

RESEARCH ARTICLE

Information Commons Between Enclosure and Exposure: Regulating Piracy and Privacy in the EU

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In the first decade of the 21st century, copyright was high on the political agenda as activists and academics criticised how stricter implementations of copyright laws limited the public access to culture and knowledge and enclosed the information commons. A decade later, streaming media and data mining have changed the information-political agenda, shifting the focus from piracy to privacy, giving concepts such as access to knowledge and information commons new meanings. This article relates the copyfights of the early 2000s to more recent copyright discussions. It relies on a series of interviews with members of the Pirate Party, conducted between 2011 and 2015 and connects them to more recent debates about the European Union Directive on Copyright for the Digital Single Market (COM/2016/0593) that was passed in March 2019. The article asks if and how the information commons movement and the international political agenda about intellectual property rights and access to information have changed with the rise of a digital economy built around streaming media and data mining.

Keywords: Information Commons; Copyright; Piracy; Privacy; EU; Digital Single Market

Introduction: The Information Commons Movement

The copyright debates of the 1990s and the beginning of the new millennium were structured around two opposing narratives about intellectual property and information commons. On the one hand, the proliferation of media piracy and counterfeits of exclusive fashion brands inspired content producers and intellectual property (IP) owners to launch anti-piracy campaigns and lobby for stronger copyright laws. They argued that piracy is theft and that stronger intellectual property rights (IPR) reward creativity, contribute to economic growth and protect jobs in the media sector. On the other hand, a new generation of media consumers argued that information wants to be free and the Internet offers hitherto unparalleled means to spread culture and knowledge to the people, while restrictive copyright laws undermine those possibilities.

This polarized approach to IPR was reflected in research. While the content industry sponsored studies that demonstrated the damage that piracy and counterfeits do to the creative industries in Europe and the USA (Karaganis, 2011), many scholars took a different perspective. In the late 1990s academics, such as James Boyle (1997), Rosemary Coombe (1998) and Lawrence Lessig (1999), began to criticise a development where continuously extended terms and scope of copyright protection contributed to privatisation of culture and information. Within a few years, something that can be described as a field of critical IPR studies had emerged, encompassing scholars from a range of different disciplines that addressed how a continuous extension and globalization of intellectual property rights in general, and copyright in particular, threatens the public domain (Boyle, 1997, 2003; Coombe, 1988; Lessig, 2001, 2008; Fredriksson, 2018, 2019; Fredriksson and Arvanitakis, 2015; Halbert, 2005; Hemmungs Wirtén, 2004; de Beukelaer and Fredriksson, 2018).

A few years into the new millennium copyright had become a hot political topic that mobilised a range of different activist and advocacy groups outside of academia. These groups made up a heterogeneous social movement in which diverging interests came together in shared concerns for the freedom of information in a digital environment. They ranged from anarchist or libertarian hacker groups such as Anonymous, through think tanks and advocacy groups such as the Electronic Frontier Foundation (EFF), to formal political

organizations such as the Pirate Party. An important assumption made by these groups was that technology ideally enables an information commons – a free flow of knowledge and culture that can be shared among peers – which is being threatened by enclosure and appropriation by copyright industries striving to expand their rights (cf. Boyle, 1997, 2002; Fredriksson, 2015b). This tension between commons and enclosure came to shape much of the copyright debates of the early years of the new millennium. The fear of such an enclosure of the information commons was a common denominator for this heterogeneous movement of copyright critics, and I will refer to those groups as the *information commons movement*.

Following the proliferation of legitimate online content providers such as Netflix and Spotify in the years after 2010, access to culture and information has become a less urgent topic of debate, since streaming media provide access to a wider range of entertainment apparently free, or almost free, of charge. On the other hand, the harvesting of user data by social media tycoons has given online privacy a central position on the information political agenda. In the second decade of the new millennium, digital rights debates have, therefore, focused less on the rights of consumers to share and access information, and more on their rights to withhold information: to not have one's digital life monitored, mined and sold. The Directive on Copyright in the Digital Single Market that was passed by the European Union in March 2019, however, changed that, and put copyright back onto the political agenda by imposing new limitations to the circulation of content online.

This article takes a retrospective look at the debates about information commons in the light of recent changes in the media landscape, where streaming media and data mining have shifted the power dynamics of media politics. Over the last 20 years the information political agenda has navigated between protecting intellectual property against piracy, and protecting individual privacy against data mining, while the information commons movement has had to balance the right to access culture and the right to withhold user information. These tensions provide an analytical framework for this article which will discuss how the debates over piracy and privacy actualise different notions of enclosure and openness and map how different actors and institutions have interacted to shape and shift this information political agenda in regards to copyright.

Empirically, it draws on a combination of semi structured interviews with members of the Pirate Party and secondary literature to provide an overview of the copyright debates since the early 2000s. The majority of the interviews were conducted between 2011 and 2013 and involved Pirate Party members in Sweden, the UK, Germany, the USA, and Australia, (Fredriksson, 2015a, 2015b, 2019; Fredriksson Almqvist, 2016a, 2016b; Fredriksson & Arvanitakis, 2015).¹ These provide an inside view on the ideology and organisation of a vital part of the information commons movement at a moment in time when it was still mobilising. In 2015 and 2016 this study was complemented with three additional interviews with two digital rights activists and one member of the European parliament, which offer reflections on a more recent development when the information commons movement is faced with a changing information political agenda. The interviews, and the previous research, contextualise the information commons movement in relation to recent developments in media policy, law and economics that add new dimensions to questions of openness and information commons.

The article begins with a brief overview over how changes in the international regulation of copyright have contributed to the mobilisation of an information commons movement. It argues that 2012 can be seen as a turning point in the debates and discourse about information commons, as well as in the relationship between the so-called copyright industry and the tech industry. The second part of the article focuses on the EU's new Directive on Copyright in the Digital Single Market of 2019 and asks if and how this directive relates and responds to the changes discussed in the first part of the article.

¹ The first set of interviews in the USA were conducted between December 2011 and May 2012, with follow-up interviews in May 2013. The European interviews were conducted between 2012 and 2013, and the Australian interviews were conducted in 2013. Among the 31 people interviewed for the entire project, five were women. Most informants were between 20 and 40 years old. All participants play important roles in their local Pirate Party community, but these roles differ significantly due to the heterogeneity of the pirate parties. Although two of the interviewees were members of the European parliament at the time of the interviews, the vast majority were amateurs dedicating their spare time to party work. In 2015 and 2016 I made three additional interviews with two digital rights activists in Amsterdam and Sydney and one Member of European parliament in Brussels. All interviews were carried out in person, in most cases individually, with the exception of three interviews with groups of two to three participants. They were recorded, and all participants agreed to be quoted by name. The interviews were semi-structured in that they broadly followed an interview guide based around four thematic clusters: the participant's individual motivations, the organization of the party, the ideology of the party, and the national and international context of the party. The interviews also allowed for individual variations within those themes. The material was analysed following a qualitative, inductive methodology.

SOPA, ACTA and the End of the Hollywood Hegemony

The growth of the information commons movement was provoked by a series of legal changes in the late 1990s and early years of the new millennium, that gradually came to constitute a more restrictive, globalized, IPR regime. As early as 1998, activists and academics reacted against the passing of two American laws: the Digital Millennium Copyright Act (DMCA) and the Copyright Term Extension Act (CTEA). The DMCA implemented two treaties passed by the World Intellectual Property Organization (WIPO) in 1996: the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) (Larsson, 2011). The goal of the WIPO treaties, and the DMCA, was to adapt copyright law to a digital environment by regulating new forms of distribution. Its primary result was a stricter regulation of the digital reproduction and distribution of music and film, for example by prohibiting the circumvention of digital rights management (DRM) protection. The CTEA, on the other hand, extended the copyright term in the US from 50 to 70 years after the death of the author, and to 95 years after the creation or 120 years after the publication of works by corporate authors. Both laws were criticised for restricting free speech and users' rights, and law professor Lawrence Lessig challenged the CTEA in the USA Supreme Court (Mitchell, 2005). Lessig's attempt to fight CTEA on legal grounds was unsuccessful, but by now "a new scepticism about copyright was", as Henry Mitchell put it, "finally beginning to leave the pages of the law reviews and take on political shape" (Mitchell, 2005, p. 41). Reactions against a more restrictive copyright regime grew as the media industry tried to put the fear of the law into people by aggressively prosecuting individual file sharers for downloading music and movies. While slapping small-time file sharers with huge fines may have deterred some potential pirates, it mainly contributed to giving the movie and music industry a bad reputation and making copyright even more contested.

The information commons movement criticized legislators for catering to what was sometimes called a *copyright industry* – a wide range of businesses including the movie, music and publishing industries which benefit from the extension of copyright protection. Both the DMCA and the CTEA were, for example, strongly influenced by lobbying from the film and music industry. CTEA was even nicknamed the "Mickey Mouse Act", since it was widely seen as having been promoted by the Disney Corporation, which had called for extended copyright terms in order to prevent old Walt Disney works from entering the public domain (Mitchell, 2005; Lee, 2013). In his 2011 book *Republic Lost*, Lawrence Lessig concluded that the copyright industry is such an influential political funder, and its interests so entrenched in the political organisations of both the Democratic and Republican parties, that it is virtually impossible to challenge the existing IPR agenda without fundamentally changing the rules for party funding in the US.

Meanwhile, in Europe, the European Union's Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2001/29/EC) of 2001 provoked reactions similar to those caused by the DMCA and the CTEA. Just as the DMCA, this directive, which came to be known as the "Information Society Directive", was initially intended to implement the two WIPO treaties: the WCT and the WPPT (Larsson, 2011). The European Commission, however, took this as an opportunity to also coordinate and strengthen the rights of copyright holders within the EU, in order to promote a European information economy. When the Information Society Directive was implemented across Europe, predominantly in 2003 and 2004, it therefore imposed far-reaching changes to existing legislation in some member countries (Larsson, 2011).

Previously, copyright had been somewhat of a fringe issue in the European political discourse, but this changed with the Information Society Directive. When the directive was implemented in Sweden in 2005, it required an extensive revision of the existing copyright law. The revised law imposed more restrictive copyright regulations, including criminalising the copying of protected works for private use, and circumvention of DRM protection. Many saw these restrictions as violations of legitimate consumer rights and unjust limitations to the possibilities to share culture and information. Thus, concerns were raised by a wide range of groups, spanning from digital rights activists to library associations across the world (Fredriksson, 2015b; Hemmungs Wirtén, 2008; Svensson and Larsson, 2009). The directive also inspired the formation of the Pirate Party, a political party that was founded in Sweden in 2006, originally with the principal aim to protect the right to share content online against an expansive copyright regime (Fredriksson, 2015a).

The debate intensified over the following years and culminated in 2009 when the Information Society Directive was followed by the implementation of the equally contested Intellectual Property Rights Enforcement Directive (2004/48/EC), known as the IPRED Directive. This directive was passed by the EU in 2004 and required member states to provide more effective tools and remedies to enforce IPR and act

against piracy, primarily in digital environments. IPRED was criticised for introducing excessive measures that threatened people's rights to integrity and due process. The directive compelled Internet service providers (ISPs) to provide copyright holders with data on individual users who were suspected of copyright infringement, and critics believed that it enabled too liberal uses of search and seizure orders. Thus, it caused outrage among digital rights groups when it was implemented in Swedish law in early 2009 (Burkart, 2013; Rydell and Sundberg, 2009).

Shortly after the Swedish implementation of IPRED, the situation became even more polarised when four men from Sweden were sentenced to heavy fines and one year in prison for setting up and running the infamous file sharing site The Pirate Bay. The Pirate Bay trial ended in April 2009 as the culmination of a legal process that had been initiated when Swedish police raided The Pirate Bay's server hall three years earlier. The entire process was highly controversial, not only because of the severe sentences that it led to, but also because the investigation had been instigated by the Motion Picture Alliance of America (MPAA) and the trial itself was clouded by allegations of corrupt judges (Burkart, 2013; Rydell and Sundberg, 2009).

Thus, we see that in a few years around 2000, a series of legal changes and actions implemented an aggressive IP legislation and enforcement strategy, promoted by the copyright industry and enacted by politicians and legislators, both nationally and internationally. The new laws provoked large public protests and contributed to the spread of national branches of the Pirate Party in Europe and other parts of the world. Eventually, The Pirate Bay trial and IPRED also paved the way for the success of the Swedish Pirate Party in elections to the European Parliament in 2009, when it received 7.1% of the votes, and thus two seats in the European Parliament (Fredriksson, 2015a; Burkart, 2013; Rydell and Sundberg, 2009).

In spite of the public attention it aroused, the information commons movement had just as little influence on the implementations of IPRED and the Information Society Directive as it had had on the CTEA and the DMCA. It was not until a few years later that the information commons movement won its first major victory, when the American Congress rejected the proposed Stop Online Piracy Act (SOPA) in the beginning of 2012. The SOPA was an attempt to supplement the DMCA with measures to act against copyright infringement online that arose outside the US. It introduced a number of means to enforce copyright more efficiently: the most controversial suggestions included prohibiting ISPs and search engines from hosting or linking to websites accused of containing material that violated copyright law (Farrand 2015).

When the bill was proposed, in the autumn of 2011, digital rights activists were alarmed by what they perceived as violations of privacy and limitations on free speech. Tech companies such as Google and Mozilla soon joined the protests because they objected to the restrictions and liabilities the legislation would impose on them. Many large search engines and platforms publicly spoke out against SOPA on their websites, and Wikipedia got much attention when it closed down its website for one day. The anti SOPA campaigns intensified rapidly, and in the early 2012 the phrase "Don't get SOPA'd" (meaning "Don't get the Internet mad at you") allegedly became a new mantra among politicians in Washington (Masnick, 2012; L. Brunner & Z Adams Green, personal communication, April 2, 2012). In the wake of these protests, Congress decided to reject SOPA on 20 January 2012.

In an interview with *The New York Times*, Christopher Dodd, head of the MPAA which was one of SOPA's most important supporters, expressed surprise and dismay that a suddenly mobilised online public opinion could outweigh the influence of the copyright industry's lobbyists:

By Mister Dodd's account, no Washington player can safely assume that a well-wired, heavily financed legislative program is safe from a sudden burst of Web-driven populism. "This is altogether a new effect," Mr. Dodd said, comparing the online movement to the Arab Spring. He could not remember seeing "an effort that was moving with this degree of support change this dramatically" in the last four decades, he added (Cieply and Wyatt, 2012, section B, p. 1).

Dodd's surprise can be viewed against the background of the recent American copyright debates. If the information commons movement had seen the passing of the DMCA and the CTEA as proofs that the copyright industry controlled the legislative process, then Dodd's reaction to the rejection of SOPA suggests that the MPAA also expected the legislators to meet their demands (Farrand 2015).

While the rejection of SOPA came as a surprise for most people, it was neither an isolated event nor a purely American one. When Americans argued over SOPA, a similar battle was taking place in Europe over the Anti-Counterfeiting Trade Agreement (ACTA). The idea of ACTA began to take shape in 2006, in informal talks between the US and Japan, who wanted to protect their IPbased industries against piracy and counterfeiting. Just as SOPA, ACTA imposed no changes to IPR as such, but gave law enforcement authorities

new tools to enforce them through stricter control of borders and Internet carriers. The architects behind ACTA believed that neither the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) nor the WIPO treaties provided sufficiently powerful means to act against media piracy and trade with counterfeited goods on an international level (Carvalho, 2013). Consequently, ACTA was negotiated behind locked doors between a few exclusive parties who believed it was necessary to bypass both the WIPO and the WTO, and to exclude certain influential countries, such as China and India, that had previously challenged the Euro-American IPR agenda (Farrand, 2015; Dür and Matteo, 2014; Weatherall, 2011).

The lack of transparency immediately raised suspicions about the treaty, and digital rights groups such as the EFF and the Quadrature du Net took up arms against ACTA as early as 2007 (Losey, 2014; Carvalho, 2013). Just as IPRED, ACTA targeted ISPs, and required that they provide information about copyright infringers hosted by their services (Larsson, 2011). ACTA was also widely criticised for overprotecting IPR at the expense of social interests such as access to knowledge, technology and affordable medicine in developing economies. Furthermore, critics feared that ACTA would impose unproportional measures of enforcement that risked compromising civil liberties and due process (Rimmer, 2011).

The ACTA treaty reached its final form in 2010, and was signed by the EU and several countries, such as the US and Australia, in the coming two years (Losey, 2014; Carvalho, 2013). Despite the efforts of the EFF and the Quadrature du Net, the legislative process had, hitherto, been running smoothly without attracting wider attention outside of the information commons movement. Consequently, the EU signed ACTA without much ado on 26 January 2012, and it was expected to be ratified by the European Parliament and the member states within a short period. At that point, however, things took a new turn, and just six months later the European Parliament decided not to ratify ACTA after a sudden outburst of public protest.

This swift mobilisation against ACTA was sparked in part by recent developments in the US. The vocal campaign against SOPA drew new attention to the question of IPR, and the fact that Congress had rejected SOPA just a week before the EU signed ACTA inspired the European protests, since it demonstrated that the media industry and its lobbyists could be defeated (Losey, 2014). The European protesters mobilised first in Poland, where digital rights groups such as the Panoptykon Foundation and the Modern Poland Foundation lobbied the national politicians to reject ACTA. Public protests grew at the beginning of 2012 and culminated on January 26 – the day on which ACTA was signed and just six days after SOPA had been rejected – when 30 members of the Polish parliament showed up in parliament wearing Guy Fawkes masks in support of the street protests (Dür and Mateo, 2014, Losey, 2014). According to Christian Engström, who was member of the European Parliament for the Swedish Pirate Party at the time, one of the reasons that the protests first gained political support in Poland was that the former socialist countries had no traditional copyright-based media industries who lobbied against it (C. Engström, personal communication, 3 October, 2012). The Polish resistance was followed by a wider social mobilisation against ACTA across Europe, and by intense campaigning within the EU parliament, not only by the Pirate Party but also by MEPs from other parties (Losey, 2014).

Looking back at the SOPA and ACTA protests one year later, a member of the American Pirate Party pointed out that the European anti-ACTA campaign took the form of street protests, while the American anti-SOPA campaign resorted mainly to clicktivism (Zaq, Yoni & Aleysha, personal communication, 10 May, 2013). The success of the SOPA protests was thus more a consequence of the support of large tech organisations and corporations. The major European telecom carriers and ISPs were indeed opponents of ACTA, but the European tech industry never launched the same kind of public online campaign against ACTA as their American counterparts had done against SOPA (Dür and Mateo 2014; C. Engström, personal communication, 3 October, 2012). It is possible that the American online campaigns against SOPA had a larger impact on the fate of ACTA than the actions of the European tech industry. Engström describes how arguing against ACTA in Brussels had been like banging your head against a wall for years, until the protests against SOPA, and particularly Wikipedia's blackout, sparked protests in Europe.

When the proposal to ratify ACTA was presented to the European Parliament in July 2012, it decided to reject the agreement by an overwhelming majority: 478 members voted against ACTA, 39 for, and 165 abstained (Losey, 2014). Just as had happened with SOPA, the situation had changed rapidly and unexpectedly, and two major copyright reforms, with strong corporate backing, had been shot down in flames within the course of six months. In that regard, 2012 was surely a good year for the information commons movement.

The Birth of the Openness Industry

It is thoughtprovoking that Lessig's book *Republic Lost* was released in October 2011, just three months before the rejection of SOPA, which at the time seemed to rebut Lessig's thesis that lobbying had made

it impossible for the public to influence copyright legislation. One can assume that Lessig was just as surprised as Christopher Dodd by the rejection of SOPA. By comparing the Anti-Acta protests to the Arab Spring, Dodd expresses a fear that the mobilisation of a digitised grassroots movement was changing the ways policy is made. The information commons movement, on the other hand, saw the fall of SOPA as a breakthrough for the defence of a free and open Internet.

The fates of SOPA and ACTA might be taken as evidence that 2012 saw the end of the uncontested hegemony of the copyright industry, but this does not necessarily mean that the information commons movement was victorious. The success of the anti-SOPA campaign depended largely on the fact that significant parts of the tech industry aligned with the protesters. That tech companies reacted against expansive copyright legislation was nothing new. Many of the criticised laws and directives had, or would have, imposed more responsibilities and restrictions on the companies who controlled the digital infrastructure, and ISPs, for instance, were critical of how IPRED forced them to share information about their customers, not only with the authorities but also with copyright holders (Larsson, 2011). The discussion about SOPA, however, was the first time that so many tech companies had voiced such a strong, coordinated and successful rejection of a proposed copyright bill.

At the time, joining forces with the tech industry raised few concerns within most parts of the information commons movement. In early 2011, members of the New York Pirate Party, for instance, held a recruitment meeting at the Google office in New York. Further, when I spoke to them in April 2012, they still regarded Google as a potential ally: “They’re all in the hacker culture ... for all the mistakes and less than ideal things they have done, they have been very devoted to the open source culture” (Fredriksson, 2015a; Z. Adams Green & L. Brunner, personal communication, 2 April, 2012). Many still believed that Google genuinely wanted to do good, even if it was sometimes forced to compromise. Another member of the New York Pirate Party concluded that in the end Google is “in the same kind of paradox that even the Pirate Party finds itself in, fearing that they are co-opted and in bed with the establishment that wishes to censor them. But at the same time truly wanting open source material, open information. [...]. I consider them confused like us” (Fredriksson, 2015a; J. Emerson, personal communication, 21 April, 2012).

A year later, one of the members I had talked to was clearly distancing himself from his previous position. When I reconnected with him in May 2013, he still believed that Google and the Pirate Party had some common interests concerning openness, but concluded that a company of Google’s size – which “has a monopoly on everything” – is not affected by the problems that the Pirate Party is trying to solve (Zaq, Yoni & Aleysha, personal communication, 10 May, 2013). One of his colleagues also referred to how Google passes data to the American authorities, and argued that – while Google might still opposes expansive copyright legislation – they care less about privacy because they do not benefit from it. He concluded that what had made the anti-SOPA campaign successful was primarily that Wikipedia had closed down for a day, and implied that corporations and organizations had more impact on the outcome of the campaign than the wide popular resistance (Zaq, Yoni & Aleysha, personal communication, 10 May, 2013).

In an interview in November 2013, one of the leading members of the Australian Pirate Party expressed an even more critical view, when he voiced concerns that the SOPA protests had been co-opted by the tech industry. He described the SOPA campaign as less of a spontaneous alliance between the information commons movement and the tech industry, and more of a “corporate capture of the movement” (B. Molloy, personal communication, 24 November, 2013). The narrative had changed significantly since the first interview: if Google in April 2012 had suffered the same threat of being co-opted as the Pirate Party faced, it now – 18 months later – had come to represent the forces of co-optation.

The perceived kinship between the tech industry and the pirate movement made sense in 2012, when the privacy implications of data mining were just clouds on the horizon and Google supported public access to knowledge through projects such as Google Books. In May 2013, however, documents leaked by Edward Snowden exposed the PRISM surveillance system and revealed that Google, Facebook, Yahoo and many other platform owners had been giving the American National Security Agency access to their user data for years.

At the same time as the tech industry was losing credibility as a progressive, liberal force, tech corporations began to emerge as major players in the new media landscape. As early as 2006, when MPAA was going after The Pirate Bay, Google bought YouTube. While Hollywood tried to cut their losses and stifle the growth of renegade media distribution on the Internet, Silicon Valley bought into the business opportunities offered by online media distribution. Ten year later there is a growing concern over how “the Four” tech giants – Google, Amazon, Facebook and Apple – not only control the platform economy but also dominate large parts of the market for online media distribution (Galloway, 2018).

While the attack by Silicon Valley on SOPA can be seen as an expression of the tech industry's ideals of openness, it also reflects a change of power dynamics in the economics and politics of information. In the interview with *The New York Times*, Christopher Dodd described the battle over SOPA as a conflict between the media and the tech industry. Faced with temporary defeat, he stretches out a hand and "calls for Hollywood and Silicon Valley to meet" (Cieply and Wyatt, 2012).

It is significant that, unlike many members of the information commons movement, Dodd does not see this as an ideological battle, but as a clash between two different business interests. And in retrospect, the rejection of SOPA comes across as a particularly lucid example of how the business strategies of the traditional media industry are disrupted by what Peter Jakobsson (2012) calls the "openness industry". The term is a response to the concept of the copyright industry, and refers to a new business model based on the commercial exploitation of user-generated content that thrives from openness rather than enclosure (Jakobsson, 2012). Jakobsson and Stiernstedt (2012, p. 50) have described the ambiguous relationship that the tech industry has with the cyberliberties movement:

the business practices and ideology of the digital media industry make it sometimes seem like its values are the same as those of the critics of the second enclosure movement and that the digital media industry hence partake [sic] in the (radical) critique of the copyright industries.

These apparent ideological overlaps are, however, superficial. Jakobsson argues that the openness industry is not a countermovement to the neoliberal process of commodification that the copyright industry represents, but rather a parallel business practice that explores other ways to commercially exploit resources that have not been commodified as intellectual property (Jakobsson, 2012).

Just as the copyright industry before it, the openness industry has developed its own lobbying organisations, such as the Computer and Communications Industries Association. These organisations oppose the copyright lobbyists and promote more liberal copyright laws intended to make it easier to capitalise on user-generated content (Jakobsson, 2012). This approach is not so much ideologically motivated as it is a business strategy to better exploit the free labour and content that users provide: "A more open policy in regards to intellectual property also means that the emerging intellectual commons on the Internet can be merged into the market and exploited by new and alternative business models" (Jakobsson and Stiernstedt, 2012, p. 53). Just as the copyright industry, the openness industry makes money by exploiting the information commons – or the "intellectual commons" as Jakobsson and Stiernstedt call it – although not through enclosure but rather through exposure.

The growth of the openness industry has changed the politics and economics of the information society: while users can more easily gain legitimate access to culture and entertainment online, those who provide that access have achieved stronger control over the distribution and consumption than ever. Furthermore, they have obtained better access to information about the users' lives and habits, both online and offline. This new form of transaction between users and providers, in which consumers offer their user data in exchange for content, raises new questions about privacy.

Copyright in the Digital Single Market: The Copyright Industry Strikes Back

For a few years following the rejection of ACTA, the issue of copyright appeared to be absent from the EU's information political agenda, which focused more on privacy issues. In April 2016, this change of focus was manifested in the passing of the General Data Protection Regulation (GDPR) (EU/2016/679), which protects the sovereignty of users over the data they produce by imposing rigorous demands for consent and transparency on all actors who gather and store personal data (Meese, et al. 2019). The GDPR was viewed with scepticism in USA and many American companies initially feared that it would make it hard for them to conduct business in Europe (Economist 2018).

The same year, copyright however resurfaced in EU politics when the European Commission presented a proposal for a new Directive on Copyright in the Digital Single Market (COM/2016/0593). Public interest in the new copyright directive was initially lukewarm, but debates intensified in the following two years. The directive (EU/2019/790) was approved, under heavy protests, by the European Parliament in the spring of 2019 (O'Brien 2019). As the Directive on Copyright in the Digital Single Market was the first comprehensive EU copyright directive since 2001, its passing marked the comeback of copyright as a contested political topic. It is, however, interesting to see if and to what extent the topic of copyright was framed differently after the growth of the openness industry and the changes to the information policy agenda it brought about.

The Directive on Copyright in the Digital Single Market does not replace the Information Society Directive. On the contrary, the first article of the new directive explicitly states that it leaves the old directive intact (EU 2019/790: Article 1:2), and the preamble to the new directive argues that it is based on and complements the Information Society Directive (COM/2016/0593). When the idea of developing a new copyright directive was first launched it, nevertheless, appeared to be a change of direction from that of the Information Society Directive. As the name suggests, the new copyright directive is part of a wider agenda that aims to create a digital single market (DSM) within the EU, which dates back to the formation of the Juncker Commission. When Jean-Claude Juncker was appointed president of the European Commission in 2014, he listed a number of priorities for the coming years. One of them was to promote 'a connected digital single market' in which digital services and products could be more easily distributed across national borders (COM (2015) 192 final, p. 2).

The DSM agenda is a response to the fact that internal borders make it hard for the EU to compete globally when it comes to platforms and digital services. Although the policy documents mention no specific countries it is obvious that they primarily refer to the USA which dominates the market for platform services in the Western world as well as in parts of Asia. As Jonas Andersson Schwarz points out, market size is essential for establishing competitive platform services (Andersson Schwarz, 2017). Although Europe has a significantly larger population than USA, the latter has a major advantage on the EU in the sense that the American market is not fragmented through state laws. Furthermore, USA actively promotes its platform industry through legislation. Julie E Cohen argues that "U.S. stances on antitrust and data protection have permitted a race to the bottom in the accumulation of platform power and that the relative U.S. laxity has disadvantaged European Internet businesses" (Cohen, 2016, p. 382). This is not only a matter of business strategies but also of international politics where the control over the platform businesses have far reaching implications for global power relations, which for instance causes tensions between the EU and the USA over how to tax and regulate American platforms. Andersson Schwarz concludes that: "platform capitalism constitutes a remaking of the 'geopolitics of information' (Schiller, 2015) that have been a facet of U.S.-dominated global power since the Cold War" (Andersson Schwarz 2017, p. 385).

The Digital Single Market agenda was an attempt to more proactively promote the platform economy and make Europe more internationally competitive by amending the fragmentation of the internal market. In the European Commission's first draft of a strategy to achieve a digital single market in Europe, from May 2015, Juncker argued:

I believe that we must make much better use of the great opportunities offered by digital technologies, which know no borders. To do so, we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation, in the management of radio waves and in the application of competition law (COM (2015) 192 final, p. 2).

Juncker identified a number of steps that could contribute to the formation of a digital single market, such as removing roaming fees for cell phone users within the EU, harmonising privacy and consumer rights, and modernising copyright law to "ensure that consumers can access services, music, movies and sports events on their electronic devices wherever they are in Europe and regardless of borders" (COM (2015) 192 final, p. 2). While some goals – such as removing roaming fees – were soon fulfilled, others turned out to be much harder to achieve. The ambition to abandon geoblocking – where access to digital content is blocked in different countries due to copyright restrictions – addressed in the previous quote was for instance left out of the new copyright directive (Marcut, 2017).

The DSM agenda differed from previous strategies in the sense that it assumed that promoting openness was the best way to make Europe competitive in the digital economy:

Europe has the capabilities to lead in the global digital economy but we are currently not making the most of them. Fragmentation and barriers that do not exist in the physical Single Market are holding the EU back (COM (2015) 192 final, p. 3).

The Directive on Copyright in the Digital Single Market thus, initially, grew from a discourse of an information economy that was significantly different from that of the Information Society Directive.

The Information Society Directive of 2001 was an integrated part of the Lisbon agenda adopted by the EU in 2000. The goal of the Lisbon agenda was to make Europe "the most dynamic and competitive knowledge-based economy in the world", and it identified intellectual property rights as an important tool to achieve this (Guibault et al., 2007, p. vii). The purpose of the Information Society Directive was to improve the

conditions for the exchange of immaterial goods within the EU by harmonising the copyright legislation in the member states and adapting it to technological development. The preamble to the Information Society Directive strongly emphasises that the protection of intellectual property is fundamental for the growth of a European information economy (2001/29/EC, §1-7). The guiding rationale of the directive was most forcefully summed up in the introduction of the directive:

A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry (2001/29/EC, 1).

The Information Society Directive was based on the assumption that the protection of property is the basis of economic development, and the circulation of immaterial resources must be strictly regulated to enable the digital economy to grow. It thus relied on the logic of enclosure and the need to control and contain flows of information. Consequently, the early statements about the digital single market – based on a belief that the disruption of barriers and the free flow of information are preconditions for a thriving European economy – contrast strongly with the older discourse of the information society directive. The DSM agenda rather seems to have been founded on the same rationale as the openness industry.

Initially, the rhetoric of the president also suggested that the copyright strategy of the EU would change direction away from the restrictive strategy set down in the Information Society Directive. Hopes for a progressive copyright directive were, however, soon crushed, as it became evident that the proposal expressed a much more conservative approach. Julia Reda, member of European Parliament for the German Pirate Party at the time, describes how Juncker's original intentions were derailed when the German commissioner, Günther Oettinger, became responsible for the policy area concerning Digital Economy and Society, and thereby came to oversee the drafting of the new copyright directive. According to Reda, Oettinger never shared Juncker's vision for a new European copyright strategy. He insisted instead on a more conservative and restrictive copyright agenda that primarily protected German business interests, particularly those of the publishing industry (J. Reda, personal communication, 7 February, 2017; Angelopolous 2017; Giannopoulou, 2018; Schroff & Street, 2018; Xalabarder, 2016).

The Information Society Directive, like most other international copyright regulations, requires its signatory states to maintain certain minimum levels of copyright protection. While it is true that it also allows for certain exceptions to copyright protection, those exceptions are not mandatory. This means that the protection of the rights of copyright holders are enforced consistently throughout Europe, while the protection of the rights of users are enacted differently in different states – creating a stronger protection for copyright holders than for users. Juncker's initial words about harmonising consumers' rights implied that the new copyright directive would address that imbalance, but the Directive on Copyright in the Digital Single Market did little to amend it. On the contrary, the final proposal was criticised for imposing even more limitations on access to information, and favouring content owners over users (Griffin, 2018). One example of this is the failed attempt to stop geoblocking, which was not even mentioned in the Directive on Copyright in the Digital Single Market even though it was originally one of Juncker's explicit goals. Reda blames this on the pressure from the film industry and mentions it as an example of the influence that media corporations still exercise on legislation (J. Reda, personal communication, 7 February, 2017).

Two other controversial examples of how business interests shaped the new copyright directive concern Articles 11 and 13.² Article 11 requires digital platforms to pay a fee to the original publishers when they post snippets of copyright protected news material, for instance when linking to an original article. This was intended to ensure that producers of journalistic content are compensated when the material they create is redistributed online. The requirement was thus justified as a means to protect the rights and revenues of journalistic media production against exploitation by new media outlets. Critics came to call the proposed fee a 'linktax', and argued that it limits the distribution of content online in order to protect the business model of established publishing houses and media conglomerates. That the German Springer concern was a strong supporter of Article 11 also added a geographical dimension to the issue as it seems to confirm Reda's opinion that Oettinger predominantly protected the interests of the German press and publishing industry (J. Reda, personal communication, 7 February, 2017; Commission's Research Center (JRC) (nd); Xalabarder, 2016).

² These were eventually included in the final version of the directive as Articles 15 and 17. But throughout the debates they were referred to as Articles 11 and 13, and for the sake of clarity I will use that terminology in my discussion.

The other main point of criticism concerns Article 13, which holds any website or platform that hosts content uploaded by users responsible for the material that is distributed through these services. While previous laws called for websites and platforms to take down content that evidently violates copyright law, the new copyright directive requires them to take measures to *prevent* such content being uploaded, through some form of pre-emptive screening (Angelopoulos, 2017). This requirement was intended to address the so-called 'value gap': a term coined by the International Federation for the Phonographic Industry to describe the discrepancy between the revenues collected by platforms like YouTube and the losses that content producers in the traditional media sector suffered when their products were redistributed online without compensation (https://www.ifpi.org/value_gap.php#docs_links). Many critics feared that Article 13 would create problems for smaller platform providers and interfere with the legit redistribution of copyrighted material allowed under fair use (Reynolds, 2019; Jacques et al., 2018).

In the end, Juncker's initiative to create a copyright directive that would harmonise the rights of consumers and facilitate the distribution of content across borders resulted in the opposite: a conventionally maximalist copyright directive that grants copyright holders extended rights without significantly adding to users' rights. It could be argued that the copyright directive, contrary to the intentions of the DSM agenda, continued to harmonise enclosure without harmonising openness. In that regard, the EU's copyright strategy appears to have been more or less unaffected by the rise of the openness industry.

Conclusion

This article has described how the rejections of SOPA and ACTA in 2012 were not only a success for the information commons movement, but also reflected a new power balance in the information economy. When the openness industry emerged as a counterweight to the copyright industry, this changed the agenda of information politics. The criticism against the copyright industry had largely focused on how copyright limits public access to culture and information. This criticism lost much of its urgency with the proliferation of streaming media, which appears to provide free access to culture and entertainment, at the cost of excessive data mining. For a few years, the issue of privacy replaced access to information as the central conflict in information politics. A closer look at EU's Directive on Copyright in the Digital Single Market, however, suggests that while the values of openness had made their way into EU rhetoric on a general level, they had little influence on actual copyright legislation, which resorted to protecting the interests of copyrightbased businesses.

It appears that the ideological tensions between openness and enclosure are insufficient to explain why the EU commission continued to promote the protection of intellectual property over the information commons. An analytical framework focusing on actors and institutions can be more useful to explain how the information political agenda has navigated between the protection of property and protecting privacy, as well as between enforcing enclosure and openness. This analysis can be visualised with three figures that map how different actors have related to those tensions at certain moments in time: around 2000, with the passing of the DMCA and the CTEA; in 2012, with the rejection of SOPA and ACTA, and in 2019, with the passing of the Directive on Copyright in the Digital Single Market.

The figure of 2000 (**Figure 1**) presents a situation where the copyright industry is a dominant force that is only challenged by a fairly marginal information commons movement, and thus manages to push the

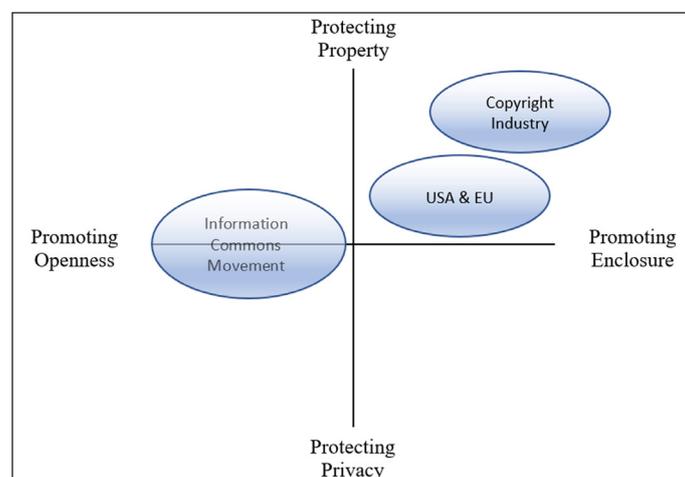


Figure 1: The information political arena 2000.

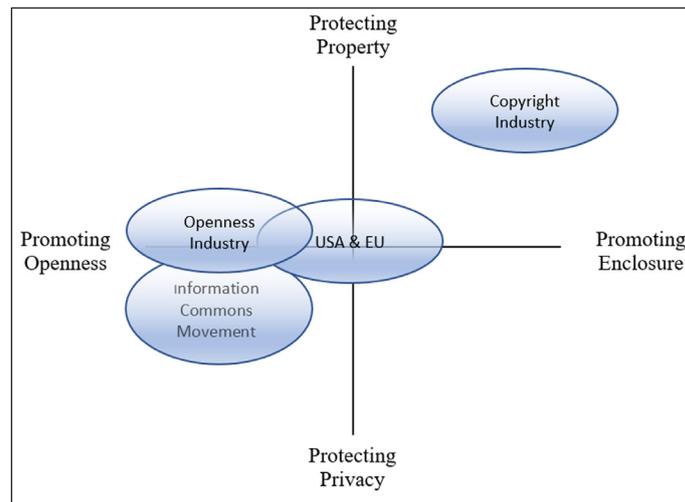


Figure 2: The information political arena 2012.

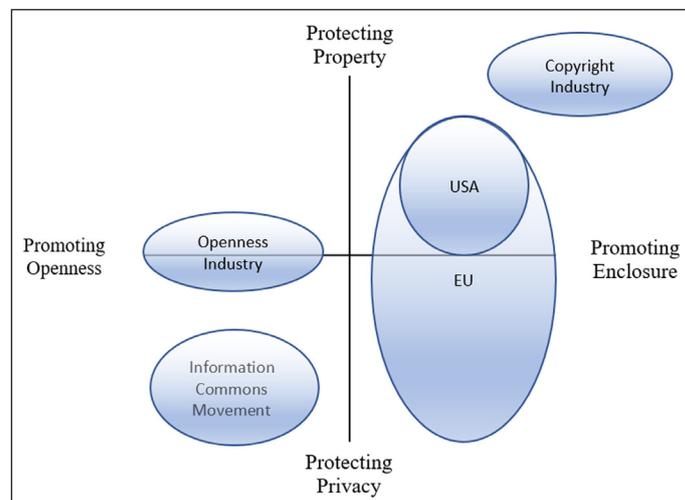


Figure 3: The information political arena 2019.

political agenda, both in the EU and USA, towards the protection of intellectual property and enclosure of the information commons. In the figure from 2012 (**Figure 2**) the information commons movement has grown but also gained an ally in the openness industry. Together, they manage to push the agenda in USA and the EU towards a concern for openness, which manifests itself in the rejection of SOPA and ACTA. In **Figure 3** both the information commons movement and the EU are gravitating towards protection of privacy, indicating that privacy has now become a major information political issue. Here the positions of the USA and the EU are for the first time diverging over the topic of privacy. However, the fact that the EU is embracing the protection of privacy does not mean that it moves away from protecting intellectual property rights and promoting enclosure which remains a core priority in the new copyright directive.

A contributing reason for the resurgence of the protection of intellectual property could be that the growing concerns over privacy issues had driven a wedge between the information commons movement and the openness industry and given the initiative back to the copyright industry. The growing badwill of the large platform owners made it easier for the old media industry to argue for stronger copyright protection. Furthermore, since the platform economy is largely controlled by American companies the criticism against the major platform owners fed straight into the economic relations between USA and the EU. The Digital Single Market strategy was initially motivated by Europe's problems to compete with America in the digital economy. Seen in that context, the 'Value Gap' between content creators and platforms comes across as a geographical redistribution of resources where American platform owners exploit European content producers. The Directive on Copyright for the Digital Single Market can thus be seen as a defensive European strategy against American platform owners. Instead of trying to promote a competing European platform industry, as the DSM agenda originally proposed, the European Commission

eventually decided to protect the European content producers and the American platform owners through stronger European copyright legislation. In that sense, the ideology of openness and the concerns for the information commons expressed in the early drafting of the DSM agenda seems to have given way for international political pragmatism.

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Competing Interests

The author has no competing interests to declare.

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