Contentious Europeanization: The Paradox of Becoming European through Anti-Patent Activism

Jelena Karanović
New York University, USA

Abstract

Through an ethnographic account of a pan-European activist campaign against software patents, I investigate how European identities emerge through contention rather than consensus. I apply anthropological literature on Europeanization and on intellectual property rights in order to rethink conventional theories about the relationship between European integration and the formation of European identity. I develop the term ‘contentious Europeanization’ to denote a set of identities and approaches to Europe that are intimately linked to EU policy-making, yet purport to develop an alternative Europe. More broadly, I argue that information technology and intellectual property law operate as frameworks for the formation of contentious political subjectivities.

Keywords

Europeanization, political subjectivities, information technology, patents, technological activism

The photo in Figure 1 was taken in July 2005 from a bridge that joins two wings of the European Parliament in Strasbourg. On that day, Members of the European Parliament (MEPs) voted for the European directive on patenting of software – also known, as the sign on the yacht indicates, as the CII (computer-implemented inventions) directive. The vote was the culmination of a seven-year controversy, and this seemingly arcane technical topic brought an extraordinarily large number of MEPs to the European Parliament to vote.

One protester described this scene to me in the following words:
We were in front of the Parliament building, tired from the all-night ride to Stras-
bourg, standing there since 7 am, wet and cold because it was raining. Then we
heard that there was a yacht on the channel, on the other side of the Parliament build-
ing. It was so symbolic of the inequalities that we were fighting: On one side, 100
geeks in yellow T-shirts, and on the other side, somebody from the rich pro-patent
lobby had made a phone call and rented a yacht to lobby the Parliament members!

He continued, ‘We were shocked, and then somebody said, “Then we will sur-
round them with canoes!”’ Protesters rented two canoes and paddled to the
yacht, carrying banners with anti-patent slogans. Parliament members who
were on their way to the session started laughing when they saw the scene
under the bridge. In the words of another protester, ‘This naval battle proved
that innovation and creativity were on our side!’

The protesters’ performance skillfully drew on symbols of the European
Union (EU) in order to formulate both an alternative vision of innovation
and a coherent political platform, all within sight of European Parliament
members. Both the yacht and the protesters carried banners in the blue and
yellow colors of the EU, but their messages were opposed. The yacht, rented
by a pro-patent organization called Campaign for Creativity, flew a banner
reading ‘Patents = European Innovation’. In the canoes, the protesters’
banner asserted, ‘Software patents kill innovation’. The protesters wore
yellow T-shirts with inscriptions ‘No Software Patents’ on the front and
‘Power to the Parliament!’ on the back. Against the imagery of a Europe gov-
erned by lobbies, the protesters pitted an image of a grassroots Europe.
Since 1998, the controversy around software patents has riveted EU policymakers, representatives of transnational software corporations, lawyers, and activists. This article documents how debates over software patents have shaped activists’ experiences of the EU and catalyzed the formation of contentious political identities among activists. Those mobilized to oppose software patents included substantial numbers of Belgians, Dutch, French, Germans, and Poles, several hundred of whom were willing to travel to Brussels or Strasbourg for conferences, protests, or other actions. Many of these activists (predominantly men in their 30s and 40s) self-identified as computer geeks or were close to that world as owners or employees of computer businesses.

I got to know these activists during my ethnographic fieldwork, conducted in 2004 and 2005, among French voluntary associations that promote free software.\(^3\) My account here is based on open-ended interviews with activists opposed to software patents in Brussels and Paris, three day-trips to Brussels at which I accompanied a group of French activists for meetings and protests, 20-month tracking of online discussions about software patents and the European Constitutional Treaty (ECT) among French free software advocates, and extended participant observation in formal meetings and informal gatherings of Parisian free software advocates.

In this article, through an account of the pan-European activist campaign against software patents, I reappraise the relationship between European integration and the formation of European identities. While much of the literature on European integration presumes that the pooling of economic resources and specific areas of national sovereignty precedes the formation of European identities, anthropologists have argued that European identity formation is not circumscribed by the EU integration agenda (cf. Borneman & Fowler 1997). My account foregrounds the aspects of European identity formation that challenge, rather than embrace, the EU integration agenda. I develop the term ‘contentious Europeanization’ to denote a set of identities and approaches to Europe that are intimately linked to EU policymaking, yet purport to develop an alternative Europe.

Information technology and intellectual property law have not been habitually perceived as matters of democratic deliberation in the EU. Yet, I argue that these putatively expert domains offer an effective framework for the formation of contentious political subjectivities. Anthropological discussions of patenting rationales and practices have foregrounded issues of accountability and representation in the emerging arenas of science, technology and medicine (Strathern 1996; Hayden 2003). While analyses to date have focused on
biosciences, I trace the debates about accountability and representation in the domain of information technology. My account highlights disputes about expertise, procedural technicalities, and bureaucratic practice among patent officers, EU policymakers, and activists. In their seven-year involvement around purportedly technical topics, I argue, activists not only devised a means of opposing the specific directive on software patents but also critically engaged the broader project of EU political integration and citizenship.

I proceed, via a review of the broader literature on European integration and European identities, to explore how Europeanization can limit the project of EU integration. Next, I examine how software patents were articulated as a European issue within EU institutions and on the streets of Brussels. My analysis centers on activists’ speech and practices in the dispute over criteria employed to recognize patents and the ensuing struggle over locating software in the (patent-prone) realm of technology. I show that this seemingly arcane dispute led activists to raise larger questions about accountability and representation in the EU. Finally, I discuss how French activists applied their newly acquired understanding of European democracy in the 2005 referendum on the ECT. I draw on texts that activists published online to analyze how the campaign against software patents provided a means of thinking about, and acting on, European integration. My conclusion reflects on circumstances that made specific choices of contentious European imagery particularly meaningful to the activists.

**European integration and Europeanization**

Since the 1950s, political science analyses of European integration have foregrounded a ‘dialectic of fragmentation and unity’ organized around nation-states (Hoffmann 1995:101). While the early architects of European integration assumed that it would fundamentally transform national sovereignty, many of them also thought that this would be ‘much to ask Europeans to accept’ (Monnet 1976:402). Inspired by plans for national modernization and postwar recovery, European civil servants were to engineer the means for a gradual transfer of commitments from the national to the European level. A political science theory based on this approach, neo-functionalism, premised that sharing of economic and technical resources in one economic domain would bring about momentous spillover effects and eventually enmesh the actors in a form of collective supranational governance (Haas 1958). Others challenged this paradigm by arguing that nation-states remained strong in the processes of integration and that European
commitments depended on, rather than opposed or transcended, national interests (Hoffmann 1995). Integration proceeded only when national preferences concurred with the proposed integration projects, and only in the areas that were not considered vitally important to the nation-state (Moravcsik 1998). While these analyses have been influential in accounting for ‘the commercial interests of powerful economic producers and ... the macroeconomic preferences of ruling governmental coalitions’, they offer little guidance for understanding European commitments among other non-governmental actors and do not account for European differences on subnational levels (Moravcsik 1998:3).

A growing literature on Europeanization in international relations, EU studies, and comparative politics adopts the same focus on national and European influences and mostly addresses institutional and policy adjustments in member states (Schmidt 2002; Featherstone & Radaelli 2003; Graziano & Vink 2008). Anthropologists have broadened the scope of these discussions, arguing that specific discourses of Europeanization have been central to reorganizing territoriality and democratic participation in Europe (Borneman & Fowler 1997). In peripheral European regions, debates about Europeanness and the meanings of Europe have been fundamental to national identities and political-economic strategies since the 18th century (Gal 1991; Thiessen 2007) and revived with the prospects of EU enlargement (Bunzl 2005). These debates about Europeanness help explain how the modernizing ideologies of European integration and accession have in some instances helped revitalize parochial and ‘integralist’ identities within Europe (Darian-Smith 1999; Holmes 2000).

Ethnographic research in putative laboratories of integration has also suggested a more complex dialectic between European commitments and plural identities of EU civil servants. In the European Parliament (Abélès 1992), the European Commission (Abélès et al. 1993; Bellier 2000; Shore 2000), and the European Space Agency (Zabusky 1995), the diverse languages and political cultures of civil servants contribute to the construction of European commitments that rest on national foundations. At the same time, expatriate European civil servants rework national differences through daily practices of work and life by relying on stereotypes more often than on attachment to respective nation-states (McDonald 1993; Zabusky 1995). These analyses suggest that European identities are developed through daily work, sectoral social relations, and reflexive practices that neither simply transcend nor extend national belonging.
My use of the term Europeanization follows the scheme delineated by Harmsen and Wilson (2000:24–5) to encompass the broader ‘environment which both sustains and limits the narrower project of European integration’. The purview of Europeanization highlights the processes of cultural and social differentiation that are attendant to the embrace and/or rejection of specific agendas in political, legal, and economic integration.6 This broader perspective reorients the analysis of the relationship between institutional change and European identity formation to entail not only ‘the manner in which institutional change may reshape identities’ but also ‘the ways in which changing identities may create pressures for new institutional forms’ (Harmsen & Wilson 2000:20). It is this relationship that I probe by presenting one trajectory of Europeanization in which participants crafted European identities and images of Europe as key resources in developing a contentious agenda in technological innovation and intellectual property law.

I further explore to what extent contentions over the EU technology policy, which have so far received little attention outside microcosms of EU integration, may catalyze the formation of political European subjectivities. While linked technological infrastructures have facilitated transformative connections across Europe for hundreds of years, these connections are open-ended and can strengthen as well as undermine inter-European affinities (Misa & Schot 2005). For example, common consumption patterns, environmental problems, and other shared experiences in Europe have not engendered a European consciousness (Shore 2000). Yet, not one but two competing sets of pan-European political imagery appeared around software-driven technological innovation: one originated in the European Commission’s proposal for co-opting software patents into the project of EU integration, while the other grew out of activist experiences with mobilizing EU policymakers against software patents. The opposition of these two pan-European projects precipitated the formation of contentious European political identities. My account below documents how software patents became ‘agents of European consciousness’ and suggests that technological innovation provides a particularly salient focus for understanding how discursive constructions of Europe around issues of little public visibility are linked to debates about the legitimacy of EU institutions (Shore 2000:26).

‘One Europe, one currency, one patent’

While pharmaceutical patents have long been an active object for activism and have been overruled in several countries on public health grounds, software
patents may seem an unlikely cause for activism. A patent is a legal title granting its holder certain exclusive rights to an invention. The 1973 European Patent Convention holds that patents can be granted ‘for any inventions which are susceptible to industrial application, which are new and which involve an inventive step’ (EPC (European Patent Convention) 1973). This convention explicitly excludes computer programs from patentability and sets the legal framework for the intergovernmental European Patent Office (EPO).

In 1997, the European Commission initiated an European patent system as part of its agenda for European integration and economic development. The Commission’s documents stated that a uniform European patenting policy would make it easier and cheaper to protect inventions across Europe and allow the EU to compete more effectively within a globalized economy (European Commission 1997). The president of the EPO vividly inscribed patents in the project of European integration via the slogan ‘One Europe, one currency, one patent’ (Kober 1997). His slogan dovetailed with a range of Commission initiatives that promoted a singular European identity with an ultimate aim of engendering support for EU integration and increasing legitimacy of EU institutions (Shore 2000).

In addition to advancing EU integration, harmonization of patent policies was intended to expand the domains of patentability and legalize the 30,000 software-related patents that the EPO had already granted, among them many of uncertain legal validity. In conjunction with the US and Japanese patent offices, the EPO in 2000 introduced the category ‘computer-implemented inventions’ that included software; in contrast to Japan and the USA, the extension of patentability in Europe has encountered vigorous opposition (Kahin 2003).

**Movement against software patents**

The first formal European group to mobilize against software patents was EuroLinux Alliance, created in 1998 as a coalition of individuals, companies, and non-profit associations promoting ‘open standards, open competition and open source software’ (EuroLinux 2000). Its membership was by invitation and its actions were not widely publicized. The organization did, however, sponsor an online ‘Petition for a Software Patent Free Europe’, signed by almost a half-million people and companies. Although the coalition included numerous free software advocates, it aimed to organize a broader constituency around the issue of software patents.
Later that year, many of the same actors established another organization, Foundation for Free Information Infrastructure (FFII). Although the FFII had formal relationships to neither free software nor open source projects, free software activists were among its most active members. The FFII was legally based in Munich with members from all over Europe. The organization also rented an office in Brussels not far from the EPO and the European Parliament. FFII had one paid staff member; the remaining work was undertaken entirely by volunteers. FFII’s multilingual wiki was the main platform for day-to-day organizing activities. For example, the FFII wiki listed the e-mail addresses and phone/fax numbers of MEPs, and volunteers then used this information to send individual postcards to MEPs about software patents.

Many FFII projects relied on advanced computing skills among its membership to engage in expert fields of patenting practice and law. For example, one FFII member wrote software that automatically searched the EPO’s patent database for legal phrases that indicated a potential software patent. If such phrases were identified, other activists would then try to demonstrate that the corresponding patent did indeed cover an algorithm, i.e. that it was a software patent. Normally carried out by lawyers, these tasks were accomplished by FFII volunteers with little formal legal training. Through this tedious and time-consuming work, activists aimed to publicly denounce the absurd wording and trivial nature of purported software inventions.

An emergent European issue

For its members and sympathizers from around Europe, the FFII subsidized travel to Brussels and arranged meetings with MEPs from their respective countries so that MEPs would realize that voters were concerned about patents. Occasionally, large contingents of activists traveled to Brussels to participate in street protests. In April 2004, I took part in one such event with a bus full of French activists. I recognized some of the people in the bus as free software advocates; others were engineers, programmers, researchers, and union organizers, as I learned in our conversations during the day. Some brought panels, a projection screen, and signs made for a street protest a year earlier, before the European Parliament’s first vote on software patents. Our protest this time coincided with a two-day European Parliament conference on software patents, where software programmers and experts on European and US patent policy were expected to discuss with left- and right-wing MEPs the economic dynamics of software patents, the effects of different proposals, and the reasons for opposing software patents. However, most people from
our bus contingent were to attend only one day of demonstrations, as staying overnight in Brussels would require private arrangements for lodging and return travel. At the behest of the FFII, online protests had started ten days earlier, organizing nearly 2000 websites of organizations, businesses, and individuals to display a welcome page in black, with the following text: ‘NO to software patents in Europe. 10 days of strike vs. 20 years of software patents’.8

A Belgian activist who had been in Paris for work guided our bus through Brussels. As the bus approached our meeting point on Luxembourg Square, we realized that a procession of cement trucks had stopped traffic. We could see no signs of protest. Yet, activists seemed to have expected that a street protest against software patents was a significant political action that would leave a visible trace in an urban landscape. As we watched through the bus windows at the confounding scene, someone in the bus asked ‘Are these trucks intended to obstruct the protest?’ There was no immediate answer. This question and the silence following it expressed activists’ unfamiliarity with the political and urban terrain of Brussels. It eventually transpired that Luxembourg Square was, in effect, the construction site of the European Parliament’s building. No powerful adversary had mobilized cement trucks against protesters.

We left our bus near the construction fence and took photos under the banner that read, in French, ‘Patented software = reinforced monopolies, hampered innovation, weakened competition, lost jobs!’ Without explicitly mentioning the EU, the banner evoked innovation, economic productivity, and competitiveness, all of which have figured in EU policies for scientific research and technological development at least since the 1980s. These imperatives had become discursively constructed as inevitable developments as lobbyists, national politicians, and EU officials invoked them to promote specific policies and to pre-empt alternatives (Levidow & Marris 2001; Rosamond 2002). The campaign against software patents sought to firmly ground the rejection of software patents within these EU imperatives.9

At a nearby park, we joined the rest of the protesters who were speaking mostly French, English, and German. An FFII organizer asked where I was from—it would have been especially auspicious if I came from one of the ten countries that were soon to join the EU. Several Slovenian activists had arrived, and FFII was trying to put them in touch with MEPs. FFII had started to forge connections with potential allies in ten Central and Eastern European states well before May 2004, when the ten countries officially joined the EU. An enlarged Europe turned out to be a political boon for
activists: notably, the Polish minister of science and technology on two occasions blocked the Council’s attempts to bypass the vote in the European Parliament on software patents. Activist descriptions of the minister’s heroic resistance in the Council suggested that Poland had decidedly earned a place in Europe.

A pamphlet made by Parisian activists for this protest claimed that software patenting ‘is not a good choice for Europe’ and that ‘if software became patentable, everything would be patentable’. This pamphlet, aiming to find accessible language for broader public and political mobilization, linked European policymaking with the cultural significance of patents. The main text, on the left side of the page, summarized the positions of the European Council, Commission, and Parliament on the software patenting directive, while a narrower text to the right argued that ‘if Haydn had patented “a symphony characterized by its structure in the form of extended sonata”, Mozart would have encountered many difficulties’. Although the pamphlet was in French only, activists addressed it to the European public and handed it out widely during the protest march.

Our protest march turned out to be a very quiet 20-minute walk through Brussels’ European Quarter. Most protesters donned yellow ‘Power to the Parliament’ T-shirts and carried yellow balloons that displayed the message ‘No Software Patents’ in English. The march took place during the lunch break but the streets were deserted, with the exception of the police, who halted the traffic that was already delayed because of construction. The protest contingent stopped in front of a big building which, I learned, was the headquarters of the European Commission. We sat down and watched a pantomime that dramatized how big software companies disproportionately benefit from patent monopolies granted to them by the European policymakers. As the skit unfolded, big business, wearing boxing gloves, knocked out the independent software developers and small companies, which received only a mouth guard as protection from the lawmakers under the pretense of fair-play market competition. This performance condensed FFII’s main arguments against software patents: notably, the claim that software patents would reorganize the software industry to the benefit of huge software companies.

This skit also acted out activists’ convictions about how software patents would position Europe against its global economic competition. High-profile discussions of economic competition pitted a unified ‘European external identity’ against the perceived threats from ‘America’ and ‘Asia’ (Bellier & Wilson 2000:3). The USA loomed large as both proponents and opponents of software
patents raised the specter of the European economy being overtaken by global competitors. The European Commissioner for the Internal Market had recently accused the FFII of being ‘anti-globalization, anti-American, anti-big business’ (The Parliament.com: European Politics and Policy 2005). Two months before the protest march, a Microsoft spokesperson argued in a public hearing that patents were key to the success of the US software businesses and that lack of software patents would impede the European economy in international competition. FFII responded that global economic competition led to the opposite conclusion: the USA was not only an external economic threat but also the main example of how software patents and litigation can hamper innovation that is associated with small enterprises.10 Drawing mostly on case studies about patent enforcement in the US software industry, activists argued that only those companies able to amass collections of patents or patent portfolios, rather than single patents, could benefit from software patents. As European software companies were predominantly small- or medium-sized enterprises with modest financial resources, legalizing patents in Europe would essentially hand over the European software industry to US giants that have the economic power to create patent portfolios. The boxing gloves of big business threatened not only small software businesses but Europeans in general.

Following the skit, we held each others’ hands to form a ‘human chain’ and then took photos of the Commission’s gray building, featuring a rising cloud of yellow protest balloons that we let loose. Most of the protesters then walked over to the Parliament building to attend the afternoon session of the conference, only to find out that they had neglected to confirm their attendance in advance and, therefore, could not enter the building. FFII activists gave priority for entry to people who came from new EU member states. Security officers then announced that activists would have to switch their yellow protest T-shirts for regular clothes to avoid appearing overly provocative or offensive. A few people, who did not want to take off their T-shirts, left. I waited for two hours before leaving. On the return bus ride and in the reports sent to several e-mail lists the following day, activists estimated that there had been between 500 and 1000 people at the demonstration. They considered that the press coverage was very good, perhaps because many TV stations were near the Commission’s building covering the antitrust proceeding that the Commission had initiated against Microsoft. Although several activists wondered why the march was silent, overall they found the trip to have been an excellent occasion for meeting new people, drinking beer, and defending a cause that they cared about.
The participants in this protest constructed software patents as a European issue in speech and in practice. In speech, activists’ arguments engaged dominant discourses of European policymakers by claiming that software patents would adversely affect both the (internal) European software industry and (external) European economic competitiveness. In practice, the campaign against software patents gave many activists firsthand familiarity with European institutions in their geographical and symbolic manifestations.

**Activist understandings of EU institutions**

While software patents were gradually introduced in the USA through successive litigation, a single EU directive situated software patents squarely in the policymaking realm. EU directives are ordinarily adopted via a joint decision procedure in which the European Commission, European Council, and European Parliament must agree on a common text. Activists’ attempts to contact MEPs, the Commission, and the Council led to very different results across these entities. FFII maintained contact with some MEPs (mostly Greens and Socialists, who were a minority in the Parliament at the time), while the Commission and the Council were overwhelmingly unresponsive to activist efforts.

This variation in responsiveness from EU decisionmakers dovetailed with activists’ concerns about accountability and the institutional structure of the EU. The EPO was not under the jurisdiction of any EU bodies, yet the Commission’s directive would legalize the EPO’s 30,000 existing software patents and create a thicket of overlapping ownership claims.\(^\text{11}\) The European Commission itself was founded as a close-knit executive branch of EU and continued to work in opaque fashion (Ross 1995). Activists’ and politicians’ indictments of the Commission and the Council for lack of accountability increased in the 1990s. For example, a whistle-blower in the late 1990s triggered an investigation that eventually uncovered ‘covert deals, bargaining and compromises struck between Ministers and their permanent representatives in the Council of Ministers, conducted behind closed doors’ and the unwillingness of the Commission (and, to a certain extent, of the Parliament) to prosecute internal fraud (Shore 2000:226).

In 2004–2005, the Parliament opposed the Commission and the Council over various issues, which included appointment of Commissioners who had conflicts of interest or who were openly homophobic. Activists’ invocations of accountability magnified these already existing tensions, aiming to strengthen the leverage of the Parliament over the Council and the Commission. MEPs in their press statements bolstered activists’ efforts at drawing public scrutiny to
alleged abuses of power and procedure. Concerns about accountability recast activists’ organizing efforts as a remedy to this state of affairs, a means to establish a public record accessible to European citizens about inscrutable EU institutions. FFII increasingly devoted its daily actions to tracking and archiving EU decisionmaking. Activists tracked the online transmissions of the Council’s voting sessions, converted the streams to open digital formats that could be viewed in GNU/Linux systems, archived, indexed, and transcribed them, and made the transcriptions and the video recordings accessible for download. In their transcripts and comments, activists highlighted what they deemed to be the instances of opaque, coercive, and undemocratic decisionmaking in EU institutions.

‘Software’s unfortunate association with technology’

At a conference that FFII organized in June 2005, the president of the Polish Association of Software Professionals deplored ‘software’s unfortunate association with technology’. His lament drew approving nods from the activists in the audience. When I asked why the connection between software and technology elicited such remorse, I learned that this issue was key to the dispute over criteria that the EPO employed to recognize patentable inventions.

Inventions, as Strathern (1996) has argued, are hybrids that link elements across customary cultural dichotomies: for example, in patent law ‘an invention implies by definition that culture has been added to nature’ (p. 524). In practice, patent claims reorganize the networks of relations, practices, knowledge, and creative influences around inventions so as to prioritize specific contributions and (usually a small number of) actors while curtailing the relevance of others. ‘Entailments and containments’ around patent claims, according to Strathern (1996), provide an entry into the rationales of inclusion and exclusion in specific cultural contexts (p. 525). Following Strathern, I explore how activists’ concerns with inclusion and exclusion in an obscure dispute over a patenting criterion gave rise to debates about political representation in the EU.

In 1986, the EPO revised its guidelines for patent examination and has since relied on a criterion of ‘technical contribution’ to identify patentable inventions. This new criterion has enabled the EPO to accept patents on software. For example, software that adapts the layout of a web page for display on cell phones would not have been patentable under the European Patent Convention, but the EPO recognized this patent in 2003 (EPO (European Patent Office) 2003). EPO’s rationale was as follows:
The execution of a program always involves physical effects, e.g. electrical currents . . . Such normal physical effects are not in themselves sufficient to lend a computer program technical character. But if a computer program is capable of bringing about, when running on a computer, a further technical effect going beyond these normal physical effects, it is not excluded from patentability. (EPO (European Patent Office) 2005[1996])

In other words, software was considered patentable as soon as it had an ‘effect’ whose ‘technical character’ could somehow be established by patent filers and approved by the EPO.

FFII activists denounced the circular reasoning at work, arguing that most software could be shown to have some effects. Aiming to set clear limits to patenting, activists traced the concept of ‘invention’ in patent doctrine to German case law, which relied on a set of dichotomies that opposed human reason to natural forces, logical functionality to physical causality, and mind to matter. These dichotomies, activists argued, located software consistently within intellectual property frameworks in the non-patentable ‘realm of pure reason, i.e. calculation, abstraction and programmation’ (FFII 2004b). Michel Rocard,14, rapporteur15 of the software patenting directive and one of its leading opponents in the European Parliament, employed this same rationale to draw the ‘red line’ for distinguishing what is patentable: ‘Software whose devising requires usage of energy, equipment or matter, deserves to be patented. Software whose conditions of production are a sheet of paper, a pencil and a good mathematical brain does not deserve to be patented’ (DI 2005:9). In other words, software was an expression of an idea rather than an (hybrid) invention.

Continued disagreements – on whether proposed limits exempted software – pitted the European Parliament and activists against the European Commission, Council, and the Patent Office. In several newspaper interviews, Rocard reminded readers that the EPO was financed by fees from patent applications (Alberganti & Foucart 2005). In 2003, the Parliament adopted FFII’s interpretation of ‘technical contribution’ and proposed that technology be patentable only if its creation implied the use of ‘controllable forces of nature’ (European Parliament 2003). This definition was rejected by the Council as too vague. The Council’s next proposed directive, in 2004, did not define the meaning of ‘technical contribution’ and was denounced by activists as another trick aiming to legalize unlimited patentability (cf. FFII 2004a).

This prolonged wrangling highlighted for activists another set of concerns. The debate had unsettled the customary boundaries of delegation, creating a ‘hybrid forum’ (Callon et al. 2001): MEPs disputed the meanings of invention
and technical contribution with the patent officers, while software engineers deplored the cultural association of software with machines. When the EU Council bypassed the amendments that came from this expanded set of interlocutors, the dispute raised questions about democratic representation. A French activist summed it up for me: ‘we, as well as MEPs, have realized that patent offices were defining national and European politics under the pretext of the technical nature of software’ (interview, 6 November 2004). In other words, the purported ‘technical nature’ of software was more than a self-serving bureaucratic rationale for patent offices: it was an attempt to evade broader public debate. Engagement with this issue has predisposed activists to dispute the assumption that European citizens could be unconcerned about bureaucratic technicalities.

**Voting on the ECT**

Over the six months leading up to the May 2005 referendum on the ECT, the Treaty was a prominent topic of debate among French politicians, activist organizations, scientists, workers’ unions, academics, journalists, pollsters, bloggers, and marketing agencies. Their discussions were dominated by alarming predictions about the consequences of either rejection or approval of the Treaty. Many commentators noted evidence – for the first time in the history of the European integration – of French popular interest in the fate of Europe as an entity. Most French political parties had voted to approve the ECT, but there were significant dissenting minorities within each party. A heterogeneous ‘collective for NO’ (collectif du non) included various groups ranging from the far left to the far right. For some commentators, the political diversity of the anti-ECT side indicated that French politicians were out of touch with the population. Other commentators dismissed opposition to the ECT as an expression of a naive revolt against mainstream politics. The same revolt, they argued, brought the ultra-right candidate Le Pen to the runoffs in the infamous 2002 French presidential elections.

The final stages of the campaign against software patents coincided with the buildup to the French referendum on the ECT. At the outset, there were few direct connections between the ECT and the EU software patenting directive. Only one article in the ECT referred to intellectual property, duly asserting that ‘intellectual property shall be protected’ (Treaty Establishing a Constitution for Europe 2004, art. II-77). Yet, activists were quick to discern that this blanket statement set no limits to the application of different intellectual property rights nor exceptions for fair use, rights of the public, or private copy. This
finding resonated forcefully with activists who were by then all familiar with the dangers of enshrining in legal doctrines such inadequately defined notions as, for example, technical contribution for software patents.

The analogy between the EU directive on software patents and the ECT was, perhaps, most effectively drawn by Roberto di Cosmo, a professor of computer science who published an online call for rejection of the ECT two months before the referendum. Cosmo’s text, drawing on the themes from the campaign against software patents, seemed to target computer geeks but was addressed to citizens. He argued that the discourse surrounding the ECT strongly resembled the discourse about the necessity of computerization. In both instances, he argued, citizens were invited to approve dominant agendas by default under the pretext of their technical nature:

On the one side, we are presented something (the computer, a European Constitution) declared essential and that, seen at a distance, is full of promises; on the other hand, we are politely informed that we will never have the competencies necessary to understand these complex objects (functioning of millions of transistors on the one hand, that of the institutions managing millions of citizens on the other), therefore we should buy them or approve them as they are proposed to us, well packaged, without allowing ourselves to express the slightest reservation, or to propose a slightest change. (Cosmo 2005, my translation)

By highlighting how citizens were being stigmatized as non-experts and hence incompetent, Cosmo made a compelling case for seeing software patents and the ECT as analogous.

In turn, this analogy allowed him to reflect on the campaign against software patents as a citizen issue, providing far-reaching lessons at an important juncture of the European integration. He explicitly invoked this experience:

Very fortunately, right before the vote in France about the European Constitution, the community of European computer scientists could follow step by step the implementation of this procedure of joint decision [codetermination] on the European directive that aimed at introducing in Europe software patents, which were previously prohibited by the 1973 Munich convention and by the 1991 European directive; it is a history which has merited chronicling on several occasions for more than four years. Unfortunately, under the pretext of technicity (ah, technicity, over and over!) this affair was not sufficiently brought to the attention of citizens. You don’t know what a software patent is? That is a serious problem, because the future of the European computer industry and millions of skilled jobs all over Europe depend on it, as do many of our freedoms and our independence, in the broadest sense. (Cosmo 2005, my translation)
While this text became famous among French free software activists as a first explicit call to reject the ECT, it also cogently expressed one way in which numerous French activists wanted to be European. Cosmo argued that the decisions about software patents deserved wider public scrutiny and proper political deliberation. Both the ECT and software patents, the text suggested, raised concern about the trust that citizens delegate, without sufficient scrutiny, to alleged experts, whether in the realm of partisan politics or patent law. Being European entailed reclaiming the debate about patents in political terms.

Activists also had firsthand experience with two mechanisms of European democratic governance that ECT purportedly strengthened. Numerous newspaper editorials asserted that under the proposed constitution, European citizens would have a stronger voice through their ability to petition the Commission to propose specific laws, while the European Parliament was to have an expanded role in EU policymaking through an implementation of the joint decision procedure. Yet, the 7-year campaign against software patents highlighted the limited promise of both of these proposals. Interminable setbacks over defining the technical contribution of software became symptomatic of the limited influence of European citizens in the Commission’s affairs as well as of the EU Parliament’s limited power against the Council and the Commission. In this spirit, a week before the referendum, five free software advocates announced online their decision to vote against the ECT. Labeling themselves ‘privileged witnesses’ of an undemocratic process, they announced ‘we will vote a NO with a profoundly European commitment’ (Sédra-Dinet 2005a). European identities, forged through collaborative work and collective experiences with European policymaking, were resources that activists self-consciously mobilized to oppose the proposed consolidation of Europe.

Conclusion

When, in July 2005, the European Parliament rejected software patents for the second and final time, the vote was ‘the most unanimous ever registered’, with 648 votes for the rejection, against only 14 opposed and 18 abstentions. It was also the most contradictory vote of the Parliament, for ‘despite the unanimity of the vote, the text has profoundly divided the Parliament, and both camps “preferred to reject it out of hand, rather than risk having the other camp’s position adopted”’ (Rivais 2005). Neither the proponents nor the opponents of the directive were strong enough to implement their amendments coherently. Thus, both sides preferred to reject the directive than to have some of its opponents’ amendments adopted.
US commentators pointed out that relatively recent public interest in the European Parliament as an institution had helped anti-patent activists exert considerable influence upon the MEPs. Mainstream French commentators claimed that the rejection of the Directive was a sign of the ineffectiveness and powerlessness of the European Parliament (Quatremer 2005). In contrast, MEP Michel Rocard argued that ‘the Parliament has in this way expressed a “collective anger” against the “intolerable” manner in which it was treated by the Commission and the Council, that had refused to consider its amendments from the first reading’ (Rivais 2005). French free software advocates proclaimed it a victory of the European Parliament: a NO to patents but a YES to innovation in Europe (Sédrati-Dinet 2005b). This particular phrasing echoed the oft-heard idiom ‘NO to the European Constitution but a YES to Europe’ that still resounded strongly among those opposed to the European Constitution, a month after the referendum.

The French rejection of the ECT in the 2005 referendum left many observers confused about whether the outcome meant a rejection of the EU, of the proposed trajectory of European unification, or of national politicians (Grunberg 2005). Nevertheless, immediately after the referendum, the proponents of the Constitution charged in the media that populism, xenophobia, and inward-looking tendencies (repli sur soi) had won. Aiming to challenge simplistic analyses, I have argued that French free software advocates who rejected the ECT were largely motivated by their firsthand experiences in pan-European organizing and mobilizing MEPs against software patents. The campaign against software patents brought activists from various European countries to work together on a daily basis, as they edited and translated online documents about software patents in the USA, about the EPO, and even about MEP voting habits. Activists embraced their newly relevant identities as European citizens in an attempt to mobilize MEPs to their cause, against the agenda of two other key EU institutions – the European Commission and the Council. In other words, opposition to a specific agenda of EU integration can clearly be interpreted as a form of Europeanization.

The way these events played out is partly attributable to a historical conjuncture. Activists’ were successful in making a political cause out of software patents partly because they were publicly criticizing European institutions at a particularly sensitive moment, when the EU was expanded to include ten new member states and was soon to adopt a new Constitution. The EU enlargement offered activists new (Slovenian) allies on the streets of Brussels and (Polish) in the European Council. Selected continuities mattered as well. An
issue of little public visibility – such as software patents – did not fit neatly into the dichotomy ‘Europe of markets’ vs. ‘social Europe’ that social movement organizations and the media have foregrounded in competing images of Europe (Porta & Caiani 2009). As I have shown, discursive constructions of Europe around software patents did not depart from but rather intensified ‘a conception of a regulatory Europe, which legitimizes itself based on its capacity to steer good governance and economic competition’ (Porta & Caiani 2009:18). Claims about inadequate accountability and democratic participation in the EU were familiar, but anti-patent activists carried them from one arena to another. The connection between software patents and the ECT was unclear until activists found ways to articulate their positions on both matters on the same terms of accountability and democratic participation.

This linking of agendas in technological activism, legal globalization, and European politics amounted to a ‘contentious Europeanization’. As activists and EU officials debated how innovations are made in the software industry and what criteria adequately capture the nature of software, they simultaneously addressed the consolidation of the software industry in Europe, the positioning of the EU in the global economic competition, and the accountability and democratic representation within the EU (cf. Jasanoff 2005). Activists’ claims linked the promises and threats of software patents with a commitment to a citizens’ Europe that rivaled the discursive links proposed by the European Commission. Through such tactical European positioning, activists contested the power of the EU Commission to set the trajectory of integration, while championing their own cause as an effort to create a more democratic Europe.

Acknowledgements
I am grateful to anti-patent activists and free software advocates for providing material for this work. The research for this essay was supported by grants from the National Science Foundation, French Embassy in Washington, and New York University. The fellowship at the Center for Cultural Analysis at Rutgers University enabled me to complete the writing. I thank Susan Carol Rogers, Rayna Rapp, Herrick Chapman, Faye Ginsburg, Sally Engle Merry, Biella Coleman, Priscilla Song, Allison Alexy, Ayako Takamori, Ingrid Erickson, Samir Chopra, and the journal reviewers for advice and corrections in the text.

Notes
1. Most conversations and texts cited in this article were in French. I am presenting my translations.
2. I refer to them as ‘activists’ in the rest of the article.
Free software is distributed with licenses that afford users rights that are habitually reserved for copyright-holders. The users of free software can legally run, copy, modify their software, and redistribute their modifications.

While most EU member states ratified the European Constitutional Treaty (ECT) by a vote in the national parliament, France attempted to ratify the ECT by a referendum. My analysis is based on my fieldwork among French free software advocates, who were a (vocal) subset of all French activists mobilized against software patents.

A promising exception is recent literature on social movements, which suggests that ‘the increasingly salient controversies over the EU [are] not only (or prevailingly) a conflict between nationalists and Europeanists, but rather between different visions of Europe, real and imagined’ (Porta & Caiani 2009:24).

For example, regional, local and national agendas accompany or appropriate EU policies in ways that run parallel to, and in some ways contest, EU objectives (Bellier & Wilson 2000).

French newspapers regularly confused anti-patent movement with free software advocates and simplified the campaign against software patents to a confrontation between Microsoft and free software activists. See, for example, ‘Brevetage des logiciels: l’UE trouve un accord’, Libération, 8 March 2005.

Each patent lasts for 20 years.

FFII had adopted the motto ‘freedom to innovate and compete in the digital economy’ and claimed that patents are state-granted monopolies that threaten such freedoms, ‘a means of quelling competition and free-riding on the creative work of others’ (FFII 2005). FFII website presented 2000 software companies across Europe that have signed the petition against software patents and endorsed the FFII to represent their interests. This legitimized the FFII as a representative of European businesses. Such rhetorical and political positioning allowed anti-patent activists, allied experts, and politicians to duck accusations that their efforts obstructed innovation and market liberalization in the EU.

Activists also highlighted India and China as a counterpoint to the US-led expansion of intellectual property rights. These countries had banned software patents, which allegedly made their burgeoning software industries more competitive than the US one.

The European Patent Office (EPO) is accountable to the administrative board of the intergovernmental European Patent Organisation.

For example, MEP Michel Rocard claimed in an interview for a French IT managers’ magazine that through procedural and political manipulation, votes in the European Council tended to benefit (US-owned) corporate interests (DI 2005).

In the same vein, the 1994 international TRIPS agreement affirmed that ‘all fields of technology’ could be patented, but did not explicitly mention whether that statement included software.

A key figure of French Socialist Party’s politics in the 1980s, Michel Rocard has held many important positions in French political life: a former presidential candidate, a former prime minister, a former head of Socialist Party, he became a Member of the European Parliament in 1999. Although his position in the European Parliament is a retreat from national politics, French audiences are familiar with his name.
15. Rapporteurs are members of a Committee in the European Parliament charged with compiling a report about deliberations of that committee.

16. Anthropologists studying open source and free software developers have highlighted novel forms of public engagement that combine software expertise, interest in law, and various ideas about democratic engagement online (Kelty 2008; Coleman 2009). While I find this argument compelling, and while there is some evidence that free software ideals and practices have inspired other activists, including those in the movement against corporate globalization (Juris 2008), in this article I leave aside the analysis of the precise ways in which FFII activism was linked to – and different from – free software advocacy in order to focus on the consolidation of a European consciousness around a highly specialist subject.

17. In the first round of the 2002 French Presidential election, the far right-wing candidate Le Pen gathered more votes than the Socialist contender. Le Pen’s appearance as a candidate in the runoff election shocked many French and provoked debates about the weight of protest vote and general political disenchantment.

18. The same claim was invoked already in the 1990s to explain the tensions between the Commission and the Parliament in formulating EU biotechnology policy (Jasanoff 2005).

References


