

*Lobbying and Lawmaking in the European Union: The Development of Copyright
Law and the Rejection of the Anti-Counterfeiting Trade Agreement*

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Abstract: The purpose of this article is to examine the issue of ‘lobbying’ in the EU legislative process, using an interdisciplinary analysis of the development of copyright laws as a way of explaining why some lobbyists are more successful than others in having their preferences taken into account in legislation, and how this success is achieved. As this article will demonstrate, the keys to successful lobbying in this field are information exchange, the ability to frame issues at an early stage in the legislative process (agenda setting), and the political salience of an issue. By assessing not only where legislative initiatives in copyright reform have been successful, such as the passing of the Information Society, Enforcement and Term Extension Directives, but also where legislative initiatives fail, as in the case of ACTA, it will be demonstrated that legislative success is not a simple case of ‘big business getting what it wants’, but of varying levels of political salience. Where the salience of an issue is low and voters consider that issue comparatively unimportant to other issues, industry representatives are able to effectively frame legislative outcomes. Where salience is high, and an issue important to voters, this ability is substantially reduced. By approaching copyright law development in this way, it is possible to reconceptualise the role of lobbying in the EU legislative process.

Keywords: - copyright, EU law, legislative process, political theory, salience, ACTA

1. *Introduction*

On 4 July 2012, the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA), a plurilateral agreement concerning intellectual property rights and enforcement negotiated between the European Union and ten other nation states party to the World Trade Organization. Defeated by a resounding 478 votes to 39, the defeat of ACTA was seen as a success by Internet activist organizations that perceived ACTA to be anti-democratic and potentially hindering to freedom of expression. Some optimism seemed warranted, given the criticisms of European Union copyright policy tending towards upward harmonization of scope and duration, and increasingly restrictive limitations and exceptions to copyright. Nevertheless, it is important to contextualise the rejection of ACTA. Copyright, at least academically, is a fiercely contested subject. Lobbyists, it has been suggested, dominate copyright policy, and ‘lobbynamics’ carries more weight than ‘objective evidence’. This view, however, does not take into account that there are also industries, organizations and individuals that lobby *against* increases in copyright protection, and considers that lobbying can be perceived as interference in the legislative process. The purpose of this article is to examine the issue of lobbying in the EU more closely, using an interdisciplinary perspective to assess lobbying in the field of copyright law and determine why some lobbyists are more successful than others in having their preferences taken into account in legislation. As this article will demonstrate, the keys to successful lobbying in this field are the importance of information exchange, the ability to frame issues at an early stage in the legislative process (agenda setting), and the political salience of an issue. The article will begin by discussing the concept of lobbying in more detail, demonstrating that the key element of lobbying is the ability to provide policy makers with sector-specific information required for developing a legislative agenda, highlighting the information requirements of the European Commission and Parliament. The third section of the article will discuss what makes

lobbying successful, and why some lobbyists may be more successful than others, by focusing on the comparative ability to set agendas in legislative policy, and the impact that the political salience of an issue on the ability of lobbyists to influence legislation. Where salience is high, and voters aware of an issue, this ability to influence the process is reduced. Where salience is low, and voters unaware or comparatively uninterested in an issue, then the ability to influence the process is increased. In the fourth section, this framework will be applied to three case studies of contentious legislation passed by the European institutions in the field of copyright law, before demonstrating why a change in political salience and active citizen participation in the legislative process resulted in the European Parliament voting to reject an international agreement that two years earlier it had fully supported.

2. Lobbying in the European Union: A Framework for Analysis

The most important prerequisite in assessing the comparative success of certain lobbying groups in impacting the framing and direction of copyright policy in the EU is to determine what the term ‘lobbying’ means, and who is to be considered a ‘lobbyist’. The term ‘lobbying’ may conjure up images of clandestine meetings between politicians and suited men exchanging envelopes in a car park, or briefcases full of money being slid across a desk in an dimly lit office in Washington DC. Indeed, as Lessig indicates, during the 19th Century practices such as open bribery were common, and not criminalised in the US until 1853.¹ Nevertheless, the practice continued throughout the 19th Century and into the 20th, although in a somewhat more discreet fashion – ‘Lobbyists and members [of Congress] had to be discreet. There may have been duplicity but there were limits...in the main the practices were hidden, and therefore limited’.² Contemporary lobbying, however, bears little resemblance to the largesse of the 1800s, either in the US or in Europe. Today, lobbying by

¹ Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - And A Plan To Stop It* (Twelve 2012) 102

² *ibid*

professional lobbying organizations is considered a professional activity, subject to significant regulation and oversight.³ So, it is something of an oversimplification to say that lobbying is about the use of money to attain influence. Instead, at a general level, lobbying can be defined as any attempt to influence public policy.⁴ More precisely, ‘wherever government makes decisions that affect the interests of different groups – industry, consumers, labour unions, non-governmental organizations and others – those groups will seek to influence the decisions in their favour’.⁵ As will be demonstrated later in this article, this means that any actor has the potential to act in a lobbying capacity. In this respect, it is not only the representatives of large multinational corporations that are engaged in lobbying practices; academics seeking to influence the direction of lawmaking based on their research, trade unions on the basis of the interests of their members, and even individuals petitioning governments and parliaments all are engaged in ‘lobbying’. It must be stated here that this is not a normative statement, but an explanatory one. The purpose of this paper is not to assess or argue the legitimacy of different forms of stakeholder participation, but to assess why some forms of engagement with the legislative process may be more effective than others.⁶ This again helps to reinforce why the question we should ask is not ‘why do European institutions listen to lobbyists when developing copyright laws?’ but ‘why are some lobbyists more successful than others in having their policies taken into account?’

Coen states that while not always seen as a welcome aspect of Western politics, most political scientists recognize that private interests have a legitimate and important role to play in the public

³ See, for example, the Lobbying and Disclosure Act 1995 (2 USC §1602) in the US. While the EU does not have a formal legislative regulatory system that covers lobbying, it nevertheless discloses the accounts of lobbyists’ activities through its ‘Transparency Register’, <<http://ec.europa.eu/transparencyregister/info/homePage.do>> accessed 7 April 2014

⁴ Christine Mahoney, ‘Lobbying Success In The United States And The European Union’ (2007) 27(1) *Journal of Public Policy* 33, 35. See also Robert Mack, ‘Lobbying Effectively In Brussels And Washington - Getting The Right Result’ (2005) 9(4) *Journal of Communication Management* 339, 340

⁵ Mack (n 4) 339

⁶ For a detailed analysis and consideration of the role that different lobbying groups may have on the political process, including whether different types of participation could be considered to promote or impinge democratic functions, see Grant Jordan and William A Maloney, *Democracy And Interest Groups: Enhancing Participation?* (Palgrave Macmillan 2007)

policy process.⁷ One of the most important roles played by these lobbying organizations is the provision of information⁸ - Klüver argues that lobbying can be conceptualized as an exchange relationship between interdependent actors in which the European institutions trade influence for information.⁹ To put it another way, the reason why lobbyists have the ability to influence the legislative process is because they are in a position to provide information believed to be required by policy-makers. 'In this context, information is valuable because of the uncertainty that pervades the political and policy processes'.¹⁰ In this respect, there is information asymmetry between political institutions and lobbying organizations. Policymakers cannot, and should not, be expected to be experts in every particular field of policy development, meaning that they are in a position where they have incomplete information regarding the repercussions of policy decisions and the possible repercussions of those decisions.¹¹ Interest groups, and in particular, business and industry representatives are perfectly placed to take advantage of this information asymmetry – this is 'due to [policy-makers'] capacity constraints, and because of interest groups' own strong incentives to pool resources and conduct research on issues of concern to their members'.¹² As one executive interviewed by Bernhagen and Bräuninger commented, 'I am actually surprised how often [ministerial civil servants] ring me up looking for information I would have assumed they would have at their fingertips...'¹³ This reinforces the interdependent relationship between lobbyists and policy-makers – lobbyists want their preferences taken into account, and in turn, policy-makers rely upon the information provided by these lobbyists in order to assess and choose between different

⁷ David Coen, 'Empirical And Theoretical Studies In EU Lobbying' (2007) 14 *Journal of European Public Policy* 333, 334. See also Jeremy Richardson, 'Government, Interest Groups And Policy Change' (2000) 48 *Political Studies* 1006

⁸ Richardson (n 7) 1009; David Austen-Smith and John R Wright, 'Competitive Lobbying For A Legislator's Vote' (1992) 9 *Soc Choice Welfare* 229, 231

⁹ Heike Klüver, *Lobbying In The European Union: Interest Groups, Lobbying Coalitions, And Policy Change* (Oxford University Press 2013) 15

¹⁰ Frank R Baumgartner, *Lobbying And Policy Change: Who Wins, Who Loses, And Why* (University of Chicago Press 2009) 123

¹¹ See, for example David Austen-Smith, 'Information And Influence: Lobbying For Agendas And Votes' (1993) 37 *American Journal of Political Science* 799, 799–800; Klüver (n 9) 58; Baumgartner (n 10) 122–25; Richardson (n 7) 1009

¹² Patrick Bernhagen and Thomas Bräuninger, 'Structural Power And Public Policy: A Signaling Model Of Business Lobbying In Democratic Capitalism' (2005) 53 *Political Studies* 43, 47

¹³ *ibid*

policy approaches. As Culpepper puts it, ‘company managers know more about the effect of legal changes on their companies than do politicians, and politicians know this’.¹⁴

The European institutions are also reliant upon the information provided by interest groups in the same way as a national government or parliament. The European Commission has the sole right of legislative initiative in the EU,¹⁵ and as such is able to exert considerable influence over agenda setting.¹⁶ The Commission therefore plays a central role in the legislative process, acting as the motor of policy-making, albeit one limited by its relatively small budget.¹⁷ Schendelen states that ‘due to its scarce resources of budget and manpower the Commission has a strong appetite for information and support from outside’.¹⁸ So great is the need for information that not only is the Commission willing to receive information from lobbying organizations, but it actively seeks that information out. In fact, the information provided is indispensable to the Commission’s legislative efforts.¹⁹ Without it, the Commission is not in a position to determine the outcome of a particular legislative endeavour in a complex sector, such as economic development or copyright policy, and therefore the Commission consults widely on proposed regulation, demanding information in the form of evidence from interested parties (or stakeholders, as they are referred to by the Commission). It is through this supply of information that lobbyists are able to influence the legislative process²⁰. Due to its position as legislative engine and its role in drafting policies, the Commission is regarded as being the main focal point of lobbying activity²¹, and businesses will therefore seek to influence the Commission

¹⁴ Pepper D Culpepper, *Quiet Politics And Business Power: Corporate Control In Europe And Japan* (Cambridge University Press 2011) 9

¹⁵ Consolidated Version of the Treaty on European Union [2012] OJ C 326/13 Article 17(2)

¹⁶ Joseph Gardner, ‘Agenda-Setting Through The Backdoor? The Commission’s Use Of Its Power To Withdraw’ (2013) 9 *Journal of Politics & International Studies* 562, 569; Neill Nugent, *The European Commission* (Palgrave 2001)

¹⁷ Pieter Bouwen, ‘The European Commission’ in David Coen and Jeremy Richardson (eds), *Lobbying the European Union institutions, actors, and issues* (Oxford University Press 2009) 20

¹⁸ Rinus van Schendelen, *Machiavelli In Brussels The Art Of Lobbying The EU* (Amsterdam University Press 2002) 68–69

¹⁹ Bouwen (n 17) 22

²⁰ Klüver (n 9) 41

²¹ Coen (n 7) 335. See also Schendelen (n 18) 69, who argues that this stage of the legislative process is the most crucial for lobbying organizations.

before any formalized documents are in place as a form of ‘early lobbying’.²² If the lobbying organization is able to ensure that any draft legislation represents their preferred policy outcome, then the ‘lobbying objective during the ensuing legislative process would then become the defence of the Commission’s proposal, which is often easier than introducing changes to it’.²³

The European Parliament is also subject to the same need for externally provided information. Upon receipt of draft legislation from the Commission in the field of internal market (including intellectual property), the Parliament must then assess it and determine whether to pass it through co-decision with the Council (now known as the ordinary legislative procedure).²⁴ As with the Commission, the Parliament is comprised of members from all over the EU, who will have radically different competences, skills and backgrounds. Information asymmetry continues to play a role in the Parliament, as MEPs need access to information that helps them to understand and assess a legislative proposal.²⁵ According to an interviewed policy adviser at the European Parliament,

We cannot do our work without the information from interest groups. They send us amendments and voting lists prior to the committee and plenary vote. Sometimes it is very tempting to copy and paste their amendments and voting lists. I mean we are all so busy in Parliament.²⁶

While the council is also subject to lobbying pressures, this occurs generally at the level of the national experts seconded to the institution, or at the level of national governments. Furthermore,

²² Bouwen (n 17) 20

²³ Mack (n 4) 345

²⁴ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 Article 294

²⁵ Klüver (n 9) 41

²⁶ Maja Kluger Rasmussen, ‘The Lobbying See-Saw: Who Tips The Scales In The European Parliament?’ (12th Biennial International Conference of the European Union Studies Association, Boston, 2011) 8

due to the somewhat closed and opaque nature of the Council as an institution,²⁷ it is difficult to conduct research on this body and assess their role in these legislative developments. For this reason, the assessment of the influence of lobbying organizations on the copyright lawmaking process will focus on the European Commission and European Parliament.

3. Knowledge, Issue Framing and Political Salience: Determinants of European Union

Institutional Policy

The preceding section helps us to understand why European institutions listen to the claims of lobbying organizations. Indeed, reliance upon the information provided by these organizations appears to be understood as an essential dimension to the legislative process. Yet it does not answer the question as to why some lobbyists are more successful than others in having their preferred outcomes adopted by European institutions, either generally, or specifically in the case of copyright law. In reality, the problem of the European institutions, and in particular the Commission, is not in gaining access to information, but trying to sort through the information provided and ‘make sense of the avalanche...that comes at them from every direction’.²⁸ What approach is taken to a particular policy issue, and the success of a particular lobbying organization or business sector in influencing that policy choice, is largely determined by three inter-related factors – knowledge/expertise, issue framing and political salience. As has already been discussed in the previous section, institutions such as the Commission are reliant upon information provided by external sources, both in order to draft legislation and to determine policy agendas. Industry representatives in particular are able to take advantage of this information asymmetry in order to influence the direction of a particular

²⁷ Timothy Bainbridge, *The Penguin Companion To European Union* (Penguin 2002) 107; Rainer Eising, ‘The Access Of Business Interests To EU Institutions: Towards Élite Pluralism?’ (2007) 14 *Journal of European Public Policy* 384

²⁸ Baumgartner (n 10) 124

policy. Nevertheless, information, and indeed evidence provided by experts, is non-neutral.²⁹ Each actor seeking to influence policy is doing so because they desire, or wish to prevent, a particular result. In environmental policy, for example, a large oil producer may wish to prevent or ‘water-down’ strict regulations relating to liability in the event of oil spills. In taxation policy, large multinationals may wish to avoid legislation that places restrictions on the movement of capital. Yet industry actors will be cautious in their justifications for a preferred policy outcome. It is highly unlikely that a representative of an oil producer will say ‘we do not want liability because it may hurt our profit margins’; a representative for a large multinational will hardly say to the Commission ‘we want legislation that will provide us with tax-cuts. Why? We are operating out of pure self-interest’.³⁰ Instead, these desired outcomes (such as lower taxation) will be linked to a policy objective that may be held by an institution such as the Commission (such as economic growth). This can be referred to as ‘issue framing’. By presenting information in a particular way, lobbying organizations are able to influence how a particular policy is achieved, or indeed, whether something is considered as being a policy at all. The techniques that can be used in order to successfully frame an issue include direct lobbying and information provision, participation in expert committees or working groups, and the framing of issues favourably in the media.³¹ An expert committee or working group is a key stage in the legislative process to influence legislative development. If representatives from a particular sector

²⁹ For a much larger analysis of this issue that takes the work of Michele Foucault as a basis, see Benjamin Farrand, *Networks Of Power In Digital Copyright Law And Policy: Political Salience, Expertise And The Legislative Process* (Routledge 2014) ch 1

³⁰ From a theoretical perspective, one way in which the political actor acting in their own self-interest can be explained is through public choice theory, a political science perspective heavily influenced by rational choice theory scholars in the field of economics. Rational choice theory as applied to political processes (concerning the allocation of ‘public goods’, hence public choice theory) is the theory that leaders of political parties are not driven by a sense of what policies are in the public interest, but are motivated by rational self-interest, and will therefore ‘formulate policies in order to win elections rather than win elections in order to formulate policies’, as described in Anthony Downs, *An Economic Theory Of Democracy* (Harper and Row 1957) 27. This theory, which became influential in political science studies of political behaviour, has been expanded to the study of lobbying organisations acting as ‘agenda-setters’, by writers such as George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press 2002). Industry representatives, this theory goes, are rational actors who will act in such a way as to maximise their utility through the adoption of approaches to legislators best able to maximise their chances of success. However, as this article focuses on *how* an actor attains their objectives, rather than focusing on explaining *why* they possess those objectives, public choice theory is not used as the theoretical framework for analysis.

³¹ Culpepper (n 14) 8–9

gain access to one of these bodies, they are then granted significant agenda-setting ability, with the ‘power to set the terms of the debate in an environment that is established with an explicit eye to protecting their interests’³². Lütz *et al* provide an example of this form of policy involvement, referring to the Cadbury Committee set up in the UK in the 1990s.³³ The Committee was set up as the result of a loss of confidence in market regulators after allegations of market manipulation, fraud and bad practice, with the goal of improving corporate governance.³⁴ The Committee was ‘dominated by the market players (among them the accounting profession, institutional investors, lawyers, corporations, the Bank of England and the London Stock Exchange), while public interests were not represented’.³⁵ This meant that the recommendations that resulted distinctly favoured the balance between ‘investor protection and managerial flexibility’ that suited the members of the Committee.³⁶ The European Commission also uses expert committees during the policy development stage. Referred to as ‘consultative committees’, these bodies can be set up by the relevant DG of the Commission in order to attain expert knowledge. These bodies can either take the form of large stakeholder hearings, medium-sized roundtables, or small expert groups, and they can either be standing committees, which are permanent consultation bodies, or ad hoc committees, temporary bodies set up to consider a particular problem or as a response to a particular development. According to Bouwen, these ad-hoc committees ‘focus the attention of their members on a precise problem for a limited period of time and are therefore often more influential’.³⁷ Participation in these consultative committees, particularly the small expert groups, is considered a high priority for industry representatives in the EU, as they are considered a ‘crucial action point for private interests

³² *ibid* 9

³³ Susanne Lütz and others, ‘Varieties Of Private Self-Regulation In European Capitalism: Corporate Governance Codes In The UK And Germany’ (2011) 9 *Socioecon Rev* 315

³⁴ *ibid* 319

³⁵ *ibid*

³⁶ *ibid* 320

³⁷ Bouwen (n 17) 30

to influence the EU decision-making process'.³⁸ According to Mahoney, in 2004 business was the dominant actor in these consultative committees, having approximately 72% of the committee positions³⁹, a position that is unlikely to have changed dramatically.

The other way in which lobbying organizations can influence the legislative process is by framing the issue favourably in the media. Media framing, as defined by Iyengar, refers to 'subtle alterations in the statement or presentation of judgment and choice problems'.⁴⁰ In other words, media framing is the way in which a particular issue is discussed in and by the media, including which aspects of the story are highlighted, and what is considered a problem. For example, a story about a large construction project being finished could be reported in different ways. It may be reported as a story in which the completion of the project has resulted in the establishment of new office premises allowing a large company to increase its number of staff and provided services, benefitting local workers and the economy. Alternatively, the story could be presented as one of corruption, involving a murky tendering process, substantial delays in the completion of the project, and questions regarding the use of funds. Iyengar argues that media coverage can be used to 'manipulate' public preferences, whether concerning taxation policy, the funding of public bodies, or general social issues.⁴¹ A financial services company could use the media to promote a view that the effective functioning of the economy is directly linked to the continued success and health of their particular business.⁴² This is not to say that the media is a passive conduit for the views of politicians, business people or other interested actors. Instead, Baum and Potter argue that the public tends to be ill-informed about policy issues, and the impact of certain approaches to policy, with the result that 'information equilibrium tends to favour leaders, and hence, the media are more responsive to

³⁸ *ibid*

³⁹ Christine Mahoney, 'The Power Of Institutions State And Interest Group Activity In The European Union' (2004) 5 *European Union Politics* 441, 450

⁴⁰ Shanto Iyengar, *Is Anyone Responsible?: How Television Frames Political Issues* (University of Chicago Press 1991) 11

⁴¹ *ibid* 12–13

⁴² Culpepper (n 14) 10

leaders' preferences than those of the public'.⁴³ This means that public attitudes towards a particular issue can be moulded by those leaders, whether government ministers or business leaders, meaning that 'without a clear understanding of the issue to anchor their responses, most were willing to be persuaded by the arguments they were offered'.⁴⁴ Information asymmetry equally applies to citizens as to European institutions; in fact, the lack of information is likely to be far more pronounced when dealing with non-expert members of the public. It may be that the public's only awareness of a particular issue is based upon media reporting of that issue. Therefore, in order to generate public support for a particular policy, industry representatives may attempt to use the media as a way of convincing the public of the importance of their preferred outcome.

Yet this does not mean that the combination of knowledge and the ability to frame policy decisions will result in lobbying organizations always being able to achieve their objectives. Despite sitting on expert committees or providing expert information to legislators, the oil producer, for example, may still be subject to regulatory oversight. A final factor that will determine the success of a lobbying organization in influencing the legislative process is the political salience of an issue. Political salience, according to Culpepper, is a way of assessing the importance of an issue to the average voter, 'relative to other political issues'.⁴⁵ If an issue has high political salience, voters are much more likely to vote on the basis of that issue, meaning the response by elected officials to that issue can be a 'vote winner' (if citizens support the approach to that issue), or perhaps of more concern to individuals facing re-election, a 'vote loser' (if citizens are unhappy with the response of that individual to that issue). It is important to note, however, that political salience is an assessment of the *importance* of a particular issue, rather than an assessment of the public's support for a

⁴³ Matthew A Baum and Philip BK Potter, 'The Relationships Between Mass Media, Public Opinion, And Foreign Policy: Toward A Theoretical Synthesis' (2008) 11 Annual Review of Political Science 39, 50

⁴⁴ Deborah Lynn Guber and Christopher Bosso, 'Framing ANWR: Citizens, Consumers, And The Privileged Position Of Business' in Michael E Kraft and Sheldon Kamieniecki (eds), *Business and environmental policy corporate interests in the American political system* (MIT Press 2007) 43

⁴⁵ Culpepper (n 14) 11

particular approach to that issue.⁴⁶ A relatively topical issue at the moment is that of same-sex marriage. While in the UK, Westminster has passed the Marriage (Same Sex Couples) Act 2013, and the Scottish Parliament has passed the Marriage and Civil Partnership (Scotland) Act 2014, the issue of same sex marriage is very divisive in some countries, and in particular, some states in the US. In Utah, for example, the Appeals Court is currently hearing a case involving a voter-approved ban on same-sex marriage, which activists are trying to get overturned.⁴⁷ For voters in Utah, same-sex marriage will be a highly salient issue, which may determine their voting preferences. For those who disapprove of same-sex marriage, they may vote according to the statements of elected officials on same-sex marriage, either supporting a candidate who publicly condemns same-sex marriage, or to remove a supporter of same-sex marriage from office. In comparison, some issues will be considered to be of low political salience. For example, in December 2013, the British Parliament passed the City of London (Various Powers) Act 2013, which provides the City of London with powers to grant temporary licenses to street traders to sell wares in designated areas. A technical piece of legislation making modifications to street trading rules is unlikely to generate much public interest, and as a result, voters are unlikely to vote to ‘reward’ or ‘punish’ elected officials for their vote on such an issue. “‘Read my lips; No new poison pills’” is an unlikely campaign slogan in any country’.⁴⁸ Issue salience is changeable however, rather than being static, as issues come to be seen as more or less important over time.⁴⁹ As we shall see, salience ‘rises and falls with news coverage, presidential speeches, world events...and the activities of interest groups’.⁵⁰

Culpepper argues that in environments of low political salience, lobbying groups such as those representing corporate managers have ‘access to superior weapons for battles that take place

⁴⁶ Ken Kollman, *Outside Lobbying: Public Opinion And Interest Group Strategies* (Princeton University Press 1998) 25

⁴⁷ Associated Press, ‘Appeals Court Appears Divided Over Utah Same-Sex Marriage Case’, *The Guardian* (10 April 2014) <<http://www.theguardian.com/world/2014/apr/10/utah-gay-marriage-federal-judges-divided>> accessed 12 April 2014

⁴⁸ Culpepper (n 14) 5

⁴⁹ Benjamin I Page and Robert Y Shapiro, *The Rational Public: Fifty Years Of Trends In Americans’ Policy Preferences* (The University of Chicago Press 1992)

⁵⁰ Kollman (n 46) 25

away from the public spotlight...[and]...are decided by what I call “quiet politics”⁵¹ In this environment, lobbying organizations can rely upon information provision, agenda-setting capacity and the ability to frame issues in the media in order to influence legislation in their favour. ‘When an issue is of little interest to voters, the press has little incentive to cover it and ambitious politicians gain little by acquiring expertise in it’⁵² In these situations Members of the European Parliament (MEPs), for example, may not invest particular time or effort in understanding the complexities of a particular piece of proposed legislation, nor to informing themselves of the context and background to that proposal, instead relying upon the information provision and provided expertise of lobbying organizations. As the European Parliament is both visible and accountable to the European Union electorate through the European elections, MEPs are more responsive to pressures from the general public (although it must be stated that in general, EU citizen attention paid to the European Parliament is rather low) than an institution such as the European Commission.⁵³ Websites such as ‘votewatch.eu’ for example provide information on the voting patterns of particular MEPs, political groupings, and votes on particular pieces of legislation.⁵⁴ For this reason, where political salience is high, MEPs can be pressured to vote based on citizen views, as will become important in the discussions of the ACTA vote in the European Parliament. However, where political salience is low, MEPs are likely to follow the recommendations of industry representatives.

4. Lobbying the European Institutions: Agenda-Setting and Political Salience in Copyright Law

As stated in the preceding section, success in influencing the direction of policy is dependent on three interrelated factors: - the provision of information, the ability to frame issues through early-agenda

⁵¹ Culpepper (n 14) 4

⁵² *ibid* 20

⁵³ Klüver (n 9) 48

⁵⁴ ‘VoteWatch Europe: European Parliament, Council Of The EU’ (no date) <<http://www.votewatch.eu/>> accessed 12 April 2014

setting and/or favourable media attention, and political salience. By examining three case studies of academically contentious, yet nevertheless successful legislative initiatives, it will be demonstrated that the success of industry lobbyists in securing preferable legislation has been based on long-standing connections with policy-makers, participation in early working group meetings and successful agenda-setting, made possible through the environment of quiet politics that is facilitated by low political salience.

A. The Information Society Directive: Setting the Agenda for EU Copyright Development

The Information Society Directive⁵⁵ has been referred to as being the subject of ‘unprecedented lobbying’,⁵⁶ with the number of interests ‘engaged in active lobbying on [the proposal having been] striking’.⁵⁷ Adopted in May 2001, the ostensible objectives of the Directive were to ensure compliance with international obligations under the TRIPS Agreement and that the Internal Market was prepared for the technological challenges posed by the Internet through the harmonization of laws concerning the exploitation of copyright and related rights.⁵⁸ The Information Society Directive harmonized the exclusive rights of reproduction⁵⁹ communication⁶⁰ and distribution⁶¹, while providing for an exhaustive list of optional exceptions and limitations.⁶² The Directive has been subject to substantial criticism by academics due to its overly restrictive nature, with rights defined

⁵⁵ Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Information Society Directive)

⁵⁶ P Bernt Hugenholtz, ‘Why The Copyright Directive Is Unimportant, And Possibly Invalid.’ (2000) 11 European Intellectual Property Review 499, 499

⁵⁷ Michael Hart, ‘The Copyright In The Information Society Directive: An Overview’ (2002) 24(2) European Intellectual Property Review 58, 58

⁵⁸ *ibid*; P Bernt Hugenholtz, ‘Copyright Without Frontiers: The Problem Of Territoriality In European Copyright Law’ in Estelle Derclaye (ed), *Research handbook on the future of EU copyright* (Edward Elgar 2009) 19; Martin Kretschmer, ‘Digital Copyright: The End Of An Era’ (2003) 25(8) European Intellectual Property Review 333, 333

⁵⁹ Information Society Directive, Article 2

⁶⁰ *ibid*, Article 3

⁶¹ *ibid*, Article 4

⁶² *ibid*, Article 5

broadly and exceptions narrowly,⁶³ as well as for the legal uncertainty caused by having a list of optional rather than mandatory exceptions and limitations to copyright.⁶⁴

The origins of the Information Society Directive can be traced back to the establishment of a working group by the Commission, which released a report known as the Bangemann Report in 1994. This working group, tasked with considering the changes needed in order to ensure that Europe would benefit from the advancement of telecommunications technologies and information processing techniques, produced recommendations on which the Council announced it would ‘adopt an operational programme defining precise procedures for action and the necessary means’.⁶⁵ Already this demonstrates that the Bangemann working group was able to significantly influence the European Union institutions, and set the legislative agenda in the field of technology development. In a section of the Report on intellectual property rights (IPRs), it was stated that ‘there is information that is proprietary and needs protection via IPRs. IPRs are an important factor in developing a competitive European industry...across a wide range of industrial and commercial sectors’.⁶⁶ For this reason, the Bangemann Report tasked the European institutions with giving IPRs their full attention, as Europe ‘has a vested interest in ensuring that a high level of protection is maintained’.⁶⁷ Page 6 of the Report provides a list of the members of the working group, which including the chair, Martin Bangemann, comprised twenty representatives from the creative and innovation-based industries, including Volvo, Elsevier, Bang & Olufsen, IBM and Général Canal +, described in the Report as

⁶³ Giuseppe Mazziotti, *EU Digital Copyright Law And The End-User* (Springer 2008) 61–69; See also Severine Dusollier, ‘Electrifying The Fence: The Legal Protection Of Technological Measures For Protecting Copyright’ (1999) 21(6) *European Intellectual Property Review* 285; Marcella Favale, ‘Fine-Tuning European Copyright Law To Strike A Balance Between The Rights Of Owners And Users’ (2008) 33(5) *European Law Review* 687; KJ Koelman, ‘A Hard Nut To Crack: The Protection Of Technological Measures’ (2000) 22(6) *European Intellectual Property Review* 272

⁶⁴ Lucie Guibault, ‘Why Cherry-Picking Never Leads To Harmonisation: The Case Of The Limitations On Copyright Under Directive 2001/29/EC’ (2010) 1 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 55

⁶⁵ European Commission and Bangemann Group, ‘Europe And The Global Information Society: Recommendations Of The High-Level Group On The Information Society To The Corfu European Council’ (1994), *Bulletin of the European Union Supplement* 2/94, 6

⁶⁶ *ibid*, 21

⁶⁷ *ibid*

‘prominent persons’.⁶⁸ The Council acknowledged in a supplement to the Report that the European institutions, as well as the Member States, had ‘an important role to play in...giving political impetus [and] creating a clear and stable regulatory framework’ in the field of intellectual property rights.⁶⁹ The following year, the Commission released a Green Paper in which the need to harmonize copyright was discussed.⁷⁰ In this Green Paper, the Commission stated that ‘the protection of copyright and related rights is vital to the Internal Market, and has cultural, economic and social implications for the Community’.⁷¹ As well as reiterating the Bangemann Report’s statement that Europe has a vested interest in maintaining a high level of protection for IPRs⁷², it states that ‘priority should be given to harmonizing the rules on the protection of both copyright and related rights to provide a high level of protection’.⁷³ In a Communication published by the Commission in 1996,⁷⁴ it was then stated that ‘Europe’s traditionally high level of protection must be maintained and further developed’.⁷⁵ In the resulting Proposal for a Directive⁷⁶ the Commission reiterated that ‘the proposal aims at maintaining the traditionally advanced level of copyright protection in Europe’.⁷⁷ It would appear, therefore, that an agenda of ensuring high levels of protection for copyright had been set prior to the drafting of a Directive.

The process of the Information Society Directive also shows the impact that information and perceived expertise can have on legislative development. If we turn to an earlier Green Paper, published by the Commission in 1988, we see that ‘piracy’ of copyrighted works is considered a

⁶⁸ *ibid*, 6

⁶⁹ *ibid*, 131

⁷⁰ European Commission, Copyright and Related Rights in the Information Society – Green Paper, COM 95 (382) final

⁷¹ *ibid*, paragraph 10

⁷² *ibid*, paragraph 3

⁷³ *ibid*, 42

⁷⁴ European Commission, Follow-Up to the Green Paper on copyright and related rights in the Information Society (Communication), COM (96) 586 Final

⁷⁵ *ibid*, 2

⁷⁶ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society COM (97) 628 final

⁷⁷ *ibid*, 9

priority as it had ‘emerged as a serious problem for copyright industries and for creative artists’.⁷⁸ While this Green Paper was not necessarily written with the Information Society Directive in mind, expert knowledge provided helped to establish the ‘problem’ that the Commission felt it necessary to combat. The evidence demonstrating that copyright infringement was becoming a serious problem all appeared to be generated by one source, recording industry advocacy organization IFPI (the International Federation of the Phonographic Industry), which provided statistics and figures regarding the economic loss resulting from copyright infringement.⁷⁹ In the 1995 Green Paper, the Commission referred to the ‘danger of piracy...and the need for arrangements...for the progressive introduction of techniques to limit copying of this kind’.⁸⁰ It was not only knowledge of the creative industries that lobbying organizations possessed, however, but knowledge of European institutional processes. As well as influencing the policy agenda regarding copyright at the pre-Proposal stage, industry representatives quickly moved to the European Parliament, outmatching those lobbying the Parliament on behalf of users’ rights. According to one interview conducted by Burrell and Coleman with the head of an organization representing the interests of libraries and archives, ‘user groups face an uphill struggle...mentioning a lack of resources and expertise in lobbying and the general mismatch between user groups and organisations such as IFPI, Walt Disney and Vivendi’.⁸¹ Rather than being able persuade the Parliament to relax some of the provisions on copyright protection, these user groups instead found that industry representative organizations were effective in persuading the Parliament to increase the restrictiveness of the proposed Directive.⁸² A second interviewee stated that whereas they had assumed that MEPs from the Socialist grouping would support their position, as they ‘ought to be natural allies of user groups’,⁸³ they found that MEPs were

⁷⁸ European Commission, Green Paper on Copyright and the Challenge of Technology COM (88) 172 final, sec.2.1.4

⁷⁹ *ibid.*, secs.2.2.4-2.2.13

⁸⁰ European Commission Green Paper (n70), 28

⁸¹ Robert Burrell and Allison Coleman, *Copyright Exceptions In Europe: The Digital Impact* (Cambridge University Press 2005) 209

⁸² Farrand (n 29) 94

⁸³ Burrell and Coleman (n 81) 208

hostile to their views, and regarded ‘copyright as an esoteric subject with which they need not concern themselves’.⁸⁴ Furthermore, it was difficult for opponents to the Directive to generate support amongst other consumer organizations, as they believed it ‘too difficult to translate concerns about copyright into the issues that consumers actually care about’.⁸⁵ This statement is somewhat telling, as it suggests that copyright law is an area of high complexity and low political salience. MEPs did not consider it worth informing themselves about the copyright debate, and consumer organizations did not appear particularly concerned. In the UK in particular, there was very little media reporting concerning the proposed Directive, and what reporting there was presented the issue as being one of ensuring protection of copyright from infringement, with statements from industry bodies such as IFPI.⁸⁶ The paucity of coverage, and in particular coverage negatively predisposed to the Directive allowed industry representatives to publicly frame the issue favourably in a way that may not have been possible in an environment of high political salience.

B. The Enforcement Directive: Quiet Politics and Quiet Battles Over Technical Legislation

The Enforcement Directive⁸⁷ was passed in June 2004, entering into force a mere one year and six months from its initial announcement in January 2003.⁸⁸ Kierkegaard argues that the speed of implementation, with the European Parliament passing the Directive after the first reading rather than being subjected to a second, was to ‘prevent the New Members [of the EU] from influencing the content of the controversial provisions’.⁸⁹ The Directive, a technical piece of legislation, intended to

⁸⁴ *ibid* 209

⁸⁵ *ibid*

⁸⁶ Farrand (n 29) 95

⁸⁷ Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights [2004] OJ L195/16

⁸⁸ Kirstin Huniar, ‘The Enforcement Directive - Its Effects On UK Law’ (2004) 28(2) *European Intellectual Property Review* 92, 93

⁸⁹ S Kierkegaard, ‘Taking A Sledge-Hammer To Crack The Nut: The EU Enforcement Directive’ (2005) 21(5) *Computer Law and Security Report* 488, 489. See also J Reinbothe, ‘The EU Enforcement Directive 2004/48/EC As A Tool For

harmonize Member States' approach to issues such as interested parties having the right to bring infringement claims⁹⁰, evidential requirements⁹¹ and the right to information that can be requested from an infringer concerning the origin and distribution network for IPR infringing goods or services.⁹² This right to information was regarded as being particularly controversial, because Internet Service Providers could be required to provide information on their subscribers, raising concerns for privacy as well as the proportionality of the Directive.⁹³

While IPR infringement had been identified as an issue by European institutions as far back as 1988, and the Bangemann Report further influencing the agenda for copyright lawmaking in the EU, another working group appears to have had influence over EU policy development concerning the need for further enforcement provisions. Meeting in Munich in 1999, a consultative committee was set up to discuss links between organized crime and IPR infringement. This group, according to the Commission, comprised 'trade associations, intellectual property right-holders, companies, lawyers, academics, national administrations [and] other European institutions'.⁹⁴ The meeting appears to have influenced the Commission's policy approach concerning the Enforcement Directive. In the Commission's Proposal for a Directive,⁹⁵ it was stated that 'consultation of interested circles...confirmed, with the support of examples in the field of music and software, the links between counterfeiting and piracy and organised crime'.⁹⁶ While in a 1998 Green Paper the Commission indicated that IPR infringement might be a way of laundering the proceeds of organized

Copyright Enforcement' in Irini A Stamatoudi (ed), *Copyright enforcement and the Internet* (Kluwer Law International 2010) s D.3

⁹⁰ Enforcement Directive, Article 4

⁹¹ *ibid*, Article 6

⁹² *ibid*, Article 8

⁹³ A Kur, 'The Enforcement Directive - Rough Start, Happy Landing?' (2004) 35(7) *International Review of Intellectual Property and Competition Law* 821, 826; Kierkegaard (n 89) 493; Pilar Camara Aguila, 'Enforcement Of IPRs' in Tatiana-Helene Synodinou (ed), *Codification of European copyright law: challenges and perspectives* (Kluwer Law International 2012) s 9.2

⁹⁴ European Commission, 'Counterfeiting And Piracy: Munich Hearing Endorses Need For EU Action' (*Europa*, July 1999) <http://ec.europa.eu/internal_market/smn/smn17/s17mn37.htm> accessed 17 July 2013

⁹⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council on the enforcement of intellectual property rights COM (2003) 46 final

⁹⁶ *ibid*, 12

crime⁹⁷, this view appeared to be reinforced by the 1999 consultative committee meeting.

Furthermore, the Commission stated in the Proposal, the parties present at the consultation ‘expressed the desire for this question to be tackled energetically and for far-reaching measures to be taken at the level of the European Union’.⁹⁸ Once again, the involvement of industry representatives from early in the pre-legislative process appears to have helped to set the agenda for copyright lawmaking, establishing what problem had to be addressed (in this case, the fight against organized crime, and the role of IPR infringement in those activities), and what measures were required in order to resolve that problem.

Upon release of the Proposal, there was significant concern in the telecoms industry concerning their potential obligation to disclose subscriber information in cases of alleged copyright infringement. As a result, three major providers, British Telecom, Nokia and Telecom Italia formed an umbrella organization, the European Telecommunications Network Operators Association (or ETNO) in order to lobby the European Parliament against the passing of the Directive.⁹⁹ However, as becomes evident due to the fact that the Directive was successful, this effort was unsuccessful. ETNO was formed relatively late in the legislative process of the Directive. In comparison, creative industry representatives had been active since at least the 1999 consultative committee meeting in Munich, effectively framing the Commission approach to copyright enforcement. Furthermore, as Haunss and Kohlmorgen found through interviews with actors involved in the process, IFPI, the previously mentioned industry representative organization, had been actively involved in the drafting of the Directive, and had ‘exerted great influence from the start’.¹⁰⁰ Of particular importance, it was concluded, were ‘the good contacts with the European Parliament [and] active cooperation with the

⁹⁷ European Commission, Green Paper – Combatting Counterfeiting and Piracy in the Single Market COM (98) 569 final

⁹⁸ European Commission Proposal (n95), 4

⁹⁹ Sebastian Haunss and Lars Kohlmorgen, ‘Lobbying Or Politics? Political Claims Making In IP Conflicts’ in Sebastian Haunss and Kenneth C Shadlen (eds), *Politics of intellectual property: contestation over the ownership, use, and control of knowledge and information* (Edward Elgar 2009) 116

¹⁰⁰ Sebastian Haunss and Lars Kohlmorgen, ‘Conflicts About Intellectual Property Claims: The Role And Function Of Collective Action Networks’ (2010) 17 *Journal of European Public Policy* 242, 255

European Commission'.¹⁰¹ In comparison, ETNO was regarded as being 'too small and developed too late to exert significant influence on the decision making process'.¹⁰² Knowledge, both of their sector and of the European institutions and their legislative processes, allowed industry representative organizations such as IFPI to exert influence over the direction of the Commission's Proposal. By being actively involved in the early stages, they were able to set the agenda, meaning that their role in the Parliament would be to support and defend the Proposal; ETNO, in comparison, were not involved in setting the legislative agenda and instead had to attempt to modify it, which is much more difficult.¹⁰³ Had this been occurring in an environment of high political salience, it is possible that the Directive may have been modified (although, ultimately, this is speculation). However, the passing of the Information Society Directive indicates that copyright law is a low salience issue, which does not particularly interest the average European voter. Haunss and Kohlmorgen found that the passage of the Enforcement Directive was only visible in the European press from September 2003 to March 2004, with only forty-seven claims made about the Directive, most of them favourable¹⁰⁴. In the UK, there appeared to be only six stories, of which three were favourable, two negative and one neutral (presenting both positive and negative claims).¹⁰⁵ ETNO's views, in comparison to the views of the Commission and industry representatives, did not get reported by the media.¹⁰⁶ This would appear to indicate that in low salience conflicts between lobbying organizations, the principle of 'quiet politics' applies, and those able to set the legislative agenda and provide key information to policy-makers is more likely to be able to influence the legislative process.

C. The Term Extension Directive: Choosing Between Experts

¹⁰¹ *ibid* 257

¹⁰² *ibid*

¹⁰³ Mack (n 4) 345

¹⁰⁴ Haunss and Kohlmorgen (n 99) 112

¹⁰⁵ Farrand (n 29) 119

¹⁰⁶ Haunss and Kohlmorgen (n 99) 119

In 2011, the EU enacted legislation increasing the term of protection for sound recordings from 50 to 70 years. The Term Extension Directive¹⁰⁷ was roundly condemned by academics working in the field of copyright law, both before and after its delayed approval by the Council, due to the fact that it was unlikely to achieve its stated aim of improving remuneration for recording artists and session musicians while reducing the number of works to enter the public domain, increasing innovation costs and costs to consumers.¹⁰⁸ Indeed, in an editorial in the *European Intellectual Property Review* signed by more than fifty academics working in intellectual property law and policy, it was stated that the proposed Directive was the culmination of ‘years of fierce lobbying by the trade bodies of the record industry’.¹⁰⁹ In a strongly worded open letter to the President of the Commission and the Commissioner for the Internal Market and Services DG, one academic stated that a study commissioned by the Commission to consider the impact of an extension of the term of protection was ignored in the Commission Impact Assessment ‘except for a single mention in footnote 51, which quotes our study out of context’.¹¹⁰ In so doing, the Commission ‘reinforces the suspicion...that its policies are less the product of a rational decision-making process than of lobbying by stakeholders’.¹¹¹ In order to provide context to this statement, it is necessary to look at the process by which the Directive was adopted in more detail.

The proposal to extend the term of protection for sound recordings did not originate at the EU level, but was in fact an initiative begun in the UK. In 2005, Gordon Brown (then Chancellor of the

¹⁰⁷ Directive 2011/77/EU of the European Parliament and of the Council amending Directive 2006/116/EC on the term of protection of copyright and related rights [2011] OJ L265/1

¹⁰⁸ See for example RM Hilty and others, ‘Comment By The Max-Planck Institute On The Commission’s Proposal For A Directive To Amend Directive 2006/116 Concerning The Term Of Protection For Copyright And Related Rights’ (2009) 31(2) *European Intellectual Property Review* 59; Natali Helberger and others, ‘Never Forever: - Why Extending The Term Of Protection For Sound Recordings Is A Bad Idea’ (2008) 5 *European Intellectual Property Review* 174; Editorial, ‘Creativity Stifled? A Joint Academic Statement On The Proposed Copyright Term Extension For Sound Recordings’ (2008) 30(9) *European Intellectual Property Review* 341; C Geiger, ‘The Extension Of The Term Of Copyright And Certain Neighbouring Rights - A Never-Ending Story?’ (2009) 40(1) *International Review of Intellectual Property and Competition Law* 78

¹⁰⁹ Editorial (n 108) 341

¹¹⁰ Letter from P Bernt Hugenholtz, ‘Open Letter Concerning European Commission’s “Intellectual Property Package”’ (18 August 2008) 2

¹¹¹ *ibid*

Exchequer) commissioned Andrew Gowers to conduct a review into the effectiveness (or not) of intellectual property laws in the UK. The Gowers Review was completed in 2006, and predominantly on the basis of academic literature¹¹² concluded that an extension of copyright to 95 years, as advocated for by the recording industry, was not justified and in fact potentially result in a loss of revenue for artists.¹¹³ On this news, the British Phonographic Industry (BPI) released a statement indicating that ‘if the UK government decides not to support copyright equalization then the music industry will have to continue its campaign in Europe. The signs there are encouraging’.¹¹⁴ In fact, prior to the release of the Gowers Review, the Commission ran a consultative exercise that began in July and concluded in October 2006, which received over 175 responses.¹¹⁵ The short period that the consultation ran, similar to that of the Information Society Directive, means that it becomes ‘almost inevitable that [only those who] were already geared-up to respond would provide input’.¹¹⁶ Knowledge of legislative processes, and having information readily accessible to provide to such consultations both assist in setting the legislative agenda and creating the appearance of particular expertise, which in turn helps to influence the direct of a particular policy.¹¹⁷ User advocacy groups, in comparison, are less able to quickly respond to such calls, and are less likely to be able to influence the process. In this instance, IFPI was one of the contributors to the consultation, and stated that the:

The term of protection for sound recordings should be extended within Europe from 50 to 95 years to match the term in the U.S. In an online global market, performers and producers in

¹¹² See figures and footnotes in Andrew Gowers, ‘The Gowers Review Of Intellectual Property’ (December 2006) 48–57; see also Centre for Intellectual Property and Information Law, ‘Review Of The Economic Evidence Relating To An Extension Of The Term Of Copyright In Sound Recordings’ (2006)

¹¹³ Gowers (n 112) para 4.40

¹¹⁴ BBC News, ‘Musical Copyright Terms “To Stay”’, *BBC* (27 November 2006) <<http://news.bbc.co.uk/2/hi/entertainment/6186436.stm>> accessed 14 July 2013

¹¹⁵ As stated in Commission Staff Working Document, Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM(97) 836 final

¹¹⁶ Burrell and Coleman (n 81) 209

¹¹⁷ Bernhagen and Bräuninger (n 12) 5

the EU are at a substantial disadvantage compared with the US and many other trading partners. They argue that consistent longer terms of protection will facilitate the dissemination of works into a larger number of markets and provide an incentive for the development of new ways of getting back catalogue, specialised genres and niche music to consumers.¹¹⁸

There is a reason for printing the quote in full. In 2008, the Commission released a Communication on Creative Content Online, which did not mention term extension, but was accompanied by a Working Paper, which did. In fact, the Commission reproduced the quote from IFPI in its entirety.¹¹⁹ This appears to suggest that IFPI were actively involved in setting the agenda for copyright term extension in the EU from at least 2006. In an Impact Assessment made by the Commission in 2008 that accompanied the Term Extension Directive Proposal,¹²⁰ the Commission relied heavily upon a study commissioned by the BPI and written by PricewaterhouseCoopers (PWC). As was already mentioned, a Commission-commissioned study by the Institute for Information Law (IViR) at the University of Amsterdam was referred to in a footnote. The justification for its reliance on the PWC Report is given when the Commission states it was the ‘only study based on actual data and enables us to add a concrete dimension to the results’.¹²¹ In comparison, more sceptical studies such as the IViR study did not appear to fit with the legislative agenda, as it recommended no change to the term of protection. In this instance, two expert opinions were in conflict with each-other. Whereas Hugenholtz argued that the acceptance of one over the other was a sign of intense lobbying pressure rather than rational decision-making,¹²² it is important to return to the statement made in the beginning of section 3 of this article, namely that the Commission has the task of sorting through

¹¹⁸ Letter from IFPI, ‘IFPI Repsonse To The Commission Questionnaire “Content Online”’ (13 October 2006) <http://ec.europa.eu/avpolicy/docs/other_actions/contributions/ifpi_col_en.pdf> accessed 13 April 2014, 6

¹¹⁹ Commission Staff Working Document (n115), 33

¹²⁰ European Commission, Impact Assessment accompanying the proposal for a Council amending Directive 2006/116/EC on the term of protection of copyright and related rights COM (2008) 464 final

¹²¹ *ibid*, 35

¹²² Hugenholtz, ‘Open Letter concerning European Commission’s “Intellectual Property Package”’ (n 110) 2

information provided in order to formulate a policy in a particular area. It is submitted that the choice of policy is not one of a dichotomy between ‘lobbying’ and ‘rational decision-making’, but determining which information provided is most convincing to that institution. The combination of agenda-setting, knowledge provision and issue salience is likely to be the deciding factor in the selection of which approach to take. Furthermore, as was indicated in preceding sections, key actors such as IFPI already had long-lasting and strong connections with both the Commission and Parliament, reinforcing perceptions of expertise possessed by an industry actor that frequently provided information to those institutions. By the time that the IViR study was completed, the legislative agenda had been set, and the Commission had to determine the most suitable way of ensuring the further reimbursement of performers and session musicians, and for what time period. A recommendation to not extend the term would be in direct conflict with that agenda, and would have difficulty in changing it. That this was a low salience issue, with only thirteen identifiable stories in the British press, the majority of which presenting the term extension favourably and quoting IFPI and pro-extension studies,¹²³ meant that the issue could be framed effectively by the creative industries.

5. The High Political Salience of Copyright? The Anti-Counterfeiting Trade Agreement, Public Protest and Citizen Lobbying

As the last section has demonstrated, copyright lawmaking in the EU is characterised by low political salience and influential industry representative organizations able to both set the legislative agenda and provide information pertinent to that agenda. To use Culpepper’s term, it is an area of policy defined by quiet politics, in which policymakers defer to industry expertise, even where other expertise is provided. This does not suggest, however, that ‘big business always gets what big

¹²³ Farrand (n 29) 103

business wants'. As has been discussed, political salience is changeable, based on changing circumstances, or even changing media coverage of an issue. To provide an example both of this changing salience, and of the ability to set the legislative agenda did **not** result in successfully passed legislation, it is possible to use the example of the recent vote of the European Parliament on ACTA.

ACTA began as a series of informal talks between the US and Japan in 2006 on the topic of counterfeiting and piracy in the context of international trade, with the discussion of a potential bilateral or even plurilateral treaty.¹²⁴ By June 2008, these informal talks became a formalized negotiation between the US, Japan, the EU, Canada, Australia, Mexico, Morocco, New Zealand, the Republic of Korea, Singapore and Switzerland.¹²⁵ However, these negotiations were secretive, with each party held to a strict confidentiality requirement, to the extent that legislative bodies in each State were uninformed about the detail of the negotiations.¹²⁶ However, certain industry representative organizations had privileged access to the negotiation documents in the capacity of 'cleared advisors'.¹²⁷ These cleared advisors included representatives of the Intellectual Property Alliance (IIPA), IBM and Time Warner.¹²⁸ According to Blakeney, these cleared advisors, such as IIPA were active participants in the ACTA negotiations,¹²⁹ suggesting considerable agenda-setting power on the part of these industry representatives. The public only became aware of the existence of the negotiations with an initial leak of a statement of initial positions released by WikiLeaks in May

¹²⁴ Swiss Federation of Intellectual Property, 'The Anti-Counterfeiting Trade Agreement - Summary Of Key Elements Under Discussion' (November 2009) 1

<https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/transparency_paper.pdf> accessed 15 July 2013

¹²⁵ Benjamin Farrand and Helena Carrapico, 'Copyright Law As A Matter Of (inter)national Security? - The Attempt To Securitise Commercial Infringement And Its Spillover Onto Individual Liability' (2012) 57 *Crime Law Soc Change* 373, 392

¹²⁶ *ibid* 393

¹²⁷ James Love, 'Who Are The Cleared Advisors That Have Access To Secret ACTA Documents?' (*Knowledge Ecology International*, 13 March 2009) <<http://www.keionline.org/blogs/2009/03/13/who-are-cleared-advisors>> accessed 14 April 2014

¹²⁸ *ibid*

¹²⁹ Michael Blakeney, *Intellectual Property Enforcement: A Commentary On The Anti-Counterfeiting Trade Agreement (ACTA)* (Edward Elgar Publishing 2012) 314

2008.¹³⁰ Substantive content came in the form of leaks by online activist organizations such as La Quadrature du Net (LQDN) of draft deliberations in 2009 and 2010, and the release of an interim draft by the EU in April 2010. Information contained in these deliberative drafts revealed that the intention of the Agreement was not only to bring in enforcement provisions to deal with counterfeit goods in transit between states, but also to apply to infringements of copyright committed online. According to Article 2.14 of this Draft¹³¹, parties could impose of criminal sanctions ‘at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale’, which was intended to include wilful copyright and related rights infringements ‘that have no direct or indirect motivation of financial gain’. This appeared to extend substantially the scope of criminal liability for copyright infringement, making it a *de facto* criminal offence.¹³² ACTA began to be frequently criticized in academic literature, particularly over the secrecy of negotiations¹³³ and the deliberate attempt to sidestep both the World Intellectual Property Organization and World Trade Organization in order to prevent substantive input from countries such as China and India.¹³⁴ The text of the Agreement was substantially modified subsequent to the publication of the earlier drafts, with Article 23(1) stating that criminal sanctions should be applied in cases of copyright or related-rights ‘piracy’ on a commercial scale, intended to include ‘at least those carried out as commercial activities for direct or indirect economic or commercial advantage’. It was determined that these sanctions should apply in cases of infringement of copyright online under Article 27(1).¹³⁵ Nevertheless, this

¹³⁰ Michael Geist, ‘Michael Geist’ (*Michael Geist Blog*, no date) <<http://www.michaelgeist.ca/content/view/2955/125/>> accessed 14 April 2014

¹³¹ European Commission, Anti-Counterfeiting Trade Agreement PUBLIC Predecisional/Deliberative Draft April 2010

¹³² Farrand and Carrapico (n 125) 394

¹³³ Farrand and Carrapico (n 125); Michael Blakeney and Louise Blakeney, ‘Stealth Legislation? Negotiating The Anti-Counterfeiting Trade Agreement (ACTA)’ (2010) 16(4) *International Trade Law and Regulation* 87; Emma Leith, ‘ACTA: The Anti-Counterfeiting Crack-Down’ (2011) 22(3) *Entertainment Law Review* 81

¹³⁴ PK Yu, ‘ACTA And Its Complex Politics’ (2011) 3(1) *The WIPO Journal* 1; HG Ruse-Khan and T Jaeger, ‘Policing Patents Worldwide? EC Border Measures Against Transiting Generic Drugs Under EC And WTO Intellectual Property Regimes’ (2009) 40(5) *International Review of Intellectual Property and Competition Law* 502

¹³⁵ The final text of ACTA (2011) can be accessed at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/acta-text-acrc.aspx?lang=eng>> accessed 14 April 2014

Draft continued to be criticized, with concerns over the scope of possible criminal sanctions and enforcement¹³⁶ as well as the possible impact on user privacy.¹³⁷

The EU and 22 of its Member States signed ACTA in Japan at a formal ceremony in January 2012. It was assumed at this point that the EU ratification of the Agreement was certain.¹³⁸ ACTA had the full support of the business community,¹³⁹ and the Commission, which regarded the rapid conclusion and implementation of the Agreement as being ‘an important step in improving the international fight against IPR infringements’.¹⁴⁰ Furthermore, European Parliament had released a Resolution in 2010 stating that that reiterated the need to ensure effective protection of intellectual property rights and considered ACTA a step in the ‘right direction’.¹⁴¹ This would appear to indicate that the legislative agenda had been set, and that activist organizations would be unlikely to prevent the ratification of the Agreement. However, by April 2012 ACTA was described as being ‘on its knees’.¹⁴² What had changed? A key development in the EU rejection of ACTA appeared to have originated in the US. In October 2011, Representative Lamar Smith introduced a Bill in the House of Representatives called the Stop Online Piracy Act (or SOPA).¹⁴³ This Bill contained a provision that would require ISPs to block access to websites used to infringe copyright or trademark through the use of a measure that would prevent a domain name being resolved to an IP address.¹⁴⁴ Critics viewed this as draconian and with the potential to be used for censorship, and major Internet service providers in particular were concerned about their potential liability under the Bill. So concerned

¹³⁶ C Geiger, ‘Weakening Multilateralism In Intellectual Property Lawmaking: A European Perspective On ACTA’ (2012) 3(2) The WIPO Journal 166, 174–75

¹³⁷ Leith (n 133) 83

¹³⁸ Olivia Solon, ‘The EU Signs Up To Acta, But French MEP Quits In Protest’ (*Wired UK*, 26 January 2012) <<http://www.wired.co.uk/news/archive/2012-01/26/eu-signs-up-to-acta>> accessed 19 August 2013

¹³⁹ Philippe de Buck, ‘Expectations Of European Companies As Regards Intellectual Property In Europe And Globally’ in Florent Gevers and Emmanuel Cornu (eds), *The future prospects for intellectual property in the EU: 2012-2022* (Bruylant 2011) 142

¹⁴⁰ European Commission, A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe COM(2011) 287 final, 21–22

¹⁴¹ European Parliament, ‘Motion For A Resolution To Wind Up The Debate On The Statement By The Commission Pursuant To Rule 110(2) Of The Rules Of Procedure On ACTA’ (17 November 2010) ss 2–3

¹⁴² Robin Fry, ‘ACTA On Its Knees’ (2012) April Intellectual Property Magazine 12

¹⁴³ HR 3261, Stop Online Piracy Act, 26 October 2011, 112th Congress

¹⁴⁴ *ibid.*, s.102(c)(2)(A)(i)

were certain providers that 18 January 2012 was a day of concerted and coordinated action by thousands of websites including Wikipedia and Reddit became inaccessible, presenting a black background, text describing the potential effect of the Bill, and providing information for contacting Representatives, whereas Google ‘censored’ their own logo.¹⁴⁵ Due to the high profile of this action, on 20 January, Representative Smith announced that the Bill would be postponed ‘until there is wider agreement on the solution’.¹⁴⁶ The relation to ACTA reflects the nature of the Internet as a global communications system – websites did not become inaccessible in the US alone, but were also inaccessible in the EU. Given the high profile of the US-based action, European citizens became aware of ACTA. When Donald Tusk, Prime Minister of Poland announced his intention to ratify ACTA, declaring it a ‘success of the Polish EU Presidency’,¹⁴⁷ an online campaign was initiated in Poland, including the creation of a Facebook page ‘Nie dla ACTA’, which received 100,000 views in less than 48 hours.¹⁴⁸ Online activists coordinated offline action, culminating in ‘15,000 demonstrators in Krakow and 5,000 in Wroclaw’,¹⁴⁹ and an increase in media attention in the rest of Europe. It has been argued that this political mobilisation began in Poland due to a combination of socio-economic and historical factors, including that copyright was used as a tool of political censorship by the government of Poland during the latter years of Communist rule.¹⁵⁰ This concern translated into concerns over copyright overreach, negative implications for freedom of speech and

¹⁴⁵ For comprehensive coverage of this event, see Dominic Rushe and Ryan Devereaux, ‘Sopa Blackout And Day Of Action - As It Happened’, *The Guardian* (18 January 2012) <<http://www.theguardian.com/technology/2012/jan/18/sopa-blackout-day-of-action-live>> accessed 14 April 2014

¹⁴⁶ Jonathan Weisman, ‘After An Online Firestorm, Congress Shelves Antipiracy Bills’, *The New York Times* (20 January 2012) <<http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>> accessed 14 April 2014

¹⁴⁷ K Odrozek, ‘Poland: Netizens Protest Government’s Plan To Sign ACTA Next Week’ (*Global Voices Online*, 22 January 2012) <<http://globalvoicesonline.org/2012/01/22/poland-netizens-protest-governments-plan-to-sign-acta-next-week/>> accessed 19 August 2013

¹⁴⁸ Farrand (n 29) 184

¹⁴⁹ The Associated Press, ‘Protesters Rally Across Poland To Express Anger At International Copyright Treaty’, *The Hamilton Spectator* (25 January 2012) <<http://www.thespec.com/news-story/2231069-protesters-rally-across-poland-to-express-anger-at-international-copyr/>> accessed 19 August 2013

¹⁵⁰ See for example Marek Jastrzebski, ‘Avoiding Censorship: The “Second Circulation” Of Books In Poland’ (1993) 36 *Journal of Reading* 470

concerns over process,¹⁵¹ as evidenced by a statement made by one of the organisers of the ACTA protests that ‘They promised debates – nothing. They promised openness – nothing. Democracy is being destroyed, the deputies don’t know what they are signing, and all this will lead to a situation when bloggers, scientists and entrepreneurs will be qualified as criminals’.¹⁵² As a result of domestic pressure, Tusk announced in early February that ACTA would not be ratified by Poland, as it did not reflect ‘the realities of the twenty-first century’.¹⁵³ Germany, Latvia, and the Czech Republic announced they would delay, if not block, the ratification of ACTA¹⁵⁴ and the Slovenian ambassador to Japan publicly apologized for signing, referring to it as an act of ‘civic carelessness...[there was] too little transparency’.¹⁵⁵ Street protests continued throughout the EU, with a ‘day of action’ on 11 February, with reports of more than 25,000 protestors in Germany, 4,000 in Bulgaria, and thousands more throughout France, the UK, Romania and other Member States, coordinated by activist organizations such as LQDN, FightForTheFuture.org and the Open Rights Group.¹⁵⁶

The success of civil society in raising awareness about an issue of concern is largely determined by the ability to disseminate information. According to Bennett and Toft, digital communications technologies such as social media platforms can help to coordinate (and blur the distinctions between) online and offline action, particularly when facilitating cross-border actions.¹⁵⁷ The use of Facebook as a communications mechanism, and the spread of information through blogging activities and tweets, facilitated by organisers such as LQDN, can result in the swift

¹⁵¹ Katarzyna Gracz, ‘On The Role Of Copyright Protection In The Information Society: Anti-ACTA Protests In Poland As A Lesson In Participative Democracy’ (2013) 4 *Journal of Intellectual Property, Information Technology and E-Commerce Law* 21, 23

¹⁵² ‘Antyweb’ as quoted in Odrozek (n 147)

¹⁵³ The Warsaw Voice, ‘Poland Withdraws From ACTA Ratification’ (*The Warsaw Voice*, 20 February 2012) <<http://www.warsawvoice.pl/WVpage/pages/article.php/19893/news>> accessed 19 August 2013

¹⁵⁴ Andrew Couts, ‘ACTA Bombshell: Germany Refuses To Sign Anti-Piracy Treaty Amid Protests’ (*Digital Trends*, 10 February 2012) <<http://www.digitaltrends.com/international/acta-bombshell-germany-refuses-to-sign-anti-piracy-treaty-amid-protests/>> accessed 19 August 2013

¹⁵⁵ Mike Masnick, ‘Full Text Of Slovenian Ambassador’s Apology For Signing ACTA’ (*Techdirt.*, 2 February 2012) <<http://www.techdirt.com/articles/20120202/02305917633/full-text-slovenian-ambassadors-apology-signing-acta.shtml>> accessed 20 August 2013

¹⁵⁶ Farrand (n 29) 185

¹⁵⁷ WL Bennett and A Toft, ‘Identity, Technology, And Narratives: Transnational Activism And Social Networks’ in Andrew Chadwick and Philip N Howard (eds), *Routledge handbook of internet politics* (Routledge 2009) 246

mobilisation of political activists who can ‘spread the message’ and organise political activities¹⁵⁸. Actors such as LQDN then become key nodes in a network of activists, providing both communications infrastructure and information to other activists. What these activists ‘lack in terms of traditional organisational resources they often gain in networking capacities through the use of social technologies to facilitate the maintenance and activation of [ties between civil society activists]’.¹⁵⁹ In this context, protest constitutes a form of ‘outsider’ strategy¹⁶⁰, a method by which concerns over a legislative policy can be voiced, or questions raised as to the legitimacy of a policy through disruptive action. These strategies do not in themselves change legislation, but raise media (and therefore citizen) attention, increasing the salience of an issue. The more media attention that an issue receives, the more likely it is that a population will see that issue as important. In this case, protests in Poland helped to draw attention to the Agreement, as well as framing ACTA as a threat to freedom and democracy due to the secrecy of negotiation and over-broad Internet copyright enforcement provisions. The outsider strategy of protest allowed for protestors to frame the media message as one of a threat to citizen freedoms, and substantial media coverage discussing ACTA in the terms used by protestors further assisted in bringing the issue to the attention of the general public, and subsequently to the reporting of the protests in other EU Member States, helping to form the informational basis for civil society organisation. In the period from the initial announcement of the existence of ACTA up until December 2011, there were in total twenty-five stories about ACTA on BBC News, and in the Guardian and Telegraph newspapers.¹⁶¹ In comparison, between January 2012 and the rejection of ACTA in July, there were thirty-nine stories¹⁶², almost double the number in six months than there were in the previous three years, and the majority of them negative. This

¹⁵⁸ Homero Gil de Zúñiga and others, ‘Digital Democracy: Reimagining Pathways To Political Participation’ (2010) 7 *Journal of Information Technology & Politics* 36, 38

¹⁵⁹ Bennett and Toft (n 157) 253–54

¹⁶⁰ Arne Hintz, ‘Challenging The Digital Gatekeepers: International Policy Initiatives For Free Expression’ (2012) 2 *Journal of Information Policy* 128, 136

¹⁶¹ Farrand (n 29) 190

¹⁶² *ibid*

raised the profile of ACTA as a political issue, and the high-visibility public actions in the Member States was used as a way of generating additional forms of political action. LQDN created the ‘piphone’, which could make Voice Over IP (or VOIP) calls to MEPs, as well as providing a searchable database that users could use to identify their MEP in order to raise their concerns about ACTA.¹⁶³ This proved to be a successful strategy, as LQDN coordinated EU citizens’ contacting of MEPs both during the committee stages of the European Parliamentary process, and again prior to the final vote. According to a press release by the European Parliament, there was ‘unprecedented direct lobbying by thousands of EU citizens who called on it to reject ACTA, in street demonstrations, e-mails to MEPs and calls to their offices’.¹⁶⁴ As a result of these pressures, the Committees on Civil Liberties, Justice and Home Affairs, Industry, Research and Energy, Legal Affairs, Development and International Trade all recommended that the European Parliament reject ACTA. This recommendation was followed on 4 July, when ACTA was rejected by 478 votes to 39.

The rejection of ACTA can be explained in terms of political salience. As was seen with the examples of the three Directives, copyright law is generally an issue of low salience that does not register with the average European voter. For this reason, industry representatives are able to influence the passage of legislation to a significant extent. In comparison, ACTA became a politically salient issue, generating protests in Europe that were then covered by the media, leading to more widespread protests and inducing citizens to contact the European Parliament, a body that has a historically weak connection to voters. In particular, media coverage referred to the concern of protestors that the Agreement represented a threat to democracy and freedom of speech.¹⁶⁵ This

¹⁶³ La Quadrature du Net, ‘How To Act Against ACTA’ (*La Quadrature du Net Wiki*, 2012) <https://www.laquadrature.net/wiki/How_to_act_against_ACTA#Contact_your_Elected_Representatives> accessed 20 August 2013

¹⁶⁴ European Parliament Press Service, ‘European Parliament Rejects ACTA’ (*Europarl*, 4 July 2012) <<http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>> accessed 20 August 2013

¹⁶⁵ Charles Arthur, ‘Acta Criticised After Thousands Protest In Europe’ (*The Guardian*, 13 February 2012) <<http://www.theguardian.com/technology/2012/feb/13/acta-protests-europe>> accessed 19 August 2013; See for example David Lee, ‘Acta Protests Spread Over Europe’, *BBC* (6 February 2012) <<http://www.bbc.co.uk/news/technology-16906086>> accessed 21 August 2013

discourse in turn was reflected by MEPs. In April, rapporteur and MEP David Martin stated that the ‘intended benefits of this international agreement are far outweighed by the potential threats to civil liberties [...] the European Parliament cannot guarantee adequate protection for citizens' rights in the future under Acta’.¹⁶⁶ The European Parliament, constituting a body of elected representatives, is susceptible to pressure by voters. Where interest in a particular issue is low, it is likely to vote according to the information provided by expert bodies or lobbying organizations. Where the salience is high, however, and citizens demonstrate their interest in, and preferences concerning, a particular policy then they are more likely to listen to the public on that issue. This would appear to indicate that where an issue becomes ‘high profile’, the usual tactics of quiet politics are ineffective. As the media coverage was unfavourable, and represented the views of protestors rather than industry, the ability to mould public perception of the issue was also lost. ACTA had become a high salience issue. Nonetheless, it is important to state that although ACTA was high salience, does not mean that copyright more generally has become a high salience issue. Speaking after the rejection of ACTA, David Martin stated that ‘this was not an anti-intellectual property vote. This group believes Europe does have to protect its intellectual property but ACTA was too vague a document’.¹⁶⁷ European President Schulz also indicated that the key issue in the rejection of ACTA was the question of transparency and democratic participation, rather than intellectual property law, stating:

The decision to reject ACTA was not taken lightly. It followed an intensive, inclusive and transparent debate with civil society, business organisations, national parliaments and many other stakeholders...All over Europe, people were engaged in protests and debates. The mobilisation of public opinion was unprecedented. As the President of the European

¹⁶⁶ BBC News, ‘Euro MP David Martin Dismisses Anti-Counterfeiting Treaty’, *BBC* (16 April 2012) <<http://www.bbc.co.uk/news/technology-17728045>> accessed 21 August 2013

¹⁶⁷ BBC News, ‘EU Rejects Anti-Piracy Agreement’, *BBC* (4 July 2012) <<http://www.bbc.co.uk/news/technology-18704192>> accessed 21 August 2013

Parliament, I am committed to dialogue with citizens and to make Europe more democratic and understandable.¹⁶⁸

This would appear to indicate that while ACTA was a high salience issue, the decision to reject the Agreement cannot be considered as representing a shift in intellectual property policy at the EU level. The success of the ACTA protests and resultant media coverage was in providing a simple and effective frame for considering the impact of the Agreement, namely that of freedom and democracy. However, in doing so, the subject of dispute became ACTA specifically, and the threat posed by this one document, rather than any perceived threats resulting from overly broad copyright protection. Activists therefore petitioned for the rejection of ACTA by the European Parliament, and the European Parliament responded by rejecting ACTA. It did not act as a catalyst for the rethinking of copyright, its aims or the appropriateness of its enforcement mechanisms. It is submitted that copyright lawmaking will continue to be an issue dominated by quiet politics, and as a result, industry organizations will continue to be successful in having their preferred outcomes taken into account. Passing a Resolution on the negotiations between the US and EU on the Transatlantic Trade and Investment Partnership, the European Parliament stated ‘intellectual property is one of the driving forces of innovation and creation and a pillar of the knowledge-based economy, and that the agreement should include strong protection of precisely and clearly defined areas of intellectual property rights’.¹⁶⁹ It would appear, then, despite the very visible conflict over, and indeed, change in legislative policy over ACTA, the legislative approach to copyright law issues in the EU ultimately remains unchanged.

¹⁶⁸ Martin Schulz, ‘European Parliament President Martin Schulz - ACTA Wrong Solution To Protect Intellectual Property’ (*Europarl*, 4 July 2012) <http://www.europarl.europa.eu/the-president/en/press/press_release_speeches/press_release/2012/2012-july/html/acta-wrong-solution-to-protect-intellectual-property> accessed 21 August 2013

¹⁶⁹ European Parliament, ‘European Parliament Resolution Of 23 May 2013 On EU Trade And Investment Negotiations With The United States Of America’ (23 May 2013)

6. Concluding remarks

While the development of copyright law in the EU has been the subject of substantial academic contention, it is only very recently that it appears to be the subject of substantial citizen contention. Copyright law and policy has been typified by an environment of quiet politics – one in which comparatively low interest in the subject demonstrated by voters has resulted in the ability of trade and industry associations to dictate the legislative approach through early agenda-setting, the framing of issues and the provision of expert knowledge. Early intervention by these actors, combined with scant media coverage and a need on the part of institutions such as the European Commission for information has meant that contemporary copyright laws have taken a distinctly industry-favourable timbre. Yet these developments should not be dismissed as an unchangeable form of regulatory capture that cannot be challenged. Instead, they should be considered as the result of reforms to highly complex and technical areas of regulation, the relevance of which is not immediately apparent to the general public. The salience of an issue is changeable, and the more salient an issue becomes, the more likelihood of citizen awareness and civil society participation. Where salience is high, legislators will be more likely to take into account the views and preferences of citizens, even where they may be in conflict with the preferences of industry actors.

The rejection of ACTA by the European Parliament is a key example of how a change in the salience of an issue can result in what appears to be a foregone legislative conclusion can be successfully challenged. Through the combination of offline, ‘outsider’ strategies such as public protest with online coordination and information dissemination, salience can be changed as the framing of that issue is changed – ACTA was no longer a matter of ensuring effective protection of intellectual property, but was a matter of censorship, of trade secrecy and a lack of democratic accountability. These comparatively low-complexity issues resounded with civil society, resulting in unprecedented lobbying of the European Union. However, while ACTA was rejected, attempts to strengthen enforcement mechanisms in copyright continues. For this reason, for those who perceive

copyright as being an issue of industry dominance, too broad in its protections and too narrow in its limits, it is the salience of copyright as a system or regulation, rather than specific legislative instruments, that must be changed.