Public Domain and Democracy in the Digital Age

Uppsala September 18-19

Abstracts

To say that a piece of information or a creative work is 'in the public domain' implies freedom of access and use. As a building block of the public sphere, it is functional to the creation and maintenance of the latter; it ensures eased access to information that traditional intellectual property regimes often do not, and it is cast as essential for the right to information. That is why most contemporary conceptions of democracy hold the public domain to be a precondition for a well-functioning political life – but how this occurs is unclear.

Public domain plays a two-fold role in democratic politics. On the one hand, it provides the repository of informative materials and cultural data, necessary for citizens to shape their own judgments on public life. On the other hand, it also ensures dissemination of information in the public sphere that may be relevant for political, historical and cultural reasons. Public domain works both as a prerequisite and a result of democratic political action and makes for both top-down and bottom-up approaches.

Peter Dahlgren

Public Domain and the Privatized Web: Power Relations and the Logics of Democratic Participation

Though the notion of 'participation' has become a rather elastic concept, I argue that conceptually democratic participation is at bottom an expression of political agency, and that it in some way must connect with power relations. The normative vision of public domain is indeed a vital dimension of the broader public sphere in which participation takes place: public domain offers resources that help enable participation as political agency (through information, culture, values, etc.). Yet public domain – and all that smacks of 'the commons' – is much on the defensive these days, with the hegemonic status of neoliberalism and its perceived virtues of privatization. Public domain is a nodal point on a broader field of power relations that impact on the extent and character of political participation – and the character of contemporary democracy. The analytic horizon of my presentation suggests that the web environment – broadly understood (and including social media) – is increasingly shaped by power relations that run counter to the participatory potential of these communication technologies. While political participation is always shaped by overarching societal-historical contexts, in regard to the web there are also three specific sets of contingencies that impact on it: political economic (ownership, control, labour, profitability, and so on); technical-architectural (having to do with hardware and protocols, platforms and apps, user devices, and data gathering and usage); and socio-cultural (as manifested by network connectivity, sociality, practices, and dispositions). These contingencies are to a great extent held in place by legal frameworks, but it is important to understand that at bottom they are manifestations of hegemonic power relations. Some writers thus conclude that we should not put our democratic hopes on the web (or more specifically, public domain on the web). However, I take the view that the corporate character of the web can and should be challenged: via legal routes, but also via democratic agency and its practices. And indeed, globally, we see all sorts of efforts to appropriate the web for participatory goals and democratic ideals: there is a strong counter-hegemonic trajectory in the ways that many citizens use the web (even if we witness uncivil and indeed antidemocratic civic uses as well). The struggle for democracy is a never-ending story....

Kristofer Erickson

How Can Policymakers Place a Value on the Public Domain? Let Us Count the Ways

This paper reports on three vignettes that make up a year-long RCUK-funded study to locate the 'value' of the copyright public domain for the creative industries. The three research activities discussed are 1) a qualitative study of strategic decision-making in uptake of public domain materials by transmedia firms; 2) a quantitative content analysis of intellectual property content of Kickstarter media products in Q1 2014 and 3) a multiple case-study analysis of unauthorized fan video game production communities and methods. Collectively, these three research exercises enable us to confront wider questions about the objectives of intellectual property policymaking and the discursive importance of the 'creative industries' for national economic development. I argue that while liberal economic discourse present in copyright reform debates such as the Hargreaves Review would appear to foreclose alternative ways of enumerating the benefits of the public domain, new openings exist. Academic theory on prosumer communities, free and open source software and intra-firm communities of practice offer ways to conceive the value of the public domain in ways that may be appetizing to national policymakers working in a creative industries frame. In contrast to the traditional copyright industry position, these theories of production and innovation do not rely on exclusive intellectual property right as a creative incentive.

Each of the vignettes also highlight methodological challenges specific to working with concepts like 'value' and 'public domain' in the context of creative industries policy. Particularly with reference to fangame and Kickstarter media production, I discuss how production practices escape or conform to categories of artistic work provided under traditional copyright law, and advance some ideas about how to approach these dilemmas in empirical research.

Luciano Floridi

National Government's Data as a Public Resource

In this paper I discuss the right to information understood as the right that citizens have to access data held by their national governments. In the course of the paper, I shall argue that

a) an important feature of the right to information is the re-location of the burden of proof, which falls not on the *source* of the request (who asks for the data) but on its *target* (who is asked for the data), which needs to justify why the available data is not made accessible;

b) the re-location in (a) corresponds, in terms of philosophy of history, to a denting of the Westphalian order, and, conceptually, to a shift in the "ownership" of data, from the target of the request to the source of the request;

c) the shift in (b) should be accompanied by a full right to use the data in question freely for private purposes;

d) the full right in (c), however, should be balanced by the public nature and value of national governments' data;

e) the public nature and value of national governments' data in (d) means that commercial uses should be subject to regulation;

f) the regulation in (e) should lead to a treatment of national governments' data as a public resource that could generate revenues to the benefit of all the citizens, present and future.

I shall conclude that, although citizens should enjoy the right to information for political purposes (transparency and accountability), when it comes to commercial exploitation, national governments' data should be treated as a national resource, in a way similar to how Norway deals with its oil. Through the so-called State's Direct Financial Interest (SDFI) arrangement, Norway participates directly in the petroleum sector as an investor, and reaps the associated rewards, generating a long-term revenue to the state. Likewise, national governments should participate directly in the information sector as investors, treating data as the new oil. Commercial stakeholders (information companies) could help in harnessing a country's public informational resources, but the latter should ultimately belong to all its citizens.

Sebastian Haunss

Social Movements and the Politicization of Intellectual Property Claims

In the last 15 years a remarkable string of contentious mobilizations has emerged, challenging the normative and institutional frameworks that regulate how knowledge is produced, appropriated, and used. The mobilization for access to essential medicines, the conflict about software patents in Europe, the advent of pirate parties in various European countries, the establishment of the Creative Commons project, the struggles against "biopiracy", i.e. the private appropriation of traditional (indigenous) knowledge, the conflicts about file sharing in peer-to-peer networks, and the coming-together of the access to knowledge (A2K) movement are all examples of mobilizations that question the current regimes governing intellectual property (IP).
In all these conflicts the public domain and/or the commons are used as concepts to counter the dominant trend to privatize knowledge and to restrict access. Some of these conflicts have produced highly visible protest mobilizations, in others advocacy groups and NGOs are the driving forces behind the contestation of the current rules that govern the production and use of knowledge.

In my presentation I will discuss to which extent the protest mobilizations that emerged in the more prominent of these conflicts share common topics, frames and mobilization structures. I will address the question, whether these protest mobilizations should be interpreted as contingent phenomena of fluctuating discontent. Or are they social movements, rooted in the growing global economic and political importance of immaterial goods, addressing a set of new cleavages which originate in the social transformations of the knowledge society?

Mireille Hildebrandt

Open Data and Big Data: Politics and Economics of Big Data Sharing

This contribution will start with a brief conceptual analysis of open data and big data, followed by a discussion of the political economy that is emerging around the sharing of access to large data sets. The focal points will be (1) what re-use of personal data is lawful and fair, depending on the type of data, the kind of data subject, the type of controller, the relevant context; (2) what role should be attributed to the creation of added value, such as commercial value or public security interests; and (3) the need to secure data sets in a way that guarantees their integrity, since access to a database may enable manipulation of the data.

Relevant questions raised will be: which incentive structure drives open data? What added value is to be expected? What type of benefits could be generated for whom? What kinds on costs will be born by whom? Who decides if and how a balance must be struck between the protection if personal data and claimed societal benefits?

Finally, the issue of distribution will be discussed: how will access, benefits, costs, be distributed amongst private and public parties and individual citizens? The issue of distribution is pivotal for differential capabilities to infer monetisable knowledge from the data, which relates directly to the manipulability that may be generated by such knowledge. Whereas the 'open data' may be accessible by all, the inferred knowledge may be propertized, thus creating new knowledge asymmetries rather than a more democratic sharing of knowledge and information.

Bert-Jaap Koops

Protecting the Private Sphere When the Public/Private Space Distinction Collapses

Legal protection of the private sphere aims to ensure that information about individuals' private life is only disclosed with consent, or when there is good reason for others, particular the government, to intrude upon the private sphere without consent. Such legal protection consists not only in data protection law, but also in protection of other privacy dimensions: home, body, communications. This legal protection, particularly in the constitutional protection of home life, is very spatially oriented: it distinguishes between private places and public places, under the assumption that private life – literally – takes place mainly in private places. This assumption no longer holds. With 'always on' mobile devices and cloud computing, people continuously carry their private life with them, and the house is evaporating as the place where private life occurs. Moreover, people are also become increasingly vulnerable in public places through ubiquitous trackability and identifiability technologies. The public/private place distinction no longer suffices as a boundary marker in regulating private-sphere intrusions. Thus, the law will need to fundamentally rethink how it shapes legal protection of the private sphere.

Ahti Saarenpää

Access Rights and Democracy

We live in a dynamic network society. The old static Information Society is a thing of the past. Access is one of the key concepts in understanding the Network Society. We are increasingly dependent on access to networks and to the information they contain and the services they offer.

At the same time, we find ourselves in the midst of a transition to a new European constitutional state, one that places a heightened emphasis on the rights of the individual. It is a state in which information can no longer be merely cheap raw material for various activities and information products no more than sources of added value that are controlled by monopolies. The societal significance of information has changed.

What is more, we find that certain traditional dichotomies - public versus private or secret versus open information - now serve us poorly. Yet they are still applied and are increasingly used to produce disinformation that takes no notice of the rights of the individual. In practice these dichotomies tend to cause a scarcity of justice.

In the constitutional state, we have to redouble our efforts to achieve an optimal legal culture. One key element of this culture is the legal planning of information systems. Access will naturally be one aspect of this planning; but it is only part of the big picture. The path information takes in our society spans a gamut from technological choices to the possibilities of and restrictions on the recycling of information. In the constitutional state, each of the stages on this path must proceed with due regard for human and fundamental rights. The age of traditional document based legal thinking should be over.

The right of access is an important one. It realizes for its part the individual's right to know, which in turn is a facet of the ideal of democracy. But access alone is not enough. At the end of the day, what we must focus on is how comprehensible, credible and useful information is in different situations. We also need a more extensive array of standards and more of a narrative perspective in legal planning and its assessment. The robust functioning of democracy is among the loudest and clearest signals in legal communication.

Dag Wiese Schartum
Automation and Legislation: Should the Democratic Process be Renewed?

Moving from law-in-books to law-in-action requires that legal rules are known and comprehensible to people applying the law - but often they fail. Automation of legal decision-making changes this situation fundamentally: Partial automation reduces the amount of required legal knowledge, and fully automated decisions could be made without relevant legal knowledge at all (just push the button!).

Automated application of statutory law implies introduction of an intermediate stage between law-in-books and law-in-action. In order to set the democratically laws into effect, technical and legal experts are transforming all relevant laws and related legal sources into programming code: law-in-programmes. This transformation process changes the legal contents. Two main observations explain why such differences are created: The rich, vague and discretionary natural language expressions of the legislator are rephrased and replaced by formal statements expressed in a restricted but precise programming language. More important is the fact that transformation from law-in-books to law-in-programmes makes necessary a thorough analysis of passed legislation. This entails mapping and solving of interpretation problems, harmonising inconsistencies, revealing needs of supplementing rules where the law is silent etc. The selected solutions to these problems represent the actual law-in-action.

While delegated legislation (regulations) constitutes a well organised and formally approved addition to Parliamentary laws, issuing of law-in-programmes comes on top of, and shadows for, the democratically passed laws. Moreover, "legal programming" is not – to my knowledge - recognised as an organised part of the regulatory process. Instead, it is by far seen as a practical-technical task in order to create an efficient machinery of government.

Automated legal decision-making is of course not primarily about computer programmes and machines; it is about people, organisation of legal processes and shaping the system of government. Professor Schartum discusses solutions to these challenges, in particular regarding possible changes of the legislative process.

Judith Simon

Accessing & Using Big Data: Epistemic, Ethical & Political Considerations

Big data has often been discarded as being merely a new buzz word and many have questioned whether it really is something entirely new, whether big data comprises a paradigm shift in business, governance or science (Kitchin 2014). What cannot be denied, however, is that the possibilities and realities of data collection and processing have dramatically increased in recent years. While both nation states and science have long been gathering and processing vast amounts of data, new actors have emerged in the realm of massive data collection and processing. Indeed, it has been in particular the increasing availability of social media data as well as various types of sensor data, which have made the difference in scale, speed and quality leading to an era of big data. In contrast to states and research, these new players are mostly non-public entities: private companies of varying size and popularity, situated in very diverse economic sectors are all mesmerized by the promises of big data – while the assessment of its perils has often been left to private advocates and ethicists. In my talk I want to approach some of the epistemic, ethical and political challenges related to the gathering, processing and usage of data. In order to do this, I will first distinguish a) different major actor groups involved in these processes, b) different types of data and c) different goals of data processing. Using the example of basic mobile phone data regarding location and time-stamps, I will show the extensiveness and depth of inferences that can be drawn if this information is combined with publicly available background information (Hofmann 2014). In conclusion, I will in particular draw attention to imbalances in access to big data corpora as well as the implication concerning the distribution of competencies required to use, interpret and potentially contest big data and the inferences drawn from them.

Ben Wagner

Internet Governance and Freedom of Expression

Why should anyone care about freedom of expression? Why does it matter that individuals have the ability to speak their mind uninhibited? What inherent value can be found in the seeking, receiving and imparting of information that would cause any society to raise it to the level of a human right? And why should the story and its subsequent narration in modern liberal thought raise the value of free expression to a value worth dying for? This paper explores the governance of freedom of expression on the Internet. It focuses on liberal democracies and global corporations in North America and Europe, analyzing governance practices rather than norms or discourses. It also brings in more recent developments in regard to the ECJs Google Spain case as well as developments in the disciplinary capacity of internet infrastructure. It will also be suggested that the Internet has seen the rise of innovative governance practices that influence how the Internet is regulated. From contesting code to algorithmic regulation and quasi-public NGOs, many novel governance practices can be observed by studying how the Internet is governed. Indeed it can be argued that Internet Governance is itself a forum for international regulatory debates on the nature of appropriate regulation in a globalized world. Finally, an argument is developed which suggests that a 'global default' of Internet speech restriction has developed in the last two decades. This global default is at the core of many disagreements in Global Internet Governance, but at the same time can only be understood in an international context. That such a system could even be developed internationally has required specific forms of global governance, termed here 'legitimacy theatre.' This phenomenon serves to ensure weak institutionalization and minimal state involvement while enabling extensive coordination between private actors. These factors all contribute to creating the Internet as we know it today and help in understanding what can be said on the most important human communications platform.

Inger Österdahl

Between 250 Years of Free Information and 20 Years of EU and Internet

The right of access to documents is constitutionally based in Sweden and has a long history. The right of access is officially considered crucial to Swedish democracy. On entering the EU in 1995, Sweden declared that public access to official records forms part of Sweden's constitutional, political and cultural heritage. The members of the EU for their part declared that they took it for granted that Sweden would fully comply with Community, now Union, law with respect to openness and transparency. Sweden continues to push for transparency when EU legislation potentially containing secrecy clauses is negotiated in the EU. It turns out, however, that the EU membership does pose challenges to the strong Swedish right of access to documents. Recent changes in the law relating to secrecy in international affairs allowing for increased secrecy were justified by the fact that Sweden had been too optimistic concerning its chances of convincing international partners of the value of increased transparency, in the EU as well as in other international organizations. The protection of personal data is also controversial in Sweden to the extent that the stricter EU legislation clashes with the traditionally weak protection of privacy in Sweden; the right of access to information has largely overridden the right to privacy. Large amounts of publicly available personal data, amassed in data bases by private actors, for commercial reasons but under the protection of the Swedish constitution, is causing problems especially since the Swedish constitutional law is considered, by Sweden, to precede EU legislation in the field. Sweden will somehow have to solve the dilemmas caused by the differing traditions of transparency between itself and other members of the EU and of other international organizations. Incidentally and paradoxically, the Swedish Government Offices themselves have been criticized for not respecting the right of access.