

## The Center for the Public Domain: A Short-Lived Venture Philanthropy

“If we could find a champion for whatever initiative it was that we wanted to support, then, because we were much more lithe and less cumbersome than some big organizations, we could invest in that champion. If we found a startup, we started it. If we found a supporter, we supported it. My strength was in finding the champion, and Bob’s strength was in trusting me that I was right.”<sup>1</sup>

—Laurie Racine,  
president of the Center for the Public Domain

### RED HAT, INC.

#### Bob Young

A native of Ancaster, Ontario, Canada, Robert “Bob” Young earned a degree in history from the University of Toronto in 1976. While in college, he encountered the work of the seventeenth-century Scottish philosopher Adam Smith. In a 2007 interview, Young outlined how Smith’s thinking had influenced his own:

Going back to university days, I’ve greatly admired Adam Smith, because he was able to articulate the value in a free-market democracy of what entrepreneurial businessmen actually did. In a free-market democracy, the citizen and the consumer are the same person. You can solve problems by marching on Washington—or, in Adam Smith’s day, by marching on Whitehall—or you can solve the same problem in the marketplace. Given that the private sector accounts for eighty percent of our economy, successful businessmen arguably have every bit as much influence on our society as George Bush or Bill Clinton has. So that’s my philosophy—your customers, i.e., the citizens, vote with their pocketbook.<sup>2</sup>

A born salesman and entrepreneur, Young began his professional career selling typewriters before founding and heading up a pair of computer-leasing companies that met with mixed success. In 1993, after having cofounded (and subsequently left) the computer software newsletter *Linux Journal*, and while still publishing a newsletter called *New York Unix*, Young

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<sup>1</sup> Interview with Laurie Racine, September 2007.

<sup>2</sup> Interview with Robert Young, September 2007.

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Teaching Case Writing Program Director Barry Varela prepared this teaching case under the supervision of Professor Joel Fleishman and Professor Fritz Mayer as a basis for class discussion rather than to illustrate either the effective or ineffective handling of an administrative situation.

used mailing lists associated with those publications to start selling CDs containing versions of the computer operating system (OS) Linux.<sup>3</sup>

## Linux

In the era before personal computers became commonplace, a program called Unix, developed in the late 1960s at AT&T's Bell Labs, was the most common OS running on business and academic mainframe computers. Although Unix was an "open" system, meaning that it provided a degree of interoperability, portability, and compatibility with user-generated software (in contrast to the considerably less flexible OSs used in some mainframes at the time), it was owned by AT&T; anyone who wanted to use Unix had to receive AT&T's permission first. In 1983, a computer scientist named Richard Stallman, of the Massachusetts Institute of Technology, announced his intention to create a Unix-like alternative OS, to be called GNU (an acronym for GNU's Not Unix), that would be *free* as well as open; that is, GNU would not be owned by anyone. Soon after, programmers at the University of California, Berkeley and in the Netherlands released competing free and open OSs. For various reasons, however, none of the three most well-known systems (GNU, BDS, and MINIX) was built around a fully free and widely adopted "kernel" (the central and most fundamental component of an OS).

In 1991, a student at the University of Helsinki named Linus Torvalds wrote a program that functioned as an OS kernel and released it to the public. The community of free-software programmers immediately recognized the value of Torvalds's work and began modifying and adding to the OS built around the so-called Linux kernel. Rather than claim ownership, Torvalds proceeded to register the Linux kernel under the GNU General Public License (GNU GPL), a legal contract developed by the Free Software Foundation (founded by Stallman in 1985) to accomplish the inverse of what licenses usually do: rather than restricting rights, the GNU GPL bestowed them. In essence, the GNU GPL granted Linux users the now well-known rights of free software: to run, study, adapt, redistribute, modify, and release modifications to the program. The GNU GPL further stipulated that any modifications to Linux must be made available to the public under the same terms.<sup>4</sup> Thus the GNU GPL ensured that all descendant versions of Linux—anything that contained the Linux kernel—would remain free in perpetuity.

Under the GNU GPL's strong "copyleft" (a term used to denote licenses that used copyright law to remove, rather than erect, restrictions on the distribution and modification of a work), Linux quickly overtook GNU as the preeminent open OS.<sup>5</sup>

## Marc Ewing

After graduating from Carnegie Mellon University in 1992, Marc Ewing spent about a year and a half developing a software program to be run on Unix, meanwhile working on Linux code in his spare time.<sup>6</sup> Within the then small and clannish world of Linux programmers, Ewing's work, which he was calling Red Hat Linux, became well known. Several of Bob Young's Linux customers mentioned to Young that Red Hat Linux was reputed to be superior to other, competing versions. Young decided to get in touch with Ewing to see if they could do business together.

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<sup>3</sup> Barr, Joe, "Bob Young on Red Hat's Origins." *LinuxWorld.com*, November 15, 2000. Retrieved from [http://www.itworld.com/Comp/2388/lw-11-vcontrol\\_3/](http://www.itworld.com/Comp/2388/lw-11-vcontrol_3/).

<sup>4</sup> GNU Project, "GNU General Public License, Version 2." Retrieved from <http://www.gnu.org/licenses/old-licenses/gpl-2.0.html>

<sup>5</sup> Ambiguity surrounding the terms "free" and "open" led eventually to the use of the phrase "open source" (coined in 1998) to denote software that was both free and open. See the definition of "open source" provided by the Open Source Initiative: <http://www.opensource.org/docs/osd>.

<sup>6</sup> Leonard, Andrew, "Linux at the Bat." *Salon.com*, October 4, 1999. Retrieved from [http://www.salon.com/tech/view/1999/10/04/marc\\_ewing/](http://www.salon.com/tech/view/1999/10/04/marc_ewing/).

In the fall of 1993, Young called up Ewing and offered to buy 300 copies of Red Hat Linux software. Young later recalled the conversation:

I get dead silence at the end of the phone. Finally, I get from Marc that he was only thinking of manufacturing 300 copies. I knew how much I was paying for the 300 copies that I was buying, so I said [to myself], “This kid is starving to death.” And so, very quickly, quickly, we immediately opened up the conversation more broadly as a result of that, and realized that we had a match made in heaven.

He needed some finance and marketing help, and I needed a product that I could brand as my own. We went back and forth in our discussion, but in January '95, we ended up merging our efforts. I bought the copyright, the brand, the trademarks, not that he had copyrighted or trademarked anything, the implicit copyrights that he owned, in return for shares in ACC Corp. Then ACC Corp, the company I had formed in March of 1993 to get into the publishing business, changed its name to Red Hat Software, Inc.<sup>7</sup>

What Young had purchased from Ewing was not the Linux code itself, of course. The GNU GPL ensured that Ewing's work belonged to the Linux community, not to him personally. What Young was buying was the Red Hat brand name. Although Red Hat Linux was “free” (as were the other two versions of Linux that Young was selling), customers were willing to pay for physical copies of the program, as well as for the technical support, improvements to the program (which, again, Red Hat didn't own), and other services that Young, Ewing, and the small but growing team of Red Hat software engineers could provide.

By 1996 Red Hat, Inc. (as it was known, having dropped the “Software”), had moved to Durham, North Carolina, near the Research Triangle Park where IBM, Nortel, Cisco, and other information technology (IT) companies had established operations, and become the world's leading vendor of Linux software. That year the influential trade magazine *InfoWorld* named Red Hat Linux 4.0 its “Best Desktop Operating System,” an award it shared with Microsoft Windows Workstation NT 4.0.<sup>8</sup> Young recalled how news of the award was received at Red Hat:

Those who were most shocked by that award were those of us at Red Hat, because there were only 23 of us, down in the tobacco fields of North Carolina, and the best Microsoft could do with a 3-year head start, a \$1-billion budget, and 1,000 of the world's smartest operating system engineers, was to tie us for this award.

You know, if there was ever a moment in time where it became just clear as day to us how this model worked, and where the power of it came from, it was that moment. We understood then that our whole business hinged on our ability to harness this worldwide team of engineers, and so if all we have to do to harness this—the best work of that worldwide team of engineers—is to publish every line of code that we write for the purpose of building the products that we build, that's a trivial price to pay compared to the billion dollars that Microsoft has to pay to build an equivalent product.<sup>9</sup>

Although many investors viewed Red Hat with skepticism (it was, after all, in the business of selling something it didn't own), the company was swept up in the dot.com boom of the late 1990s. When Red Hat filed its initial public offering (IPO) in June 1999, it reported 127

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<sup>7</sup> Barr, “Bob Young on Red Hat's Origins.” Brackets in original.

<sup>8</sup> Unsigned article, “The Best of 1996.” *InfoWorld*, 19(4), January 1997. Retrieved from <http://www.infoworld.com/cgi-bin/displayNew.pl?poy/poydos.htm>.

<sup>9</sup> Barr, Joe, “Bob Young on Community, Criticism, and Profit.” *LinuxWorld.com*, November 22, 2000. Retrieved from [http://www.itworld.com/Comp/2388/lw-11-vcontrol\\_4/](http://www.itworld.com/Comp/2388/lw-11-vcontrol_4/).

current employees and a net loss over its existence of approximately \$372,000.<sup>10</sup> Nevertheless, the IPO was greeted with enthusiasm; share price more than tripled, from \$14 to \$52, on the first day of the offering, giving the company a value of over \$3 billion.<sup>11</sup> Because Bob Young and Marc Ewing each owned 15.1% of Red Hat's stock prior to the IPO,<sup>12</sup> they became instant multimillionaires. Less than a month after the IPO, the stock price had risen to \$122 and Young and Ewing were billionaires.<sup>13</sup>

## INTELLECTUAL PROPERTY AND THE TRAGEDY OF THE ANTICOMMONS

Article 1, Section 8 of the U.S. Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>14</sup> The only "right" enumerated in the original text of (as opposed to the amendments to) the Constitution, the legal protections granted through copyrights, patents, trademarks, and related terms enable the producers of music, literature, technological devices and methods, and other intellectual property (IP) to profit from their creations for a limited period of time. The first federal copyright act (1790) limited the period of copyright to 28 years. In 1909 the period was extended to 56 years; in 1976, to life of the author plus 50 years (75 years total for corporate-owned works); in 1988 to author's life plus 70 years (95 years for corporate-owned works). The 1988 extension, which as of 2008 protects all corporate-owned works created after 1923, was in large part a result of lobbying efforts by the Disney movie studio's corporate parent. Disney has (so far) successfully prevented Mickey Mouse, who first appeared in 1928, from falling into the public domain. "Now we've extended the copyright term so long, we've locked up all of 20th century culture," Duke University law professor James Boyle has observed. "Every book, every movie, every poem, every song [will be protected] for nearly 100 years and sometimes even more than 100 years."<sup>15</sup>

Besides extending the period of copyright, IP rights have expanded to include domains never envisioned by the Founders. In 1980 the Supreme Court, in ruling that a genetically modified microorganism could be patented,<sup>16</sup> established the principle that living things are patentable. In 1981 the Supreme Court likewise ruled that a device that made use of mathematical algorithms (which in themselves were unpatentable) could be patented,<sup>17</sup> strengthening the previously dubious idea that software was patentable. (Software had always been subject to copyright, which proscribed reproduction; software patents went further, protecting underlying functions and methodologies.) The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), administered by the World Trade Organization, for the first time integrated IP law into the system of international trade. TRIPS required WTO member nations to enforce minimum levels of IP protection in the areas of (among others) copyright, trademark, and geographical indication, as well as patents in "all fields of

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<sup>10</sup> Corbet, Jonathan, "Red Hat's IPO Filing." *Linux Weekly News*, June 10, 1999. Retrieved from <http://lwn.net/1999/features/RedHatIPO.php3>.

<sup>11</sup> Shankland, Stephen, "Red Hat Shares Triple in IPO." *CNET News.com*, August 11, 1999. Retrieved from <http://www.news.com/2100-1001-229679.html>.

<sup>12</sup> Corbet, "Red Hat's IPO Filing."

<sup>13</sup> Kanellow, Michael, and Stephen Shankland, "Red Hat Stock Surge Creates Billionaires." *CNET News.com*, September 8, 1999. Retrieved from [http://www.news.com/Red-Hat-stock-surge-creates-billionaires/2100-1001\\_3-205557.html](http://www.news.com/Red-Hat-stock-surge-creates-billionaires/2100-1001_3-205557.html).

<sup>14</sup> Constitution of the United States, Article 1, Section 8.

<sup>15</sup> Quoted in Morgan, Fiona, "Copywrong." *The Independent Weekly*, December 3, 2003. Brackets in original.

<sup>16</sup> *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

<sup>17</sup> *Diamond v. Diehr*, 450 U.S. 175 (1981).

technology,”<sup>18</sup> a phrase that has been interpreted (controversially) to include software, pharmaceuticals, and even “business methods.”<sup>19</sup>

### The Tragedy of the Anticommons

The widely recognized phenomenon known as the “tragedy of the commons” (a phrase coined by the ecologist Garret Hardin in 1968<sup>20</sup>) describes a social trap involving actors with unlimited access to a finite resource. Hardin observed that individuals, guided by self-interest, tend to maximize their use of a common resource such as land or water. For the individual, the incremental depletion of the shared resource is more than offset by personal gain: gain is privatized, while loss is diffused throughout the community. In the absence of coercive restraint, individual self-interest leads inevitably to overgrazing of land, depletion of water, or pollution of the air: to the destruction of the commons.

In 1998, law professor Michael Heller published a paper describing a social trap that involved the inverse of the tragedy of the commons. After the breakup of the Soviet Union, Heller traveled to Moscow and observed that, while the Russian economy was producing enough goods to keep streetside kiosks well stocked, many storefronts were nearly empty. Heller discovered that, owing to complex ownership regimes left over from Soviet days, oftentimes numerous individuals held ownership stakes in a single storefront. No one could open up a storefront business without first obtaining the permission of all the other owners.<sup>21</sup>

Kiosks, by contrast, typically were owned by single individuals. Free of competing ownership claims, kiosks thrived as places to conduct business.

Heller defined the anticommons as “a property regime in which multiple owners hold effective rights of exclusion in a scarce resource.”<sup>22</sup> The tragedy of the anticommons, he argued, “is that rational individuals, acting separately, may collectively waste the resource by underconsuming it compared with a social optimum.”<sup>23</sup>

Pursuing the idea further, Heller and Rebecca Eisenberg identified U.S. patent law as a potential source of anticommons tragedy, arguing that the proliferation of patents threatened to stifle innovation in biotechnology:

The problem we identify is distinct from the routine underuse inherent in any well-functioning patent system. By conferring monopolies in discoveries, patents necessarily increase prices and restrict use—a cost society pays to motivate invention and disclosure. The tragedy of the anticommons refers to the more complex obstacles that arise when a user needs access to multiple patented inputs to create a single useful product. Each upstream patent allows its owner to set up another tollbooth on the road to product

<sup>18</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Section 5, Article 27.

<sup>19</sup> A term of art. “According to a definition adopted by the U.S. Patent Office, Business Methods are ‘machines’ for performing data processing or calculation operations in the practice, administration, or management of an enterprise, the processing of financial data, or the determination of the charge for goods or services.” See Moetteli, John, “The Patentability of Software in the U.S. and Europe.” Summary of presentation before the Institut für Europäisches und Internationales Wirtschaftsrecht EUR-HSG, St. Gallen, Switzerland, October 28, 2005. p. 13. Retrieved from [http://www.patentinfo.net/patentsearchersnet/download/THE\\_PATENTABILITY\\_OF\\_SOFTWARE\\_IN\\_THE\\_US\\_AND\\_EUROPE.pdf](http://www.patentinfo.net/patentsearchersnet/download/THE_PATENTABILITY_OF_SOFTWARE_IN_THE_US_AND_EUROPE.pdf)

<sup>20</sup> Hardin, Garret, “The Tragedy of the Commons.” *Science*, 162(3859), December 13, 1968, pp. 1243-1248.

<sup>21</sup> Heller, Michael A., “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets.” *Harvard Law Review*, III(3), January 1998, p. 623.

<sup>22</sup> Heller, Michael A., “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets.” *Harvard Law Review*, III(3), January 1998, p. 668.

<sup>23</sup> Heller, Michael A., “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets.” *Harvard Law Review*, III(3), January 1998, p. 677.

development, adding to the cost and slowing the pace of downstream biomedical innovation.<sup>24</sup>

As with biomedical innovation, so too with innovation in information technology. By the late 1990s, Linux enthusiasts had begun to realize that expanding IP protections were threatening the open source movement.

## THE FOUNDING OF THE RED HAT CENTER

Philanthropy observers Roger L. Martin and Sally Osberg define an entrepreneur as a person who seeks out contexts in which “inefficient and unsatisfactory” systems persist because there exists no “strong force that has the likely effect of breaking the system out of its particular equilibrium.”<sup>25</sup> Martin and Osberg elaborate:

The entrepreneur is attracted to this suboptimal equilibrium, seeing embedded in it an opportunity to provide a new solution, product, service, or process. The reason that the entrepreneur sees this condition as an opportunity to create something new, while so many others see it as an inconvenience to be tolerated, stems from the unique set of personal characteristics he or she brings to the situation—inspiration, creativity, direct action, courage, and fortitude.<sup>26</sup>

Like the business entrepreneur, the social entrepreneur, when confronted with a context of “suboptimal equilibrium,” sees opportunity rather than inconvenience. Osberg and Martin observe further that:

. . . it is important to dispel the notion that the difference [between entrepreneurs and social entrepreneurs] can be ascribed simply to motivation—with entrepreneurs spurred on by money and social entrepreneurs driven by altruism. The truth is that entrepreneurs are rarely motivated by the prospect of financial gain, because the odds of making lots of money are clearly stacked against them. Instead, both the entrepreneur and the social entrepreneur are strongly motivated by the opportunity they identify. . . .<sup>27</sup>

By his own account, Marc Ewing never pictured himself as making a lot of money in business. He was mainly interested in software development for its own sake. In an interview conducted in the fall of 1999, soon after the Red Hat IPO, Ewing described his ambition:

When I first started Red Hat I didn't have very lofty goals. My aim was to keep enough money coming in so I could maintain my hacker lifestyle—hacking on Linux in my spare bedroom. If I could just do that, and be able to eat, have a car, go to the movies,

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<sup>24</sup> Heller, Michael A., and Rebecca S. Eisenberg, “Can Patents Deter Innovation? The Anticommons in Biomedical Research.” *Science*, 280(5364), May 1, 1998, pp. 698-701.

<sup>25</sup> Martin, Roger L., and Sally Osberg, “Social Entrepreneurship: The Case for Definition.” *Stanford Social Innovation Review*, 5(2), Spring 2007, pp. 31-32.

<sup>26</sup> Martin and Osberg, “Social Entrepreneurship: The Case for Definition,” pp. 32-33.

<sup>27</sup> Martin and Osberg, “Social Entrepreneurship: The Case for Definition,” p. 34.

whatever, I'd be happy. I computed that I would only need to sell 1,500 copies every single year—that's nothing!—and I'd be able to support myself.<sup>28</sup>

Bob Young's ambition, by contrast, very much did include the idea of himself as a successful business entrepreneur. Over the previous two decades he had started several businesses that had met with limited success. Now one of his companies had taken off and he was wealthy beyond his wildest expectation. Having finally "made it," Young immediately began to look around for a new venture.

But for Young and Ewing, having more money in the bank than they could reasonably hope to spend made starting up a new for-profit company less compelling than it had been before they were rich. Rather, they chose to establish a philanthropic entity. Young recalled how he and Ewing narrowed their prospective philanthropic area of interest:

We recognized that many, many people had contributed to our success and we wanted to do something to recognize their contribution.

We asked ourselves the question: What can we do to contribute to the ongoing success of the open source software movement? At the time, late 1999, we considered funding some additional open source software projects, but there were all sorts of funding of open source projects happening at the time, so we did not think it was necessary for us to help. So we asked ourselves the reverse question: If the open source movement failed, why would it fail?

Our conclusion was that it would not be a result of market forces, but as a result of governments not understanding the role collaboration played in technical innovation. Governments around the world were considering more and more IP protections on the premise that independent inventors needed incentives to create more innovations. But in doing so they actually made it increasingly difficult to work collaboratively.

Patents were being awarded ever more readily in ever more fields and over ever broader ideas (software, one-click shopping, etc.), and copyright had been extended from 20 years to almost a hundred years. The result of this trend to ever greater IP protection would be to make it ever more difficult to invent, and ever more expensive to introduce inventions into the marketplace without incurring the cost of armies of lawyers. A cost that most inventors simply could not afford.<sup>29</sup>

After settling on the prospective area of interest, Young and Ewing started to think about the nuts and bolts of setting up their philanthropic venture. As paper billionaires whose wealth was entirely dependent on the stock performance of a single company, they weren't in a position to set up an organization worth hundreds of millions of dollars. The organization they had in mind would have total assets measured in the tens of millions, rather than the hundreds of millions, of dollars. A traditional endowed foundation worth, for example, \$50 million, with a payout rate of five percent of assets annually (the minimum required by federal tax law), would have only about \$2.5 million to spend per year, some of which would be eaten up by staff salaries and other overhead. Not much philanthropic work could be done with so few dollars.

Consequently, Young and Ewing decided to set up an organization that would spend down its assets over a relatively brief time. Young recalled:

We saw ourselves as a venture philanthropy. We [each] put up \$15 million not with the

<sup>28</sup> Leonard, Andrew, "Linux at the Bat." *Salon*, October 4, 1999. Retrieved from [http://archive.salon.com/tech/view/1999/10/04/marc\\_ewing/index1.html](http://archive.salon.com/tech/view/1999/10/04/marc_ewing/index1.html).

<sup>29</sup> Young, Robert, email correspondence, July 20, 2007.

goal of husbanding that money carefully so a hundred years from now there's still a foundation promoting the public domain. We invested \$15 million in the same way venture capitalists put \$15 million into a technology startup. The idea is to spend it as rapidly as you can be effective—no faster than that, but no slower than that—so that at the earliest possible point you have yourself a good business. That's how venture capitalists think about their investments. They don't put \$15 million into a startup for the CEO to sit on the money carefully. They put the money into the startup for the CEO to invest that money as aggressively as he can to achieve the ends of his business. In philanthropy that's basically the same philosophy—we were trying to have as big an impact on this space as quickly as we could.<sup>30</sup>

### **Laurie Racine and the formation of the board**

The Red Hat Center was founded in November 1999.<sup>31</sup> Young recalled the process of recruiting members of the board of directors:

What was interesting about composing the board was that we basically got our first choices. When we started this thing, no one was funding this area of public policy. So guys like [Harvard law professor] Lawrence Lessig were just genuinely very excited to see that someone was funding some research and thinking into the area of intellectual property, as was John Seely Brown, who ran Xerox PARC [Palo Alto Research Center]. You normally think of a research center as being all about commercialization of IP, and here we had the head of a multinational research project who was just the reverse—he recognized exactly the same problem. His researchers were having a hard time being allowed to work on things because they were being bound in by this expanding IP culture. And so all these smart people were willing to step up and say, yeah, this is a debate that needs to happen.<sup>32</sup>

The board included, in addition to Lessig and Brown, Duke University business professor Sim Sitkin; Duke law professor James Boyle; and John Gilmore, an early employee of Sun Microsystems. Young and Ewing were also members of the board. The president of the Red Hat Center was Laurie Racine. Racine recalled the process of her hiring:

I was working at the Fuqua School of Business, at Duke University, as director of the Health Sector Management program. Sim Sitkin, with whom I was working, was doing some consulting for Red Hat. Bob Young and Marc Ewing were looking for someone who knew a little bit about a lot of things and didn't need to know anything about technology. I was a very good generalist. I had a background in health care, knew a fair bit about the arts—I was involved in founding the Full Frame Documentary Film Festival. I had chaired boards of education. So I had this rather eclectic background, and I could barely use my PC. I'd never even heard of Linux.

I went in to meet Bob and Marc. Marc was the technology geek and Bob was the marketing person. They asked me a series of questions, and then they offered me a job there, at that moment. They asked, "Do you want to do this?" and I looked at them and said, "Do what?" I had no idea what they were talking about. They said, "We want to take open source technology and redefine it as a philosophy and apply it to sectors

<sup>30</sup> Young, Robert, interview with the author, September 9, 2007.

<sup>31</sup> Unsigned article, "Red Hat Sets Up Open Source Study Center." *Triangle Business Journal*, November 1, 1999.

<sup>32</sup> Young, Robert, interview with the author, September 9, 2007.



outside of technology, because we think it is a way to build collaborative thinking and collaborative projects. And we're looking for a generalist." I said, "Fine." I was hired halfway through the formation of the board.<sup>33</sup>

## **THE CENTER FOR THE PUBLIC DOMAIN**

### **An eventful first year**

One of the first issues Racine and the board had to tackle was whether, for legal purposes, the Red Hat Center would be a private foundation or a public charity. A private foundation is a 501(c)(3) organization that derives revenue from earnings on investments and makes grants to other charitable organizations rather than running its own programs. A public charity is a 501(c)(3) organization that derives at least one third of its revenue from gifts or other sources. Public charities may solicit donations, lobby, and engage in other activities prohibited to private foundations.

"We started to have some dissension about how we should run the organization and what it should really be doing," Racine recalled:

Certain individuals on the board wanted the foundation to function more or less as an activist organization. We had to decide whether to set it up as a private foundation or as a public charity. We chose to set it up as a private foundation. We could have gone the other direction.<sup>34</sup>

Soon after the foundation's founding, conflict arose between the Red Hat Center and Red Hat, Inc. The original plan was for Young and Ewing to each fund a third of the foundation, with Red Hat, Inc., funding the final third. But Wall Street indicated displeasure with the idea of a brand-new company putting major resources into a philanthropic entity.<sup>35</sup> Consequently, Red Hat, Inc., declined to invest further cash in the Red Hat Center. Nevertheless, through Young and Ewing's contributions, much of the Red Hat Center's asset base was tied up in Red Hat, Inc., stock.

After reaching a high of over \$140 per share in early December 1999, Red Hat, Inc., stock entered a slow but steady decline that continued through the third quarter of 2001, when it reached a low of just over \$3 per share. The drop in price severely affected the value of the foundation. Racine recalled how declining assets affected work at the foundation:

Originally, Red Hat was supposed to supply a third of the foundation's assets, so the total would be something like \$50 million. But Red Hat's money didn't go in. Then we made a terrible strategic mistake. I wanted to go to a major investment banking firm to manage the money, but the bank wouldn't take us on. So instead we went with the high-net-worth individuals' portfolio at another financial services company. The stock started to go down, and they basically said, "Hold it, hold the Red Hat stock, don't sell." And I listened to them, which was a huge mistake. Their managers were turning over left and right. The foundation board was furious, and they were right—we should have sold. And so that was excruciatingly painful. It changed the entire course of what we decided to do. We had to be much more efficient and strategic.<sup>36</sup>

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<sup>33</sup> Racine, Laurie, interview with the author, September 12, 2007.

<sup>34</sup> Racine, Laurie, interview with the author, September 12, 2007.

<sup>35</sup> Racine, Laurie, interview with the author, September 12, 2007.

<sup>36</sup> Racine, Laurie, interview with the author, September 12, 2007.

At the same time as it was becoming clear that the amount of money the foundation would have to spend would be well below the originally proposed \$50 million, Wall Street began expressing nervousness about the prospect of the Red Hat Center's someday doing something that might reflect poorly on the company with the similar name. As a result, management at Red Hat, Inc., pressured the foundation to change its name. The board renamed the foundation the Center for the Public Domain (CPD)—a name Racine objected to. "I think we did ourselves a disservice by changing the name to something that was *for* something," Racine recalled, "which immediately meant we were *against* something else."<sup>37</sup>

The decrease in money, as well as the change in name, inevitably affected the foundation's mission and strategy. "When the Red Hat Center started out, it was not all about IP-related issues," Racine recalled:

It was really about looking to spark the debate, or increase the conversation, about what open source means when we take it beyond technology and apply it to any number of other sectors. We spent a fair amount of time on the Hill, courting congressmen. Would anybody listen to us about open source and what it was going to mean for the future of technology and many other things in this country? No. They looked at us like we were mad. This was in 1999 and early 2000. They just didn't get it.

When we had the \$50 million, we thought we were going to be all over the place and just kind of throw money at things left and right and see what stuck. It was going to be about trying to fulfill the original mission, of taking open source as a technology and growing it into a philosophy that had a place in business and the arts and science—open collaboration and the beginning of open networks.

Once we had only \$12 or \$15 million, we were forced to look at only one thing, and we ended up looking at IP. That was driven by the interests of the board, not by my interests. And so we became the Center for the Public Domain.<sup>38</sup>

For Racine, the shift in focus away from open source broadly and toward the more narrowly defined areas of IP and the public domain was difficult. "At that point I didn't have any great interest in IP policy. I was much more interested in this idea of open source, of collaborative networking, than I was in IP," she said. "But I don't think the change in focus was a mistake for the foundation. The staff took the money we were given and spent it wisely given what the mandate was."<sup>39</sup>

With such a small organization—staff at the Center for the Public Domain never numbered more than six—and with a board that still had conflicting ideas about how activist the organization should be, the question arose as to whether it was necessary even to have a board of directors.

"As the differences in objectives and opinions on the board became more pointed," Racine recalled, "I set it up so that there would be only three members of the corporation—Bob and Marc and I." She explained:

The board members would not be members of the corporation, and that allowed us to make decisions more strategically, without having to involve the whole board. Then, as it became clear that we were not going to be activist driven, Bob and Marc and I said, "We

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<sup>37</sup> Racine, Laurie, interview with the author, September 12, 2007.

<sup>38</sup> Racine, Laurie, interview with the author, September 19, 2007.

<sup>39</sup> Racine, Laurie, interview with the author, September 19, 2007.

can be really effective if we just run with a really good staff—very small, very strategic—and make core business decisions as if we were an investment startup fund.” That was the first reason we decided to disband the board.

The second reason was that we needed to fund certain board members—specifically Boyle and Lessig, and to a lesser extent Gilmore—because we felt the work they were doing was very, very important. To be compliant with the law, we would have had to kick them off the board to fund them. It just didn’t make sense to replace them, to redo the board—it was easier to get out clean and go back to the core legal structure. So the members of the corporation—Bob, Marc, and I—dissolved the board altogether. Now, the board was surprised, but in the end it served all of them very well.<sup>40</sup>

How did the decline in value of Red Hat stock affect the foundation? How did the name change affect the foundation?

As president of the foundation, Laurie Racine reported to the board. Yet as one of three members of the corporation, she exercised power over the board. In your opinion, was this an optimal arrangement?

How did dissolving the board improve the functioning of the Center for the Public Domain? How might the action have harmed the foundation?

Is a board of directors necessary to the functioning of a small foundation? To a large foundation?

### Major grantees

Self-consciously conceived of as a “venture philanthropy,” the CPD employed a strategy that consisted in large part of investing in promising organizations that were working to support the CPD’s mission. Racine described how her working relationship with Young helped support the CPD’s strategic approach:

Bob Young and I had a very successful working relationship, and the reason is that he understands that you need a champion for things. If we could find a champion for whatever initiative it was that we wanted to support, then, because we were much more lithe and less cumbersome than some big organizations, we could invest in that champion. If we found a startup, we started it. If we found a supporter, we supported it. My strength was in finding the champion, and Bob’s strength was in trusting me that I was right.<sup>41</sup>

Among the CPD’s major grantees were:

- The Center for the Study of the Public Domain — With roots that reach back to a November 2001 symposium hosted by the Duke University School of Law and funded in part by the CPD—the first conference, as far as the organizers could ascertain, ever held on the public domain<sup>42</sup>—the Center for the Study of the Public Domain, cofounded by

<sup>40</sup> Racine, Laurie, interview with the author, September 19, 2007.

<sup>41</sup> Racine, Laurie, interview with the author, September 12, 2007.

<sup>42</sup> Boyle, James, “Foreword: The Opposite of Property?” *Law and Contemporary Problems*, 66(1 & 2), Winter/Spring 2003, p. 1.

James Boyle, serves to “promote research and scholarship on the contribution of the public domain to speech, culture, science and innovation, to promote debate about the balance needed in our intellectual property system and to translate academic research into public policy solutions.”<sup>43</sup>

- Creative Commons — Led by James Boyle and Lawrence Lessig among others, Creative Commons works to “build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”<sup>44</sup> Among its many projects, Creative Commons has established a system of copyright licenses ranging from the relatively restrictive “Attribution Non-commercial No Derivatives” (which allows others to copy your work and share it as long as they credit you, but disallows them from changing it or using it commercially) to the radically unrestrictive “Attribution (by)” (which allows others to copy, share, change, and even use your work commercially as long as they credit you), with various gradations in between.<sup>45</sup>
- The Future of Music Coalition — The Future of Music Coalition is an “education, research and advocacy organization that identifies, examines, interprets and translates the challenging issues at the intersection of music, law, technology and policy . . . through continuous interaction with its primary constituency—musicians—and in collaboration with other creator/citizen groups.”<sup>46</sup>
- The Electronic Frontier Foundation — Cofounded in 1990 by John Gilmore and former Grateful Dead lyricist John Perry Barlow, the Electronic Frontier Foundation focuses on “civil liberties issues raised by new technologies,”<sup>47</sup> working to “protect freedom” through litigation, the publication of white papers, raising public awareness through “action alerts,” and other tactics.
- ibiblio — A joint effort of the School of Information and Library Science and the School of Journalism and Mass Communication, both of the University of North Carolina-Chapel Hill, ibiblio is “one of the largest ‘collections of collections’ on the Internet,” a “conservancy of freely available information, including software, music, literature, art, history, science, politics, and cultural studies.”<sup>48</sup>
- Public Knowledge — Washington, D.C.-based Public Knowledge “[monitors] Congress, US Agencies, State Legislatures and International Bodies”<sup>49</sup> and works to “promote innovation and the rights of consumers, while working to stop any bad legislation from passing that would slow technology innovation, shrink the public domain, or prevent fair use.”<sup>50</sup>

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<sup>43</sup> Center for the Study of the Public Domain, “About Us.” Retrieved from <http://www.law.duke.edu/cspd/about.html>.

<sup>44</sup> Creative Commons, “History.” Retrieved from <http://wiki.creativecommons.org/History>.

<sup>45</sup> Creative Commons, “Choosing a License.” Retrieved from <http://creativecommons.org/about/licenses/meet-the-licenses>.

<sup>46</sup> Future of Music Coalition, “Frequently Asked Questions.” Retrieved from <http://www.futureofmusic.org/about/faq.cfm>

<sup>47</sup> Electronic Frontier Foundation, “A History of Protecting Freedom Where Law and Technology Collide.” Retrieved from <http://www.eff.org/about/history>.

<sup>48</sup> ibiblio, “About ibiblio.” Retrieved from <http://www.ibiblio.org/about.html>.

<sup>49</sup> Public Knowledge, “Core Work.” Retrieved from <http://www.publicknowledge.org/about/what/corework>.

<sup>50</sup> Public Knowledge, “About Public Knowledge.” Retrieved from <http://www.publicknowledge.org/about>.

The CPD also funded the Berkeley Center for Law and Technology; the Center for Media Education; Collaborative Ownership in a Digital Economy; the Consumer Project on Technology; the Legal Information Institute at the Cornell University Law School; the Electronic Privacy Information Center; the Federation for Free Informational Infrastructure; the Free Software Foundation; the IP Conservancy; and *probono.net* among other groups.<sup>51</sup>

Young reflected on the CPD's strategic approach of identifying and funding organizations that were just getting started:

As we got into the exercise, Marc and I realized we were either going to have to continue to reup our investment in the Center for the Public Domain or we would have to position the Center so that, when it ran out of money, it would pass the torch to the organizations that it had helped spawn. That was our conclusion relatively early on—that our best strategy would be to help Larry Lessig create and gain momentum behind Creative Commons, help Gigi Sohn build credibility for Public Knowledge in Washington, and help Jamie Boyle get some momentum behind the Center for the Study of the Public Domain at Duke. Now that we've wrapped up the Center for the Public Domain, we take a lot of pride in the success of those and other organizations we helped accelerate in the early stages of their growth.<sup>52</sup>

By helping to launch organizations that were defining a new field of public policy advocacy, the CPD hoped to induce other foundations, with greater assets and the ability to make longer-term commitments, to enter the field. Racine reflected on this aspect of strategy at CPD:

We were learning as we were doing. To a certain extent, the strategy kept evolving. It changed from the first year to the second year to the third year. In the first few years we were flying by the seat of our pants. By years three through five we kind of knew what we were doing. In many ways we were defining a field, because the larger foundations—MacArthur and Ford and Kellogg—came to this after we did. We were making some noise, and they started calling on us and asking us what we thought about this whole area of intellectual property, what we knew and what we would be willing to collaborate on.

We were interested in getting people with much larger portfolios, who were going to be around for a much longer time, to pick up the mantle. Though we didn't have contact with Hewlett at the time, they saw the importance of what we were doing. Our grantee Creative Commons helped define the open education resources portfolio at Hewlett. Elspeth Revere at MacArthur realized that IP was going to be important to a variety of verticals, as did the Ford Foundation, who were largely interested in policy issues. Ford was also interested in the impact of intellectual property, and what we were doing looked very interesting to them. They picked our brains and asked for our collaboration and our input.

Our attracting the attention of the larger foundations was not strategic in the sense that we went after them. They may have been thinking about IP in a variety of ways, and when they saw the work we were doing—saw who we were funding and that we were getting some publicity—they started calling us.<sup>53</sup>

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<sup>51</sup> Center for the Public Domain, "Grant Making." Retrieved from <http://web.archive.org/web/20010226122458/www.centerpd.org/grantmaking/support.html>.

<sup>52</sup> Young, Robert, interview with the author, September 9, 2007.

<sup>53</sup> Racine, Laurie, interview with the author, September 19, 2007.

## **Lulu.org**

The Red Hat Center/Center for the Public Domain had originally been conceived of as having a five-year lifespan. As the five-year mark approached, Ewing and Young were forced to think hard about whether they really wanted to terminate their philanthropic venture. For Young, the decision to terminate wasn't that difficult:

Toward the end of the Center for the Public Domain, Laurie Racine and I were the two who were working on it—Marc had gone off to Chicago and was not involved nearly to the extent that Laurie and I were. As we were running out of money, we regularly had the conversation “Should we reinvest in the Center?” And when I looked at reinvesting in the Center versus doing something else, I realized that following my Adam Smith philosophy of life, I could have as big an impact in the field, if not bigger, by solving the problem in the marketplace as I could by putting another \$10 million in the Center.<sup>54</sup>

In 2002, the CPD created a print-on-demand venture called Lulu.org. “The idea was that people would come to us and we would license the book under Creative Commons, which was just getting started,” Racine explained. In the standard publishing model, the author retains copyright but signs over publication and other rights to the publisher; the publisher prints, markets, and sells the book, sharing the profits with the author. New word-processing, printing, and distribution technologies enabled Lulu.org to turn that model on its head. With Lulu.org, the author would retain all rights and perform most of the marketing and selling; in exchange for printing the book, Lulu.org would receive a share of the profits.

If Lulu.org had stayed a part of the CPD, the foundation would have had to redefine itself, for tax purposes, as an operating foundation because it would have been generating revenue outside of investments.<sup>55</sup> Instead, Lulu.org split off from the CPD. Racine explained:

Bob said, “I think Lulu is a really good idea. I’m going to take it and make it a for-profit.” I was a little bit devastated, actually. I had no problem with it being a for-profit, and Bob was looking for his next gig, but I didn’t want him wresting it away from me. But he was going to do something else with it. At one point he wanted help with it, and so in order not for there to be a conflict of interest, I left the Center—we went on hiatus—and went to work for Lulu for six months and didn’t take any money from the foundation. After six months I went back to the foundation.<sup>56</sup>

Young viewed Lulu.com (as the for-profit company came to be known) as, among other things, a vehicle through which he could address some of the same issues the CPD was addressing:

The Center for the Public Domain and Lulu are very tightly related, interestingly enough. The fear at the time was that an expanding set of legislation around copyrights and patents was going to reduce consumer choice, as fewer entrepreneurs would be given the opportunity to bring their products to market. The big guys would own all the patents and they would shut down all the little guys. By doing things such as Lulu, we are empowering potentially millions of authors to bring their work to market, notwithstanding the additional copyright terms that Congress has passed that have further empowered the Disney corporation. An author working on his own no longer has to ask

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<sup>54</sup> Young, Robert, interview with the author, September 9, 2007.

<sup>55</sup> Racine, Laurie, interview with the author, September 19, 2007.

<sup>56</sup> Racine, Laurie, interview with the author, September 19, 2007.

Random House's or Disney's permission to bring his work to market because services like Lulu provide an alternate route for the author.

We're not doing Lulu as a social service. We're doing it because if we're right—if there is a problem associated with the consolidation of the media industry and with the expansion of intellectual property control over content—and if you can figure out how to solve that problem in the marketplace, you both make your world a better place one customer at a time *and* you solve the social problem. You get paid for making the world a better place. And that's very directly why I chose not to reinvest in the Center for the Public Domain and to invest my money and my energy into building a self-sustaining company that addresses exactly the same concern that the Center was trying to address.<sup>57</sup>

Revisit Martin and Osberg's ideas concerning how entrepreneurs approach a context of "suboptimal equilibrium." What suboptimal equilibrium did Bob Young hope to address with the Center for the Public Domain? With Lulu.com?

How were the CPD and Lulu.com similar in their approaches to solving the social problem Young identified? How were they different?

In your opinion, is Bob Young correct in believing that for-profit companies like Lulu.com are better able to solve certain social problems than are philanthropic foundations like the CPD? What sorts of problems are better solved through the market? What sorts of problems can't markets address?

## **SPEND-DOWN AT THE CPD**

As the Center for the Public Domain's assets grew smaller, the foundation itself contracted. Racine recalled:

Once we realized we were in our last six to nine months, we basically said to everybody, "Okay, this is ending." Bob added some extra money, in short bursts of a quarter of a million dollars at a time, to keep it going for a while. Eventually we moved to the third floor of my house to save money, and it was just my assistant and I for about a year. So the Center shrank in segments.<sup>58</sup>

The CPD shut down for good at the end of 2005. When asked if she believed the foundation had met its goals, Laurie Racine answered:

Yes. I think we made a couple of bad decisions, but on the upside we made a lot of really good ones. We changed the landscape, and that was the goal. There's no doubt in my mind that we did that. The two greatest successes were Creative Commons and Public Knowledge. Creative Commons because it has catalyzed a generation and a movement. And Public Knowledge because it has had a significant effect on the Hill and on the way legislators think about issues of creativity. Our little foundation had a much larger impact

<sup>57</sup> Young, Robert, interview with the author, September 9, 2007.

<sup>58</sup> Racine, Laurie, interview with the author, September 19, 2007.

than one would have imagined.<sup>59</sup>

When asked the same question, former CPD board member and cofounder of Creative Commons Lawrence Lessig answered:

The critical thing to remember is that when the organization got started, the stock was worth an extraordinary amount of money. So things got going with the expectation that it would be a foundation with \$50 million, and by the time the stock could be unlocked and sold, the value had changed quite substantially. So the foundation was launched in reality with a very different set of expectations from how it was originally conceived.

Part of what that meant was that people thought pretty quickly, “How are we going to take a relatively small amount of money now and leverage it to do something valuable?” And I think it did that. Obviously it didn’t do as much as people thought when we were thinking about a \$50 million organization, but I think it did a lot. [For example] it was essential to the creation of Creative Commons.<sup>60</sup>

When asked whether he thought the CPD had achieved its goals, Bob Young said:

No. I can answer that one categorically by saying no. And I don’t mean for a second to diminish the work Laurie Racine and her staff did, because they had a major impact.

The reason it did not meet its goals is exactly the reason I’m not in the not-for-profit business anymore. The goals, and the definition of reaching those goals, were so difficult to define. So I’m saying the Center didn’t reach its goals, but equally I’m saying the Center didn’t *not* reach its goals. We neither reached our goals nor did we not reach our goals, simply because our goals were so poorly defined—we weren’t a hundred percent sure what our goal was. We had eight people around the table whose goal it was to make the world a better place, but we had eight opinions as to how to do that.

At the same time, I’m happy to say that both Marc and I were thrilled with the results of the Center for the Public Domain. Both of us felt it was a worthwhile investment. Had we to do it all over again, we might have changed some of the tactics and some of the specifics of how we did it, but we absolutely would have done it again. We were thrilled with the impact that the Center was able to have in addressing the issues we set out to address in late ’99.<sup>61</sup>

In your opinion, was the Center for the Public Domain successful in achieving its goals?

<sup>59</sup> Racine, Laurie, interview with the author, September 19, 2007

<sup>60</sup> Lessig, Lawrence, interview with the author, October 8, 2007.

<sup>61</sup> Young, Robert, interview with the author, September 9, 2007.