvantaged and should therefore be regarded as weak actors without significant influence.

But in our cases – as we will show in the next chapter in more detail – this reasoning cannot explain the outcomes of the two conflicts. Of course we agree that actors with many resources are normally in a better position to influence decision making than actors with little resources. However, such static actor attributes are not a sufficient condition for political influence and not the only variable to explain an actor's position and its potential influence in the decision making process. Resourcefulness alone could neither explain the success of one industry group in the IPRED 1 conflict nor could it explain the defeat of the proponent of software patents in the other case. Instead we argue that dynamic relational aspects are often central: The relation between the actors and the character and constitution of the network can also be a factor that affects decision making processes and increases influence of particular actors. We therefore should look for collective action networks, coalitions, and framing processes to understand the structure



of the conflicts and to be able to explain their outcomes. Using elements from social movements research and network analysis we therefore have developed an explanatory framework that is better suited to analyze our two IP conflicts, and we maintain that it will also have a superior explanatory capacity in other IP conflicts.

We argue that the following network related aspects affect the decision making process and the actors' ability to exert influence:

- a) Rationale, occasion and objective of networks: For example, are networks situational and focused on specific issues? Or do they exist independently of specific issues and occasion as permanent networks? Where there networks before and after the conflict?
- b) Composition of the networks: For example, are they based on personal or organizational membership? It is also important, if networks are rather broad or include only few actors.
- c) Form and scope of mobilization: It can have some impact on the course of the conflict if networks are characterized by grassroots mobilization.
- d) Density of networks and collective actor: It is assumed that groups of actors have the chance to exert influence particularly when they appear not as loose alliance of disparate special interests but as dense network and as coherent collective actor with a clear profile.
- e) Framing and common definitions: This relates to the discursive strategies and the arguments that are put forward by the actor. Conflicts are framed in specific ways. The success of alliances and networks depends substantially on the ability to agree on common problem definitions and to develop common strategies and action alternatives.

Thus, we argue that based on dense, broad and situational networks with a clear profile, weak actors can have a considerable influence on decision making processes. Guided by these propositions we can now analyze the conflicts on the Software Patents Directive and on the Enforcement Directive in the following chapter.

### **3. Conflicts about the EU directives on software patents and IP enforcement**

The two directives that we have chosen have played a central role in shaping the regulatory framework for intellectual property rights in the EU during the last decade. Both directives have been introduced and decided in a similar time frame between 1997 and 2005. They have been subject to the codecision procedure in which agreement must be

reached between the European Parliament and the Council. They were drafted in the same directorate general of the Commission (DG Internal Market), and in both cases they were confronted with opposition from stakeholders who tried to influence the decision making process in their favor.

The »directive on the enforcement of intellectual property rights« (IPRED 1) aims to strengthen and harmonize the enforcement of intellectual property rights, including copyright, trademark and patents, in the EU member states. It requires all member states to apply »penalties which must be effective, proportionate and deterrent« (COM 2003: 19) against counterfeiting and piracy. The directive gives rights holders more possibilities to prosecute counterfeiters and other infringers using civil law measures. Rights holders e.g. shall be able to call on judicial authorities to issue an interlocutory injunction to prevent further infringement of intellectual property rights or to demand destruction of counterfeited goods.

The »directive on the patentability of computer implemented inventions« was intended to introduce patents on inventions »implemented on a computer or similar apparatus which is realised by a computer program« (COM 2002: 13). Whether this definition would include »software as such« which is explicitly exempted from patentability in the European Patent Convention was highly disputed among the opponents in the conflict around this directive. Certainly the opponents of the directive succeeded in framing it as the »Software Patent Directive« and only the core supporters were talking about the CII directive.<sup>3</sup>

If we compare the scope of these two directives we see that the subject areas affected by them differ significantly. The Enforcement Directive touches several issues such as intellectual property rights in music, movies, drugs, luxury goods, automotive spare parts and initially also software, and it includes different forms of intellectual property rights, such as patents, copyrights and trademarks. The Software Patent Directive had a much narrower scope. For potential mobilizations the broader and the narrower scope might have advantages and disadvantages. A broader issue might appeal to a larger constituency that is affected by the directive. At the same time the breadth of the issue might hinder effective mobilization as it might be less easy to construct a convincing overarching collective action frame. The narrow focus of the Software Patents Directive may, in contrast, make it easier to construct a collective action frame, while – like in

many single issue movements – frame bridging, i.e. building coalitions with others not directly affected by the directive, might become more complicated.

Aside from this the similarities between the two directives are striking. As we can see in table 1 the time frame and the institutional setting of both directives was nearly identical.

**Table 1: Decision Making Process of the Software Patents and IP Enforcement Directive**

<b>Software Patents</b>	<b>IP Enforcement</b>
June 1997: Green Paper: Promoting innovation through patents (COM(1997) 314 final)	Oct. 1998: Green Paper: Combating counterfeiting and piracy in the single market (COM/98/0569)
European practice: European Patent Convention (EPC) and most member states' national patent laws clearly prohibited granting patents for software »as such«, but in the practice of the European Patent Office (EPO) a significant and steadily growing number of patents were nevertheless granted for software solutions.	European practice: Different legal frameworks. Product piracy and copyright infringement were illegal in all member states, but the actual legislation differed in breadth and scope.
1999: the Commission launched a consultation via the Internet on the patentability of computer-implemented inventions it received 1450 responses in the two months of the consultation. 91% of the responses to the Commission consultation rejected the proposed patentability of software	March 1999: Consultation in Munich
Feb. 2002: COM publishes a »Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions« (KOM 2002).	Jan. 2003: COM publishes a »Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights«
Codecision Procedure	Codecision Procedure
Sep. 2003: Parliament adopts a series of substantial amendments and changes to the proposed directive that de facto largely reversed the Commission's intentions.	March 2003: Parliament adopts a series of (mostly minor) amendments and changes.
March 2005: common position adopted by the Council that largely ignores the Parliament's amendments and changes.	April 2004: Council approves Parliament's first reading amendments.
July 2005: European Parliament decides in its second reading to refrain from trying to change and/or amend the directive again and instead rejected the directive with a huge majority of 648 to 14 votes.	
<b>Directive failed</b>	<b>Directive approved</b>

3 According to a former commission employee even the Commission circulated its the preparatory documents with filenames containing »swpat«.

We can see here that it took little over four years from the initial Green Paper to the Commission's proposal for the IP Enforcement Directive and another 15 months to reach a final decision. In the case of software patents it took only a little longer – four and a half years – from the Green Paper to the proposal, but another three and a half years until the proposal was finally rejected. While we witness a heated debate about the pros and cons of software patents – an issue that seemed from the outset much less controversial – we see a relatively smooth and undisturbed legislative process in the case of the IP Enforcement Directive where one could have expected much more conflict as the directive touches upon issues like file-sharing that have received much more public attention than the arcane issue of software patents.

Both legislation processes were carried out under the codecision procedure, which requires the Council and the European Parliament to agree on an identical text before the proposal can become law. They can do so after the first reading (e.g. in cases where there is a general consensus or time pressure). Otherwise, there is a second reading in each body. While this institutional setting was identical, the de-facto decision-making process differed significantly: In the case of the Enforcement Directive, the decision-making process was considerably speeded up through the introduction of a so called trialogue; i.e. informal meetings and negotiations between the European Parliament, the European Commission and the Council of the European Union. This has certainly affected the ability of weak actors to influence this process. The main actors involved in this legislative procedure wanted an adoption in the 1st reading in order to finish the legislative act before the EU enlargement in May 2004. There were concerns that the new EU member states (with widespread IPR infringement in some countries) might complicate and slow down the decision-making process. This specific form of decision making lead to reduced avenues of influence for informal and extraparlimentary opponents of this directive.

The Commission argued in both proposals with the need to harmonize the internal European market and to comply with international treaties. It furthermore claimed to strengthen with the directives the competitiveness of European industries in the world. De facto did the Commission not just aim to harmonize different national legal settings but followed a course of expansion of intellectual property rights.

In both cases the Commission received strong support by industry lobby groups that represented a number of powerful key players in the respective fields. But also in both cases business interests did not unanimously support the Commission's proposals. Ma-

major firms from the European telecommunications industry opposed the IP Enforcement Directive, and a large number of mostly SMEs opposed the Software Patents Directive. Civil society and consumer interest groups mobilized against the directives in both cases.

In the following we will analyze these actor constellation and the networks that were involved in both conflicts more thoroughly and discuss what we can learn from these networks about the influence of different actors – and in particular of weak actors – on the decision-making process. We will show that the analysis of the social networks is better suited than traditional power analysis to explain why the conflicts did not end with a clear victory for the proponents of both directives.

### **3.1 The Software Patent Directive**

In the case of the Software Patents Directive the actor network comprises about 800 actors. This includes six large membership and support networks. On the side of the proponents these are the formal membership network of the European Information & Communications Technology Industry Association (EICTA) with 37 national associations and 50 companies and the Business Software Alliance (BSA), presenting itself on its website as »the voice of the world's commercial software industry and its hardware partners«. Even though some relevant companies are members in both associations (SAP, Intel, Adobe Systems, Apple and Symantec), the network data shows that there was not much cooperation between EICTA and BSA. This may be due to the latent rivalry between the two association as to who represents the major high-tech industries in Europe.

On the side of the opponents the only formal membership network is that of the Foundation for a Free Information Infrastructure (FFII). The EuroLinux Alliance, Economic-Majority.com and patentfrei.de are support networks that are actually much larger than depicted in the network graphics.<sup>4</sup>

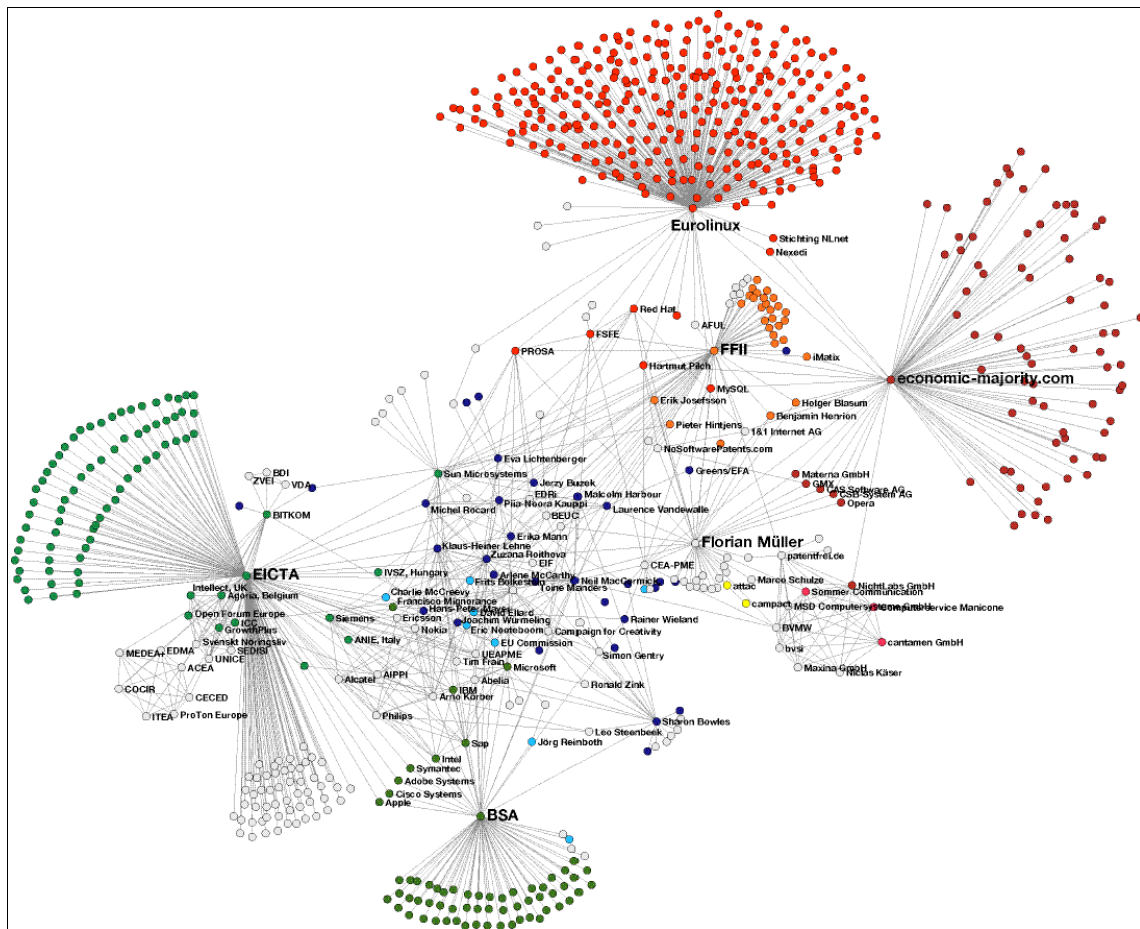
The most important difference between the proponents' and the opponents' networks is that the latter did not exist before the conflict. Preexisting networks of e.g. the SME business associations CEA-PME and UEAPME have played only a minor role and did

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4 The Visualization shows only the most important section of these support networks: In the case of the EuroLinux Alliance these are the firms and individuals mentioned as sponsors, in the case of economic-majority.com these are those supporters with financial contributions of 100 € and more. In the case of the German patentfrei.de network we show only those actors that have signed a number of central statements or have been mentioned as regional representatives.

not contribute much actively to the mobilization and the framing in the conflict – even though they provided some infrastructural support. CEA-PME cooperated closely with FFII and used their established contacts to MEPs, however these MEPs were not important in the decision making process. Most of the opponents’ network emerged and was actively constructed during the mobilization. We can therefore define this network as a situational network.

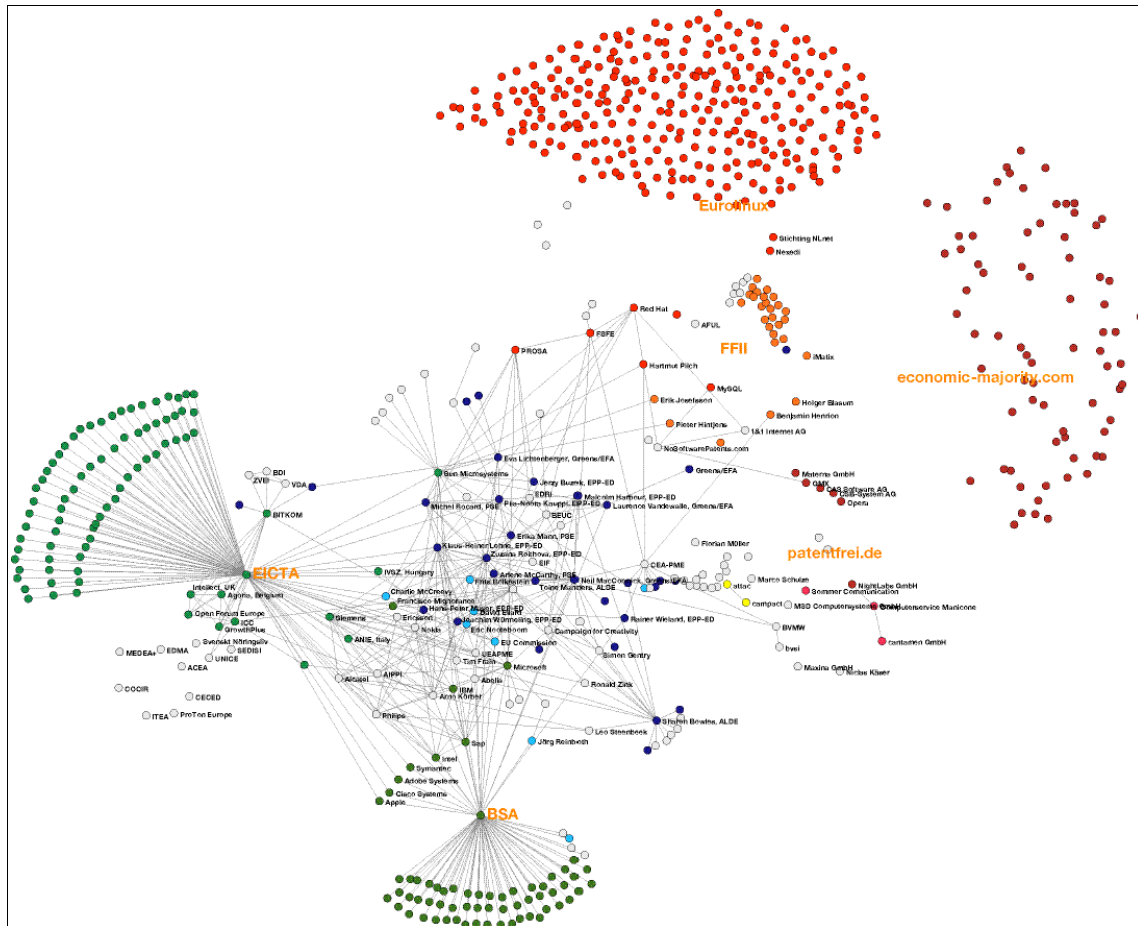
**Figure 1: Software patents network during the conflict**



This ad-hoc character of the oppositional network was combined with a narrow thematic focus on just one issue: software patents. We therefore see a situational single issue network. This means that the participating individual and organizational actors joined the network for just this reason so that many of them show a great commitment and dedication. The majority of those participating in the oppositional network were individual software programmers or small software companies. Actors from other sectors also joined the network with the clear objective to prevent the directive.

On the other hand, the preexisting large membership networks of the proponents were neither situational nor focused on a single issue but already existing and occupied with many issues, of which one was the Software Patent Directive. Thus, the overall proponent network had a continuous character and its members brought in different interests and different reasons for being part of the network.

**Figure 2: software patents network before the conflict**



The situational and focused character may be one reason for the high density of the oppositional network. Besides some central organizations and firms many individual actors are involved. The network is highly interwoven, but shows at the same time a low level of overlapping. Indeed, the campaign Economic-Majority.com is a kind of spin-off from FFII, but our network analysis shows that it is not the same persons and organizations just with different clothes. The companies and organizations supporting Economic-Majority.com are mostly not members of FFII, and between Economic-Majority.com and the EuroLinux Alliance there are as well only few overlaps. FFII is the central actor which – together with some very important individuals such as Hartmut

Pilch, Benjamin Henrion (both FFII) and Florian Müller (nosoftwarepatents.com) – holds together the different smaller networks and actors.

The network analysis shows that the opponents managed to build a broad and diversified and at the same time flexible network. Whereas the network of the proponents was also relatively big, it was much more institutionalized and had only few important nodes. For example, only few lobbyists contacted the MEPs, whereas the many different actors from the opponents' network contacted them. These manifold avenues of influence can be seen as another reason for the success of the »No Software Patents« camp.

The mobilization against the Software Patent Directive shows many characteristics of a grassroots mobilization. Many directly affected and committed actors took actively part in the campaign by writing papers, uploading websites, organizing demonstrations and lobbying MEPs. The network was very open so that interested actors were able to participate. This kind of grassroots mobilization had also an effect on the discursive level: As committed individuals they had a high level of credibility among many MEPs.

Another strength of the oppositional network was its transnational and decentralized structure with bases in almost all EU member countries. They utilized the multilevel structure of the EU by being active at the European level but also at the national level where they lobbied national governments, parliamentarians and parties.

In spite of the plurality of the network as a whole, the FFII was – as noticed above – in its centre. It was not only a central functional node in terms of connecting different actors and providing an infrastructure but also an actor that provided the opponent network with expertise and patterns of interpretation and argumentation. It played a central role in the opponents' collective action framing.

The master frame of the mobilization ties together competitiveness, innovation, and SMEs. It was argued that only big companies would benefit from software patents, because only they would be in a position to use the patent system efficiently and to bear the financial and temporal costs of patent research and application. As in the field of software development most big companies are based in the USA while the large majority of European software developers work in SMEs, the directive would in fact hamper innovation in Europe and the competitiveness of European firms.

However, there was an amalgamation of these economic with other more political arguments. For example, the question of democratic procedures was raised as the Commission and the Council more or less ignored the amendments made by the European



Parliament. These arguments reflected the plurality and the flexibility of the oppositional network.

Our – preliminary – analysis of the discourses and framing processes in the software patents conflict shows that the actors of the opponents' network shared a common definition of the problem and agreed on joint strategies. The construction of a shared master frame was possible despite some marked differences between organizations in the anti software patents camp. Thomas Eimer (2007) distinguishes two different conceptual approaches how to treat software: Whereas the FFII favors a club good or open source approach, which guarantees some rights for the developer, other relevant organizations, such as the Free Software Foundation (FSF) champion the idea of free software as a public good or as common. This latter approach widens the largely economic perspective of the club good approach and takes up political and ideological arguments that are critical to capitalism and neoliberalism. However, this difference did not play an important role in the campaign. Although the discursive strategies and modes of framing correspond to the open and manifold structure of the network, which means that they are multifaceted, the software patent opponents were able to develop common approaches and to establish a master frame. Thus, this network – with FFII as the nucleus – succeeded to form a collective actor with a clear profile.

The proponents' argument was similarly shaped by a frame around innovation and competitiveness. However, they meant something different by using these phrases: They claimed that patents on computer implemented innovations would be a crucial factor for innovation in Europe. Patents would protect the investments in research and development and thus strengthen innovation. Not being able to file such patents in Europe would keep large companies from investing in Europe with the effects of a competitive disadvantage for European enterprises and for the whole European economy. Furthermore it was argued that many jobs were endangered if the directive would fail. During the conflict this framing was not adapted to the other side's arguments.

The proponents' network was characterized by a small number of central actors and an unanimous framing, but it nevertheless did not succeed to construct a collective actor. This can be explained by the relatively low intensity of commitment of individual network actors and by the fact that predominantly professional lobbyist were running the campaigns (such as Mark McGann of EICTA, Francisco Mignore of BSA and Simon Gentry of the Campaign for Creativity). The proponents did not manage to initiate a kind of political collective mobilization in which the participants would have been

able to form a collective identity. However, they tried to copy somehow the methods and forms of grassroots mobilization of FFII and the opponents. BSA, for example, gathered several SMEs to sign a petition arguing in favor of patents and the Campaign for Creativity tried to stage an astroturf campaign. But in the end EICTA and BSA – did not overcome their rivalries and try to build a strong and dense common network.

As might be expected, the MEPs were mostly not part of one of the two camps. They were usually contacted both sides and often cooperated with both. Only some individuals such as the Green MEP Eva Lichtenberger and the adviser to the Greens/EFA group, Laurence Vandewalle, were important nodes in the opponent network and at the same time important avenues to the European Parliament. The Commission was – in accordance to its pro- software patent position – more involved in the proponents network.

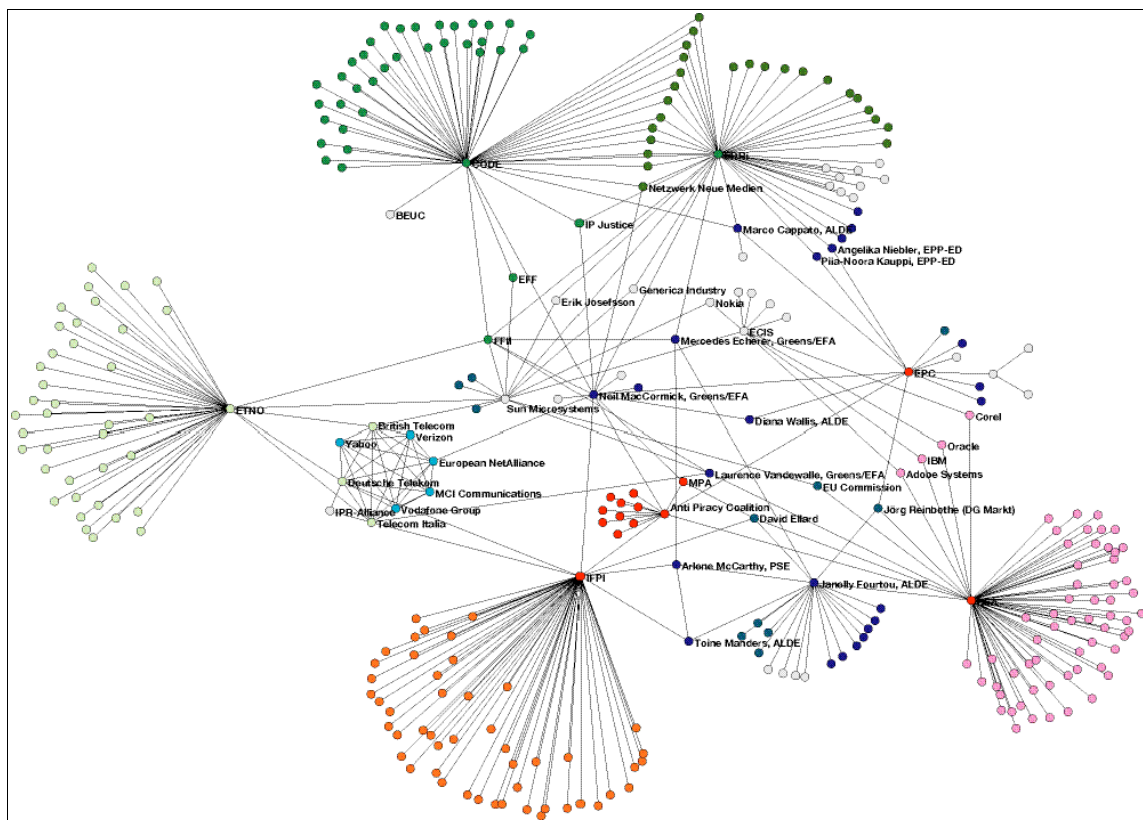
After a preliminary analysis of the framing in the software patent conflict we can state that the opponents network succeeded in establishing the master frame competitiveness and innovation of SMEs. Together with the frame democratic procedures this mobilized many affected enterprises and individuals and was attractive and convincing for many MEPs, who finally stopped this directive. Thus, the opponents, normally seen as weak actors, were very influential in the discursive realm and consequently in the whole decision making process.

### **3.2 Enforcement Directive**

The whole network of relevant actors involved in the conflict on the Enforcement Directive was much smaller than the Software Patent network (ca. 300 nodes). On the side of the proponents the main actor and sub-network was the International Federation of the Phonographic Industry (IFPI) with its members (50 national record industry associations and about 1400 companies in over 70 countries). Together with 12 other business association (among them BSA, Motion Picture Association, International Video Federation, European Newspaper Publishers' Association) IFPI formed the informal Anti-Piracy Coalition to fight product piracy in Europe and to lobby for an EU legislation against IP infringement and thus created a situational network that was focused on a specific issue. This Anti-Piracy Coalition under the leadership of IFPI was crucially involved in writing the first draft of the proposal for the directive and thus exerted great influence on the whole debate from the beginnings. The BSA was another important actor of the proponent camp. In contrast to the Software Patent Directive, where single

MEPs played important but not central roles, we here can also identify one MEP in the centre of the network: Janelly Fourtou (then EEP, now: ALDE), who was the rapporteur in the legislative process and who had close contacts to the above mentioned industry associations. She was also already involved in drafting the directive and actively campaigned for it. As Janelly Fourtou is married to the then CEO of Vivendi Universal, which has interests in restricting and fighting of illegal copying and downloading of music, she was accused by some organizations and MEPs of being biased and of pursuing private interests.

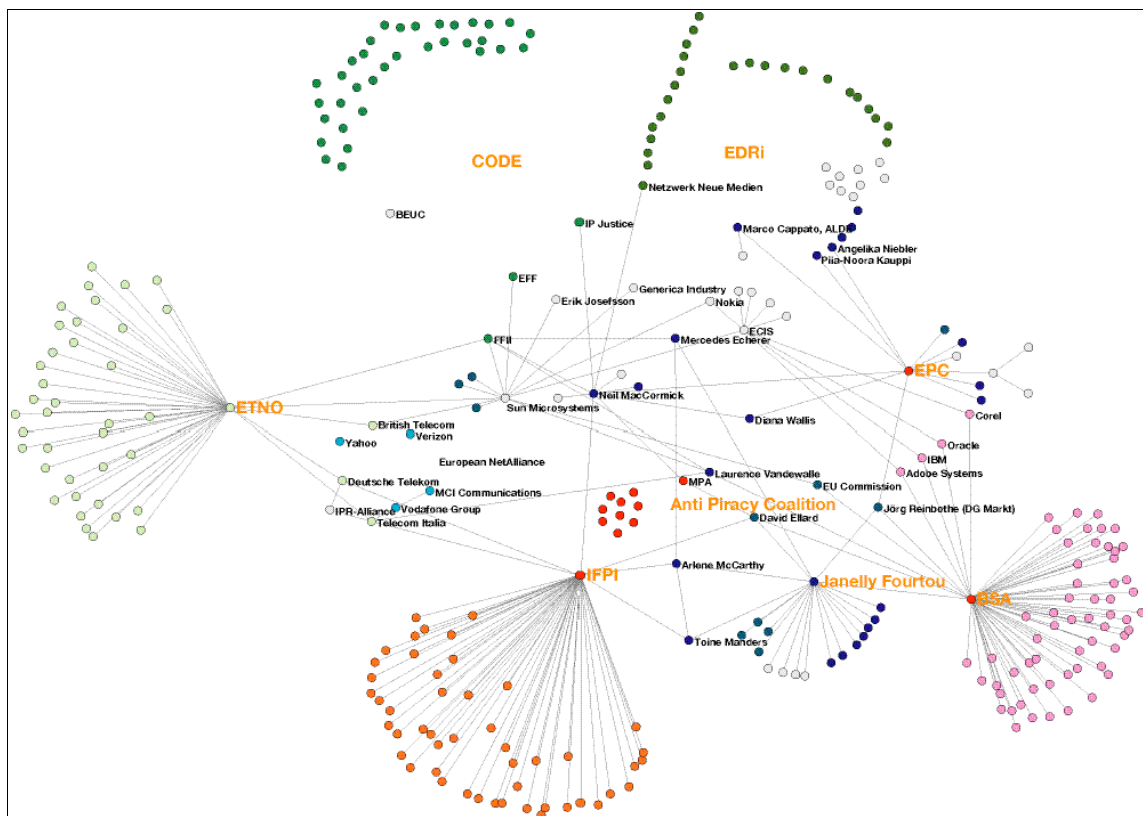
**Figure 3: IPRED1 network during the conflict**



The network of the opponents included as main actors/single networks the European Digital Rights Initiative (EDRI) and the Campaign for an Open Digital Environment (CODE), two civil society and digital rights initiatives, which were established on the occasion of the mobilizations against this directive. EDRI comprises 25 member organization, CODE – mainly organized by the US organization civil society organization IP Justice – 53 members. EDRI had a campaigner only responsible for the campaign against the Enforcement Directive and tried to bring together civil society groups, scientists and small software developers. However, at that time the software developers and

FFII were occupied with campaigning against the Software Patent Directive and therefore were not very active in the campaign against the Enforcement Directive, which obviously weakened the opponents' network. There were also attempts to forge cooperation between these civil society actors and the economic actors, but this attempt by and large failed. The companies that were against this directive were for example the telephone companies (telcos) and internet service providers BT Group, Deutsche Telekom, Vodafone Group, MCI Communications, Verizon, Yahoo und Telecom Italia. Via the European Telecommunications Network Operators' Association (ETNO) and the informal European Net Alliance they tried to represent their interests. These companies did not want to be held responsible in case of for IP infringements of their customers. Furthermore, the generic medicine producers and producers of generic automotive parts saw their interests affected negatively by the directive.

**Figure 4: IPRED1 network before the conflict**



We can summarize that the proponents' network was characterized by actors with much resource based power. Additionally, the most important actors created a situational network (the Anti-Piracy Coalition), which was focused on IP infringement and the Enforcement Directive. This small network proved to be relatively dense and functioned

as a kind of relay for the interaction of the proponents. Moreover, the involvement of Janelly Fourtou was an important avenue for the business associations to exert influence on the European Parliament. IFPI's crucial role in drafting the Directive was a great advantage for these proponents. Besides good contacts into the European Parliament, there was intense cooperation with the Commission. Although the network was not very big, it proved to be very effective and assertive.

On the other hand the opponent network was also in parts characterized by situational network building as EDRI and CODE as well as the informal European Net Alliance were created to lobby against the Enforcement Directive. However, the opponents' network was too small and developed too late to exert significant influence on the decision-making process. The network had only a relative low density and the two main civil society initiatives EDRI and CODE showed a comparatively strong overlap, which indicates a smaller mobilization base. EDRI and CODE did not succeed to initiate a relevant political mobilization or a grassroots mobilization – as in the software patents case – so that no real momentum developed in the campaign against IPRED 1. There were only few committed organizations and individuals actively involved.

Another central reason for the opponents' defeat is the missing stable connection of the two important sub-networks in the opponent camp. Obviously EDRI/CODE representing the civil society and civil rights interests and ETNO/European Net Alliance representing telecommunication companies and specific economic interests were too different to build a relative stable common network. In addition, the framing of both actor groups did not merge. They did not try to establish a master frame in which the different interests to prevent the Enforcement Directive could have been accommodated. They failed to construct a collective actor with a consistent collective action frame and a collective identity. The framing of each sub-network alone was not able to counter the hegemonic framing of the proponents in the discursive field. Whereas the argument of the civil society organizations – that the Enforcement Directive would threaten civil rights – had at least some success with a number MEPs, the rationale of the telcos did not play an important role in the discourse and was not taken up by other actors. Due to the missing broader political mobilization, also the civil society actors alone did not manage to develop characteristics of a strong collective actor. Even although they had a clear profile, they were too weak and had a too small environment of other active actors to function like a collective actor.

On the other side the proponents managed to construct a successful master frame that became hegemonic: They claimed that the directive was about »fighting against criminality and product piracy«. And this master frame was accepted by the majority of the actors as the adequate interpretation. Thus the directive was seen as the proper tool to solve the problem of product piracy. Even some of the left wing MEPs agreed to this frame and the proposed problem solving strategy. The main frame of the opponents, »threat to civil rights« and their argument that the directive would be too far reaching and would criminalize more or less innocent citizens who only wanted to share their music with their friends was not generally accepted by a minority. The economic arguments of the telcos and the generic producers played an even minor role in the discourse on the Enforcement Directive.

#### **4. Conclusion**

Our analysis has shown that relational characteristics of the actor networks can, indeed, explain the outcomes of the two conflicts about European IP directives to a certain extent. Comparing the two conflicts we see three factors that were responsible for the partially surprising outcomes:

*1. Size & Structure:* The different size of the two networks was not a result of scope of the directives. On the contrary: The Software Patents Directive objectively affected a much smaller constituency than the Enforcement Directive. The larger network in the case of the software patents conflict therefore reflects therefore a much better mobilization ratio compared to the enforcement conflict. In the software patents case the central mobilizing actors, above all the FFII, were able to create a snowball effect, i.e. at some point during the mobilization individuals and organizations started to join the protests and lobbying campaign without being explicitly asked to do so. The campaign had a relatively open structure and developed the characteristics of a grassroots mobilization. Moreover the network analysis suggest that in both cases the successful networks were situational and focused collective action networks that did not rely solely on preexisting membership. These collective action networks were able to mobilize support for their position even against resourceful established actors that are usually regarded as more powerful. The dynamic structure of mobilization networks can obviously counter the static power of resources in some situations.

This was most clearly visible in the case of the software patents conflict where a network of mostly individuals and SMEs was able to compete with a group of transnational

IT firms that not only spent significant sums in their lobbying campaign but were also supported by major European business associations like UNICE.

In the case of the Enforcement Directive, the supporters' and the challengers' networks were both to some degree situational networks centered around the Anti-Piracy Coalition and around EDRI/CODE. This time the nodes of the network were mostly not individuals or firms but often associations or NGOs, and the networks did therefore not develop a grassroots dynamic as in the software patents conflict. But they nevertheless provided a clear focus for the respective campaigns. Another reason for the defeat of the anti-Enforcement Directive campaign was the missing connection between the civil society actors and the economic actors. The supporters of the directive have been successful because they combined their traditional forms and avenues of lobbying with engagement in an informal and flexible coalition – using their traditional resource based power and the power potential of the situational and focused network.

In the software patents case the failed attempts of the proponents to mimic the grassroots approach through the Campaign for Creativity, which subsequently won the »Worst Lobbying Award«<sup>5</sup>, and EICTA's attempts to present itself as the voice of European SMEs shows that the other side there too realized the power of their opponents' mobilization even though they were unable to copy it.

2. *Commitment*: Directly related to these characteristics of the networks is their ability to mobilize not just support but highly committed participants. While the resourceful players relied mostly on traditional lobbying tactics the anti-software patents network was able to partially substitute their lack of financial resources by the time invested from many individuals. Unlike lobbyist who are in the European institutions generally accepted as competent and informed but nevertheless, especially in the parliament, also regarded with some skepticism, the often very committed individuals that were mobilized in the software patents conflict were able to gain significant credibility through the convincing self-representation of their interests. Here the differences between the institutions became most visible. The Commission only cooperated with the established lobbyists and associations, whereas the Parliament was generally much more responsive to the concerned individuals.

3. *Focus*: As we have argued above it was not the network characteristics alone that can explain the outcomes of the two conflicts. The collective action framing of the actors

involved also played an important role. Success or failure in the two conflicts also depended on the networks' ability to frame the conflict appropriately.

In the conflict around the Enforcement Directive the opponents' campaign was fragmented, and there was no shared approach and no consensual framing. In the foreground of the NGO campaign stood the civil rights argument, whereas the economic argument was inconsistent. The civil rights argument alone was neither able to convince the majority of the decision makers nor did it provide a master frame for the mobilization. The opponents were not able to convey why more rigid enforcement of IPRs would conflict with civil rights, whereas the supporters of the directive convincingly argued that the directive was necessary to combat product piracy and criminal activities. Since the precondition of a focused and convincing master frame was not met in the conflict on the Enforcement Directive the proponents had to deal with a weak rival in the struggle for discursive hegemony and influence on the decision making process. This is one central reason for the relatively low level of conflict on the Enforcement Directive and for the success of the proponents. In the anti-software patents campaign – in contrast – the economic and civil rights arguments were successfully merged. The FFII, which is mainly a network of small software developers with their economic interests, also included civil rights arguments about freedom of speech, open access and democratic procedures in their framing. This combined set of arguments was convincing for a relevant number of MEPs and the general public, and was therefore well suited for a political mobilization.

Taken together we can conclude that a broad mobilization in combination with a dense network and the construction of convincing master frame are conditions for successful campaigning and influence of weak actors.

In more abstract terms we can see that in order to be successful weak actors have to build situational coalitions that fulfill the conditions of a collective actor with a recognizable collective identity: They collectively have to define the field of opportunities and constraints of their action. This implies the formulation of aims and strategies as well as a shared interpretation of the problem and its solution.

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5 The EU lobby awards campaign is organized annually since 2005 by Corporate Europe Observatory, Friends of the Earth Europe, LobbyControl and Spinwatch (see: [www.worstlobby.eu](http://www.worstlobby.eu)).



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