

Property and Public Goods in view of Copyright and Copyleft

Input by Sabine Nuss at the Conference on

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People often call the contemporary formation of capitalism (apart from the overused term "globalization") "Knowledge-Society" or "Information-Society" or even "Information Age", which helps just as little to understand the change and the state of today's society as the term "steam engine-society" would have illuminated the era of industrialization (Marcuse 2002). Nonetheless this terminology indicates that "information", or rather, "knowledge," plays a more important role than it used to.

This choice of terminology implies that the development of new technologies is a key factor in contemporary society: Digitization and the networking of Personal Computers and Host Systems - the so-called "Internet" - change the mode of production as well as some characteristics of commodity circulation. In the circulation sphere, digitization and networking create a particular problem with Intellectual Property Rights – which is just another word for commodified information or knowledge. To put it simply: the intangible nature of digitized information makes the creation of an artificial shortage of these goods a difficult proposition. But shortage is the precondition of commodification; if goods are freely available, nobody would pay for them. The copyright industry is racing to develop technical measures such as copyright protection schemes for digitized information to cope with this problem. But those technical measures are still not really successful, on the contrary: hackers and the industry are neck on neck in a race in which one side tries to enforce its copyright, while the other aims to demonstrate that this attempt is futile, that every copyright protection scheme can be overcome. Because of the inability to enforce copyright sustainably by technology alone, the copyright industry has sought to back it up by legislation. First examples are the Digital Millennium Copyright Act (DMCA) in the US and the European Union's Directive on Copyright (which is already adopted into national law), which both make it a criminal offense to circumvent copyright enforcement technologies.

It is characteristic for the contradiction between the need of open knowledge for innovation and the need of closed knowledge for commodification that intellectual property rights have been contended since they were introduced - even by bourgeois economists. Its critics hold that patents erect barriers to the access of knowledge and stifle innovation and growth by restricting imitation. The proponents of patents emphasize that the capitalist needs to enclose knowledge, because otherwise s/he would be imitated by other market participants (with low input, but the same possibilities to profit) and would never be able to refinance the capital spent to create the knowledge.

With the new technologies this tension seems to come to a climax (and this is new), because digitization allows the creation of perfect copies of information and the overwhelmingly broad distribution of knowledge at almost zero cost. One of the most important digitized information products which emerged in the last five centuries is software, which itself is the raw material (together with hardware) of the whole internet infrastructure. Programmers were the first to realize what it means when electronic data is subsumed under the exclusion principle as a means of the realization of a profit. In the beginnings of the computer industry business was restricted to the sale of hardware and technical support. Software was a by-product, then it was no problem to exchange software to jointly work on it. This got more difficult following the introduction of restrictive licenses on software. Proprietary software emerged where the source code – a program's human-readable language – was held back, in a way like a company secret.

The consequence was that programmers couldn't improve on and develop proprietary software. Richard Stallman, programmer at MIT and today's guru of the free software movement, was understandably annoyed and lamented the end of the glorious days of freedom and open cooperation in software development. He founded the Free Software Foundation, launched the General Public License (GPL) and coined the term "copyleft" as opposed to "copyright". But the rejection of private property over source code is for Stallman not only a more efficient mode of production but also a step towards a freer society.

Software under GPL has to be "free", although free in this context doesn't necessarily mean "free of charge" but that the source code remains openly visible and accessible to all. Moreover Copyleft is a general method for making a program or other work free, and – and this is special - requiring all modified and extended versions of the program to be free as well.

A great amount of software was developed in this spirit, and one of the best-known products is the operating system Linux. In the late nineties, a sort of countermovement was formed, the Open Source Movement, that also advocated open source codes but rejected Stallman's political ideological attitude. Open Source's motivation lies rather in the greater efficiency of open, compared to proprietary source code. Commercialization is explicitly welcomed.

In the meantime, a couple of organizations have emerged that use the label "free" to shield the internet from private commercial interests, but also from governmental regulation. The term "free" is now not only applied to free software but also to text, music and pictures, although these are different forms of digital goods. "Free" is more a label than a strict legal term. Until today the free software movement is part of a comprehensive social movement, which is fighting for free access to digitalized information. E.g. just a few days ago there was a big conference in Berlin (it was the fourth conference of the very popular "Wizards of Oz"-Conference) and it had the title "Information Freedom Rules". And since a few weeks we have the phenomenon of a Europe-wide emergence of a new political party, called the "Pirate Party", a "one-topic"-party which fights for the legality of file sharing systems in the internet. The Pirate Party wants to fundamentally reform copyright law and get rid of the patent system.

The proponents of free software or free information in general put often forward the argument, that knowledge should be a common good or a public good. They point out the fact that digital goods aren't scarce but duplicate when passed on. They complain about restrictive copyright regime, which in their opinion creates artificial scarcity, where actually is no scarcity at all. They regard the traditional property rights system as unfit and outdated for the digital age. Against that background new sale models for digital content emerge. "Copycan" for example is a quite new model, just to mention one. The artist uploads his/her work in digital form (e.g. music files), and a preview of it to copycan.org. The artist announces the amount of money he would like to have for releasing his work to the commons under a free license like Creative Commons. People transfer money to the trusted party's account with reference to the particular artist. If the announced amount is reached, the artist gets paid, the content gets released and is from then on freely available. The files can be copied and distributed through filesharing networks. The slogan on the webpage of Copycan says:
„Culture is flowing freely, artist and consumers are happy“.

In that discourse everything is about „the commons“. The term „commons“ stems originally from the social ecology and is likewise related to nature, like water, air, sun, forest, lakes, and so on. It is nowadays applied to information. Yochai Benkler developed the thesis to invent an information protection movement like the environmental protection movement. What free access to air means to breathing, is comparable with what free access to information means to creativity and therefore to the development of human beings. That's basically the argument.

The mainstream of the free information movement is just fighting for a less restrictive access to knowledge. In a more radical point of view Free Software could be the germ of a future communist society. Free software and the movement of free information as a whole seems to have the potential to disrupt the capitalist system. I'll go into that later on.

First of all one can state, that the pure material character, the constitution of a thing (if it is knowledge or water or whatever), does not lead automatically to a certain determination of a good. If a good is a private one or a public / common one is not a question of nature, it is a question of the constitution of a society. That also holds for information and digital goods.

And I would add that in capitalism – sure - the easier it is to exclude people from the usage of things, the more likely it is that they are to be transformed into a private good. It needs special social techniques to bring goods in the social form of private good - above all force.

It's part of Karl Marx's theory that one has to distinguish the social form of a thing from its material character. The social form of a good in the capitalist society is the commodity-form, it is the carrier of the exchange value. In addition a commodity has a use value – which refers to the material consistence. As Marx pointed out: “As use values, commodities are, above all, of different qualities, but as exchange values they are merely different quantities, and consequently do not contain an atom of use value.” According to Marx, the commodity form is ignorant toward its content. That means that given the appropriate technological and legal means, every content could be commodified.

Why goods are public goods has, according to Karl Marx, and even to Adam Smith not a highly normative but a functional reason. Marx states that the commons are general conditions of production and that they are only funded by the government as long as it is not profitable for the capital to supply these goods (Marx 1857/58, 1953: 432). If the single

capitalist doesn't invest in general conditions of production like railroads or telecommunications and so on, than the government has to pay for it and by doing so it acts like the "ideal collective capitalist" as said by Frederick Engels.

But when the investments are already made, then it is possible for the government to privatize public goods with the goal that the private companies now provide these goods in order to make profit. Recent examples for this strategy are the privatizations of telecommunication or utilities companies in Europe. As Marx noted, there is a tendency inherent in capitalism to transform all of the labour in labour of which capitalists can reap surplus - meaning to privatize companies and make them accessible for capital accumulation. The recent development of privatization of the common or public goods worldwide indicates therefore that capitalism is in a new state of it's historical development.

A lot of scholars and activists don't question the social form of the private good - in contrast they praise the market and the form of the private good as efficient and well installed – for certain goods. Accordingly, most of the advocates of the commons concept defend it only for certain goods and they justify that with a diffuse mixture of material consistence and normative claims. They ignore that under capitalist circumstances public goods are functional for the capital itself and that they are a pure social construction, so that they will be transformed in a private good as soon as its profitable for capital and as long it is not in the interest of the nation state to keep control over these goods - as it is the case in the national defense.

If one wishes to withdraw goods from commodification then its better not to justify that with any material character, like e.g. “information duplicates when passed on”, but rather with a clear political statement against the social form of private goods. That requires rethinking and questioning this form, which is obviously the prevailing and seldom challenged form in which everything tends to transform, dependent on technological, legal and ideological means and dependent on the state of the art of capitalism: It's Private Property.

A few words to the assumption, that Free Software and the Free Information Movement could be a germ, sort of a beginning for an alternative society (alternative to capitalism). I don't want to talk bad about Free Software and the idea of sharing knowledge. In contrary, I myself see Free Software as a great example for the possibility of cooperative production beyond the

money and value form. And moreover: It shows a great advantage compared with the capitalist mode of production which is based on private property. The fast development of the internet technology would have never happened without the mode of production of Free Software. Without this way of production we probably would still work with electronic typewriters and maybe simple error-prone networking.

But that doesn't mean, that Free Software could disrupt or question capitalism. Besides the many companies, institutions and individuals, which all are using Free Software in the meanwhile, there are also companies whose business model is based on Open Source. They not only support Open Source but also making it work inside of companies or between companies and their partners.

The conflict of free available code with the necessity to hold private property as precondition for commodification could be solved in different ways: One can use open source software and sell only support "around" it, like Zope or Suse do for example. The other possibility lies in doing a mixture. All companies try to benefit from the global and collaborative knowledge, additionally they create new communities, with the aim to develop - in the open source philosophy - a special software, which itself improves their commercial product.

The different licenses are the instruments which provide on the one hand, that the necessary knowledge - the raw material - keeps its open access for the companies. On the other hand there are open source licenses that allow future releases to be closed, although they are based on open source. It is not the place here to carry out in detail the different licenses and which business model can be derived from it respectively. All I want to stress is that the licenses play an important role to keep a balance between open and closed code and this is nothing else than the expression of the fairly old tension between open and closed knowledge within capitalist economy.

All the well-meant and pathetic speech about freedom, sharing with friends, and so on, in the beginning of the free software movement produced a feeling of an alternative or even revolutionary way of production. But within capitalist economy it was even for capital a quite liberating and effective moment and capital now benefits from the more innovative and progressive mode of production open source development has and provides. GPL was and is still based on copyright law. It uses explicitly the copyright to reverse it into copyleft, but it is only a question of modifying licenses to suit open source software to commodification

purposes. The GPL helped in a way uncage closed software out of its isolated “captivity“ and maintain or even enhance the production of knowledge.

The mode of production of open source has thus arrived in the business world. Rooted in the non-commercial sphere, it needed to be formalized in the sense that the according institutional framework, namely the set of private property rights, had to be applied on the open code. In the age of global networking it became old-fashioned and less efficient to develop software in a local and closed way. To adapt the mode of production of knowledge to the new information technology it was necessary to open the code, to open the knowledge, in order to exploit further knowledge now globally, not just locally anymore, to absorb and concentrate the widespread talents and to invent licenses which nevertheless secured the commodification of knowledge.

On the level of production the open source business models seems to fit perfect to new working conditions, which are often labeled with the term „Precarization“. One interesting point is the *integration of independent and voluntary developers*, people, who are not hired by a company, but working with each other connected across the world through an online portal. The blurring *frontiers between business and non-business* are a further characteristic of open source production. All the programmers we talked to were not able to draw a line between their working time and their leisure time. Due to the voluntary, kind of private and often unpaid work from which parts move into mechanisms of extracting value, the frontier seems to disappear.

Cultivating developer loyalty to work on certain open source projects could be seen as method to motivate employees whereas the incentive lies not in monetary rewards but in a reward which lies in the *usefulness of the product itself*. Then there is the “ideological reward“, which seems to play an important role: identification with a certain *community philosophy*, which seems to lie somehow outside of the usually selfish considered commercial spheres.

Furthermore programers could prove themselves in developing open source, visible for all. Thus the probation period before regular hiring is dislocated from the companies into the open and private sphere. Thereby the companies save money by having no need any more for adjustments into new jobs. Work on Free Software or Open Source is project related work, it seems to be the more flexible way to hire work, instead of hiring the worker.

At least one of the lessons will be that collaborative work between people driven not by monetary reward but by the usefulness of a product seems to yield a high motivation to work. And that definitely casts doubt on the prevailing property rights theory according to which only private property could generate incentive to work. On the other side, the incorporation of open source and the motivation of work generated by such "free" conditions in capitalist process of valorization also shows that capitalism is not dependent of incentives set up and put forward by classical property structures.