



International Conference on Public Domain in the Digital Age

Louvain-la-Neuve, Belgium,

Monday 30 June and Tuesday 1st July 2008.

program and abstracts

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PROGRAM

CONFERENCE DAY 1 (30 JUNE 2008)

8:15 Registration

8:45 Introduction and welcome

PLENARY KEYNOTE SESSION

9:00 *New Moves in 'Legal Jujitsu' to combat the Anti-Commons -- Mitigating IPR constraints on scientific research and innovation by a 'bottom-up' approach to systemic institutional reforms*

- Paul David (Stanford University, UNU-MERIT (Maastricht), Ecole Polytechnique & Telecom-ParisTech)

9:40 *The economic and social impact of the public domain*

- Mark Isherwood (Rightscom Limited, United Kingdom)

10:20 *Issues in Assessing Creative and Scientific Commons*

- Bronwyn H. Hall (University of California, Berkeley, U.S and and Maastricht University)

11:00 Coffee

PARALLEL SESSION 1

Digital Libraries and Scientific Information

11:30 *Digital Libraries in Poland. Status in 2008*

- Bozena Bednarek-Michalska, (Nicolaus Copernicus University Library, Poland)

11:50 *UPCommons: an institutional repository and the public domain*

- Ruth Iñigo and Anna Rovira, (Universitat Politècnica de Catalunya, Spain)

12:10 *Digital libraries and silent works*

- María Iglesias (Centre de Recherche Informatique et Droit, University of Namur (FUNDP), Belgium)

12:30 *The DRIVER project: on the road to a European Commons for scientific communication*

- Karen Van Godtsenhoven (DRIVER project, University of Ghent, Belgium)

12:50 Lunch

PLENARY KEYNOTE SESSION

14:00 *Intellectual Property Regimes: a Comparative Institutional Framework*

- Eric Brousseau (Université de Paris X, France)

- Maria Alessandra Rossi (Cleis, University of Siena)

14:40 *The digitalizing of Literary and Musical Works*

- Gerald Spindler (University of Göttingen, Germany)

15:20 *Identifying and analyzing current available legal models for voluntary sharing of content in Europe*

- Mélanie Dulong de Rosnay (Berkman Center for Internet & Society, Harvard Law School, U.S./CERSA, France)

16:00 *Sharing access to intellectual property through private ordering*

- Séverine Dusollier (University of Namur (FUNDP), Belgium)

16:40 Coffee

PARALLEL SESSIONS 2

STREAM 1: PUBLIC SECTOR INFORMATION

17:00 *Measuring the economic and social benefits and costs of public sector information online: a review of the literature and future prospects*

- Paul Uhler (International Scientific and Technical (S&T) Information Programs, The National Academies, Washington, U.S.)

17:20 *ePSIplus: Towards the 2008 Review of the Directive on Public Sector Information (PSI) Re-use*

- Robert Davies (ePSIplus Co-ordinator, MDR Partners, United Kingdom)

17:40 *The Use of Creative Commons Licenses in the Ministry of Justice of the Government of Catalonia*

- Jordi Graells, Joana Soteras, Betlem Verdejo (Ministry of Justice, Government of Catalonia, Spain)

STREAM 2 CREATIVE WORKS

17:00 *Towards a model of Commons Based Peer Regulatory Production: the Creative Commons Case*

- Prodromos Tsiavos (LSE/ Oslo University)

17:20 *Building digital commons through open access management of copyright-related rights*

- Giuseppe Mazziotti (Ph.D., European University Institute, Florence, Senior associate at Studio Legale Nunziante Magrone, Italy)

17:40 *The Value of Registering Creative Works*

- Roland AltonScheidl, Vorarlberg University of Applied Sciences, ras@fhv.at
- Joe Benso, International Media Association, joe.benso@osAlliance.com
- Martin Springer, International Media Association, ms@osAlliance.com

CONFERENCE DAY 2 (1 JULY 2008)

PLENARY KEYNOTE SESSION

- 9:00** *Copyright policy for digital libraries in the context of the i2010 strategy*
- Marco Ricolfi (Turin University, Italy)
- 9:30** *Evaluation of the directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the digital information society*
- Lucie Guibault (Institute for Information Law (IViR), University of Amsterdam, The Netherlands)
- 10:00** *Facilitating collaboration in eGovernment: the European Union Public License*
- Karel De Vriend (European Commission - Directorate General for Informatics (IDABC))
- 10:30** Coffee
- 11:00** *Use of Free/Libre/Open Source Software in the public sector: lessons from the UNU-MERIT Surveys*
- Rishab Ghosh (Senior Researcher, UNU-Merit, The Netherlands)
- 11:30** *Plenary panel session to discuss on the relationship between the terms of the recent public debates on OA initiatives and the considerations posed by the assessment exercise of OA initiatives at this conference*
- Moderator: Philippe Aigrain (Sopinspace, Society for Public Information Spaces, France)
 - Panelists:
 - Javier Hernández-Ros (Head of Unit Digital Libraries and Public Sector Information, Information Society and Media DG, European Commission)
 - Juan Carlos De Martin (President of the Politecnico's libraries and member of EurOpenScholarship, Italy)
- 12:30** Lunch
- 14:00** *Synthesis of the 4 conference streams by appointed rapporteurs*
- Synthesis: Tom Dedeurwaerdere (Professor at the Faculty of Philosophy, Director of research at the Centre for the Philosophy of Law (CPDR), Université catholique de Louvain, Belgium)
 - Moderator: Ed Steinmueller (Professor at the University of Sussex, United Kingdom)
- 15:00** *Communia General Assembly*
- 18:00** (conference end)

(9:00) NEW MOVES IN 'LEGAL JUJITSU' TO COMBAT THE ANTI-COMMONS -- MITIGATING IPR CONSTRAINTS ON SCIENTIFIC RESEARCH AND INNOVATION BY A 'BOTTOM-UP' APPROACH TO SYSTEMIC INSTITUTIONAL REFORMS

- Paul David (Stanford University, UNU-MERIT (Maastricht), Ecole Polytechnique & Telecom-ParisTech)

Most of the discussion and debate among legal scholars and economists concerning the so-called 'anticommons' --following Heller and Eisenberg (1998), has been restricted to questions about the existence and seriousness of obstacles to discovery, invention and innovation that result from "over-patenting." But the anti-commons as a conceptualization of the perverse resource allocation effects of the distribution of private ownership rights has a considerably wider potential range of empirical relevance, and warrants commensurately more careful study. This paper seeks first to underscore that analytical point by considering a stylized model of the impediments imposed upon the conduct of research by the burdensome licensing charges that can result from the distribution of monopoly rights over multiple complementary database resources. The approach recognizes the emergence and growing role of digital databases as critical facilities of the research infrastructure in many scientific and technical domains, and points to the generality of the phenomenon of "multiple marginalization" due to the uncoordinated exercise of market power by database owners in setting licensing charges. The latter is the economic core of the anti-commons problems created by intellectual property rights and technical impediments to federation of databases.

Dealing separately with THE several analytically distinct aspects of the "anti-commons problems" that arise from the distribution of IP ownership acknowledges that such inefficiencies in the allocation of research resource as they would occasion may differ in seriousness, be amenable in different degrees to market solutions, or, failing that, require distinctive institutional remedies. Focusing within this framework upon on the differential incidence of "multiple-marginalization" effects on exploratory and applications-oriented R&D, this paper points to the need for a more nuanced approach in empirical efforts to assess the ways in which this and other cost-imposing dimensions of the anti-commons problem would manifest themselves. Viewed from this perspective, the conclusions drawn from the questions posed to academic researchers by the pioneering survey- and interview-based studies of the impact of patented research tools in the biomedical area seem to be overly sanguine, in supposing that the existence of a "serious anti-commons" effect would take the form of the blocking or abandonment of research projects, for such events are unlikely when the obstacles can be foreseen and avoided. More subtle but cumulatively distorting long term effects on the advance of fundamental science are a likely consequence, however, for, as seen from an analysis of the "anti-commons effect in databases, the potential for multiple marginalization and royalty stacking places especially heavy burdens on "exploratory research" compares with focused applications R&D.

The discussion of suitable policy measures in the paper's aims to (a) clarify the meaning and practical significance of the idea of legally creating a "information common" for scientific and technical research communities by means of common-use contracting, (b) inquire into the conditions under which these are likely to emerge spontaneously as "clubs" or "pools" among holders of IPR in research tools and databases, rather than having to be pro-actively encourage by public agencies, and (c) consider specific policy measures that would be appropriate and effective in promoting participation of universities and other public research organizations in IPR licensing arrangements of that kind. The latter proposal envisages an indirect route to reforming the workings of the Bayh-Dole and Stevenson-Wydler Acts in the U.S.-- and parallel legislative measures

introduced by a number of OECD countries, by setting out specific institutional arrangements for forming and governing efficient (non-abusive) “scientific research commons” (SRCs) based upon contractual agreements among holders of IP rights in research tools.

NOTES

(9:40) THE ECONOMIC AND SOCIAL IMPACT OF THE PUBLIC DOMAIN

- Mark Isherwood (Rightscom Limited, United Kingdom)

The project entitled Economic and Social Impact of the Public Domain in the Information Society commenced work on 1st January 2008 and is due to provide its final report to the European Commission by the end of April 2009. At this time, June 2008, the principle area of work for the project team is the gathering of data to enable the analysis to be undertaken to estimate the number, value and use of public domain works. We expect this data gathering process to continue through until September. Analysis is expected to commence in July and will very much be an iterative process with on-going data gathering activities.

In addition, the project team has been working on a stream of activity which will seek to assess the capacity of European cultural institutions to implement the principles for re-use as established in the Public Sector Information Directive. This is expected to be completed by the beginning of August. Finally, early stage data gathering has commenced on the stream of work which will focus on the identification and analysis of the currently available mechanisms for voluntary sharing of content.

The focus of the first few months of the project has been the development of methodologies and scoping of the requirements for data gathering. Given that there are no results to discuss, this paper focuses on the methodologies the project team will be taking with the various streams of work.

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(10:20) ISSUES IN ASSESSING CREATIVE AND SCIENTIFIC COMMONS¹

- Bronwyn Hall² (University of California, Berkeley, U.S and Maastricht University)

This title is of course inspired by Griliches' seminal 1979 article on assessing the returns to R&D³. But I make no claim that the discussion here will inspire as much subsequent research or be as influential as that article. The case is also somewhat different, with social returns or benefits being somewhat more to the forefront than in the Griliches article. But some similarities to the problem of measuring returns to R&D will no doubt become evident.

1. Define what we mean by creative and scientific commons. Give examples. Should we restrict the discussion to databases to keep things simpler? Or to scientific commons more generally? One way to view these activities is as IP "pools," that are constructed using some kind of contracting, analogously to patent pools used for standard-setting or cross-licensing.

2. What are the alternative mechanisms for data provision and diffusion? Often there is transitory high economic value alongside permanent archival value as data accumulates. Documentation and archiving is costly – in situations where searchable archives have been created, particularly in chemistry and biomedical research areas, they are often protected and priced far above marginal costs of data search and extraction. Give examples.

What's the goal? For society, diffusion of knowledge and increases in future researcher productivity. For individual producers, reputation, contribution to the public good, etc. Heterogeneous behaviour is very important here – some researchers are very public good conscious and others not at all. Therefore free-riding is bound to happen, the question is whether it is important enough to harm the enterprise, and which enforcement mechanisms work best⁴.

What's the output? For example, it is possible to measure citations to various databases organized in different ways. This might prove useful if other factors (related to type of data) could be controlled for. David reports that such mechanisms are being created by Science Commons as part of its MTA mechanism, allowing labs to track the use of materials through citations to the papers and patents that the users file and that similar mechanisms are being developed for the SC Neurocommons project.

What's the cost? Who bears it? What types of licenses are chosen by different types of authors? The role of social norms. Inputs are essentially a byproduct of other activities (joint production) which complicates things. Thinking about databases, there is clearly a separate cost to releasing them to the public, related to support and maintenance (even if provided on an "as is" basis, professional reputation concerns will induce some response to queries and errors).

The goal of the paper is to make a start on answering some of these questions and to point the way to future research that might help to quantify the performance of various types of scientific commons.

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¹ At the present time, this might more properly be titled "Thoughts on 'Issues in.....'".

² I am very grateful to Paul David for suggesting this topic to me and providing some useful feedback in the form of comments and references.

³ Griliches, Z. (1979), Issues in Assessing the Contribution of R&D to Productivity Growth, Bell Journal of Economics 10, 92-116.

⁴ Sioban O'Mahoney of the role of foundations such as Debian, Mozilla in regard to FLOSS (reference from Paul A. David).

(11:30) DIGITAL LIBRARIES IN POLAND. STATUS IN 2008

- Bozena Bednarek-Michalska, (Nicolaus Copernicus University Library, Poland)

The article presents the political context and the current status of digital libraries network in Poland. It demonstrates the major challenges in the various areas in which libraries operate, problems which should be discussed. It describes some important library initiatives that emerged in order to coordinate activities, and presents concrete examples (WBC, KPBC, POLONA) of the actual digital collections accessible via the Internet. The author also attempts to diagnose the situation and indicate solutions, which may bring measurable benefits to Poland and Europe.

NOTES

(11:50) UPCOMMONS: AN INSTITUTIONAL REPOSITORY AND THE PUBLIC DOMAIN

- Ruth Iñigo and Anna Rovira, (Universitat Politècnica de Catalunya, Spain)

Institutional Repositories give the opportunity to faculties and researchers from universities and research institutes to freely publish and facilitate open access to their publicly funded research activities results. There is also a good chance for scholars and research communities to highly increase their visibility in the world and their impact. For University libraries is the opportunity to document, organize and preserve the intellectual heritage of the institution at the time it increases its prestige.

Besides, publishing in UPCommons in one of the indicators used to evaluate the performance of strategic plans of the Research and Academic Units

UPC libraries have developed different repositories to offer to the university community a tool to publish their academic and scientific works in open access.

- E-prints UPC (<https://upcommons.upc.edu/e-prints/>) collects documents generated by academics in their research activities. Content is organized around communities which can correspond to departments, research groups or institutes.
- Revistes i Congressos UPC (<https://upcommons.upc.edu/revistes/>) accommodates full text of e-journals articles and proceedings published by any unit of the UPC (institutes, departments, etc.).
- Theses and dissertations Online is a digital cooperative repository of doctoral theses presented at some Spanish universities managed by the Consortium of University Libraries of Catalonia (CBUC). Universities taking part are responsible for editing and uploading theses and dissertations to the repository.
- Academic works collects in digital format the final academic works (final degree projects/works, minor theses, recognition of foreign diplomas tests, etc.) presented by university studies at UPC.
- OpenCourseware is a repository inspired by the MIT OpenCourseware. It is a web-based electronic publishing initiative with the goal to provide free, searchable access to UPC's course materials for educators, students and self-learners and extend the impact of UPC openCourseware and all the openCoursewares around. The repository grants the access and preservation to the course material from now on.
- Digital Video Library: it contains a selection of the available video recordings of the University (academic lessons, conferences, etc.)
- Graphic Archive of the School of Architecture of Barcelona: it preserves part of the documentation generated through the academic activity of the institution along its history. The collection includes both architectural projects and drawings dated in the 19th century and actual academic works.

Several services developed by the UPC Library through recent years have become to be strategic within UPCommons Project. One of them is the Intellectual Property Service (SEPI): UPC libraries offer to the authors (academics, students, etc.) of the documents published at UPCommons, information and guidance about rights and copyright policies. SEPI website provides authors with answers to FAQs regarding common aspects of creation, dissemination and publication of academic and research works.

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(12:10) DIGITAL LIBRARIES AND SILENT WORKS

- María Iglesias (Centre de Recherche Informatique et Droit, University of Namur (FUNDP), Belgium)

The natural destiny of a work is the public. Works embody a discourse to be transmitted to the public. But there are some situations where copyrighted works are obliged to remain in silence. So when it is impossible to identify the rightholder or, if identifiable, it is impossible to locate her. Without the possibility of getting her permission, the so-called orphan works can be neither reproduced nor communicated to the public. Therefore their role in the public sphere is severely mutilated. But this is not the sole situation in which Copyright Law forces the works to be in captivity. Such a silence comes out again in relation to out of print works, to those works that are out of the market. These creations, sterile from a commercial point of view, become also sterile from the cultural one. Captivity appears over again in the case of other abandoning situations, for example when rightholders do not reply to the request of potential users. The more paradigmatic (and problematic) situation is that related to unpublished items, works that, in most cases, have not even been intended to be a work and then to contribute to the public sphere.

Digital libraries have a key role in preserving the voice of copyrighted works. In the cases mentioned above, the copyrights (and sometimes not only the copyrights) impose a mandatory silence justified on the exclusive rights, on the autonomy of will. It cuts short preservation and access to DL projects and increases the risk of a black cultural hole. But the fact is that we do not know about the will of the author, nor her heirs or other rightholders. Then, is this mandatory silence in coherence with the social function of our legal systems? Silent works do not provide any benefit to the author, neither to the society. How should react the legislator as far as this empty space, neither private nor public, is concerned? Some countries are already discussing partial solutions to face this problem. Are they enough? To take profit of the possibilities that technology gives us to liberate these works, to put their muzzles off, to incorporate them in the public sphere may require, once more, a reflection exercise about the fundamentals of the copyright systems and about the best shape of our Copyright Law. It goes without saying that Digital Libraries may help in this liberation process, to what extent will depend not only on the will of the authors but on the will of our international and national policy makers.

This paper intends to be a first attempt of a copyright silence roadmap and to briefly describe the different measures that have been proposed to tackle this problem and, as far as possible, to restore the voice of silent works.

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(12:30) THE DRIVER PROJECT: ON THE ROAD TO A EUROPEAN COMMONS FOR SCIENTIFIC COMMUNICATION

- Karen Van Godtsenhoven (DRIVER project, University of Ghent, Belgium)

The European DRIVER project (the Digital Repository Infrastructure Vision for European Research) builds a repository infrastructure combined with a search portal for all the openly available (Open Access) European scientific communication. The goal is to aggregate all the Open Access materials into one knowledge infrastructure or scientific commons, with collections, scientific communities and customized portals. For the infrastructure, the DRIVER open source software package D-NET v.1.0 (http://www.driver-repository.eu/index.php/D-NET_release) has been developed. The DRIVER project chose to include only open access full-text materials, which means it does not retrieve reference-only materials, in order to promote the Open Access movement with the readers and authors. Specific studies (Mossink, W., 2007. Intellectual Property Rights, in: Weenink, K. et al., (Eds.), A DRIVER's guide to European repositories: Five Studies of Important Digital repository related Issues and Good Practices. Amsterdam University Press, Amsterdam, pp.103-112) about copyright for digital repositories have been issued, and the DRIVER project partners keep advocating an Open Access mandate for all the publications funded by the EC, in parallel with geographically-based or subject-based mandates. The last couple of years have seen a rise in 'self-archiving' mandates issued by major research funders and institutions, both in Europe as well as in the USA, which is a favorable evolution for authors' rights as well as for the greater public. Since authors are 'obliged' to retain some rights to their work, this allows them to put articles online, which enhances their readership and impact (Piwowar, H. A., et al., 2007. Sharing Detailed Research Data Is Associated with Increased Citation Rate. PLoS ONE, vol. 2 (3): e308). This, in turn, accelerates science because of the timely and free availability of the publications. The more articles, proceedings, raw data and research results become available, the more DRIVER can build on these data with services for both readers and authors, who will be encouraged by the positive effects (enhanced readership and impact) and deposit more articles. The 'V' in the DRIVER acronym embodies this strategic Vision: a Scientific Commons for Europe and the rest of the world.

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(14:00) INTELLECTUAL PROPERTY REGIMES: A COMPARATIVE INSTITUTIONAL FRAMEWORK

- Eric Brousseau (Université de Paris X, France)
- Maria Alessandra Rossi (Cleis, University of Siena)

In this paper, we construct a framework for understanding the multiplicity of institutional arrangements that shapes the governance of intellectual property resources - what we call IP regimes. Our notion of IP regime is rather broad and includes not only relevant state-designed laws and institutions but also the private arrangements that contribute to defining the social relationships pertaining to the use of intangible resources. The object of our analysis thus includes not only patent, copyright and trade secrets laws but also private institutions such as open source and creative commons communities, collective copyrights organizations and patent pools.

Indeed, while substantial attention has been paid in the literature to the design of IP laws, and especially patent laws, and - to some extent - to formal intellectual property institutions such as specialized courts and administrative procedures, scant attention has been devoted to exploring in a unified framework the range of institutional arrangements that contribute to the governance of intellectual property resources.

We rely on comparative institutional analysis to explore the properties of different intellectual property regimes and assess the trade-offs involved in the relevant organizational choices. Rather than being concerned with identifying the conditions for implementing an efficient ³ideal² IP system, as most of the IP literature, we are concerned with the concrete organizational arrangements that shape the management of intangible resources and aim at comparing their salient properties.

The paper is organized as follows. In section 2, the rationale for an approach that goes beyond formal IP institutions and towards issues of governance will be explored. In section 3 the characterization of intellectual property regimes we propose will be introduced so as to highlight its relevant dimensions and trade-offs. In section 4 the characteristics of the knowledge/technology domain we deem salient will be described. Section 5 maps the latter to the previously identified features of IP regimes so as to identify the nature of the IP regime best suited to the different knowledge/technology domains.

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(14:40) THE DIGITALIZING OF LITERARY AND MUSICAL WORKS

- Gerald Spindler (University of Göttingen, Germany)

I.

Digitalizing literary and musical works do not raise specific issues concerning copyrights. Digitalizing such works and making them available on the internet require rights of reproduction or rights to make available to the public.

Due to the harmonisation of copyright law in the EU by the Information Society Directive there are scarcely any differences between member states as far as the protection of digitalized works as such is concerned.

However, the situation differs quite a lot with regard to limitations or mandatory licences of digitalized works. As the InfoSoc-Directive only provides for a certain set of limitations which, however, is not mandatory rather than optional for member states, the situation in Europe resembles a rag rug. Limitations in one member state are not necessarily matched by limitations in other member states.

Moreover, member states do not treat unanimously ephemere and/or temporarily copies; some jurisdictions still regard even access providing as requiring copies and hence copyright licences.

Finally, liability issues are more and more at the centre of debates as providers are compelled to undertake filtering and controlling activities despite the prohibition of active monitoring obligations by the E-Commerce-Directive. "Voluntary" agreement such as the Olivennes-Report in France are significant for the ongoing discussion.

The reinforcement of liability and enforcement of copyright infringements, however, may also endanger activities for sharing content and enabling free access to content. As portals, libraries etc. could face liability claims in case of sharing protected content the management of copyrights of the content shared and hosted becomes crucial.

File-Sharing as one of the most popular methods to share copyrighted content is mostly qualified as a copyright infringement, be it the upload or the download because the privilege of private use (fair use) is trespassed.

II. Open Access and the InfoSoc-Directive

From a perspective of sharing and freely accessing content European law does not offer many chances for member states to limit copyrights for public purposes. Art. 6 para 4 subpara 4 of the InfoSoc-Directive blocks most of attempts to enable free access online to copyrighted content. Moreover, Art. 5 para 2, 3 of the InfoSoc-Directive provides only for a limited scope of mandatory limitations on copyright.

However, the exact scope of the InfoSoc-Directive still is opaque as compulsory licences are obviously not covered by the Directive. Such models of using compulsory licences have been discussed in Germany recently. Nevertheless, international conventions like the Berne Convention restrict largely the use of such licences.

On the other side, European law does not hinder contractual approaches to enable sharing of content and free access to works, such as open source, open access, or creative commons licenses.

III. Retrodigitalisation ("orphan works")

One crucial issue for sharing content and enabling free access to content concerns the retrodigitalisation of already published works:

In theory, authors of published works might be asked to license their works for electronic use to libraries or other repositories. However, most of the authors are hard to reach as their addresses or even more their heirs are unknown. The InfoSoc-Directive does not deal directly with this issue as no specific limitations are offered to open archives to the public

use (or even more for electronic use). However, the limited range of allowed limitations hamper the introduction of specific “orphan works” limitations in member states in order to retrodigitalize those works and open archives for public use.

Hence, according to the current legal situation only contractual solutions or fictions of license transferences are possible:

Germany opted for a fiction that provides that all unknown publishing rights are transferred within a year to the publisher if the author does not object to it. However, there is neither any obligation for the publisher to (retro-) digitalize the work nor to make it accessible to the public. Moreover, there are serious doubts if such a fiction passes the 3-step-test as the author will lose all rights to the publisher (however, combined with a compensation for the author).

Other member states make use of a collective licensing model such as the Scandinavian states. However, collective licenses can not differ between such works whose author can be found and asked to transfer the rights and real orphan works where no author could be found. Thus, it is arguable whether such solutions are legitimate from the perspective of the constitutional protection of authors (property rights).

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(15:20) IDENTIFYING AND ANALYZING CURRENT AVAILABLE LEGAL MODELS FOR VOLUNTARY SHARING OF CONTENT IN EUROPE

- Mélanie Dulong de Rosnay (Berkman Center for Internet & Society, Harvard Law School, U.S./CERSA, France)

Creative Commons (CC) licenses have been created in the context of United States copyright law. Their porting in continental Europe jurisdictions revealed differences between the two legal systems and cultures, such as the role of collecting societies, the status of certain performances and displays in public places, database rights, liability and warranties.

CC licenses can also be interpreted as the expression of the personality of the author. Attribution is generalized. The Non Derivative Works option, the reputation and the non-endorsement clauses corresponds to the moral right of integrity. Contributing to the commons or reserving commercial rights express the right of destination.

Beyond differences between Common law copyright and Roman-German contract law and *droit d'auteur*, CC licenses can finally be interpreted as an example of global law reflecting the nature of intellectual or personal rights at the digital age, a cultural norm evolving with communities practices.

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(16:00) SHARING ACCESS TO INTELLECTUAL PROPERTY THROUGH PRIVATE ORDERING

- Séverine Dusollier (University of Namur (FUNDP), Belgium)

Intellectual property is a complex mix of different interests that either request that intellectual creation be protected by an exclusive and proprietary right or that guarantee some free access to and use of such intellectual creation. Intellectual property both grants and protects exclusive rights of property and entertains a public domain and free use of intellectual assets. This assortment of property and commons, that fundamentally distinguishes intellectual property from the traditional right of property in a tangible, is normally achieved through traditional law-making. However, recent attempts of private orderings have tried to modify this balance, generally to expand the monopoly granted by the law, through the recourse to contracts and technological measures. More surprising is the use of private ordering tools from the other side of the balance, by the proponents of a public access to works, to counteract IP expansion instead of intensifying it. From open source software to open access initiatives in artistic creation, scientific publications, or biotechnological inventions, licensing is now employed to promote a collective access to and sharing of intellectual resources, produced and distributed through a logic opposed to a proprietary exclusion. As in its use to expand intellectual property rights, private ordering deployed to enhance sharing and to open access to creations, has a normative effect. This Article aims at assessing the nature of the mechanism of the lawmaking operated by open access initiatives, as well as its normative sustainability as a project to enlarge the public domain within intellectual property. As a norm-creating process, does the private ordering method, particularly when used for sharing objectives, form a regulatory force in IP to be reckoned with?

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(17:00) MEASURING THE ECONOMIC AND SOCIAL BENEFITS AND COSTS OF PUBLIC SECTOR
INFORMATION ONLINE: A REVIEW OF THE LITERATURE AND FUTURE PROSPECTS

- Paul Uhler (International Scientific and Technical (S&T) Information Programs, The National Academies, Washington, U.S.)

Governments and their administrative agencies continuously create, collect, manage, and store vast quantities of digital data and information and increasingly disseminate much of it online. The data and information that are produced by the public sector bodies include, for example, geographic and meteorological data, company registers, financial reports, public health information, social and economic statistics, legislation and judicial proceedings, and many other kinds of information, collectively referred to as public sector information (PSI).

Rapidly advancing information and communication technologies (ICT) have begun to fundamentally transform all information industries, including in the public sector, over the past two decades. These technologies have improved the information management potential within the public sector and made the dissemination of information cheaper and easier. By leveraging the opportunities of ICTs, PSI has thus increasingly been used beyond its initial purposes. Economic and social value is derived from PSI directly as an exploitable public good for products and services, and indirectly as a basis for improving efficiencies in decision making.

In many countries, especially within the OECD, PSI is used broadly by other public-sector organizations, by private-sector companies in general (as information users), by information industry firms in particular (as re-users through their value-added information products and services), by research communities, and by individual users in society (e.g., for health and educational purposes). In many cases, the information is used beyond national borders as a global public good.

At the same time, governments have been developing or revising their policies concerning access to and use of PSI through legislative and regulatory (administrative) mechanisms. Some of these policies extend across the entire government, while others are specific to certain types of information or specific agencies within the government. Within the OECD countries, and indeed throughout the world, there are different approaches and levels of access to and use of PSI. Access and use policies vary from fully open to restricted, freely available or with various access fee charges, and ranging from unrestricted use to a broad range of use restrictions. Moreover, the access and use policies and conditions vary not only across national governments, but also in many cases within each country at the state and local levels. Also, some governments have initiatives for promoting the use of the Internet for disseminating their information products to the public.

In general, there is a growing recognition by both the public and private sectors of the importance of digital networks to the economy and society, and the key role that PSI and government policies governing such information play. Despite this recognition, there is surprisingly a poor understanding of how PSI is actually used, especially by individual users, its economic and social value and impact, and of the effects of different access and use policies on this value and impact. There is a concomitant lack of comprehensive or detailed empirical data about the users and effects of PSI disseminated on the Internet, and of the different policy approaches to the dissemination of PSI.

Given the huge amount of funding allocated by governments to PSI activities, there is an urgent need to promote better understanding of these issues and processes. Policy makers and information managers require evidence about the costs and benefits of different access and use policies on societies, with a view to improving government policies for the production, management, dissemination, and use of PSI. In particular, there is a broad need for empirical studies that can answer some fundamental questions about the actual use of PSI and its effects, and about how different government policies (e.g., open vs. restricted access and reuse) can promote or undermine the full utilization of PSI towards social and economic development goals.

This paper provides a review of the literature regarding the methodological aspects of studying the economic and social effects of disseminating and using PSI online, and suggests some actions that could be taken to improve such studies and the understanding of PSI activities.

NOTES

(17:20) EPSIPLUS: TOWARDS THE 2008 REVIEW OF THE DIRECTIVE ON PUBLIC SECTOR INFORMATION (PSI) RE-USE

- Robert Davies (ePSIplus Co-ordinator, MDR Partners, United Kingdom)

ePSIplus, funded under the eContentplus programme, has monitored and reported on developments on the transposition of the Directive on PSI re-use since September 2006. The sum total of the accumulated knowledge from these sources has been used to formulate the ePSIplus network recommendations on the review of the PSI Directive, which this document represents. The ePSIplus recommendations are to be discussed and validated at the ePSIplus Conference to be held in Brussels on 13 June 2008. This paper presents the draft recommendations. Whilst this is not solely germane to content and data which falls within a 'classical' definition of public domain (i.e. outside applicable copyright term), it is highly relevant to a broader concept of public domain where public information of all kinds may be open to all forms of re-use for a wide range of economic and social purposes. The recommendations fall under seven main headings: Progress on implementation of the Directive; Channels for redress; Discriminatory practices; Access to PSI; Stimulating the private sector to act; The Economic case; and Specific provisions of the Directive.

NOTES

(17:40) THE USE OF CREATIVE COMMONS LICENSES IN THE MINISTRY OF JUSTICE OF THE GOVERNMENT OF CATALONIA

- Jordi Graells, Joana Soteras, Betlem Verdejo (Ministry of Justice, Government of Catalonia, Spain)

Nowadays the Internet is about sharing, co-producing, transforming and personalizing to create new products and services. To create, it is necessary to be able to make use of knowledge that already exists, without limits, and to share it afterwards. This is the philosophy of innovation that is now all-pervasive thanks to the democratization of technology.

Creative Commons (CC) licenses are legal texts that allow authors to hand over some rights of their work for the uses they deem appropriate. So, these licences are an alternative for managing the author's copyright in a more flexible way.

As a public Administration, the Ministry of Justice has decided to use CC licenses with the idea of turning over the knowledge created by the organization to the public so that it can be re-used. In this regard, CC licenses have been essential for this opening-up of knowledge.

Thus, for each item of material or work, the most suitable license is chosen and applied to both digital and paper formats. The Ministry of Justice played a leading role by publishing in June 2007 the Administration's first general-content work to be subject to a CC license.

From the beginning, the Ministry has ensured that external authors of a work sign a cession of rights contract in favour of the Ministry of Justice in order to allow the Ministry to manage the author's copyright of the work appropriately through CC licenses.

On the other hand, an in-house training programme for the staff has been implemented in order to make sure that people who produce content to be published on the web site or on the platform of collaborative work e-Catalunya are respectful of the authors' copyright. To be able to licence material under CC one has to own all rights and sometimes people do not know that the images and other material they use for their work are subject to image and intellectual property rights. For this reason, workshops have been organized to explain how to find free-use material on the Internet and how to cite it appropriately.

In parallel with the dissemination of works through institutional channels, the Ministry of Justice has taken a step forward in the socialization of its knowledge by opening new communication channels using the Internet open repositories, where it posts its own content. It has two open channels in YouTube and Sclipo to publish videos; it publishes presentations in Slideshare, images in Flickr and events in Google calendar. Moreover, it has the blog Gestió del coneixement that gathers the most innovative experiences in knowledge management and the methodology used by the Ministry through the Compartim programme.

With these initiatives the Ministry of Justice promotes a more open and collaborative Administration, internally as well as externally, to favour the creation of new knowledge from the content that it shares. Several terms have been used for this concept: Open administration, wikiAdministration, etc. It is, in short, a matter of not losing the opportunity to collaborate, through flexible social networking, with the public, companies and social organizations.

NOTES

(17:00) TOWARDS A MODEL OF COMMONS BASED PEER REGULATORY PRODUCTION: THE CREATIVE COMMONS CASE

- Prodromos Tsiavos (LSE/ Oslo University)

Objective of this paper is to examine the reasons why a Commons Based Peer Production (CBPP) model may be applied in the case of developing regulatory instruments and the implications from the implementation of such a production mode. Starting point for the paper is the observation that CBPP constitutes a representation of an increasing number of institutions and organizational constellation of contemporary society ranging from Free Open Source Software to social networks software, open manufacturing or distributed political networks. The prevalence of CBPP is a direct result of contemporary socio-technical conditions and as this paper argues it also causes a paradigmatic shift in the way we built regulation. This study focuses on the regulation of IPRs as a primary example of the way in which CBPP appears as an alternative model for regulatory production. While the discourse in relation to the protection of the public domain has been primarily focused on the question of its regulatory content (i.e. achieving a more balanced rights allocation and dealing with the issue of mass scale infringement), this paper argues that it should also focus on the mode of producing the relevant regulatory instruments. The mis-match between the socio-economic realities of a digitally networked environment and regulatory content is the symptom of a deeper problem of regulatory alienation of the regulated subject from the content of the relevant regulatory instruments. The adoption of a CBPP model for regulatory production could solve problems of efficiency and effectiveness as well as of representation. The Creative Commons (CC) case is presented as a paradigmatic case of applying such a model for the production of licensing schemes and policies that could operate as an add-on to the existing Copyright system. While CC is a first effort toward the direction of CBPP regulatory production is far from being one. This paper examines the degree to which CC conforms to the CBPP model, the reasons why it should move more actively toward such direction and the ways in which this could be done. This research concludes by highlighting the importance such paradigmatic shift could have for the area of IPR regulation and the potentials from adopting such a regulatory strategy.

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(17:20) BUILDING DIGITAL COMMONS THROUGH OPEN ACCESS MANAGEMENT OF COPYRIGHT-RELATED RIGHTS

- Giuseppe Mazziotti (Ph.D., European University Institute, Florence, Senior associate at Studio Legale Nunziante Magrone, Italy)

This paper seeks to explore how the implementation of open access licences onto recordings and other forms of digital performance of creative works which have entered the public domain, complements the notion of digital commons.

The paper starts from the assumption that there are types of creative works (i.e. music works, theatre plays, etc) whose effective dedication to the public domain for the benefit of the public at large would never reach the full status of “commons” if digitised performances of these works were not disseminated under open access licences (e.g., Creative Commons’).

The introduction draws on the assumption that creative works which give rise to a huge stock of the public domain in certain fields of creativity would not become available to the public in digital formats (at least for free) without the necessary intermediation of performers and producers of audio and video recordings. From this perspective, there would be no lawful way for the public at large to enjoy for free digital items embodying creative works such as a Bach’s suite, a Brahms’s symphony or a Shakespeare’s play, if certain kinds of music and theatre performers and/or recording producers did not release their digital performances and recordings using open access licences.

The paper seeks to explain why the implementation of these licences to the management of copyright-related rights for the achievement of an effective dedication of certain works in the public domain to the digital commons is of very high relevance. It is argued that, at least in civil law (i.e. *droit d’auteur*) systems, newly created works of art are copyright protected by default and fall into the public domain only after expiration of the protection term of 70 years post mortem *autoris*. Unlike U.S. law, *droit d’auteur* systems do not seem to endorse and confer validity upon copyright licences which aim to make new works available in the public domain immediately, through a relinquishment in perpetuity of all present and future rights under copyright law by the author.

By considering some examples of digital platforms making use of open access licences for the dissemination of music works adopted by both music performers and recording producers, the paper shows that, as European digital copyright laws stand, the mostly evident and fruitful use of open access licences for the building of digital commons in the field of creative works concern old works whose copyright protection is expired and whose copying, dissemination and, possibly, re-use has been preventively authorised on the grounds of a “copyleft” licence.

The paper concludes that public bodies and other entities that institutionally pursue the policy objective of building platforms and repositories of digital commons should promote the implementation of open access licences by holders of copyright-related rights (e.g., educational institutions, young performers and ensembles, agencies of artists’ management, start-up producers, etc) and provide incentives to make their digital works available to the public for purposes other than that of making an immediate profit from the sale/licensing of digitised items.

NOTES

(17:40) THE VALUE OF REGISTERING CREATIVE WORKS

- Roland Alton Scheidl, Vorarlberg University of Applied Sciences, ras@fhv.at
- Joe Benso, International Media Association, joe.benso@osAlliance.com
- Martin Springer, International Media Association, ms@osAlliance.com

The Austrian Competence Network for Media Design, a research consortium of Austrian higher education institutions and SMEs in the so-called creative industries, had launched a service for registering creative works at the WizardsofOS conference in Berlin in September 2006. After nearly two years of operation, we would like to draw a summary of experiences and challenges. Furthermore, we will have a look at related services and Creative Commons' strategy on this issue.

The creator who registers with Registered Commons benefits from two important advantages. A certificate issued allows the creator to provide evidence for her intellectual ownership of a work. Secondly, and almost as important for evidence of authorship as a certificate, Registered Commons digitally records the exact time of a registration with a timestamp, obtained from a trusted third party. Typical users are musicians or photographers, who are keen to post individual works on the internet, but who wish to retain control over them, or bloggers and even agencies who prior to giving client presentations, wish to protect their work from plagiarism using the timestamp.

Companies who are interested in the commercial distribution and other uses of the material require legal security for their business, notably in the form of reliable information. Precisely this is missing from many websites that offer material under alternative licences, the public domain as well as for orphan works.

In this paper we present good practices for online registration services at the first COMMUNIA conference on the Public Domain in the Digital Age (COMMUNIA 2008). Furthermore, we will be going to ask the following questions: Is reliable and simple registration of works the right way to improve confidentiality and trust? How could Rights Collecting Societies benefit from such registries? What kind of governance is required, to run such registries? And do they conflict with public patent laws or authorities? We will conclude with a proposal for either adapting the DMP authority scheme or establishing registration peering and using existing namespaces. The authors are affiliated with Registered Commons, a service initiative launched in 2006.

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(9:00) COPYRIGHT POLICY FOR DIGITAL LIBRARIES IN THE CONTEXT OF THE I2010 STRATEGY

- Marco Ricolfi (Turin University, Italy)

The paper describes in §§ 1-2 the EU policy on digital libraries and the role played within it by the High Level Expert Group (HLG), with special reference to the findings in the Final Report by the Copyright Subgroup of the HLG. In §§ 3-6 it summarizes the analysis and recommendations by the Subgroup in four areas, digital preservation, web harvesting, orphan works and out-of-print works. It further discusses in § 8 four other crucial copyright issues which digital libraries have to face, which, while not addressed by the Report, might belong to a “Second Basket” of policy-making open questions. After examining in § 9 some assumptions of the EU policies in connection with libraries, archives and museums, the paper addresses in § 10 the question whether copyright as we know it still is an appropriate tool in the current digital context or should be displaced by another mechanism. Finally it analyzes the impact of the move towards a new regime (Copyright 2.0) on the costs and benefits of digital libraries.

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(9:30) KEYNOTE SPEECH: EVALUATION OF THE DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL INFORMATION SOCIETY¹

- Lucie Guibault (Institute for Information Law (IViR), University of Amsterdam, The Netherlands)

This paper presents an evaluation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the digital information society. Although the public domain is nowhere explicitly mentioned in the Directive, the overall framework that it creates undeniably affects the way digital copyright protected works are being used.

The objectives of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society² were twofold: (1) to adapt legislation on copyright and related rights to reflect technological developments, and (2) to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO) in December 1996. As one of the centrepieces of the Lisbon Agenda, which aims at making the European Union “the most dynamic and competitive knowledge-based economy in the world” by 2010, the Information Society Directive is seen a crucial element in any strategy leading towards fostering the growth of the knowledge-based economy in the European Union. Does the Directive achieve the goals set by the legislator? How does it generally impact the use of copyright protected works and thereby, the evolution of the public domain?

At the same time, the copyright framework must be able to take account of the needs for digitisation and online accessibility of cultural material and digital preservation by libraries, archives, and museums. The European Commission published a Recommendation on the digitisation and online accessibility of cultural material and digital preservation in 2006³. The objective of the Recommendation is to develop digitised material from libraries, archives and museums, as well as to give citizens throughout Europe access to its cultural heritage, by making it searchable and usable on the Internet. The achievement of these goals inevitably raise copyright issues. As noted in Recital 10 of the Recommendation, only part of the material held by libraries, archives and museums is in the public domain, while the rest is protected by intellectual property rights. To what extent does the Information Society Directive allow libraries, archives and museums to comply with the objectives of the Recommendation?

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¹ This contribution is based on L. Guibault, G. Westkamp, T. Rieber-Mohn, P.B. Hugenholtz, et al. Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, report to the European Commission, DG Internal Market, February 2007, http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf

² OJ 2001 L 167 of 22.6.2001, p. 10

³ Commission of the European Communities, Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation O.J.C.E. L 236/28, 31 August 2006.

(10:00) FACILITATING COLLABORATION IN EGOVERNMENT: THE EUROPEAN UNION PUBLIC LICENSE

- Karel De Vriend (European Commission - Directorate General for Informatics, (IDABC))

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(11:00) USE OF FREE/LIBRE/OPEN SOURCE SOFTWARE IN THE PUBLIC SECTOR : LESSONS FROM THE UNU-MERIT SURVEYS

- Rishab Ghosh (Senior Researcher, UNU-Merit, The Netherlands)

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