iCommons
LAB REPORT

Your window on the Commons

July/August 2007

iCommons ▶loftwork

From JHB with love...

Dear global commoners

The iCommons office is always inspired after Summit time. After lying back on Croatian beaches in a daze for two weeks after the incredible event in Dubrovnik, we're back to work with a vengeance – planning for the iSummit 2008, ironing out the final bugs of icommons.org beta, working on new features and starting a new project to develop leadership on commons issues from the global South.

And, while everyone stays at the office to work, I'm in lovely Taipei at Wikimania – meeting as many Wikipedians as possible and learning about what makes this incredible community tick. Sitting in the Wikimedia Foundation Advisory Board retreat for the past two days, I've learned new ways that iCommons and the Wikimedia Foundation can work together – especially in smaller Wikipedia language communities where Creative Commoners and Wikipedians can work together to create awareness, teach wiki editing skills and fly the free culture flag high.

After Wikimania, I will go to Japan to start planning iSummit 08 with partners City of Sapporo, ccJapan and Digital Garage. The local team is already hard at work and we're looking forward to a really exciting event next year July. As soon as we've decided on a venue (comment on which venue you prefer here: http://icommons.org/articles/call-for-comments-for-the-isummit-2008-venue), we'll be able to confirm the dates. We're also going to ask you to help us by starting to raise your own funds to get to the event – or at least help us to get you there. And if you've been able to raise your own funds in the past, please tell others how you did it by writing an article on icommons.org.

Also on the cards for this month is our collaborative design for the next version of icommons.org. Felipe Vaz from the Overmundo Institute has been managing the changeover for us and now we're looking towards what usability changes we can to make things easier for us. We're really excited by the new possibilities of the site and would like to decide together what new features should be in Version 2.0. JC Bukenya, iCommons Web Developer, has started a node to facilitate this discussion during August so that Overmundo can start working on improvements in September. There is so much that we can do here, but we're going to be focusing on issues that enable greater usability, and exploring what we can do to enable distributed investment and volunteer management. If you're interested in being involved in this discussion, or want to add your piece to the puzzle, please join the node here: http://icommons.org/nodes/icommonsorg-version-20.

Finally, we'll be helping OLPC to pilot their 'Summer of Content' project. This is a wonderful way to get people to help you develop open content for your organisation and a great opportunity to support Free Culture projects around the world. Imagine having people in your country build a database of open content images on a particular theme, or 'how to' guides on using CC for specific groups. If you're interested in becoming a paid intern or being a mentor, go to http://wiki.laptop.org/go/Summer_of_Content_2007. And if you're interested in interning for iCommons – either in the next 2 months (August/September) or in December/January, please email me.

Well, that's it from me for this month. I recommend that you subscribe to the new rss feed for stories on icommons.org at http://icommons.org/rss_articles and help to edit and vote for stories to make it to the front page. There are some incredible voices coming to the fore here and great stories from around the world on some really pioneering initiatives. They need your support! 'Til next month,

Heather

heather@icommons.org

Content

Node reports: a summary of iCommons community projects this month

Policy/law by Paul Jacobson

Two new nodes were created during July. These nodes are Project DaC and the Open Law Project. The first node is intended to facilitate greater competition amongst collection societies for "musicians, [to] reform to be friendlier to the Internet, legalize CC and side-agreements, and be more accountable". The Open Law Project, on the other hand, aims to make South African law more accessible to the public as a whole through the creation of a Wikipedia-type of South African law. Both nodes take aim at the established status quo and are likely to poke their fair share of holes in biased and closed structures and further develop meaningful open access

to our growing cultural heritage and our shared legal frameworks.

Media/events by Kerryn McKay

So far there are three nodes listed in the media/ events category but at present there does not appear to be much activity around these projects although there may be activity 'offline' which has not been recorded. There seem to be two main challenges for the nodes, and the media/ events nodes especially: firstly, people record their projects and then move off to mailing lists and other means of recording material instead of using the cool space available in the node. Secondly, a number of events-type projects are built around the themes of culture or education, for example, and

then get categorised according to this rather than as an 'event'. I think that it is a learning curve for all of us node administrators, to ensure that our nodes do not stagnate and that we maximise this resource.

Culture by Daniela Faris

We have nine nodes in this category, covering a range of topics, with goals ranging from taking a local open music contest to the world, to sharing knowledge and capacity building skills from the South, to creating a press kit for artists. So far, the Local Context, Global Commons node is in the lead with eight participants and an active programme, followed closely by the node that aims to explain CC

Introducing Gogo Hleba, iCommons' agony aunt

Meet iCommons' Agony Aunt - Gogo Hleba. Her Xhosa name is translated to 'Granny Gossip', as she is the type of grandma who loves to nose around at gatherings, collecting the low-down on all commons happenings. This know-it-all has earned her Masters degree in psychology from the University of QwaQwa, her dissertation titled read:

Networking skills and Communities, Distributed Mechanisms for Getting the Info You Need. She has also penned a self-help book titled *How to Become a Commons Superstar - and Be Happy*.

Gogo Hleba is completely qualified to assist you with your unrequited love tragedies (why does my community just not get me?), your relationship worries (how can the GPL and CC BY-SA licences be compatible?) and brain-stretching intrigues (I really STILL don't get it - how is CC different from iCommons?).

And sometimes, when Gogo has to go back home to her village in KwaZulu to visit her nephew's son's aunt's second wife, we'll have guest Gogos to help you through your sticky commons situations...

Please send your questions to **askgogo@icommons.org** before **30 August**, to be included in the next newsletter. Questions can range from the insane and ridiculous to intelligent and serious. In other words, we welcome real queries that we can debate, as well as those that are merely good for a giggle. To avoid disappointment, be sure to read the Ask Gogo policy on the website too!

Gogo tells it like it is: "It's not a diet; it's a lifestyle choice."

I feel like I want to really be a part of the iCommons community but I don't know where to start. I did not go to the Summit conference and I'm not much of a writer (although I enjoy reading the high 5 of the week) so I don't know where I could contribute. I feel like I'm on the outside looking in, as if this is a club that I would like to join but don't know how. I work in a call center but in my spare time I'm into remixing and will mash up anything from Sergio Mendes to Dylan.

Gogo says:

Now that the joyful ululating has stopped at the iCommons head office (we're awfully pleased that at least one person reads the High 5 of the week) I'd like to address your concern. It may surprise you to know that I, Gogo Hleba, also once felt like I was on the outside looking in. I always thought rams were animals, FLOSS was something you cleaned your teeth with and OERs was the sound people made when they tripped over a chicken in the yard. I felt like I knew absolutely nothing. (As it is, I still firmly insist that rams are male sheep with all their private bits intact.)

But I do know one thing: although the iCommons community may seem to you like a get-along-gang that has grown up together (and indeed, many of these commons folk have come of age within the movement) they really do have welcome hearts and wide open ears. They are eager to hear about what you do, eager to share their projects and ideas, and eager to learn from you and your own experiences. If you want to be a part of this community, register yourself on icommons.org and roll up your sleeves. You may read about a node that you like the sound of: join it! You might think that you have a better idea: share it! You can upload some of your remixes into the cultural database for others to listen to (just check the iCommons policy first... we don't want Gogo Hleba inciting illegal activity). You could even post a question to the iCommons mailing list; you'll be surprised by how many people will offer you friendly advice and direct you to the best resources. All you need do is step through the window! And if you fall over a chicken just say Open Educational Resources!

Q: I noticed that Joi was looking extremely fit at the recent iSummit in Croatia. Gogo, do you know what regime he followed in order to get so healthy looking?

Gogo says:

Someone said to me at the Summit, "Gogo Hleba, doesn't Joi look fine?" I said, "Where's Joi?" And the response was "Over there by the fruitstall." Well, I can tell you I almost fell over (and with my generous proportions I could have been down there for days!) I had been looking at a young fellow in running shorts thinking about the joys of being young again, when I realised that I had, in fact, been staring at Joi who is only a few years younger than Gogo herself. I have done some careful research into what has made Joi look like he took a dip into the Fountain of Youth. Some people claim he won the Lotto. Not so. Some say he has a new hairstylist. Not true. Tailor? Nyet. The truth is simple. In a word: fruit. Another word: vegetables. No red meat (including rams). It's not a diet; it's a lifestyle choice. Do you too, wish to look lithe, healthy and youthful? Forget lipo, facelifts and dermabrasion. Just eat fruit. Because you're worth it!

Joi, by Fumi on flickr.com, CC BY-NC-SA 2.0

◀ Node reports: continued from page 2

licenses & their effects on artists, with six participants. The latest nodes are the folkxplorer and Calendar Songs nodes, so sign up if you have any skills, time and knowledge to share with these node admins. Despite the rosy outlook for the Culture nodes, there has been a lull in activity in some of the projects, so it would be fantastic to see new users and new discussions happening around these incredibly exciting projects.

Business by Rebecca Kahn

There aren't a lot of nodes in the business section of iCommons node space, but those that are there are fascinating: openbusiness.cc is a space that aims at fostering entrepreneurial innovation inspired by Open Source,

Creative Commons and peer based economics, in conjunction with successful business models. Financial Commons is based in Brazil, and is working on extending the CC domain to monetary economics and finance, organizing support from e-commerce players in Brazil to local development initiatives associated to the creation, management and distribution of intangible assets while advocating the emergence of the Financial Commons paradigm. Create Incentives for Artists To Be Artists is a project that seeks to bring artists using CC and business who need content, together, to create workable and financially viable partnerships. All three of these nodes are in active phases, and

need the help of volunteers to take them to the next level of implementation.

The iCommons.org 2.0 Node by JC Bukenya

There are seven users participating in this node and two forum topics have been created. One is a discussion around the idea of having interactive nodes where the node system is enhanced to have functionality to serve as a project management tool. The other discussion is based on getting together a list of enhancements from the community, that would serve as a guide to the developers, on the focus for upgrading the website. If you have any ideas on how to make the nodes application on icommons.org more user-friendly, please participate in this node.

On the cover this month

This month's cover is designed by **Sioux**, courtesy of **Loftwork**. Sioux lives in Tokyo and works as an illustrator and painter:"using watercolours and acrylic coulours, I pursue the traditional Japanese expressions by describing women who are charming and sometimes beautiful to me." This month's cover depicts the wealth of media we are surrounded with every day. From iPods to laptops, we not only define what, where and when we would like to consume information, we are also now empowered to create and share it. Let us not take for granted the power and responsibility that we each have, as creators and distributors of our culture and heritage.

Preparing for Summit '08 in Sapporo

We are still shaking the Croatian sand out of our sandals and yet already iCommons is beginning preparations for Summit 08. The home team in Joburg has begun to put together a list on the iCommons wiki of administrative and logistical areas that could be changed and bettered at next year's summit. This, of course, takes nothing away from this year's summit and the sterling job that MI2 did to make Summit 07 memorable.

If you have **suggestions for improvements**, please go to the iCommons wiki and add to the list. We have 4 basic headings: summit registration, website, content & general technical issues; media; and bricks 'n mortar. Feel free to add to these, and to add headings if necessary.

Also, have your say in **choosing the next venue** for the Summit '08. There's a choice between the city-slicker Royton Sapporo or the out-of-town, yet cultural Sapporo Convention Centre. Each venues has a list of pros and cons for you to consider, so find out more about these on the iCommons website and be sure to leave a comment, to cast your vote!

Source-ing yoga and the implications for the commons
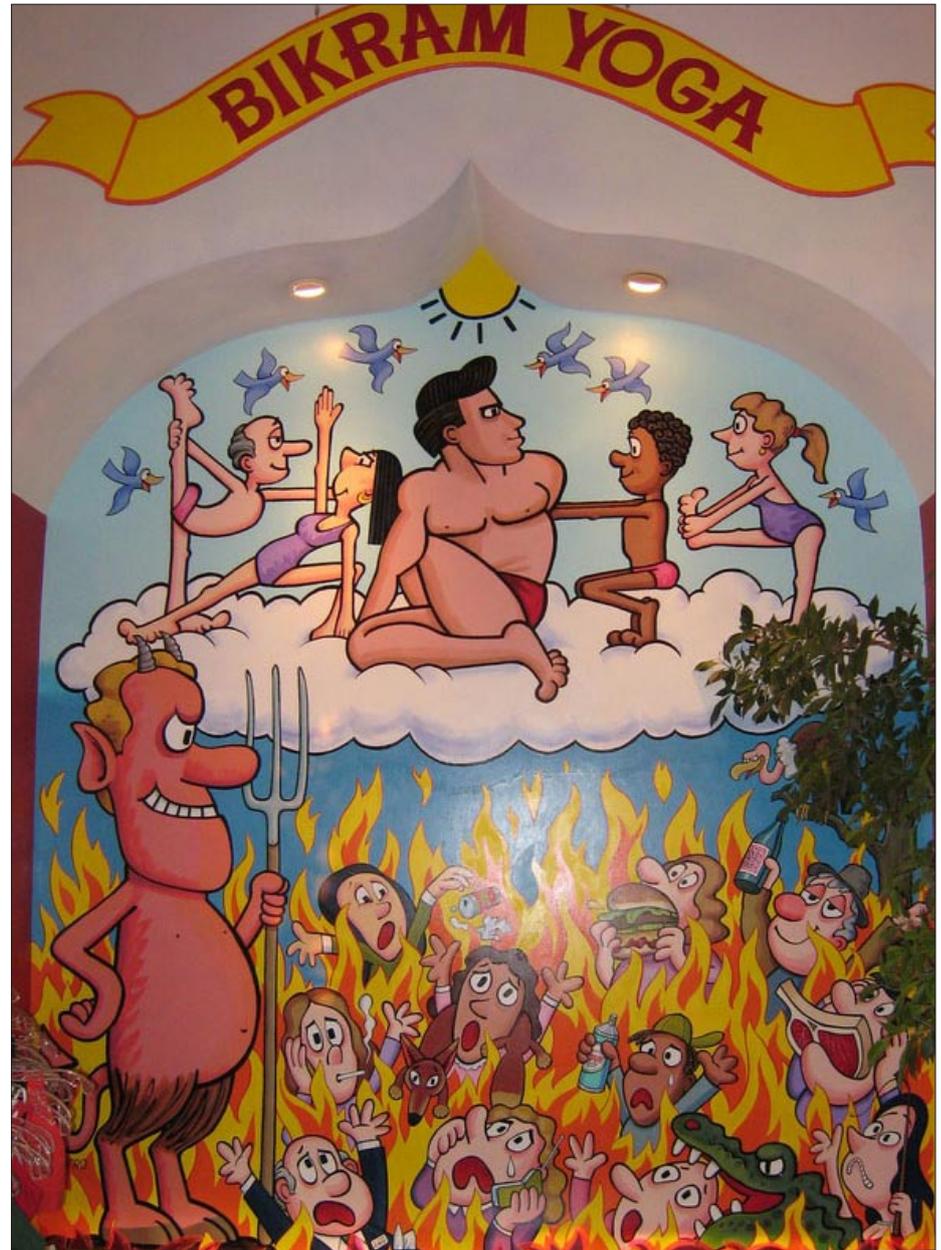
Bikram Choudhury and fellow yogis in heaven, while the non-yogis scream in hell, hamburgers and cigarettes in tow. Perhaps a consequence if yoga falls out of the commons? by JasonUnbound on flickr.com, CC BY-NC 2.0

Allison Fish, University of California, Anthropology grad student

Approximately five years ago two lawsuits relating to ownership claims in yoga grabbed international attention. These disputes, termed "the yoga wars", set off a series of reactions among interested parties from around the world. This article will trace two reactions to Bikram Choudhury´s decision to apply for, and attempt to enforce copyright and trademarks claims to a specific series of 26 yoga postures. These reactions are based upon the premise that yoga ethically exists in the commons. However, as will be demonstrated, this notion of the commons is not static, but is complex and differs significantly in each instance employed.

Yoga is a several thousand year-old South Asian spiritual philosophy that trains the embodied mind to accept 'Truth' through a combination of physical and mental practices. In the past five decades, cosmopolitan consumers attracted to alternative health systems have created a market demand for a commercial yoga that focuses upon the physical performance and benefits of the practice. In 2004, it was estimated that commercial yoga

generated more than $8 billion internationally, most of that amount stemming from US and European markets. In an effort to preserve control over some aspect of this profitable market different parties have, in the last several years, registered thousands of yoga-related IP claims. Figures from US government agencies indicate that there are 2,315 trademarks, 150 yoga-related copyrights, and 135 patents on yoga accessories registered in this country alone. However, this is not an isolated phenomenon and similar intellectual property claims can be found in other states around the world including Japan, the European Union, and even India. Despite these numbers the first attempts to enforce such claims did not occur until 2002.

Bikram yoga, often disparagingly referred to as the "McDonald's of yoga", is a highly profitable practice that was pioneered by the notorious yogi, Bikram Choudhury, who immigrated from India to the United States 30 years ago. Bikram's signature series involves a specific arrangement of 26 postures and two breathing exercises performed over a 90 minute period in a studio heated to 105°F. Approximately five years ago Bikram began officially registering copyrights and trademarks on his yoga series. In 2002 he began his first lawsuit for copyright violation against a studio owner who was his former student. This suit was settled out of court and no decision was established about the validity of Bikram's claims. However, because Bikram continued to threaten legal action against other studios and the issue remained unsettled, Open Source Yoga Unity (OSYU) was formed to address these issues.

OSYU's mission is to protect "the public nature" of yoga in all its expressions and to bring Bikram to court, thus, "ensuring [yoga's] continued natural unfettered practice for all to enjoy and develop". OSYU attempted to achieve this vision through a lawsuit against Bikram for declaratory judgement that his copyright was invalid.

Like the earlier case, however, the OSYU dispute ended before reaching a legal conclusion when both parties agreed to settle out of court in April 2005. The OSYU argument for a public domain practice is, debatably, a position that remains true to the philosophical root-ethics of yoga. However, traditionally speaking, practitioners of yoga are not always allowed unfettered access to the knowledge. Instead, traditionally, access to yogic knowledge is restricted by a guru or teacher, who has the responsibility to determine if a student is capable of safely receiving advanced spiritual instruction.

Because the logic behind claims to own yoga seemed incongruent with both its traditional practice and IP law, the Bikram lawsuits received international media attention. This publicity prompted the reactions of several actors including that of the Indian government, who contends that since the country shares a

Don't try this at home, by tiarescott on flickr.com, CC BY 2.0

special relationship with yoga, the state has both the ethical and legal right and responsibility, to protect the practice from privatization. Thus, because certain entrepreneurs are moving to "own" specific aspects of yoga, and some countries are allowing this to occur by registering IP claims, the state has no other choice, but to act as a protective guardian. This equation of state and cultural guardianship that has been particularly emphasized in the case of yoga due to the practice's economic, spiritual, and political significance in India.

Though it appears that the government of India first became concerned with global circulation and private IP claims to yoga after the Bikram lawsuits, it had previously been concerned with the piracy of its cultural heritage from the late 1990s. This concern was triggered by patent claims on traditional Indian uses of agricultural and botanical products such as neem, turmeric, and basmati rice. Though the government of India has successfully challenged some of these patents – it took several years to develop sufficient legal evidence, with the cost of the process amounting to millions of dollars.

Concerned that similar situations could recur in the future, the Indian government decided to create a Traditional Knowledge Digital Library (TKDL) as a preventative measure. As a result of the Bikram lawsuits, one section of the TKDL has been dedicated to the documentation and digital preservation of yogic practice. Once completed this portion

of the TKDL will contain thousands of pages of ancient texts translated into five languages and illustrations of a few thousand postures.

Originally, the TKDL was intended to function so as to negate private property claims to Indian traditional knowledge and early discussions imagined an open access system. However, this decision was revised after discussions with advisors from international organisations, who feared such openness could destroy the state's future use of its traditional knowledge as an economic resource. Thus, access was only to be granted to IP examiners. However, presently there have been indications that access may be granted to others on a sliding fee scale that is pegged to the identity of the party (i.e., educational institutions and pharmaceutical companies would pay different fees and have different access rights).

The intended use of the TKDL, which under its terms of use policy, is presently defined as a proprietary database of the Indian government, seems to be in flux. This volatile state demonstrates the Indian government's changing conception of the commons, and who is entitled to access of these commons, in which yoga and other similar traditional knowledge systems reside. This instability is mirrored in how other organisations, such as OSYU, employ similar notions with respect to a practice that, arguably, may not have been "traditionally" subject to an absolute free and open access from its inception.

Virgin Mobile: Asleep on the Job?

Emma Carroll and Jessica Coates

It's Friday afternoon. That one drink at lunch turned into more than a couple, resulting in an emergency nap under your desk back at the office. The boss need never know…

Unfortunately for you, though it's 2007, the digital age. Someone in the office had a camera, and unbeknownst to you that photograph of you snoring under the computer was posted on the Internet and picked up by a telecommunications corporation to use in their national advertising campaign. Busted.

Recently billboards were put up across Australia displaying Creative Commons licensed photographs from the Yahoo7 Flickr website as part of Virgin Mobile's new online and outdoor advertising campaign, entitled "Are you with us or what?". The amateur photographs were branded with 'comical' captions in what Virgin mobile stated was "…part of an approach designed to reject clichéd advertising in favour of more genuine and spontaneous shots". Controversially, Virgin did not inform the photographers, or the people in the photographs, that they were using the images.

This campaign has gained a lot of attention in the media, making the front page of news.com, several prominent broadsheets and the Australian Broadcasting Corporation's popular youth radio network, Triple J. It's also led to a lot of online discussion, both on Flickr and on individual blogs about the legal and ethical implications of the campaign.

While at least one of the Flickr photographers, Qole Pejorian (aka Alan Bruce), is "excited" to see his photos used as the face of Virgin, some of the other photographers and subjects of these photographs didn't find the ads quite so humorous. Particularly outspoken was

the brother of a 15-year-old girl, who is featured in a photograph with the caption "Dump your penpals".

From a Creative Commons licensing standpoint, there are a few legal issues to consider. If the photographs Virgin used were licensed to allow commercial use and the company has complied with any other licence restrictions (ie., Attribution, No Derivatives, ShareAlike) this kind of use would seem to be permitted under the CC model. However, there are some questions about whether Virgin has followed these steps. At least one of the images used by Virgin appears to currently be under a licence that doesn't allow commercial use - though it's not clear whether it was under a broader license in the past. The same photo also has a ShareAlike requirement, and there's no sign of Virgin labelling the billboards as ShareAlike.

More generally, it's questionable whether Virgin's attribution satisfies CC licence requirements. They have included a link to the home page of the original photographer's Flickr account in the bottom corner of both the billboards and the web versions of the ads, but they haven't directly named the photographer, linked to the image itself, or referenced/linked to the CC licence the photo is under - all of which are part of the standard attribution required by a CC licence. And, at least in Alan Bruce's case, they haven't followed clear attribution instructions on his Flickr profile. Although the licence allows users to vary these requirements when it is 'reasonable', it is questionable whether Virgin had reason not to give greater attribution in this case. And you would think that, from a risk management point of view, it would be worth implementing best practice for a national advertising campaign.

There are also other legal issues that need to be considered. Has Virgin breached the moral rights of these photographers? Accurate attribution is one of three moral rights required under Australian copyright law – if the attribution used in the campaign is not sufficient for the CC licences, it is also possible that it does not satisfy this legislative right. Furthermore, by adding potentially insulting captions, have Virgin breached the photographers' moral right of integrity? This is more questionable, as the captions are aimed at the subjects, not the photographers. But moral rights law is still in its fledgling stages in Australia, the first case to award a moral rights infringement was only decided in December 2006, so it is possible that a cause of action may exist here.

The public discussion of the issue has really focused on the question as to whether Virgin should have obtained model clearances from the people who are identifiable in the photographs. Although it seems to be industry practice to do so where a photograph is being used for commercial purposes, there is a real question as to whether this is a legal requirement in Australia. Section 53 of the Federal Trade Practices Act does prohibit commercial conduct that misleads or deceives consumers into thinking a particular person has purchased or is affiliated with a product. However, existing cases in this area involve a person who is a celebrity or at least well known to the public, where it is clear that consumers were falsely led to believe that person was endorsing the product. These ads, with their deliberate 'amateur' style and sarcastic bylines, don't really imply endorsement – if anything, they make it clear that the person is an unwitting participant in the joke.

Defamation could potentially be raised as a remedy if publication of the photograph impaired the reputation of the subject. However, you would need to prove that the people involved had a public reputation that had been lowered, exposing them to hatred, contempt or ridicule, or causing them to be shunned or avoided. After all, defamation protects reputation and social esteem, not self-esteem.

In response to these criticisms, Virgin appears to have removed most of the photographs in which particular people can be identified from their website and replaced them with related but less controversial images. For example, one ad using the line 'People who talk in lifts have bad breath' which original pictured (you guessed it) a group of people talking in a lift now has a picture of an overflowing ashtray. Whether Virgin has taken the same step for the billboard advertisements is unclear.
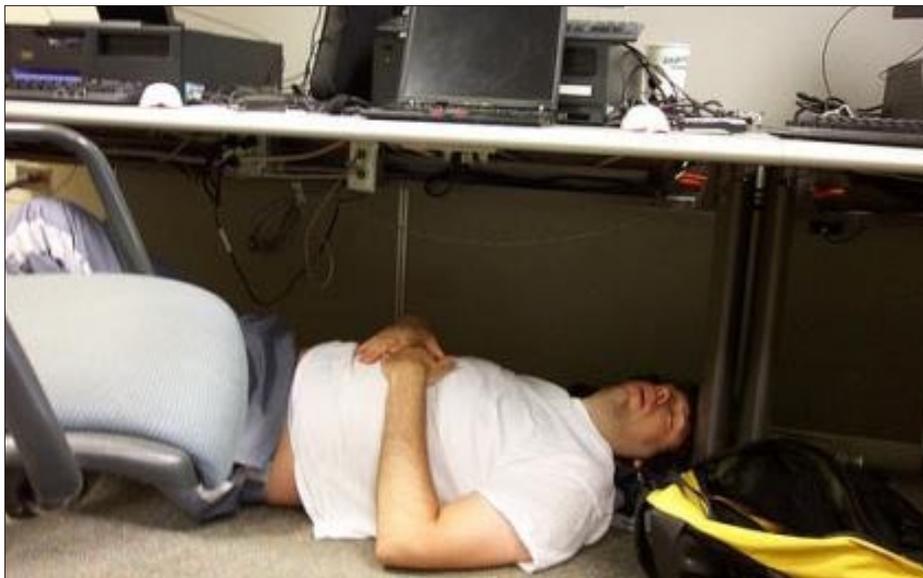
Taking a nap · not so private anymore… by agoode on flickr.com, CC BY 2.0

Some commentators have suggested that the failure to deal with the issue of model clearances represents a flaw in CC licences. However, the licences make it very clear that they merely provide copyright permissions, and that they do not purport to deal with any other area of law. Due to the vast number of uses that can be made of CC licensed material, and the vast number of laws that can come into play in these uses (eg., defamation, privacy, competition) it would be impossible for the licences, or the person issuing the licence for that matter, to definitively cover all potential legal issues in releasing it for general use. There is arguably an onus on the person or company making use of the work to identify any laws their particular use might breach, and to make an effort to obtain any additional permissions that are needed - particularly if their use is large-scale and commercial.

Commentators have also questioned whether CC is educating its licence users enough about the consequences of selecting a licence that allows commercial use. And CC most certainly has a duty to try to assist people to understand the implications of their licence use. However, of all possible criticisms, surely Virgin's campaign cannot be said to be controversial on this basis – surely a person who licences their material to allow commercial use should have been aware that their image might end up in, well, a commercial.

What this incident has really highlighted is the ongoing difference of opinion as to the ethics of, and motivations for, CC usage. Some people have argued that this kind of use goes beyond the purpose of the CC licences. Even if they had no legal duty to do so, should Virgin have notified the photographers that they were planning on using their photos in such a widespread commercial campaign? This might have been a good risk management strategy, and would probably have helped them to avoid some of the public criticism they've received.

On the other hand, there is also an argument that this is exactly why CC has non-commercial licences - so that people can choose to share their material even with large corporations if they wish to, without requiring them to get extra consent. As Alan Bruce puts it:

"the thing about the CC Attribution-Only licence is that you are telling other people, 'go ahead, use this picture as you wish, just credit me,' without any requirement to tell the photographer or even be 'nice' with the photo. So I guess this licence isn't for the faint of heart...

On the other hand, if you sell your photo to a stock photo bank, the same things apply... people who buy your photo can use it however they like.

But I would prefer fame instead of money, and this licence certainly has gotten me a bit of fame!"

How open is open?

Rebecca Kahn, iCommons reporter

One of the objectives of the Local Context, Global Commons project is to develop a framework for measuring openness, which can be applied to anything; from government systems to archival sectors or individual projects.

Of course, without defined guidelines, it's easy for a term like 'openness' to become relative, particularly considering that the project spans several countries, all of which have differing perspectives. Naturally, the process of deciding what to include in the framework will need to take all of these perspectives into consideration, and the decision-making process will have to be shared between all participants. Although developing this framework within the context of the project is the main objective at the moment, it is possible that the project could grow to become a more global framework, which could be used in the evaluation of openness in projects, governments and communities around the world.

So what would this thing look like?
One possibility for the framework would be to establish a checklist, which can be adjusted, depending on the sector being evaluated. Then, working from the bottom up, various point of openness can be listed, from the most basic, to the most complex. The sector's openness can then be determined, depending on how many of the criteria a sector is able to meet.

The most logical starting point would be to look at where information is stored in specific countries, by sector. Is it online, in a library or made available in print? If the information is in a library, then how easy or difficult is it to access? Is there a fee for access involved? In what language is the information available? If the information is online, is it easy to find? How accessible is the Internet in the country being evaluated? Is there a charge for accessing the information? If the information is in print, does it carry a charge? If accessing the information does cost, who does the revenue go to? These types of questions serve to establish the most basic premise of whether information can be accessed or not, and how easy that process is.

The second level of evaluation could be one that looks at how freely that information can be used. For example, is it copyrighted? What kind of copyright is being used? Are provisions made for the copying and re-use of the information, and if so, under what conditions? Can material be commercially used? Can it be broadcast or published? Are there restrictions to who is able to re-use that work, for example, the BBC's Creative Archive only allows material to be re-used by residents of the United Kingdom, because they pay licence fees which fund the creation of content.

The third level would look more at who owns the copyright and the copyright policies they prescribe. If, for example, the public sector is being evaluated, do they make it policy to use open standards? Do they use any open licensing? If so, what kind of licences are they using?

If a community is being evaluated, the criteria can be adjusted. For example, what are the governance policies of the community? Are the governance structures available to community members? Is there a transparent decision-making process?

So how do you plan on putting this together?
Of course, this multiplicity of questions needs to be refined, and trimmed down – ideally the checklist would be as short as possible to facilitate ease of use. The process of refining the questions would be one aspect of the project in which input from the various partners would be extremely useful.

Another aspect of the project is the development of different checklists (all sharing the same basic standards) that can be applied to different sectors, like education, policy, archives, access to indigenous knowledge, open communities and open businesses. During this phase of development, input from people with expertise in each area would have to be solicited.

And the point is?
Ultimately, the aim of the exercise is to create a framework that can be used by anyone who needs to evaluate openness. Donors would be able to use it in the grant-making process, activists could use it when evaluation governments or organisations, projects looking for funding could use it to show their credentials, and communities wishing to work on their internal structures could use it to guide their restructuring. It would, ultimately, become a standard, that can change and evolve as our understandings of openness grow and change.

Finding common ground in the Digital Commons

Eric Kansa, UC Berkeley School of Information & Alexandria Archive Institute

Lawrence Lessig's understanding of the regulation of speech and expressions (see *Code and Code 2.0*) can help frame some issues around indigenous culture and online communication. Lessig highlights the importance of technological controls that work beyond IP law in shaping how culture and information flows within society. Information architectures are similarly significant areas of concern for indigenous knowledge. Highly systematised and rigidly structured systems are the norm for databases produced by narrow, expert communities. Such communities, including researchers, museum and archival professionals, and even legal advocates on behalf of indigenous communities have all developed databases containing highly codified expressions of traditional knowledge (TK). Representations of traditional knowledge are stored in museum, archive, and library databases, as well as databases that attempt to explicitly document items of traditional knowledge in order to allocate them to the public domain. These "prior art" databases are used as a strategy to thwart unwanted patents derived from traditional medical or environmental knowledge.

However, these databases have come under increasing fire for divorcing TK from their communities and cultural contexts. The systematic documentation and categorisation of indigenous knowledge in such archives continues the practices that emerged during the height of European colonialism (see Bowker and Star's *Sorting Things Out: Classification and Its Consequences,* 2000). Most of the effort going into cultural heritage archiving works in a well meaning but very "top down" manner. The method typically involves committees of technical and subject-matter experts developing ontologies, which serve as "universal" standards for organising cultural heritage collections.

Unfortunately, this "top down" approach leaves very little room for community input or divergent worldviews. This is very important from an indigenous knowledge perspective. Building online digital archives of indigenous cultural heritage can often become an exercise in de-contextualised listing of coded elements of cultural knowledge. Much indigenous knowledge is difficult to "archive" and communicate through such systems, because it is often implicit and highly context dependent (as stated in Michael Brown's *Who Owns Native Culture?* 2003). The imposition of a culturally alien database schema dissociates indigenous culture from its context, making it lose much, if not all, of its meaning. Such attempts at cultural heritage documentation may have little relevance to a local community; worse, it may be seen as an act of appropriation, even if motivated by a desire to help.

The conceptual difficulties of surrounding the "informatics" of cultural heritage parallels the difficulties in reconciling local norms of privacy, propriety, and spirituality that may regulate access and use of knowledge. This makes "top down" approaches to protect traditional knowledge hard to devise. It is difficult to set global rules and parameters for culturally bound systems that are inherently fluid and contextually dependent. Such attempts run the risk of missing the mark by either under-protecting traditional knowledge or over-regulating it with arbitrary legal and bureaucratic systems. Local cultural norms regulating traditional knowledge make global, international governance very difficult. If traditional knowledge protection schemes become overly rigid in defining how people can and cannot express elements of traditional culture, this dynamism and fluidity will be lost. Rigid barriers may cause cultural production and expression to loose much of its vitality (for an anthropological critique of overly formalised regulation, see Brown's *Who Owns Native Culture?*). Members of indigenous societies already face tremendous pressures because of globalisation. Wrongly structured "protections" may lock cultural legal museum cases and further diminish and distort threatened indigenous knowledge.

International and national legal frameworks that better recognise indigenous conceptions of property, propriety, spirituality and privacy probably should be developed. But such efforts at cultural protection are insufficient. For interest, protectionism, even in its most drastic forms (DRM, copyright extensions) have done little to promote the recording industry. Other ways to strengthen indigenous culture need to be found. Fostering indigenous creativity, connectivity, and innovation are probably far more effective at preserving and enhancing the dynamism and vitality of traditional knowledge. Capacity building, education, and information technology investments must be part of the equation Such investments will help people in traditional societies can maintain social networks, systems of knowledge, and modes of expression in the face of the

The systematic documentation and categorisation of indigenous knowledge ... continues the practices that emerged during the height of European colonialism

many pressures of globalisation. Vital, vibrant communities with the capacity to maintain, use, and further develop traditional culture will be better able to assert themselves in international legal arenas and more successfully navigate through other challenges.

If they are open and accessible, digital technologies and communications will help empower members of indigenous communities. Obviously, language, economy, infrastructure, bandwidth, security and literacy are all factors that greatly determine how to structure effective capacity building strategies. One of the chief barriers, now, is limited bandwidth and connectivity, especially for rural peoples, even in comparatively developed nations, such as the United States. Nevertheless, there are some

encouraging trends and developments, both in terms of connectivity (increasing penetration and power of cellular networks), and in terms of hardware (cheap cellular handsets and the Open-Laptop-Per-Child programme).

Ramesh Srinivasan's work with Tribal Peace (a database driven web resource for Native American communities in Southern California) and Village Voice (a Somali refugee web resource in the Boston area) help illustrate how online tools can be adapted to meet the needs of indigenous communities and displaced peoples. Similar "localised" approaches include systems built by Aboriginal communities of Warumungu, Northern Territory, Australia. They developed the Anyinginyi Manuku Apparr DVD collection of songs and stories, organised according to principles that made sense to this community.

One very sophisticated online resource is the Cherokee Nation's official website. This website supports a range of news, employment opportunities, arts and culture, schooling and Cherokee language education (including roll-over translations of site content from English to Cherokee and computer aided Cherokee lexicons)(see also Angela Haas' *Making Online Spaces More Native to American Indians: A Digital Diversity Recommendation. In Computers and Composition Online*, 2005).

"One size fits all" solutions are unlikely to be found, and highly particular frameworks need to be developed for virtually every community wanting to express traditional heritage in digital environments. Fortunately, such niche-customisation is not as infeasible as it sounds. Demand for flexibly structured, community-building and collaborative tools extends well beyond indigenous communities and has motivated the rapid development of many open source social software community content management systems (CMSs). Many of the social software frameworks enable a much greater degree of community customisation and adaptation than more traditional, rigidly structured systems that are typical of museums and other

institutional data repositories. These systems should be explored as a means to empower indigenous communities both for solving everyday needs of coordination, information sharing and activism, and for shaping how they represent and express themselves globally.

Access and open, participatory systems can help indigenous peoples have much greater say in how they are portrayed and represented. With access to a commons-based resource such as Wikipedia, indigenous stakeholders can monitor, edit and contribute in ways to make their voices heard. Indeed, there are fascinating examples within Wikipedia where members of indigenous communities have edited and commented on entries that describe their communities. The discussion page linked to the Wikipedia entry about the Cherokee Nation illustrates how Native American participants are working to correct perceived misrepresentations of their communities.

While openness is empowering we need to remember that participation in open, collaborative systems should be a matter of choice and not compulsion. Few

While differences in worldview and opinion will continue, it is time for advocates of the digital commons to reach out to indigenous peoples and recognize some common interests.

advocates of the commons would argue that it is ethical to broadcast confidential medical records or other personal secrets without the consent of people who are well informed of the risks of such exposure. Putting an "Attribution" licence on such content won't make it any more ethical. In the same way, members of the global Commons need to recognise that ideas of privacy and secrecy vary widely, and indigenous ideas of what's sacred, private, shareable, or secret vary tremendously. While Creative Commons licences can be a powerful tool for indigenous cultural expression, there are some cases where Creative

This is a Vanuatu Sand Drawing. Drawn into the sand, they transmit a wealth of traditional knowledge about local history, indigenous rituals and kinship systems, by PhillipC, CC BY 2.0.

Commons licence choices map poorly to local needs. To fill these gaps, other, non-standard, and incompatible licences may emerge as a result. Many elements of indigenous cultural heritage will probably never be neatly and cleanly compatible with global conceptualisations of "free culture" operating on a bedrock of compatible open licences. Much cross-cultural communication will likely take place in a necessarily "messy public sphere of contest, debate, and protest" (quoting from Cori Hayden's 2003 book, *When Nature Goes Public: The Making and Unmaking of Bioprospecting in Mexico*).

We can't gloss over the complexities of communicating across different value systems. The interests and goals of traditional knowledge protection will sometimes clash with the commons. Nevertheless, there is very fertile common ground to be found, especially if we remain focused on the critical issue of empowerment. Strategies that afford indigenous communities the tools, both legal and technical, to help maintain social ties, innovate, create and have a global voice can help bring such empowerment. Powerful open source software and innovative legal tools such as those pioneered by Creative Commons are available now. While differences in worldview and opinion will continue, it is time for advocates of the digital commons to reach out to indigenous peoples and recognize some common interests. Both movements will be challenged by each other, but both movements may find common goals and invaluable alliances.

pictures from flickr.com, from left to right by: hellofaboy CC BY-NC 2.0; carf CC BY-NC-ND 2.0; Tatiana Cardeal CC BY-NC-ND 2.0; carf CC BY-NC-ND 2.0; shapeshift CC BY-NC-SA 2.0; Charles Fred CC BY-NC-SA 2.0

10 of the best - Multimedia News Sites

Rebecca Kahn, iCommons reporter

Online news is a tricky one – there's a big difference between newspapers that just copy and paste their print content onto the Internet, and publications that have managed to create dynamic, living and breathing online communities where news can be debated, discussed, and the potential of multimedia can be used to it's full extent.

That being the case, this month, sadly, we only have nine subjects. Finding really dynamic sites was harder than I anticipated and the gaps between the really amazing ones and the just okay ones is huge. But what they all have in common is an ability to tell stories well, which, at the end of the day, is what we read papers for in the first place.

Guardian.co.uk

www.guardian.co.uk

If there was ever to be a battle of the online news sites, *The Guardian Unlimited* would come out the clear champ. This site, which is the online version of The Guardian newspaper offers all it's content free of change, as well as offering readers access to their massive archive, and content from the Sunday paper, *The Observer*. As well as including all the print content, *The Guardian Unlimited* also has unique online content, which includes photo, video and audio. They upload several podcasts daily, including local and international news round-ups, cricket scores, and coverage of books, arts, music and science.

While blogs have always been a feature of the site, in March 2006, *The Guardian* launched a section called 'Comment is Free', which features opinion pieces by over 600 different writers. These are specifically written to generate debate and discussion, and responses often run into the hundreds. While users have to register to comment, there is no pre-moderation of comments, so it really is free. Although *The Guardian* has a traditional reputation for being left-leaning, with an average of 15 million unique visitors a day, the comments and opinions are pretty wide-ranging.

BBC.co.uk

www.bbc.co.uk

The 'Beeb', as it's fondly known, is probably one of the best places to go for up-to-date news coverage. With the might of the BBC behind it, it's no wonder that this website is able to offer free content from around the world on one of the biggest sites on the web. The site compliments the news and programming that is broadcast on the BBC television and radio stations, and includes video and audio footage, and a massive archive all of which is available in 33 languages. At the moment, the site is estimated to have over 2.2 million pages. Through their involvement with

Old new news. by ERIO on flickr.com, CC BY-NC-SA 2.0

the Creative Archive Licence Group, some content is available in the UK for reuse and sharing.

New York Times

www.nytimes.com

The 'Gray Lady' has been one of the newspapers that has fully embraced the possibilities of creating an online version. While not all of the content is free (stories are usually free for the first week, and become 'premium' content that has to be paid for) the range of multimedia angles included in stories is very impressive. Video, photos, audio and graphics are included in most stories, and there is a multi-media section, where longer, more documentary-style stories are available.

The Sunday Times

www.sundaytimes.co.za

The Sunday Times has been one of the first South African papers to start using multimedia in it's digital version, and in the digital version of it's daily sister paper, *The Times*. Most video, audio and images are kept in a separate multi-media section. All rights are reserved by *The Times*, but they do provide the code for embedding video and audio into blogs and websites. But be warned – some of this stuff is for strong stomachs only.

El Pais

www.elpais.com

First published as Spain made its transition to democracy in the 1970s, *El Pais* has become the largest paper in Spain, with an estimated 2.2 million readers. The online version features free content, and free access to archives, with an entire interactive multimedia section, loaded with photos, images, audio and

video as well as blogs by regular and guest writers, and active community forums and chat spaces.

NPR.org

www.npr.org

Since the 1970s, National Public Radio has been producing news and cultural programming for audiences in the USA. Since they went online, though, this content has been available, either as streaming audio, or as podcasts, to listeners all over the world. The website offers text-versions of stories, as well as audio downloads of programmes produced by NPR and it's affiliate stations.

National Geographic

www.nationalgeographic.com

It may not cover hard news, but *National Geographic* have been running in-depth, beautifully photographed and laid-out stories about the world we live in since 1888. The online version features stories that integrate video and audio with the beautiful stories that are the trademark of the publication. They also have a world music section where you can listen to and learn about music as diverse as Afrobeat and psychedelic pop from Cambodia, and take advantage of the regular free downloads.

Times of India

www.timesofindia.com

With a whopping 2.6 million readers of the print version, *The Times of India* was founded in 1838 as a paper for British colonists in India. The online version came into being in 2001, and all content since then is available for free on the site. Active blog and discussion forums run on the site, as well as video and audio sections that both compliment stories and stand alone.

Organisation Spotlight: WikiEducator

Location: Vancouver, BC, Canada
Web Address: http://wikieducator.org
Licences: CC BY-SA, CC BY, public domain
Number of active initiatives: 27
Number of pages of content: 1,570
Number of wiki edits: 61,524
Number of cups of coffee consumed: 4,326,711
By: Steve Foerster

WikiEducator is a project sponsored by the Commonwealth of Learning, an international NGO funded by member states of the Commonwealth of Nations. As its name would suggest, it's a wiki, and it's meant as an umbrella resource that various initiatives can use as a workbench for building open educational resources, or OERs. As a wiki that uses MediaWiki software, it has the same interface as Wikipedia.

One of several initiatives using WikiEducator is the Virtual University of Small States of the Commonwealth. VUSSC is not actually a university, but rather is a consortium of universities in small states, such as the University of the West Indies and the University of Mauritius. Among other things, VUSSC is using WikiEducator to build an undergraduate curriculum in travel and tourism that is specifically designed to address the sustainable development needs of small economies - a curriculum unavailable from large countries whose experience of development is contextually different.

Another example is the XXI Texts project, which seeks to find textbooks that have fallen into the public domain, as a result of these books having been published sufficiently long enough ago or having not had its copyright renewed. The project then revises them to make them useful and relevant to twenty-first century students.

It's surprising how often textbooks that were published decades ago can still be sufficiently useful to such an extent that that it would be much easier to adapt it for today's students than to write a new one from the start.

WikiEducator was instigated in early 2006 by Wayne Mackintosh, an education specialist with the Commonwealth of Learning, with a three-phase timeline. In the first phase, from inception to the end of 2007, the focus is on establishing a democratic governance model and setting up the resources necessary so that new participants can have all of the tutorials and similar materials they need to become productive within the WikiEducator environment. The second phase reaches till the end of 2008, and focuses on developing as much content as possible. The third phase is from the start of 2009 onwards, and the focus is on sustainability - continuing to bring in educators to add to the collection, and to encourage the use of the resources already available. The ultimate goal is to have a complete set of curricula in every discipline at the primary, secondary, and tertiary levels by 2015.

Clearly, we have our work cut out for us! However, so far we're on track with the implementation of our first phase. At its beginning, decisions were made for WikiEducator by Dr Mackintosh. Now however, he has appointed an Interim International Advisory Board to reflect the wishes of our growing community, and once we have 2,500 registered users we will hold elections to establish a properly elected International Advisory Board. Meanwhile, we've added a selection of tutorial and style guides, so that the participants who start using WikiEducator during the content phase will have guidelines on how to proceed.

WikiEducator Frequently Asked Questions

Q: If it's a Commonwealth project, does that mean that WikiEducator is only meant for English language materials?
A: No, not at all! As a Commonwealth of Learning sponsored resource, English was our starting point, but we now have a French language track of WikiEducator, and are in dialogue with a number of Spanish speakers to develop a track in that language. We realise that the Commonwealth has enormous cultural and linguistic diversity and have every wish to respect that as we move forward with building OERs.

Q: Since WikiEducator produces OERs, what licence are those materials released under?
A: Our community has developed around the definition of free cultural works. As such, all resources build on WikiEducator are released under the Creative Commons Attribution-Share Alike 2.5 licence or later. There has been discussion among some participants to change this licence so that initiatives working through WikiEducator would be able to release their materials in a manner compatible with CC BY-SA, which essentially means the less restrictive CC Attribution licence or public domain dedication, and as of July 2007 the Board appears close to approving such a proposal.

Q: Does WikiEducator use material from Wikipedia and other WikiMedia sites?
A: Unfortunately, because of the incompatibility between the copyleft provisions of the CC BY-SA licence and the GNU Free Document licence used by Wikipedia, we are as yet not able to use material from Wikipedia when building OERs on WikiEducator. However, this is a matter of great concern to both organisations, and indeed the entire OER movement, and finding a solution to allow cross-use of material is being worked on by all those concerned.

iCommons.org Highlights

South African legal resources
by Paul Jacobson
How free are legal resources in your country? Paul breaks down how and what you can access in the South African legal landscape.
http://icommons.
org/articles/south-african-legal-resources

Who owns what? User-generated content in Brazil
by Paula Martini
Paula takes a look at how user-generated content is being used effectively in Brazilian cultural initiatives.
http://icommons.org/articles/who-owns-what-user-generated-content-in-brazi

Sprint ahead for learning
by Judy Breck
Do we underestimate the power of mobile phones for learning?
http://icommons.
org/articles/sprint-ahead-for-learning

Don't miss the podcast interviews with Ronaldo Lemos and SJ Klein by Kiruba Shankar!

The invisible women of science and technology

In 2005 a great uproar ensued after Harvard President Lawrence H. Summers suggested that "intrinsic aptitude" could explain why fewer women have excelled in science and math.

History as we know it, is often a lopsided account of "His Story" - a story shaped by the few elite men in positions of institutional power at the time. Women, representing half of humanity, did not share equality with men within the same social class and culture, except during pre-recorded and unwritten oral cultural days of ancient civilisation in Egypt and perhaps during Pre-Vedic and early Vedic times in India (before 2500 to 3000 BC).

Women's access to basic education, let alone higher learning was severely restricted and discouraged throughout most of recorded history and even to this day in many developing countries.

But what of the women who have succeeded despite these obstacles? Here **Susmita Barua** highlights the unsung heroines behind the development of modern technology, paying tribute to the women who defined the way we work, live and communicate today.
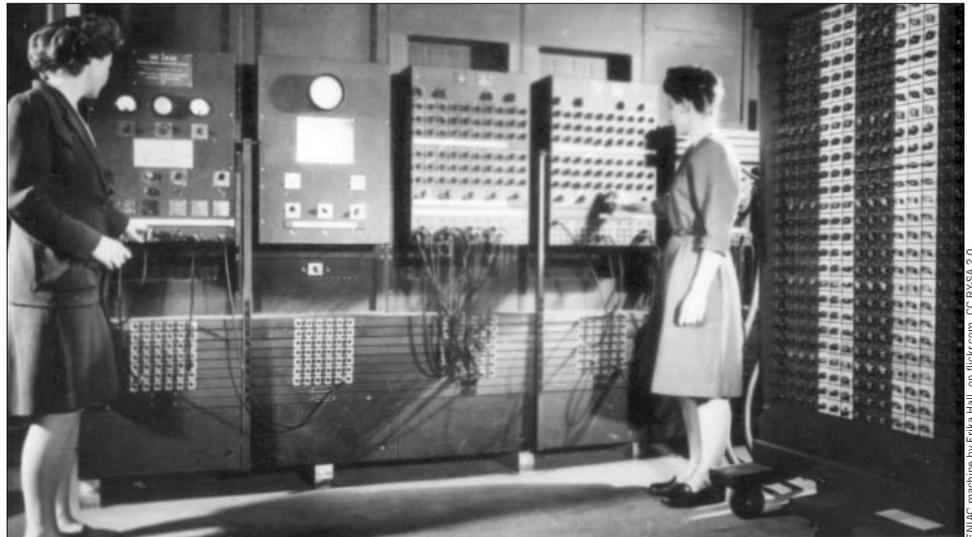
ENIAC machine by Erika Hall, on flickr.com, CC BY-SA 2.0

The first electronic computer called the Electronic Numerical Integrator And Computer (ENIAC) was a thirty-ton box that contained 17,000 vacuum tubes, 70,000 resistors and 6000 switches. Six women mathematicians were carefully selected to run ENIAC. They worked as as "**trajectory analysts**", which involved vast amounts of tedious calculations as no operating systems, manuals or computer languages existed at the time. To this day, no computer history books mention the names of Jean Jennings, Betty Snyder, Kathleen McNulty, Marlyn Wescoff, Frances Bilas and Ruth Lichterman, who played a **crucial role** in the breakthrough. Four of the six programmers quit the project, but two - Jean Jennings and Betty Snyder, stayed and were later involved in the creation of the Universal Automatic Computer (UNIVAC), the **first commercial** computer, in 1948. Snyder created the **C-10 code** that enabled simple typewritten commands for programming the device instead of using of dials and switches. It wasn't until Kathryn Kleiman made a film recently about these pioneers that these women were acknowledged.

Hedy Lamarr, pic in the Public Domain, from wikipedia.org

Ada Byron, daughter of the famous poet, Lord Byron, collaborated with Charles Babbage to write the **world's first computer programme** in 1843. Babbage devised the plan for Analytical Engine in 1841, a forerunner of the modern day computer. Ada's scientific paper anticipated the development and creative use of **software** (in fact, she coined the word 'software' in this paper) and the analytical machine to compose music, produce graphics, carry out personal and scientific tasks including artificial intelligence. The British Government's **rejection** of Analytical Engine, many believe, set the computer technology back by 100 years.

Ada Byron, pic in the Public Domain, from wikipedia.org and Analytical Engine, by Gastev on flickr.com, CC BY-SA 2.0

Hedy Lamarr was an actress and communications technology innovator. Along with George Antheil, she developed a controversial early version of frequency hopping that was used to make radio-guided torpedoes harder for enemies to detect or jam. Lamarr's concept of frequency hopping is the basis of today's **wireless technology**, used by cellular phones and WiFi Internet connections. She was honoured in 1997 by the Electronic Frontier Foundation for her contribution to science and technology.

Read the rest of the article on !

Fall in love... with your Self

Applying open source collaboration models to other creative endeavours

by Schmadtler & Waldhead

Greetings in the name of the divine Chakra to all you wonderful human souls.

Waldhead and Schmatler are back, this time wearing carefully placed crystal accessories, tie-dyed hemp pantaloons, and feathers in our long flowing hair (what we have left of it that is!) Yup, we are going to rinse you of the negative energy generated by our last article where we talked about money being a motivating factor for people sharing the fruits of their labours. This time we are changing tack entirely and looking at self-improvement as a reason for people to share their creative output, one step at a time on the path to ultimate enlightenment.

As a matter of fact, even with all this incense smoke in the air, we were able to find some good old hard statistics to back up our rhythmic chanting. Swami Ghosh (sometimes referred to as Rishab Ghosh) asked a lot of open source software developers about their divine motivation, and a surprising number of them pretended that money had nothing to do with it, but that learning and sharing knowledge were the path to enlightenment. More than 2500 developers participated in the FLOSS survey. Almost 80% said they joined to learn and develop new skills, and almost 70% remained active developers because they wanted to share knowledge and skills. Even in the absolute stillness of one's mind, this sounds almost too good to be true. Hari Hari!

Yet this focus on learning and sharing knowledge is not as surprising as it seems. Working as a developer on an open source project can be a great way to hone one's skills as one is collaborating with people from around the world who could have very different approaches to solving problems. Open source is by its very nature subject to peer review and code submitted to a project often goes through some harsh criticism on a project's mailing lists before it is accepted. An example of such crit is a quote from Greg Kroah-Hartman (one of the Linux kernel hackers) who has these words of wisdom for a would-be contributor: "Wow, for such a small file, every single function was incorrect. And you abused sysfs in a new and interesting way that I didn't think was even possible. I think this is two new records you have set here. Congratulations." We believe he added a few divine blessing as well, but we are not allowed to repeat them here.

Lively debates about the best way of coding something are the norm in open source as various members of a project discuss the pros and cons of of each approach and how a submission stands in comparison to this. If you have a tough shell and can take others poring over your code and giving line-by-line

feedback then you stand to learn a lot from this process. Of course the opposite could be true and the experience could be so traumatic that you either check yourself into a clinic for depression or end up stalking your critics and subjecting them to physical and psychological aggression as revenge. But let's not focus on these negative thoughts, instead loosen your prayer shawl, take a deep breath, hold it and think about a sunny beach with palm trees and dolphins splashing in and out of the waves in front you... and exhale. Yes. All better now.

This notion of sharing your works in order to get feedback which can be used to improve yourself applies to other forms of creativity and numerous examples abound. Even before we entered the computer age (and Schmatler started sending obscene emails to everyone he knew) we learned and shared knowledge in "communities of practice". Etienne Wenger and Jean Lave found that learning often happens in groups of people that have a common interest, engage in similar activities, and who talk about their experiences - trading stories and asking each other

Meditation by Marc Oh! on flickr.com, CC BY-ND 2.0

for help. With digital technology people have a lot more possibilities to express themselves and communities of practice can include people from all around the world. Budding film makers can share their works online while they are still in the formative phase and get feedback from their peers on editing techniques, what parts of the film are worth keeping, and what other changes they can make to improve it before final release. The 911 conspiracy theory movie *Loose Change* is a good example of this – the makers have released two subsequent versions of their original documentary after receiving comments from the community. Sites like Garage Band offer a similar concept for music – users of the site submit their tunes and these are reviewed by other users of the site,

creating feedback loops which should in theory lead to better music being produced. Photo-sharing sites like Flickr let users comment on each other's photographs - enabling photographers to share techniques and give each other tips for improving composition, lighting and so on (or they can slag each other off and insult each other's mothers in the comments, it can go either way).

The notion of allowing someone to remix or modify your creation (which is enabled by the "derived work" section of Creative Commons licence) can also help one to improve as you see how other people take your original creation and turn it into something different. This might lead to your original work being improved which would give you pointers for future works, or the opposite might be true (like that Jason Nivens git trashing various old school RUN DMC Hip-Hop classics by putting monotonous dance beats over them) in which case you would have a great example of what not to do in future!

Well, it's time for us old codgers to head off to our geriatric yoga class so we'll leave you with a quote and look forward to seeing your self-improved auras next time.
- *"Aah, this show is good for what ails me."*
- *"What ails you?"*
- *"Insomnia. "*

Download this month's iCommons podcast

Very quietly, and without much fanfare, the South African Bureau of Standards has aligned itself with open standards, rather than with proprietary software as the norm among South Africans. Paul Jacobson and Andrew Rens were there when it all went down, and spoke to Rebecca Kahn.

International Copyright Law: The three-step test

This month, iCommons' resident copyright expert, Tobias Schonwetter, explains the meaning of the most important constraint for national copyright exceptions and limitation, commonly referred to as the three-step test.

CC license users deliberately bypass the statutory copyright regime in order to facilitate access to and dissemination of their works. Apparently, contemporary copyright legislation (more and more harmonised all over the world by means of bilateral or multilateral treaties) is increasingly considered unsuitable not only from a user's perspective but also for creators' purposes. In my previous columns, I have highlighted some of the most unsatisfying copyright facts, such as the absurdly long term of copyright protection and the ignorance for non-western approaches to intellectual property. After all, strict copyright protection hampers not only the dissemination of works but the creation of works itself. For most creators are users of the works of others in the course of the creation process and as such have to deal with all the restrictions imposed by the relevant copyright laws. In other words, to a certain extent, copyright law just runs contrary to our 'remix culture'.

Harmonising copyright exceptions and limitations

However, as a matter of fact, statutory copyright law still applies to the vast majority of works these days. For this reason, it is (in my opinion) very important to re-emphasise that there has always been a broad consensus that the exclusive rights of copyright-holders in their works are not unlimited. On the contrary, a strong set of limitations and exceptions is deemed necessary to, inter alia, safeguard fundamental rights and freedoms of users, to regulate competition and industry practice, and to promote the dissemination of information. Hence, copyright limitations and exceptions are of utmost importance for a fairly balanced copyright law. Unsurprisingly, exceptions and limitations differ significantly between countries due to the fact that their utilisation does reflect public policy considerations by national lawmakers. Naturally, such considerations vary or might even be diametric since countries have reached different stages of development and are founded on dissimilar law traditions. Therefore, exceptions and limitations have been made subject to various treaty obligations in order to reach a minimum standard of harmonisation. By far the most important international treaty obligation in this context is the so-called three-step test. I have briefly mentioned this test in previous columns without explaining further details because I was already planning to devote an entire column to the meaning of the test at a later stage. Upon noting that the Free Courseware Project at the University of the Western Cape in South Africa described my previous remarks regarding the test as helpful for lawyers but not so much for normal folk, I decided that the time is ripe for some more substantial comments regarding the three-step test. It has to be borne in mind, however, that the test was made by policy-makers for policy- and lawmakers. Legal gibbering is therefore intentional and (believe it or not) ultimately helpful – because, after all, the legal language might sound strange and unclear at times but it always strives for the highest level of precision and conciseness. I shall try to describe the test in as plain language as possible in order to impart some insight here. Yet, this column is inevitably going to be more legal than the previous ones.

The test's history

In 1967 when international policy-makers introduced an abstract formula concerning the question of permissible exceptions to the general right of reproduction under national copyright laws at the Stockholm Conference for the revision of the Berne Convention for the Protection of Literary an Artistic Works of 1886. Over the years, this three-step test was embodied in several international treaties and other agreements, and although only minor changes in terms of the wording of the three steps have been made, the scope of application of the test has broadened significantly - especially because the test is no longer confined to the reproduction right in newer copyright treaties. It is for that reason that any serious discussion regarding the introduction as well as the interpretation of exceptions to the right-holders' copyright has to start with an analysis of the requirements stipulated in the three-step test. In a nutshell, the test sets limits to exceptions to exclusive rights, such as fair use and fair dealing, and allows exceptions

a) in certain special cases;
b) that do not conflict with the normal exploitation of the work; and
c) that do not unreasonably prejudice the legitimate interests of the author / right-holder.

Nowadays, the three-step test appears not only in the Berne Convention (Article 9 (2)) but also in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) (Article 13), the WIPO Copyright Treaty (WCT) (Article 10) and the WIPO Performances and Phonograms Treaty (WPPT) (Article 16). Moreover, several European Directives as well as numerous Free Trade Agreements and national copyright laws contain the test. However, despite its incorporation in all these legal instruments, no considerable degree of agreement exists as to the actual meaning of the test. It has been suggested repeatedly, to use the U.S. fair use doctrine with its four part test stipulated in section 107 of the U.S. Copyright Act as a tool for the interpretation of the three-step test. I strongly advise against that! As a national exception to the right-holder's exclusive rights, the fair use doctrine has to meet the conditions set out in the three-step test. Thus, it would of course be a severe dogmatic violation of the underlying system to interpret a provision, which exercises control over another provision by means of the controlled provision.

The WTO Dispute Resolution Panel decision in 2000

In 2000, a WTO Dispute Resolution Panel dealt with the interpretation and application of the three-step test contained in Article 13 of TRIPS and extensively analysed each of the steps on the occasion of a dispute between the European Union and the United States of America over an exception to the right-holders' copyright in US copyright law (case WT/DS160). As it was the first and only decision by an international body concerning the three-step test in copyright law, the decision provides valuable guidance to legislatures enacting legislation to comply with the three-step test and to those interpreting existing legislation.

Before dealing with the meaning of each step, however, it is important to mention that the area of application of the three-step test is vague in itself. In other words, it is somewhat disputed to what exceptions and limitations the test really applies. Fundamental legal principles as well as principles of international treaty interpretation are at the core of this debate and it takes a good deal of twisted legal thinking to engage in this discussion. For the present purposes it is sufficient to start from the assumption that the three-step test applies directly to exceptions to the general right of reproduction as mentioned in the Berne Convention as well as to excep-

tions to all exclusive rights additionally granted in the subsequent treaties and agreements. All other exceptions to the exclusive rights recognised in the Berne Convention must, in addition to the specific requirements contained in the Berne Convention itself, pass the three-step test. The three steps of the test are cumulative; hence, a failure to comply with one of the steps results in the exception being disallowed.

First step - "Certain special cases"

With regard to the first part of the three-step test, the WTO Panel considered various dictionary definitions of "certain", "special" and "case" and stated eventually that "the first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach" in a quantitative as well as a qualitative sense. That does not mean, however, that every situation to which the exception could apply needs to be explicitly identified, provided that the scope of the exception is known and particularised. However, the first step does not require that the exception or limitation in question is justified by some clear reasoning of public policy.

Second step - "No conflict with a normal exploitation of the work"

Regarding the second step of the three-step test, the WTO noted that "not every use of a work, which in principle is covered by the scope of exclusive rights and involves commercial gains, necessarily conflicts with a normal exploitation of that work. If this were the case, hardly any exception or limitation could pass the test of the second condition and Article 13 might be left devoid of meaning, because normal exploitation would be equated with full use of exclusive rights. […]" Rather, the second step of the test is violated if a copyright exception or limitation causes "significant or tangible" commercial losses in either actual or potential markets. In this respect, each individual exclusive right should be considered separately.

Third step - "Not unreasonably prejudice the legitimate interests of the author/right-holder"

Before analysing this last step of the three-step test, it needs to be pointed out that the actual wording of the international treaties containing the test differs regarding the protected persons. For instance, Article 9 (2) of the Berne Convention as well as Article 10 WCT refer to the "author", whereas Article 13 of TRIPS and the European Directives protect the "right-holder". It is apparent that the term "right-holder" encompasses a wider range of protected persons than the term "author", e.g. the holder of a right to use. The WTO Panel considered at first the dictionary meanings of "interests", "legitimate"

and "prejudice". Thereafter, it observed that the phrase "not unreasonably" is slightly stricter than "reasonable", and stated that "prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner". In addition, the WTO Panel made the following important remarks regarding the terms used in the final step of the three-step test: As for the notion of "legitimate interests" the phrase does not need to be limited to actual or potential pecuniary interests. The term "legitimate" relates not only to lawfulness, but also has the connotation of legitimacy from "a more normative perspective, in the context of calling for the protection of interests that are justifiable in the lights of objectives that underlie the protection of exclusive rights".

Conclusion

The Panel's decision has been criticised in parts – e.g., because it makes it difficult for open-ended provisions such as fair use to pass the first step of the test – and it is questionable whether or not it has made the future outcome of legal disputes in this field any more predictable. Yet, the decision has clarified that the three-step test contains in its third step an important proportionality test in the way that the harm to the right-holders has to be reasonably related to the users' benefits. Within the realm of the proportionality test the payment of "equitable remuneration" can serve as a means to avoid that the prejudice reaches an unreasonable level. It remains unclear though, what "equitable remuneration" exactly means.

Elsewhere, I have expressed my doubts as to whether the three-step test in its current wording is suitable for the digital age – chiefly because a growing number of works can now be marketed directly to the end user by means of Digital Rights Management Systems. Consequently, a general exception for any private copying could potentially conflict with the copyright holders' market opportunities and therefore violate the second step of the international three-step test. However, at this stage the three-step test remains the central instrument in international copyright law to examine the legitimacy of national copyright exceptions and its proper understanding, interpretation and application are therefore indispensable for everybody working in this particular field. The economically driven decision of the WTO panel of 2000 may, in some parts, give reason for criticism. Yet, from a practical point of view it sets at present the only effective benchmark, despite its limited precedent value: neither other Member States nor domestic courts are bound by the decision; even a later Panel would arguably not be legally obliged to follow that decision.
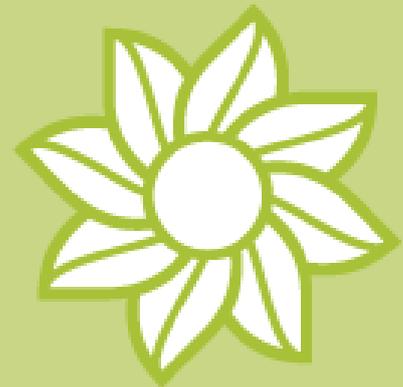
ABOUT ICOMMONS
Incubated by Creative Commons, iCommons is an organisation with a broad vision to develop a united global commons front by collaborating with open content, access to knowledge, open access publishing and free culture communities around the world.

CONTRIBUTE!
Interested in being a **columnist**/**blogger**/ **contributor**/**translator** of the iCommons Lab Report? Contact iCommons Lab Report Editor, Daniela Faris at daniela@icommons.org

LICENCE
The iCommons Lab Report is released under the following licence:

Creative Commons Attribution 3.0
(http://creativecommons. org/licenses/by/3.0/)

Please attribute both the author and the source of the newsletter (http://icommons. org) if you republish the newsletter.

The stories may have been edited for publishing in the print edition of the newsletter. Please refer to the iCommons website for the full, unedited stories.