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**Transnational governance through standard setting
The role of transnational communities**

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Abstract

This chapter explores the role that community forms of social organization play in transnational standard setting. We compare the evolution of two cases through time – the International Competition Network/Community and the Creative Commons Community. Those two transnational communities exhibit quite distinct features and character. The International Competition Network has been, from the start, a selective and exclusive community bringing together public or quasi-public agencies to buttress an existing and dominant agenda. The Creative Commons community, on the other hand, emerged as a bottom-up, civil society based social movement, constructed around a challenger agenda with an inclusive grassroots philosophy. Our comparison of those two quite different cases does not uphold the expectation that different types of transnational communities would show distinctive strengths and weaknesses. Rather, we show that each of those communities deployed strategies to deal, through time, with their own particular weaknesses and that both have been quite successful in their overall objective to strengthen and spread a given standard across multiple boundaries.

Keywords

Transnational governance, standard setting, communities, copyright, competition law, regulation

Over the last decades, we have seen a multiplication of transnational standard setting initiatives. We live today more than ever in a transnational “world of standards” (Brunsson and Jacobsson 2000). Multi-stakeholder arrangements, with a varying combination of public and private actors, come together and produce rules or “soft laws” often with a transnational ambition if not reach (Djelic and Sahlin-Andersson 2006, Graz and Nölke 2008, Tamm Hallström and Böstrom 2010, Brunsson, Rasche and Seidl 2011). Transnational standard setting entails complex dynamics of standard elaboration and negotiation, standard implementation and monitoring. Such transnational dynamics of standardization proliferate today and we can follow them in many different domains of economic activity – with an impact on production, research and development, marketing and distribution, finance, audit and litigation.

Those dynamics involve a variety of actors. Quite striking are the role, presence and clout of private actors of different kinds (Graz and Nölke 2008). But even more striking is the fact that the strong involvement of many different private actors does not necessarily imply a “retreat of the state” (Strange 1996). The idea of the “emergence of private authority” (Hall and Biersteker 2002) is partly misleading, at least in the sense that it would suggest a simple transfer of governance power from public to private actors. The reality, in fact, is more complex and subtle. Quite often, state or government representatives are directly or indirectly involved in transnational standard setting – not necessarily as drivers but as actors amongst others in a process where consultation, deliberation, confrontation, negotiation all play an important role. Hence, governance arrangements associated with transnational standard setting generally go beyond simple state-to-state or firm-to-firm interactions. Civil society actors (NGOs and social movement activists in particular) have a tendency to target both states and firms, together and at the same time, demanding action and responsibility in initiatives that go well beyond the borders of any single country (Prakash and Gugerty 2010). As a result, governance through standard setting involves a significant blurring of classical dividing lines – between the public and the private but also between the national and the transnational. Interestingly, transnational standard setting also generally means a partial overlapping of the categories of “regulators” and “regulatees”. At least some of those actors who will/may have to conform to a particular standard are likely to be involved already in the process of standard setting.

We suggest, in this chapter, that the complex multi-stakeholder dynamics associated with transnational standard setting can be effectively captured through the conceptualization of transnational communities. Transnational standard setting, as a particular form of transnational governance, both generates and is facilitated by the structuration of transnational communities (Djelic and Quack 2010). Typologies of governance forms have tended to associate communities with primary grouping based on solidarity (Crouch 2005, Jessop and Ngai-Ling 2006). We argue, in this chapter, that communities based on territory and physical proximity, not to mention direct interaction, constitute only one particular form of communities amongst others. In modern societies, forms of communal organization have evolved. They need no longer be based on kinship and propinquity. They can be structured around a shared cognitive, epistemic, practice or value base and/or through the mutual orientation to a common project. A collective “imagined identity” emerges in the process that translates into strategies and actions on the ground. In analytical terms, communities differ from other forms of governance (markets, hierarchies or networks) in the nature of their coordination. While markets are coordinated through exchange, hierarchies function through command and control while networks are stabilized through multi-directional negotiation. Communities, on the other hand, are coordinated through conscious common orientation and shared identity (Morgan 2001; Djelic and Quack 2010; Mayntz 2010). Yet, empirically, such communities often overlap with and develop in parallel to organizations or networks (Mayntz 2010). The line separating, in particular, social networks as interconnected nodes from communities as defined above may sometimes be thin and fluid and we might often encounter hybrid arrangements (Crouch 2005). As a consequence, transnational communities as social groups emerging from mutual interactions across national boundaries, oriented around a common project and or “imagined” identity, can be difficult to grasp empirically. Nevertheless, as we argue in this chapter, a focus on transnational communities is helpful in order to explore the neglected cognitive and cultural dimension of transnational standard setting.

Building upon earlier work on transnational governance, we explore in this chapter the interplay between processes of transnational standard setting and processes of transnational community building (Djelic and Sahlin-Andersson 2006; Djelic and Quack 2010). We illustrate these processes and their interplay through the comparative analysis of two empirical cases that each exemplify a distinct pattern of transnational community development. A first case is the transnational setting of standards for the regulation of

competition and the parallel structuration and development of a transnational community – embodied in particular in the International Competition Network (ICN). The second case is the development and dissemination of Creative Commons licenses by non-profit organizations, here also paralleled and sustained by the structuration of associated transnational communities. In both cases, we find that transnational processes of standard setting are co-evolving with transnational processes of community building. Transnational standard setting triggers and fosters processes of community building beyond national boundaries. But transnational communities are also themselves important facilitators of transnational standard setting initiatives. In particular, those communities contribute, over time, to the alignment of the cognitive and normative orientations of members. Hence, they can help stabilize and ground fragile standard setting projects by turning them into behavioral patterns applicable and legitimate in many diverse and distant locales. In the conclusion, we try to learn from those similarities but also from differences between those two cases, indicating directions for further research.

Transnational Communities and Standard Setting

We live in a (transnational) “golden era of regulation”, characterized by the multiplication of rules that reach over and beyond national boundaries (Levi-Faur and Jordana 2005). Our well-entrenched national “rules of law” increasingly have to confront the progress of a transnational “law of rules” (Djelic 2011). Those “rules” are often described as “soft laws”. The difference between “hard” and “soft” law lies essentially in the fact that “soft law lacks the possibility of legal sanctions...and hence is not legally binding” (Mörth 2004:1). Various forms of so-called “soft law” become consequential and effective through non-legal mechanisms of inducement and persuasion, and yet, not infrequently, “soft laws” could be a first step towards and an input for “hard” law-making (Djelic and Sahlin-Andersson 2006: 377, Quack 2007).

Standards as “soft laws”

“Soft laws” can take different forms – principles, guidelines, directives, codes of conduct, “white books”, best practice and evaluation schemes, or standards. Typically, the term “standards” is used to identify highly formalized sets of rules but with a high degree of specificity – in contrast to, on the one hand, broader and more general principles and, on the other hand, more informal guidelines or best practices (Ahrne and Brunsson 2006: 82;

Braithwaite and Drahos 2000: 20). Still, the lines separating these different types of non-legally binding rules can be rather fuzzy and they become even more so if we look at standard setting as a process rather than at standards as outcomes.

This fuzziness translates into significant variability when it comes to definitions. On the one hand, ISO proposes a rather narrow definition of a standard as

a document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context (ISO/IEC 2004).¹

On the other hand, Brunsson and Jacobsson call for a broader and more encompassing understanding where standards are “pieces of general advice offered to a large number of potential adopters” (Brunsson and Jacobsson 2000: 2). Drawing on Timmermans and Epstein (2010: 71), we position ourselves somewhere in between. We propose to focus on standard setting rather than standards. We understand standard setting as a process of constructing and implementing agreed-upon rules, usually backed by some external body, with the aim of creating uniformities across time and space between different localized activities. Standard setting understood in this sense can also encompass attempts to formulate guidelines, codes of conduct or to work out best practices as intermediary steps in the process of formulating and implementing standards.

The standards that emerge from complex production processes, often at a transnational level, in principle tend to be voluntary. Some of these standards, such as quality and technological standards, aim at better coordination of economic activity in global markets. Others strive instead to build social and environmental concerns into the constitution of markets, as in the case of standards relating to labour rights, human rights, corruption and ethics or environmental protection. In order for standards to be effective, they have to be associated with a whole range of mechanisms and processes that target adoption on the ground across and beyond local differences and contexts – norms of transparency and accountability, incentive systems, persuasion, socialization and monitoring mechanisms if not more coercive tools such as exclusion from access to resources, markets, benefits or even banishment from a valued community or “league”. To understand how and why some standards develop a quasi-

¹ It is clear that this definition has become itself a “standard” for the definition of standards. It has been appropriated word for word by most national or transnational normalizing or standardizing organizations.

binding character and others do not, the process perspective needs to be broadened beyond the defining phase to subsequent phases of diffusion and implementation. Botzem and Dobusch (forthcoming) argue that such an approach to standard setting should grant particular attention to reciprocal interactions between standard formation and standard diffusion and how those two stages generate different forms of legitimacy. Processes of legitimacy building around particular standards are likely to invoke the participation of a variety of groups and interests that often started from a national base (Black 2008; Quack 2010). These processes will also contribute in time to the structuration and stabilization of those same groups into a broader collective – and in time community – with a transnational reach and scope.

Transnational Communities and their Role

When it comes to transnational standardization, transnational communities can play different roles. We identify a number of analytically distinct roles that can combine in different ways. Firstly, transnational communities, particularly in the form of epistemic or practice communities, can be initiators of formal standard setting processes. Cutting pragmatically across entrenched perceptions and interests, whether public or private, transnational communities can draw on diverse pools of knowledge and expertise and bring them together in a unique manner. Secondly, transnational communities can contribute to the creation of a transnational public problem space, where issues in need of standardization can be identified and agreed upon. Creating and framing a common problem is clearly an important first step towards collective mobilization and action. Thirdly, transnational communities can mobilize collective action to support transnational standard setting projects but also to help diffuse standards and convince local actors to adopt them. By addressing diffuse and unorganized actors as potential users and adopters, standard setters often galvanize processes of community formation among previously isolated actors, which in turn positively feedback on diffusion and adoption rates. Fourthly, transnational communities shape and delineate a public arena where a multiplicity of actors can actively search for a common solution or standard. In so far as communities nurture discussion and deliberation, or provide social space for contained contention and conflicts over standard setting they structure public arenas where compromise solutions to complex standard setting problems can emerge. Fifthly, and partly as a consequence of their previous roles, transnational communities can over time foster preference transformation in some or all of their members; this can be the result of learning, mutual adjustment, socialization or inducement by threat of exclusion. As a consequence they can contribute to the progressive convergence of preferences between participants coming

from many different national institutional and cultural backgrounds and this throughout the process of standard setting. Finally, transnational communities can have a profound impact in standard setting as they exert their capacity for informal sanctioning of and social control over their members. The probability of “conversion” and real adoption will increase through peer pressure, the sharing of information, and more formal socialization mechanisms. Ultimately, the strongest source of sanctioning is the threat of exclusion from or refusal of admission into an existing community – particularly if this community is associated with significant resources and/or legitimacy.

While it is clear that structured transnational communities are likely to be powerful facilitators of transnational standard setting, a partial reverse influence can also be assumed. Transnational standard setting is likely to involve and invoke processes of community formation at a transnational level. A successful standardization process is bound to come together with the stabilization, deepening and broadening of one or several transnational communities. Those communities may even construct and crystallize their collective “imagined identity” through and around the standard setting project itself.

We conceptualize transnational communities as being actively constructed and shaped by people with multiple group affiliations interacting across societal and national borders. This conceptualization makes it possible to envision different patterns of community formation, development and maintenance, as well as community decline. We distinguish three dimensions that are likely to influence the development of transnational communities, and hence could serve to structure a typology of transnational communities (Table 1). A first dimension is the nature of the goals fostering community building, which itself reflects the relative power of members in a given regulatory field. Transnational communities can start out from a small base of powerful actors with the goal to enlist others in following their proposed (and existing) standards. Yet, transnational communities can also emerge through a challenger project where less resourceful actors target the development of an alternative standard. A second dimension refers to the nature of the rules governing access for new members. While elite communities apply selective and exclusionary rules when it comes to access, grassroots communities follow a more inclusive mode of community building. A third dimension concerns the nature and the mix of actors involved in community building. The range would go here from transnational communities formed exclusively of state or quasi-state actors to transnational communities made up of only private actors. In private

transnational communities, a distinction also needs to be made between those communities made up exclusively of powerful, often organizational, business actors and those communities that are constructed through the aggregation of multiple individual or organizational actors drawn from civil societies. Naturally, somewhere between the different extremes we have the possibility of many different hybrids.

Table 1 – Dimensions of Transnational Community Development

DIMENSION 1: Nature of Goals/Power	Enlisting ----- Challenging
DIMENSION 2: Mode of Access	Elite-exclusionary ----- Grassroots-inclusionary
DIMENSION 3: Nature of Actors	State ----- Business ----- Civil Society

In theory, different combinations are possible that would suggest different patterns of transnational community development. Table 2 identifies the analytically most relevant combinations along those three dimensions and moves us towards a typology of transnational community development². Transnational communities consisting of powerful actors in a given field of governance aiming at enlisting other actors to follow their standards are likely to employ a selective if not exclusionary mode to recruit new members. Such communities can consist of regulatory state agencies of a few powerful countries aiming to enlist regulatory agencies from other parts of the world; they also can be formed by business actors aiming to enlist others of a similar kind to produce standards as a “club common good”. In both cases, the mode of access is selective if not exclusionary – members of the emerging community recruit their peers and exert strong control about who is able to join. In contrast, transnational communities that are formed with the goal of challenging dominant rules in a given field of governance are likely to follow a grassroots approach which is more inclusionary and targets a broad variety of actors from civil society or mixed background (state as well as business).

Table 2 –Typology of Transnational Communities Development

² This typology elaborates further on a distinction drawn in earlier work that contrasted a bottom-up approach by which a transnational community is built up and stabilized through multiple and repeated interactions between members of diverse national or local communities with a top-down approach according to which a small, generally elite, transnational group tries to disseminate its particular project or agenda to audiences in multiple nations and localities (Djelic and Quack forthcoming).

		<i>Goals</i>	
		Enlisting	Challenging
<i>Mode of access</i>	Elite/Exclusionary	TOP DOWN (State / Business)	---
	Grassroots/Inclusionary	---	BOTTOM UP (Civil society/mixed)

Elsewhere (Djelic and Quack forthcoming) we have suggested that different types of transnational communities might have their specific strengths and weaknesses. Transnational communities consisting of powerful actors following an elite approach with a top-down trajectory are likely to constitute more unified actors in terms of standard-setting. Yet, they might lack the ability for broad mobilization on implementation, monitoring and control. Transnational communities challenging dominant rules and recruiting members via an inclusionary approach, often following a bottom-up trajectory, might find it difficult to come to a unified position on rule-making. Yet, they will have a greater capacity to mobilize varied resources and collective action. One way for those different types of communities to deal with their respective weaknesses, we furthermore suggested, would be to develop complementary strategies.

In order to examine the value of this typology for the analysis of the co-evolution between transnational standard setting and transnational community building, we now turn to a more detailed analysis of two case studies. The Competition/ICN and Copyleft/Creative Commons cases were chosen because they represent a good mix of striking differences and parallel roles in processes of transnational standard setting. The communities involved in each case display significantly different characteristics with respect to their goals, their modes of access as well as the nature of membership. The International Competition Community (ICN) consists predominantly of officials from governmental or transgovernmental competition agencies reaching out periodically to small numbers of private actors (non-governmental advisors – NGAs). By contrast, the Creative Commons community counts a majority of non-state actors, essentially lawyers and civil society groups. While the former developed out of and in interaction with a transnational network of governmental agencies, the latter generated and evolved in tight connection to an international non-profit organization with national affiliates.

Finally, while the former started out with the objective of fostering convergence at the global level around common understandings and practices, the latter set out to develop a private license, both as an alternative to, and as a critique of, existing international and national laws.

Our two cases are nicely contrasting on all three dimensions, and therefore one could expect different trajectories reflecting distinct strengths and weaknesses. Still, in spite of those striking differences, the emergent transnational communities in both cases turned out to perform, through time, quite similar functions. They both significantly contributed to the elaboration, diffusion and adoption of shared standards. In order to do so, they both relied on softer mechanisms of persuasion and socialization. And in the end, they both came to allow for a certain degree of flexibility and local adaptability – combining formal standard setting with a degree of “informed divergence”.

The International Competition Network (ICN) and Standard Setting for the Regulation of Competition

The International Competition Network (ICN) was officially launched in October 2001. Thirteen national antitrust agencies and the European Union competition agency were its founding members.³ From the start, membership was both open and restricted to all national, regional or multi-national antitrust agencies. Numbers rose fast and, by the spring of 2002, the ICN already had fifty members. Today, the ICN has close to a global reach – 99 jurisdictions are represented that together account for more than 90% of world GDP (ICN 2010).

From Transnational Network Based on Common Interest...

The 2001 Founding Memorandum defined the ICN as

a project oriented, consensus-based, informal network of antitrust agencies that will address antitrust enforcement and policy issues of common interest (ICN 2001)

As a network, the ICN has three main characteristics – it is virtual, inclusive and open in a selective manner. First, the ICN is a virtual network – with no offices, legal status, employees or even budget. The ICN does not have a geographic hub or permanent secretariat. A Steering Group of 15 members sets agendas and work plans, identifying priorities that then have to be approved by members during the yearly conference. The work itself is done within ad hoc and

³ The thirteen countries were: Australia, Canada, France, Germany, Israel, Italy, Japan, Mexico, South Africa, South Korea, the United Kingdom, United States and Zambia.

temporary working groups that each focus on a particular issue and meet rarely, relying instead on modern technologies. Second, the ICN is an inclusive network, based on voluntary membership. Any national or multi-national competition authority can easily become a member without having to fit any specific criteria. At the same time, though, it is important to note that throughout the last ten years, the Steering group of the ICN has been and remains dominated by representatives from the more established antitrust agencies – with an overwhelming weight of developed countries.⁴ Finally, the ICN is a network that is selectively open. While membership in the full sense of the term is strictly restricted to competition agencies, the ICN keeps a number of doors open to other parties interested in or connected to issues of competition and antitrust. In principle, the ICN wants to “maximize cooperation with non-governmental antitrust experts from the relevant international, industry, consumer, legal, economic and academic communities” (Ugarte 2002). In practice, this means that member agencies and in particular members of the Steering Group can invite non-governmental experts to the annual ICN conferences or to working group events.

From the start, the central focus of the ICN transnational network was competition – “all competition all the time” (Finckenstein 2003). Initially, the ICN emerged as an initiative to foster dialogue amongst antitrust officials and beyond. Ultimately, though, a more ambitious objective was to create, deepen and spread, worldwide, a “culture” of antitrust and competition – which, as key actors recognized, was part of a “broader mosaic” and came together with a culture of “markets” (Kolasky 2002: 3-5). A forum for dialogue, exchange and collaborative work could generate in time a common culture around competition policy. It would also build up progressively a dense social and cognitive space and, hopefully, beyond simply the network, a real “community of interest” (Finckenstein 2002).

The structuring logic behind the ICN was to start with the creation of an inclusive, tight and in fact exclusionary network of insiders and to combine and articulate it, progressively, with a number of weaker external networks reaching out to important constituencies, both nationally and transnationally. Such a combination would be likely to increase the scale and scope of the double effort at transnational culture-building and transnational culture-spreading. That one of

⁴ In 2008, the list of countries represented in the Steering Group was quite telling and not very different from the list of founding members: US (2 representatives), UK, Mexico, Japan, Canada, Russia, Brazil, Australia, Korea, Germany, Turkey, Netherlands, France, EU, South Africa, Italy, Switzerland).

the three original working groups focused on “advocacy” says enough about the centrality of that double project. The Advocacy working group defined its mission in the following way:

Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition (AWG 2002).

The Advocacy working group (AWG) began with a systematic comparison of the situation of member agencies and with an exploration of their embeddedness in unique national institutional contexts. The AWG sent a questionnaire to each ICN member to build up the empirical base for such a comparison and exploration. The first report was presented during the 2002 Naples conference. This report underscored different perceptions on the importance of advocacy in each member agency as well as variation in the types of obstacles and challenges that member agencies faced in their competition advocacy activities. Following this analysis, the AWG defined its mission as “recommending best practices to ICN members and providing them with information to support their advocacy tasks” with a consideration for the variability of national conditions and local politics (AWG 2002).

...to Transnational Community of Governance

While building itself up progressively as a “community of interest”, the International Competition Network was in fact from the start doing much more. With hindsight, it is obvious that the structuring of the ICN through the last ten years has largely contributed to the framing of competition and antitrust as a public problem space with transnational scope and reach. The ICN has been actively involved in shaping and delineating a transnational public arena around those issues. It has played the role, if we can use this image, of a central “magnetic” forum – attracting and involving, around its member base, a multiplicity of other actors with an interest or a stake in competition and antitrust.

The ICN does not define itself as a regulatory actor - while many of its members could be defined in this way within their respective jurisdictions. Still, its role and impact since 2001 show the progress of an ambition that goes well beyond dialogue, information and exchange. Members of the Steering group are conscious of – and claim in fact – such broadening of their ambitions through time. From a transnational network, the ICN has transformed into a “transnational community of interest” and progressively it has even been imposing itself as a highly active “transnational community of governance”. The ICN is increasingly targeting, in

its various forms of official and less official communication, a real transformative impact on competition regulation both nationally and transnationally.

Transnationally, the ICN increasingly sees its role as contributing to best practice definition and standard setting. It is, in other words, increasingly claiming an identity as a “transnational community of governance”. The ICN has the capacity and the resources to mobilize widely and broadly – if only because of its significant reach – around different projects targeting the elaboration of partial best practices and standards. The different adhoc and temporary working groups are particularly well designed for this kind of purpose. As David Lewis, then Chairman of the ICN Steering group, said in his introductory remarks to the 2009 Zurich annual conference, “we (the ICN) are clearly in the business of making ‘soft law’ and this is what we must continue” (Lewis 2009). ‘Soft law’, he made clear is qualitatively different from ‘hard law’ – and not just a “less binding, pale version” of it (see also Mörth 2006). The ICN does not follow a logic of constraint or coercion. “Soft law”, Lewis continues,

is rooted in consensus rather than majority; in persuasion through shared experience rather than coercion; in understanding and celebrating differences rather than suppressing them (Lewis 2009).

Even though the ICN defines itself today as a transnational community of governance and is thus, as such, targeting some form of transnational standard setting, it also sets itself the objective of having a local or national impact. It hopes to do that through two different but complementary paths – that follow respectively a trickle-down and a trickle-up trajectory (Djelic and Quack 2003). First, members of the Steering group are hoping for a trickle-down impact. ICN work should come to reflect upon national competition regimes in a direct way, through the involvement of representatives from member agencies. The idea is not that members comply with recommended practices right from the outset. Rather, the hope is that they “will consider them as aspirational goals in the context of evolving national competition frameworks” (Finckenstein 2003: 13). Members are, in other words, in no obligation to ensure that domestic laws reflect ICN guidelines and recommendations. Each agency will decide whether and how to implement the recommendations – adapting its strategies to local politics and constraints (Fingleton 2009b: 21). Still, members of the ICN Steering committee expect, on a practical level, that “as best practice proposals are acted upon by members, a natural peer influence will come to bear on other jurisdictions to do the same” (Finckenstein 2002:4). The ICN Steering group hopes that such trickle-down impact will combine with a trickle-up one. By opening the network of insiders to representatives of relevant and important

constituencies, the Steering group wants to build bridges with those constituencies. Non-governmental experts are co-opted and involved in the work of the ICN at many different stages with the idea that they will then become themselves important agents of the fight for competition and antitrust in their respective constituencies. Once a number of local constituencies – or parts thereof – become champions of competition and antitrust, they can push those ideas back up at the national or regional governmental level and thus reinforce the impact and influence of competition authorities.

Hence, throughout its evolution over the last ten years, the ICN has emerged as an increasingly significant and powerful “transnational community of governance”. As such, it has been fulfilling most of the functions such communities are expected to fulfill (Djelic and Quack 2010). The ICN has shaped a transnational problem space and interactive arenas around the issue of competition. It has played a role in the mobilization around competition regulation. It has directly contributed to the setting of rules and standards and to the monitoring of their implementation. It has helped transform preferences along the way and has certainly exerted a certain kind of social control over its members.

While the ICN was progressively moving away from being a simple transnational network to becoming a “transnational community of interest” and in time even a “transnational community of governance”, the various steps it took were not always easy ones. Members of the ICN, and particularly members of the Steering group, have had to realize in the process the complexities of transnational “soft governance”. And while they persisted in their ultimate ambition of being an important actor of transnational governance for competition and its regulation, they have had to dampen a bit early hopes of easy convergence and homogenization. As Lewis recently acknowledged, “the evidence is that ‘best practices’, even in relatively uncontroversial areas, usually have to be tailored to national circumstances and so implementation will always be uneven at best” (Lewis 2009). The Steering group appears to have come to the realization that “convergence is not possible” and its members are now talking about “informed divergence” instead, as a less ambitious, more realistic but also more complex goal (Fingleton 2009a: 6). “Informed divergence”, according to them, implies to identify the “nature and sources of divergence and to understand and respect the divergent underlying rationale” in each national jurisdiction (Fingleton 2009b: 27).

This "softer" stance, though, should not blind us to the consequential politics and power issues that are at work here. As members of the Steering Committee underscore a "culture of antitrust" goes together with a "culture of markets". As such, the project of the ICN belongs to and has been integrated from the start in the broader wave of neoliberalism that has diffused across many shores (Campbell and Pedersen 2001; Dezalay and Garth 2002; Fourcade-Gourinchas and Babb 2002; Djelic 2006). The structuration of a transnational community around competition and antitrust would not have been even thinkable without the striking missionary activism of American (but also European) competition authorities that took place from the 1990s on. Between 1990 and 1998 only, American Antitrust Authorities (Antitrust Department, DoJ and Federal Trade Commission) alone sent 390 expert missions around the world to help countries across all regions set up a national competition regime. They also provided training in the United States for around 300 foreign (future) experts (Djelic and Kleiner 2006). Effectively, this suggests that what might really be at stake is not the convergence of many different standards but the progressive and "soft" imposition of a certain model of competition – a standard pioneered in the United States and relayed to a degree by the European Union. Interestingly, those background politics and power issues have reflected less than could be expected on internal debates within the ICN. Regularly, a few members within the ICN worry that it should be made "clear that all members of the competition family are the actors of the initiative and that they all play an equal role" (Tesauro 2002). But this is as far as it seems to go – softly expressed worries addressed by the formal re-assurance that "of course, consistently sound antitrust enforcement policy cannot be defined and decreed for others by the United States, not that you would presume to do such a thing" (Kolasky 2002: 3).

Creative Commons and Standardized Copyright Licenses for a Digital Commons⁵

In 2001, a group of US legal academics founded Creative Commons (CC) as an American non-profit organization. In the context of the TRIPS (trade-related aspects of intellectual property rights) agreement negotiations, the US media industries ran a powerful lobbying campaign to extend copyright in order to protect their traditional business model. This new organization instead was targeting a middle ground between the internet practice of freely sharing content and the traditional "all rights reserved" setting that copyright law provides⁶.

⁵ Details of the following section are, unless stated otherwise, based on Dobusch and Quack (2010a).

⁶ <http://creativecommons.org/about> [accessed: 25 April 2011]

The Creative Commons organization set itself the objective to develop standardized licenses. Those licenses would enable creative individuals and organizations to easily grant copyright permissions to freely copy, distribute and recombine contents, thereby contributing to a digital commons. By 2010, Creative Commons had developed into an international organizational network with more than 100 affiliates. The licenses it has produced have been “ported”, i.e. translated and legally adapted to local requirements, in about 70 different jurisdictions. Cautious estimates of the total number of works licensed under Creative Commons worldwide added up to about 350 million by then.⁷

From Emergent Epistemic Community to Organizational Capacities

Creative Commons was not born out of nowhere. The idea of fostering a public commons for all kinds of contents had been nurtured during the late 1990s by a community of legal academics in the United States (Dobusch and Quack 2010a). The TRIPS agreement in 1994 and the US Copyright Term Extension Act in 1998 spurred this group to react in critical terms to the extension of copyright terms. Similarity in professional backgrounds was certainly an important foundation for the emergence of a community around this critical opposition. Of equal importance, though, were shared norms and the commitment to a common policy project. In so far as this group was a network of professionals and opinion leaders “with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area” they constituted what Haas (1992) calls an “epistemic community”.

This epistemic community significantly contributed to the framing of a public policy argument that denounced existing copyright regulations based on “all rights reserved” as highly problematic. The extension of copyright terms was presented as socially undesirable because it hampered a free use of the internet for research, educational and cultural purposes. Founding members of the Creative Commons organization published articles and books that denounced the shortcomings and problems of the dominant copyright doctrine (Lessig 1999, 2001). In 2003, one member of this community, Stanford law professor Lawrence Lessig, challenged the constitutionality of the US Copyright Term Extension Act in the Supreme Court. Acting then as the legal advisor in the trial of an online publisher of public domain texts, his plea was, however, not heard. Several members of the community attempted to

⁷ See <http://wiki.creativecommons.org/Metrics> [accessed: 7 January 2011]

convince policy-makers of the advantages of securing tax deductions for individuals who would be willing to relinquish their property rights⁸ in texts.

In their role as public intellectuals, these members of the community called on a form of “cultural environmentalism” to protect the public domain (the “cultural commons”) from all types of infringements (Boyle 2006). They put forward the notion of a “free culture” to overcome outmoded doctrines of copyrights (Lessig 2004). While the epistemic community was originally based in the US, the statements and publications of its members rapidly diffused through old and new media to like-minded people in other countries. Progressively, a transnational public problem space emerged. Virtual arenas were established and actors from different backgrounds became mutually aware of each other. They engaged in common discussions and became gradually oriented towards a common policy project.

With the Creative Commons organization, the founding members in fact had set up an infrastructure that provided a home for ongoing discussions on digital commons. Their vision built on principles developed by a larger and more established practice community and social movement in the open source software sector (Weber 2004). In the process, they emphasized the broader applicability of the open source licensing approach to all kinds of creative works. In the words of Lawrence Lessig, Creative Commons was founded

“... to produce copyright licenses that artists, authors, educators, and researchers could use to announce to the world the freedoms that they want their creative work to carry. If the default rule of copyright is “all rights reserved,” the express meaning of a Creative Commons license is that only “some rights [are] reserved.””

The Creative Commons organization was established to provide a “brand” for the Creative Commons copyright licenses. Its purpose was also to raise funds and create the administrative capacities necessary for the realization of the community’s vision of a “digital commons”. Financial support came from law centers at Universities and public foundations. Since the early days, the board of directors of the Creative Commons organization (with a strong representation of lawyers) has worked together with a technical advisory board (with a strong presence of computer scientists) and an audit committee. Creative Commons started as a rather minimalist organization with only a few staff members employed¹⁰. The first main task was to develop a legal toolbox: machine-readable license modules and corresponding

⁸ Interview with Lawrence Lessig 2007.

⁹ Interview with Lawrence Lessig 2007.

¹⁰ Ten years later, the organizational chart lists 41 staff members (20 full-time, 10 part-time paid staff and unpaid) (<http://mirrors.creativecommons.org/cc-org-chart.pdf> [accessed: 13 January 2011]).

iconographic markers that could be combined to form different standardized copyright licenses. In December 2002, the first versions of Creative Commons licenses were issued in the US.

Towards Transnationalization – of Communities and of Organization

Transnationalization originated mainly from bottom-up initiatives and queries. Soon after the first launch of the licenses in the US, foreign lawyers and experts contacted Creative Commons to obtain the right to port the licenses into their own national legal systems. These foreign contacts often belonged or were inspired by the free/open source software movement. As early as the spring of 2003, Creative Commons opened an international office in Berlin with a view to coordinate the activities of volunteers in different countries. Creative Commons had become a model for audiences in many different countries searching for alternatives to the existing copyright¹¹. Creative Commons' approach to transnationalization of their model combined community building with the setting up of an international organizational network. This approach emerged out of a series of ad hoc decisions and personal interactions with activists pursuing a similar cause in other countries. Among those foreign nodes, a number had been socialised into the Creative Commons spirit through participation in seminars run by some of the founding members in major American law schools.¹²

The Board of Directors of Creative Commons encouraged like-minded individuals with professional legal credentials and a reputation in the copyright debate to become so-called “project leads” in their country. These project leads were typically critical copyright lawyers or experts in open source software with a base in public universities or research institutes. The latter then became “affiliate institutions” in the Creative Commons organizational network. Creative Commons signed a memorandum of understanding (MOU) with the affiliate institution with the intent to “work together to advance public education, access and the use of knowledge by translating and legally adapting the Creative Commons licenses and/or

¹¹ Braithwaite and Drahos (2000: 539) highlight that modelling can be a “potent weapon” for relatively weak actors because it involves learning based on conceptions of practical actions - actions which pursued by a large number of people can make a change.

¹² The project leads, for example, of two pioneer countries – Japan and Finland – had been at the same Seminar at Stanford where they met Lawrence Lessig. Ronaldo Lemos, the Brazilian project lead, first came into contact with Creative Commons at Harvard's Berkman Center. Those early socialization opportunities hence played a big role in the transnationalization of the community (Dobusch and Quack 2010a).

amendments to the Creative Commons licenses ... and to explain the mission and the purpose of Creative Commons.”¹³ Restrictions and constraints stated in the MOU related exclusively to the use of Creative Commons as a trademark and to the formal license porting processes. The organization of local events, funding or thematic priorities were up to the discretion of local organizations. Hence, they could take into consideration and adapt to the different local and national social and political contexts.

A close look at the individuals and at the affiliate organizations involved in translating the licenses shows that transnationalization during the first years (2003-2005) was fueled predominantly by the absorption into the epistemic community of critical open source and internet lawyers from outside the US. The pre-existence in a given country of a free/open source software movement was then and there a clear accelerator of license porting. Even though not all lawyers involved were copyright experts, legal professionals clearly dominated the transnationalizing epistemic community during the early expansion phase of Creative Commons.

Once licenses were in place, the activities of Creative Commons and its affiliates expanded from developing legal tools (which still continued in the form of upgrading and revising license versions in response to feedback from users) to a wider set of tasks related to public advocacy and user mobilization. For example, Creative Commons engaged in courting well-known artists or widely recognized public institutions to adopt their copyright licenses as one strategy to promote them as a standard. At the local and national level, project leads and affiliate organizations became contact-points for loosely coupled individuals and practice groups from many different fields of cultural production (i.e. music, education, public archives) and provided opportunities for them to engage in shared projects of collaborative production of digital content under the CC license standard. Creative Commons therefore also gave rise to the formation of new collective actors within the field of digital production, as well as it shaped the common identity of these actors. Project leads in jurisdictions which joined the network after 2005 often came from civil society or educational fields thereby reaching out to potential users from the start.

¹³ Template of a memorandum of understanding, see <http://wiki.creativecommons.org/images/9/9f/CCMOU.pdf> [accessed: 13 January 2011]

Advocacy, publicizing and mobilizing quickly yielded fruit. The use of Creative Commons licenses increased exponentially after their release¹⁴ with the double effect of enhancing attractiveness to future potential users and bringing many new individuals and practice groups to the Creative Commons community. This clear trend towards a broadening of the community was partly fuelled by the building up, globally, of social movements targeting the protection of civil rights to information on the internet and promoting a “digital and cultural environmentalism.” This translated in the dynamism of online discussions on various mailing lists and public events associated with the Creative Commons community.

While the multiplication of practice and user groups was instrumental for Creative Commons to prosper, it also made management structures and functions much more complex in the still young organization. Local affiliates and user activists asked for more participation and decision-rights in the organization while Board members like Lawrence Lessig emphasized that developing CC licenses as a brand required “expertise rather than democratic motivation”¹⁵. In 2005, the Board initiated an organizational overhaul at both the international and national levels. At the international level, Creative Commons actually split into two parts when it hived off “iCommons” in November 2005 as a separate legal and organizational entity headquartered in London. At the same time, the internationalization project in Berlin was renamed Creative Commons International (CCi) and remained as “just an office” of the US non-profit organization.

At the national level, Creative Commons introduced a differentiation between legal and public project leads. The legal lead continued to provide legal expertise and work in close cooperation with the CCi office in Berlin on both license porting and license development. The public project lead, on the other hand, was meant to take over all the “community work” – above all organizing events, marketing the licenses, and networking among and across different groups of license users. Legal and public project leads could be based in the same or in different affiliate organizations. While this division of labor was implemented in most jurisdictions, iCommons as a separate organization never lived up to the expectations of its founders. After having organized iSummits in Rio de Janeiro in 2006, in Dubrovnik in 2007 and in Sapporo in 2008, it silently suspended its activities after four years of existence. Today,

¹⁴ By 2009 Creative Commons had become the standard license for open content in the internet, as evidenced by the move of Wikipedia from an open source software license to the use of Creative Commons licenses in the same year.

¹⁵ Interview with Lawrence Lessig 2007.

it only continues to operate as a webpage for the posting of events while debates on more democratic participation in Creative Commons periodically reemerge on mailing lists and in other virtual and public arenas.

Creative Commons is therefore a community that has evolved, over the past ten years, from a small mostly national epistemic community into a transnational community of interconnected communities (of practice, episteme or interest). In many respects, it seems to be able to benefit from its internal plurality and diversity. It has clearly become a transnational community with an impact on governance. It plays, as such, different roles. It is involved in the framing of public problem spaces and arenas. It contributes to the structuring and the mobilization of collective actors. It plays a significant role in rule setting and in the monitoring of rule implementation. It has unmistakably shaped and transformed the preferences of many members in the process. And it certainly exerts a degree of social integration and control.

The development of the Creative Commons community has to be seen in the context of the political and social controversies surrounding transnational copyright regulation as revealed, initially, through the TRIPS negotiations. Its organizational and framing strategy has been successful in the face of a much more resourceful opposition essentially because it resonated with widespread social practices of internet use. By addressing and mobilizing both, authors that have no or only a limited interest in the commercial exploitation of their creations and users of commons-based goods or file-sharing software they fostered the creation and expansion of a collectively experiences, transnational community of practice (Dobusch and Quack 2010b). By way of this shared self-image, they can be mobilized and because they daily use and champion the CC license, they in fact have a regulative impact. Still, it remains to be seen to which extent the Creative Commons community, which evolved as a countermovement to a copyright coalition, will be able to exert equal impact in the area of commercial cultural production (see Elkin-Koren 2005). Currently, Creative Commons is generating fiercer opposition amongst copyright collecting agencies, i.e. private bodies established in different countries to collect royalty payments from various individuals and groups for established artists as copyright holders than within multimedia companies whose

advocacy campaigns address predominantly internet piracy¹⁶. Yet, Creative Commons is pursuing coordinated negotiations with copyright collecting agencies in different countries, the outcomes of which will be important for the further diffusion of its license. Overall, thus, the case study of the Creative Commons shows how a community of challenging civil society actors reached out to a wider constituency of actors from the public and private sector and, through organizational and framing strategies, built a collective identity for a mixed set of producers and users of internet content in the public domain.

Discussion and Conclusion

We have argued, in this paper, that the analysis of transnational communities provides a fruitful new perspective on the complex constituencies and dynamics of transnational standard setting. We define transnational communities as social groups emerging from interactions across national boundaries and bound together through mutual recognition and a common sense of belonging (Djelic and Quack 2010). We have argued that those transnational communities contribute to standard setting processes and hence have a significant impact when it comes to transnational governance. We have identified and explored different roles in that respect. Transnational communities, we propose facilitate the emergence of a transnational problem space and public arena. They foster collective mobilization, particularly of the kind cutting across different dividing lines – public and private, transnational and national, “regulators” and “regulatees”. We also underscored the potential role of transnational communities when it comes to the launching of standard setting projects. Transnational communities, we argued, help shape and transform the preferences of their members, with partial alignment through time as a consequence. Finally, transnational communities unmistakably exert social control in a more or less formal way.

Our two case studies differed from each other in significant ways along the three dimensions identified above – goals and power, mode of access and nature of actors. On the one hand, the ICN case pointed to an elite top down pattern where powerful public agencies strove to enlist and mobilize others around an existing standard. The Creative Commons case reflected a more grassroots pattern of community development led by private and civil society actors with the project to develop an alternative or challenger standard. We hypothesized that each of these types of community development patterns might have specific strengths and

¹⁶ <http://governancexborders.com/2010/06/27/declaring-war-on-free-culture-collecting-society-confronts-creative-commons/> [accessed: 25 April 2011]

weaknesses. The two cases studied in this paper illustrate this quite nicely. They also show that, in each case, the community came to deploy complementary strategies. In spite of clear differences, transnational communities came to perform through time strikingly similar roles in those two cases. This suggests that we should explore the developmental trajectories of different communities rather than simply doing static comparisons. In time, the elite ICN community has come to open up in a selective and controlled manner with a view to connect with certain important stakeholders in the private business and academic spheres mostly. In parallel, the challenger and grassroots based Creative Commons came to differentiate from within in order to deal with an increasing internal heterogeneity.

A systematic comparison of the enlisting and challenging types of transnational community has allowed us to underscore what community dynamics add to the operation of organizations and networks engaged in standard setting and how those dynamics could intentionally or unintentionally feedback on formal organizations and networks. This systematic comparison has also suggested the contribution of cognitive and cultural factors to the stabilization and institutionalization of transnational standards. Naturally, the concrete ways in which the communities in each case fulfilled those parallel roles differed in part. The ICN tended to privilege peer pressure and inclusivity pressure as mechanisms of socialization. The Creative Commons, on the other hand, was better characterized by the use of modelling as a strategy aiming at persuasion and learning. Another difference was quite striking at the start but, interestingly, did come to whither away in part through time. Initially, the ICN strove to impose general standards to be adopted locally. The Creative Commons by contrast fostered diversity in the local adaptation of a general standard. Yet, as the ICN community became through time more aware of and reflexive about the limits of convergence, it moved towards a philosophy of “informed divergence” that included quite a bit of room for local adaptation. In parallel, as the Creative Commons community came to realize that too many jurisdictional variants of their licenses could create undesirable compatibility and convertibility problems, they amplified the promotion of the generic licenses. Hence, the initial differences in philosophy between our two cases appear to be diminishing over time. Whether this is also true of differences in terms of socialization mechanisms remains an open question to be explored in further studies. To test this empirically would call for a different research design and different data gathering methods. Equally, it would be interesting to explore whether enlisting elite communities constituted of business actors exhibit the same kinds of features

and dynamics as those characteristic of the ICN, which is made of public or quasi-public regulatory agencies.

Finally, while the systematic comparison of our two cases underscored the importance of transnational communities in the ongoing process of transnational governance through standard setting, it also, we propose, pointed to the potential significance of a reverse impact. As transnational standard setting is deployed and developed, the networks, organizations and individuals involved increasingly come to exhibit community features and properties. The exploration of this proposition, again, would call for an extension of our research design and for now, this remains an interesting but tentative proposition.

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