

*Piercing the Technological Veil: Software Interoperability, European Law, and Fundamental Rights*

Imagine that, in a faraway fictitious land, A expresses a series of words that have no synonyms and only make sense in that particular sequence. In order to utter competing or complementary expression, B and C need to 'borrow' that exact same series of words. As it turns out, that country's intellectual property rights will determine whether or not A is able to monopolize or control all debates using that series of words. By analogy, B and C need access to A's interface information if they want to create software programs capable of interoperating with A's software. For the 'interface' is a set of electronic keys that, so far as structure is concerned, must be precisely emulated in order to secure co-operation between programs. It is argued that European software laws – software-specific regulation and competition laws taken together – grant software copyright holders de facto control over much software expression by means of the interface code. The question thus arises whether those laws comply with the right to freedom of expression.

This project does not seek to reinvent the wheel. Rather, it is believed that existing wheels – critical concepts like 'media pluralism' or 'political expression' – might take very different shapes when placed in a digital setting, given distinct technological and economic circumstances. Approaching software regulation from the viewpoint of fundamental rights forces us to acknowledge software's unique hybrid nature as a means for expression and expression in its own right. Only with this frame of mind can one properly assess the intricate interplay between generic competition law and intellectual property rights regarding software.