

COPYRIGHT REFORM, COMMONS, FREE KNOWLEDGE AND DEMOCRACY

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Thank you for your invitation as a speaker in this open debate on the copyright reform.

We have been listening for two hours about authors, works, copyright infringements and it surprises me that nobody has mentioned yet the wealthiest work built under intellectual property.

In 1986¹ a group of authors continued with the composition of a documentation set that was licensed under an intellectual property permissive model: copying of the documents not only was allowed but was promoted. The group of technically skilled authors incorporated what was known as the IETF,² Internet Engineering Task Force. The document set consists of the so called RFCs,³ Request For Comments, and it has happened to be a successful adventure which has transformed radically, amongst others, the way we communicate, the economy, the kind of society we live in and the way we make politics. I refer to Internet foundings and the task of this documentation licensed under a permissive model⁴ is enable computers to talk to

* [Free transcription of my intervention at the S&D Group debate: 'Copyright: what is broken, how to mend it?' on Thursday 18 October, 2012 at the European Parliament, Brussels]. Javier de la Cueva (Madrid, 1962), a practising lawyer in the area of intellectual property. Email: jdelacueva@derecho-internet.org See: <<http://javierdelacueva.es/contacto>>

1 The IETF founding statement was: *16 January 1986. The Chair opened the meeting by announcing that the agenda had been substantially changed by recent events. The most important being the eminent demise of the Gateway Algorithm and Data Structures Task Force (GADS) and the formation of two new task forces in its place: the Internet Engineering Task Force (INARC) and the Internet Architecture Task Force (IETF). The INARC will focus on long research issues and will continue to be chaired by Dave Mills. The IETF will concentrate on short term operational problems and will be chaired by Mike Corrigan. Proposed charters for these new groups are included with these minutes.* Prepared by Phillip Gross, *Proceedings of the 16-17 January 1986 DARPA. Gateway Algorithms and Data Structures Task Force*, p 3. <<http://www.ietf.org/proceedings/01.pdf>> Accessed 27 October 2012.

2 See IETF <<http://www.ietf.org>>. Accessed 27 October 2012.

3 See <<http://www.rfc-editor.org/rfc.html>>. Accessed 27 October 2012.

4 For intellectual property conditions applicable to RFCs, see *IETF Trust Copyright Policy and Trust Legal Provisions (TLP). Frequently Asked Questions*. June 22, 2010. <<http://trustee.ietf.org/docs/Copyright-FAQ-2010-6-22.pdf>> Accessed 27 October 2012. Especially items 2.1 and 2.2: *2.1 What rights are granted to the IETF Trust under RFC 5378? Under RFC 5378, each Contributor grants the IETF Trust a broad (worldwide, royaltyfree) license to copy,*

each other.

Even though Internet is the most important and the wealthiest intellectual property work built in the last times, it seems to be invisible. Although free works (free as in freedom, not as in *gratuit*) are the core of our society, the study of the effects they suffer when legal regulations are modified is not in the public discourse. But before arriving to the point of intellectual property, please let me speak about the context where the copyright reform will operate so we can analyse properly its implications.

The four domains of the commons

Elinor Ostrom⁵ was awarded in 2009 with the Economic Sciences Nobel Prize for *her analysis of economic governance, especially the commons*⁶ and her writings can illuminate us when researching on this field. Ostrom and Hess (2001) were the first to propose the treatment of information as a *common pool resource*. The *commons* are resources collectively owned by communities. As such a commons, information suffered the same perils as the rest of goods in this category:

The records of scholarly communication, the foundations of an informed, democratic society, are at risk. Recent legal literature heightens our awareness of "the enclosure of the intellectual public domain" through new patent and copyright laws. There are a number of issues concerning the conflicts and contradictions between new laws and new technologies. Information that used to be "free" is now increasingly being privatized, monitored, encrypted, and restricted.⁷

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5 Elinor Ostrom curriculum vitae: <<http://www.indiana.edu/~workshop/people/lostromcv.htm>> Accessed 23 October 2012.

6 See <http://www.nobelprize.org/nobel_prizes/economics/laureates/2009/ostrom.html>. Accessed 27 October 2012.

7 Hess, C, Ostrom, E. (2001) *Artifacts, Facilities, and Content: Information as a Common-Pool Resource*. Presented at the Conference on the Public Domain, Duke University Law School, Durham, NC, Nov. 9-11, p 45. <<http://law.duke.edu/pd/papers/ostromhes.pdf>> Accessed 27 October 2012.

Antonio Lafuente⁸ taught us in a most clarifying paper⁹ that the commons develop their existence in four domains. These domains are body, nature, city and digital. Examples of commons in each domain can be: the DNA in the body domain, clean air, fisheries, woods, sea in the nature domain; the cities sewer systems and activities born within urban life like dancing waltz, playing football or painting graffiti would exemplify the city domain, whilst the best example of the digital domain is free (as in freedom) software. Amongst many others, perils to these commons are the cases of patents on biological organisms, the possibility of reaching agreements on greenhouse gas emissions under Kyoto Protocol, enclosures to public spaces where to practice sports or the appropriation of traditional knowledge.

Lafuente's categories serve us as a great conceptual tool to approach the commons we are most interested when dealing with intellectual property: the commons in the digital domain. To specify further, Harvard Professor Yochai Benkler¹⁰ distinguishes three layers in the digital domain:¹¹ The infrastructure, the logical and the content one. Infrastructure layer components are designed to match requirements of the RFCs open standards, the logical layer is composed by software that handles domain system,¹² web¹³ and email¹⁴ servers, web browsers,¹⁵ email clients¹⁶ or operating systems like GNU¹⁷/ Linux.¹⁸ On the content layer we find works like

8 Antonio Lafuente, researcher at the Centro de Ciencias Humanas y Sociales (CCHS) of the Spanish National Research Council (CSIC). His works are available on line at <http://digital.csic.es/browse?type=author&value=Lafuente%2C+Antonio>. Accessed 27 October 2012.

9 Lafuente, A. (2007). Los cuatro entornos del procomún. Archipiélago. *Cuadernos de Crítica de la Cultura*, November 2007, number 77-78, pp. 15–22. http://digital.csic.es/bitstream/10261/2746/1/cuatro_entornos_procomun.pdf Accessed 23 October 2012.

10 Yochai Benkler curriculum vitae: <http://www.benkler.org/CV.html>. Accessed 27 October 2012.

11 Benkler, Y. (2006). *The Wealth of Networks. How Social Production Transforms Markets and Freedom*. New Haven and London: Yale University Press, p. 469. http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf. Accessed 23 October 2012.

12 From <http://www.isc.org/software/bind>: *BIND is by far the most widely used DNS software on the Internet. It provides a robust and stable platform on top of which organizations can build distributed computing systems with the knowledge that those systems are fully compliant with published DNS standards*. Accessed 27 October 2012.

13 See <http://apache.org>, <http://nginx.org>. Accessed 27 October 2012.

14 See <http://www.courier-mta.org/>, <http://www.cyrusimap.org/>, <http://www.exim.org/>. Accessed 27 October 2012.

15 See <http://www.mozilla.org/en-US/firefox/new/>. Accessed 27 October 2012.

16 See <http://www.mozilla.org/en-US/thunderbird/>. Accessed 27 October 2012.

17 See <http://gnu.org>. Accessed 27 October 2012.

18 See <http://kernel.org>. Accessed 27 October 2012.

Wikipedia,¹⁹ OpenStreetMaps,²⁰ the semantic web²¹ or Tim Berners-Lee work opening governments.²² I should add that this morning I checked the web server of this parliamentary group and it is a free software Apache-Coyote server.²³ This means this parliamentary group is profiting from the digital commons for free.

New agents to build and protect the commons

This is our will: to build a strong digital *commons* that can be copied, transformed and disseminated *ad infinitum* for everybody to profit. As it should be clear by now, restrictions to copy are not applicable to these intellectual property works. As in a natural language, protection of this intellectual property is reached by sharing the code.²⁴ Proprietary wealth is obtained by the players working over the common and untouchable baseline. People on the legal field have been using this model since more than two thousand years ago: we freely copy the law and the judicial resolutions and it is an obvious fact that numerous professionals live from this free knowledge, including the members of the European Parliament.²⁵

To create the digital commons and to protect them from political power aggression, two new agents have appeared: collectives and hackers. The importance of taking them into account in the process of copyright reform is obvious. Collectives are a main agent producing goods. Peer production²⁶ as an emergent phenomenon is comparable to the association of merchants in XII century²⁷ which derived into the birth of corporations, of so much importance nowadays. For good or for bad, collectives have been able to end the reign of Encyclopedia Britannica and substitute

19 See <<http://wikipedia.org>>. Accessed 27 October 2012.

20 See <<http://openstreetmaps.org>>. Accessed 27 October 2012.

21 See <<http://www.w3.org/2001/sw/>>. Accessed 27 October 2012.

22 Berners-Lee, T. (2009). *Putting Government Data Online*. <<http://www.w3.org/DesignIssues/GovData.html>>. Accessed 27 October 2012.

23 To check the parliamentary web server software, open a console in a GNU/Linux computer and insert the following command: `curl -S http://www.socialistsanddemocrats.eu/` Inside the answer you will find the key-value expression: `Server: Apache-Coyote/1.1`. This web server software is available for free (both as in freedom as *gratuit*) in <<http://tomcat.apache.org/tomcat-4.1-doc/config/coyote.html>>.

24 As well known by Alliance Française, Goethe Institut or British Council, extending the knowledge of a language is significant for the economy of the exporter country. A language is a commons.

25 De la Cueva, J. (2006). "El Derecho es copyleft. O la libertad de copiar las leyes", in *Copyleft. Manual de Uso*. pp. 141-158. Madrid: Traficantes de Sueños.

26 Benkler, Y. (2006). *Op. cit.*

27 See Le Goff, J. (2010). *Mercaderes y banqueros de la Edad Media*. Madrid: Alianza Editorial. Original title: *Marchands et banquiers du Moyen Âge*.

it for Wikipedia. Linux Kernel²⁸ proves that collective work has no limits in code quality. On the same side, hackers (not to be confused with the term cracker)²⁹ are demonstrating the capability of becoming a *negative legislator*³⁰ through coding, turning laws into a non enforceable political anachronism. Implementation of harder laws to "protect" restrictive intellectual property rights have no result in diminishing intellectual property infringements but do trigger the creation of software (another work under intellectual property) which is used to render ineffective the legal rules issued to enforce intellectual property. Hackers answer restrictive intellectual property laws with computer source code that circumvents legal code allowing users to discover new technological uses. The undesired side effect of restrictive laws is an expansive bit-copy system.

There is a tension between private and collective intellectual property that must be considered by the legislature when approaching a copyright reform. Especially this socialist and democratic group should not forget the potential of the invisible collective intellectual property. As Benkler argues, the *expansions of [proprietary] rights operate, as a practical matter, as a tax on nonproprietary models of production in favor of the proprietary model.*³¹ This is not only a theory but a reality in Spain, where the collecting agency *Sociedad General de Autores y Editores* shows in its balance sheet 229 million euros belonging to authors with pending identification,³² while the collecting agency *Centro Español de Derechos Reprográficos (CEDRO)* appropriated 1.7 million euros³³ in 2011 asserting it was not capable of identifying the right holders. In these cases, it is certain that collecting agencies, who only represent proprietary models, "tax" and receive incomes as levies from non member works

28 See Linus Torvalds master branch <<https://git.kernel.org/?p=linux/kernel/git/torvalds/linux.git;a=summary>>. Accessed 27 October 2012.

29 From <<http://www.plethora.net/~seebs/faqs/hacker.html>>: *Won't my hacker break into my computer and steal my trade secrets? No. Hackers aren't, contrary to media reporting, the people who break into computers. Those are crackers. Hackers are people who enjoy playing with computers. Your hacker may occasionally circumvent security measures, but this is not malicious; she just does it when the security is in her way, or because she's curious.* Accessed 27 October 2012.

30 Traditionally, constitutional courts have been the only *negative legislators*. The expression was coined by the Austrian jurist Hans Kelsen.

31 Benkler, Y. (2006). *Op. cit.* p. 461.

32 See <http://www.sgae.es/recursos/Memoria_2011/Informe_de_Auditoria_de_SGAE.pdf> p. 41. Accessed 27 October 2012.

33 The exact amounts have been 1.724.059 euros in 2011, 2.054.566 euros in 2010 and 1.224.858 euros in 2009 as per CEDRO financial statements: <<http://www.cedro.org/docs/socios/memoria2011.pdf?sfvrsn=8>> p. 79. Accessed 27 October 2012.

resulting in final appropriation of amounts they are not entitled to receive.³⁴ Regulating rights in a copyright reform affects not only to users but also to state costs, to common wealth generation and to financial transfers from public to private interests.

European lawmakers should carefully take this collective intellectual property into consideration as it is the seed for development.³⁵ Invisibility of the commons has been the rule for this event but it is also the rule for economic indicators. We use bad metrics when analysing the wealth of the commons and although Gross Domestic Product (GDP) is unable to state the value of Internet protocols,³⁶ we can ascertain that a country with no Internet is underdeveloped as it would be if it could not freely use the alphabetical order algorithm or the multiplication table. Time must come when the legislator chooses properly between laws that promote collective wealth or precepts that defend proprietary rights criminalising extended uses of technology.³⁷

Democracy and knowledge

Finally, we must concisely mention the relationship between copyright and democracy.

Intellectual property is an ordinary right whilst freedom of speech and the right to

34 Private copy levy was charged in Spain to all public equipment and supplies of blank CDs and DVDs until the execution in 2012 by Spanish Government of the Judgement of the European Court (Third Chamber) of 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE). <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0467:EN:NOT>> Accessed 27 October 2012. No money has been refunded by the collecting agencies to the Kingdom of Spain nor it has been demanded by the latter.

35 Neelie Kroes Vice-President of the European Commission, on the 5 March 2012: *Let me underline one initiative that I am supporting to make digital technology work for governance and transparency: by opening up public data. In the digital age, data takes on a whole new value, and with new technology we can do great things with it. Opening it up is not just good for transparency, it also stimulates great web content, and provides the fuel for a future economy.* <http://europa.eu/rapid/press-release_SPEECH-12-149_en.htm>. Accessed 27 October 2012.

36 Simon Kuznets, Nobel laureate and creator of GDP, in a Report to the U.S. Congress in 1934: *...the welfare of a nation [can] scarcely be inferred from a measure of national income.* See also the European Commission and others "The Beyond GDP initiative": *The Beyond GDP initiative is about developing indicators that are as clear and appealing as GDP, but more inclusive of environmental and social aspects of progress.* <<http://www.beyond-gdp.eu/index.html>>. Accessed 27 October 2012.

37 One of the music majors, the right holder Sony Corporation, offers this publicity about his product Walkman: *It couldn't be easier to fill your Walkman full of all your favourite music, movies, TV shows, podcasts and pictures for playback with superior quality. Supporting all popular file formats, even music from iTunes, Walkman lets you manage all your content with drag and drop simplicity.* <<http://www.sony.co.in/productcategory/walkman-mp3-player>>. Accessed 27 October 2012. Right holders sell technology suited to infringe intellectual property and market their products emphasising the simplicity of its usage.

receive and impart information are fundamental rights.³⁸ Although it is not necessary to remember the importance for democracy of a well founded public opinion, we should scrutinise the evidence that these fundamental rights core to democracy are enclosed within an intellectual property carrier.

In historical timeline, oral speaking in the *agora* or *ekklesia* was the information handled to build the public opinion in the 5th century BC Greek democracy. After the press invention, oral and written words nurtured the political system, the protestant reform and the Enlightenment. Nowadays, we cannot understand democracy without a *common pool* of oral plus written information and *open data*.³⁹ Citizens, NGOs, private foundations and other institutions are using *open data*, promoting *open access* and *open science* to develop technologies of objectivity suitable for political power control in a *praeter* Orwell sense: citizens auditing their governments and pushing to what is known as *open government*.⁴⁰ We the people code micro-political actions where we share *open data* and propose following a free proceeding which can be as simple as clicking the Facebook *I Like it* or as complex as a complete judicial procedure.⁴¹ Data mining and web scraping are political actions made by political actors enclosed inside intellectual property.⁴²

38 For intellectual property as an ordinary right, see: Judgement of the European Court (Grand Chamber) dated as of 29 January 2008, *Productores de Música de España (Promusicae) vs. Telefónica de España SAU*. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0275:ES:NOT>>. Accessed 28 October 2012. Judgement of the European Court (Third Chamber) dated as of 24 November 2011, *Scarlet Extended SA vs. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0070:EN:HTML>>. Accessed 28 October 2012. Judgement of the European Court (Third Chamber) dated as of 16 February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) vs. Netlog NV*. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0360:EN:HTML>>. Accessed 28 October 2012.

39 Nadal, H., De la Cueva, J. (2012). "Redefiniendo la isegoría: open data ciudadanos", in Cerrillo i Martínez, A., Peguera, M., Peña-López, I., Pifarré de Moner, M.J., & Vilasau Solana, M. (coords.) (2012). *Retos y oportunidades del entretenimiento en línea*. Actas del VIII Congreso Internacional, Internet, Derecho y Política. Universitat Oberta de Catalunya, Barcelona 9-10 July, 2012. Barcelona: UOC-Huygens Editorial. <http://openaccess.uoc.edu/webapps/o2/bitstream/10609/15121/6/IDP_2012.pdf>. Accessed 27 October 2012.

40 De la Cueva, J. (2011). "Praeter Orwell: Sujetos, acción y open data ciudadanos", in *Argumentos de Razón Técnica*, n. 15, 2012.

41 See <<http://derecho-internet.org/canon>>, a collective distributed pleading against private copy levy on blank CDs and DVDs, initiated in 2003 and finished when the Spanish court asked the European Union Court of Justice a preliminary ruling on the interpretation of the relevant Directive.

42 De la Cueva, J. (2012). *Metodología y codificación de la acción micropolítica. Acciones políticas ciudadanas en internet*. (Master's thesis). <http://derecho-internet.org/files/2012-09-09_metodologia-codificacion-acciones-micropoliticas.pdf>. Accessed 27 October 2012.

There is another pending problem. Albeit these political actions are ruled by intellectual property normative, even for jurists it is difficult to agree on the correct hermeneutics of the law. Intellectual property law is not understandable for the common man nor the jurist. To ascertain a correct interpretation, we need to study a law degree, then specialise in intellectual property law, then litigate and wait several years to obtain a court final resolution that can arrive when a new law has superseded the object of litigation. This is a poor framework for democracy. We need a law understandable by everybody, not only by specialists: democracy cannot be built over non understandable laws by the common man. Political actions should not require an intellectual property law specialisation nor depend on its uncertainty.

In democracy, the general rule is that everything which is not forbidden is allowed. In totalitarian regimes, everything that is not allowed is forbidden. Intellectual property share principles with totalitarian regimes: all that is not allowed is forbidden. These rules can be acceptable when the content of intellectual property is private interest, but they establish an extremely toxic framework for democracy when the content of the message under intellectual property is political action.

When we reform copyright, we are not only regulating property, we are regulating knowledge. And knowledge must be free.⁴³

Thank you very much.

Brussels, 18th October, 2012.

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⁴³ See the activities of the Open Knowledge Foundation at <<http://okfn.org/>>, its projects <<http://okfn.org/projects/>> and working groups <<http://okfn.org/wg/>>. Accessed 28 October 2012.