

Open Access to Legal
Information and Copyright
Rules: A Law and Technology
Perspective

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Mission impossible?

Open Access to Legal Scholarship

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The Structure of the Presentation

- 1) Intellectual property vs. [and] norms of science
- 2) Digital technologies and access to information: closed models vs. open models
- 3) Open Access to legal scholarship: promises and perils
- 4) Conclusions

1) Merchants and IP Law

- **Intellectual property** has been shaped mainly by **economic interests**
- The **ancestors of patents and copyrights** emerged as **privileges** granted by the king to the representatives of the **merchant class**, such as weavers and printers, to exercise their activity exclusively
- The mechanism of privilege has then evolved to the **exclusive right** recognized by the law
- From an economic perspective, the exclusive right is a mechanism which is needed **to balance the incentive to produce creative information with the possibility of accessing the same information**

1) Republic of Science and Informal Norms

- The institutional features of the production of scientific knowledge have been mostly shaped by the practices and **customs (informal norms)** of the community of scientists, the so-called Republic of Science
- **Communality** implies that the knowledge is the product of the collaboration among colleagues and, therefore, it must be shared within the scientific community. All the actual knowledge is built upon past knowledge and it is the basis for that of the future (as Isaac Newton said “if I have seen further it is by **standing on the shoulders of Giants**”)
- The emphasis on **originality** generates the incentive to publish the works as soon as possible, trying to avoid being anticipated by others. But, after having **published** the work, the scientist does not have any more exclusivity over the knowledge she has produced

1) One interesection between IP and Norms of Science: the Scientific Journals

- The invention of **scientific journals** by the Royal Society of London in early 1665
- The scientific journal is the “**public record of original contributions to knowledge** [...]” (Guedon, 2001)

1) The “Serial Pricing Crisis”

- After the World War II **supply and demand of scientific publications quickly rose**
- The rise of the concept of “**core journals**”
- The market of scientific journals is a market where the best authors want to publish in highly-read journals and readers want to read journals which publish the best authors (**natural barriers to entry**)
- The market of scientific journals is an **intermediated market**, where **libraries** are the **key buyers**, which leads to **lower reader price sensitivity**

What role do digital technologies have in the access to scientific knowledge?

2) The Rise of the New Technology

Information (computer) & Communication
(Internet) Technologies:

- **Costless perfect (intangibles) copies & worldwide distribution**
- **Control over access and control over content use:** from secret code to digital encryption technology (e.g. computer program interfaces, texts, music, movies)
- **Contents total modifiability:** open source code (e.g. Internet Protocols, operating systems, texts, music, movies)

2) Technology, market structure and incentives

- **Closeness:** competition for the monopoly (high fixed costs and zero marginal costs; scale economies; price discrimination; lock-in and switching costs; network externalities; standards)
- **Openness:** competition for the reputation (indirect reward or public funding) or gift (zero marginal costs; network externalities; standards); what else?

2) The Rise of New Business Models: between Market and Gift [and piracy?]

- **Rigid and Centralized Control:** Digital Rights Management (DRM) - centralized production, direct distribution, new intermediaries and control over access and use; lock-in; price discrimination: e.g. Sony Playstation, iTunes
- **Flexible and Decentralized Control:** Peer to Peer production and distribution (also free of charge) – content modifiability: open source software (e.g. Linux), texts (e.g. Wikipedia; Open Access to scientific publication), video (e.g. YouTube)
- **Simultaneous boom of “piracy”:** illegal file sharing

2) The Impact of Technology on the Sources of Law

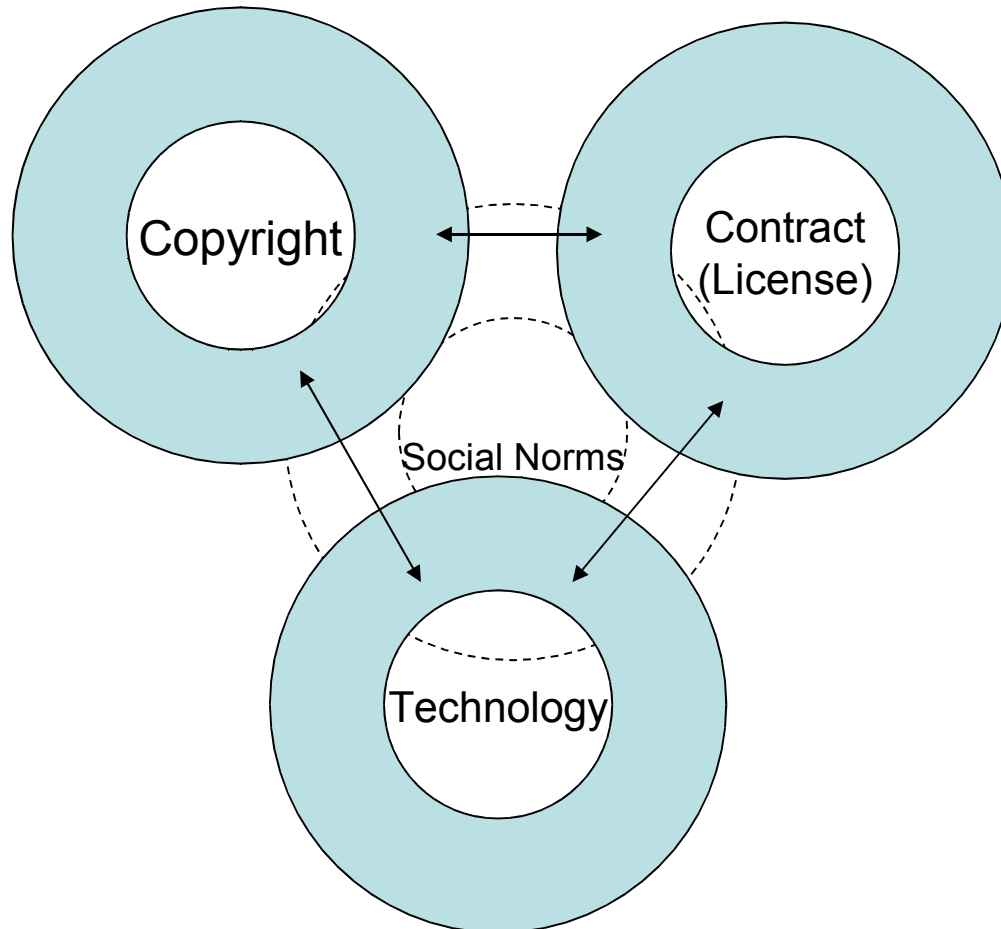
The decreasing importance of public ordering:

- Statutory Law & Case Law

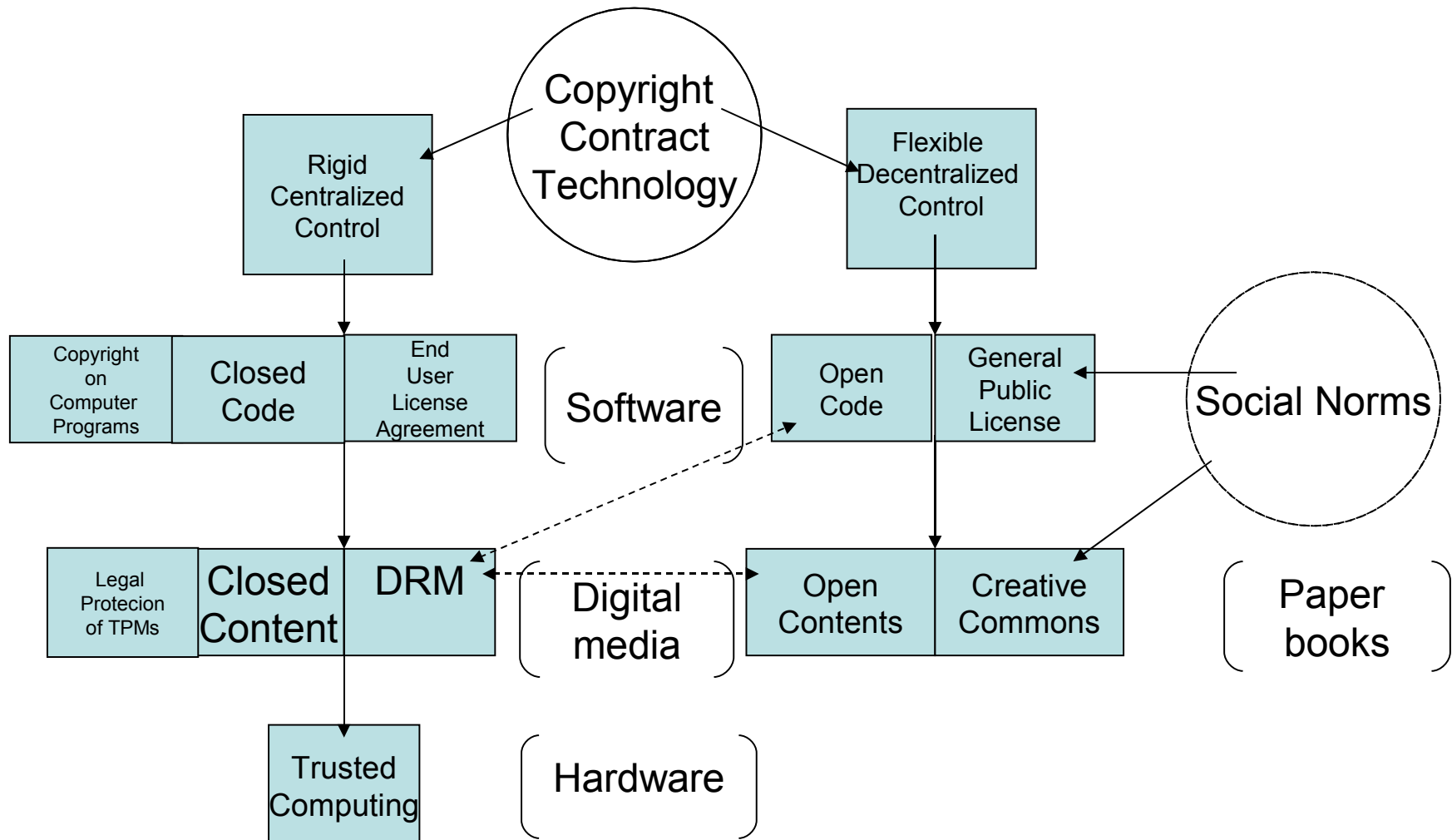
The growing importance of private ordering:

- **standard contracts (licenses)**
- custom/social norms
- technology architecture; **technology standards**

2) Three (or four) Rings (Sources of Law) for Information Control: Copyright, Contract, Technology (and Social Norms)



2) Closed Access Models vs. Open Access Models



3) The Dark Side of the Force

- There is the risk that **rigid and centralized control, shaped on market considerations, invades the proper domain of the scientific community** decreasing the possibility of access to scientific knowledge expressed in a digital format
- This risk is acute in the field of **legal scholarship**
- A **vast amount of legal information** - also covering information that is, in theory, in the public domain - **is presently accessible only through closed and proprietary databases such as Lexis and Westlaw**
- The **contractual and market power** of databases holders **is strengthened by new copyright laws**

3) The Open Access: a New Hope

- To counteract this risk, part of the scientific community is promoting the logic of the **OA to the scientific knowledge** (v., e.g. Berlin Declaration 2003)
- Many scientific communities publish their **results on websites freely accessible to anyone through the Internet** (Gold Road and Green Road)
- Despite the initial delay, the OA movement is **quickly growing in legal scholarship**

3) The Institutional Structure

- a) Functions of publications
- b) Incentives
- c) Copyright rules

3a) Functions of Publications and New Intermediaries

- The major functions of publications (**selecting the best works, making the works accessible, publicizing the works, and archiving the works**) is based on the:
 - old participants (commercial editors, university press, law reviews student-edited, etc.)
 - and **new intermediaries** (legal scholarship repositories like **Social Science Research Network's** Legal Scholarship Network and Berkeley Electronic Press Legal Repository, **Wikipedia**, **Internet search engines** like Google Books and **Google Scholar**, **social software**, etc.)

3b) Incentive System, Names (and Trademarks) and Reader's Attention

- Production costs are – as in the past – borne by the authors and their institutions (universities and law faculties)
- Dissemination costs – lower than in the past - are shared among the authors, their institutions and the old and new intermediaries
- The incentive system is based on the **reader's attention**
- Moreover, OA dramatically reduces the delay in publication and the costs of reading/accessing that material

3c) Copyright Rules and Author's Revenge

- **The author retains the copyright** (in particular, the right of attribution) over the publication **and grants** - through open licenses such as **Creative Commons Licenses** (see the Open Access Law Program of the Science Commons Project) – to the public and the intermediaries **a limited set of rights**

4) The Complex Mix of Rules

- The future of OA depends on the complex mix of **formal law**, **OA policies**, **social norms of science** and **technological standards**

4) The Importance of Technological Standards

- OA is a powerful instrument making work accessible
- The success of the OA in the other three functions of publishing (selecting the best works, publicizing the work, and archiving the work) will depend not only on institutional arrangements but also on the development of a **trustworthy technological system based on standardization of metadata**

4) OA is not Nirvana

- OA is not Nirvana. **The dislocation of publishing functions** to new intermediaries raises a number of **new risks**
- To counteract these new risks we have to take Internet Governance seriously and to see beyond copyright law

Thank you!

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