

## WHY DO WE NEED SOCIAL WORLDS WHILE TALKING ABOUT D-KNOWLEDGE COMMONS ECOSYSTEM IN CYBERSPACE?

*by*

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*This paper is based on the application of the “Social World’s” theory created by Shibutani to the worlds of knowledge society, cyberspace, d-Knowledge Commons Ecosystem.<sup>1</sup> Knowledge society will be presented as the social world and cyberspace as the sub-social world with the d-Knowledge Commons Ecosystem as the sub-world of cyberspace. This theory will open discussion about activity, boundaries, arenas and values of each social world/sub-worlds. However, the main intention of this paper is an introduction to a discussion about the sub-world of d-Knowledge Commons Ecosystem as an example of one of the most striking sub-worlds within cyberspace trying to answer the question: why do we need social worlds while talking about d-Knowledge Commons Ecosystem? This paper is to be divided into five parts: 1. Activity, 2. Boundaries, 3. Arena, 4. Values, 5. Conclusion.*

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<sup>1</sup> The social worlds theory was created by T. Shibutani in 1955 and then developed by A. Strauss and H. Becker.

## **ACTIVITY [1]**

Social worlds and sub-worlds themselves become the analytical concepts used for the study of collective action. Shibutani focused on the idea of commitment as the basis of social action. In this approach, social worlds are groups with shared commitments to the pursuit of a common task. They develop ideologies to define their work and moreover they accumulate diverse resources needed to get the task done. Thus the "social world" is an interactive unit that arises when a number of individuals strive to act in some collective way<sup>2</sup>. And this is knowledge society. Every "social world" needs the core activity to be established in order to exist. It could be argued that the most striking activity for knowledge society is the "creation of knowledge". However in the sub-world of knowledge society called cyberspace it could be argued that "virtual" "connectedness to knowledge and information" could be perceived as primary activity. While in the d-Knowledge Commons Ecosystem, being the sub-world of Cyberspace, the most important one is "creation of digital knowledge commons".

## **BOUNDARIES [2]**

The notion of knowledge society as "social world" is used here to refer to a form of social organization which cannot be accurately delineated by territorial, formal, or membership boundaries. There are no particular boundaries, one could claim. The boundaries of social worlds/sub-worlds are highly fluid because they are determined by interaction and effective communication which transcend and cross over the more formal and traditional delimiters of organization. Hence, it could be argued that the most striking "boundary" which distinguishes knowledge society as the social world is creativity. Thereby for the cyberspace it is creativity within cyberspace which is the boundary. While for the d-Knowledge Commons Ecosystem the boundary is the notion of creativity within cyberspace "while giving much but expecting so little" (Wikipedia slogans).

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<sup>2</sup> Kacperczyk, A., 2005, 'Zastosowanie koncepcji społecznych światów w badaniach empirycznych' in *Konstruowanie jaźni i społeczeństwa. Europejskie warianty interakcjonizmu symbolicznego*, ed. Hałas, E., Konecki, K.T., Wydawnictwo Naukowe Scholar, Warszawa.

### **ARENA [3]**

One of the most crucial notion developed for the “Social World’s” theory is called: arena. This is a place of interaction and dispute among different groups of interest within the social world regarding primary problems, definitions of problems which occur there. It could be argued that there is the common arena existing for knowledge society, cyberspace and d-knowledge commons ecosystem which is called intellectual property rights (IPRs).

In the IPRs arena of knowledge society, cyberspace and d-Knowledge Commons Ecosystem various actors from diverse backgrounds are seeking alternatives for over-expansion of intellectual property. Access to Knowledge (A2K) initiative is one of the most striking examples. A2K is the initiative presented in the draft entitled Treaty on Access to Knowledge which started in 2005 in Great Britain and has recently been a subject of discussion and communication within the cyberspace by the University of Yale.<sup>3</sup> Among others<sup>4</sup> there is one very important communication in the Preamble to this draft Treaty: “Determined to create the broadest opportunities to participate in the development of knowledge resources (...). Recognizing further the importance of knowledge resources that are created for the benefit of all, and the need to protect and expand the knowledge commons.” What are the motives of presenting this abovementioned communication by the knowledge society in the sub-world of cyberspace? The answer to this question is an attempt to name the self-correction mechanisms activated by the knowledge society like: open source and open content.

Open source idea is an example of social movement. According to the rules of Copyleft licensing<sup>5</sup> users of a computer program with an open source code may use this program, modify it, copy the program or any portion of it, thus forming a work based on the program and distribute such modifications or work under the license terms. Therefore users learn from

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<sup>3</sup> Specific information about the A2K Yale Project can be found at <http://research.yale.edu/isp/index.html>

<sup>4</sup> Among others communicates the Preamble reads: “Sharing of the benefits of scientific advancement; determined to protect, preserve and enhance the public domain, which is essential for creativity and sustainable innovation; seeking to control anticompetitive practises; seeking to promote the transfer of technology to developing countries.”

<sup>5</sup> For more information about free software licensing visit <http://www.fsf.org>.

the program and are able to raise the level of the program and develop it. Hence in case of free software idea, the talk is about an active use of technology while in case of commercial computer programs we would rather speak about passive use of technology. Open source movement (particularly the one of copyleft kind) in order to show the freedom idea is not emphasizing the ownership element so characteristic of IPRs. herefore it is about the real instrumentalization of copyright.<sup>6</sup> Perhaps from the very first side it seems a bit contrary because copyright in open source movement is used not in order to protect ownership legally but in order to promote idea of free software, sharing knowledge.<sup>7</sup> Therefore IPRs exist in copyleft and its existence has received wide recognition in public licenses like GNU GPL.<sup>8</sup>

Open source idea is influencing other sectors of the market and the open content<sup>9</sup> movement, originating from the United States is one of the examples. It is meant as the initiative of „free creations and free contents” and is characterized by the will to „give the society a creation” meant as „response and alternative action against the successive boosting and extension of the copyright protection”.<sup>10</sup> The open content movement covers music collections, scientific papers collections, virtual libraries, visual and graphic items. If a creation made available is accompanied by a general license agreement on free contents, such as Open Content License, Open Publication License.<sup>11</sup> will be regarded as a test to check whether we are dealing with the open content movement.<sup>12</sup>

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<sup>6</sup> Barta, J., Markiewicz, R. 2005, Oprogramowanie open source, w świetle prawa. Między własnością a wolnością, Wydawnictwo Zakamycze, Kraków.

<sup>7</sup> Linux is a proof of the success of open source movement also in Europe. Today one might observe that free software idea has become an alternative and competition for the commercial computer programs like *Windows*. Some of the companies (like IBM) decided “to make free” their patent *portfolio* for the open source idea which is an example of support for open source from commercial companies.

<sup>8</sup> Lambert, P. 2001, ‘Copyleft, copyright and software IPRS: is contract still king’, E.I.P.R., vol. 23, no. 4, pp.167.

<sup>9</sup> Wiebe, A. 2006, ‘Open access and intellectual property in cyberspace’ in Legal, privacy and security issues in information technology, ed. Mercado Kierkegaard S., Institutt for rettsinformatikk, University of Oslo,Oslo.

<sup>10</sup> Barta, J., Markiewicz, R. 2005, Oprogramowanie open source, w świetle prawa. Między własnością a wolnością, Wydawnictwo Zakamycze, Kraków.

<sup>11</sup> The specific features of *Open Content License*, *Open Publication License* and *Open Music License* can be found at <http://opencontent.org/opl.shtml>, <http://openmusic.linuxtag.org>.

<sup>12</sup> An earlier version of this part (starting from Arena [3]) of the article is available in the issue of MR Int. 2007 (Medien und Recht International) and was an integral part of the presentation during the “Lex Informatica” Conference (Vienna, July 2007).

In the IPRs arena of knowledge society, cyberspace and d-Knowledge Commons Ecosystem is also about seeking alternatives in IPRs as Human Rights for over-expansion of intellectual property.

Could IPRs pretend to be considered Human Rights? There is clearly a basis for such a claim in the international Human Rights instruments (examples: Article 27 of the Universal Declaration of Human Rights and Article 15 of The International Covenant on Economic, Social and Cultural Rights). According to Article 27 of the Universal Declaration of Human Rights everyone has “the right to the protection of the moral and material interest resulting from scientific, literally or artistic production of which he is the author”. However, in the same article it is also stated that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Also Article 15 of The International Covenant on Economic, Social and Cultural Rights comprise the rights of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications and, to benefit from the protection of the moral and the material interests resulting from any scientific, literally or artistic production of which he is the author. On the other hand, Article 15 requires States to make sure that everyone will be able “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

Taking wordings of Article 27 and Article 15 under consideration it is argued that the rights of authors and creators should not only enable, but also facilitate rather than constrain cultural participation and access to knowledge. In this context it is possible to perceive this balancing of rights as inherently internal to IPRs as Human Rights.<sup>13</sup> The balancing of rights appears in two situations. Firstly it may involve the narrow and private interest of authors and inventors on one side and wider and public interest of the society as a whole on the other side (universal reach). Secondly, IPRs as Human Rights will also have to be seen in relation with other Human Rights.<sup>14</sup>

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<sup>13</sup> Torremans, P.L.C 2004, ‘Copyright As a Human Right’ in Copyright and Human Rights. Freedom of Expression, Intellectual Property, Privacy, ed. Torremans P.L.C., Kluwer Law International, Hague, London, New York.

<sup>14</sup> Torremans, P.L.C 2004, ‘Copyright As a Human Right’ in Copyright and Human Rights. Freedom of Expression, Intellectual Property, Privacy, ed. Torremans P.L.C., Kluwer Law International, Hague, London, New York.

Theorizing about IPRs as Human Rights would lead to the practicing part finding out exactly how this “first situation of balancing” works out on the example of Eldred case. The case will be re-examined (as the “hard case”) with the application of the Alexy’s “Structure of Balancing”<sup>15</sup> as the means of applying access to knowledge principle. Since balancing is based on the assumption that principles will never establish exactly what should be done or what must not be done (“optimization requirements”), it is necessary that principle of access to knowledge should be carried out to “the greatest extend possible”. In order to do it, it is necessary to contrast it with opposing principle such as protection of knowledge. In Eldred case open access to books in the cyberspace library was dependent on the non-extension of the term of copyright protection by US Congress. When the US Congress passed the Sony Bono Copyright Term Extension Act (CTEA), all copyrighted works were given additional twenty years of protection before they would enter the public domain. As the result, works that had been ready to enter the public domain in cyberspace were no longer available for publication and valuable literary and digital resource was taken out of public control. Eldred argued that continued congressional expansion of copyright interfered with the constitutional mandate that copyrighted works only be protected for a limited time (according to Public Clause Congress is obliged to promote the development of science through the assurance of copyright for the definite period of time).<sup>16</sup> This implies a conflict between two principles: access to knowledge and protection of knowledge. In order to discuss the conflict according to “Structure of Balancing” three elements ought to be analyzed: Rule of Balancing, Weight Formula and Burden of Argumentation.

According to the Rule of Balancing the establishment of the “importance”, “abstract weight” and “reliability” of the access to knowledge principle and the protection of knowledge principle is required. While focusing on the “importance” of each principle it is relevant to establish whether the “importance” of access to knowledge principle justifies the detriment to, or non-satisfaction of, the protection of knowledge principle. In this way a commensurability can be established with a use of the following triadic

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<sup>15</sup> Alexy, R. 2004, *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

<sup>16</sup> Lessig, L. 2005, *Wolna kultura*, WSiP, Warszawa.

scale: “light” is 1, “moderate” is 2, “serious” is 4. The range of the importance of these principles depends on normative and factual premises. The normative premise concerns the “meaning” of the relevant positions of access to knowledge principle and protection of knowledge principle from the “concept of person” viewpoint that the legal and political system must presuppose.<sup>17</sup> Thus, protection of knowledge should be given more weight in a liberal society. If an act of public power interferes with intellectual property rights, this results in a serious violation of the principle underlying them. However, while considering the concept of a person from the commons society perspective access to knowledge principle is perceived as one of the most required.

As for the empirical premises, they concern what the measure in question means for the importance of both principles. From this point of view, the importance of access to knowledge principle depends on the efficiency, speed, probability, reach and duration of the CTEA in failing to satisfy this principle at stake. The more efficient, fast, probable, powerful and long the CTEA is in failing to satisfy access to knowledge principle the greater the importance of this principle (4 for “serious”). The importance of protection of knowledge principle depends on the efficiency, speed, probability, reach and duration of the CTEA in satisfying this principle at stake. The more efficient, fast, probable, powerful and long the CTEA is satisfying protection of knowledge principle the greater the importance of this principle (4 for “serious”). Therefore, in Eldred case a hypothetical Court could consider that the degree of detriment to the protection of knowledge principle (principle 1) is serious as is the “importance” of the access to knowledge principle (principle 2).

The second element of the Rule of Balancing is “abstract weight”. This means finding out the “greater abstract weight”. Abstract weight is derived not only from the different legal hierarchies of the legal sources but also from the social values using the same triadic scale as previously. Thus, the measurement of the “abstract weight” of principle of access to knowledge as well as the principle of protection of knowledge depends on the search for the best substantial theory of the constitution that the judge is to undertake. The judge will give the highest abstract weight to protection of knowledge and liberty if this theory is an individualistic one. However, if the theory is a

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<sup>17</sup> Pulido, C. B. 2007, *The Rationality of Balancing*, ARSP, vol. 92, pp.195-208.

communitarian one, the judge might give the highest weight to access to knowledge and to the common good. The hypothetical Court could consider that in Eldred case the “abstract weight” of protection of knowledge is “moderate” (2) and that the access to knowledge principle is “serious” (4).

It is also relevant to establish “reliability” of access to knowledge principle and protection of knowledge as the third element of the Rule of Balancing. It concerns the reliability of empirical assumptions. It answers the question what the measure means for the non-realization of protection of knowledge principle (principle 1) and the realization of the access to knowledge principle (principle 2) in the Eldred case. This ought to be established with the help of the following scale: “reliable” is 1, “plausible” is  $\frac{1}{2}$ , “not evidently false” is  $\frac{1}{4}$ . The hypothetical Court could state that the “reliability” is reliable in both principles.

In order to have a balancing outcome for the Eldred case, “importance”, “abstract weight” and “reliability” should be assessed. The tool for this is called the Weight Formula. According to this formula, the concrete weight, in Eldred case, of protection of knowledge principle (principle 1) in relation to access to knowledge principle (principle 2) results from the quotient between, on the one hand, the product of the “importance” of principle 1 (4 for “serious”), the “abstract weight” for this (2 for “moderate”), and the “reliability” of the empirical assumptions regarding that importance (1 for “reliable”), on the other hand, the product of the importance of access to knowledge principle (principle 2) (4 for “serious”), the “abstract weight” of this (4 for “serious”), and the “reliability” of the empirical assumptions relating to that importance (1 for “reliable”).<sup>18</sup> The concrete weight of principle 2 in relation to principle 1 is greater than the concrete weight of principle 1 to principle 2, thus, Eldred case should be decided according to principle 2, namely access to knowledge.<sup>19</sup>

However, in 2002, Eric Eldred was unsuccessful in rescinding the twenty-year extension to copyright, but the controversy surrounding the

<sup>18</sup> The third element of Alexy’s Structure of Balancing is the Burden of Argumentation. It refers to the situation when the weight of both principles is identical, which is not the case.

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$$\frac{4 \times 2 \times 1}{4 \times 4 \times 1} \quad ? \quad \frac{4 \times 4 \times 1}{4 \times 2 \times 1} \quad \frac{8}{16} \quad \frac{16}{8} \quad \frac{1}{2}$$
$$- \quad ? \quad - \quad - < 2$$



CTEA, created the opportunity to re-think Eldred case.<sup>20</sup> This could enter a key-discussion whether it is possible to indicate equivalents of “importance”, “abstract weight” and “reliability” in the Human Rights language (would for example “proportionality” work for “importance”?). Then would it be possible to argue that all these wordings together (with Human Rights language) create a comprehensive “Commodious Equilibrium” for the judge to look at while ruling “hard cases” such as Eldred case.

#### **VALUES [4]**

According to social worlds theory, value is a kind of a special notion because it is existing as a part of certain “story” which is essential for the world/sub-world to exist (it is not a buzzword).<sup>21</sup> Value is always a part of certain “commons” and the good of certain “commons” is always the main target and the main concern of social world/sub-world.

What are then the values of knowledge society, cyberspace and d-Knowledge Commons Ecosystem? Saying that the society is a reflective one means that a society is able to activate self-corrective mechanisms and reverse everything that is not a value for the community.<sup>22</sup> The primary aim of the “reflectiveness” feature is to reverse the unfavourable trends (e.g. in law) in the society which are very often taken contrary to economic ratio.<sup>23</sup> These self-corrective mechanisms for the social world of knowledge society are Open Source and Open Content perceived as social movements. Therefore “reflectiveness” seems to be the primary value of the social world of knowledge society. The value of “reflective” social movements has been already communicated via Internet in the draft entitled Treaty on Access to Knowledge. This would mean that knowledge society development has a major influence on the modern concepts of justice „adding an entry” the communicated justice.<sup>24</sup>

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<sup>20</sup> Halbert, D.J 2005, *Resisting Intellectual Property*, Routledge, Taylor&Francis Group, London.

<sup>21</sup> Kacperczyk, A., 2005, ‘Zastosowanie koncepcji społecznych światów w badaniach empirycznych’ in *Konstruowanie jaźni i społeczeństwa. Europejskie warianty interakcjonizmu symbolicznego*, ed. Hałas, E., Konecki, K.T., Wydawnictwo Naukowe Scholar, Warszawa.

<sup>22</sup> Kołakowski, L. 1990, *Cywilizacja na ławie oskarżonych*, Res Publica, Warszawa.

<sup>23</sup> Giddens, A. 2003, *Stanowienie społeczeństwa*, Wydawnictwo Zysk i S-ka, Poznań.

<sup>24</sup> Brodecki, Z., Nawrot, A.M. 2007, *Świątynia w cyberkulturze. Technologie cyfrowe i prawo w społeczeństwie wiedzy*, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk.

While “reflectiveness” is a *materia prima* for the social world of knowledge society, program code is the one for cyberspace, since software is omnipresent in the cyberspace. Cyberspace derives its uniqueness neither from the data that are stored nor from the fact that we can exchange the data. It derives rather from the specific possibilities of the program codes such as for example program codes of TCP-IP.<sup>25</sup> In the sub-social world of cyberspace free code facilitates a great idea that software can be both used and rewritten by anyone. It could be also argued that code in cyberspace ought to be “free as in free speech”, which links the free exchange of ideas to the process of software development. Taking under consideration the fact that law is not the only thing that regulates conduct and that there are other institutions, one of the most striking ones is computer code.

Within the sub-world of d-knowledge society, IPRs perceived as Human Rights, in the way they should not only enable, but also facilitate rather than constrain cultural participation and access to knowledge, could be considered as a value. However, how IPRs operate as Human Rights is to be observed through the art of balancing in cases such as *Eldred*.

## CONCLUSION [5]

Why do we need social worlds while talking about d-Knowledge Commons Ecosystem in Cyberspace?

Firstly, employing a social worlds perspective to knowledge society, cyberspace and d-knowledge commons ecosystem is adequate because it allows us to find out and understand that there is a very interactive, common arena of IPRs (for the worlds/sub-worlds of knowledge society, cyberspace and d-Knowledge Commons Ecosystem) which could be called: seeking alternatives for the over-expansion of IPRs (the rights that are protected far too well).

Secondly, application of this theory provides us with common values for all the worlds/sub-worlds considered - and they are: reflectiveness, communicated justice, computer code, facilitation of access to knowledge through Human Rights as IPRs, balancing structure while considering cases. That creates a common theme for the worlds/sub-worlds, which could be called

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<sup>25</sup> Stocker, G. 2003, ‘Code-the Language of Our Time’ in *Code – the Language of Our Time*. Code=Law, Code=Art, Code=Life, ed. Cantz H. Ars Electronica, Linz.

“a copy-Duty”.<sup>26</sup> It has its roots in the problem of “accessibility” which centers more on copy-RIGHT than on copy-DUTY. While in the knowledge society, cyberspace and particularly the Knowledge Commons Ecosystem sub-world the problem ought to center Not on copy-RIGHT but on copy-DUTY which is the duty of owners of protected property by IPRs to make that property accessible.<sup>27</sup> This “copy-DUTY” derives directly from IPRs as Human Rights.

And finally, employing a social worlds perspective to knowledge society, cyberspace and the Knowledge Commons Ecosystem is adequate because it allows us to realize how significant it is to name values according to this theory, particularly while considering Alexy’s statement about values: “what under a system of values is *prima facie* the best, is under a system of principles what *prima facie* ought to be; and what under a system of values is definitively the best, is under a system of principles what definitively ought to be (...). Law is concerned with what ought to be. This counts in favour of the model of principles.”<sup>28</sup>

Cyberspace is perhaps already full of space and welcome for many social sub-worlds to grow, telling their own stories, focused on various ideas of commitment and creating different, best values and principles that *prima facie* ought to be.

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<sup>26</sup> Lessig, L. 2006, *Code Version 2.0.*, Basic Books, Persus Books Group, New York.

<sup>27</sup> Lessig, L. 2006, *Code Version 2.0.*, Basic Books, Persus Books Group, New York.

<sup>28</sup> Alexy, R. 2004, *A Theory of Constitutional Rights*, Oxford University Press, Oxford.

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