Re-use of public sector information in cultural heritage institutions

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Abstract
In 2013 the European Union amended the Directive on Public Sector Information, establishing the principle that all available information produced and collected by public sector institutions must be made available for reuse under open terms and conditions. The amended Directive also brings publicly funded libraries, museums and archives into its scope. These new rules on reuse of heritage materials, treated as public sector information (PSI), attempt for the first time to define a general framework for sharing cultural heritage information all around Europe. In this paper we argue that if Member States are not careful, the implementation of the changes required by the new Directive could do more harm than good when it comes to access to digitised cultural heritage in Europe. These concerns relate to how the directive interacts with copyright legislation. The paper recommends that in order to contribute to the opening up of cultural heritage resources, Member States should ensure that all qualifying documents that are not currently covered by third party intellectual property rights fall within the scope of the Directive. Member States should also implement the Directive in a way that will not require institutions to charge for the reuse of works that they make available for reuse. For documents that are still protected by intellectual property rights but where these rights are held by the cultural heritage institutions, Member States should encourage the use of Open Definition-compliant licences.

Keywords
Law; information technology; public sector information; public domain; intellectual property rights; open formats; open licences.

Introduction

A decade ago, the European Union established rules for the re-use of public sector information in

Directive 2003/98/EC on the re-use of public sector information (2003 Directive)[1], which went into effect on 31 December 2003. It was designed to encourage EU Member States to make information and resources that they produce and collect reusable to the greatest possible extent. Re-use rules have been devised as complementary to the citizens' rights of access to public sector information, which remains regulated by national law. However, while such an access is often seen as a basic civil right, re-use is considered an economic right. In fact, beyond fuelling the innovation and creativity that stimulate economic growth, open public sector information also empowers citizens, thereby enhancing participatory democracy and promoting transparent, accountable and more efficient government. From this perspective, public sector information, when re-used, becomes the basis for added economic, civic, and social value, as recognised by the same Commission.

Re-use of cultural heritage resources

The 2003 Directive included in its scope information held only by some Public Sector Bodies (PSB) such as ministries, states agencies, municipalities and organisations funded for the most part by, or under the control of, public authorities.[2] It explicitly excluded cultural, scientific and educational institutions and their resources[3].

In June 2013 the 2003 Directive was amended by Directive 2013/37/EU (2013 Directive)[4] which placed museums, libraries (including university libraries) and archives within its scope. However, information held by institutions such as orchestras, operas, ballets and theatres were not included in the scope of the amending Directive[5], and the same holds true for Public Broadcasting Organisations.[6]

While some of the rules for cultural heritage institutions deviate from the general PSI re-use rules, the rationale for including these institutions under the new consolidated PSI Directive is the same: cultural heritage resources are seen as documents on which added value can be built for commercial gain and the public benefit. **These new rules on re-use of heritage materials, treated as public sector information, attempt for the first time to define a general framework for sharing cultural heritage information all around Europe[7].**

The 2013 Directive introduces a number of new features, one of which is the important "re-usable by default" rule. This rule provides that all the information already publicly accessible under national laws will also be considered re-usable.[8]

1 Directive 2003/98/EC on the re-use of public sector information

2 The Directive defines documents as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) and any part thereof"; See Art. 2(3) PSI Directive (consolidated version).

3 See Article 2.1 (f) which states that 'this directive shall not apply to … documents held by cultural establishments, such as museums, libraries, archives, orchestras, operas, ballets and theatres'.

4 Directive 2013/37/EU amending Directive 2003/98/EC on the re-use of public sector information

5 Article 2.1 (f) of the consolidated directive now states that 'this directive shall not apply to … documents held by cultural establishments other than libraries, museums and archives'

6 While the scope of cultural institutions covered by the new regulation seems quite clear, doubts arise in the case of institutions that are not explicitly referred to as a libraries, archives or museums, but that accumulate cultural resources. For example, the Polish National Filmotheque is a film archive, but formally not defined as such. Since the scope of the Directive is to increase the availability of heritage collections, it should be interpreted as to include those institutions that despite a different *nomen* carry out the same function.

7 In addition to the 28 Member States of the EU the directive is also applicable to the member states of the European Economic Area and can be expected to have a strong normative influence on countries that aspire to join the European Union.

8 See Art. 3(1) consolidated version.

Cultural heritage institutions may take advantage of a specific exception to this general rule and they may choose whether or not to make documents for which they hold intellectual property rights available for re-use.[9] However, when they choose to do so, documents must be re-usable for commercial or non-commercial purposes in accordance with the conditions established by the consolidated Directive for other documents held by cultural heritage institutions.

Cultural heritage resources are already being shared by cultural heritage institutions in all EU Member States;[10] however, this practice entirely depends on the policies, funds, resources and efforts of a given institution. In this regard, the implementation of the new 2013 Directive is not expected to cause any revolutionary changes. Yet, if implemented correctly, this new Directive can lead to the establishment of Europe-wide standard rules for the availability of cultural resources, and increase the scale at which cultural heritage information is shared. On the other hand, an implementation contrary to the spirit of the Directive could lead to the creation of unnecessary hurdles to the re-use of public sector information, which would frustrate the very principle that inspired both the 2003 and 2013 Directives.

Charging for re-use

The consolidated Directive establishes a number of conditions that apply to the re-use of documents falling within its scope, such as the principle of non-discrimination and rules related to charging for re-use of documents. In principle, the consolidated Directive limits charging for re-use to cover only "marginal costs" – the costs necessary to make the resources available. However, some public institutions are "required to generate revenue to cover a substantial part of their costs relating to the performance of their public tasks or of the costs relating to the collection, production, reproduction and dissemination of certain documents made available for re-use," and thus are permitted to charge above the marginal cost.[11]

The Directive states that libraries, museums and archives are explicitly allowed to charge above marginal cost, but charges "should not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment." In the past, the allowed level of such return on investment has been ambiguous. The EU legislator indicates that "the prices charged by the private sector for the re-use of identical or similar documents could be considered when calculating a reasonable return on investment". This means that the Directive allows cultural institutions to make profit by supplying and allowing re-use of their resources.[12]

9 See Art. 3(2) of the consolidated version.

10 Europeana.eu alone brings together more than 30 million objects from more than 2500 institutions from all 28 Member States.

11 See Art. 6 consolidated version.

12 This is further explained in the recent "Commission notice — Guidelines on recommended standard licences, datasets and charging for the re-use of documents" it is pointed that return on investment can be understood as a percentage allowing for recovery of the cost of capital and inclusion of a real rate of return (profit). Guidelines refer also to comparing prices to commercial players in a comparable market and conclude that since public cultural institutions do not bear the business risk the way the private sector does, a “reasonable” rate of return would be "slightly above the current cost of capital but well below the average rate of return for commercial players, which is likely to be much higher due to the higher level of risk incurred".

Third party intellectual property rights – limitations of the scope of the Directive

The Directive limits the type of information that falls within its scope in relation to the existence of intellectual and industrial property rights. A first case of exclusion from the Directive's scope relates to documents for which **third parties** (meaning not the cultural heritage institution) hold intellectual property rights such as copyright, related or neighbouring rights as well as *sui generis* forms of protection.[13] Thus, for works covered by **third party** intellectual property rights there is no re-use obligation.

A second case of exclusion relates to documents protected by "industrial property rights" defined as patents, registered designs and trademarks. In this case the exclusion is **absolute**, as it operates irrespective of the right holder. In other words, no obligation to allow re-use applies when a document is covered by an industrial property right --including those cases where the right holder is the library or museum itself.

As a result of these two cases of exclusion, documents held by cultural heritage institutions are within the scope of the consolidated Directive only if: (i) they are in the public domain, either because they were never protected by copyright or because copyright has expired; or (ii) the cultural heritage institution is the original right holder or assignee of the intellectual property rights.

That being said, it is important to note that the reuse obligations deriving from these two situations diverge. For (i) documents that are in the public domain the general rule applies: documents must be re-usable if they are generally accessible (Art. 3(1)). In the different case of (ii) documents for which the institution holds the copyright and/or related rights the derogatory rule of Art. 3(2) applies: the institution can decide whether it wants to allow re-use or not. Nonetheless, if re-use is allowed it must follow the general requirements of transparency and non-discrimination, as well as the specific limits on the charging policy (see below).

Consequently, documents whose intellectual property rights belong to third parties, but a specific copy thereof is held by a cultural heritage institution are excluded from the Directive, as confirmed by Recital 22 and Art. 1(b) of the consolidated version, and accordingly there is no obligation to allow re-use.

Unfortunately, Recital 9 of the 2013 Directive introduces some uncertainty.[14] It might be interpreted as implying that any document held by a library but *originally* owned by a third party and whose term of protection has not yet expired is a document for which third parties hold an intellectual property right, and therefore is excluded from the scope of the Directive. This reading seems contrary to the provisions established in Article 3 (consolidated version) and contradicts the overall objectives and principles enshrined in the Directive (to open-up public knowledge for re-use). It would further create an unjustified limit to the re-use of PSI in clear contradiction with the

13 Rights covered include performers' performances, sound recordings/phonograms, broadcasts of broadcasting organisations and first fixations of films, as well as the *sui generis* database right and other related rights created or allowed by the EU legal framework (such as scientific and critical editions, non original photographs, published editions, typographical arrangements, etc).

14 "Taking into account Union law and the international obligations of Member States and of the Union, particularly under the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights, documents for which third parties hold intellectual property rights should be excluded from the scope of Directive 2003/98/EC. If a third party was the initial owner of the intellectual property rights for a document held by libraries, including university libraries, museums and archives and the term of protection of those rights has not expired, that document should, for the purpose of this Directive, be considered as a document for which third parties hold intellectual property rights".

legislative history and legal background of the Directive (both versions).[15]

Given this potential for confusion, it is important that Member States implement the 2013 Directive in line with the rules laid down in Article 3(2) (consolidated version). This means that all documents for which the institution holds the relevant intellectual property rights are subject to the discretionary decision to allow re-use. If re-use is granted, then it will be subject to the other conditions established by the consolidated Directive. This also applies to documents that have been acquired by public institutions from third parties, provided that the intellectual property rights have also been transferred to the institution (or other similar agreement to the same effect has been made).[16] Recital 9 (2013 Directive) should be interpreted as simply meaning that documents are outside the scope of the directive when the cultural heritage institution holds a document for which it does not simultaneously hold the intellectual property rights, including the situation where the right holder is unknown.[17]

Public domain and public sector information

Overall, the Directive is in line with the current trends in regard to digitisation of cultural resources held by public institutions. Often these digitisation projects focus on works in the public domain and works for which institutions own the relevant intellectual property rights. For both financial and practical reasons, cultural institutions have been mainly digitising out-of-copyright works.

15 Recital 9 speaks of third party rights insisting on documents held (not owned) by university libraries, archives or museums. The reference should be intended to refer to works protected by a copyright owned by a third party, and for which the library or museum has only acquired the physical ownership of a copy, or in any case a mere right to display or lend the document. Cases where the cultural heritage institution does not just hold the document but owns it too – and is its copyright holder - should therefore be excluded from the scenario of Recital 9 (2013 Directive).

16 This view seems supported by the legislative history of that provision. Nowhere in the drafts that lead to the 2013 Directive is suggested a reading or interpretation that would significantly derogate from the overall scope of the Directive, i.e. favouring re-use of PSI. In particular, previous versions of current Recital 9 of the 2013 Directive, set forth the principle of "strict necessity" which seems to better explain the real function of said Recital. Recital 7 of the Explanatory Memorandum (which corresponds to current Recital 9 of the 2013 Directive) had an opening text which is reported for the convenience of the reader: "Directive 2003/98/EC should therefore lay down a clear obligation for Member States to make all generally available documents re-usable. As it constitutes a limitation to the intellectual property rights held by the authors of the documents, the scope of such a link between the right of access and the right of use should be narrowed to what is strictly necessary to reach the objectives pursued by its introduction. In this respect, taking into account the Union legislation and Member States' and Union's international obligations, notably under the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), documents on which third parties …". It must also be noted that any different reading would clearly envisage a contradiction between Recital 9 of the 2013 Directive and Art. 3. Suffice to recall that "the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting them in a manner clearly contrary to their wording"; See Case C-162/97 *Nilsson and Others* [1998], paragraph 54, and Case C-308/97 *Manfredi* [1998], paragraph 30. The EC seems to have recently adopted a similar view on the relationship between Recital 9 and Art. 3 of the 2003 Directive; see below fn 16.

17 This view seems to be supported by the same European Commission, at least informally. In the Minutes of the 19th Meeting of the Public Sector Information Group, held in Luxembourg on September 10th, 2014, the EC expressed the following opinion in response to a specific question on the meaning of Recital 9: "The second sentence of recital 9 appears to suggest that documents whose IPR has been acquired by the cultural institution from third parties should be treated as covered by 3rd party IPR and therefore excluded from the scope of the Directive. In fact, the second sentence stresses that 3rd party IP rights on documents held by cultural institutions should be respected even in cases where identifying the right holder is difficult (circumstances in which such works can be used are normally covered by Directive 2012/28/EU – the Orphan Works Directive). The Commission is of an opinion that recitals cannot undo the operational provisions in the body of a Directive and in this case the application based on the literal reading of article 3 seems the best way to ensure the objectives of the PSI Directive. Therefore, the second sentence of recital 9 should rather be interpreted as encompassing only those situations in which cultural institutions physically own copies of documents, which are still protected by copyright but the right holders of which are unknown (orphan works)". Orphan works are therefore excluded from the general re-use rule. Orphan works are now object of the specific provisions contained in Directive 2012/28/EC on certain permitted uses of orphan works". The Minutes are available at http://ec.europa.eu/digital-agenda/en/news/public-sector-information-group-main-page.

While the Directive will not change this situation, it could produce a negative effect on the availability of public domain works to the general public.

The current best practice with regard to digitisation of public domain materials by cultural heritage institutions is to make these materials available for free and without restrictions on re-use[18]. The digitisation of public domain works has been an important driver for the nascent open data movement in the cultural heritage sector.

From a policy perspective, cultural heritage institutions that decide to make public domain works available under conditions that limit or regulate their re-use could potentially frustrate the inner balance between public and private interests supposedly created by copyright law. Again, the Directive does not, and should not, modify this inner balance of copyright law. Yet, a superficial extension of the 2013 Directive to works held by cultural heritage institutions would produce the unwanted effect of introducing new barriers – mainly financial. Charging will affect the re-use of public domain works and consequently damage the balance established by the temporal nature of copyright.

As outlined above, the Directive (consolidated version) provides cultural heritage institutions with the ability to charge for works that they make available for re-use. While this may be a useful strategy for some institutions to recover a portion of their costs, there are many cases where charging for re-use will limit access to and re-use of the resources in question.[19] The most appropriate decision can only be made by the CHIs on a case by case basis.

No charging requirements

National legislatures implementing the 2013 Directive should be careful not to require institutions to charge for the re-use of works that they make publicly available[20]. Adding charging requirements (or encouraging them) could undermine the public domain, limit online access to, and re-use of, cultural heritage resources, and damage the nascent open culture data ecosystem.[21] The decision whether to charge for re-use should be left with the CHIs which are usually best placed to assess the specific needs on a case by case basis.

When applied to cultural heritage resources that have entered into the public domain such requirements would have the effect of prolonging the access limitation created by the duration of copyright protection – a duration already considered to be too long by many stakeholders. These charging requirements, if implemented improperly, have the potential to undermine the overall objective of the Directive (increasing re-use of resources held by public institutions).

Licensing

The recitals of the 2013 Directive and a recently published “Guidelines on recommended standard

18 See Europeana's Public Domain Charter or the image re-use policy of the Rijksmuseum.

19 See for example the 'Yellow Milkmaid' white paper published by Europeana in 2011 or the above mentioned image re-use policy of the Rijksmuseum.

20 An existing example of Public Sector Information legislation that encourages institutions to charge for re-use of public domain works that they make available is the French law on access and reuse of public sector information, which has the effect that public domain works available via portals like Gallica cannot be used for commercial purposes without obtaining a license.

21 It should be noted that the Directive defines maximum level of charges and that the first implementations of the amended Directive into national laws often define lower limits.

licences, datasets and charging for re-use of documents" put a lot of emphasis on the use of standard open licences. Open licences, such as the Creative Commons licences, build on copyright and as a result their attachment to works that are out of copyright should not produce any effects. Accordingly, open licences are not usually enforceable when applied to material that is in the public domain. Clearly, the arguments in favour of standard licences apply equally to standard tools for marking public domain works, such as the Public Domain Mark[22] and the CC0 Public Domain Dedication.[23]

Open licences (especially those that comply with the Open Definition[24]) should be used not only when making available documents but also meta-data for which the copyright lies with the cultural heritage institution – at least in the limited cases where meta-data attract copyright protection (such as original descriptions of cultural heritage objects).[25]

Non-discrimination

The Directive (consolidated version) requires that all conditions attached to the re-use of documents shall be non-discriminatory for comparable categories of re-use and that the re-use shall be open to all potential actors in the market. To fully realise the potential of open data and to stimulate the development of new services, re-use should be open to all on equal footing. This means that institutions cannot grant access to certain categories of users but refuse it to others, or enter into exclusive agreements with selected partners. However, the Directive contains one important exception that allows exclusive contracts for cultural heritage institutions engaging in digitisation projects. The Directive specifies that such agreements should be limited in time and as short as possible, with a maximum duration of 10 years.[26]

Recommendations for Implementation by Member States

As we have explained above, the ongoing implementation process in the Member States poses a number of potential pitfalls. If Member States are not careful, the implementation of the 2013 Directive could do more harm than good to the availability of cultural resources held by Europe's cultural heritage institutions. Such an effect would frustrate the intentions expressed by the EC when the 2013 Directive was approved.[27]

22 Public Domain Mark

23 CC0 Public Domain Dedication. According to the Commission's Guidelines, "open standard licences, for example the most recent Creative Commons (CC) licences (version 4.0), could allow the re-use of PSI without the need to develop and update custom-made licences at national or sub-national level. Of these, the CC0 Public Domain Dedication is of particular interest. As a legal tool that allows waiving copyright and database rights on PSI, it ensures full flexibility for re-users and reduces the complications associated with handling numerous licences, with possibly conflicting provisions."

24 Open Definition

25 Meta-data usually represent factual information such as titles, names, and dates. The standard for copyrightability in the entire European Union for any category of works is the "author's own intellectual creation" which is present when the author makes free and creative choices and puts his or her personal stamp in the work. When an output is constrained by technical and factual rules, there is little to no space for free and creative choices, reducing the possibility of protected works only to those meta-data that can show personal, free and creative choices. See also Dr. Till Kreutzer,'Validity of the Creative Commons Zero 1.0 Universal Public Domain Dedication and its usability for bibliographic meta-data from the perspective of German Copyright Law', (2011) for a discussion about the protectability of meta-data published by cultural heritage institutions.

26 There is however an exception to this rule: "In the case when the period exceeds 10 years, its duration shall be subject to review during the 11th year and, if applicable, every seven years thereafter." which theoretically allows for exclusive contracts with an indefinite duration.

27 E.g. "[The Directive] encourages the Member States to make as much information available for re-use as possible" or "[it] introduces a genuine right to reuse by making reusable all content that can be accessed under national access to

Accordingly, Member States implementing the 2013 Directive are invited to pay utmost attention to the following three main recommendations:

1. Member States should implement the 2013 Directive in line with the principles established by Article 3 (consolidated version) and ensure that all qualifying documents that are not currently covered by third party intellectual property rights fall within the scope of PSI national legislation.

2. Member States must not implement the Directive in such a way that encourages or requires institutions to charge for works that they make available for re-use. The decision to charge for re-use should be up to the individual institution. If this is not the case, the implementation of the 2013 Directive will limit access to and re-use of the public domain.

3. For documents that are still protected by intellectual property rights, but where these rights are held by the cultural heritage institutions that have these works in their collections, Member States should encourage the use of Open Definition-compliant licences, such as the Creative Commons licences or the Creative Commons Zero mechanism. This applies in particular to meta-data produced by cultural heritage institutions, in the limited cases where these meta-data attract copyright protection.

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documents laws"; see http://ec.europa.eu/digital-agenda/en/european-legislation-reuse-public-sector-information.

Ensuring utmost transparency – Free Software and Open Standards under the Rules of Procedure of the European Parliament

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Abstract
Going beyond the constitutional requirement of openness laid down by the Treaties, the European Parliament has imposed upon itself a further commitment to conduct its activities with the utmost transparency. Our study suggests that ensuring this "utmost transparency" is not only an essential procedural requirement but actually a fundamental democratic principle which brings precise duties.
Thus, the principle of openness should guide Parliament's choices of IT hardware and software systems and, as technology evolves, these choices should be continuously and pro-actively reassessed. By its own standard, Parliament should choose the systems and technologies that are the most open and the most accessible to the public.
We conclude that the Rules of Procedure of the European Parliament should whenever possible make Free Software and Open Standards mandatory for all systems and data used for the work of Parliament. In our view, that is the most appropriate way for the Parliament to meet its own standard of "utmost transparency".

Keywords
Law; information technology; Free and Open Source Software; European Public Law;

Foreword

By Prof. Douwe Korff

This report is timely, and deals with an important issue in an era of widespread disillusionment with and distrust of politics and political institutions (or at least politicians). "Utmost transparency" has the potential to strengthen accountability and increase popular participation in the democratic processes. The report links this principle with the technical standards and practical steps that can be taken to ensure its full implementation – or that can effectively limit access. As the authors of this study point out, there is a difference between the somewhat legalistic right of access to information ("freedom of information") on an ad hoc, on-request basis, and general openness and transparency. The former right allows entrance to an in-principle closed building, or to closed rooms within closed buildings, on request, subject to limitations; the latter removes entire walls and allows daylight to permeate to all corners. Parliament's duty to ensure "utmost transparency" clearly demands the latter rather than just the former.

In order to elucidate the relevant requirements, the authors provide excellent overviews of a large number of widely diverging and complex issues relevant to the topic: human rights law, EU law ranging from the Charter of Fundamental Rights to EC directives on public sector information and Commission decisions on data re-use, copyright, patents and protection of databases, principles of good governance, transparency standards relating to the environment (Aarhus), the G8 Open Data Charter and others on the mainly legal and governance standards side; the European Interoperability Framework (versions 1 and 2), open standards (as variously formally defined) and "semi-formal" RFCs, FOSS and email system requirements on the more practical, technical side. They have looked at relevant rules and practices in a range of countries including India, Sweden and the UK.

Crucially, the authors have managed to draw on all these sources to indicate clearly what should be done in practical, technical terms by the officials managing the information and IT systems relating to the work of the European Parliament to truly and fully achieve the legal requirement of "utmost transparency". This report will become a major point of reference for the debates on those steps. It is to be greatly commended for having taken the issue seriously (rather than just rely on all-too-easy slogans or political rallying cries). It cannot be dismissed by those with the power to take action. Rather, it should lead to Parliament clearly instructing its civil servants to take the steps needed to achieve the "utmost transparency" required of the institution. The recommendations should be fully implemented: that will enhance democracy, accountability and public participation, and trust in the Union at a time of doubt and insecurity.

London 15 November 2014.

Scope and method of analysis

This study arises from a proposal by the Greens/EFA, backed by two Plenary decisions, that the European Parliament investigates its own transparency obligations under its Rules of Procedure with regard to Free Software and Open Standards.[1]

The scope is therefore to verify whether, in general or in single areas, the principle of openness and the right of access to information mandates, and if so to what extent, the use of Free Software

1 "The Greens/EFA group in the European Parliament has commissioned a study into the implications of Rule 103 of the European Parliament's Rules of Procedure for the Parliament's decisions, policies, procedures, etc., with regard to Free Software and Open Standards [...] The study will assess whether, and if so how and to what extent, Rule 103 can inform the EP's ICT decisions, policies, procedures, etc. (including procurement decisions) with regard to Free Software and Open Standards." From "Greens/EFA commissions "Rule 103" study" http://icg.greens-efa.eu/pipermail/hub/2014-May/000130.html

and Open Standards, or what kind of preference towards it, if any.

Distilling general principles and propositions into practical guidelines is largely a matter of political decisions, therefore extraneous to this study. Conversely, the aim of this study is to bridge the gap between an overly laconic provision and the strategical administration of the IT, by utilising the available information in different trajectories.

The first trajectory is top-down, and analyses the principle of openness from a constitutional point of view. This aims to provide the cardinal points to the rest of the analysis.

The second trajectory is lateral, and aims to retrieve useful material from neighbouring areas, both in terms of policy and legislation, that could be useful to define a sort of *"acquis"* in terms of openness of EU bodies and institutions, where available and relevant.

The third trajectory is bottom-up, and analyses single areas of IT, which have been discussed in the recent past or can be exemplary, their possible failures and shortcomings in terms of openness and possible actions and directions to solve the situation.

Finally, as the study analyses the inference between the principle of openness and Free Software and Open Standards, a short description of what they are cannot be avoided.

Although similar in concept, this study only addresses the adjacent area of "Right to Access" or "Freedom of Information" in so far it is relevant for the understanding of the Principle of Openness in EU law, and its possible requirements for the discussion on Free Software and Open Standards. Access to document procedures are laid down the Regulation (EC) No 1049/2001[2] and by Rule 116[3], and are not as such material to this study. Undoubtedly the right of access to documents is an useful complement to openness as it ensures that the openness is achieved in full, by providing means to take an active role in disclosing facts and documents that are withheld from public view and should not. However, the access to documents mechanism proceeds by formal questions and answers, whereas the openness is evidently a more dynamic and holistic process that does not depend on legal actions and requests by individuals.

Therefore, the right to access to documents as such is only treated insofar as it provides useful information for the application of the principle of openness in practice on the debate on Free Software and Open Standards.

The Constitutional Principle of Openness under European Law

Parliament has Imposed upon Itself a Commitment to Conduct its Activities with the Utmost Transparency

Rule 115 of the Rules of Procedure of the European Parliament provides that:

> *Parliament shall ensure that its activities are conducted with the utmost transparency, in*

2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001R1049&from=EN

3 Rules of Procedure of the European Parliament, TITLE IV : TRANSPARENCY OF BUSINESS, Rule 116 : Public access to documents http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140701+RULE-116+DOC+XML+V0//EN&language=EN&navigationBar=YES

> *accordance with the second paragraph of Article 1 of the Treaty on European Union, Article 15 of the Treaty on the Functioning of the European Union and Article 42 of the Charter of Fundamental Rights of the European Union.*[4]

The European Parliament has been a champion in promoting not only openness of the legislative process and the access to legislative documents, but also that the EU Courts should accept that openness constitutes a general principle of EU law, and that the right to information is as such a fundamental human right. In Netherlands v Council, the European Parliament argued as follows:

> *In this connection, the Parliament avers that, whilst it is competent for the institutions to adopt appropriate measures for their internal organization with a view to ensuring their sound operation and the proper conduct of their procedures, the principle of openness of the legislative process and the access to legislative documents entailed thereby constitute essential requirements of democracy and therefore cannot be treated as organizational matters purely internal to the institutions. In this context, the Parliament adverts to the democratic nature of the Community legal order. It maintains moreover that the requirement for openness constitutes a general principle common to the constitutional traditions of the Member States which is also enshrined in Community law. Lastly, it argues that the right to information, of which access to documents constitutes the corollary, is a fundamental human right recognized by various international instruments.*[5]

In its judgement, the Court stressed that the domestic legislation of most Member States enshrines, in a general manner, the public's right of access to documents held by public authorities as a constitutional or legislative principle. The Court found that this trend "discloses a progressive affirmation of individuals' right of access to documents held by public authorities" and that accordingly, the Council deemed it necessary to amend the rules governing its internal organisation, which had hitherto been based on the principle of confidentiality. The Court added that, "so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration".

While dated, this analysis is still interesting for at least three reasons. First, the legal doctrine is divided as to whether or not it is possible to interpret the Netherlands v Council judgment as authority for the existence of a fundamental right of access to documents.[6] Second, when interpreting Rule 115, the relevant legal question is whether or not internal rules of the institutions may confer a substantive legal right to access to documents, to information, and/or to data on EU citizens. Third, the Court clearly links the issue of public access to documents to the nascent principle of good administration.

4 Rules of Procedure of the European Parliament, TITLE IV : TRANSPARENCY OF BUSINESS, Rule 115 : Transparency of Parliament's activities http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20140701+RULE-115+DOC+XML+V0//EN&language=EN&navigationBar=YES

5 Case C-58/94 Netherlands v Council [1996] ECLI:EU:C:1996:171 at para 18.

6 See in that regard, for example, Chiti, E., "Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of the European Union", European Public Law, Vol. 2, No 4, 1996, p. 536 et seq.; Lafay, F., "L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire", RTD eur. 33(1), January-March 1997, p. 37 et seq.; Bradley, K. St. C., "La transparence de l'Union européenne: une évidence ou un trompe-l'oeil?", Cahier de droit européen, 3-4, 1999, p. 283 et seq.; Travers, N., "Access to Documents in Community law: on the road to a European participatory democracy", The Irish Jurist, Vol. 35, 2000, p. 164 et seq. For a different interpretation, see, for example, Ragnemalm, H., "Démocratie et transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires", Scritti in onore di G. F. Mancini, p. 809 et seq., Öberg, U., EU Citizen's Right to Know: The Improbable Adoption of a European Freedom of Information Act, Cambridge Yearbook of European Legal Studies, Vol. 2, 1999, s. 303-328

According to the case law of the Court, the purpose of the Community institutions' internal Rules of Procedure is to organise the internal functioning of its services in the interests of good administration. The essential purpose of such rules, particularly those with regard to the organisation of deliberations and the adoption of decisions, is to ensure the smooth conduct of the decision-making procedure. It follows that natural or legal persons may normally not rely on an alleged breach of such rules, as they are not intended to ensure protection for individuals.

Therefore, internal rules cannot be regarded as measures conferring on European citizens a substantive right of access to documents, to information, or to data held by the EU institutions. They are not intended to vest in European citizens a formal "right to know" what is going on within the European institutions, which is a prerequisite in a participatory democracy, where decisions are taken "as closely as possible to the citizen". In the absence of general rules on the right of public access to information or to data held by the EU institutions, European citizens' "right to know" and to participate "as closely as possible" in the decision-making process must therefore be found elsewhere.

As a preliminary conclusion, Rule 115 does not in itself confer any rights on European citizens. Nevertheless, as compliance with internal Rules of Procedure may constitute an essential procedural requirement, and may in some circumstances have legal effects vis-à-vis third parties, their breach can give rise to an action for annulment before the EU Courts. Indeed, procedural rules laid down in Rule 115 constitutes an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure thereby vitiated.

In the light of the Court's judgment in European Parliament v. Council, that rule is an expression of the democratic principles on which the European Union is founded. In particular, the Court has already stated that the Parliament's involvement in the decision-making process is the reflection, at the EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.[7] Not only has Parliament imposed upon itself that it shall ensure that its activities are conducted with the utmost transparency, but its actions shall also conform with the Principle of Openness enshrined in the Treaties and in the Charter, and the Right of Access to Information in Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The Principle of Openness and the Right of Access to Information: A Basis for Imposing Free Software and Open Standards ?

The first real step towards allowing the public a right of access to documents held by the Community institutions dates back to 7 February 1992 when the Member States signed the Final Act to the Maastricht Treaty.[8]. In Declaration No. 17 to that Act, the Member States pointed to the close connection between the transparency of the decision-making process and the democratic nature of the Community institutions. Nowadays, the principle of openness in European Union law has solid roots, as the very text of the Rule 115 makes clear, in the fundamental Treaties of the European Union.

7 Judgement European Parliament v. Council EU:C:2014:2025, paragraph 80-81
8 Broberg, M., Access to documents: a general principle of Community law?, European Law Review (2002), pp. 196, 197

The Treaties

Article 1(2) and Article 10(3) of the Treaty establishing the European Union (TEU) states that in the European Union decisions are to be taken as "openly as possible" and *as closely as possible* to the citizen.

In this respect, Article 15(1) TFEU states that in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies are to conduct their work as openly as possible. According to the first subparagraph of Article 15(3) TFEU, any citizen of the Union, and any natural or legal person residing in or having its registered office in a Member State, is to have a right of access to documents of the Union's institutions, bodies, offices, and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with that paragraph. Moreover, according to the second subparagraph of Article 15(3), the general principles and limits on grounds of public or private interest governing this right of access to documents are to be determined by the European Parliament and the Council of the European Union, by means of regulations, acting in accordance with the ordinary legislative procedure. In accordance with the third subparagraph of Article 15(3) TFEU, each institution, body, office or agency is to ensure that its proceedings are transparent and is to elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph of Article 15(3) TFEU.

It should be noted at the outset that the General Court has held that Article 1, para. 2 EU and Article 255 EC did not have direct effect, and could therefore not form the basis of a request for disclosure of a document of an institution. The first provision was not regarded as "clear"[9], and the second was not considered to lay down an unconditional obligation, since its implementation was held to be dependent on the adoption of subsequent measures. [10]

In a different strand of its case-law, the General Court has referred to the "principle of the right to information" [11], and to the "principle of transparency" [12], in support of a finding that the previous internal rules of access to documents of the institutions must be interpreted in the light of the "principle of the right to information" and the principle of proportionality. The issue has obviously divided the General Court, which has also stated:

> *For the purpose of applying Article 4 of Regulation EC No 1049/2001 regarding public access to European Parliament, Council and Commission documents, the concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual.*[13]

To date, no clear guidance on this issue has been provided by the Court. In Council v Hautala, the Court did not find it necessary to rule on "the existence of a principle of the right to information" in European Union law.[14]

Based on this lack of clarity in the case-law of the EU Courts, in Pitsiorlas v Council and ECB, the ECB contested the very existence in EU law of a fundamental legal principle which provides for a

9 Within the meaning of the judgement in Case 26/62 Van Gend en Loos [1963] ECR 1
10 Case T-191/99 Petrie and Others v Commission [2001] ECR II-3677, paragraph 34-38 and Joined Cases T-3/00 and T-337/04 Pitsiorlas v Council and ECB [2007] ECR II-4779
11 Case T-14/98 Hautala v Council [1999] ECR II-2489, paragraph 87
12 Case T-211/00 Kuijer v Council [2002] ECR II-485, paragraph 52
13 Case T 264/04 WWF European Policy Programme v Council [2007] ECR II-911 at para 76.
14 Case C-353/99 P Council v Hautala [2001] ECR I-9565, paragraph 31

general right of access to its documents and to those of the EU institutions. It argued that although arguments based on such a principle have been raised on numerous occasions before the EU judicature, none of the EU Courts has considered it appropriate to examine them.

In its judgement, the General Court held that "even supposing that the right of access to the documents held by the Community public authorities, including the ECB, may be regarded as a fundamental right protected by the Community legal order as a general principle of law", the plea of illegality in respect of Article 23.3 of the ECB Rules of Procedure, based on the alleged infringement of such a principle, could not be upheld. The General Court pointed out that fundamental rights cannot be understood as "unfettered prerogatives" and that it is "legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched" [15]. The General Court held that, as regards the right of access to documents, reasons related to the protection of the public interest or a private interest may legitimately restrict that right.[16]

Be that as it may. As Advocate General Poiares Maduro has correctly pointed out, the fact remains that henceforth the existence of the right of access to documents of the institutions is no longer based on internal measures adopted by the institutions, with which they are bound to comply, or even on Regulation 1049/2001, but on a provision of constitutional import.[17] The Court has in this regard clarified that the "principle of openness" stated in a general manner in the second paragraph of Article 1 TEU is "crystallised" by Regulation 1049/2001.[18] An alleged infringement of the second paragraph of Article 1 TEU is therefore in the Court's view not distinct from a plea alleging a wrongful application of the exceptions referred to in Regulation No 1049/2001.

The existence of a "principle of openness" is confirmed by Art. 15 of the Treaty on the Functioning of the European Union, which states:

> *In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. [emphasis added]*

Charter of Fundamental Rights of the European Union

Similarly, Article 42 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (‘Charter of Fundamental Rights’) also acknowledges this right:

> *Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.*

Article 42 of the Charter of Fundamental Rights of the European Union (‘the Charter’), Article 15(3) TFEU and Article 2(1) of Regulation No 1049/2001 thereby establish a right of access to documents of the institutions. In the context of the European Parliament documents, it should be noted that Article 4 of the Statute for Members of the European Parliament[19] provides that documents and electronic records which a Member has received, drafted or sent are not to be treated as Parliament documents unless they have been tabled in accordance with the Rules of Procedure. As Advocate general Kokkot has noted, the documents relating to a legislative

15 Case 4/73 Nold v Commission [1974] ECR 491, paragraph 14
16 Pitsiorlas v Council and ECB, paragraph 221-223
17 Sweden v Commission, C-64/05 P, EU:C:2007:802
18 Commission v Agrofert Holding EU:C:2012:394, paragraph 88
19 OJ 2005 L 262, p. 1

procedure which are in the possession of a rapporteur must in principle be regarded as being in the possession of the Parliament. It will at some point in time be necessary to decide whether Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union allow such documents to be excluded from the right of access in the future.[20]

Moreover, Art. 10 TEU regarding the principle of democracy (especially Article 10(3), echoes the second paragraph of Article 1) and Article 15 TFEU, dealing with good governance, openness, transparency and access to documents.

Article 10 in the European Convention of Human Rights

The development of the principle of openness in EU law has been accompanied by a parallel development of the case law of the European Court of Human Rights. In Guerra and Others v. Italy, the Strasbourg Court held that freedom to receive information under Art. 10 of the ECHR merely prohibited a State from restricting a person from receiving information that others wished or might be willing to impart to him. It states that freedom could not be construed as imposing on a State, in the circumstances of that case, positive obligations to collect and disseminate information of its own motion [21] Similarly, Társaság a Szabadságjogokért concerned a request for access to information by a non-governmental organisation for the purposes of contributing to public debate. Here, the Court noted that it had recently advanced towards a broader interpretation of the notion of the "freedom to receive information" and thereby towards the recognition of a right of access to information.[22]

In a recent judgment of 25 June 2013, for the case of Youth Initiative for Human Rights v Serbia,[23], the Court unanimously recalled, in its reasoning on admissibility, that the notion of "freedom to receive information" embraces a "right of access to information". The judgment has, in our view correctly, been interpreted as having "established implicitly the right of access", in that the notion of "freedom to receive information" embraces a right of access to information.[24]

In a concurring opinion, judges Sajó and Vučinić highlighted the general need to interpret Article 10 in conformity with developments in international law regarding freedom of information, which entails access to information held by public bodies referring, in particular, to Human Rights Committee, General Comment No. 34 [25].

The Human Rights Committee has in turn stressed both the proactive and the reactive dimensions of the freedom of expression and freedom of information. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source, and the date of production. As the Committee has observed in its General Comment No. 16, regarding Article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes.

20 Opinion Afton Chemical EU:C:2010:258
21 See Guerra and Others v. Italy, 19 February 1998, § 53, Reports of Judgments and Decisions 1998-I).
22 Társaság a Szabadságjogokért v. Hungary, no. 37374/05, § 44, 14 April 2009.
23 Application no. 48135/06, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-120955
24 European Parliament Policy Department C on request by the Committee on Civil Liberties, Justice and Home Affairs (LIBE): Openness, transparency and access to documents and information in the European Union, available at http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493035/IPOL-LIBE_NT%282013%29493035_EN.pdf ; see also Dirk Voorhoof, Article 10 of the Convention includes the right of access to data held by an intelligence agency, accessible via http://strasbourgobservers.com/2013/07/08/article-10-of-the-convention-includes-the-right-of-access-to-data-held-by-intelligence-agency/
25 Document CCPR/C/GC/34 of 12 September 2011, §§ 18, 3, 15)

Paragraph 3 of the General Comment No. 34 provides as follows:

> *Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.*

Moreover, to give effect to the right of access to information, States Parties should proactively put in the public domain government information of public interest. States parties should make every effort to ensure easy, prompt, effective, and practical access to such information. In regard to freedom of expression, the Committee has linked it with the developments in information and communication technologies (paragraph 15):

> *States Parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.*

The principle of openness and the right of access to information are directed – among other things – at ensuring that decisions are taken as openly as possible and closely as possible to the citizens, in other words, it is a basic democratic tenet, where citizens must see what happens within the institutions (which is one of the means through which accountability of the institutions and their agents is ensured) *and* the institutions have an obligation to at least listen to what citizens have to say (in other words, participation and representation of interests). [26].

Legislative Openness

Ever since the Treaty of Amsterdam the concept of "the legislative" has had a place in the language of the EU Treaties. Under the second subparagraph of Article 207(3) EC the Council was already required to define "the cases in which it is to be regarded as acting in its legislative capacity" to allow the right of access to documents under Article 255(1) EC to be exercised.

In the realm of secondary legislation, Recital 6 in the Preamble to Regulation No 1049/2001 states that "[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity." The Treaty of Amsterdam enshrined both the right of access to documents of the institutions, on the one hand, and referred to the special consideration to be given to the 'legislative capacity' of the Council, on the other. It has been argued that this indicated that the appropriate context for exercising the right of access was where the Council was acting in a "legislative capacity", thus acknowledging the close relationship that, in principle, exists between legislative procedures and the principles of openness and transparency [27].

On a comparative note, and despite the differences that may exist between national legislation and EU "legislation", or between Member State legislatures and the EU "legislature", the "legislative procedure" by which the Council and the European Parliament are bound, is conceptually very close to the national "legislative procedure", speaking from the point of view of its underlying purpose and thus the principles on which it must be based. In the end, they have in common the

26 Interesting a reading is the work is the work Schauer, Frederick (2011). "Transparency in Three Dimensions". *University of Illinois Law Review* **2011** (4). pp. 1339–1358. Retrieved 2014-08-08. although in the US constitutional environment

27 Opinion of Advocate General Cruz Villalón in Case C-280/11 P Council v Access Info Europe, EU:C:2013:325

need to satisfy the imperative requirements of democratic legitimacy.

As the Advocate General correctly pointed out in Case C-280/11 P Council v Access Info Europe:

> *'Legislating' is, by definition, a law-making activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, 'transparent'. Otherwise, it would not be possible to ascribe to 'law' the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict. In a representative democracy, it must be possible for citizens to find out about the legislative procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate.*
>
> *In the context of this public procedure, transparency therefore plays a key role that is somewhat different from its role in administrative procedures. While, in administrative procedures, transparency serves the very specific purpose of ensuring that the authorities are subject to the rule of law, in the legislative procedure it serves the purpose of legitimising the law itself and with it the legal order as a whole.*[28]

In its judgment in Sweden and Turco v Council,[29] the Court held that it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming from increased openness. It states that when the Council is acting in its legislative capacity, it is particularly relevant that openness be considered, given that it enables citizens to participate more closely in the decision-making process, guarantees that the administration enjoys greater legitimacy, and is more effective and more accountable to the citizen in a democratic system.

The following Recitals in the Preamble to Regulation No 1049/2001 are relevant in this respect:

> *(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.*
>
> *(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.*
>
> *(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.*

The Court has confirmed that the considerations of legislative openness are clearly of particular relevance where the Council is acting in its legislative capacity: "Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic

28 Opinion of Advocate General Cruz Villalón in Case C-280/11 P Council v Access Info Europe, EU:C:2013:325
29 (EU:C:2008:374)

rights".[30]

The theoretical underpinnings of the Principle of Openness and of legislative openness has thus acquired a solid foundation in the Treaties and in the case-law of the court. However, due to the eternal tide wave and purported conflict between Openness and Efficiency, Parliament has in practice struggled to live up to the Principle of Openness by resorting to informal decision-making procedures. As Nikoleta Yordanova has correctly noted:

> *Traditionally, the parliamentary committees have offered important venues for political involvement of extra-parliamentary actors due to the openness and transparency of their meetings. In the past fifteen years, however, the EP has been resorting ever more often to informal decision-making, whereby the parliamentary decisions are not reached internally following deliberations and debate in committee and plenary but in secluded trilogue meetings of limited number of representatives of the three EU legislative institutions – the EP, the Council of Ministers and the European Commission.*
>
> *[...]*
>
> *The implications of the switch to an informal mode of legislating for representation in the EP are twofold – decreased input and, potentially also, output legitimacy. Specifically, the decrease in committee influence has curtailed the channels of representation of interest groups to affect decision-making, depriving them of an effective tool to monitor and shape the legislative process and outcomes by raising timely demands. A possible implication of this is diminished receptiveness of legislators to constituents' interests. Moreover, the lack of transparency of the secluded inter-institutional meetings has limited the ability of constituents to monitor their representatives' policy bargaining, positions and the concessions, and, consequently, to evaluate how responsive legislators are to their preferences and demands.*[31]

The Need for Lawmakers to Deliberate in Private

The European Union, the Member States and 19 other States are parties to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Convention'), which entered into force on 30 October 2001. The Convention is based on three 'pillars' – access to information, public participation, and access to justice. Its preamble includes the following recitals:

> *Recognising that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,*
>
> *Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,*
>
> *Recognising the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,*

Mirroring Article 2 of the Convention, the second sentence of Article 2(2) in Directive 2003/4/EC

30 Sweden and Turco v Council, paragraph 46 and Council of the European Union v Access Info Europe, paragraph 00

31 Nikoleta Yordanova, Collusion in Bicameral EU Decision-making Efficiency at the expense of transparency and representation?, Paper prepared for the Conference: New Trends in Political Representation, available at http://nikoletayordanova.net/wp-content/uploads/exeter.pdf

on public access to environmental information[32] allows Member States to exclude from the scope of the Directive bodies otherwise falling within the definition of "Public authority", "when acting in a judicial or legislative capacity".

The Convention was approved on behalf of the European Community by Council Decision 2005/370,[33] the annex to which contains a declaration by the European Community which reads, in so far as relevant, as follows:

> *In relation to Article 9 of the Aarhus Convention the European Community invites Parties to the Convention to take note of Article 2(2) and Article 6 of [the Directive]. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.*
>
> *Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2(2) and Article 6 of [the Directive].*

In ratifying the Convention on 20 May 2005, Sweden lodged a reservation which, in so far as is relevant, reads as follows:

> *Sweden lodges a reservation in relation to Article 9.1 with regard to access to a review procedure before a court of law of decisions taken by the Parliament, the Government and Ministers on issues involving the release of official documents.*[34]

In accordance with Directive 2003/4/EC, public authorities must in principle be required to make environmental information held by or for them available to any applicant at his request. However, the Directive permits Member States to exclude public bodies acting in a legislative capacity from the definition of a 'public authority'. In addition, access may be refused to certain types of document, or if disclosure would adversely affect the confidentiality of proceedings of authorities where such confidentiality is provided for by law.

In her opinion in Flachglas Torgau, AG Sharpstone summarised the dilemma as follows:

> *The performance of both judicial and legislative functions could be impaired if information of all kinds concerning each and every stage of the process – analysing the relevant issues and data, deriving conclusions from that analysis and formulating a final decision – could be demanded of right at all times by any member of the public. It seems reasonable to assume that considerations of that kind were in the minds of those who initially drafted the first of the instruments concerned and have remained, albeit implicitly, in the minds of those who have participated in the drafting of the subsequent instruments.*
>
> *Yet it is by no means desirable, nor would it appear consistent with the overall thrust of the Convention or the Directive, for legislative or judicial activity to take place in impenetrable secrecy. It is generally considered necessary, in order to ensure the rule of law and democratic government, for both courts of law and legislative assemblies to*

32 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) ('the Directive')

33 Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1)

34 Sweden's reservation is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en#EndDec

> *operate in the presence of the public (or at least of the media as an intermediary) other than in wholly exceptional circumstances – and it is, moreover, generally accepted that such circumstances are more common in the course of judicial than of legislative activity. Other than in wholly exceptional circumstances, therefore, in neither case should decisions be taken on the basis of facts, or for reasons, which are concealed from citizens.*[35]

Conduct of Business as "Openly as Possible" or with the "Utmost Transparency"

Rule 115 states that "Parliament shall ensure that its activities are conducted with the utmost transparency", which on a textual interpretation goes beyond the more relative principle of openness enshrined in Article 1 TEU, whereby “decisions are taken as openly as possible”. Indeed, it strikes that Rule 115 uses the word ***utmost***, which is a far stronger word than "as openly as possible" used for other institutions:

> ut·most
>
> adj.
>
> *1. Being or situated at the most distant limit or point; farthest: the utmost tip of the peninsula.*
>
> *2. Of the highest or greatest degree, amount, or intensity; most extreme: a matter of the utmost importance.*
>
> n.
>
> *The greatest possible amount, degree, or extent; the maximum: worked every day to the utmost of her abilities.*[36]

Therefore it is clear that there is no effort to spare in order to bring the "utmost" openness or transparency, in other words, openness to the most extreme consequences. Parliament has in this respect imposed upon itself a far higher standard to meet in order to ensure openness than any other institution.

This means that the balancing test at hand should at least equal, and may even exceed, the one laid down in the case-law of the Court under the Principle of Openness. To this effect, the Court has held that assessing whether or not information is confidential therefore requires that the legitimate interests opposing disclosure be weighed against the public interest in the activities of the Community institutions taking place as openly as possible[37].

A similar construction has been adopted by the Court as regards access to documents. The Court has held that since they derogate from the "principle of the widest possible public access to documents", exceptions to that principle must be interpreted and applied strictly[38]. In Council v In 't Veld, access was requested to an opinion of the Council’s Legal Service, issued in the context of the adoption of the Council’s decision authorising the opening of negotiations, on behalf of the European Union, in respect of the proposed agreement. Having established the "principle of the

35 Opinion Flachglas Torgau EU:C:2011:413

36 http://www.tfd.com/utmost American Heritage® Dictionary of the English Language, Fourth Edition copyright ©2000 by Houghton Mifflin Company. As reported by The Free Dictionary

37 General Court Case T-237/05 Éditions Jacob v Commission [2010] ECR II-2245, citing, to that effect, Bank Austria Creditanstalt v Commission, paragraph 71, and Case T-474/04 Pergan Hilfsstoffe für industrielle Prozesse v Commission [2007] ECR II-4225, paragraphs 63 to 66.

38 Council v In 't Veld, EU:C:2014:2039, paragraph 48, Council v Access Info Europe, EU:C:2013:671, paragraph 30 and the case-law cited.

widest possible public access to documents", the Court held:

> *51 However, the mere fact that a document concerns an interest protected by an exception to the right of access laid down in Article 4 of Regulation No 1049/2001 is not sufficient to justify the application of that provision (see, to that effect, Commission v Éditions Odile Jacob, C-404/10 P, EU:C:2012:393, paragraph 116).*
>
> *52 Indeed, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, first explain how disclosure of that document could specifically and actually undermine the interest protected by the exception — among those provided for in Article 4 of Regulation No 1049/2001 — upon which it is relying. In addition, the risk of the interest being undermined must be reasonably foreseeable and must not be purely hypothetical (Council v Access Info Europe, EU:C:2013:671, paragraph 31 and the case-law cited).*
>
> *53 Moreover, if the institution applies one of the exceptions provided for in Article 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having regard to the advantages of increased openness, as described in recital 2 to Regulation No 1049/2001, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (Council v Access Info Europe, EU:C:2013:671, paragraph 32 and the case-law cited).*[39]

In the same vein, the European Ombudsman has recognised that the wording and purpose of Articles 11 and 12 of Regulation 1049/2001 do not imply an obligation on Parliament to have, in its public register of documents, a reference to each and every document it holds. However, the Ombudsman found that Parliament should certainly interpret Articles 11 and 12 of Regulation 1049/2001 in a manner which allows the public to obtain "as complete a picture as possible" of how Parliament carries out its core tasks. Documents which relate to these core tasks should therefore, as far as possible, be recorded in Parliament's public register of documents. [40]

Against this background, any derogations from the Parliament's Rule 115 that "its activities are conducted with the utmost transparency" must be interpreted strictly, and in the light of the Court's case law on the Principle of Openness and the right of access to documents.

It is also clear that Rule 115 section 1 does not just refer to the fact that the works of the Parliament must be open and public. This is a separate concept, it cannot be a replacement for openness, as it is dealt with by different provisions, e.g., section 2 of Rule 115:

> *Debates in Parliament shall be public.*

Therefore it is safe to conclude that simply the publicity of the works is not sufficient. On the other hand, it is evident that those parts that need to be non-public shall be subtracted from the principle of openness, but this shall be an exception to the rule.

It should be noted that one of the open issues during the negotiations in the Council on the reform of regulation 1049/2001, is whether some reforms are needed to comply with the Treaty of Lisbon, which obliges the EU institutions to take decisions “as openly and as closely as possible to the citizen” and which requires a transparent legislative process. As has been The European Charter of

39 C-350/12 P, Council v In 't Veld, ECLI:EU:C:2014:2039

40 Decision of the European Ombudsman closing the inquiry into complaint 262/2012/OV against the European Parliament, available at http://www.ombudsman.europa.eu/cases/decision.faces/en/57773/html.bookmark

Fundamental Rights also now recognises the right of access to EU documents "whatever their medium", as a fundamental human right. At the very least the Treaties extend the scope of the right of access to all EU bodies and it is not clear whether this requires a legislative amendment to do away with current discrepancies such as different time frames for different EU bodies.

Neighbouring concepts

Re-use of Public Sector Information

The Directive 2003/98/EC on the re-use of public sector information [41] as amended by Directive 2013/ 37/EU [42], also known as the "PSI Directive" [43], establishes a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of the Member States. Article 2(4) of the PSI Directive defines re-use as "the use by persons or legal entities of documents held by public sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced. Exchange of documents between public sector bodies purely in pursuit of their public tasks does not constitute re-use".

Article 3 of the PSI Directive entitled 'General principle' states that Member States shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable for commercial or non-commercial purposes in accordance with the conditions set out in in the Directive.

Recital 9 clarifies that the definition of "document" is not intended to cover computer programmes. To facilitate re-use, public sector bodies should make their own documents available in a format which, as far as possible and appropriate, is not dependent on the use of specific software. Where possible and appropriate, public sector bodies should take into account the possibilities for the re-use of documents by and for people with disabilities.

In recital 16, the PSI Directive establishes a link between re-use of public sector information and the "right to knowledge" in the following terms:

> *Making public all generally available documents held by the public sector - concerning not only the political process but also the legal and administrative process - is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy. This objective is applicable to institutions at every level, be it local, national or international.*

The PSI Directive does not contain an obligation to allow re-use of documents, and the decision whether or not to authorise re-use remains with the Member States or the public sector body concerned. It applies to documents that are made accessible for re-use when public sector bodies license, sell, disseminate, exchange or give out information. To avoid cross-subsidies, re-use includes further use of documents within the organisation itself for activities falling outside the scope of its public tasks. Activities falling outside the public task will typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market.

41 Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-utilisation of public sector information (OJ 2003 L 345, p. 90)

42 Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information (OJ L 175, 27.6.2013 p. 1-8)

43 In the remainder of this section, by using "PSI Directive" we make reference to the amended directive.

In Recital 9, the PSI Directive purports to build on the existing access regimes in the Member States and does not change the national rules for access to documents. It does not apply in cases in which citizens or companies can, under the relevant access regime, only obtain a document if they can prove a particular interest. At Community level, Articles 41 (right to good administration) and 42 of the Charter of Fundamental Rights of the European Union recognise the right of any citizen of the Union and any natural or legal person residing or having its registered office in a Member State to have access to European Parliament, Council and Commission documents. Public sector bodies should be encouraged to make available for re-use any documents held by them. Public sector bodies should promote and encourage re-use of documents, including official texts of a legislative and administrative nature in those cases where the public sector body has the right to authorise their re-use.

An addition to Article 2 of the PSI Directive, introduced by Directive 2013/37/EU [44], provides a number of useful definitions for the purpose of this study, since the European legislator has made an attempt to define open format and open standards as follows:

> *6. 'machine-readable format' means a file format structured so that software applications can easily identify, recognize and extract specific data, including individual statements of fact, and their internal structure;*
>
> *7. 'open format' means a file format that is platform-independent and made available to the public without any restriction that impedes the re-use of documents;*
>
> *8. 'formal open standard' means a standard which has been laid down in written form, detailing specifications for the requirements on how to ensure software interoperability;*

Under the new article 5.1 on available formats, public sector bodies shall make their documents available in any pre-existing format or language, and, where possible and appropriate, in open and machine-readable format together with their metadata. Both the format and the metadata should, in so far as possible, comply with formal open standards. However, this does not imply an obligation for public sector bodies to create or adapt documents or provide extracts in order to comply with that obligation where this would involve disproportionate effort, going beyond a simple operation.

Article 11 of the PSI Directive provides a prohibition of exclusive arrangements. Under Article 11.1, the re-use of documents shall be open to all potential actors in the market, even if one or more market players already exploit added-value products based on these documents. Contracts or other arrangements between the public sector bodies holding the documents and third parties shall not grant exclusive rights. Under Article 11.2 where an exclusive right is necessary for the provision of a service in the public interest, the validity of the reason for granting such an exclusive right shall be subject to regular review, and shall, in any event, be reviewed every three years. The exclusive arrangements established shall be transparent and made public.

The G8 Open Data Charter

In June 2013, the EU endorsed the G8 Open Data Charter and, with other G8 members, committed to implementing a number of open data activities in the G8 members' Collective Action Plan. Commitment 1 of the Collective Action Plan required each member to publish by October 2013 details of how they would implement the Open Data Charter according to their individual national frameworks. In the EU implementation of the G8 Open Data Charter, it is stressed that compliance with the G8 Open Data Charter and para. 47 of the June 2013 G8 communique is fully consistent

44 See note above

with existing EU policy. Particular reference is in particular made to "the many initiatives already adopted at EU level, including the revised Directive on the re-use of public sector information, the EU Open Data Portal and the new Commission rules on the re-use of its own documents".

In its self assessment, the European Union stressed that it "has for years been stressing the goal of opening up data as a resource for innovative products and services and as a means of addressing societal challenges and fostering government transparency. Indeed, better use of data, including government data, can help to power the economy, serving as a basis for a wide range of information products and services and improving the efficiency of the public sector and of different segments of industry. The European Union aims to be at the forefront of public administrations in terms of openness in relation to its own documents." It is noteworthy that Open Data within the European Union is first and foremost seen as "a resource for innovative products and services" with economic potential, and only seem to regard Open Data to hold a secondary function in fostering Open Government.

The challenges identified by the EU for making further progress towards the openness of information resources were considered mainly practical and technical, namely:

- *making data available in an open format;*
- *enabling semantic interoperability;*
- *ensuring quality, documentation and where appropriate reconciliation across different data sources;*
- *implementing software solutions allowing easy management, publication or visualisation of datasets;*
- *simplifying clearance of intellectual property rights.*[45]

The EU has furthermore committed to promoting the application of the principles of the G8 Open Data Charter to all EU Member States within the context of a range of ongoing activities, in particular through ensuring the implementation of Directive 2013/37/EU of 26 June 2013 revising Directive 2003/98/EC on the re-use of public sector information (or the PSI Directive as defined in the previous section) which, according to the EU:

- *ensures that publicly accessible content can be reused in compliance with the Directive;*
- *encourages free provision of public sector information (government data) for reuse and lowering the cost of reuse of government data by introducing a new maximum ceiling for reuse based on marginal costs;*
- *expands the scope of application of the EU Directive to certain cultural institutions;*
- *defines 'machine-readable format' and 'open format' and encouraging the use of those formats;*[46]

Re-use of EU Institution documents

As a rule, the European Commission has allowed re-use of its documents for commercial and non-

45 EU implementation of the G8 Open Data Charter, Open data context, page 2 http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=3489

46 EU implementation of the G8 Open Data Charter, EU Commitment 4: Promoting the application of the principles of the G8 Open Data Charter in all 28 EU Member States, page 8 http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=3489

commercial purposes at no charge since 2006, adopting a first decision of 7 April 2006 on re-use of Commission documents[47]

According to the seventh recital of this decision, "An open re-use policy at the Commission will support new economic activity, lead to a wider use and spread of Community information, enhance the image of openness and transparency of the Institutions, and avoid unnecessary administrative burden for users and Commission services". Again, the underlying rationale of the decision was to "support new economic activity", and the ambition in fostering Open Government was reduced "enhance the image of openness and transparency" of the Institutions.

In 2011, the Commission engaged itself to work towards providing documents in machine-readable format, where possible and appropriate, and to set up an Open Data Portal to promote the accessibility and re-use of this information. In December 2012, the European Union Open Data Portal was launched and provides access to data held by the Commission and other EU institutions and bodies.[48]

Re-use of Public Sector Information does not necessarily ensure an Open Government

Obviously, the main purpose of the Public Sector Information Directive (PSI Directive) is to pave the way for a European information market. At their core, these rules are intended to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information.

As noted above, the European legislator's push for Open Data has been more driven by commercial purposes of data mining than in a quest of opening government to external scrutiny. In some cases the re-use of documents will take place without a licence being agreed. In other cases, a licence will be issued imposing conditions on the re-use by the licensee dealing with issues such as liability, the proper use of documents, guaranteeing non-alteration and the acknowledgement of source. If public sector bodies license documents for re-use, the licence conditions should be fair and transparent.

Nevertheless, in creating a private market for Public sector information can have unintended consequences. According to the directive, public sector bodies should respect competition rules when establishing the principles for re-use of documents avoiding as far as possible exclusive agreements between themselves and private partners. However, in order to provide a service of general economic interest, an exclusive right to re-use specific public sector documents may sometimes be necessary. This may be the case if no commercial publisher would publish the information without such an exclusive right.

On 18 March 2010, the Swedish Government presented its Bill (2009/10:175) on Public Administration for Democracy, Participation and Growth. One proposal contained in the Bill was for a law on re-use of documents emanating from Swedish public administration. On 3 June 2010, the Act (2010:566) on the re-use of public administration documents entered into force. The Swedish Agency for Public Management has therefore been assigned to survey the extent to which Swedish central and local government agencies (public sector bodies) have granted exclusive rights or arrangements of the kind referred to in Article 11 of the PSI Directive.

The survey shows that five central public sector bodies state that they have granted exclusive rights for one or more companies to re-use the respective bodies' documents. The questionnaire

47 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:107:0038:0041:EN:PDF
48 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:330:0039:0042:EN:PDF

and interviews implemented by the Agency for Public Management show that several changes have taken place over the past year in terms of phasing out exclusive rights, if any. The survey shows, moreover, that there are unclear points regarding how the notion of 'exclusive rights' (or 'arrangements') should be defined. Based on the responses to the Agency's questionnaire survey, we find wide-ranging perceptions of differences between licensing agreements, on the one hand, and exclusive rights on the other. According to the Agency, there is substantial uncertainty regarding how the term 'exclusive right' should be interpreted. The Swedish Agency for Public Management therefore draws the conclusion that it is imperative to define the terms 'licensing agreement' and 'exclusive right', and also to assist both central and local public sector bodies in their work of developing non-discriminatory licensing agreements.[49]

It should be noted that in March 2012, the Swedish Competition Authority closed an investigation with regard to a possible abuse of a dominant position by the Swedish Patent and Registration Office (SPRO) regarding its Trademark register. The Swedish Patent and Registration Office (SPRO) started to offer from 2010 free access to the Trademark register to the downstream end-user market. Customers on the upstream wholesale market were offered more detailed data in different formats (so-called “register lifted data”) for a one-time fee and then a yearly fee. Before 2010, SPRO had offered access to the database to end-users for a fee. The SPRO motivated the decision to eliminate the fee with that free access was within the public task assigned to it by the government. The complaining (incumbent) re-user alleged that it was likely it will be squeezed out of the market by SPRO offering a competing product for free.[50]. This case shows that the underlying economic rationale for the PSI Directive can actually run counter the stated objective of fostering an Open Government.

Does Openness mean "accessible"?

We submit that transparency should be measured having regard to not only the average person "without impairments", so to speak, but also with those who are for instance visually or hearing impaired. In other words, transparency also should take "accessibility" into account.

For web content a standard has been developed by W3C, which is the Web Content Accessibility Guidelines (WCAG)[51].

European Commission (EC) Mandate M 376 required the three main European standardisation bodies CEN, CENELEC and ETSI to harmonise and facilitate the public procurement of accessible information and communication technologies (ICT) products and services within Europe. [52]

Both of the mentioned standardisation rules have been mandated by some Member States[53]

49 Statskontoret, A survey of exclusive rights or arrangements (2010:21), available at http://www.statskontoret.se/in-english/publications/2010/a-survey-of-exclusive-rights-or-arrangements/.

50 Björn Lundqvist and Ylva Forsberg (Stockholm University), Marc de Vries (Citadel Consulting) and Mariateresa Maggiolino (Bocconi), LAPSI 2.0 – competition law issues position paper, available at http://www.lapsi-project.eu/sites/lapsi-project.eu/files/LAPSIcompetitionartikelDraftII-1.pdf; Elisabeth Eklund and Oscar Jansson, Lower fees for re-use of public sector information – the PSI Directive and cases from the Swedish Competition Authority, available at http://www.worldservicesgroup.com/publications.asp?action=article&artid=4792; see also Björn Lundqvist, Marc de Vries, Emma Linklater och Liisa Rajala Malmgren, Business Activity and Exclusive Right in the Swedish PSI Act, Swedish Competition Authority, Uppdragsforskningsrapport 2011:2, available at http://www.konkurrensverket.se/upload/Filer/Trycksaker/Rapporter/uppdragsforskning/forsk_rap_2011-2.pdf.

51 Web Content Accessibility Guidelines (WCAG)". Retrieved 16 October 2014.

52 "European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain (European Commission Standardization Mandate M 376, Phase 2)". Retrieved 16 October 2014.

53 Some information on the adoption of accessibility standards, a recent book is Buie, Elizabeth; Murray, Diane (2012).

The Commission reports that since January 2010, all new EUROPA websites have been created in compliance with WCAG 2.0, level AA success criteria.[54] and this includes the website of the European Parliament. [55]

However, "accessibility" seems to extend to much more than just web view, as the flow of information is certainly passing through means that go beyond the web and the Internet in general. There is, therefore, a wider need to ensure accessibility by allowing that the IT systems be interoperable and technology neutral, so that accessibility is ensured not only by providing accessible content, but by allowing any technology provider to ensure that they can build accessible tools using the content in whichever form it can be presented, and – as much as possible – to make tools to tackle specific problems for people with different impairments for whom the simple accessibility criteria are insufficient.

Does "accessible" mean (also) Free and Open?

If "transparency" here means "directly open, transparent and accessible to all the constituents" and not just to those directly involved in the Parliamentary works and interest-bearer, as a complement of democracy, openness shall be in principle brought to the farthest and least reachable corner of the Union where constituents have a chance of looking into how a particular matter has been dealt with by the Parliament and components thereof. An example of why openness is a requirement for transparency via accessibility has been provided in the previous chapter.

In an interconnected world this goal can be efficiently achieved by means of technology, in particular through telecommunication technology. This seems a sufficiently self-evident and commonly accepted concept that does not deserve further discussion and evidence.

Telecommunication technology cannot exist without standards. This is also quite easily understood and common ground. [56]

Therefore "openness" shall mean that the external communication channels, of all sort, must use standards, which (or the many possible) standard(s) remaining yet to be assessed.

All signs point in the direction that standards involved in a public institution shall be "**open**" [57] Quite in the same direction goes the seminal work of De Nardis and Tam [58] from which a citation is indeed appropriate:

> *With regard to standards that directly affect conditions relevant to democracy, the most prominent examples consist of standards that affect citizens' access to information*

Usability in Government Systems: User Experience Design for Citizens and Public Servants. Elsevier. ISBN 978-0-12-391063-9. Retrieved 16 October 2014.

54 "Web Accessibility". European Commission. Retrieved 16 October 2014.

55 "Accessibility of the Europarl website". European Parliament. Retrieved 16 October 2014.

56 "Standards are critical to the interoperability of ICTs and whether we exchange voice, video or data messages, standards enable global communications by ensuring that countries' ICT networks and devices are speaking the same language." From "ITU in Brief". Retrieved 25 July 2014.

57 For a very large collection of reference in this regard Opengovstandards.org is probably the best source. Quoting from it "Transparency means that information about the activities of public bodies is created and is available to the public, with limited exceptions, in a timely manner, in open data formats and without restrictions on reuse. Transparency mechanisms must include the disclosure of information in response to requests from the public and proactive publication by public bodies. Key information about private bodies should be available either directly or via public bodies."

58 DeNardis, Dr. Laura and Tam, Eric, Open Documents and Democracy: A Political Basis for Open Document Standards (November 1, 2007). Available at SSRN: http://ssrn.com/abstract=1028073 or http://dx.doi.org/10.2139/ssrn.1028073

> *concerning government decisions as well as standards concerning government records. The importance of accountability renders openness of implementation and use similarly important in this context.*
>
> *[...]*
>
> *Consequently, the standards that affect such conditions must be continuously free of barriers to the widespread use of the relevant access technology. Democratic values are inconsistent with differential costs in the form of royalty fees or interoperability barriers that potentially result in unequal citizen access to such information.*

It is also quite self-evident that transmitting information to an outlet that cannot be used by the intended recipient equals to opaqueness, as openness must be a characteristic of the entire space between the object and the observer. As said before, while having total openness – which means totally unencumbered space – is more a reference than a realistic goal, getting as close as practically possible to it is the yardstick of compliance with the rule in hand.[59] [60]

It is reasonable that the means and infrastructure to be used to achieve the goal of openness are a matter of technical decisions in a scenario of non-unlimited resources. It also seems reasonable that once a high level decision on which channel is more conveniently adopted, at an early stage of the decisional process, and throughout the life cycle of the adopted solutions, the decision makers shall measure how easily accessible the channel is.

As soon as the radio broadcasting was shown to be a practical way to spread information, institutions found it convenient to use the radio channel to increase the outreach of their messages. When television came along, and become a widespread medium, that channel was also used, both directly and through facilitating reporting by the press. Because today Internet is one of the most used source of information, all institutions use the various communication avenues that Internet allows to increase, at exponential rates, access and feedback, including the European Parliament.

Internet is a showcase of open standards, because as such Internet is nothing more than a collection of protocols one stacked upon the other. [61] so that information and services are exchanged between and through an arbitrary set of networks through common interfaces. It is hard to think of something more accessible and widely available and efficient. No doubt any openness must involve Internet distribution.

But while it is true that Internet means a stack of protocols and interfaces, due to its anarchic and agnostic nature, it is possible that some of the chosen protocols are less easily available and widespread. In theory, parties can agree upon "proprietary protocols" and still have a way to communicate. Privacy-aware protocols, like those enabling VPNs are just there for that, creating a privileged channel that excludes all others not part of the conversation. Encryption is a way to transmit a confidential message over a public channel, introducing a secret and private element that allows only those privy to something to make sense of the message.[62] On the other end of the spectrum are those protocols, widespread, available and unencumbered standards that any entity is able to intercept and interpret to the fullest without any kind of restriction, where nothing, being it a technical, economic or legal element, hindering the access to the message. This is one possible

59 Updegrove, Andrew. "With Access and Information for All". *Consortium Info*. Retrieved 25 July 2014.
60 Updegrove, Andrew. "How Open Must an Open Government Platform be?". Retrieved 25 July 2014.
61 For an historical perspective of how Internet developed and was defined, see Barry M. Leiner, Vinton G. Cerf, David D. Clark, Robert E. Kahn, Leonard Kleinrock, Daniel C. Lynch, Jon Postel, Larry G. Roberts, Stephen Wolff (2003). *A Brief History of Internet*. Retrieved 25 July 2014
62 A good list of sources on cryptography and the problem it solves can be found at "Cryptography". Retrieved 9 December 2014.

way of defining "open standards". Which is the subject of the next section.

Free and open in technology

In the last paragraph of the previous section we have concluded that free and open is a proxy for "transparency". [63] Here we will describe what "Free and Open" mean from a technology point of view with reference to commonly accepted, yet controversial at times, sources.

Free and Open Standards

There is no legal and binding definition on what an Open Standard is. All the attempts made so far within the EU legislature and policy documents have faced strong debate and criticism from either side of the spectrum ranging from those who claim that "Open" applies to all standards that are available to every concerned entity, to those who claim that "Open" needs a far stricter definition and the list of requirements for a standard to be called "open" extend beyond the nature of a technical document of the standard to encompass the legal restrictions to its implementations (first and foremost patents) and the independence from a single implementation, especially coming from the main proponent of the standard.

The debate around the European Interoperability Framework in its two incarnations (v.1 and v.2) is particularly illustrative of this dualism.

The European Interoperability Framework V.1

The European Interoperability Framework was conceived in 2003 and defined as "[an] overarching set of policies, standards and guidelines which describe the way in which organisations have agreed, or should agree, to do business with each other." [64] In essence, it is an effort put in place to have one reference for public administrations as well as private entities within Europe to seamlessly share services and data with each other, by means of agreed practices and standards, as an action from eEurope 2005 Action Plan.

One of the tasks of the project was indeed to find some common ground as to what "standard" means and what an "open standard" also means:

> *To attain interoperability in the context of pan-European eGovernment services, guidance needs to focus on open standards 17. The following are the minimal characteristics that a specification and its attendant documents must have in order to be considered an open standard:*
>
> - *The standard is adopted and will be maintained by a not-for-profit organisation, and its ongoing development occurs on the basis of an open decision-making procedure available to all interested parties (consensus or majority decision etc.).*
> - *The standard has been published and the standard specification document is available either freely or at a nominal charge. It must be permissible to all to copy, distribute and use it for no fee or at a nominal fee.*

63 See also Lathrop, Daniel; Ruma, Laurel (2010). *Open government : [collaboration, transparency, and participation in practice]* (1st ed. ed.). O'Reilly. ISBN 978-0-596-80435-0. Retrieved 14 October 2014.

64 "EIF - European Interoperability Framework for pan-European eGovernment services". Retrieved 7 August 2014.

- *The intellectual property - i.e. patents possibly present - of (parts of) the standard is made irrevocably available on a royalty-free basis.*
- *There are no constraints on the re-use of the standard.*[65]

Note that the recommendation did not prescribe the use of only open standards, but only advised to "focus" on open standards. There was also no ethical or ideological implication in the recommendation, which came from an objective and functional analysis.

To our knowledge, that was the first attempt to define open standards in an official, albeit non legislative, document from the European Union. The document was officially adopted in 2004.

The European Interoperability Framework V.2

In 2006, the European Commission has started the revision of the European Interoperability Framework.[66]

The effort was completed on December 2010.[67]

Reportedly due to intense lobbying by industry representatives,[68] [69] notably in the new document there is no reference to standards at all, let alone to open standards, but more vaguely to "open specifications". [70]

The relevant language starts with "***If*** the openness principle is applied in full" [emphasis added], therefore it is not even a recommendation that of applying openness in full, but only a trajectory is envisaged and made an hypothesis. Consequently Recommendation 22 of the EIFv2 states:

> *Recommendation 22. When establishing European public services, public administrations* ***should prefer*** *open specifications, taking due account of the coverage of functional needs, maturity and market support. [emphasis added]*

The very definition of open specification in the EIFv2 is far more vague than the one found in the EIFv1:

> *If the openness principle is applied in full:*
>
> - *All stakeholders have the same possibility of contributing to the development of the specification and public review is part of the decision-making process;*
> - *The specification is available for everybody to study;*
> - *Intellectual property rights related to the specification are licensed on FRAND terms or on a royalty-free basis in a way that allows implementation in both proprietary and open source software.*

"FRAND" is an acronym of "Free, Reasonable And Non Discriminatory" conditions, and is a term

65 *European Interoperability Framework For Pan-European eGovernment Services*. p. 9. ISBN 92-894-8389-X. Retrieved 7 August 2014.
66 "Revision of the EIF and AG". Retrieved 7 August 2014.
67 "Annex 2 to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions 'Towards interoperability for European public services' COM(2010) 744 final". Retrieved 7 August 2014.
68 "European Commission Betrays Open Standards". *ComputerWorld UK - Blog*. Retrieved 7 August 2014.
69 "European Interoperability Framework supports openness". *Opensource.com*. Retrieved 7 August 2014.
70 EIFv2 , page 26

of the trade in the standardisation world, and beyond. However, it is not clear what it really means [71], as for instance it can be argued that imposing a per copy royalty is discriminatory against Free Software or software with (other) strong *"copyleft"* licensing conditions. Therefore it is open to question whether FRAND conditions that do not allow "implementation in both proprietary and open source software" are indeed FRAND as per the very definition of open specifications.

This is not the place to resolve the issue, but it is indicative of how there is a tension between those who oppose extending the definition of Open Standards to something that is not as open as it can be (mainly, some of the biggest patent holders, yet not all of them), and those who advocate a stricter definition to include only something that is really open to be adopted, without the need to take affirmative steps to obtain a license, even from a patent pool.[72] [73]

The UK definition

Whether it is advisable or not to adopt a firm stance on Royalty Free standard can be debated at length. However because there are policies and rules that take that approach, means that at least it is *possible* to come to a stricter definition of Open Standards.

One clear Royalty Free stance with really far reaching requirements case is the one adopted by the UK Government.[74]

> ***12. Open standard - definition***
>
> *Open standards for software interoperability, data and document formats, which exhibit all of the following criteria, are considered consistent with this policy:*
>
> *Collaboration - the standard is maintained through a collaborative decision-making process that is consensus based and independent of any individual supplier. Involvement in the development and maintenance of the standard is accessible to all interested parties.*
>
> *Transparency - the decision-making process is transparent and a publicly accessible review by subject matter experts is part of the process.*
>
> *Due process - the standard is adopted by a specification or standardisation organisation, or a forum or consortium with a feedback and ratification process to ensure quality. (The European Regulation enabling specification of fora or consortia standards will enter into force 20 days after its publication in the EU Official Journal and will apply directly in all EU member states from 1 January 2013.)*
>
> *Fair access - the standard is published, thoroughly documented and publicly available at zero or low cost. Zero cost is preferred but this should be considered on a case by case basis as part of the selection process. Cost should not be prohibitive or likely to cause a barrier to a level playing field.*
>
> *Market support - other than in the context of creating innovative solutions, the standard is mature, supported by the market and demonstrates platform, application and vendor*

71 Most telling the EU-commissioned study for the European Commission - Directorate-General for Enterprise and Industry, cfr pag. 130.

72 For a dissertation of the topic in general, please see Dolmans, Maurits; Piana, Carlo (2010). "A Tale of Two Tragedies – A plea for open standards, and some comments on the RAND report". *International Free and Open Source Software Law Review* **2** (2): 115–138. doi:10.5033/ifosslr.v2i2.46. Retrieved 7 August 2014.

73 Also with useful analyses on openness of standards a more dated article: Krechmer, Ken (7 February 2005). "Open Standards Requirements". *The International Journal of IT Standards and Standardization Research* **4** (1). Retrieved 7 August 2014.

74 UK Cabinet. "Open Standards principles". Retrieved 11 November 2014.

> *independence.*
>
> *Rights - rights essential to implementation of the standard, and for interfacing with other implementations which have adopted that same standard, are licensed on a royalty free basis that is compatible with both open source (see a list of open source licences approved by the Open Source Initiative via their License Review Process) and proprietary licensed solutions. These rights should be irrevocable unless there is a breach of licence conditions.*

The Indian definition (an example of strictest approach)

Another very strict definition is the one for India's Government [75]

> ***4.1 Mandatory Characteristics** An Identified Standard will qualify as an "Open Standard", if it meets the following criteria:*
>
> *4.1.1 Specification document of the Identified Standard shall be available with or without a nominal fee.*
>
> *4.1.2 The Patent claims necessary to implement the Identified Standard shall be made available on a Royalty-Free basis for the life time of the Standard.*
>
> *4.1.3 Identified Standard shall be adopted and maintained by a not-for-profit organization, wherein all stakeholders can opt to participate in a transparent, collaborative and consensual manner.*
>
> *4.1.4 Identified Standard shall be recursively open as far as possible.*
>
> *4.1.5 Identified Standard shall have technology-neutral specification.*
>
> *4.1.6 Identified Standard shall be capable of localization support, where applicable, for all Indian official Languages for all applicable domains.*

Many more definitions

These are just samples to show how strong the debate on Open Standards is and what the centerpoint of the discussion is: patents, or patent holders trying to extract royalty revenues for any time a standard is used; and claiming that a patent license, with attached conditions for use, should be agreed upon, even though on a "FRAND" basis. As of August 2014, Wikipedia counted no less than 20 different definitions, and undoubtedly many more exist. [76]

The RFCs

"RFCs" (shorthand for "Request For Comments") are specifications which do not qualify as *de iure* standards (standards adopted by internationally recognised standard setting bodies after a formal process"), but nonetheless are respected and complied with as if they were formal standards. RFCs which is one of the ways that many of the most used Internet protocols have born and evolve.

RFCs are akin to formal standards, because an authoritative and documented source of normative and explanatory text exists. They have been adopted since the times of the ARPANET project ("Advanced Research Projects Agency Network" the initial network from which Internet

75 Government of India. "Policy on Open Standards for e-Governance". Retrieved 25 July 2014.
76 "Open Standard". *Wikipedia*. Retrieved 7 August 2014.

originated) [77] and evolved over the times. RFCs are now a body of standards collected and organised by the IETF (Internet Engineering Task Force)[78] and by the less famous Internet Society[79].

They should not be underestimated, as they are at the foundation of some of the most important and widely used protocols, such as the protocols that make the Internet email system [80]

IETF's RFCs are generally considered Open Standards, and are commonly understood as "Royalty Free" Open Standards, although the "IPR policies" (the rules according to which technologies can be introduced into the RFCs depending on the "Intellectual Property Rights" – mostly patents rights – are claimed by the contributing party) allow for royalty-bearing licensing of the included technologies. [81]

Free and Open Source Software (FOSS)

Definitions

There are two separate definitions on what is Free and what is Open Source Software. [82]

The Free Software Definition (by the Free Software Foundation) [83]

> *A program is free software if the program's users have the four essential freedoms:*
>
> - *The freedom to run the program as you wish, for any purpose (freedom 0).*
> - *The freedom to study how the program works, and change it so it does your computing as you wish (freedom 1).*
> - *Access to the source code is a precondition for this. The freedom to redistribute copies so you can help your neighbor (freedom 2).*
> - *The freedom to distribute copies of your modified versions to others (freedom 3). By doing this you can give the whole community a chance to benefit from your changes. Access to the source code is a precondition for this.*

The Open Source Definition (by the Open Source Initiative)

This is a slightly more verbose definition (only headlines are provided, for brevity):[84]

1. Free Redistribution
2. Source Code

77 "Stephen D. Crocker, "How the Internet Got Its Rules", The New York Times, 6 April 2009". Nytimes.com. April 7, 2009. Retrieved 2014-07-25.
78 IETF (Internet Engineering Task Force) http://ietf.org/
79 Internet Society http://www.internetsociety.org/
80 e.g., the IMAP Protocols, see among them "IMAP protcol, RFC1064". Retrieved 25 July 2014.
81 See IETF RFC 3979
82 For an historical and general overview of Free and Open Source Software we refer to a briefing paper prepared for the Juri Commitee by Carlo Piana, which covers much of the background of Free Software Piana, Carlo. "A discussion of the different software licensing regimes". *WORKSHOP ON LEGAL ASPECTS OF FREE AND OPEN SOURCE SOFTWARE*: 30–49. Retrieved 7 August 2014.
83 "What is free software - The Free Software Definition". Retrieved 7 August 2014.
84 Full text at "The Open Source Definition". *OSI*. Retrieved 7 August 2014.

3. Derived Works
4. Integrity of The Author's Source Code
5. No Discrimination Against Persons or Groups
6. No Discrimination Against Fields of Endeavor
7. Distribution of License
8. License Must Not Be Specific to a Product
9. License Must Not Restrict Other Software
10. License Must Be Technology-Neutral

Although the two definitions are different, it is difficult – nay impossible – to find a subset of licenses that qualify under one definition and are outside the other definition, therefore, for our scopes, we will treat Free Software and Open Source Software (i.e., software licensed under either definition) as synonyms.

Is that about it?

There is no serious contention as to whether Free Software is the golden standard for openness in software.

Yet, if openness is a continuum, there are lesser forms of openness also in the software making. For instance, claims can exist that proprietary platforms that implement standard interfaces are "open", and indeed some form of openness exists also in ultra-proprietary software like Microsoft Windows. [85] Interoperability is a form of openness, standards are a form of openness, also in software.

However, when it comes to software, the four freedoms granted by Free Software are not an easy yardstick with which to be measured. Full access to code, especially when it is enforceable through the *"copyleft"* conditions, has many advantages that go beyond the much touted "bazaar model" of development. [86] Access to code and the legal permissions that the license provide mean anyone with sufficient skills can take over the program and "fork" it (forking means that someone parts from the current development and starts a new independent development branch). In other words, while full access to code does not mean that backdoors and insecurities cannot be inserted, they are quite easily discovered and easily fixed. But in essence, full access to code and the legal permissions that the license convey means that there is an assurance that the software development can proceed even in the event that for any reason relationships with the original developer become problematic.

The most important point is that in a Free Software environment, where the user benefits from the four freedoms and the legal permissions that this brings to them, from an economic point of view a new game (as in the Gaming Theory) is created, compared to what happens in a proprietary

85 Or at least it has been claimed. See for instance Jansen, Slinger; Cusumano, Michael A.; Brinkkemper, Sjaak (2013). *Software Ecosystems: Analyzing and Managing Business Networks in the Software Industry*. Edward Elgar Publishing. p. 163.

86 Raymond, Eric S. "The Cathedral and the Bazaar". Retrieved 11 August 2014

environment. This game creates a reassurance against lock-in, because most of the techniques that have been so far used to force clients to stay with one vendor have little meaning where an exact replica of the entire set of applications can be obtained from other sources, and further development of them can be taken over from any arbitrary point. Let us discuss it in more depth.

Lock in

So far we have dealt with Free and Open from the perspective of having an unimpaired access to information and data. In other words, to have communication channels that allow content to flow without impairment from one point of the channel to the other. We have seen that certain decisions should be taken to maximize the chances of this happening.

However, as with any decision, decision-makers are not always at liberty to choose what is theoretically best. **Budgetary restrictions**, for instance, are an obvious obstacle to this freedom, therefore choices need to be made under the condition of best allocation of non-unlimited resources. **Time** is another constraint. If, due to circumstances, choosing a solution requires considerable time, a quicker solution might be preferable, albeit suboptimal in other terms. **Technical constraints** also exist, and interact heavily with both of the previously mentioned ones.

"Technical constraints" deriving from what already is in place (technical infrastructures, previous investments in technology, archives) is what is usually called **"lock-in"**.

Lock-in is a phenomenon where previous choices reduce the freedom to make future choices, because making them would mean relinquishing a seizable part of the investment made in the past. Therefore, it seems to make sense to choose the solution that best adapts to the existing environment, albeit suboptimal in general terms, because the best option would be anti-economical due to the need to change substantial parts of the existing environment. This also generates, and most of the time increases, the lock-in.

Locked-in solutions might not allow achievement of the goal of transparency, because budgetary and time constraints work against it.

The Commission has analysed this phenomenon with a lot of care, although sometimes it proved itself unwilling to take the medicine it prescribed to others,[87] within Action 23 of the Digital Agenda. [88] The Commission identified lock-in as an important problem that can only be cured with the adoption of open standards – although, as we have seen before, it failed to define properly what an open standard is and it showed a weak spine in taking the concept of openness where others took it.

> *The Digital Agenda for Europe identified "lock-in" as a problem. Building open ICT systems by making better use of standards in public procurement will improve and prevent the lock-in issue.* [89]

Therefore standards are a way to avoid lock-in. The Commission carefully avoids using the wording "open standards", but many indications and references make it clear that it points to that when it refers to "standard based procurement". The two main working documents describing how public procurement should be done to avoid lock-in are in

87 "European Commission renews controversial Microsoft contract". Retrieved 9 December 2014.
88 "Action 23: Provide guidance on ICT standardisation and public procurement". Retrieved 8 August 2014.
89 "Open Standards". Retrieved 8 August 2014.

- A Communication titled "Against lock-in: building open ICT systems by making better use of standards in public" [90]

- A staff working document "Guide for the procurement of standards-based ICT — Elements of Good Practice" [91]

Proceeding from the above, we can safely take a few conclusions:

- in order be free to adopt the best tools available, now and in a medium to long term, the Parliament has a special burden to avoid lock-in.

- Because the best tool to avoid lock-in, according to the Commission (but with the agreement of a vast literature, as cited in the two above documents), is a standard-based approach, the Parliament is especially bound to adopt a standard-based approach in procurement.

- Not only transparency mandates the use of open standards for the outward channel, but transparency leans heavily towards the use of standard-based decisions and modular, vendor independent, lock-in averted solutions.

The cited documents take no stance towards (or against, for that matter) **Free Software** in the lock-in avoidance context. However it seems that one cannot take any conclusions from this omission, only that the lock-in avoidance shall be taken into consideration with all kind of licensing regimes or development environment or technology. At the same time there seems to be no contradiction in the principle we have introduced that Free Software enhances the anti-lock-in power of the user (so much that even the user has the permission to be developer). And we reiterate the fundamental concepts:

- Truly Free Software solutions are outside the control of the vendor. The vendor can have a temporary control or even have a stronghold over one solution, but examples exist that when this control is too tight and against the interests of the Community, the ability to "fork" is an essential tool that exerts a constraint on any dictatorial vendor. [92]

- The availability of source code, and possibly a healthy and diverse development community, is a guarantee that there is no orphan work or constrained upgrade path. Free Software allows the choice to buy or make, or to have made by others unrelated to the copyright holder. Proprietary software vendors have incentives and abilities to lock clients in [93].

- Free Software vendors have less, or even no incentives toward locking their clients in, because efforts would be largely ineffective or impossible. De facto, most of Free Software project tend to use open standards,and non open standards and format only if network effects make the former non viable.

90 "Against lock-in: building open ICT systems by making better use of standards in public". Retrieved 8 August 2014.
91 "Guide for the procurement of standards-based ICT — Elements of Good Practice". Retrieved 8 August 2014.
92 A useful discussion on what the ability to fork means in terms of relieving competition concerns can be found in "Commission Decision of 21.01.2010 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement(Case No COMP/M.5529 - Oracle/ Sun Microsystems)". Retrieved 10 November 2014. , Section 4.4.3 (pag. 118 onwards).
93 The most striking example is probably the *Microsoft* case The most striking example is probably the *Microsoft* case "Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft)". Retrieved 10 November 2014.

- The European Parliament should use IT solutions guaranteed to be independent from IT vendors. Instead of making IT decision based on cost, it should prefer technologies that allow others to work with it.

Free and Open data and content

If transparency means being able to receive information, in a legal environment that means "data" and "content". Protection of data and content under European law occurs under three main headlines: Secrecy (or confidentiality) Copyright (or *droit d'auteur*), which may or may not include "moral rights" Data base (or *sui generis*) protection

We can safely exclude "secrecy" from our analysis. Except for the matters that, in case, must be kept secret for any reasons, the transparency rule is the opposite of the secrecy rule.

Copyright and data base protection require more in depth analysis.

Copyright

Copyright is uniformly regulated across Europe, under the general umbrella of the Berne Convention, by the implementation at member states' level the "Copyright Directive" [94]. Fully analysing the working of copyright is beyond the scope of the research, as it is discussing the slight differences in the single Member States implementations, particularly in terms of exceptions to copyright.

Law texts are generally recognised as not bearing copyright. However, all preparatory works, studies, briefing papers, analyses and other documents can have a different status according to whom has prepared them and under which arrangement with the Parliament.

Under the default copyright regime, the copyright holder has a number of rights to prevent others from performing certain actions, including copying, transforming, translating the copyrighted content. This right arises with the making of the copyrightable subject without the need of any affirmative step or claim. Silence is sufficient.

Under such regime, irrespectively of the actual copyright status under which certain material is being served onto the public, even uncertainty as to the copyright status of certain works can have a chilling effect on the transparency and prevent it from achieving its fullest implementation.

One of the enablements of the Internet (and open standards) is the ability to re-use and transform content to produce new service that provide the same content in innumerable new ways. That could include a "syndication" of content, mash-ups, translations [95]. Anywhere there is unmet demand for services containing the same information, there can be a service from an unexpected source. Sometimes this service is brought by private, amateur service providers, who have no resources or knowledge to fully inspect all sources to verify if they are freely re-usable in automatically aggregated content. Some do it nonetheless, other might be discouraged from re-

94 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML

95 "A mash-up, in web development, is a web page, or web application, that uses content from more than one source to create a single new service displayed in a single graphical interface." See http://en.wikipedia.org/wiki/Mashup_%28web_application_hybrid%29. Similarly, syndication means aggregation of content from various sources. See for reference http://en.wikipedia.org/wiki/Web_syndication

sharing the (modified) content on copyright grounds. This is not unexpected in an environment where prohibition is the rule and free use is an exception.

It is therefore important, in the view of the authors, that any time when the rules would allow free re-use of the content, including translation, transformation, aggregation, it is explicitly stated in a clear and irrevocable way. Absent a clear and final rule that puts the content in "public domain", there should be a default "licensing statement" to clarify the legal status of it. We submit that removing any uncertainties is a step in the right direction. That is, ensuring that all information subject to transparency be **Open Content**.

Legal instruments exist to this effect. The most known set of these instruments with regard to creative content is the Creative Commons[96] one. In particular, the Creative Commons Attribution - only license and the Creative Commons CC-zero (or CC-0) seem to be the most appropriate for implementing an affirmative open content strategy where the copyright status of the work so permits. In order for it to be possible, all material prepared for and upon instruction of the Parliament needs to be licensed by their authors under the same or compatible licenses.

Because this is an analysis of open content only from the point of view of transparency, we defer to the many studies on the open content in the public sector for a more detailed discussion.

(Open) Data

The same reasoning is applicable to the data. The ability to drill into data to distil information is generally understood to be a key to transparency. [97] In order to perform actions on data it is necessary that not only data are made available, i.e., disclosed, but that all the actions necessary to perform the analysis and meta-analysis are permitted. This might not always be the case or uncertainty could exist on it.

Datasets are protected in Europe by the Database Directive, as implemented by member states. [98]

The Database Directive provides a protection of database on which the maker has put a significant investment in the obtaining, verification or presentation of the contents. This protection is a different kind from copyright or patent protection, and therefore is called *sui generis* (of its own kind) and, like the copyright, is granted without any affirmative action, including issuing an express claim, by the maker. Therefore, in default of an express license or waiver, the principle is that the extraction, duplication and dissemination of the dataset (or of a substantial part thereof) is reserved to the maker.

Therefore, in order for datasets to be re-used, and thus to enhance their availability, id est, transparency, data should be treated as long as possible as "Open Data". [99] Open data in the public sector is such a common ground that many states have stated in full the principle that data by default should be open. [100] Among them the G8 countries have adopted a clear document favouring

96 Creative Commons http://creativecommons.org/
97 "Democracy and open data: are the two linked?". Retrieved 14 October 2014.
98 "Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases". Retrieved 8 August 2014.
99 An open data definition, modelled upon the Open Source Definition can be found at "Open Definition".
100 See for instance US's "Executive Order -- Making Open and Machine Readable the New Default for Government Information". Retrieved 8 August 2014.

the use of Open Data. [101] [102] [103] Across Europe, a drive towards open data is given also by the PSI Directive, which prescribes that certain data held and produced by the Public Administration at large be made available for industry perusal [104].

The European Commission, not bound to the PSI Directive, recognising the importance that all data produced by it be available to the general public as much as possible in an open and unencumbered fashion, and possibly also in a machine-readable format, has adopted a Decision on re-use of Commission documents (2011/833/EU)[105], adopting an open by default rule (Art. 9). As for the formats, Art. 8 of said Decision provides:

> *Article 8 Formats for documents available for reuse*
>
> *1. Documents shall be made available in any existing format or language version, in machine-readable format where possible and appropriate.*
>
> *2. This shall not imply an obligation to create, adapt or update documents in order to comply with the application, nor to provide extracts from documents where it would involve disproportionate effort, going beyond a simple operation.*
>
> *3. This Decision does not create any obligation for the Commission to translate the requested documents into any other official language versions than those already available at the moment of the application.*
>
> *4. The Commission or the Publications Office may not be required to continue the production of certain types of documents or to preserve them in a given format with a view to the reuse of such documents by a natural or legal person.*

While fully analysing the licensing of data goes beyond the scope of this study, and while the discussion on open standards also covers the *way* (or format) in which data are made available for non-intermediated consumption, we suggest that not only for transparency purpose, but in order to generally remove unnecessary confusion, that instead of **licensing** data, a **waiver** on database right is adopted as default legal release tool. [106]

Practical applications

Here we will use the findings in the previous sections to analyse what in practice the principles mean in different areas of the Parliament's IT systems.

Email system

Despite the emergence of social networks and other public, semipublic and semiprivate communications tools, emails remain by and large a ubiquitous way of communicating, both individually (one-to-one) and on a larger scale (one-to-many, many-to-many) for example via discussion lists.

101 "Open Data Charter". Retrieved 8 August 2014.
102 A useful resource for information on open data in a governmental environment can be found at "Citizens, democratic accountability and governance". *Open Knowledge*. Retrieved 8 August 2014
103 "Open Data: unleashing the potential". *Gov.UK*. Retrieved 10 November 2014.
104 "European legislation on reuse of public sector information".
105 "Rules for the re-use of Commission information". Retrieved 14 October 2014.
106 One of the authors has explained this finding in "FreeGIS.net Data Licence 1.0". [ITA], but see also Morando, Federico. "http://leo.cineca.it/index.php/jlis/article/view/5461". Retrieved 8 August 2014.

All the Members of the European Parliament and their staff are given a personal mailbox that they can use for their institutional activities. The addresses of the MEP are public and the public uses them to reach the MEPs, e.g., for campaigning purposes.

Meanwhile, the email system is threatened by all sort of attacks, because of its very nature of being decentralised, lightweight and unverified. These attacks range from simple "spam" (unsolicited emails) to scams (email messages trying to illegally induce the recipient to perform certain activities), to conveying malicious code. In addition, email is often used to illegally collect information pertaining to the recipient (from simple profiling up to "phishing", an attack that strives to collect sufficient information to actually steal money or overcome protections), if not compromising the secrecy of the communication by intercepting the flow of email exchange (e.g, through "man-in-the-middle" attacks).

Basic introduction to the standard infrastructure

The email system, which is basically made of two server components (one for sending the outbound emails, one for receiving, storing and forwarding to the recipient) and one client component.

- The standard server components are the Simple Mail Transfer Protocol (SMTP)[107] for relaying and sending the messages out;

- and the Internet Message Access Protocol (IMAP)[108] and the Post Office Protocol (POP)[109] for accepting, storing and making available the inbound message.

The client component can be a local application, installed on a computer, or a web application – often referred to as "webmail" – which offers retrieving, reading, composing and sending services that replicate those of the local application, without the need to locally download the message.

Some providers have developed proprietary extensions to these protocols and services, probably the most popular is the MAPI protocol that links together the client Microsoft Outlook (and other clients that implement the protocol) with Microsoft Exchange Server [110] , but also Google's Gmail and Apple's Mail use proprietary protocols, especially for mobile consumption of the email services.

If for the outside world, using those proprietary client/server protocols makes very little difference, as the email is sent and received through standard protocols (although compliance with content and transport standards can vary), it is important that their adoption does not impair the ability of clients that do not implement them to access the email without impairment.

A standard secure layer from client to server

It is important that the email can only be sent and received by authenticated users. In other words, email shall receive a high degree of protection.

IMAP requires userid and password to access the email, and offers secure connection between the

107 http://tools.ietf.org/html/rfc5321
108 http://tools.ietf.org/html/rfc3501
109 http://tools.ietf.org/html/rfc1939
110 "Exchange Server Protocols". Retrieved 7 October 2014.

client and the server so that the flow of communication cannot be intercepted between the server and the client (most commonly with SSL/TSL)[111]

Similarly SMTP allows both user authentication and encryption of the flow, although many publicly available SMTP servers do not require either.

On privacy concerns, it is highly recommendable that both are in use, as they create a readily available layer of security at virtually no expense. According to art. 22.1 of Regulation (EC) No 45/2001, the data controller (as well as a third party processor or service provider) shall comply with the following rule:

> *Having regard to the state of the art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.*

As TLS is a publicly available standard, using it is highly recommendable.[112]

TLS only protects the data stream from the originating point (the client for outbound and SMTP for incoming email) to the first endpoint (the SMTP server for outbound and the client for incoming email). Once the email has left the internal system, it is bound to be transmitted in clear over the Internet. In order to secure the content from the sender to the recipient, the only way is full encryption of the message, as the message itself will be relayed through an arbitrary number of servers as plain text.

The two most used ways of (directly)[113] encrypting the messages are S/MIME[114] and OpenPGP[115], neither of which is an approved standard, although they are implemented directly or through third parties in many email clients, so they satisfy many of the requirements for being open standards (fully public and available standard text, independently managed, multiple independent implementations, no known IPR). Although the adoption of email encryption seems to be very limited, the case for allowing encrypted emails to flow through the servers is clear also from a transparency point of view (no pun intended).

Encrypted email cannot be scanned by security systems and therefore they are likely to be intercepted by them. This would be a *false positive*, though, since it would be a legitimate email. In order to preserve the viability of an encrypted channel of communication, this kind of messages should be whitelisted, at least at the user request, and in any case any such blocked message should be notified to the user, put into a quarantine and the user should be enabled to open it.

111 http://tools.ietf.org/html/rfc5246
112 This is very basic advice, securing an email system is well beyond the scope of this work and the expertise of the authors. Many guidelines can be found online, supporting this finding and more, like http://www.cisco.com/web/about/security/intelligence/bpiron.html or https://otalliance.org/best-practices/transport-layered-security-tls-email
113 Obviously an email message can have arbitrary encoded files, including encrypted ones, here we are only dealing with encrypted messages that are recognised directly by the client application without the need to open them outside, and with the ability to have a "seamless" email discussion
114 http://tools.ietf.org/html/rfc5751
115 http://tools.ietf.org/html/rfc4880

Mailing lists

Emails are complementary to the use of mailing lists, which are particularly useful discussion fora when discussion occurs by threading them via an email discussion. To do so certain rules in both RFC5321 (section 3.9) and RFC2369 [116] should be implemented.

From a discussion in a Freedom Of Information access request [117] it looks like any such request coming from an external mailing list is outright refused by the European Parliament's systems, on the grounds that the address is considered not genuine ("spoofed"). However, a message sent by a member of a mailing list to the mailing list and relayed by the mailing list to its subscribers (including the sender) needs to contain the from: and reply-to: address of the originating email message must not be modified, and obviously this would cause the address of the incoming email being considered not genuine (again, "spoofed") according to the criterion that all messages from a European Parliament address must come from a European Parliament SMTP server. However, this is absolutely not mandated by the standard protocols (it is indeed *normal* that an address comes from an SMTP in a domain different from the domain of the originating address) and impedes the users of the European Parliament system to participate in external discussion mailing lists.

This seems in stark contradiction with the principle of transparency.

Publishing and archiving documents

Publishing information in the form of documents can be achieved through numerous ways, the most common of which is through the World Wide Web and its HTML/XML standards. These standards are mainly meant for files being uploaded to or generated by content management services and be read via a browser by the general public.

However, people rarely work with web pages and web pages are most of the time not just documents. Individuals and working groups still use "standalone" documents that they share, edit, print, archive and make available to a larger audience, and these documents are still largely based on the same model of paper documents and are made using document applications (such as wordprocessors, spreadsheets, presentations applications). As the bulk of the documents produced by public institutions are generated, kept and electronically exchanged in their original form, or "printed" and exchanged as if they were on paper, many times it has been suggested that the use of proprietary and non standard documents tilt the table in favour of the proponents of those documents and at the same time limit the access to those document by those who do not use the applications made by the same proponents.

The state of Massachusetts has perhaps been the first taking action to solve this situation and mandate the use of open standards in document files made and exchanged by the public administration.[118] It will take too long to narrate the discussion that ensued. At the time of writing, the last large government to take action in this regard has been the UK Cabinet, which has opened a very large consultation and performed a thorough analysis of the best way to achieve "transparency and accountability of government and its services".[119] Citing from the premises of this study:

116 http://www.ietf.org/rfc/rfc2369.txt
117 Interoperability with the EP's mail systems http://www.asktheeu.org/en/request/interoperability_with_the_eps_ma
118 "Massachusetts moves ahead sans Microsoft". Retrieved 13 October 2014.
119 "Improving the transparency and accountability of government and its services". Retrieved 13 October 2014.

> *[...] in order for data to be used this way, it has to be released in a format that will allow people to share it and combine it with other data to use it in their own applications. This is why transparency isn't just about access to data, but also making sure that it is released in an open, reusable format.*

In terms of publishing documents, the conclusion has been: [120]

- ***PDF/A** or **HTML** for viewing government documents **Open Document Format***
- *(ODF) [ISO/IEC IS26300] for sharing or collaborating on government documents*

Surveillance and privacy

Electronic communications via Internet are exposed to mass surveillance and the privacy of those who use it is constantly at risk.

The use of open standards goes in the direction of enabling multiple parts to interoperate and access to the source of information. Whereas recently it has been alleged that a few subjects (mainly governments and governmental agencies) may have achieved the ability to scan and retain information on virtually any electronic communications -- whether through the collection of "metadata" or actual recordings of content exchanged -- the use of open standards is a way to minimize the chances that other subjects may also achieve a similar control.

Internet was born and has grown as a deeply decentralised ecosystem. Market forces may or may not lead to a less decentralised situation in the future, with concentration in the hands of few. The European Parliament, as any public institution, should be aware of the impact that its decision have in exposing the privacy of their citizens that interact with their services by forcing them to use technologies which are available only through certain operators. Or worse, through services directly in the hands of them.

Similar conclusions seem to have been taken by the European Parliament Resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)):[121]

> *91. Takes the view that the mass surveillance revelations that have initiated this crisis can be used as an opportunity for Europe to take the initiative and build up, as a strategic priority measure, a strong and autonomous IT key-resource capability; stresses that in order to regain trust, such a European IT capability should be based, as much as possible, on open standards and open-source software and if possible hardware, making the whole supply chain from processor design to application layer transparent and reviewable;*

Conclusions

The Court of Justice has reminded us, the European citizenry, that openness contributes to strengthening our democracy, by enabling us to scrutinise all the information which has formed the basis for a legislative act. This means that we, the citizens of Europe, should be able to see, evaluate and analyse all the information used in the drafting of any EU law. The possibility we

120 "Open document formats selected to meet user needs". Retrieved 13 October 2014.
121 http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2013/2188%28INI%29

have to scrutinise the considerations underpinning legislative action is in fact a precondition for the effective exercise of our democratic rights.

Going beyond the constitutional requirement of openness laid down by the Treaties, the European Parliament has imposed upon itself a further commitment to conduct its activities with the utmost transparency. Our study suggests that ensuring this "utmost transparency" is not only an essential procedural requirement but actually a fundamental democratic principle which brings precise duties.

Thus, the principle of openness should guide Parliament's choices of IT hardware and software systems and, as technology evolves, these choices should be continuously and pro-actively reassessed. By its own standard, Parliament should choose the systems and technologies that are the most open and the most accessible to the public.

But beyond that, the principle also concerns possible legal restrictions on further distribution and use of the resources made available, including independent analysis, aggregation, re-use and redistribution of the data. Such restrictions should never undermine the basic requirements of openness and utmost transparency. On the contrary, Parliament must use systems, technologies and software that allow for the free-est analyses, re-uses and re-releases of its data: these are essential activities in a modern democratic society.

We therefore conclude that it follows from the principle of openness and of "utmost transparency" that when Parliament decides to make a given set of data or information available to the public, this must be done through non-discriminatory, transparent and up-to-date means of communication, and in open formats that support such further analyses, uses and releases.

We find that lock-in and vendor dependence are difficult to reconcile with the principle of openness and of "utmost transparency" to which Parliament has committed itself. In our view, Parliament should not take lowest costs as an absolute metric in its strategic choices of IT systems. Rather, technologies that allow others to work with Parliament's own systems and data should be privileged, even if they were to incur some extra costs.

This view is fully in line with new EU rules on public procurement that allow for the taking into account of environmental and social considerations and innovation in the awarding of public contracts. In our view, promoting Free Software and Open Standards through proportionate and calibrated specifications also serves the general economic interest of the EU, in the true sense of the term.

Finally, we have shown that other public bodies in certain Member States provide measurable benchmarks for the adoption of Free Software and Open Standards. We believe that the European Parliament should follow those leads, and exceed them.

We conclude that the Rules of Procedure of the European Parliament should whenever possible make Free Software and Open Standards mandatory for all systems and data used for the work of Parliament. In our view, that is the most appropriate way for the Parliament to meet its own standard of "utmost transparency".

About

The study "*Ensuring utmost transparency — Free Software and Open Standards under the Rules of Procedure of the European Parliament*" has been produced at the request of the Greens/EFA Group in the European Parliament and was first published online on 12/12/2014.

The study has been open for public review on euwiki.org from October 15 till November 15 2014.[122] Online support during the review period has been provided by Jonatan Walck.[123]

The cover illustration of the study has been created by Siri Reiter.[124]

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122 See diff on euwiki: http://en.euwiki.org/w/index.php?title=Ensuring_utmost_transparency_--_Free_Software_and_Open_Standards_under_the_Rules_of_Procedure_of_the_European_Parliament&diff=17300&oldid=16920

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An Introduction to the Open Data User Group

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Abstract
This article gives a succinct introduction to the work of the Open Data User Group and the demand driven process being employed by the United Kingdom to boost the release of publicly owned data assets and how this is creating greater transparency and economic benefit to the country. Examples given also show how international collaboration will enhance these benefits as more formal structures and processes are created to manage the Open Data explosion.

Keywords
Open data; demand driven; transparency; open data institute; open data user group; addresses

What is Open Data?

Open Data represents a fundamental shift in the way people communicate ideas and information. Inextricably tied to the World Wide Web, the purpose of Open Data is to facilitate interoperability and intermixing of data sets. It is seen by many web scientists as the key 'language' as a further 3 billion people gain access to the Web over the next decade.

The Open Data Handbook defines Open Data as "data that can be freely used, reused and redistributed by anyone subject only, at most, to the requirement to attribute and sharealike."[1] In this sense, it is very similar to Open Source software in the way it can be obtained, combined with other information and used to create value. A more complete explanation is available via the Open Data Handbook.[2] Today, Open Data is primarily non-personal information as this avoids the risks posed to privacy and personal security.

Open Data as a movement is still in its infancy with work focussing on the release of Government statistics and 'base level' data such as maps, company listings and other data of social, environmental or economic importance. This article describes some of the early work

[1] http://opendatahandbook.org/en/what-is-open-data/
[2] http://opendatahandbook.org/en/what-is-open-data/

in the UK and further afield to bring Open Data to the masses as part of a drive for greater transparency and sharing of information, as well as how this 'public sector first' approach is beginning to influence the world of big business.

The Open Data Movement

The growth of Open Data in the UK is linked inexorably to the growth of the web by several things, with the most obvious being the name Sir Tim Berners-Lee.[3] This article will come back to him later. However, there are some clear parallels to be drawn immediately between the Web and Open Data. The Web was intended for use by anyone, for free and for any purpose. Open Data is exactly that: information released for Free (or at most with a cost-recovery charge) which can be used, re-used and combined with other information or software tools to create a service, product or dataset that can then be shared or sold. Open Data is often available as raw information in a spreadsheet and increasingly as an API (or direct software link) for easy use by developers and data scientists. Importantly, there should also be no control on what the data can be used for (other than the normal lawful purposes governed by state personal data protection and other laws).

Open Data in its most simple and common guise is often made up of the information collected or created by public bodies in the course of providing services to tax payers, for example: maps, addresses, rail stations, weather forecasts and tax receipts. Such bodies often build up vast quantities of reference data and transactional results (e.g. whether or not your child's school had a good pass rate in GCSE Geography). That data may be used to improve those services, recoup the cost from other agencies or publish statistics every now and then, such as the Census or GDP.

In the past, this data was either locked away within the agency that collected it or sold to the open market for rather high prices with very complex and restrictive licenses designed to prevent onward sale and reuse (or at least make some more money from any reuse!). Good examples of this practise include Ordnance Survey[4] maps or Royal Mail postcode data[5] – all of this data built by government agencies in order to serve their citizens. This data is paid for by taxes but then sold back to those same citizens for a profit.

Open Data is different – the agencies releasing it have realised that you've already paid for it, it's not 'secret' or personal and you have a right to see the information and use it for the benefit of your business or community. It also serves the notion of 'transparent government' as it shows you (or more commonly, investigative journalists) what your tax money is spent on; giving you the opportunity to hold those in power to account and make an informed choice on election day. As an added bonus, this extra scrutiny makes it easier for public bodies to find efficiencies and improve services.

The UK Open Data Structure

As with everything involving Government, the number of bodies involved in Open Data weaves a complex web. I'll try to simplify this as much as possible and identify only the key

[3] http://www.w3.org/People/Berners-Lee/
[4] http://www.ordnancesurvey.co.uk/business-and-government/products/index.html
[5] http://www.poweredbypaf.com/

people, bodies and processes and consider the process which applies when a person or body seeks to have some data held by the public sector released as open data.

The body tasked with collecting requests for data is the Open Data User Group[6] (ODUG). The ODUG is an independent body set up by the Cabinet Office to be the voice of the users of public sector information. For example, citizens using apps to locate the nearest bus stop and the businesses building those apps. Requests for access to public sector data may be made through a process administered by the Cabinet Office called the Data.gov.uk Data Request Mechanism. The Cabinet Office reviews such requests in conjunction with ODUG as discussed below.

Made up of representatives from commercial data users large and small, academia, the public sector and so on, ODUG, in addition to collecting requests, is tasked with receiving feedback on existing open datasets (including licensing, access & quality) and taking this to government to encourage the release of quality open data that will benefit the widest possible audience. Requests are made via the data.gov.uk website and are usually public – this transparent method allows for the community to be involved early and support requests or point the requester in the right direction if the data is already available or is not a government-held dataset. At time of writing, the data.gov.uk portal had received 789 requests since September 2012[7].

The requests are then filtered down by ODUG. Many requests can be dealt with simply and quickly by the Cabinet Office's Transparency Team (a group of civil servants tasked with encouraging other departments to open up their data). More complex requests are worked into a business case (often involving the original requestor and other interested parties) which can then be taken to the next group of stakeholders – the Public Sector Transparency Board[8].

The Public Sector Transparency Board is responsible for the wider transparency agenda (of which Open Data is only one part) with membership ranging from the likes of Sir Tim Berners-Lee (inventor of the World Wide Web) and Sir Nigel Shadbolt (Chairman of the Open Data Institute and Professor of Artificial Intelligence at Southampton University) to Dr Rufus Pollock (Open Knowledge Foundation[9]) and various business leaders. This group has a wider remit advising government on greater transparency to create more interest in the political process from the general public, to encourage more collaboration between the public and private sectors, and to create the environment for economic growth.

The Public Sector Transparency Board will review the business cases and (where required) liaise directly with the relevant body to further the request or ask ODUG to continue their work to strengthen the case in specific areas.

In many instances though, business cases are taken directly to government bodies by the Cabinet Office's own Transparency Team who work closely with ODUG. This can lead to 'quick wins' in areas of quality assurance or licensing, or simply speed up release schedules.

While the above may sound complex, the Data Request Mechanism can be simplified as follows.

1. A request for data is made on data.gov.uk (either for new data or improvements to

[6] http://data.gov.uk/odug
[7] http://data.gov.uk/odug-roadmap
[8] https://www.gov.uk/government/groups/public-sector-transparency-board
[9] https://okfn.org/

current data).

2. Requests are assessed by ODUG and Cabinet Office.

    a. Complex requests go into an ODUG Business Case template.

    b. Simple requests are processed by Cabinet Office and the relevant Department (e.g. fixing a broken link or updating a dataset).

3. Business Case is published on data.gov.uk and discussed by Public Sector Transparency Board.

4. Data owner (Department) responds to the request.

5. Data is released (often following further consultation) or a reason for non-release is given.

The UK is a leading light in Open Data. All of the work going on with the Transparency Board, ODUG and various other sector or department-specific groups contributes to the Transparency Agenda. This thought leadership can be highlighted best via two other groups (while not connected directly to the data request mechanism they are still of great importance) – the Open Data Institute and the Open Government Partnership.

The Open Data Institute

Set up in 2012 by Sir Tim Berners-Lee & Sir Nigel Shadbolt with £10m of government funding (to be matched by private sponsorship over 5 years); the Open Data Institute[10] (ODI) was born from the work of the two Knights pushing successive governments to invest in technology and data innovation via the Public Sector Transparency Board[11], Technology Strategy Board[12] (now known as Innovate UK – a group set up to fund and champion economic growth based around tech industries) and other outreach work.

The ODI has set out to be the hub of open data innovation in the UK – training data scientists with universities and schools, mentoring start-ups, training public servants and existing businesses and liaising with other groups to improve the infrastructure that supports innovation (for example, working with ODUG on business cases). The ODI have extended this role by offering Open Data Certificates to public sector bodies (and private organisations) who publish Open data to signify the quality, usefulness and openness of the data.

While a UK-only organisation, the ODI has garnered international attention with over 30 governments from around the world visiting their Shoreditch base to talk about setting up their own franchise (with more than a dozen ‘nodes’ now active in locations such as Dubai, Gothenburg & Chicago). This influence on global open data initiatives leads us nicely onto the other significant piece of the jigsaw.

[10] http://theodi.org/
[11] https://www.gov.uk/government/groups/public-sector-transparency-board
[12] https://www.gov.uk/government/organisations/innovate-uk

The Open Government Partnership

This group of around 60 nations has committed to the principles of transparent government and working with civil society to encourage the release of data to provide informed choices and strong accountability. Countries involved range from Mexico to Sweden to Kenya and beyond.

The UK co-chaired the group (alongside Brazil) in 2013 and used the OGP[13] summit in October that year to release the first draft of the UK National Information Infrastructure (a plan for a single store of key datasets – mainly open – that are required for the efficient running of UK society, such as public service locations, company identifiers and transport data)[14] and announce a 'Beneficial Ownership' database[15] of companies. This database identifies those people who have beneficial ownership of a company. This assists with the more efficient collection of business taxes and helps tackle certain tax avoidance techniques. Many OGP members announced significant new commitments to open government and many other countries announced their intention to join.

The OGP could be regarded as something of a talking shop but aims to work across global borders to build opportunities for experiences to be shared and progress to be encouraged. The effectiveness of the OGP will be easier to judge once all of the commitments made in 2013 are enacted.

So what does all of this mean?

The Open Data movement is a global process that is linked to the open government agenda to offer greater transparency, accountability, choice and ultimately opportunities for efficiency within government as well as economic / social opportunities outside of it.

The UK has been at the vanguard of making government more transparent and looking for opportunities to enable economic growth using open data.

While progress has been mixed, a few good examples help to explain the opportunity.

Case Study 1 - The NHS – saving money through data sharing

Work by Mastodon C (one of the start-ups mentored at the ODI), Health Care UK and the writer of Bad Science (Dr Ben Goldacre) demonstrated the potential size of savings available to the NHS if prescribing doctors switched from branded to cheaper, non-branded alternatives of common drugs. The specific example examined statins (used to prevent cardiovascular problems) and highlighted that even though doctors were advised to use the cheapest available product (from 81p per prescription) versus more expensive (up to £20), branded versions, this was not what was actually happening on the ground.

[13] http://www.opengovpartnership.org/
[14] http://data.gov.uk/dataset/national-information-infrastructure
[15] http://www.theguardian.com/politics/2014/apr/21/vince-cable-public-register-company-ownership

It's important to note that studies found all versions of the drug were equally safe and effective for patients so there really was no good reason to prescribe the expensive alternatives.

The study examined 37 million rows of data and found potential monthly savings of £27m if prescriptions of the two branded versions had been switched to cheaper alternatives[16].

The team noted that previous studies had estimated potential savings of over £1 billion per year across a number of drug types. This specific example shows how simple it would be to save money on the NHS budget to direct to new drugs, hospital buildings or other services.

If more NHS data (including anonymous outcome data) is made available, there are many potential uses for savings, faster new drug studies and informed choice for patients across the board.

In 2013 the UK government announced the Care.data[17] initiative. This met with public outcry because of the perceived lack of consultation on plans to share patient outcome data from GPs with other public bodies and private businesses. The Care.data experience shows that there is still work to be done to educate society (and government) on the risks and benefits of sharing data (although sharing data is not the same as Open Data, the two are closely linked).

Case Study 2 - The Birmingham Civic Dashboard

Between August 2011 and May 2013 the Birmingham Civic Dashboard ran in order to study the way people interacted with Birmingham City Council, what services they wanted, when and where. Using open mapping data from the Ordnance Survey, the team from developer Mudlark made a simple to use tool for council workers and the public to view the kinds of requests at different times of day to get a better understanding of the issues affecting people and how the council responded to them.

All of the resulting data was also made available in an Open form for others to download[18].

This kind of engagement could be rolled out further within local authorities or even nationally to help tax payers understand where their money goes, the kinds of services available to them and then choose what they need, where and when. For government bodies, they would be able to direct their resources at what was needed most in much shorter timescales based upon actual data rather than long term estimates.

Case Study 3 - Data.gov.uk Data Request Mechanism

The Cabinet Office manages a mechanism, called the Data.gov.uk Data Request Mechanism, which allows the wider 'data community' to actively influence the release of data by the UK public sector.

[16] http://www.economist.com/news/britain/21567980-how-scrutiny-freely-available-data-might-save-nhs-money-beggar-thy-neighbour
[17] http://www.nhs.uk/NHSEngland/thenhs/records/healthrecords/Pages/care-data.aspx
[18] http://civicdashboard.org.uk/

Requests are regularly reviewed with the ODUG to identify quick wins and those requests that require a full benefits case to demonstrate the value to the relevant data owner.

Since the current process was introduced in autumn 2012, datasets released (or scheduled for release) include historic house prices from the Land Registry[19] and the Charities register. Benefits cases published in the first year included the VAT register[20] (which has led to a key announcement in the UK 2014 budget on the release of this data), an open national address register (now being actively pursued by the ODI), Energy Performance Certificates (still under consideration), data on vehicle registrations and stolen vehicles (currently under consultation) among several others.

The key examples here have changed attitudes in the relevant departments leading to open consultations on how best to release the data rather than reasons not to release it. The ODUG and its group of stakeholders are also helping the government respond to key issues such as the flooding in England in the winter of 2013/14 via the release of data and a #FloodHack event. This led to the historic announcement from the Environment Agency to become a completely 'Open Data' agency.[21]

In short, the work of ODUG in representing the economic and social needs of the data community is contributing to shift the position of government on open data from *one of those things that had to be done to tick a box for the Minister* to *a real opportunity to innovate, change behaviours and create significant benefits*.

Building for the future

As everything above hopefully explains, the journey towards total Open Data and transparent governance is progressing nicely but there is still more to do. The UK Public Administration Select Committee recently published a report pointing out that while progress is being made, some serious mistakes must never be repeated[22] (with specific reference to the privatisation of the Royal Mail Postcode Address File).

In the example of the Postcode Address File (PAF), there is a clear need for a single, accurate and Open address register for purposes beyond delivering mail. The Census requires addresses to ensure that everyone can take part (with the 2011 Census having to spend £7 million on creating their own address file due to restrictions on PAF). There are also growing requirements for addresses in fields such as navigation, mobile application development and the delivery of crucial public services (everything from getting an ambulance to the right place to planning where to build much needed social housing).

Without an Open address register, much of the benefit of Open Data is lost. This is why ODUG used its Release of Data Fund to help the ODI pilot the first phase of a program to create an Open Address Register[23] with further funding confirmed in November 2014.

Evidence presented to the committee indicates a great deal of positivity but a real need to

[19] http://www.landregistry.gov.uk/market-trend-data/public-data/price-paid-data
[20] http://data.gov.uk/benefits-of-releasing-an-open-vat-register
[21] http://us6.campaign-archive2.com/?u=e7311d49e9ac144a359ee2a96&id=206953c7ad
[22] http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/open-data-substantive/
[23] http://theodi.org/news/383k-government-grant-released-to-create-uk-open-address-list

change attitudes in certain sectors of Government from one of caution to one of support.

Common themes in the submissions made include short term costs to release data, loss of revenue where data is currently sold (for example, Royal Mail PAF or OS MasterMap) and fears from privacy lobbyists and sections of the media (for example, how anonymous can you make medical records so that they are useful but not an invasion of privacy?). However, this final point is more to do with Data Sharing (which can be the sharing of private, personal or sensitive data for specific uses rather than free and unrestricted use) than Open Data – another area of confusion that needs to be addressed.

Recent moves by the EU to introduce new Data Protection regulations across the bloc (with added impetus provided courtesy of the NSA hacking scandal) could create tensions between transparency advocates and the privacy lobby. Careful education of citizens and politicians is required.

Closer to home, ODUG will focus on the following key areas:

1. The National Information Infrastructure:[24] Announced in October 2013, the NII was an attempt by the UK government to 'codify' what should be included in a basic toolbox of data assets that could be used as the backbone for all data-based decisions. For example, this 'infrastructure' could be obvious datasets on transport networks, costs and timetables or more fundamental, such as the basic locations of all public services in the country. After some slow progress, the ODUG and Cabinet Office are working to re-invigorate the programme to define what should form the basis of our national Open Data toolkit.

2. Open Address Register:[25] Thanks to a 'Release of Data Fund' managed by ODUG, work is beginning to create an Open and free address register to form the backbone of the NII and all other open data opportunities. This is being led by the ODI.

This doesn't mean that work on data requests and other funding requests will stop. ODUG are regularly supporting[26] agencies and NGOs to release and make use of Open Data[27] and will continue to hold the public sector to account whenever the call to 'give us our data' is resisted.

The real task now is for businesses, academia and public sector experts to unite to put across the strongest case for more anonymous open data to be released but with the strongest possible sanctions against its use for nefarious means. The UK is lucky; ODUG, ODI, Transparency Board and large network of experts means we are well placed to make the case to do more and take balanced risks to benefit society.

[24] http://data.gov.uk/blog/the-national-information-infrastructure-where-are-we
[25] http://theodi.org/blog/open-addresses-discovery-phase
[26] http://data.gov.uk/blog/funding-agreed-important-new-open-data-projects
[27] http://data.gov.uk/blog/release-data-fund-update

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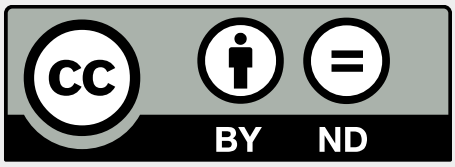

OpenSaaS: Using Free and Open Source Software as Software-as-a-Service

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Abstract
Under German copyright law, rights of use cannot be granted for so-called unknown types of use. Software-as-a-Service (hereinafter: "**SaaS**") is a use considered to be unknown until the mid 1990s. When taking the law in a literal sense, Free and Open Source Software (hereinafter: "**FOSS**") licenses granted before then thus cannot grant the rights of use necessary for SaaS, meaning that some FOSS cannot be lawfully made available via SaaS under German copyright law.

Keywords
Law; information technology; Free and Open Source Software; Software-as-a-Service; licensing

Introduction

The term OpenSaaS describes the mash-up of two software licensing and delivery models both of which have left deep traces in the IT sector. The increasing use of FOSS has challenged the conventional idea of proprietary software licensing, while the software delivery model SaaS successfully competes with the traditional sale of seat licenses for software which is hosted on company-owned servers. OpenSaaS can therefore be expected to become the "next revolution in on-demand software delivery".[1]

This proposition is substantiated by the ubiquity of SaaS.[2] It was described as an evolving paradigm in 2011 and since then continued to grow.[3] As Richard Stallman puts it: "There's a sucker born every minute."[4] Currently, FOSS is deployed widely and used in all sorts of

1 http://en.wikipedia.org/wiki/User:Opensaas/Sandbox.
2 Raffo, Zusammen mit SaaS (Software as a Service wächst auch Cloud-zuCloud-Backup, accessible via http://www.searchstorage.de/news/2240226273/Zusammen-mit-SaaS-Software-as-a-Service-waechst-auch-Cloud-zu-Cloud-Backup; Mell/Grance, The NIST Definition of Cloud Computing, accessible via http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf.
3 All, Gartner: SaaS Growth Shows No Signs of Slowing, accessible via http://www.itbusinessedge.com/cm/blogs/all/gartner-saas-growth-shows-no-signs-of-slowing/?cs=48600. In small and medium sized companies the use of software via SaaS grew by 30% in 2013; http://www.shortnews.de/id/1099316/saas-loesungen-sind-einer-der-groessten-trends-im-softwarebereich.
4 Charles, Google's ChromeOS means losing control of data, warns GNU founder Richard Stallman; accessible

entrepreneurial operations and offerings.[5]

Against this background, an increasing use of FOSS in the cloud and combining these two successful software licensing and delivery models is the logical way forward. Nevertheless, it represents a challenge under German Copyright law, as considered in greater depth below..

Do FOSS licenses grant the necessary rights?

Under German copyright law, the starting point of any analysis regarding SaaS is to tackle the subject of the necessary rights of use that need to be granted to the SaaS provider. As software is protected by Articles 69a ff of the German Act on Copyright and Related Rights ("**Urheberrechtsgesetz**", "**UrhG**")[6], the author is entitled to all rights. According to Article 69c of the German UrhG these rights include the right of reproduction, the right to modify and adapt, the right to distribute including the rental right and the making available right. No third party is entitled to exercise such rights unless they have been explicitly granted. If no such rights are granted, others are only entitled to run the program. According to German copyright law, however, the right to run the program solely entitles the user to exploit the program's functionalities. Correspondingly, it does not entitle the user to make the functionalities of the program available to others. In other words, German copyright law differentiates between own use of software and enabling others to use it. As SaaS providers enable others to use software and make use of a program's functionalities, SaaS providers depend on the rights of use being granted by the right holders in order to lawfully provide Software-as-a-Service, as they are not just running the program.

In order to decide which of the above mentioned rights must be granted to the SaaS provider by the authors, it is first of all necessary to look at how the software is going to be used in technical terms. Technically, the SaaS provider will centrally host the software and provide it for use by third parties, the users. These users usually access the software via a web browser using a thin client. For the most part (if we think, for example, of email services), no specific client software or applets need to be installed by the user to be able to use the software, which means that the software does not actually "change hands".[7]

Having said that, the use by the SaaS provider is clearly beyond what is defined as mere "use of the software" (that is, running the program in accordance with its intended purpose) as according to Article 69d of the German UrhG the user would be entitled to do even without a license. Instead, the SaaS provider exploits the software commercially by making it available to users without providing them with their own copy, while recovering his costs from all his customers and charging them a usage-based fee. In order to be able to provide his service, the SaaS provider reproduces the software when installing it on his servers, making it available to users, enabling his users to access the software and make use of its functionalities. Whenever the software needs adjustments to be fit for use via SaaS, the provider will also modify and adapt it. Against this background, a substantial majority in Germany takes the view that to provide such services in accordance with German copyright law, software licenses for SaaS would need to include the

http://www.theguardian.com/technology/blog/2010/dec/14/chrome-os-richard-stallman-warning?INTCMP=SRCH.

5 Cooper, Effects of cloud computing on Open-Source Compliance, accessible via http://www.linuxjournal.com/content/effects-cloud-computing-open-source-compliance.

6 An English translation of the German Copyright Act (UrhG) accessible via http://www.gesetze-im-internet.de/englisch_urhg/index.html.

7 In some cases, using Software via SaaS may require local applications. For the most part, however, internet access and web browsers are sufficient to use Software via SaaS; for further reading see http://www.pcmag.com/encyclopedia/term/56112/saas.

rights to reproduce and modify and adapt the software and – most importantly – the right to make the software publicly available.

The right to modify, adapt and reproduce the software covered by the license is characteristic for FOSS licenses[8], which is why these rights are explicitly included in such licenses, whereas the right to make a covered work available to the public by means of network communications is only referred to in very few licenses. For example, clause 2 d) of the Affero General Public License Version 3 ("**AGPL-3.0**") imposes the same obligations on those making a covered work accessible to others through a computer network as it imposes on those distributing a covered work in any other form.[9]

If the making available right is expressly included in a FOSS license agreement, the right is granted for the software covered by the license. If, however, the making available right is not expressly named, views regarding the granting of this right amongst lawyers and courts differ widely.

Excursus: What is the Making Available Right?

The right to make available a work covered by copyright law is laid down in Article 19a of the German Copyright Act. It reads:

> *"The right of making works available to the public shall constitute the right to make the work available to the public, either by wire or wireless means, in such a manner that members of the public may access it from a place and at a time individually chosen by them."*

It is based on Article 3 Sections 1 and 2 of the Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and was newly added to the German UrhG in 2003.

Whether a work is "made available to the public" most of all depends on what is considered to be "public" within the meaning of Article 19a of the German UrhG. The term "public" is defined in Article 15, Section 3:

> *"(3) The communication of a work shall be deemed public if it is intended for a plurality of members of the public. Anyone who is not connected by a personal relationship with the person exploiting the work or with the other persons to whom the work is made perceivable or made available in non-material form shall be deemed to be a member of the public."*

Thus, by enabling users to make use of software provided via SaaS, the SaaS provider makes the software available within the meaning of Articles 19a, 15 Section 3 of the German UrhG if no personal trust-based relationship exists either between him and his users or among his users. This may even apply if there is only one SaaS user: i.e.. a group of users is not a prerequisite.

Further to this, Article 19a of the German UrhG does not require the software to be downloadable in object or source code form.[10] The interpretation of Articles 19a and 69c No. 4 of the German

8 According to the Free Software Foundation's definition Free Software (a term nowadays used synonymously for Open Source Software) is a matter of the users' freedom to run, copy, distribute, study, change and improve the software (http://www.gnu.org/philosophy/free-sw.en.html).

9 Clause 2.1 MPLv2 refers to the making available right as well and explicitly grants this right to users.

10 *Marly*, Praxishandbuch Softwarerecht, 6th edition 2014, paragraph 226; *Schäfer*, in: Niemann/ Paul, Praxishandbuch

UrhG is controversial. Some fill the room left for interpretation of the articles' wording by defining the making available right as only covering cases, in which the software or essential parts of it are transferred to the user in object or source code form.[11] However, this interpretation does not correlate with the description of the making available right in the underlying Directive 2001/29/EC, according to which the making available right does not require software to be transferred: even though recital 25 uses the word "transmission" and thus suggests that copies of the software need to change hands, on-demand transmissions under making available right are then described by the fact that "members of the public may access them from a place and at a time individually chosen by them". This includes the ability to download the software but even goes beyond that, as it also applies to software which can only be used via online-access.[12] Further, the German UrhG explicitly differentiates between acts by which the software is being transmitted (i.e. distribution) and the preceding act of making the software publicly available, thus aiming at granting protection by copyright as early as possible.

Do FOSS licenses include the making available right?

The answer to this question largely depends on the specific license agreement and its wording and can be very different for each particular FOSS license. For the purposes of this article, the GNU General Public License Version 2 ("**GPL-2.0**"), the GNU General Public License Version 3 ("**GPL-3.0**") and the AGPL-3.0 will be looked at as an example. The latter, as it was deliberately designed to fill the ASP/SaaS-loophole of the GPL-2.0. The first, as it is the most frequently used FOSS license[13], and GPL-3.0 as it has replaced GPL-2.0.

AGPL-3.0 and GPL-3.0

AGPL-3.0, as well as GPL-3.0, explicitly include the making available right in their respective Sections 0, where the term "propagation" is defined to include copying, distribution (with or without modification) and making available to the public a covered work. Accordingly, by the respective Sections 2 granting the "right to propagate a work" licensed under AGPL-3.0/ GPL-3.0, the right to make the covered software available in the meaning of Article 19a German UrhG is also granted.

GPL-2.0

Unlike AGPL-3.0 and GPL-3.0, where the right to make available covered work is explicitly granted, GPL-2.0 grants the right to distribute works under its terms.

The term "distribution" is not defined in the license. However, in a narrower sense it is usually defined as "transferring software copies to a third party". This interpretation of the term is supported by the GPL-2.0 wording for example in Section 1 ("distribute verbatim copies"). When

Rechtsfragen des Cloud Computing, chapter 6, paragraph 23 Higher Regional Court of Munich, decision of February 7, 2008 - 29 U 3520/07 - openJur 2012, 90291; Regional Court of Hamburg, decision of June 14, 2013 – 308 O 10/13.

11 *Grützmacher*, in: Wandtke/Bullinger, UrhG, 4th edition 2014, § 69c, paragraph 53.

12 This article draws the attention to the software that is immediately used by the SaaS user. Other software (such as the operating system or virtualization software) are left out of consideration, as they are primarily used by the SaaS provider who is running the program in accordance with its intended purpose according to Article 69d of the German UrhG. Until which point in the stack the SaaS provider is still running a program in accordance with its intended purpose and at what point he is making software publicly available by enabling third parties to make use of the software's functionalities needs to be decided case by case depending on the precise technical circumstances of the individual case.

13 See table of Top 20 Open Source Licenses, accessible via http://www.blackducksoftware.com/resources/data/top-20-open-source-licenses.

software is made available via SaaS, no copies change hands, which means that when strictly interpreted, GPL-2.0 does not grant the right to make the covered software available to third parties.

As this interpretation obviously contradicts GPL-2.0's intention to make software freely available for all users and all kinds of use, the term "distribute" should be adapted to the changes driven by technical progress and be read to include the right of making software available to the public via SaaS (or in any other way for that matter). This interpretation is in line with the licence's original intention to enable the use of covered software in any possible way, and supported by the wording of Section 3 GPL-2.0 that refers to a distribution being "made by offering access to copy from a designated place".

Even though this seems to be necessarily included in the interpretation of the term "distribute", considerable challenges arise under German copyright law, as quite frequently the granting of rights using GPL-2.0 has to be considered invalid where the provision regarding the so-called "unknown types of use" are taken literally.

Excursus: Unknown Types of Use

The former Article 31 Section 4 of the German UrhG deemed any agreement invalid that included the granting of rights for yet unknown types of use of works protected by copyright law. Article 31 Section 4 of the German UrhG read as follows:

> *"The granting of rights of use for as yet unknown types of use, and obligations aiming at this purpose are invalid."*

The Article was designed to ensure that authors would be involved in any kind of commercial exploitation of their work at a time when they were actually able to assess the monetary value of the underlying right. Article 31 Section 4 of the German UrhG was repealed and rewritten into Article 31a in 2007, according to which agreements including unknown types of use are now lawful. The situation for rights granted under FOSS licenses before 2007 has, however, not changed, since the transitional provision in Article 137l of the German UrhG is not applicable to FOSS. Consequently, with regard to FOSS, Article 31 Section 4 of the German UrhG remains effective for rights granted before 2007.[14]

The suitability of Article 31 Section 4 of the German UrhG for software (in general) has been disputed amongst lawyers. Some refer to Article 69a Section 3 of the German UrhG, which says that software should be treated like a literary work. The reference is general, no exceptions are mentioned, meaning that Article 31 Section 4 of the German UrhG is also applicable to software. Others point to the intent and purpose of Article 31 Section 4 of the German UrhG which – they say – prohibits applying it to software irrespective of the licensing model. They argue that, unlike other authors of copyrighted works, the authors of software are more likely to be well-paid to develop a product that is designed to be adapted to changing industrial and technical conditions. In other words, their interest in profiting from its commercial exploitation is already compensated by the fees they are paid. Further reference is made to Article 69b of the German UrhG, whereby all rights of use for software developed by employees are transferred to the employer. The contradiction between this transfer of rights to the employer and the assignment of rights outside the scope of employment relationships – they argue – can only be dissolved if Article 31 Section 4 of the German UrhG is not applied to software licenses at all.

14 Jaeger, in: Redeker, Handbuch der IT-Verträge, delivery 25 June 2013, chapter 1.20, recital 112.

This argument can be sustained for FOSS development. Nowadays, FOSS is mainly developed by company employees. For example, the top contributors for Linux are salaried employees.[15] With regard to FOSS, the suitability of Article 31 Section 4 of the German UrhG can be contested on the grounds that FOSS licenses do generally not include license fees. Furthermore, broad circulation of software even using new technologies will be in the author's interest at least when the source code is also made available.

However, if Article 31 Section 4 of the German UrhG is actually found to be applicable to FOSS licenses, its provisions are fulfilled regarding the granting of the making available right by GPL-2.0.

SaaS is an "unknown type of use", as it is technically and economically independent of other types of use. It was unknown until it became technically feasible, economically relevant and actually commercially exploitable. Given these circumstances, making copyrighted works available via SaaS is considered to be an "unknown type of use" until the mid 1990s.

It is yet to be assessed in legal literature and court decisions whether this is still valid. However, there are strong arguments against it.

For one, GPL-2.0 comprehensively grants rights of use by naming and describing the ways in which software can be used. However, GPL-2.0 does not go further and state that any other ways in which software can be used are included in the license as well, despite the fact that they are not explicitly named and described. In consideration of GPL-2.0's goal to comprehensively grant all imaginable rights of use, one can only assume that such rights (i.e. those that are not explicitly named and described) were supposed to be granted as well. This makes GPL-2.0 different from typical licenses and agreements granting rights for unknown types of use.

Secondly, GPL-2.0 makes a vague reference to the making available right by referring to the "designated place software can be downloaded from" in clause 3. Offering a program for download is the second way besides SaaS/ASP by which software can be made publicly available.

It is contradictory to first interpret "distribute" as being inclusive of the right to make covered programs available via SaaS just to then render the GPL-2.0 void by applying Article 31 Section 4 of the German UrhG based on SaaS being an "unknown type of use".

Furthermore, GPL-2.0 aims at a comprehensive granting of rights. Like other FOSS licenses, it does not contain any restrictions with regard to types of use. There are certain conditions that have to be met, and if they are not, the rights of use are cancelled entirely – but the ways in which the covered works may be used are not limited in any way. In order to achieve this goal, the so-called "principle of transfer tied to purpose" as laid down in Article 31 Section 5 of the German UrhG might be applied. However, it would need to be applied a sensu contrario, because it is usually applied for restricting rather than for granting rights of use.

Eventually, it is possible that there is simply a tacit consensus amongst rightholders that GPL-2.0 actually grants the right to make software available via SaaS.

15 Linux Kernel Development: How Fast it is Going, Who is Doing It, What They are Doing and Who is Sponsoring it (2013 Edition), accessible via http://www.linuxfoundation.org/publications/linux-foundation/who-writes-linux-2013.

Is a SaaS provider required to meet the license obligations?

Specifically in the context of FOSS and FOSS licenses, SaaS raises another question: Does making the software available via SaaS oblige the SaaS provider to fulfil the license requirements? This especially includes the question of whether the source code has to be made available, too, whenever software is provided via SaaS. The answer to this question challenges the FOSS philosophy of ensuring the freedom of software, as this freedom only exists if the source code is openly accessible.[16]

AGPL-3.0

According to Section 13 AGPL-3.0 the SaaS provider - as the person who offers his users to remotely interact with a program via a computer network - is obliged to license any modifications to software licensed under AGPL-3.0 also under AGPL-3.0. In particular, he must give all users (but not all third parties) the opportunity to obtain the corresponding source code of the software version made available via SaaS.

Legally, this means that all license obligations must be met when software licensed under AGPL-3.0 is used by a SaaS provider. However, for the most part, the practical inability to examine the software offered to users for remote interaction with a program via a computer network for AGPL-3.0'd components remains.

GPL-3.0

As stated above, GPL-3.0 grants the right to make software licensed under GPL-3.0 available via SaaS as part of the right to "propagate" covered works. Since obligations from license requirements only arise if a covered work is conveyed, the SaaS provider is not obliged to fulfil the GPL-3.0 obligations. In other words, making available software licensed under GPL-3.0 via SaaS is an effective way to bypass the GPL-3.0's license obligations, in particular the obligation to make the source code available.[17]

Provisions closing this so-called "ASP-loophole" were intentionally not included in GPL-3.0. Rather the issue was tackled by the AGPL-3.0.[18] According to Section 13 GPL-3.0, AGPL-3.0 can be applied whenever GPL-3.0-licensed code is linked or combined with software licensed under AGPL-3.0.

GPL-2.0

GPL-2.0 only grants the necessary right of making available covered software via SaaS if the term "distribute" is interpreted as including the making available right. In other words, the SaaS provider is either distributing software licensed under GPL-2.0 resulting in him having to meet the license obligations, or he has not been licensed to make the software available via SaaS. As laid down above, a SaaS provider is not just "running the program" under German copyright law, as the provisions distinguish between making use of software oneself and enabling others to make use of the program's functionalities. While in the first case it is only about using a program, the latter goes beyond that and thus requires specific granting of rights

16 Cooper, Effects of Cloud Computing on Open-Source Compliance, accessible via http://www.linuxjournal.com/content/effects-cloud-computing-open-source-compliance.

17 Pohle/Ammann, Software as a Service - auch rechtlich eine Evolution?, K&R 2009, 625, 629.

18 Smith, GPL-3.0 and Software as a Service, accessible via http://www.fsf.org/blogs/licensing/2007-03-29-GPL-3.0-saas.

Conclusion

When taking Article 31 Section 4 of the German UrhG in a literal sense, it precludes certain FOSS licenses granting the rights of use necessary for making FOSS available via SaaS. However, there are strong arguments against applying this Article to software licenses in general and to FOSS licenses in particular. What courts will say about it, remains to be seen.

About the author

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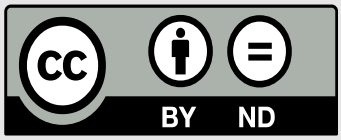

Book review: 'Digital Copyright Law and Practice', by Simon Stokes

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Abstract
Katie Hill reviews Digital Copyright Law and Practice, a book which is due to come out in 2014.

Keywords
Law; information technology; Free and Open Source Software; intellectual property; copyright; book review

Simon Stokes's Fourth Edition of Digital Copyright Law and Practice is a fairly comprehensive explanation on the topic of digital copyright and related areas and contains précises of interesting (for the most part) and relevant case law and legislation as well as some commentary and practical examples of how various issues could be addressed in reality.

The opening pages explain that the aim of this book in relation to digital copyright is "to help educate rights owners, users and their lawyers of these challenges so that they can better protect and exploit their copyrights". To write a book which is designed to guide three groups of people who are likely to have disparate levels of knowledge and different requirements is a real challenge and it is unclear why anyone would declare this aim so baldly unless they felt that they had accomplished it.

Although the precedents and checklists section at the end of the book may prove to be instructive and useful for both lawyers and their clients (though will clearly need revision with future developments), I am unconvinced that this book fully achieves its stated aims. The book is also rather awkward and unwieldy in places. The "rights owners and users" focussed sections may prove to be irritating for lawyers and it is possible that the lawyer orientated sections will have a soporific effect on non-lawyers.

The book does, in certain places, go into some depth of explanation on the basics of copyright (which seems designed for the layman) but fails adequately to cover all bases if its intention is to start from first principles assuming practically zero knowledge. For example, joint authorship is rather glossed over and this may lead to confusion when the nuances are later discussed. The text delves into legislation and case law across the world which is perhaps only really exciting for lawyers. A little more commentary and discussion on the issues and the views of the author on how this impacts practice going forwards may be interesting and assist in breaking up these rather dry lawyer-focussed sections. That said, a full text on the basics which also gives deep critical insight into law and practice would extend this book to a tome of such a size as to become

unappealing and a line has to be drawn somewhere.

This, however, is nothing to a major issue which is exemplified by the following statement: “Some argue that copyright ought not to exist or at least it should be severely limited in its application. The ‘open source’ or ‘copyleft’ movement discussed later in this book is one example of this”.

Ideally, in that discussion, Mr Stokes would give a further explanation of F/OSS and correct this statement but alas, the page and a half committed to open source’s “challenge” to software copyright neither corrects nor clarifies, and the final two page section merely provides a slightly alarmist checklist for companies considering open source. The fact that in a book dedicated to digital copyright there are a measly four pages dedicated to open source and a couple of scattered references seems bizarre. But worse than that, the text misrepresents the F/OSS movement. This potentially misleads its readers and must be addressed in the fifth edition.

About the author

Katie Osborne *is a solicitor at Moorcrofts LLP, a boutique technology firm based in Thames Valley. Katie transferred to Moorcrofts for the final part of her training contract in order to work under the guidance of Andrew Katz and remained with the firm once she qualified. Katie now acts for a wide range of clients both based in England and abroad in non-contentious commercial issues, intellectual property and technology. Katie has recently passed Harvard Law School's distance learning course on US copyright law and has a particular interest in FOSS and open hardware and data issues.*