Is the downloading of the new global IPR regime changing the EU? The second image reversed of intellectual property rights

Oriol Costa Fernandez / Henk Erik Meier

1. Introduction

The promotion of effective multilateralism is a key objective of the European Union’s foreign policy. Over the last twenty years, the relationship between the European Union and international institutions has become ‘more sustained and consistent’ (Jorgensen 2009: 188). Therefore, scholars have studied the origin of the multilateral identity and preferences of the EU (Jorgensen 2006; Manners and Lucarelli 2007; Groom 2007), the role of the EU in promoting regionalism (Grugel 2007; Söderbaum and Langenhove 2006), and the EU’s potential for shaping the norms and rules of the multilateral system (Chaban et al. 2006; Leonard 2005). Others have focused on the role of the EU in specific international regimes and negotiations (Ahnlid 2005; Kerremans and Gistelinck 2008; Ladefoged Mortensen 2009).

However, as pointed out by institutionalists studying ‘second image reversed processes’ (Gourevitch 1978), international negotiations and agreements can also have a domestic influence (Kelley 2004). The interaction between the EU and international institutions involves both bottom-up and top-down processes. A number of International Relations (IR) scholars study how and under what conditions international institutions influence domestic politics (Checkel 1997; Cortell and Davis 1996; Dai 2007; Risse-Kappen 1995). At the same time, some academics are addressing how the EU transforms its member states (Börzel 2005; Sedelmeier 2006; Radaelli 2003). Given that the EU is also a political subject participating in international negotiations and regimes, why would the EU not be conditioned by the policies and norms that are derived from international negotiations and regimes?

The evolution of international regimes on intellectual property rights (IPR) represents a perfect subject for studying the influence of international institutions on the EU. On the one hand, IPRs have been perceived as of increasing economic importance for the developed economies. The corresponding paradigm change in IPR regulation emanating primarily from the US and increasingly shaping international IPR regimes has heavily influenced the EU. In particular, the European Commission has turned from being a rather passive ‘law taker’ into a major ‘law maker’ pressing for stricter IPR regulation. Yet, on the other hand, as international IPR regulation has become more contested, domestic controversies within the EU about negative effects of stricter IPR regimes have also increased, suggesting that international IPR regimes have served to legitimize far-reaching changes...
in policy paradigms within the EU while at the same time raising awareness of their problematic effects.

In this article we will study the influence of two particular international IPR regimes on the EU. First, we will focus on the major transformation of international IPR regulation accomplished by the ‘Agreement on Trade-Related Aspects of Intellectual Property Rights’ (TRIPS), which became part of the WTO framework in 1995. Second, we will examine the impact of the new WIPO copyright regime consisting of the World Intellectual Property Organization Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) adopted in 1996 on the EU. In order to support our claim, we rely on the literature and on primary sources to trace processes and identify their influence on key EU decisions regarding IPR. Within this paper, we will focus on the ‘big picture’ of IPR regulation, that is, the impact of international regimes on the EU’s IPR policies, and in particular on the basic guiding regulatory paradigms and principles.

We are most interested in the ways in which the regimes shape EU approaches, from which the nuances of policy-making follow. In particular, we claim that the influence of the global IPR regime goes a long way in explaining why the Commission became committed to an orthodox agenda of IPR regulation. Moreover, the reform of global IPR regulation empowered the Commission in the related intra-EU negotiations. However, we also claim that the influence of the regime on the EU depends critically on the likelihood that the international norms can be dealt with in a technocratic as opposed to a politicized manner.

We proceed as follows: In our theoretical discussion, we argue that the more prone an international regime is to politicization, the less likely it is to influence the EU. After presenting our rationale for case selection, we provide empirical support for this claim. In our conclusions, we discuss the theoretical implications of our results and sketch out avenues for further research.

2. A framework for analysing changes in IPR regulation

The EU has become one of the key actors shaping international IPR regulation. Nevertheless, in addition to these bottom-up processes, top-down processes have taken place influencing European IPR regulation. Obviously, these are ‘coupled processes’ that take place at virtually the same time. There exist feedbacks between them, and on occasion bottom-up and top-down processes tend to reinforce each other. However, we attempt to disentangle the two processes analytically. Therefore, we bracket the bottom-up dynamic and focus on the top-down one. Adopting such a ‘second image reversed’ perspective has a long tradition both in IR and in European integration studies. Accordingly, domestic conditions of the ‘target’ state are supposed to play a major role. Therefore, it is reasonable to expect the specificity of the EU’s governance structure to have an effect on the influence of international regimes. We claim that the critical factor for that influence is the likelihood that an international norm can be dealt with in a technocratic as opposed to a politicized manner.
2.1 The mechanisms of influence

To have an influence on the EU, international institutions need to alter ‘its domestic balance’ (Dai 2005: 388). This can take place in two different ways:

First, they can change the objectives of domestic actors, either by modifying cost-benefit calculations or by altering underlying preferences (Eising 2002). For such an effect, conditional membership is one of the clearest examples (Kelley 2004: 428). If one relaxes the rationality assumption, regime-driven norms can also provide rules of thumb for actors solely looking for satisfactory solutions with ready-made strategies (Cortell and Davis 1996: 453). In addition, sociological and constructivist approaches claim that regimes can modify domestic actors’ preferences, through ‘processes such as influence or persuasion’ (Kelley 2004: 428) and ‘social learning’ (Börzel and Risse 2000: 7).

Second, international regimes can also alter the distribution of power among domestic actors and, therefore, constrain or facilitate the expression of certain interests or ideas. They can enable some actors to access decision-making processes (Abbot and Snidal 2000: 428), or they can ‘increase the political leverage and further improve the informational status of pro-compliance constituents’ (Dai 2007: 8). Thus, domestic actors can use international norms ‘to generate pressures […] on state decision-makers’ (Checkel 2001: 577). Finally, regimes also allocate legitimacy to certain proposals or policies, shifting the burden of proof onto other actors.

However, when explaining the influence of international regimes, scholars working on second image reversed processes assign a major role to the conditions of the domestic setting (Radaelli 2003: 48; Risse-Kappen 1994: 208; Cortell and Davis 2000: 66; Sedelmeier 2006: 10). Admittedly, the specificity of the EU’s governance structure (Héritier 1999) is likely to have some effect on the forms and scope of an international regime’s influence. At first sight, the influence of international institutions upon the EU seems to be hampered by the fact that ‘the institutional conditions of European policy-making […] would seem to favour the status quo and decisions based on the lowest common denominator’. However, other institutional features have enabled policy activities to develop ‘steadily and, at times, innovatively over the years’ (Héritier, 1999: 2–3). We will now turn to these facilitating conditions and argue that they are more or less ‘active’ depending on the technical vs. political character of each of the norms derived from the regime.

2.2 Facilitating conditions

International regimes influence internal political processes ‘by way of the action of domestic political actors’ (Cortell and Davis 1996: 451). Therefore, an international regime must first gain the support of a domestic policy entrepreneur, which is no trivial step (Dai 2007: 138). While the EU provides a multitude of access points for interested actors (Jönsson et al. 1998: 328), ‘the EU system is a chain of institutions’ that act not only as access points, but also as veto points (Zito 2001: 586). Thus, the construction of coalitions to get norms which are derived from international institutions adopted becomes more complex.
However, in the EU some conditions can facilitate such a formation of coalitions. First, coalitions are frequently forged on the ‘meso-level’ of the EU (Peterson 1995), among and within the myriad of Council working groups, Directorates of the Commission etc., which are generally run by specialized, middle-ranking policy-makers and bureaucrats. Here, technocratic rationality tends to dominate, which influences the way proposals are assessed. In addition, technocratic rationality triggers self-restraint and shapes debates in terms of joint problem solving (Lewis 2005: 943). Furthermore, similar functional agencies can share the desire to cut slack and push their preferred policies forward (Peterson 1995: 78).

Naturally, not all issues are equally suitable for ‘cooperative transgovernmental behaviour’ (Peterson 1995: 78). In particular, history-making decisions are shaped by very different actors, arenas and logics: ‘choices preoccupy the highest political levels in Europe’, like national cabinets and prime ministers meeting in Intergovernmental Conferences, and are driven by political and legalistic rationalities (Peterson 2001: 294). Here, the positions of states are expressed in a less filtered way and are less exposed to processes that can transform them. Therefore, the more politicized an issue becomes, the less permeable it is to the influence of international regimes. By implication, the more an issue is prone to be dealt with technocratically, the greater the chances of an international regime to influence the EU.

Technical issues also fit better with the expertise and resources of the European Commission playing a central role in the construction of coalitions. Networks ‘normally coalesce around the Commission’ and Directorates-General tend to ‘build up specialized networks’ around them (Jönsson et al. 1998: 328) in order pursue their own agendas (Héritier 1999: 23). ‘[B]y organizing institutional platforms for exchange, selecting and bringing together experts’, the Commission stimulates the debate and it gives it ‘direction’ in its own favour (Kohler-Koch 2002: 4). Again, the more technocratically an issue can be framed, the easier it is for the Commission to set up a coalition of actors that endorse the norms of international institutions.

The formation of coalitions supporting an international norm depends also on the capacity of policy entrepreneurs to persuade other actors to back them. Of course, what is critical here is the more or less casuistic coincidence of interests and approaches and the assessment that actors make of the regime. Nonetheless, the character of the EU as a political system in the making plays a role because of the organizational consequences of policies. Again, when policies that are driven by international institutions are of a technocratic nature, they are more prone to have an impact on the EU. Entrepreneurs must ‘convince decision makers that a problem and a ready solution exist that fit the policy-makers’ interest’ (Zito 2001: 587; Peters 1994: 10). Given that ‘the range of policies within the proper purview of the [EU] is not clearly defined’, an entrepreneur ‘may be able to expand the range of issues under consideration and with it expand the scope of Community action’ (Peters 1994: 20; Héritier 1999: 8). Thus, regime-related

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1 In Peterson’s terms, we use the expression ‘history-making decisions’ as ‘shorthand for the grand bargains that determine how and how much the EU changes’ (Peterson 2001: 294).
norms and policies that promise an increase in policy powers for the EU tend to find supporters more easily among those who favour a greater degree of European integration. The same argument applies to policies that help build the international actoriness of the EU (which allows for the appearance of feedbacks between top-down and bottom-up processes) or to opportunities to empower specific EU institutions (Peterson 2001: 303). Yet the increase in policy powers induced by the decision to adopt policies and norms derived from international regimes should not cross a certain threshold. If the increase is perceived as too large, then the decision will become a history-making one and states will be more likely to oppose it. Decisions that can be framed as technical ones are less likely to trigger this kind of resistance.

To sum up: We assume that international regimes influence the EU by altering ‘its domestic balance’. International regimes can either change actors’ objectives or they can modify domestic power balances and perceptions of legitimacy. Their impact depends on a number of facilitating conditions. To gain influence on the EU norms derived from an international regime, the support of a winning coalition is needed. Furthermore, norms embodied in international regimes have to resonate with norms within the EU. The support of a domestic policy entrepreneur within the EU, preferably the Commission, is critical. Furthermore, the construction of winning coalitions will be easier when the international regime is likely to strengthen the EU or to intensify integration. However, we claim that of utmost importance is that norms derived from a regime do not get politicized and can be dealt with in a technocratic manner. These conditions are likely to facilitate the formation of a winning coalition and discourage resistance from member states.

3. Global IPR regulation as contested policy-domain

In this article, we aim to test the hypothesis that the impact of international IPR regimes on the EU is related to their degree of politicization. More precisely, we claim that the more politicized an international IPR regime is, the less likely it is to have an impact on the EU. It is important to note that we are not making a normative argument here. We do not want to imply that it is better for issues to be dealt with in a technocratic manner, as opposed to a politicized one. On the contrary, raised awareness and political debates on problematic decisions is always a good thing. However, we find this particular variable to be a key one when accounting for the influence of a global IPR regime on the EU. In order to support our claim, we employ a most similar case design and have chosen two international IPR regimes that differ according to their degree of politicization. But first, in order to carry out our analysis it is necessary to discuss the growing relevance of IPR regulation and sources of politicization.

3.1 The growing relevance of IPRs

First of all, it is essential to note that IPR regulation, at the domestic and the international level, has traditionally represented a rather arcane policy domain. This is due to the fact that IPR regulation is a very technical and complex matter covering
a broad range of objects and uses, such as patents, copyrights, trademarks, designs, geographical indications, trade secrets and anticompetitive practices. In all of these fields, national regulatory legacies differ considerably (cf. Meier 2005).

What is common for all IPRs is that they grant the owner exclusive rights for the exploitation of immaterial goods, that is, knowledge and information, for a defined time period (Sell and May 2001). Thus, the IPR owner becomes a temporary monopolist. The main difference between ordinary property rights and IPRs is that ordinary property rights are supposed to serve the allocation of scarce goods whereas IPRs create an ‘artificial scarcity’ (Landes and Posnors 2003: 8). Thus, the main normative question in the IPR domain is how can the existence of IPRs be justified if their main effect is the exclusion of the general public from access and use of knowledge and information (Meier 2005), in particular when innovation has to be understood as a cumulative and collective process (Boyle 1997). Nowadays the dominant justification for exclusive IPRs relies on the idea that granting innovators exclusive rights is the preferable solution for creating incentives for innovation. Without exclusive IPRs, the character of knowledge and information as a public good would result in their under-provision (Hess and Ostrom 2003). Yet, even IPR advocates have pointed to the existence of an ‘incentives vs. access trade-off’ (Landes and Posner 2003: 8). Accordingly, exclusive IPRs intended to stimulate innovative and creative efforts can also hamper the efficient dissemination of knowledge and culture by creating huge transaction costs (Grossman and Stiglitz 1980; Hess and Ostrom 2003). Strict IPRs can result in an ‘anticommons’ where important resources, here knowledge and information, remain underused (Buchanan and Yoon 2000). It is important to note that at the theoretical and empirical level, the question of how much IPR protection is necessary and how much is excessive is still unresolved (Landes and Posner 2003).

What is evident is that IPR regulation always has a distributional dimension which has a number of implications: First of all, IPR regulation is likely to affect marginal consumers or, more precisely, exclude consumers not able to pay for access to knowledge and information. Second, IPR regulation is likely to stimulate economic rent seeking by (potential) IPR owners eager to reap more profit (Maskus 1998). For that reason, critics of stricter IPR polices have claimed that these initiatives represent a ‘second enclosure’ movement. Accordingly, the intended commodification of knowledge and information and the resulting exclusion of ‘marginal consumers’ are supposed to increase information inequalities within society and, consequentially, create social costs (Boyle 2002).

Regardless of the continuing academic controversies about IPRs, IPR regulation has received an enormous boost in political attention. This is due to the perceived rise of the ‘knowledge economy’ (Maskus 1998). Technical progress has served to create new forms of intellectual property not fitting into classical IPR concepts and to ease the non-authorized use of intellectual property, for example, by lowering costs for reproducing copyrighted works (cf. Meier 2005). Therefore, regulatory innovations in IPRs have been deemed necessary in order to guarantee investment in new technologies (David and Foray 2003). However, the discourse about the ‘knowledge economy’ also indicates highly consequential shifts in the comparative advantages of the developed economies. Since the 1970s, global
trade in high technology products has steadily increased. While the developed economies have heavily benefitted from this trend, they have faced growing international competition in more traditional sectors (Getlan 1995). Thus, the North’s pressure for stricter global IPR protection has to be understood as an essential mercantilist attempt to defend competitiveness (Ryan 1998). Here, it is important to note that, although stricter global protection of IPRs may create positive dynamic welfare effects for the entire world economy, static (re)distributional effects of stricter global IPRs certainly benefit developed economies heavily at the expense of developing countries (Ryan 1998; Sell 1998, 2003; Drahos and Braithwaite 2002). Consequentially, global IPR regulation has provoked intense North-South conflicts (Drahos and Mayne 2002; Maskus and Reichman 2004). These aspects of IPR regulation carry the potential for intense politicization (Landes and Posner 2003). Since we claim that the degree of politicization is highly consequential for the impact of an international IPR regime on the EU, we will now explore potential sources of politicization in more detail.

3.2 Sources of politicization of IPR regulation

We argue that while changes in IPR regulation and protection always imply distributional effects, the degree to which IPR regulation becomes politicized depends on the dimension on which IPR protection is strengthened. In other words, the way IPR protection is expanded is related to the degree of politicization. Based on an idea presented by Pugatch (2007), we distinguish between:

(1) The better enforcement of already existing rights. In this case, stricter IPR regulation does not touch upon the definition of IPRs but just enables rights holders to make better use of their rights by providing, among others, legal and administrative procedures for enforcement. Such regulatory changes are usually considered to be more legitimate and are thus less prone to politicization. Nevertheless, it is essential to note that even the better enforcement of existing rights yields distributional effects.

(2) The challenging of regulatory legacies through the expansion of the scope of IPRs, or the strengthening of its exclusivity. Expanding the scope of IPRs increases the number of objects or uses covered by IPRs such as patentable objects and protected exploitations of creative works. For example, one of the central goals of biotechnological industries has been to convince regulators to allow the patenting of living organisms, which has been framed as a necessary prerequisite for the creation of a vibrant biotechnology sector. Similar demands have been raised by the software industry. Copyright based industries have continuously lobbied to subject more and more consumer uses to licensing requirements in order to prevent private copying of their products, which, in the music industry, for example, has the potential to threaten traditional business models. It should be obvious that such an expansion of the scope of IPRs is likely to bring about visible distributional effects in favour of rights holders. Moreover, expanding the scope of patentable objects in order to include, for example, living organisms is likely to challenge national legacies deeply rooted in ethical convictions. The same applies to expansions likely to restrict for-
merly ‘free’ public uses. Such IPR policies challenge incumbent ideas about the balance between creators and innovators on the one side and the general public on the other side. Furthermore, IPR policies can aim to strengthen the exclusivity of IPRs, for example, by extending the duration of IPRs. Again, this is likely to have distributional effects and to challenge regulatory legacies. In these cases, the reinforcement of IPR protection leads to politicization.

In short, the traditionally rather arcane policy-domain of IPR regulation can become highly politicized by yielding highly visible distributional consequences and/or by challenging regulatory legacies deeply rooted in ethical convictions. When IPR polices aim at enabling rights holders to make better use of already existing rights, distributional effects are supposed to be legitimate. In contrast, regulatory innovations increasing the number of objects or uses covered by IPRs are more controversial. They come with distributional or even redistributional effects (when the position of IPR owners is strengthened at the expense of consumers or the public), and the inclusion of new objects, such as living organisms, may pose difficult ethical questions and challenge regulatory legacies. However, a caveat should be made. For the politicization of IPR regulation is not only relevant whether regulatory initiatives ‘objectively’ represent ‘just enforcement’ or ‘expansion’ policies, but it also depends on how IPR regulation is perceived among relevant stakeholders, which in turn depends on the existence of awareness among stakeholders of the potential impact of IPR regulation.

*Figure 1: Dimensions of IPR protection and politicization*

Source: *elaborated by authors.*

Note: The diagrammatical illustration should not be interpreted to mean that the two regulatory processes examined started from the same regulatory status quo ante.
Thus, as the above graph illustrates, we argue that IPR regulation is less likely to be politicized as long as it refers only to the first dimension of better enforcement of existing rights (X axis). In contrast, IPR policies are more prone to become contested if they challenge regulatory legacies (Y axis). It is thus possible to measure politicization without resorting to the measure of its consequences, provided one keeps in mind that it is the perception of a significant shift in the scope and exclusivity of IPR that triggers politicization. In order to test our argument that the degree of politicization of IPR regulation is crucial to understand the differential impact of international IPR regimes on the EU, we have selected two cases where the impact of an international IPR regime on the EU was framed quite differently on the two dimensions of the graph above:

1. The adoption of the TRIPS agreement was mainly framed as being about better international enforcement of existing IPRs. It is decisive to note that TRIPS had far-reaching domestic implications. Yet, with the exception of the Commission, policy makers did not pay much attention to these implications. As a result, TRIPS could be depicted as a project intended to protect ‘first world assets in the third world’ (Abbott 1989).

2. In contrast, the Commission’s intention to use the ratification of the new WIPO treaties on digital copyright to modernize copyright within the EU denotes an ambitious policy-shift challenging national legacies.

If our theoretical reasoning holds true, the impact of international IPR regimes has to be significantly higher in the TRIPS case (less politicized) than in the WIPO case (more politicized). The degree of the politicization of an issue can be measured empirically by focusing on public awareness, mobilization of societal actors, controversies during the EU legislative process and post-legislative compliance problems.

4. Two case studies on the impact of international IPR regimes on the EU

4.1 The impact of TRIPS on the EU’s IPR policy

The TRIPS process was induced by shifts in the international political economy and the inability of the incumbent international IPR regime to deal with the resulting new challenges in a way satisfying to the developed economies. Thus, policy-makers from the US aimed to press for stricter global IPR protection by linking trade and intellectual property. In order to shift political arenas, it was essential to convince policy-makers, in particular from the EU, to support the project. First of all, EU actors were not really aware of the opportunities provided by the TRIPS process initiated by the US. Yet, due to policy learning, it is a particular striking feature of TRIPS that the very negotiation process had a huge impact on EU policies. More to the point, TRIPS triggered a substantial policy change within the EU. Commission and member states changed their stance toward IPR regulation within the Community. While this feature of TRIPS creates a problem of endogeneity for analysis, we want to stress that only after a ‘top-down’ process of policy learning through the TRIPS initiative did the Community...
emerge as a major policy shaper in later stages of the TRIPS negotiations, ‘uploading’ European IPR preferences to the TRIPS framework.

4.1.1 Mechanisms of influence

The TRIPS process influenced the EU by changing the policy positions of the Commission as well as of member states. Insofar, TRIPS seems to represent a clear case for policy learning induced by international regimes. Unfortunately, the policy learning literature suffers from ‘over-conceptualization’ resulting in an overload of hardly observable or verifiable concepts. Therefore, in order to prove that policy learning has happened, we follow the attempt of Eising (2002) to turn policy learning into a more clearly defined empirical concept. Thus, we agree that even obvious policy change does not necessarily indicate policy learning in the strict sense of a ‘change of basic policy preferences’. Rather, policy change may only denote a change of strategy (cf. Eising 2002). Thus, we will not only ask whether Commission and member states changed the payoffs they attributed to certain policy but also whether they changed the domestic status quo in a way that exceeded the minimum requirements of the international regimes (cf. Eising 2002: 90–91).

In the case of TRIPS, it is highly evident that the Commission and member states changed the payoffs they attributed to policy outcomes, that is, international IPR regimes and (limited) IPR harmonization within the EU. In other words, during the TRIPS process EU actors came to appreciate potential benefits from stricter global IPR regulation and better IPR harmonization within the EU. That policy change qualifies as policy learning insofar as

a) the member states agreed to limited domestic IPR harmonization even before TRIPS had materialized and

b) the Commission came to perceive IPR regulation as a key element within its strategy to strengthen market integration and promote European competitiveness.

Thus, the TRIPS process induced at least a process of ‘instrumental policy learning’. Commission and member states attributed higher payoffs to the relevant policy outcomes. In turn, this reinforced the coalition of international actors that supported an ambitious global IPR regime.

In order to understand how the TRIPS process could trigger such consequential policy learning, it is important to note that the TRIPS process was heavily inspired by institutional flaws in the incumbent international IPR regime: By the early 1970s, global economic integration challenged the territorial (i.e. national) base of IPR regulation. US policy-makers as well as the Commission became increasingly concerned about the increase in global trade with counterfeit goods (Matthews 2002) and the fact that a number of new knowledge-based products did not fit into traditional concepts of IPR protection (Maskus 1998).² However, the incumbent IPR regime frustrated their efforts to strengthen and update international IPR

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² Computer software, electronic transmissions of broadcasts, Internet materials and databases raised questions regarding whether copyright protection was adequate to protect and encourage investments. Moreover, biotechnological inventions did not fit into traditional patent law (Ryan 1988; Maskus 1998).
Costa Fernandez/Meier | The second image reversed of intellectual property rights

The pre-TRIPS regime was also shaped by a North-South divide (Maskus 1998; Gervais 2003). Developing countries were aware of the effects of stricter IPR protection in terms of rent transfer to the developed economies (Ryan 1998; Sell 1998, 2003; Abbott 1998: 507) and wanted to reform the WIPO system in favour of technology transfer (Drahos and Mayne 2002; Matthews 2002; Maskus and Reichman 2004). The one-nation, one-vote decision-making at WIPO gave developing countries control over the agenda (Ryan 1998). Consequently, in June 1985 the negotiations about a revision of the international patent convention ended in deadlock and were not resumed for a long time (Sell 1998).

This encouraged US business interests to shift the counterfeit issue to the more propitious GATT venue. Counterfeiting was first brought up as a serious issue there during the Tokyo Round (1973–1979) by the US and the EC. After their initiative failed in 1982 (Stewart 1993: 2260), an unprecedented mobilization of US businesses pushed for an issue linkage between IPR protection and trade policy, which became one of the key US targets for the new GATT round, which resulted in the WTO regime of which TRIPS is a part (Ryan 1998; Sell 1998).

Thus, the frustrating experiences with the WIPO regime explain how the prospect of an enforceable counterfeit code modified the cost-benefit calculations of EC actors:

First, the TRIPS process was likely to lower the costs for enforcing European intellectual property rights abroad, which was in the common interest of member states, the Commission, and IP industries. In addition, the US was willing to bear most of the costs for constructing a global ‘consensus’ on TRIPS. Thus, while costs for reforming the IPR regime were lowered, the expected benefits from an IPR regime ‘with teeth’ increased (cf. Sell and Prakash 2004). The calculations for intra-EU harmonization of IP protection also changed, as it could be framed as a prerequisite for reforming the global regime, which was now perceived as a more promising course of action. Whereas the Commission’s demand for copyright harmonization in 1982 had only resulted in a Council resolution in 1984 encouraging the fight against audio-visual piracy (Rodriguez Pardo 2001), the Commission could now demand member states to sign the WIPO treaties in order to have a stronger stance in international negotiations (European Commission 1988, 1991).

Second, the TRIPS process induced at least a process of instrumental policy-learning, in particular within the Commission. US interest groups and trade policy-makers were aware that consensus-building with the US’s major trade partners was necessary for the TRIPS process, but Japan and the EC were mostly supporting an agreement on counterfeit goods, instead of a comprehensive IP code (Drahos and Braithwaite 2002: 37, 115–116). US corporations not only used highly emotive language to raise public support for their claims (Weissman 1996; Litman 2001; Sell and Prakash 2004), they also constructed a global coalition of IPR industries to convince governments to press for stricter IPR protection with the help of the GATT process. Between 1980 and 1982, informal meetings were
conducted between representatives of key business and government officials in the US, the EC, Canada, Japan and Switzerland. In June 1988, these business initiatives culminated in the highly influential paper ‘Basic Framework of GATT Provisions on Intellectual Property’ (Matthews 2002: 8–9).

It becomes evident that during this intensive exchange with US policy-makers and businesses the Commission modified its initial moderate stance regarding stricter IPR protection (Simmonds 1988). Following the US policy trajectory, first, the Commission identified IPR industries as industries that might soon have the potential to grant the Community a comparative advantage in global competition (European Commission 1988). Consequently, before the TRIPS process even had come to an end, metaphors such as ‘knowledge economy’ and ‘information society’ started occupying the imagination of the Commission and served as guidelines for future IPR policy making (Bangemann Report 1994). The Commission convinced member states of that vision (European Council 1994), with the effect that commitment to a high level of protection of IPR holders is by now a standard mantra of European regulation (European Commission, 1995) and has materialized in a boost to legislative activity on IPR (cf. table 1).

4.1.2 Facilitating conditions

Several facilitating conditions increased the impact of the TRIPS process on the EU:

First, the Commission acted as the major domestic policy entrepreneur in support of TRIPS. This is due to the fact that the TRIPS process coincided with increasing awareness within the Commission that intra-EC trade with IPR-based products and services challenged the national base of IPRs, particularly as national IPR protection differed considerably (cf. European Commission 1977, 1982). There was no Community legislation on patents, while the European Patent Convention (EPC) of 1973 excluded a number of subjects from patentability (Strauss 1996), and not even all EC member states were signatories of all WIPO treaties (European Commission 1988). In addition, in the copyright domain, tensions between common law copyright and continental droit d’auteur prevailed (Littoz-Monnet 2006). These differences threatened to distort the internal market and to create unfair competition, because the European Court of Justice’s doctrine of ‘Community exhaustion’ had made parallel imports possible and was likely to trigger regulatory competition among member states. Finally, lax enforcement of IPRs made some member states potential targets of US trade retaliatory measures.

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3 The European Patent Convention was, to the frustration of the Commission, not part of EC law. This was due to the fact that in the 1970s the goals pursued by the European patent system were not achievable within the Community context because of limited membership. Thus, the EC member states negotiated a Luxembourg agreement on a Community patent in 1975, but it never entered into force because it was not ratified.

4 According to the Community exhaustion principle, once a product protected by an IPR has been put on the common market, it is no longer possible to rely on the IPR to limit the product’s movement within the single market. Moreover, the European Court of Justice developed the doctrine of distinguishing between the existence and the exercise of IPRs, according to which IPRs might be recognized in one member state but might be not to be exercised in another because these IPRs might fall within the prohibitions laid down by Community law (Littoz-Monnet 2006: 443).
tions (Drahos and Braithwaite 2002: 93-94). In sum, TRIPS coincided with and reinforced an already evolving policy agenda of the Commission committed to harmonization of IPR laws.

Second and related, the character of the EU as a political system in the making was another decisive factor for the Commission’s active role. TRIPS promised to help to harmonize the hitherto under-developed IPRs within the Community and yield new powers to the Community, particularly the Commission. The Commission felt empowered by the TRIPS process and perceived it as an opportunity to reform IPR regulation, as the boost in legislative activity shows. However, it is important to note that the Commission tackled the issue in a cautious way as long as the TRIPS negotiations went on. In addition, the negotiation process created its own policy opportunities. The regulatory and harmonization efforts by the Commission to a great extent served the goal of improving the Community’s bargaining position in the TRIPS process by creating a Community trademark system, establishing IPRs based on geographical indications and harmonizing the particularly controversial rental and lending rights (cf. table 1). Given these feedback loops between TRIPS as a top-down process and EU policy-making as a bottom-up process, it would be wrong to claim that TRIPS was simply about the globalization of IPR standards of the North. In fact, the EU’s policy-making in the IPR domain evolved rapidly during the TRIPS process.

Table 1: EU legislative activity within the IPR domain

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<th>Year</th>
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<td>1989</td>
<td>Council Regulation 89/1576/EEC on the Definition, Description and Presentation of Spirit Drinks</td>
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<td>1990</td>
<td>Commission Regulation 90/1014/EEC on Implementing Rules on the Definition, Description and Presentation of Spirit Drinks</td>
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<tr>
<td>1993</td>
<td>Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission</td>
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<td>1993</td>
<td>Council Regulation 94/2100/EC on the Community Trade Mark</td>
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<td>1994</td>
<td>Council Regulation 94/2100/EC on Community Plant Variety Rights</td>
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A number of further conditions served to create support for a stricter global IPR regime while preventing the politicization of the issue. TRIPS benefited from the character of IPR regulation as a rather arcane and technical domain. While the benefits of stricter global IPR protection are easily predictable and highly concentrated, costs are hard to predict and broadly spread. Thus lobbying efforts by IPR industries during the TRIPS process were in general not met with societal resistance (Braithwaite and Drahos 2002) nor were they highly visible to the broad public. Yet, it is essential to note that – with the adoption of a new policy paradigm in IPR regulation – the Commission has become a hub of a network in favour of stronger IPR regulation, including lobbyists and national experts (Haunss and Kohlmorgen 2008).

Moreover, the Commission was keen to downplay the immediate effects of TRIPS on member state regulation. It framed TRIPS as being mainly about the better external protection of already existing IPRs and only limited harmonization (European Commission 1988), preventing its politicization within the EU. Within the EU, TRIPS was thus perceived to be primarily about better enforcement of existing IPRs (policy changes were placed along the X axis of the graph above). Yet, this was only part of the truth: Whereas TRIPS actually provided strong mechanisms for global enforcement (Sell 2003), the agreement also created new global IPRs, because TRIPS extended protection to a number of additional goods and services, raised minimum standards, the scope and duration of IPRs and restricted compulsory licensing. Within the Community, these effects of TRIPS were not visible due to already high levels of IPR protection.

Finally, the TRIPS process resonated well with member state interests and did not excessively challenge national legacies (along the Y axis) even though some member states had to adjust their national IPR policies in order to improve the
Community’s stance in the TRIPS negotiations. Obviously, possible drawbacks resulting from these adjustments were outweighed by the advantages to be gained from an enforceable international IP code. The TRIPS process also seems to have benefitted from the specific ideological ambiguity in IPRs that makes them appealing for free-trade oriented states and for protectionist ones. While IPR protection comes with a taste of residual mercantilism, inadequate IPR protection could be framed as a barrier to legitimate trade (Sell 2003: 15). As a result, all accounts of the internal negotiations about the Community’s position in the Uruguay round report broad support among the member states for the goals pursued by the Commission regardless that the Commission’s ambitions were substantially changing over time (Devuyst 1995; Woolcock and Hodges 1996). Moreover, no fundamental arguments about the desirability of stricter international regulation seem to have emerged (Young 2002: 41, 2003).

Everything considered, the degree of domestic politicization of TRIPS within the EU was rather low: There was limited public awareness, there was no visible competition between interest groups over access to and influence on policy making, the legislative process went smooth and created little compliance problems. The fact that the TRIPS process met rather favourable domestic conditions in terms of politicization as our key explanatory variable resulted from a number of favourable conditions:

- The Commission acted as major domestic policy entrepreneur supporting the project because it resonated well with the Commission’s policy and institutional agenda.
- There was hardly any public awareness of problematic effects of TRIPS within the EU, and affected interest groups raised their voice in support of the project. Moreover, the Commission managed to downplay TRIPS’ far-reaching implications.
- TRIPS was not met with resistance from member states because it did not immediately challenge their national legacies and promised certain benefits to them.

4.1.3 Impact on EU policies

While there is hardly any doubt that TRIPS represents a major innovation for the world trade system (Abbott 1998), the negotiations and the agreement had a huge impact on the EU in at least three respects:

5 For example, stricter global IPR protection came with promises to more agriculturally oriented member states since TRIPS provided an opportunity to globalize the French system of IPRs for geographical indications (GIs) (Sell 2003; Rovamo 2006). While GIs had, until then, been met by only limited international support (Gervais 2003: 3), EU member states perceived GIs as a protective instrument for Europe’s highly subsidized agriculture in case trade barriers were going to be dismantled (Panizzon 2006: 26).

6 Concerning the WTO negotiations, the main issue causing tensions between member states and the Commission and among member states was the Community’s position on agriculture. That conflict proved that it was difficult for the Community to deal with trade issues once they became politicized (Woolcock and Hodges 1996: 322).
1. The EC’s ambitions concerning global IPR protection.
2. The Commission’s policy paradigm in IPR regulation.
3. The momentum of IPR harmonization efforts within the EU.

As can be shown, the EC’s ambitions concerning the scope and substance of a global IPR agreement evolved considerably during negotiations. At first, the TRIPS process inspired the Community to strengthen its approach of external IPR enforcement by emulating the aggressive US approach. Special 301 of the US Trade Act of 1984 allowed the US Trade Representative to conduct aggressive bilateral diplomacy to seek IPR reforms in developing countries (Ryan 1998). The EC followed suit. Council Regulation (EEC) No 2641/84 of 17 September 1984 provided the EC with a ‘new commercial instrument’ (OJ 20.9.84 L252/1) legitimizing trade retaliations against third countries, even when it involved an IPR treaty they were not part of (Garcia Molyneux 1999). This served to quieten developing countries’ opposition against TRIPS (Hoekman and Kostecki 2001).

Moreover, during the TRIPS process the Community evolved into a major actor pressing for an ambitious agreement, precisely because of the potential impact of a global IPR regime. Initially, the Community’s aims concerning TRIPS were modest in comparison to the intentions of the US and Japan (Gervais 2003: 10–11; Doc. 7748/86, PV/CONS, 33 Ext. GATT 107). Yet, after the Ministerial Declaration of Punta del Este legitimized the TRIPS process, the Community emerged gradually as a major policy entrepreneur (Simmonds 1988). The EC proposal of 1987 demanded that TRIPS cover a number of new types of intellectual property (cf. MTN.GNG/NG11/W16; Stewart 1993: 2267). Eventually, the proposal from March 1990, covering all aspects of IPRs, their acquisition, enforcement and the application of national treatment and most-favoured nation principles, served as catalyst for the negotiations (MTN.GNG/NG11/W/68; cf. Gervais 2003: 16). The fact that the South would have to accept TRIPS as part of a package deal, comprising a mix of carrots (market access for textiles and agriculture) and sticks (unilateral IPR enforcement by the US and the EC), once more changed the cost benefit calculations of the EC. It was possible to discuss the final agreement among the triumvirate of the US, EC and Japan, i.e. among actors seeking high levels of global IPR protection (Matthews 2002: 33). In contrast to the Community, US enthusiasm for TRIPS decreased after it had become clear that the US would not be able to globalize its IPR regime in toto because of certain North-North conflicts (cf. Cottier 1991) in which the EC prevailed (geographical indications, video levies, patent exemptions) (Stewart 1993, Cortés Martín 2004).

Concerning the Commission’s policy paradigm for European IPR regulation, it was decisive that TRIPS, by framing strong IPRs as a prerequisite for global trade and innovation, strongly supported a policy shift. Thus, TRIPS legitimized a new agenda for the Commission dedicated to encompassing commodification of intellectual property within and outside the Community. The latter included the conclusion of treaties at WIPO to govern the digital environment (Abbott 1998).

Finally, in terms of domestic IPR regulation, the TRIPS process made it easier to press for (limited) harmonization of member state regulations even before TRIPS came into force or the success of the Uruguay round was certain. The
Commission benefitted from the fact that these harmonization efforts could now be presented as serving the goal of protecting IPR assets abroad (European Commission 1988, 1991). Therefore, the Commission succeeded in exploiting the TRIPS process to reap new powers for the Community and to give IPR harmonization within the Community a new momentum. It was of greatest importance for European IPR regulation that TRIPS legitimized a new agenda for the Commission dedicated to encompassing commodification of intellectual property within and outside the Community. The latter included the conclusion of treaties at WIPO to govern the digital environment (Abbott 1998).

Nonetheless, this case supports our argument that competence gains from international regimes should not cross a certain threshold. The Commission’s ambition to strengthen exclusive supranational competencies in the new issue areas covered by the WTO Agreement failed to materialize (Garcia Molyneux 1999: 389–390). For reasons of sovereignty as well as differing trade interests, a broad coalition of liberal and protectionist member states denied the Community new exclusive competencies (Meunier and Nicolaïdis 1999; Young 2000). Member states perceived the new trade issues as more politically sensitive than the traditional ‘at the border’ issues because they extended into areas of domestic regulation (Meunier and Nicolaïdis 1999: 489). Common commercial policy has remained placed on the continuum between supranationalism and intergovernmentalism, despite slight changes in the Amsterdam and Nice treaties (Leal-Arcas 2004: Billiet 2006: 914–915).

4.2 The impact of the new WIPO treaties on the EU’s copyright regime

While we focus here on the top-down processes of international IPR regulation, it should be obvious that for the Commission, the TRIPS negotiations had demonstrated that international IPR regimes provided an opportunity to play a ‘two level game’ where results in international negotiations could be used to legitimize a shift of the policy status-quo within the EU. What becomes evident from the WIPO process is that the Commission tried to use the WIPO negotiations to press for an encompassing modernization and harmonization within the highly contested realm of copyright. Yet this process became much more politicized, and this limited the impact of the new treaties on the EU’s copyright regime.

It is important to note that this politicization was an immediate effect of TRIPS. The resistance of developing countries to the agreement had served to increase global awareness of the problematic effects of stricter IPR regulation. Moreover, an informed public in the North came to realize that the paradigm change in global IPR regulation was likely to affect consumers even in the developed world. This was due to the fact that the US agenda for adjusting domestic IPR regulation to the new digital opportunities of disseminating and copying copyrighted works intended to restrict consumer rights considerably (Drahos and Braithwaite 2002; Sell 2003). The Commission followed suit, which implied an ambitious agenda for the WIPO negotiations as well as for domestic copyright regulation within the EU likely to challenge national legacies of copyright regulation.
4.2.1 Mechanisms of influence

TRIPS did not adjust global copyright to the digital environment, but it entailed an agenda for WIPO to do so (Abbott 1998). Therefore, the Commission, as well as US negotiators, intended to use the WIPO diplomatic conference on certain copyright and neighbouring rights questions of December 1996 to force developing countries to modernize copyright according to the North’s approach (Samuelson 1997). The Community – as well as the US – aimed to create two new digital IPR regimes in the areas of copyright and of phonograms, that is, an exclusive right of reproduction covering temporary storage of protected works in any electronic medium, and an exclusive right of communication to the public that was intended to cover the access of copyrighted material by wireless means. Moreover, the Community wanted to get protection for technical locks. Finally, another project of the Europeans was to get international IPR protection for databases accepted (INR/CE/VI/1).

Of the new WIPO treaties, the Copyright Treaty (WCT) is of particular importance to our account as it had an impact quite different from TRIPS on the policy preferences of the primary EU actors. While the Commission adhered to its post-TRIPS agenda, member states came to realize the domestic costs of stricter global IPR regulation:

Concerning the Commission’s post-TRIPS agenda, the Commission remained dedicated to the Information Society paradigm implying stronger and expanded IPRs as a prerequisite for innovation and competitiveness. Thus, the WIPO negotiations were hardly likely to induce any further substantial policy learning within the Commission. Rather, the WIPO negotiations influenced the cost-benefit calculations of the Commission in such a way that the Commission tried to use the WIPO negotiations to push for substantial domestic policy change. The Commission’s aim was to subject copyright almost exclusively to its economic vision because it perceived the EU to be involved in a regulatory competition with the US (European Commission 1995a, 1996). In sum, for the Commission and European copyright industries the WIPO negotiations came with the same potential effects in terms of cost-benefit calculations as TRIPS, that is, a considerable reduction in costs for external IP enforcement and the internal modernization of IP laws. Consequently, the Commission tried to use the transposition of the new WIPO treaties into EC law as an opportunity for an ambitious harmonization of European copyright law (European Commission 1997), as becomes evident with the ‘Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society’, the EU Copyright Directive (EUCD) (Hugenholtz 2000). Actually, the new WCT entailed new provisions supporting a considerably expanded digital copyright so that the new WIPO treaties helped the Commission to shift the policy status quo decisively in favour of rights holders by legitimizing a digital modernization of EU copyright including extended and new exclusive rights, technological locks and increased sanctions (Kretschmer 2003, 2005).

Whereas the WIPO regime influenced the Commission ‘only’ insofar as cost-benefit calculations for achieving policy shifts were changed, the member states experienced some limited policy learning, as they became increasingly aware of the
political costs associated with the WIPO treaties when the transposition process materialized. In contrast to TRIPS, the new WIPO regime was contested from the outset, since TRIPS had served to increase public awareness of potential distributional and redistributive effects of global IPR regimes in the South and in the North (Drahos and Braithwaite 2002). The new WIPO treaties represented a much more politicized framework than TRIPS and were also more ambiguous when it came to the regulatory paradigm. The WCT certainly did not legitimize an exclusive economic approach like the one adopted by the Commission, since the WCT stressed the need to balance the interests of rights holders and the public and granted some discretion for national implementation. Moreover, the contested character of the post-WIPO process shows that the conflicts shaping the WIPO negotiations served to increase the awareness of actors within the EU for the potential distributional effects of digital copyright. In addition, the controversies surrounding the WIPO negotiations also shaped the legislative history of the EUCD.

4.2.2  Facilitating conditions

As already indicated, the Commission acted as the major policy entrepreneur in support of an ambitious WIPO treaty and a ‘WIPO plus’ directive. Due to ‘policy learning’ during the TRIPS negotiations, the Commission assumed that job growth associated with technological innovations would not materialize without a coherent regulatory network, including an expanding copyright that made the significant infrastructure investment required for the new communication networks viable. Also, the Commission had identified copyright as the IPR field requiring most attention, due to differences in national regulatory legacies and technological challenges (Littoz-Monnet 2006; European Commission 1977, 1982, 1985). In addition, it deemed it to be necessary not only to create new exclusive rights for the Internet and other digital services but to address the territorial base of copyright definition and administration (European Commission 1995a). Moreover, the Commission had identified technical protection measures (TPMs), which were likely to enable new business models and to protect against piracy, as its most preferred means to solve the puzzles of digital copyright. In other words, the Commission adopted an IPR agenda squarely placed along the Y axis.

The strategy of the Commission to combine the transposition of the WIPO treaties with an ambitious agenda for reforming EU copyright (European Commission 1997) required the Commission to act efficiently in the bottom-up process of shaping the WIPO regime and in the top-down process of translating the new treaties into EU law. However, external and domestic conditions were less favourable than in the TRIPS case and worked contrary to a strong impact of WIPO on the EU.

On the external dimension, the WIPO arena proved more difficult for the US-EU tandem, since trade issues could no longer be directly linked to IPR protection. During the diplomatic conference on certain copyright and neighbouring rights questions of December 1996, the US and the EU attempted to expand copyright to ‘ephemeral’ reproductions of protected works, to extend legal protection to every transmission of works, to limit the power of states to regulate copyright
exception, to prohibit the production and circulation of anti-circumvention technologies, to protect the integrity of rights management information systems and to create a *sui generis* protection for databases (Samuelson 1997). In contrast, developing countries were keen to ensure that the treaties maintained the existing balance of interests between end users and rights holders (Gillen and Sutter 2004). The WIPO negotiations were also shaped by an unprecedented involvement of affected interest groups. Network operators and online service providers fearing liability claims from copyright industries brought down the idea of extending copyright to every temporary copy during transmissions. In result, there was only an ‘agreed statement’ that copyright applied to ephemeral copies (von Lewinsky and Gaster 1997).

 Nonetheless, global copyright may still be expanded, as the EU successfully demanded the treatment of digital transmission of works as communications to the public. Furthermore, the WCT expands copyright coverage to works available to the public through online usage. In contrast, the developing countries achieved that the new WCT preamble stressed the necessary balance between rights holders’ interest and the public and recognized states’ authority to grant copyright exemptions. Thus, the only improvement to the status quo regarding exceptions was the generalization of the Berne three-step test for ‘limitations’.7 Similarly, the US-EU demand for a comprehensive ban on the trading and manufacturing of tools developed to circumvent TPMs was watered down due to opposition from developing countries and consumer groups as well as from manufacturers of consumer electronics. Eventually, the WCT only required states to have adequate and effective legal protection for TPMs, but not against preparatory acts such as the production and sale of circumvention tools (Samuelson 1996, 1997; Gillen and Sutter 2004; Imfeld and Ekstrand 2005). Therefore, in terms of the Commission’s ambitions, the new WIPO treaties represented only a ‘second best’ alternative to the policy status quo.

 On the internal dimension, the WIPO process became highly politicized as soon as it became evident that the Commission’s agenda for the WCT transposition came along with political costs for member states since the Commission’s harmonization and modernization ambitions did not resonate well with national legacies but expanded the scope of IPR. Already during the WIPO negotiations, it had become apparent that member states with a continental *droit d’auteur* legacy led by France took a much stronger stance on ‘inalienable’ authors’ and performers’ rights, which posed problems in particular for the UK and Ireland (cf. CRNR/DC/102: 31–32). Moreover, while France acted as copyright hardliner, other member states were concerned that the expansion of copyright to temporary copies would shift the balance between rights holders and consumers too far (cf. CRNR/DC/102: 34–39). In addition, several member states indicated at the WIPO negotiations that they were keen to keep national copyright exceptions (CRNR/DC/102: 73–74; for an excellent account, cf. Reinbothe and von Lewin-

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7 According to the Berne test, copyright exceptions are only acceptable in certain special cases which do not conflict with a normal exploitation of the work and which do not unreasonably prejudice the legitimate interests of the rights holders.
Regardless of these internal divisions, member states supported the Commission’s position during the negotiations and were keen to get the Community accepted as contracting party and special delegation at the WIPO conference (cf. CRNR/DC/7; CRNR/DC/8; CRNR/DC/81).

However, these controversial issues re-surfaced when the WCT had to be implemented in EC law as the transposition agenda of the Commission faced significant implementation problems. It soon became evident that the WIPO transposition could not be dealt with in a technocratic manner and faced problems when it came to forming a winning coalition. Distributional consequences and the challenges of national legacies turned the WIPO transposition into a highly politicized process:

First, the enormous differences between common-law copyright and continental droit d’auteur turned copyright legislation into a minefield. As Littoz-Monnet (2006: 446) has argued, the lesson from the legislative initiatives of the 1980s was that Community action would face difficulties if it challenged national policy legacies. Yet that is precisely what the intended post-WIPO copyright reform was going to do. In other words, the reform was going to yield visible distributional effects among constituencies in EU member states. This is due to the fact that the digital expansion of copyright in combination with TPMs had the potential to considerably restrict consumer uses formerly considered to be legitimate in some national jurisdictions. Moreover, the Commission – supported in this matter by the European Parliament (EP) – also aimed at a harmonization of copyright entailing a reduction of national copyright exceptions. These ambitions of the Commission and the EP (cf. Council 2000d, 2001) had to increase the political costs of reforming copyright for national governments (Westkamp 2007), while the expected benefits (i.e. job growth) were at the least hard to predict.8

In addition, the post-WIPO process violated another favourable condition for a strong impact of international regimes on the EU, namely technocratic decision-making. Rather, the WIPO transposition proved to be highly politicized due to a battle between rights holders on the one hand and network operators and consumer groups on the other so that the European Copyright Directive (EUCD) had to strike a delicate balance between different interest groups. As a result, the EUCD was one of the most heavily lobbied pieces of legislation to pass the EP, which approved 58 amendments to the Commission proposal. The legislative process required some time: the Commission introduced its initial proposal for the Information Society Directive on 10 December 1997 and an amended proposal on 21 May 1999. The Common Position followed on 28 September 2000, and the EUCD was finally adopted on 22 May 2001.

The Commission was very aware of potential controversies and therefore managed not to address the issue of the territorial base of the definition of copyrights. However, the Commission was not that self-restrained when it came to copyright exceptions, which it wanted to reduce decisively (European Commission 1997).

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8 The EP’s support increased adaptational costs because, among other things, the EP had demanded that ‘fair compensation’ should be a condition for application of certain copyright exceptions. This was met with resistance by some member states fearing that such compensation would exceedingly restrict consumer uses legitimate under national law (cf. Council 1999b, 2000c).
This proved to be the issue where the Commission’s failure became most evident. First, the EUCD exempts Internet service providers from liability claims. Regardless that the member states had supported the Commission’s approach in the WIPO negotiations, here existed some divisions among member states about how to strike the right balance between rights holders and Internet providers (cf. Council 1999a, c, 2000a, b). Concerning non-mandatory copyright exceptions, member states’ positions differed considerably regarding the desirable level of harmonization in terms of national copyright exceptions. Some member states were not only keen to maintain as many national copyright exceptions as possible, they also wanted to keep for themselves the opportunity to create entirely new exceptions. As a result, the EUCD extended the list of possible, that is, optional copyright limitations considerably in order to allow member states to maintain their legal traditions (Littoz-Monnet 2006). The Commission and the EP could only prevent member states from adopting a completely open list.

Moreover, the member states were very suspicious that technical protection measures to control and to restrict every consumer use might compromise national copyright traditions and national copyright exceptions. Here, joint resistance from member states and the EP watered down the legalization of TPMs. However, regardless of the strong objections from the EP (European Commission 1999), the Commission included a highly restrictive provision into the EUCD (Ginsburg 2001; Litman 2001; Dinwoodie 2004; Lucchi 2005). Yet, member states were not willing to give up and claimed that the question of how to protect fair uses or copyright exception belonged to them (cf. Giubault et al. 2007).

While the EUCD articles on exceptions to copyright restrictions and technical protection measures were by far the most controversial elements of the EUCD in terms of member states’ amendments, member states were also divided on the issue of rights exhaustion. During the WIPO negotiations, that conflict had been concealed by the fact that the Community had presented a proposal allowing for total flexibility on the issue of exhaustion (cf. Reinbothe and von Lewinsky 2002: 813). Here, certain more free-trade oriented member states preferred international exhaustion, but a majority approved the protectionist Community exhaustion principle as proposed by the Commission. Community exhaustion allows for reaping additional economic rents from copyrighted works if these works are sold outside the EU. Finally, resolution of that critical issue had to be postponed (cf. Council 1999a, c, 2000a, b). At the end of the cumbersome legislative process, Italy, Spain and France complained that the EUCD did not manage to attain a satisfactory degree of harmonization and came with the risk of substantial disparity among the member states with regard to exceptions and remunerations for rights holders (cf. Council 2000e).

To sum up, the WIPO process was highly politicized: Public awareness was much higher than in the TRIPS case, competing interest groups lobbied the Commission, member states and the Parliament so that the legislative process became rather cumbersome, and, finally, the Copyright Directive faced considerable compliance problems. This high degree of politicization is due to the fact that the WIPO process met some rather unfavourable conditions:
On the one hand, the Commission acted once more as major domestic policy entrepreneur because the WIPO process was a central piece of the Commission’s policy and institutional agenda. On the other hand, the Commission faced major problems in forming a winning coalition for its ambitious agenda and confronted resistance from a number of lobby groups and societal actors opposing the WIPO agenda.

Moreover, the WIPO process stirred up member states’ opposition because the new WIPO regime challenged national legacies of IPR regulation and was likely to bring about visible redistributitional consequences for domestic stakeholders, as it expanded the scope of IPR along the Y axis of the graph above.

### 4.2.3 Impact on EU policies

Regardless of the fact that the WIPO process did not meet all the facilitating conditions for an international regime to have a strong impact on the EU, WIPO did have an impact:

1. The Commission was able to decisively shift the policy status quo in EU copyright regulation.
2. At the same time, politicization of the WIPO process served to water down the Commission’s ambitions considerably.

Concerning the shift in the policy status quo, the Commission managed to commit EU copyright in the EUCD to its commercialized vision of digital copyright. In this the Commission was successful as EU IPR regulation remained dedicated to the post-TRIPS regulatory paradigm of stricter protection of intellectual property. In accordance with the WCT, the Commission was able to extend the protection for copyright holders by creating a new ‘communication to the public’ or ‘making available to the public’ right. Moreover, the Commission was able to push for a ‘WIPO plus’ solution regarding a digital reproduction right that covers all acts of reproduction, whether online or offline, temporary or permanent, granted to a number of actors and applying to all parties involved in the dissemination of protected works for use (Giubault et al. 2007).

However, the highly politicized character of the post-WIPO process forced the Commission to abandon its ambitious harmonization efforts (Littoz-Monnet 2007). The resistance of member states and the involvement of a large number of actors resulted in a number of compromises that harmed the goal of harmonizing copyright law. Moreover, the policy compromises within the EUCD served to simply shift the arguments between affected interest groups from the supranational arena to the legislative processes in member states (Hugenholtz 2000). Therefore, implementation has not resulted in harmonization but in a mosaic of national exemptions and solutions (Westkamp 2007). That the member states would not be able to transpose the EUCD in time became visible very early (Council 2002). Consequently, differences in national legislation have resulted in intense litigation activity regarding the scope of national copyright exceptions and the integrity of TPMs (European Commission 2007).
5. Conclusions

International institutions have an influence on the EU by way of two basic mechanisms. First, they can change the objectives of intra-EU actors, either altering their cost-benefit calculations or shaping/constituting their preferences. Second, they can differentially empower some domestic actors, be it through material or symbolic resources. These mechanisms also apply in the realm of international IPR regimes. Our study of the impact of the TRIPS agreement and the WIPO treaties on the EU demonstrates that an intricate mix of all the various mechanisms was at work. The negotiations on the TRIPS agreement and the WIPO treaties on copyright triggered substantial policy change within the EU that qualifies as ‘policy learning’ insofar as the Commission came to re-evaluate payoffs associated with certain policy agendas and outcomes. Both the Commission and member states became dedicated to an ‘Information Society’ paradigm placing emphasis on the need for stricter IPRs. Therefore, the EU turned from a rather passive ‘law taker’ into an active international ‘law maker’ trying to globalize the EU’s domestic IPR regime where possible.

In addition, the international negotiations and agreements promised increased benefits at the international level for those states embracing the ‘Information Society’ paradigm as they offered the universalization of stronger IPR rules and better enforcement mechanisms. Moreover, political opportunity structures were modified in a way benefitting policy entrepreneurs interested in fostering policy change. This holds true even for the WIPO process although WIPO is both institutionally weaker and less prone to deliver clearly pro-IPR conventions. However, the alternative to a weaker international institution for IPR enforcement would be the costly and much more controversial unilateral enforcement of EU IPRs vis-à-vis third countries. Also, in our case studies international institutions have legitimized an IPR modernization approach while at the same time provoking some amount of debate about it, especially in the cases of copyright and biotechnology by raising awareness of controversial aspects of IPR modernization. Finally, they have also opened opportunity windows for the Commission to play a central role in areas where the EU was far from having a clear-cut competence, a consistent domestic policy, or any degree of international actorness. Thus, international IPR regimes have eased the harmonization of EU member states’ legislation, triggering some degree of European integration.

Even if similar causal mechanisms were present in both cases, facilitating conditions were rather unevenly distributed, in particular when it came to the possibility of handling the changes triggered by international institutions in a technocratic, non-politicized way. In both cases the Commission acted as the major policy entrepreneur. It invariably pushed for ambitious internal and international IPR legislation, and it served as the hub for a diversity of actors ranging from US industrial lobbies to national IPR experts. To be sure, the fact that both TRIPS and the WIPO promised an expansion of policy competence and international actorness for the EU played an important role in encouraging the Commission to adopt a pro-active role. It is essential to note that in the cases examined the negotiations on international IPR treaties resonated very well with the Commission’s major policy concerns, that is, internal market integration and European competitiveness. However,
the Commission’s success depended on the extent to which the domestic policies triggered by TRIPS and the WIPO were prone to be dealt with in a technocratic or politicized way. This is where the case studies vary most notably.

As depicted above, our rationale for case selection has been based on the idea of applying a most similar case design where our cases only differ with regard to the degree of politicization as our main explanatory variable. Comparative case study evidence shows that our two cases score quite differently on the politicization variable and that these different degrees of politicization ‘correlate’ with the quite different impact of the examined international regimes on the EU’s policies (cf. table 2).

Notwithstanding our careful case selection, detailed process tracing suggests that the degree of domestic politicization of an international regime is not independent from the (perceived) contestation of that very regime. As the case of WIPO proves, ‘policy learning’ from an international regime can also work as ‘awareness raising’ of problematic effects from the policy changes associated with that regime. As a result, mechanisms of influence and facilitating conditions, or better said, non-facilitating conditions interact in a way that increases the visible contestation of an international regime, further worsening its prospects to have a strong domestic impact.

Nonetheless, both international regimes studied allowed the Commission to substantially shift the policy status quo. EU-internal changes triggered by the negotiation and adoption of TRIPS were framed in terms of improving the (external) enforcement of pre-existing IPR, and hence in basically technocratic terms. The framing of TRIPS by the Commission served to downplay TRIPS’ immediate effect on the member states. Therefore, the conditions were propitious for a substantive impact of TRIPS on the EU, both regarding changes in the policy paradigm and the adoption of directives. Decisions on the enforcement of rights are more likely to be perceived as legitimate and less likely to face opposition based on ethical or moral concerns, or to seriously contradict national legislative legacies. In addition, technocratic decisions fit better with the Commission’s resources and can trigger harmonization processes, but at the same time they are not seen as encroaching on national competences.

As regards copyright, the modernization agenda involved broadening their scope, the strengthening of the exclusivity of IPRs and new ways of enforcement as copyright holders were given much more control over protected content. In particular, the agenda of a more commercial copyright restricting consumer uses challenged deep-seated national traditions. This served to politicize the EU-internal debate and hindered the creation of harmonized EU rules on copyright. Therefore, the impact of WIPO on EU policies was reduced even though the WIPO process did allow the Commission to decisively shift the EU policy paradigm. In sum, in our cases the mechanisms that enable international institutions to influence the EU only work when the changes they trigger can be dealt with in a technocratic way. However, it is important to note that while strong politicization was certainly not in the interest of the Commission, which was aiming at emulating the strict US approach, it raised public awareness of the problematic effects of stricter IPR regulation, revealing that ‘downloading’ policy controversies from the international level can serve to activate societal actors and to mitigate policy bias.

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### Table 2: Comparative case study evidence

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<td>- Inducement of policy learning</td>
<td>- Political system in the making</td>
<td>- Shift of internal policy status quo in favour of a strict IPR approach and legitimizing of new Community activity</td>
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<td></td>
<td>- Legitimacy for a strict IPR approach</td>
<td>- Low politicization;</td>
<td>- Acquisition of new powers by the Community</td>
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<td></td>
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<td>- Limited public awareness</td>
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<td></td>
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<td>- No visible competition between interest groups</td>
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<td>- Smooth legislative process</td>
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<td>- No compliance problems</td>
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<td>- Low politicization due to</td>
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<td>- Good resonance with member states’ interests</td>
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<td>- Low visibility</td>
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<td></td>
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<td>- Technocratic character due to focus on enforcement</td>
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<td>WIPO</td>
<td>- Only ambiguous change in Cost-Benefit Calculations</td>
<td>- Commission as major policy entrepreneur</td>
<td>- Highly consequential in terms of policy paradigm, but partial shift of the policy status quo</td>
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<tr>
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<td>- Legitimacy for digital modernization of copyright</td>
<td>- Political system in the making</td>
<td>- Failure of ambitious harmonization efforts</td>
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<td>- Pressure on the EU to act</td>
<td>- High politicization;</td>
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<td>- Increasing awareness for controversial features of emerging global copyright regime</td>
<td>- High public awareness</td>
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<td>- Strong competition between interest groups and intense lobbying efforts</td>
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<td>- Cumbersome legislative process</td>
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<td>- Considerable compliance problems</td>
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<td>- High politicization due to</td>
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<td>- Problematic resonance with member states’ policy legacies</td>
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<td>- High visibility</td>
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<td>- Distributional and redistributional character due to focus on changes in the scope, exclusivity and enforcement of IPRs</td>
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References


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