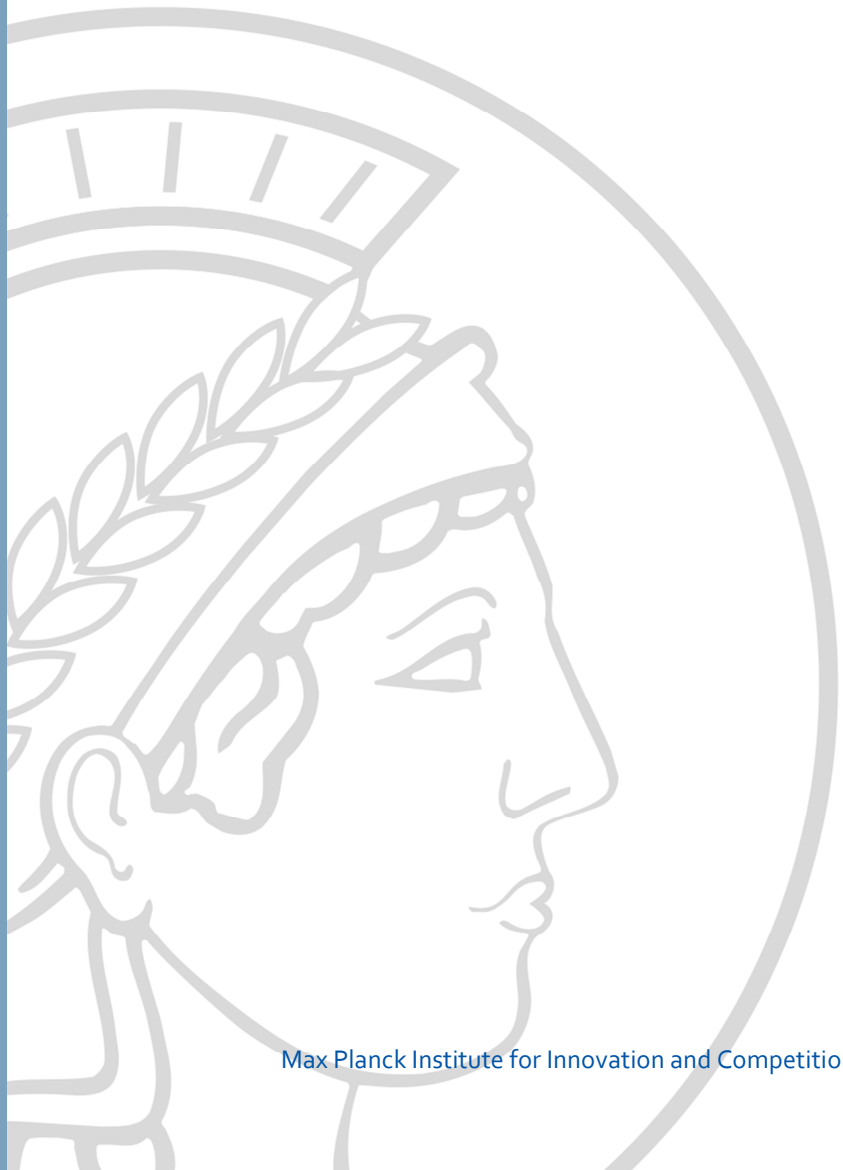
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OPEN vs. PROPRIETARY WORLDS



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ACCESS AND USE: OPEN vs. PROPRIETARY WORLDS

Reto M. Hilty[*] *and Kaya Köklü*[**]

A. Outset

There are good reasons to assume that an "open world" – a world in which IP rights do not impede the access and use of knowledge – somehow is a better world. We all know the picture of the dwarf standing on the shoulders of the giants – nicely symbolizing that nobody can create or invent something entirely new from scratch. Based on this elementary finding, one may conclude that the inclusion of the preexisting in something new should be facilitated, whereas a prohibition of such inclusions, in contrast, should be avoided as it might impair the emergence of the new.

A closer look reveals that the story is certainly much more complicated. What is preexisting today was new at an earlier time. The reasons why this new at that earlier time emerged are multifaceted. One of the reasons might be that the person generating the new presumed that he will likely gain a (whatever) return for his investments. Without such a positive forecast, investments would have been omitted – and something new could not have emerged.

Consequently, unrestricted openness does not necessarily lead to a better world in terms of innovation and creation. If something preexisting is missing from the outset, there is nothing new to be built upon. Further, if something new does not emerge today, the preexisting will lack tomorrow. Hence the prerequisite for the emergence of the new must be satisfied at any stage; the preexisting should not be taken for granted[1].

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[1] Following the recent discussions related to access issues (*e.g.* concerning educational material, but also with regard to generic and genuine medicine), one gets the impression that this concern is somehow underestimated. It is true that with regard to what already exists today, one may achieve a better availability with open models – but would there be further progress in educational knowledge or medical research if those who have to invest will be deterred and frustrated by a non-preventable use of third parties?

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In other words, if openness goes too far, it risks eliminating the probability of a sufficiently high return and consequently the willingness to invest in innovation and creation. Thus, there is a danger that openness would eliminate the prerequisite for the emergence of something new. Consequently, openness would not foster, but jeopardize innovation and creation.

The lesson to learn from this conclusion is that positive impacts of openness depend on its degree. What needs to be achieved is an adequate balance between incentives for and protection of investments on the one hand and use opportunities related to the outcome of such investments on the other. The optimal balance will foster both worlds, the open and the proprietary one, namely by preventing over-exclusivity related to the preexisting knowledge – impeding access and use possibilities required for the creation of the new – as well as over-openness, ultimately undermining incentives to invest in the new.

The crucial question to be answered is how the law should be framed in order to achieve such an appropriate degree of openness within a proprietary world. It is obvious that in a world of IP rights the risk of imbalance is rather one-sided; IP rights as a matter of principle are of an exclusive nature. Hence, the risk of over-exclusiveness is more likely than over-openness.

A certain co-existence of the open and proprietary world is already observable (as will be shown below). However, the actual degree of openness apparently is not sufficient to achieve a maximum of innovation and creation; an appropriate balance between exclusiveness and openness does not seem to be met yet. Assuming that this observation is true, the problem to be solved is: How can we foster openness – or at least maintain it – in a proprietary world full of IP rights?

B. Approaches how to safeguard openness

The current legal framework – *i.e.* the fact that we have IP rights like copyright law or patent law – is not *per se* detrimental to the existence of an open world. Quite the contrary: IP rights are so to speak prerequisites to safeguard a once established openness.

An IP right is an exclusive right allowing the prohibition of the use of the subject matter of protection. But at the same time the right holder has the freedom to allow certain use activities – either totally for free or by imposing certain conditions.

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This is what the currently known open approaches – *e.g.* the "Creative Commons licenses" (CCL)[2] – rely on. These approaches do not replace but work alongside copyright law and enable the rightholder on the basis of a simple and straight forward contractual construction to permit third parties certain use activities under specific conditions.

To some extent, the contractual construction may legally be interpreted as a contract for the benefit of a third party: Subject to the type of CCL, any subsequent contributor to a preexisting work shall be allowed to use the work under the condition that he will allow for corresponding – creative – uses with regard to his (new) creation (in which he might have own copyrights) as well.

It is worth mentioning that such CCL are not only symbolic in order to show that a specific work is more or less free to be used by third parties. CCL are also enforceable in court proceedings, *e.g.* in the event that someone uses a CC-licensed work for a new creation without providing third parties with a corresponding CCL for subsequent creative uses of his newly created work (in other words does not apply the CCL model for his work himself). There are plenty of court decisions worldwide confirming that someone, who infringes the conditions of CCL commits not only a breach of his contractual obligations but also a copyright law infringement based on the unauthorized use of the underlying work.[3] Consequently, a breach of the contractual licensing obligations may usually also qualify as a breach of copyright law, which additionally leads to cease and desist as well as damage claims.

The success story of CCL confirms that the current legal framework does not per se impede open models. Quite the contrary, the enforceability of CCL demonstrates that IP rights are essential to safeguard a perpetual openness. But still, two fundamental questions need to be answered:

[2] Creative Commons licenses are a success story worldwide. More than 400 million works in the Internet are currently available under a so-called CC-license. According to a CC-license, not "all rights are reserved", but only "some rights are reserved". For further information on Creative Commons licenses, visit: http://creativecommons.org/

[3] Case law can be found in various jurisdictions like Spain, the Netherlands, Australia, Belgium and Germany. For a non-comprehensive list of cases, visit: http://wiki.creativecommons.org/Case_Law. Particularly remarkable is a decision rendered by the Regional Court in Berlin on October 8, 2010 (file number 16 O 458/10, published in: MMR 2011, 763). The Regional Court found an improper use of a photo under a CCL and granted an *ex-parte* preliminary injunction on the basis of a breach of the respective licensing conditions.

Question 1:

Are open models sufficiently used in practice with a view to the aforementioned balance between exclusivity and openness? And in case of a negative answer: is there any need for action – should in particular the legislator create incentives to increase the actual use of open approaches?

Question 2:

In view of the fact that the proprietary world (created by a comprehensive setup of IP rights) obviously coexists together with the open world (which, as demonstrated above, itself is based on IP rights to some extent), is the latter one endangered by the first one? In other words, is there a risk that the currently observable scope of open models cannot be maintained in the long run? Consequently, the question arises whether there is a need for legal intervention to strengthen "competition" between the open and the proprietary world.

C. Open Models in Practice

To answer the first question, one needs to consider the most important open approaches in practice so far. The following overview will help to decide whether and, if yes, to what extent legal interventions might become necessary.

1. Open Software

The forerunner of the open world doubtlessly was the open source movement related to software.[4] Today, it can be observed that there are two – smoothly – coexisting worlds, the proprietary and the open one. And it is fascinating to see that both worlds allow for profits. Software in the proprietary world is sold as such, whereas the business model in the open source world follows a different approach.

In the open software world, the profit is not made by the (freely available) software itself, but by commercial services provided around that software, *e.g.* by providing installation and training services or technical assistance in creating an interoperability of open software

[4] *See* Metzger/Jaeger, Open Source Software and German Copyright Law, IIC 2001, p. 52.

with proprietary IT systems. Obviously there are sufficient incentives – not only idealistic but also monetary ones – to enter the open software world and to abstain from the proprietary one. As competition between the two worlds apparently works well, there is no need for the legislator to intervene in this particular field of copyright law.

2. Open Access Publishing of Scientific Research Results

More recently, open access publishing related to (notably) scientific research results has become a major subject of discussion.

Proponents of an open access publishing argue that in particular results from publicly financed research should be made freely available within open access databases (also known as "Golden Open Access"). The most powerful drive for open access publishing clearly emanates from universities and other research organization, hoping that the dramatic increase of costs for purchasing (commercial) academic publications[5] could be banned. Whether this hope is justified on a long-term perspective remains unclear, as open access publishing does obviously not mean publishing without any involved costs. Quite the contrary, open access publishing may well involve some substantial costs, *e.g.* for establishing and maintaining the database, for an easily accessible technical infrastructure and last but not least for quality assurance of the scientific articles.

Although there are already existing open access databases for scientific publications, the acceptance and practical relevance of this open approach is quite limited so far. No doubt that to some extent open access publishing enriches the academic debate. But a closer look reveals that a success similar to the one of open source software can hardly be expected. What is lacking are similarly promising business models or other incentives to actually use open access facilities.

Currently, there are hardly any incentives for scientists to effectively publish in open access facilities instead of high ranked (commercial) journals. In order to be successful, any such incentive primarily needs to meet the scientist's expectation that his publication shall in first instance support and enhance his academic career. He will consequently make his decision according to whether open or commercial journals will help to achieve his goals.

[5] *See* Impact Assessment accompanying the document "Commission recommendation on access to and preservation of scientific information in the digital age", July 17, 2012, SWD(2012) 222 final, p. 16.

In view of the above, one might consider legal interventions – either on a contractual basis (*e.g.* obligations imposed by a university vis-à-vis employed scientists), or by a limitation of the scope of the individual copyrights, which are most often lying in the hands of commercial publishing houses.[6] But whether such interventions would effectively reduce the costs to access scientific research results and increase the outcome of academic publishing at the same time is doubtful. Any such attempt would also bear the risk of unwanted side-effects, like an increased competition to attract the best academics (who might avoid employers limiting their freedom to publish on a contractual basis).

3. Freely Accessible Online-Platforms

A further field related to open creativity as an alternative to the proprietary world are freely accessible online-platforms with mainly user-generated content. There are specific online-platforms where an unlimited number of contributors help the emergence of a commonly created work. Sort of a prototype in that respect is Wikipedia; Google might be deemed as another one. Whereas Google is commercially highly successful, a sustainable success of Wikipedia is less obvious.

With regard to Google, one should, however, not confuse the term freely accessible with openness. The fact that contents are freely accessible may not mask the fact that the content is neither user-generated (as this is the case with regard to Wikipedia) nor that Google invests tremendous amounts of money to get the provided content created. Rather, Google pursues a business model that – at least to some extent – reminds us of open source software: What is commercialized is not the content as such, but the attention of the Internet users. As the attention of customers is key for commercial success, it does not wonder that firms are willing to pay substantial amounts for advertisements being placed on Google sites.

Wikipedia, in contrast, is a fully established environment of user-generated content. It is not only freely accessible, but also free of commercial advertisements. Therefore, it is not surprising that the

[6] *E.g.* the German Parliament currently considers implementing a secondary publishing right for publicly financed scientist's (*see* draft law by the German government of April 10, 2013), which has in fact nothing in common with the "Golden Open Access" approach anymore. The secondary publishing right as proposed in the draft law is limited to scientists of non-university research institutions and allows a second publication in a non-commercial open access database only after a grace period of 12 months. Furthermore, the secondary publishing right entitles only to publish the final manuscript version, which has not the same format of the first publication. If this proposal will ever enter into force, it is likely that it remains ineffective due to the very limited scope of application.

costs – mainly accruing from providing the technical infrastructure and a relatively far reaching system of quality control – cannot easily be recovered and, hence, lead to regular appeals for crowd funding.

Astonishing are the obviously existing, non-monetary incentives to – anonymously – create and contribute content for such an online-platform. Insofar, Wikipedia provides for a remarkable example of countless active supporters of an open world.

The examples of Google and Wikipedia impressively demonstrate that freely accessible online-platforms with and without commercial incentives may become successful even within a proprietary world. Hence, one can conclude that there is no need for legal intervention – at least not concerning the goal of safeguarding openness within the proprietary system. Regarding Google, this does of course not mean that side effects of the tremendous commercial success of that company should be overlooked. Notably, antitrust concerns increasingly are addressed and might call for intervention. Such considerations, however, focus on a subject matter different from the discussion on how to safeguard sustainable openness with a view to access to and use possibilities of content.

4. Open Innovation

A latest development in terms of openness is located in the field of innovation. Although it is hard to say what the term "open innovation" exactly means, there seems to be a fundamental difference compared to the aforementioned examples: the safeguard of openness, relying on an IP right that can be enforced against infringers of the (open) licensing regimes, is not based on copyright law, but requires the existence of another IP right, namely a patent.

Unlike copyright law, where the mere act of creation of a work is sufficient to gain protection, patent law requires a costly and time-consuming registration process of the relevant invention. Compared to the applied system of CCL for copyright protected works, it is questionable whether someone would cover all registration expenses for the sole purpose to entitle third parties a free "inventive use" under the condition that they will apply corresponding licensing conditions for any follow-up invention.

Without going too deep into that problem, it seems obvious that the IP system applicable to technical innovation hardly provides for incentives to enter the open world. Rather, the actual patent system forces a patent owner to stay within the proprietary world in order to cover his expenses for the registration of his invention – expenses in general, but also with a view to the IP system as such.

At first sight, the above described problem might suggest an intervention by the legislator in order to create more incentives for openness within the proprietary system of patent law. However, such an attempt would necessarily end up in legal amendments which are of fundamental nature. To phrase it abstractly, the costs of the IP system – whether of monetary or of other nature – would have to be reduced to zero for those inventors who are willing to enter (and to sustainably remain) in an open world of innovation. Without prejudice to the feasibility of such a system, it needs to be noted that for the time being, any such consideration roots in purely theoretical reflections and shall therefore not be pursued in the following.

D. Endangerment of the Open World by the Proprietary IP System

The last mentioned example of open innovation demonstrates that there are inherent risks for the open world if the entrance into the proprietary world seems to be more beneficial for those who generate the new. If an inventor provides for openness related to his invention – meaning that he does not apply for patent protection – he would not be in the position of prohibiting third parties to use and commercially exploit his invention. Without a patent, he will not be able to impose any kind of licensing terms concerning the use of his invention. It is not only that he could not hinder the inventive use of his own invention by third parties, he in particular could not prevent follow-up inventors from leaving the open world and to apply for a proprietary, exclusive right instead.

In other words, the entrance into the open world requires sufficient incentives, which in many cases might not exist. Only in exceptional cases, the open world may be beneficial under specific circumstances – notably if incentives derive from monetary prospects (as shown above with regard to open source software or Google – as far as Google may be deemed to represent the open world at all). In most cases, the incentive to enter the open world bases on different considerations and in particular on intrinsic motivation. Under certain conditions this may suffice to maintain a system sustainably open. Wikipedia is certainly a good example in this regard. However, one should not overlook the weakness of this platform as it produces costs that cannot be covered by the open world business models alone.

For the time being, it is hardly conceivable how a legal intervention to safeguard the open world against the proprietary world might look like. A panacea or feasible solution is currently not in sight. In any case, one needs to face that in the end, all kind of open approaches are based on the voluntariness of the actors: To safeguard the open world, a right holder needs to be willing not to enforce his

exclusive right to the full extent, but to use it as a mean to keep the open world sustainably open. Such behavior can hardly be stimulated by law. Any such incentives must derive from the factual circumstances, *e.g.* based on market prospects or individual motivation.

Worth to note is that there are already existing legal tools to safeguard at least a certain degree of openness in a proprietary world. Such tools are based not on the voluntariness of the involved parties, but on legally mandatory limitations to exclusive rights. Depending on the individual case, statutory permissions, in terms of directly applicable legal provisions which allow for the use of an IP protected subject matter (like a copyright protected work or a patented innovation) under certain conditions like *e.g.* for educational purposes or for research, may become relevant. Often overlooked is the importance and effectiveness of compulsory licenses, which significantly may open up the proprietary world by allowing third parties to use the subject matter of protection against the payment of a remuneration determined by court.

E. Outlook

In view of the limited possibilities to foster open models, it is advisable to invest more efforts in the development of legal instruments to limit over-exclusive rights instead of dreaming of a far reaching open world. As long as the proprietary system coexists with open approaches, success stories of the open world will remain subject to the voluntariness of the involved actors.

If, however, the general perception is that this voluntariness is not sufficiently widespread – and there are certainly good reasons to believe that – the required balance between sufficient investment security (which requires a certain degree of exclusivity) on the one hand and opportunities to use the outcome of investments on the other can only be achieved on the bases of further legal measures. In other words, if the goal is a maximum of innovation and creation, one should not shy away from establishing of more tailor-made limitations and exceptions to our existing IP system.