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# Framing the Debate: Free Expression versus Intellectual Property, the Next Fifty Years\*

Prof. Eben Moglen

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## Abstract

Prof. Moglen explains and analyzes, from a historical perspective, the profound social and legal revolution that results from digital technology, as applied in all fields: software, music, and all kind of creations. In particular, he explains how digital technology is forcing a substantial alteration (disappearance) of the intellectual property systems and forecasts the near future of IP markets.

## Keywords

intellectual property, copyright, software, free software

## Topic

Intellectual property

*Emmarcar el debat: Expressió lliure contra propietat intel·lectual, els propers cinquanta anys*

## Resum

*El Prof. Moglen explica i analitza, des d'una perspectiva històrica, la profunda revolució social i legal que resulta de la tecnologia digital quan aquesta s'aplica a tots els camps: programari, música i tot tipus de creacions. En concret, explica la manera en què la tecnologia digital està forçant una modificació substancial (desaparició) dels sistemes de propietat intel·lectual i fa prediccions per al futur pròxim dels mercats IP.*

## Paraules clau

*propietat intel·lectual, drets d'autor, programari, programari lliure*

## Tema

*Propietat intel·lectual*

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\* Transcript of the seminar held on Thursday 22 June 2006 at the main campus of the UOC.

Within the framework of the Third International Conference on the GPLv3, organized by the Free Software Foundation Europe in collaboration with the UOC's Law and Political Science Department and the Catalonia Regional Government's Information Society and Telecommunications Department (STSI), which was held on 22-23 June 2006 in Barcelona, Professor Eben Moglen offered a seminar at the UOC on the legislative changes brought about by digital technology within the ambit of intellectual property.

**Dra. Xalabarder:** We are very pleased that we could convince Prof. Eben Moglen<sup>[www1]</sup> to come to the UOC to talk to us about his experience and views concerning the world that is emerging from digital technologies. Prof. Moglen is General Counsel of the Free Software Foundation,<sup>[www2]</sup> and is the Chairman of Software Freedom Law Centre.<sup>[www3]</sup> Prof. Moglen is professor of law at Columbia University Law School<sup>[www4]</sup> in New York, where I was a student of his quite a few years ago. At that time, he was teaching American Legal History. Now he has decided to stop *teaching* history and start *making* history.

**Prof. Moglen:** That's an interesting joke!

**Dra. Xalabarder:** This morning, while I was attending the GPL conference and had the chance to listen to Richard Stallman for the first time, I realized that there is a lot of ideology behind the free software movement... a lot of utopia -if you allow me to say so. Although, I am sure Prof. Moglen will consider it a reality, rather than utopia, right?

**Prof. Moglen:** Well, we actually live there now, yes!

**Dra. Xalabarder:** Precisely, this is why we brought him here: to tell us about this new world that we are already living in. I leave you with Prof. Moglen, who not only helped create the free software ideology but has been leading it ever since towards becoming a reality.

**Prof. Moglen:** I will have a lot to explain! I am guilty of history and ideology and of making history! It is a lot to deal with! I wonder if I can live up to even a small part of it!

This introduction is an invitation to take a course I had not planned to take, of trying to explain what unifies the work of reading history and programming computers, and thinking about law in the American impact style, which are, I think, the formative intellectual activities in my grown-up life.

I started programming computers at 13, or rather being paid to program computers at 13. I had started doing it without getting paid a little while earlier than that. That was in 1972. So, I grew up technically in the world before un-freedom was the primary way of using knowledge about programming. I spent my childhood, or at least my adolescence, working for increasingly sophisticated technology companies, and they were Xerox, Oxon and IBM. Working with heavy metal, machines that cost many millions of dollars to make and install and to take care of, to do what those companies thought of as 'research work'. That was at a time when you didn't need any stinking license to be a computer programmer. There were few smart kids in the world, there were a lot of machines that needed thinking and there were some companies that paid people to think.

So we did that. And we shared what we thought with everybody. In a quaint way, the companies that we worked for may have owned the computer programs that we wrote, but the patent system didn't apply to them; there was every reason to suspect that copyright might not apply to them, either; and businesses didn't have any advantage in keeping the trade secret.

On the contrary, software was a product differentiator for very expensive hardware. And it suited hardware businesses to pay people to make better software and to help their users use it better -which included helping their users to customize it, change it, and share their improvements. The ownership regime under which that technology developed was obscure, but it didn't matter because the value was in the hardware, which was very expensive and hard to make, and nobody cared about the sharing of the software.

[www1]: <<http://moglen.law.columbia.edu>>

[www2]: <<http://www.fsf.org>>

[www3]: <<http://www.softwarefreedom.org>>

[www4]: <<http://law.columbia.edu>>

In 1979, I was working as researcher in computer programming language development for IBM, and I wrote, in that capacity, a little non-appreciation of a piece of hardware built by the Apple computer company, called the Lisa,<sup>[www5]</sup> which was Steve Job's first attempt to make a Macintosh: friendly, round, with square windows, point-click-I-never-think. And I said: *This is horrible! This is very bad for everybody in the world!* He has taken language and removed it from the interaction between human and machine intelligence. The result is to turn the human being into a child, an infant, a pre-linguistic human being. *This -I said- is the caveman interface!* You point and you grunt: "*Hhmm!*" And that is the breadth of human-machine interaction! This is not going to be good for the way people use computers. It isn't going to be good for the way computers are made. It is not good for society. *Let's hope it fails!* -I thought. And then I went back to writing complicated programming languages designed to make it easier for people to think about hard problems. All of which became immediately irrelevant as the idea of the Apple LISA turned out to have only one slight error about it: it was not stupid enough! And even more stupid versions of the same basic idea crawled out from Xerox, Park, Apple or Redmond and were instantiated the way software is.

By the time that happened, I had pretty much left the field behind. I had gone off to get a PhD in History and a Law degree, things I had already intended to do anyway, but I chose to use IBM's money to re-train myself to live in a different world, because I did not see that world moving in a positive direction.

And so I spent a lot of time thinking about how legal systems evolve. I did mostly American history, because I cared about American history in a parochial way, but also because I wanted to be an intellectual historian of law. I wanted to think about the history of legal ideas over time and the one that was most feasible for me to work in, was the one closest to hand. With that in mind, I went to Law School in a very instrumental frame of mind: if you are going to do the history of concrete, learn how to make concrete. I ended up working, among other things, for

Justice Thurgood Marshall,<sup>1</sup> who was important in my life because he was an ordinary man who had figured out how to change the world. And I realized that it didn't require exceptional conditioning or brilliance, it required commitment, knowing what you are trying to do and knowing how you are trying to do it.

Later on, after I had done enough legal history to get the teaching job and had begun to experience the crushing difficulty of being an American junior Law professor, I realized that when time came to do something else with tenure, the thing I was going to do was try to change the world in the direction of technological freedom. That was a historical proposition -in that sense, I think you are quite right: I meant to take the long view and make some history, if you please.

Now, here the personal and uninteresting story that I am telling you gets connected to some larger results which are more interesting.

We started in the 20<sup>th</sup> century with Thomas Edison's<sup>[www6]</sup> inventions which fundamentally altered the way human beings thought about culture. Human beings had, previous to Edison, seen culture as something that happened between human beings. It required people to be present. The visual arts were capable of transmitting ideas over space and time with extraordinary effectiveness. But both medieval and early modern human beings tended to see even the most extraordinary fine art as meant for here and now; even though the power of the art to transmit ideas over great space and time was known to them. Even before the rediscovery of the Greek humanities and Roman opportunities in the Renaissance, and -to a surprising extent- after it, human beings continued to think of culture as a thing happening here and now. Shakespeare plays are meant to be performed today, writing them down, printing them, remembering them; having an authoritative version of them was less the point. A sonnet might last past a man's life, but the mere tragedy about Hamlet, prince of Denmark...?

1. Prof Moglen was a Law clerk (1986-87) to United States Supreme Court Justice Thurgood Marshall. See [http://en.wikipedia.org/wiki/Thurgood\\_Marshall](http://en.wikipedia.org/wiki/Thurgood_Marshall)

[www5]: <[http://en.wikipedia.org/wiki/Apple\\_Lisa](http://en.wikipedia.org/wiki/Apple_Lisa)>

[www6]: <[http://en.wikipedia.org/wiki/Thomas\\_Edison](http://en.wikipedia.org/wiki/Thomas_Edison)>

The same is true in many different ways of other parts of human culture before Edison. It is not true of any part of human culture after Edison. On the contrary, the 20<sup>th</sup> century came to the conclusion that our culture is basically product, either being sold correctly or being sold or traded un-optimally. Our culture came to be analyzed within a frame entirely industrial in its understanding of the situation: I make, he sells, you buy.

This generated a quite stable intellectual universe for theorists. The economists, the copyright lawyers, the engineers, and the people who call themselves the entertainment business... all had a common ground on which to talk and they talked very comfortably together. The entertainment business made a ton of money; it paid lawyers to keep it going; it paid lawyers who were law professors to indoctrinate other lawyers in the beauty of keeping it going. And it produced a great deal of opportunities to share meals and drinks and time in Belaggio and other nice places. The result of which was that the responsive system, the one that grew up around those players, was perfect. Nobody thought it needed any change of any kind, under any circumstances, and they sailed right along into the future the way the European *Ancien Régime* sailed into the summer of 1914 in the *Belle Époque* riding the wave of the future that would keep them in power forever.

Of course, it did not work out that way, any time. And not this time, either. What happened, ugly enough, was something which had been foreseen by some guys now dead - so dead, in fact, that they were regarded as universally barred- but a couple of them seem to me, at any rate, to have something left to say and so some years ago, I started plundering them, collaborating -we would say-<sup>2</sup> (they didn't mind, they were dead).

What Karl Marx<sup>[www7]</sup> and Friedrich Engels<sup>[www8]</sup> actually had said that was so terribly important was that everything solid melted into air. This turned out to be the most precocious thing that the entire communist manifesto had in it.

It had seemed, to the XIXth century, to be nothing more than a metaphor, describing the bourgeoisies' power to run the engine of reinvention until nothing is left of it, but itself.

But it wasn't just a literary metaphor, it turned out. It was a piece of technological wisdom. The digital revolution fundamentally altered the universe that seemed so stable; the universe that had grown up out of Thomas Edison's improvements and Henry Ford's wisdom about how to organize capitalism. The digital revolution fundamentally altered all of the relationships just enough. It took the maker and the purchaser and moved them much closer to one another than the salesman ever wanted them to come. It facilitated sharing; it announced plasticity; every bit could be turned into every other bit, with only a little bit of movement. The result was that music started to become plastic, even before it was digitized. Hip-Hop, which is essentially a form about the plasticity of music, began to be the world's new way of thinking about music even before the digital revolution destroyed the integrity of music that Hip-Hop was satirizing. This is not actually terribly surprising. Literary modernism arrived before the summer of 1914 and began the process of asking the questions about the role of the individual in the industrialized state capable of murder, long before the troops got to the Somme.<sup>3</sup>

In that sense, the culture of the late 20th century was busy doing its job: it was anticipating its own future, very smartly. But the owners, the economists, the lawyers, the men in the entertainment industries... they hadn't seen it coming; they were sailing along on the surfaces of the *Ancien Régime's* perfection and it caught them by surprise.

Within a very short period of time, some very important things had happened. I am not yet talking about Free Software, you noticed. For one thing, children of all over the world had begun to lose their moral belief in the integrity of the legal system with respect to certain obvious truths.

2. See Eben Moglen (2003): The dotCommunist Manifesto, at <http://moglen.law.columbia.edu/publications/dcm.html>

3. The 1916 Battle of the Somme was a joint French-British offensive against German lines in Northern France, within the context of First World War.

[www7]: <[http://en.wikipedia.org/wiki/Karl\\_Marx](http://en.wikipedia.org/wiki/Karl_Marx)>

[www8]: <[http://en.wikipedia.org/wiki/Friedrich\\_Engels](http://en.wikipedia.org/wiki/Friedrich_Engels)>

If you are a two-year-old, it seems perfectly obvious that music is the thing that is passed, hand to hand, from one person to another. That's the way two-year-olds usually think about music. Only if you are grown up does there appear to be anything unusual about the idea that music is the thing that human beings give to one another. The possibility that video, audio, everything can be mixed up together and turned into some unique artifact by each individual person doing it is known to every eight-year-old in the world. The reasons why you shouldn't be allowed to do that are not reasons which appeal to an eight-year-old mind. The consequences that all over the developed world and large parts of the "less developed countries" too, people are growing up who do not believe in the prevailing theory of ownership. And ownership, at any given moment, is nothing but the theory in power. So, we found ourselves then, at the dawn of the 21<sup>st</sup> century, watching as some history re-happened.

If you had been through it the first time or even thought about it the first time, while not going through it, that was a help: it actually located you in what was otherwise a landscape whose landmarks were disappearing very rapidly. It was even possible to foresee some of them. In 1999 after -as Raquel would say- I thought there was no more utopia left about software, because we lived there, I wrote a little piece called "Anarchism Triumphant, Free Software and the death of copyright"<sup>[www9]</sup> in which I said: *Something has already happened to software that is irreversible. I said: Next, we are going to watch it happen in music and after that we are going to watch it happen in journalism. I said: After all, individual people with individual video cameras and recording equipment are journalists. Who has the advantage this year covering Kosovo? Surely, it is not the television networks with their overpaid greedy people... they can be only in a few places at a time. The world can be in all places at once! Who makes better news? -I said- proprietorism or anarchism? We shall soon see.*

By 2006, that proposition is no longer regarded as some weird thing said off planet Earth. It is the standard of everybody's beliefs in the war between the bloggers and the journalists, or in the war between the

Wikipedia<sup>[www10]</sup> and the Encyclopedia Britannica.<sup>[www11]</sup> In other words, what happened to software in the 1990's was actually a working model for what is happening to everything else. For the same reason, it all melted into air. The expensive complex hardware that I worked on at the beginning of my career as technologist is now available everywhere on Earth very cheaply, at essentially no practical cost. In 1979, I went to work for IBM at the then twentieth largest computing center in the world. The twelfth largest place inside IBM; where software was being manufactured by 340 professional main-frame programmers. There were hectares of hard disc drives, of the kind that were 12 inches wide and that you lifted up at the end of your arm like a crane. Hectares of disk drives... The total capacity of all these drives in that laboratory, on the day I went to work there (on the 8<sup>th</sup> of July 1979) was 30 Gb. It seemed very impressive then. It costs about 65 dollars now. It is 2.5 inches wide and 9 millimeters high, it costs 60 dollars and it is as big as the whole laboratory was.

What the electrical engineers did, by way of building boxes at the end of the 20<sup>th</sup> century was phenomenal. Had it been up to Gates, software would have been worse, of lower quality, of higher price, of limited functionality, less available and much, much, much more difficult to use. But that is the story of monopoly and there is nothing about it that is interesting. Every micro-economist knows why that happens. They didn't say so for 20 years; but they knew why. They kept telling us: monopolies increase price, reduce outputs, and stifle competition. Mr. Gates was someone supposed to be uniquely, exceptionally, different. It was not clear why, but they thought it was. In other words, what was happening at the end of 20<sup>th</sup> century was, in part, a failure caused by the hypocrisy in certain disciplines. They had got used to a few things that were not really true, but it was comfortable to say. And, there were some things that used to be true that were wrong. Both were hard to climb down from. It wasn't altogether clear how you admit that most of what you told was wrong, and the rest of it was stuff that you said just because people paid you to say it. Even for lawyers that was difficult to deal with. So, there was a rather lengthy period in which I

[www9]: <<http://moglen.law.columbia.edu/publications/anarchism.html>>

[www10]: <<http://www.wikipedia.org>>

[www11]: <<http://www.britannica.com>>

think there were a few people who were prepared to say that the emperor had no clothes. There were a lot of people who were pretty sure the emperor was naked but they didn't want to say so. And there were few people who saw the emperor in full dress every time they looked and could never be persuaded, under any circumstances, that there was anything wrong with the accoutrements.

That was then.

Mr. Lessig<sup>[www12]</sup> assigned himself the role of rock star and he plays it beautifully. Prof. Benkler<sup>[www13]</sup> assigned himself the role of 'truck dust' economic theorist. I have been kidding Yochai (Benkler) for years that he was going to be the winner of the final Nobel Prize in economics -in which the last Nobel Prize was awarded for explaining to economists that which had been obvious to everybody else on Earth for at least fifty years; after which, there would be no more need for the Nobel Prize in economics at all-. But Benkler's formalization was terribly important in convincing some people to pay attention, who never would have paid attention no matter what else happened in the real world, if somebody hadn't published the thing in the Yale Law Journal explaining why. So I was deeply grateful to Yochai who put himself to task, which I considered to be a task worse than death, of publishing articles in the Yale Law Journal explaining why, for people of limited and actual willingness to engage with fact, but who need a lot of 'truck dust' to get any work done. So, Yochai assigned himself that role.

Pamela Samuelson<sup>[www14]</sup> assigned herself the role of lead diplomat for the merger of industries and coexistence. And I assigned myself the role of the bad boy. And I went out to play the role of the bad boy. I had help. Mr. Stallman<sup>[www15]</sup> is a very bad boy. There are other people, too. After all, it turned out that there are tens of thousands of people around the planet prepared to invest in being bad boys long enough to get some real work done. And one

thing I had learned in my life with Thurgood Marshall was that you can get a lot of work done if you have a couple of people who are prepared to stand up to the prevailing theory about human justice, with a different theory about human justice. And I was very glad, because I was not in any danger of getting killed, while my former boss had been in danger of getting killed pretty much all the time. So, this looked to me like cushy work. And I had tenure!

Now 2006... where do we stand? That there is a potential incompatibility between free expression and the law of copyright is widely agreed to be a question again, after a generation in which it was regarded as invisible. The entertainment industries have spent millions and then tens of millions and will soon spend hundreds of millions of dollars, trying to maintain their position in the world against the onslaught by 12-year-olds. 12-year-olds have identified the entertainment industry as bad people who shouldn't get any richer than they are already, and it would not be a terrible shame if they went out of business altogether. This is very bad news for the entertainment industry, because those 12-year-olds are the only people who are going to live on Earth within another 50 years!

The lapse in the moral consensus behind the rules of the ownership of ideas has largely been filled by shouting and blustering by the U.S. government, which has taken it upon itself as the ruler of the world to protect its industries by imposing the moral consensus in the form of legal rules on everybody else. As you know, when they don't have a legal agreement among countries, when times are really hard, when they are not going to get the next little piece through, they stage a little elopement to some place like Barcelona, where they were yesterday,<sup>4</sup> and they try to turn out another agreement for re-owning ideas, just in case people have not noticed how much force it takes to keep that system still in being. That is the problem: it takes immense amounts of force. It is really hard to manufacture owned culture in the 21<sup>st</sup> century, because you are

4. Prof. Moglen is referring to the Seminar "The Proposed WIPO Treaty on the Protection of Broadcasting Organizations: From the Rome Convention to Podcasting" organized by WIPO on June 21st 2006 in Barcelona. <[http://www.wipo.int/edocs/prdocs/en/2006/wipo\\_ma\\_2006\\_23.html](http://www.wipo.int/edocs/prdocs/en/2006/wipo_ma_2006_23.html)>

[www12]: <<http://www.lessig.org>>

[www13]: <<http://www.law.yale.edu/faculty/YBenkler.htm>>

[www14]: <<http://www.ischool.berkeley.edu/~pam>>

[www15]: <<http://stallman.org>>

always competing with un-owned culture which is very successful.

In the world of software, for reasons I first set out in my work almost ten years ago, the battle is hopeless; and it has already been won by non-proprietary production. In the world of music, the battle is hopeless and it will be won when musicians desert the firms which have mistreated them for a generation and a half, and go back to just playing music for people who like it, without worrying about how to force them to pay. That is not very far off. In the world of video, the situation is far more complicated and will take a lot more time to reach equilibrium; but one thing is for sure: most of the world's adolescents living in rich societies at present know how to think of themselves as multimedia producers. They know how to mash up video and audio, with text. When you tell students in a modern higher education institution 'Go away and bring me your report' they come back with video and audio and text and stuff found on the Net and they produce artifacts out of it, and they have only been at that for 5 years! Imagine what happens when the young people of the world have been at that idea for 3 generations! The notion that even video culture, expensive productions of narrative film, are going to be primarily made by people who own them and only give them to other people in return for payment is not really very likely.

Moreover, there is a revolution going on against the owners of bandwidth in the world. The telephone companies are coming down. They are coming down in part because free-software is going to bring them down. We are trying to do that, because we want people to have an equal right to speak freely and to communicate with one another. I used to think that this was going to be a very difficult job. I now think it is going to be much easier than we first planned. In all of these areas, and in more than I could have named, the problem was that the social paradigm underneath the law vanished, as it often does in legal history, and the people who benefited from the rules didn't notice, as they often don't notice in legal history. And the rules sailed on for a little while longer, before beginning to fail. Nowadays that happens much faster than it did in our societies two, three or five hundred years ago. With that rapid change in the underlying quality of the rules, there is enormous openness for the insertion of a little quantities of force that will have major redesigning effects on

the whole structure. This is a paradise of what I called high impact, low resource *lawyering*; and the opportunity to put little bits of effort into making large movements because the whole movement is very soft and can be stretched and bent with comparative ease. Moreover, there are now many organizations around the world which have earned literally billions of dollars by taking advantage of anarchist production. They have brought their own state of economic dependency on anarchist production to such a high level, that they cannot actually continue operating their businesses without the anarchists' products. They, therefore, now begin to serve as founders, mentors, and benefactors, for anarchism. They employ our programmers and pay them wages. They assist our programmers in gaining additional technical skill and applying that skill more broadly. They allow me to heavily fund a carefully constructed law firm in New York, to train only lawyers to represent only anarchists on only the payrolls of the big companies which produce the money to pay for the legal representation of anarchism. They have to do that. They need anarchism to be legally solid. They do not want it to fail. They want the anarchist legal institutions that we have created to become stronger over time, because now their businesses depend upon the success of anarchist production.

In other words, we have reached a very important moment, a moment noticed some hundred years ago by my collaborators Marx and Engels. We have reached the moment at which the bourgeois power sources have turned the crank on invention to the point in which they are actually fueling their own downfall. They have created the necessary structures for their replacement and the forces which are speeding up that replacement are their own forces, which they are deliberately applying because the logic of capitalism compels them to use those new forces to make more money, even though in the long run it speeds the social transition which puts them out of business altogether. This is a very beautiful feeling. Whether you are riding the bus or you are standing by the side of the road watching the bus, this is a particularly artistically-interesting moment. My only concern is for the poor benighted law professors who still do not notice. And my concern for them is largely founded on my sense that it would be good for their intellectual aesthetics to be allowed to contemplate a thing as beautiful as this. It is not, I admit, the intellectual coherence of the *Institutes of*

*Justinian*.<sup>5</sup> On the contrary, it is about as far from the intellectual coherence of the *Institutes of Justinian* as you can get. It isn't law as a deductive science, which is bad news for Napoleon Bonaparte, but he too is dead. In fact, what we are having is a paradise of a very different kind of *lawyering*: *lawyering* as experimental chemistry. Push things together, see what explodes, learn new lessons, try more explosions next time. Look for what can be used to re-orient the whole of the large institutions in the direction of your preferred social aims. Now is the time for large projects with big pay-offs. Now is the time of social plasticity. Another generation from now, and these immensely pliable joints will have begun hardening again.

You, who teach lawyers, should be teaching them that now is the moment for big projects and big gains. They know more about the world than older richer people and this is the moment for them to take advantage of that fact. If they don't, they will soon go to work for the older richer people, and the game will be over for them. This is what we have before us at this moment. I have colleagues in New York and in most other universities in the U.S. who are sleeping through it. It is a pleasure to be in a place where nobody ever sleeps. Thank you very much.

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### Recommended reference

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5. Written at the order of the Emperor Justinian, the *Institutiones* (535 A.D.) was some sort of legal textbook intended for a systematic and dogmatic teaching of the law. Prior to the *Institutiones*, and also ordered by Justinian, the *Codex Justinianus* (529 A.D.) compiled all the existing imperial *constitutiones*; and the *Digest* (533 A.D.) compiled the writings of the classic Roman jurists (case law).