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CONSIDER THIS:

[The New Yorker Story \(J.D. Salinger, R.I.P\)](#) 40

Once upon a time, a roustabout named Harold Ross created a magic magazine that managed to define sophistication while remaining accessible to everyone. When he died, his successor and authors like J.D. Salinger set out to redefine what sophistication in fiction was (supposed to be) all about, and a new type of story was born. Pity, that.

EDITOR'S NOTE:

Let's All Get Together



Regular readers of *Standards Today* will be aware that hundreds of organizations that develop and promote standards have been formed using a legal and governance model that leads them to be referred to as “consortia.” But think for a moment and tell me if you know what kind of model would be wise to use to set up an organization to support any other type of largely virtual activity?

That’s interesting, isn’t it? Silence would have answered the same question in the standards development community thirty years ago, too. But then a few pioneer consortia were formed, and the word spread. As it did, the structures used to form and govern consortia became more refined, and best practices evolved and became better known by word of mouth. The same phenomenon is happening today in the world of open source development.

But developing standards and open source software are not the only areas where people and companies would like to launch collaborative activities among nationally and internationally distributed participants. The question is, will they know how to go about doing so?

In this issue, I try and offer a lifeline to the would-be founders of the virtual collaborations of the future, by way of introducing and explaining the very flexible, impressively versatile, concept of the consortium. In my **Editorial**, I place today’s Internet and Web-based opportunities for collaboration in historical perspective, and note that our ability to take advantage of today’s enormously expanded opportunities for collaboration will be impeded if project founders are unable to create the type of governance, support and legal structures needed to ensure the success of their endeavors.

In the issue’s **Feature Article**, I provide a detailed overview of what characterizes a consortium, how they can be created, and the areas of legal concern that consortium founders and participants need to take into account. I conclude with taxonomy of consortium structures, and evaluate each in comparison to the others for the benefit of those who will increasingly be in the market for the right foundation for their prospective collaborative activities.

I follow with this month’s selection from **The Standards Blog**, in which I inform you, sadly, that our good friends in the world of video and consumer electronics are preparing a new, blockbuster standards war for our viewing enjoyment (roll over, Betamax).

Next up is the first chapter of a new project I’m working on: a cybersecurity mystery eNovel called **The Alexandria Project**. If you enjoy it, you can find

another seven chapters at The Standards Blog, where a new episode will be posted every Monday.

As usual, I close with a ***Consider This*** essay, occasioned by the regrettable passing of J.D. Salinger, and the welcome demise of a type of short fiction that flourished under the stewardship a certain magazine's second managing editor, and justifiably became known as "a New Yorker Story."

As always, I hope you enjoy this issue. But either way, it's always great to hear what you think. Let me know, why don't you?

Andrew Updegrove
Editor and Publisher
2005 ANSI President's
Award for Journalism

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EDITORIAL:

Enabling a New Age of Collaboration

Andrew Updegrove

Collaboration has always been an essential part of human activity, but until the advent of the Internet, the technological means by which non-local collaboration could occur seldom progressed to any meaningful extent. Only three great enabling leaps forward preceded the current century: the invention of the printing press, which allowed *ideas* to spread farther, faster, and to more recipients; modern transportation, which allowed *people* to travel farther, faster and more often to meet with others; and the modern telecommunications system, which allowed real-time *interaction* to occur across great distances, albeit mostly on a one-on-one basis.

The Internet and the Web have the potential to far exceed the impact on collaboration of any, and perhaps all, of these earlier technological advances. This, because the Internet is capable of allowing virtually anyone on earth to have simultaneous access to the same information, and to actively participate in real time in the same endeavor. In short, the Internet has the power to

The Internet has the power to trump the reach of the printing press, the ease of modern transportation, and the interactivity of the telephone combined.

trump the reach of the printing press, the ease of modern transportation, and the interactivity of the telephone combined.

Indeed, the potential that Internet and Web technologies offer for collaboration have already been realized, as evidenced by the proliferation of open content and open source projects, the migration of expensive, hard copy scientific and other journals to free Internet-based access, and the adoption by governments of more transparent and interactive Web-based platforms, to name only a few examples.

Still, unaided technology can only enable collaboration up to a rather informal point. As a widely distributed activity becomes more ambitious and complex, pragmatic issues – such as who will pay for the servers and manage related administrative duties – begin to arise. So, too, do legal concerns, including who will own the resulting work product, and make sure that no third party's rights are infringed. Issues like these particularly trouble government, academic, corporate and other potential institutional participants. Unless these matters can be addressed to their satisfaction, they are unlikely to engage.

As a result, ambitious Web-based collaborative projects are harder to launch than more elementary initiatives, such as simple Wikis for sharing information and providing a venue for discussion.

Happily, new mechanisms have been designed and made available in some areas of high interest and wide participation, such as open source “forges” that provide a mix of practical and legal tools to anyone that wants to launch such an initiative. But tools such as these have been optimized for use a single type of collaboration.

Those that wish to launch a new Web-based activity in other areas often struggle with the questions such as cost sharing, governance, ownership, liability protection, and even how to open a bank account without the name and employer ID number of a legal entity to provide to the bank. Too often, the founders of new initiatives seeking legal assistance or advice from traditional non-profit organizations may find that they are encouraged to shoehorn their project into a particular corporate form and tax exemption model that was designed for far different uses. Often, this form will ill serve, if not actually impede, their ability to achieve their goals.

In fact, there are a number of pre-existing legal and governance frameworks that are well suited for modern on-line collaboration, although their visibility, outside the niches in which they have been used, is low. Each of these frameworks is in some respects different, sometimes simply because each has evolved in its own, widely divergent area of endeavor. But interestingly, each has adopted the same name to describe its style of organization – as a consortium.

This is not a coincidence. As I explain in greater detail in the *Feature Article* of this issue, behind the differences in documentation and formalities, each of these frameworks is based upon the same core principles and addresses the same essential needs, whether the goal of the collaboration is to conduct research and development, to bid to acquire and own a sports team, to share the costs of library acquisitions, or to develop and promote technical standards.

But if consortia are so well suited for collaboration, why are they common in certain domains and nonexistent in others? Perhaps because until a successful first-mover becomes broadly visible in a sector, it does not occur to others that they, too, could easily engage in the same types of activities. Indeed, the consortium model only took root among libraries within the last few decades. But in that short time, the launch of new library consortia has accelerated logarithmically. And in the area of standards development, the number of consortia has burgeoned from a handful in the mid 1980s to more than 500 today.

It seems clear, then, that these consortium models should be made more visible generally, so that their useful and flexible structures can be repurposed in new areas where they have not yet been utilized. Just as the standard setting consortium framework is beginning to spread into disciplines such as the health sciences, the approach taken by libraries should be made known to other types of non-profit entities that could acquire and share information with their peer organizations to mutual advantage.

As importantly, lightweight, well-explained, and easily implemented frameworks for on-line collaboration should be developed and made available for any “grass roots” initiative to adopt and use with confidence, just as the Creative Commons organization has developed a family of free copyright licenses that authors can use to protect the rights they wish to reserve, while encouraging the collaborative use of their creative works by others.

Making proven consortium structures more visible should encourage more diverse participation in more ambitious types of collaboration, with fewer resulting mistakes and greater certainty of results for all concerned. With so much to be gained through global collaboration (and the enabling technology already in place), the lack of proper administrative, governance, and legal tools should hardly be allowed to hold back the momentum of global collaboration – especially when they are already there, waiting to be used.

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FEATURE ARTICLE:

Dissecting the Consortium: a Uniquely Flexible Platform for Collaboration

Andrew Updegrove

Abstract: *The opportunities and imperatives for collaborative action of all kinds among both for-profit and non-profit entities are growing as the world becomes more interconnected and problem solving becomes less susceptible to unilateral action. Those activities include research and development, information acquisition and sharing, group purchasing, open source software and content creation, applying for government grant funding, and much more. At the same time, the rapid spread of Internet and Web accessibility allows collaborative activities to be undertaken more easily, and among more widely distributed participants, than has ever been possible before. But while the technology enabling collaboration has become ubiquitous, hard-won knowledge regarding best practices, successful governance structures, and appropriate legal frameworks for forming and managing successful collaborative activities has yet to be widely shared. As a result, those wishing to launch new collaborative projects may have difficulty finding reliable guidance in order to create structures appropriate to support their activities. In this article, I provide a list of attributes that define and functions that are common to consortia, an overview of how their activities are typically staffed and supported, a comparative taxonomy of the existing legal/governance structures that have been created to address them, and an overview of the legal concerns which consortium founders need to address.*

Introduction: Although the word “consortium” has long been in common use, providing a precise definition for such an organization might challenge many that are familiar with the term. This should not surprise, because the label has been applied to endeavors as diverse as library collectives, syndicates formed to purchase professional sports teams, multimillion dollar collaborative research and development (R&D) projects, groups of competing companies allying to bid on government contract opportunities, and standards development organizations. This impressively heterogeneous set of examples suggests the importance of the consortium concept in the public, commercial, academic and non-profit sectors.

While the particulars of the legal structures used to support consortia across so many domains varies, the concerns these structures address are remarkably uniform, providing a clue why the word “consortium” is applied to such divergent types of organizations in so many different disciplines. The range of examples also suggests the degree of flexibility available to unite multiple stakeholders (often of many different types) behind a common purpose. For example, among the collaborations listed above can be found very successful organizations that are incorporated, and also ones managed under short memoranda of understanding;

entities that have very limited, by-invitation only membership, and others that have an open, global membership of thousands; organizations with hundreds of dedicated employees and others with none; and initiatives with budgets ranging from the inconsequential to the many millions of dollars.

One of the central attributes that defines a consortium is collaboration to achieve a common purpose, often one that cannot be achieved well, or perhaps at all, absent collective cooperation and pooling of monetary, information or other resources. In our increasingly globalized, digitized and interconnected society, both the need as well as the opportunities for such collaborations are increasing dramatically.

Historically, the utilization of the consortium concept has been limited to certain narrow for-profit activities. More recently, its use has expanded into additional areas, and particularly to support non-profit endeavors. Once proven to be useful in a new domain or niche area, consortia have often multiplied, and sometimes greatly, in

In our increasingly globalized, digitized and interconnected society, both the need and the opportunities, for collaboration is increasing dramatically.

the same sector. This record of experimentation followed by proliferation suggests that the restriction of consortium activity to certain vertical domains arises more from lack of awareness in adjacent sectors of the potential for consortium-based collaboration than with deficiencies in the concept itself.

The premise of this article is that consortium principles and structures should become more widely familiar and better understood, so that these useful and flexible tools can be universally utilized. Accordingly, in this article, I will provide a list of attributes that define and functions that are common to consortia, an overview of how consortia activities are typically staffed and supported, a comparative taxonomy of the existing legal/governance structures that have been created to address them, and an overview of the legal concerns which consortium founders need to address.¹

I What Defines a Consortium?

What perhaps best defines the concept of a consortium is the lack of clear boundaries to separate what clearly is a consortium what clearly is another type of joint activity. When defined by a single characteristic, such as number and type of members, or nature of purpose, consortia can be found along a broad spectrum that, at some indefinable point, transitions into other types of endeavors that would not commonly be deemed to fall within the same definition. To give a single example, R&D projects with two participating partners, each funding the project and sharing in the commercial benefits, would more properly be referred to as a joint venture, while the same project with ten members would commonly be viewed as a consortium. What then, of a similar project with three participants?

¹ Much of the material in this article is based on the author's more than twenty years of experience in forming and representing more than 100 consortia, as well as other joint ventures and syndicates of various types.

Similarly, a trade organization qualified in the United States with the Internal Revenue Service (IRS) as a public charity, with thousands of individuals as members and a variety of activities, only one of which is standard setting, would be categorized simply as a non-profit membership or trade organization. Conversely, another non-profit organization formed only to develop standards, admitting only corporate members, and gaining tax exemption as a trade association, would invariably be recognized as a consortium.

Indeed, even the term “consortium” is at best a generic label of convenience for otherwise comparable entities that may choose to adopt a wide range of identifiers in their proper names, including Alliance, Forum, Foundation, Partnership, Special Interest Group (or simply, “SIG”), and Association.²

What then defines organizations that are likely to be referred to, or to refer to themselves, as “consortia,” and what differentiates them from other, in some ways comparable organizations?

Core attributes: I would suggest that the following characteristics would be commonly acknowledged to be shared by all entities properly referred to as consortia:

Common purpose: Consortia are invariably formed for a specific purpose. That purpose is more typically narrow than broad, but in any case in a successful consortium it will be well defined, easily understood, and of sufficient importance to motivate action. Usually there will be some urgency attached to addressing the purpose, thus providing sufficient motivation for the founding members to take time from their normal responsibilities to combine and act.

Collaborative imperative: For any of a variety of reasons, the purpose will either be better addressed, or may only be possible to accomplish, through joint action. Examples of motivations may include high cost (e.g., in an R&D consortium); a desire to share information without violating antitrust laws (e.g., a consortium formed to share marketing and sales information); the need to gather consensus as well as combine technical expertise and/or intellectual property (e.g., a standards development consortium); a desire to demonstrate unity and/or market power (e.g., a political action group); the opportunity to aggregate buying power to secure better prices and terms (e.g., a purchasing consortium); or the desirability of spreading acquisition costs across multiple, similar peer organizations (e.g., a library consortium).

Definable target group: The common purpose will be easily recognizable by one or more categories of stakeholders in a given technical, political, geographic or other domain as a matter of importance indicating the need for action, thereby providing a pool or easily identified and recruited participants.

Entity participation: While a given consortium may admit individuals as well as legal entities, very few organizations that merit characterization as consortia

² Indeed, even the use of “consortium” as a collective label of convenience is not universal. For example, for historical reasons, collaborations in some sectors are usually referred to as “syndicates” rather than consortia. Examples include groups of banks that each provide part of the funding for a “syndicated” loan, and “syndicates” of newspapers that share news.

for current purposes are based primarily on individual membership (which by its nature tends to lead to structural, funding, governance and other differentiators of substance).³

Coordination, administration and cost: Achieving a common purpose requires a sufficient degree of coordination and administrative support that a means is required to provide these functions, either through member volunteerism, hired employees, or outsourced service contracts. Achieving the common goal may also require a budget, which must be met, in whole or in part, by member contributions.

Consensus governance: In contrast to stock corporations, where control is largely a reflection of percentage ownership, consortia typically operate at some level of consensus governance. As a result, an individual consortium member will typically have greater influence, relative to its percentage economic contribution to the maintenance of the enterprise, than will a stockholder in a corporation, or a limited partner in a limited partnership.

Consortia are often formed to allow individual participants to gain access to an opportunity that lies beyond their individual economic means or competencies, or which is only attractive if the risk of failure can be shared more widely

Optional attributes: Many consortia will also demonstrate, or be formed in part to take advantage of, one or more of the following capabilities:

Ownership and management of intellectual property: Consortia will often be formed to create, or as a means to another end will need to develop, valuable intellectual property. Once created, these assets must be owned and managed in a way that serves the goals of the consortium (on which more will be said later).

Aggregation of resources: Consortia are often formed to allow individual participants to gain access to an opportunity that lies beyond their individual economic means or competencies, or which is only attractive if the risk of failure can be shared more widely. Examples include R&D consortia with very significant budgets, as well as consortia formed to purchase sports teams, real property, race horses, or indeed any other type of asset.⁴

³ Indeed, the standard setting consortia that are primarily based on individual membership, such as the Institute of Electrical and Electronics Engineers (IEEE) and the Internet Engineering Task Force (IETF), rely heavily on direct or indirect corporate sponsorship to support the standard setting activities in which employees of the sponsors engage. This participation is usually with the encouragement, and in some cases at the direction, of these sponsor-employers. The same is true with many of the most important open source foundations, such as the [Apache Foundation](#) and [Eclipse Foundation](#).

⁴ One could fairly argue that consortia comprising primarily individuals, or individuals and businesses, which are formed solely to purchase and manage discrete assets should not be included in the definition of consortia at all, but should be relegated to one or more additional categories, better referred to as syndicates and partnerships. Ultimately, the question is one of whether such organizations have more in common with consortia than not, and whether the differences outweigh the commonalities. Be that as it may, for purposes of this article, I have elected to include these groups, in part because they, and outside observers, often use the word consortium to describe them,

Non-profit purpose: While consortia are most often formed at least in part to serve economic ends, they are almost always formed without the objective of being independently profit-generating (the notable objection being consortia formed for the purpose of purchasing and managing assets). Thus, an R&D consortium may create commercially valuable technology, but will not be likely to commercialize the technology itself, and a group purchasing consortium will secure better prices for its members, but will not generate and distribute profits in its own right. This preference for a non-profit business plan is usually independent of whether the organization does, or does not, plan to seek tax exemption.

Promotion and market support: While the work of an R&D consortium may be conducted on a confidential basis and shared only with the consortium participants, other consortia may include market education as an essential part of their common purpose. An interoperability standard created by a standard setting organization (SSO), for example, only becomes useful if it is widely implemented, usually by others in addition to the members of the SSO that created it. Similarly, the economic benefits of the standard to its developers may only be obtained if customers come to associate value with compliance, and therefore require compliance in the products or services they are willing to purchase. Members of such a consortium will therefore usually coordinate at some level on marketing activities, and may also invest in the creation and management of global certification and branding campaigns.⁵

Open membership: While some consortia adopt “invitation only” admission policies, others (and especially national and international consortia) will operate on an open membership basis, allowing any eligible applicant to join. This is for multiple reasons, including lessening of antitrust risk, increasing the likelihood of gaining tax exemption, earning credibility in the marketplace, spreading costs, and increasing the number of supporters of the common goal.

Qualification: The gross parameters or other features of a consortium are sometimes dictated by qualification criteria imposed by a third party, such as a government agency that provides funding for certain types of collaborative activities, such as R&D, information gathering, economic development or some other public purpose. In such a case, the eligibility of members, types of activities and certain other attributes may be mandatory rather than elective.

II Consortium Functions

Since participation in a consortium is by definition voluntary, success depends upon providing potential members with a value proposition that equals, or exceeds, the full costs of participation. Those costs include not only any cash contributions

and in part because their inclusion helps demonstrate the breadth, flexibility and wide utility of consortium principles.

⁵ For a detailed review of certification and branding as conducted by SSOs, see: Updegrave, Andrew, [Certification and Branding, Essential Guide to Standards](http://www.consortiuminfo.org/essentialguide/certification.php), ConsortiumInfo.org, at <http://www.consortiuminfo.org/essentialguide/certification.php>

required, but also travel and time costs, which may often outweigh initial and ongoing participation fees.⁶

Examples of the functions that a consortium needs to provide (depending on its purpose, scope of activities, membership, and other factors) in order to be successful include the following:

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|
| <p>Governance: Potential participants must believe that they will have more to gain than to lose by participating in the consortium. Typically, having a say in the operations, strategy, and policies of a consortium is a valuable right. Consequently, it is important that the founders of a consortium not reserve too much control to themselves, because the result may be a failure to recruit sufficient additional participants to achieve the founders' goals.</p> | <p><i>Potential participants must believe that they will have more to gain than to lose by participating in a consortium</i></p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------|

However, those forming a consortium should also bear in mind that control may be of greater importance to some potential members than others, and a "pay to play," multi-tiered membership structure, with the more influential classes of members paying higher fees to gain more influence, will often provide an appropriate means to maximize both operating funds as well as numbers of members. In other situations, differentiating control in this fashion could be fatal, because the perception among potential members may be that certain factions, or categories of stakeholders, with more ample resources will be able to skew results to their unique advantage.

Liaison: Many consortia will pursue goals that require interaction with other entities. The consortium provides a means whereby the credibility to request the right to consult with, and be consulted by, other organizations can be established, and for that activity to be conducted.

Hosting: Collaborative activities need to be organized, scheduled, hosted, chaired, recorded and reported back, all in an efficient, member-friendly fashion.

Administration and staff support: While some consortia will have few members and no need for any sort of centralized administrative function, others will have many members, face to face meetings to schedule and host, Web sites to create and maintain, membership applications to accept, renewals to process, bank accounts to maintain and bills to pay. These functions are usually provided in one of the following fashions, with some models being more common in some domains more than others:

⁶ Indeed, some consortia require members to provide the full time of one or more dedicated employees as part of their membership commitment, representing an in-kind commitment that can run into the hundreds of thousands of dollars in the case of highly skilled (and compensated) engineers.

- **Share and share alike:** Members take turns providing necessary support. This is usually a poor solution unless there is little to be done. Not surprisingly, it is employed most often where the goals are limited (e.g., to develop a single deliverable) and the budget is necessarily small.
- **Secretariat:** One member volunteers to provide all of the support services, usually referred to as the “Secretariat function.” This can work well if the Secretariat member takes the job seriously. Sometimes, the Secretariat function relieves the volunteering member of the requirement to pay dues. Consortia formed by, or among, academic institutions will frequently adopt this model. It is also used where an existing non-profit organization (e.g., a trade association) agrees to host an activity that may recruit participants that are not members of the host organization as well as members.
- **Outsourced management:** Outsourcing some or all of the administrative functions is an increasingly popular choice of consortia in disciplines such as standards development. There are a number of service providers that exist solely for the purpose of providing this function, some of which will hire dedicated staff that exclusively serve their larger consortium clients.
- **Mixed management:** The consortium has one or more core employees to provide dedicated leadership, and outsources other functions to a single management company, or piecemeal to a variety of service providers.
- **Standalone:** When consortia reach a certain size, usually defined by headcount, they are likely to operate as an independent entity, with their own lease, payroll, administrative staff, and other dedicated resources.

III Legal Considerations⁷

Collaborative associations invoke a variety of legal concerns, all of which should be properly considered and addressed prior to formation in order to avoid later complications, risks, excess costs, and lost opportunities.⁸

Pre-formation: The following categories of concern should be considered prior to settling on a legal structure and fixing the rules under which the collaboration will operate:

Governance: The structure of a consortium should facilitate, rather than inhibit, achieving consensus and operating cooperatively together. As a result, the

⁷ It should be noted that the laws of jurisdictions vary widely and change frequently, and that the facts and circumstances applicable to any given consortium or consortium participant will vary widely. Accordingly, any information provided or observations or opinions stated in this article relating to legal subjects are provided for illustrative purposes only, and under no circumstances be regarded or taken as legal advice.

⁸ I have addressed the legal considerations involved in forming an SSO in greater depth in this chapter of the earlier cited *Essential Guide to Standards: Forming a Successful Consortium Part II – Legal Considerations*, at <http://www.consortiuminfo.org/essentialguide/forming2.php>. Many of these considerations will be applicable to a greater or lesser extent to forming a consortium for other purposes.

choice of law, choice of structure (as discussed in a later section of this article), policies, and procedures of the consortium should be appropriate to the task at hand.

Antitrust: Many consortia bring head to head competitors together in the same room, to discuss and work towards common objectives. As a result, great care must be taken to avoid even the appearance of improper activities lest regulators or private parties bring an action against the consortium and its members. This should not be viewed as a reason to shy away from appropriate collaborative activities (indeed, many such activities, such as standards development, are viewed as being pro-competitive under applicable laws of the United States, when properly conducted), because the rules to be observed are usually well known and clear.

How the consortium is structured at the outset will often have a marked impact on the liability profile of the consortium on an ongoing basis. For example, if the governance structure favors one type of entity over another, or the admissions criteria would exclude one class of

The structure of a consortium should facilitate, rather than inhibit, achieving consensus and operating cooperatively together

industry participants that will be impacted by the actions of the consortium, then the potential for abusive behavior will have been built into the foundations of the organization. Even if such conduct does not occur, the organization may become a lightning rod for a private legal action, or a letter to regulators recommending investigation, by a party that suspects that such conduct has, or will, occur.

Tax: In many cases, it will be desirable and appropriate for a consortium to apply for exemption from U.S. and state taxation under IRS Section 501(c), most commonly as a 501(c)(6) trade association, but on occasion under Section 5.10(c)(3) as a charity or as a foundation. However, making too reflexive a decision to opt for tax exempt status can be a mistake, to the extent that it unnecessarily restricts actions that would otherwise be important to undertake in order to achieve the consortium's goals. This is a particularly relevant consideration, given that if the consortium is likely to have a modest budget, it should not be difficult to manage it in such a way as to incur little or no tax liability.

The choice of the category of tax exemption should also be carefully considered, as the restrictions applicable to each alternative can vary. Often, a consortium will elect to seek qualification as a public charity when it could as easily, and often more easily, qualify as a trade association. The result of this decision can be needlessly

greater reporting requirements at the state and federal levels throughout its existence, a higher likelihood of being audited, a requirement to obtain audited financials, and the necessity of transferring its assets (perhaps with the prior approval and under the supervision of the State Attorney General) to another public charity, rather than to distribute them back to its members, or transfer them to a different type of tax exempt entity. None of these restrictions would be likely to apply to a trade association.

In the case of a more complex consortium, it may be appropriate to incorporate more than one entity. For example, to the extent that there are activities that cannot be engaged in without jeopardizing the tax exempt status of the main organization, a taxable subsidiary can be created. And to the extent that the main organization is not eligible for certain types of funding, a sister organization (e.g., a foundation) can be created as well. Obviously, the complexity of the organizational structure should not exceed real needs and budgetary realities.

Ongoing concerns: Besides everyday legal needs (e.g., contract review, corporate maintenance, etc.) consortia can also have unique ongoing legal needs. Depending on the nature of the organization, those needs may include the following:

Antitrust monitoring: While many consortia will be completely innocuous from an antitrust perspective, either by the nature of their activities and/or the composition of their membership, others will require ongoing monitoring to ensure that members do not inadvertently violate antitrust laws and regulations in the United States, and, as appropriate, abroad.

Accordingly, legal counsel representing consortia should be sufficiently familiar with antitrust laws to provide advice on how consortium activities can be established and conducted within appropriate boundaries. Any organization with the potential to conduct activities in connection with which antitrust concerns might arise should adopt, distribute to its members, and observe, an appropriate antitrust compliance policy. That policy should clearly state that criminal, as well as civil, penalties can be imposed on those that violate the antitrust laws, and that individuals as well as their employers can be held liable.⁹

Where participation by a significant percentage of the competitors in a given market niche are expected to participate, or activities of a more sensitive nature from an antitrust perspective are conducted, monitoring by legal counsel should be proportionately more active.

IPR Considerations: As a generality, joint ownership of copyrights, patents and other intellectual property rights (IPR) is cumbersome and to be avoided. A

⁹ Historically, consortia have often adopted detailed antitrust memos that not only list prohibited activities, but also provide an explanation of the principles and laws of concern. More recently, many organizations have adopted high level policies less than a page in length, presumably on the theory that flagging the overarching risk, and then referring members to their own legal counsel is a better strategy. In any event, perhaps the most worthwhile preventive policy is to ensure that committee chairs, and others that supervise activities where inappropriate behavior could occur, have a clear understanding of what discussion topics and other actions are prohibited, and of their obligation to intervene if such activity occurs.

legal entity provides both a neutral owner, as well as a mechanism for publishing, licensing or otherwise making the IPR available to consortium members (and often the marketplace generally) in an economical and manageable fashion. IPR management by consortia can in the alternative include accepting member commitments to license IPR (or, as usefully, commitments not to assert IPR) to implementers or users of the consortium's work product, leaving the ownership of relevant IPR with consortium members. This practice is near-universal in consortia functioning as SSOs with respect to "essential claims" of patents that would be "necessarily infringed" by an implementation of an SSO standard.

The formation of a consortium as a legal entity also provides long-term stability with respect to IPR, regardless of the continuing participation of any individual member. In the appropriate case, ownership by the consortium also provides a liability shield for consortium members, protecting them from any risks associated with the ownership and management of the IPR.

Consortia use IPR policies (in the case of an incorporated organization) and inter-company documents (in the case of an unincorporated initiative) to regulate the ownership of, and rights in, IPR as it is created, in order to avoid later disputes or surprises. For non-technical consortia that will own only text-based materials such as white papers, Web sites and the like, a very short IPR policy, or section

The formation of a consortium as a legal entity also provides long-term stability with respect to IPR, regardless of the continuing participation of any individual member

of the organization's Bylaws, will suffice to ensure agreement among members that the consortium will own the copyright in all work product, whether or not created by member committees or arriving in the form of member contributions.

In the case of SSOs, IPR policies typically require working group participants (and sometimes all members) to disclose essential patent claims. The obligated parties are also required to state whether they will, or will not, make such claims available to all would-be implementers on "reasonable and non-discriminatory terms," and whether such "RAND" terms will, or will not, include the requirement to pay a royalty or other fee.

For a consortium formed for other purposes, such as submitting a collaborative bid on a contract or conducting joint research and development of actual technology, much more detailed legal documentation will typically be used to assure that ownership and usage rights are properly addressed. In each of these examples the legal documentation may vary widely, and careful attention is essential at the time of formation to ensure that the consortium will operate smoothly, and that ongoing relations of the consortium's members will be harmonious rather than the opposite.¹⁰

¹⁰ For a detailed review of certification and branding as conducted by SSOs, see the [Intellectual Property Rights and Standard Setting](#) chapter of my earlier cited *Essential Guide to Standards*, ConsortiumInfo.org, at <http://www.consortiuminfo.org/essentialguide/certification.php>

IV Consortium Legal Structures

The legal structures predominantly in use today have evolved partly out of pragmatism, and partly as a matter of convention, dictated by the evolutionary history of the organizations founded in a given industry sector or non-profit area of activity. Anyone seeking to launch a new consortium would therefore be well advised to research a variety of different alternatives, rather than simply model a new organization on an existing consortium within the same area of endeavor.¹¹

While no list of alternatives would be likely to include all of the legal variations that have been used to stand up a consortium, the following examples should capture most of the frameworks that would be appropriate to use in creating a collaborative project, with some of the principle advantages and disadvantages of each noted, as well as summarized in the table provided at the end of this article section:

Intercompany contract consortium: In this model, no legal entity is formed. Instead, an agreement among the members provides for all legal purposes, with the result that anything that needs to be established must be provided in the members' agreement, or in another agreement entered into among the parties (this contrasts with an incorporated entity, where off the shelf bylaws can be easily customized to provide most of the legal governance documentation needed). This means that the legal work required to set up a contract consortium, as compared to an incorporated consortium, may be significantly greater and more costly, since most or all of the work required will require custom drafting and negotiation among the founding members.

Failing to create a corporate entity can have other shortcomings, depending on the nature and scope of the initiative. Because no legal entity is formed, the profits and losses of the organization will pass through to the members, which may be inconvenient if the consortium will have significant cash flow. Moreover, the consortium will not be able to carry insurance, open and maintain a bank account, or sign contracts. As a result, one or more members must volunteer to maintain the account, sign the contracts, and otherwise act to an extent as the legal alter ego of the consortium – a role that few members may be willing to play. Hiring a third party to act as a representative may solve this problem, but unless the services of a management company are otherwise needed, this represents a needless additional cost.

Those considering a non-incorporated structure should also consider the fact that there may be less certainty that their contractual terms will be legally enforced, in comparison to bylaw terms that are directly based on corporate statutory language, and which have been interpreted for decades in available case law. Where certainty of result does exist, it will not always be welcome. For example, regardless of any language to the contrary that is included in the operative agreement among the members of an unincorporated consortium, applicable law may deem the arrangement to be equivalent to a partnership, subjecting all members to joint liability not only with respect to the debts or actions of the organization itself, but

¹¹ That said, where a particular model has become well entrenched and widely known in a particular niche, up to a point it may make better sense to utilize the same structure in order to facilitate recruitment, since potential members are already familiar and comfortable with the status quo.

potentially for the acts or omissions of any single member when that member is arguably acting on behalf of the organization.

For all these reasons, and contrary to a common misconception, unless the scope, membership and duration of the projected collaboration are all intended to be quite limited, creating a corporation and allocating rights in the entity's bylaws will almost always present an easier, cheaper, and more risk-free option than constructing a consortium from the ground up through a custom contract. A notable exception will arise when an external factor (e.g., a government funding requirement) dictates a contractual relationship between the consortium members in order to qualify.

Because of the costs and risks of custom creation, where a decision is made to form a contract-based organization it will be particularly wise to emulate any existing contract-based structures that may be appropriate for the project at hand. In the world of standards development, one such structure has become quite popular, and scores of collaborative organizations have been formed under this "promoter-adopter" model.

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While some full-fledged organizations have been formed to operate on the promoter-adopter model, it is best suited to create and release a single standard. Typically, a small number of core members (often a group formed by invitation only) enter into a "promoter agreement," under which the founding members agree to use a specification contributed by one or more members, or to jointly create a specification needed by all (for example) to provide interoperability for a new type of product that each of the founding members wishes to sell.

Under the terms of the promoter agreement, each founder typically provides the group with a royalty-free cross license to all of its essential patent claims under the specification under development. The promoter agreement also permits each participant to sublicense the right to implement the same specification, subject to the patent rights of each promoter. All promoters typically agree to make patent licenses available to all such sublicensees under RAND terms.

The right to implement the specification is in turn provided to third parties under an "adopter agreement," using a form mutually agreed upon by the promoters. Adopters may or may not still be required to enter into separate patent license agreements with each other promoter. The terms of these licenses may sometimes be more restrictive than might commonly be found in relation to standards that are developed by consortia based upon more open models, or which find it necessary to employ less stringent IPR policies in order to attract a broad membership.

The promoter-adopter model is particularly popular with a few companies with very large patent portfolios, and is most often found in the market niches occupied by

these companies. The advantages of the promoter-adopter model include the following:

- A high degree of certainty regarding patent rights among promoters and adopters (adopters are usually asked to provide a reciprocal license of their own essential claims back to the promoters, allowing them and other sublicensees to implement the specification without concern).
- A light-weight document structure, since the promoter agreement typically provides for all obligations (formation, governance and IPR related) in a single agreement, and the shorter adopter agreement provides all that an adopter needs, other than any direct licenses required by one or more of the promoters.
- A reasonably standardized document package, due in part to the fact that a large percentage of the organizations based upon this model have been founded by a small number of companies.

While these advantages do not eliminate the shortcomings of a non-incorporated structure, the promoter-adopter model has been well tested, and can therefore be relied upon to function as a workable basis for collaboration among the members themselves in situations where valuable IPR will be involved. It is particularly worth noting that this model could be used in other situations involving pooled IPR beyond the standards development environment.

Third party contractor consortium: While most consortia are formed by those that become their members, on occasion a product or service vendor will conceive of a plan for a consortium-type activity over which it desires to maintain a level of control, or from which it hopes to gain a particular advantage. For example, there may be great value in a particular market sector to sharing and analyzing information relating to sales data, materials acquisition data, or other areas of common concern. However, competitors in that sector will rightly be concerned over the antitrust implications of sharing such information directly.

At the same time, while there may be insufficient motivation among those in that sector to form and manage a consortium intended to collect, anonymize, analyze and share such information in an appropriate, risk-free fashion, there may be sufficient interest to attract a meaningful number of companies to participate for a fee. The motivation for the service provider, besides the fees it can collect, may include the opportunity to market the same data and/or services relating to applying the lessons learned from such data, to the same companies, and to other companies, if the contract terms permit it to do so.

In situations such as these, the service provider may barter its up-front time and energy in setting up what superficially may look like a membership consortium in order to gain access to data it could not otherwise easily collect, and in order to gain an advantageous platform from which to market its services. As with a traditional consortium, individual companies apply for “membership” on an annual basis, and pay an annual fee. In the example above, they would also provide data, and share data, and may also have the opportunity to attend meetings and engage in other activities hosted by the service provider.

The principal difference in such an arrangement is that the service provider may own and control all of the data or other deliverables created, as well as the name of the organization and the right to alter, discontinue and sell the enterprise. For this reason, those approached as potential founding participants in such an initiative may wish to negotiate for protective provisions that give them some measure of control over the future of the venture to lower the risk of later abandonment or disappointment.¹²

The third party contractor model can be created in a variety of ways. In the simplest, the contractor simply offers a short contract to each participant, which for all intents and purposes becomes a customer of the contractor. If liability concerns are an issue for the service provider or the members, or if the members wish to have some protection against abandonment, a membership corporation may be created, with the contractor providing all services during good behavior, and (in the example above) exclusive rights relating to the information being gathered. Absent gross neglect, the service contract renews automatically, and the contractor may be able to sell the contract, and its exclusive rights, to a third party reasonably able to perform the same function.

While the staffing model is similar, the third party contractor model should not be confused with the out-sourced management model discussed in Part II of this article. The important difference is that in the latter, the management company has no ownership or control rights, and can be more easily terminated by the consortium and its members.

Forming a corporation with stock ownership is an appropriate alternative where the consortium may generate profits, or will create valuable commercial assets that at some point will be liquidated or distributed

Stock corporation: Forming a corporation with stock ownership is an appropriate alternative where the consortium may generate profits, or will create valuable commercial assets that at some point will be liquidated or distributed (i.e., where the consortium is more in the nature of a joint venture). However, where the consortium has been formed for a non-profit motive or on a non-profit basis, the existence of stock can be more of a burden than a benefit, because the value of the stock at the time that a member joins or leaves must be calculated, and the shares bought or sold, which may be a needless and pointless exercise. Additionally, such an organization could not secure tax exempt status, and its appearance to the public (if this is a consideration) would be closed rather than open, and commercial rather than non-profit.

Limited Liability Company (LLC): While similar to a stock corporation in some respects, an LLC allows great flexibility with respect to how profits and losses are allocated, and also in some jurisdictions permits members of the LLC, when

¹² A variant on this theme is the “user group,” in which a vendor shares information, and welcomes input, from customers that it hopes will become more loyal and active as a result. A user group may also resemble a membership consortium, with regular meetings, technical activities, and perhaps an elected advisory council that acts as a representative interface with the vendor. The economic support for a user group is provided by the vendor.

serving on the governing body of the LLC, to disclaim any fiduciary duty to each other, which would not be possible in the case of the other incorporated alternatives addressed in this Section. Unless these differentiators are important to meeting the needs of the members, using an LLC structure will usually be inadvisable, due to the costs of creating and maintaining the organization, and the generally more complex and confusing nature of the governing documents.

Non-profit corporation: The corporate laws of U.S. states generally provide for the formation of one or more variations on the corporate form that are intended to be more suitable, and often more flexible, for non-profit purposes. However, these options vary greatly from state to state, and the types of associations for which these statutes were originally intended (e.g., churches, agricultural collectives, fraternal associations, and so on) do not always align well with the needs of a modern consortium. Even if the laws of a given state may provide an appropriate vehicle for consortium formation, if that entity is intended to have wide national or international membership, potential members and their legal counsel may be uncomfortable relying on laws and structures with which they are unfamiliar.

Delaware membership corporation: Delaware law is more universally familiar to both domestic and foreign attorneys than the law of any other US state. Moreover, the differences between its laws as they apply to not for profit membership companies are not only slight, but provide ample flexibility for the task at hand. For this reason, I have formed scores of consortia under Delaware law with excellent results. Within this type of structure, all of the rules relating to member class structure, member rights, obligations, voting, creation of a governing body, indemnification and more can be included entirely in the Bylaws. To the extent the activities of the consortium require, other rules can be provided for in Board adopted policies (e.g., IPR Policies, Antitrust Policies, Committee Process Rules, and the like).

Multiple entities: For more ambitious consortia with larger budgets, more diverse funding sources, and opportunities to operate partially in a tax exempt mode and partly not, a multiple-entity structure may be appropriate, notwithstanding the greater complexity and costs of creation and maintenance. As earlier noted, entities can include taxable operating subsidiaries and other types of non-taxable entities as affiliates, as well as separate for-profit corporations or partnerships that are separately funded and owned by subset of members willing to underwrite a greater percentage of the consortium's budget, sometimes in return for ownership of, or preferential rights in respect of, IPR or other assets developed or purchased by the for-profit entity.

Structural summary: When contacted by a client to assist in forming a consortium, many attorneys will find themselves faced with a task that they have never confronted before, and for which they have no models to consult as references. In such a case, a natural reaction is to begin from a familiar starting point, which in many cases will be a joint venture agreement or the bylaws for a traditional non-stock corporation intended to qualify as a public charity. While the former may be a good choice if only a few parties are involved, and the latter for a locally-based project which intends to seek contributions as a charity, if other

factors already noted are present, one of these alternatives may represent a very poor and limiting choice that may be later regretted.

It is therefore important to explore all available models before committing to a decision that will have long term implications. Ideally, a model will be found that has been used by comparable organizations already in existence that have demonstrated their ability to succeed and thrive under the structures they have adopted.

| Comparison of Consortium Structural Options | | | | | | | |
|----------------------------------------------------|------------------|----------------------|---------------------|------------------------|---------------------------|------------------------------------------------|-----------------------------------------------------------------------------------------------|
| | Flexi- bility | Cost to Create | Liability Shield | Entry/ Exit Ease | Tax Exempt Eligible | Most Suitable For | Notes |
| Contract Consortium | High | High | No | Varies | No | Few members, discrete purpose | Requires custom drafting/much negotiation |
| Promoter-Adopter | Low | Low | No | Easy | No | Narrow focus projects in IPR-rich environments | Commonly used to develop standards in semiconductor and some other IT sectors |
| Third Party Contractor | High | Varies | Yes | Easy | No | Limited objectives | Likely to arise where potential members are not motivated to create the consortium themselves |
| Stock Corp. | Low | Low | Yes | Hard | No | For profit venture | Stock ownership makes changes in membership complicated |
| LLC | High | Can be High | Yes | Varies | No | Complex for-profit situations | Main advantages are lack of fiduciary duties and flexibility |
| NFP Corp. | Varies by State | Low | Yes | Easy | Yes | Varies by state | Less desirable for most national and international consortia |
| Delaware NFP Membership Corp. | High | Low | Yes | Easy | Yes | General non-profit uses | Well recognized, flexible |
| Multi-Entity | High | High | Yes | Varies | Yes | Complex projects | More expensive to create and maintain |

V Summary

Multiple forces in the world today are converging to increase the ease and raise the value of collaboration in both the public and private sectors. Indeed, it is becoming increasingly common in business literature to find the opinion expressed that companies that fail to collaborate with their peers will be at a severe disadvantage to their more-willing competitors.

In light of such opportunities, it is important for the founders of new collaborative projects, and their legal counsel, to be familiar with the types of frameworks available to serve as platforms for their endeavors, and to choose wisely before launching their initiatives. Happily, the consortium model, in all of its variations, provides a uniquely flexible and appropriate foundation upon which the collaborations of the future can be based.

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Here We Go Again: Video Standards War 2010

Andrew Updegrove



Think of the words "standards war," and unless you're a standards wonk like m...oh, never mind...you're likely to think of the battle between the Betamax and VHS video tape formats. That's because videos are consumer products that just about everyone uses, and therefore the bloodshed in that standards war was not only shed in public view, but the some of the blood that was shed was shed by the public (i.e., those that bought video players supporting Betamax,



the losing, but arguably superior, format). Fast forward (pun intended) to the present, and the trademarks "HD DVD and "Blu-ray" may ring a bell - and that's no coincidence.

Why? Because different industries have different business models and strategies that involve standards, and these often perpetuate over time - decades, in this case. In the case of the consumer electronics sector, that culture has too often been one of a patent-based, winner take all effort to cash in big time while your competitors take it on the chin. And it's not just media formats, either. As I noted in a [blog entry](#) a few weeks ago, we're seeing the same type of behavior in eBook readers. Since there's only one market, and the market demands one format to win in the end, that means that the camp that owns the bundle of patents underlying the winning format standard wins a bonanza.

Why? because the losers must pay through the nose for the license rights to build the players that implement the format standard that wins. The winners, on the other time win twice: once, by receiving the royalties, and again, because their own players have a lower cost to produce, because they don't have to pay royalties to themselves.

So guess what? Here we go again, but with a bit of a twist this time.

One thing that is different this time around is that it's the content owners, and not the consumer electronics firms that are pushing hard for a solution, so it's not patent royalties and the ability to sell a new generation of electronic devices that is driving the action.

Instead, what's involved are two different approaches intended to help content vendors somehow survive in the face of plummeting revenues and a continuing plague of piracy while allowing legal content owners to watch videos on whatever device they want, wherever and whenever they want, without having to carry around the original media on which they purchased, for example, a movie.

That's a hard problem to solve. If the content vendor wants to protect itself by using "Digital Rights Management" (DRM) technology to prevent you from sharing a single purchase with your 1,000 closest friends, it may also add a feature that may prevent you from transferring the same movie to your laptop as well, and especially if you download the video, rather than buying it on fixed media. Yes, the technology is getting more sophisticated, allowing you to perhaps copy a video or music download (or a copy of Word or an eBook, for that matter) to an approved number of devices, or share it with a certain number of friends, but that still isn't the same as being able to use your purchase as you wish without thinking about it.

That's becoming more of an issue, because as consumers get more and more used to listening and watching content on more types of devices, they become more and more unhappy about

Why have two different approaches at all?

having their freedom to make use of their purchase as they wish restricted. As a result, they may be more likely to opt for an illegal copy than a legal one. Meanwhile, broadband Internet services have now become widespread enough that streaming media has become widely feasible, so "cloud" hosting of your purchases has become practical as well, so there are even more reasons why you'd like to be able to watch that video on every device with a screen you own. Finally, with the advent of MP3 downloads, a whole generation of consumers is quite comfortable with never purchasing music or videos on fixed media at all.

In the face of this reality, the industry has come up with a pretty practical solution: pay once for a video, and the seller will track your ownership for you, and make that information available to anyone who hosts the same content anywhere. If you're in a hotel, say, and want to watch a video you've already purchased, the video service provider for that hotel can just check your record to see if you've already purchased it, instantaneously and invisibly. If you have, then you're good to go. Or, if you're sitting in an airport, just log on to the Internet and watch it on line.

Pretty neat solution, if you think about it. But how to make it happen?

That's where the standards war, or in this case, a variation on the theme comes up. In one camp, we see a several years old alliance called the [Digital Entertainment Content Ecosystem](#), or DECE, which includes [five out of six](#) of the major movie studios (Warner Brothers, Paramount, NBC Universal, Sony and Fox), together with an impressive array of players in almost all of the affected sectors: software and hardware companies (e.g., Microsoft, Intel and Cisco), consumer electronics vendors (Sony, also a content owner), mobile device vendors (like Motorola and Apple, cable companies (including Comcast, Cox Communications and Liberty Global) and video and player distributors (e.g., Netflix, and Best Buy).

That's a pretty imposing lineup, by any measure, and I can vouch from personal experience that this represents quite an accomplishment. Why? Because each of these companies had to be convinced by the founders that DECE would make money for them, that the project was viable, and that they should support this approach rather than another, or be content to just sit on the sidelines and watch what happened before making a commitment.

This week at the mammoth Consumer Electronics Show in Las Vegas, DECE announced 21 new members, as well as the fact that its members have agreed on the format specification they will use to enable the program (so far, it will support Adobe's Flash Access, CMLA-OMA, Marlin, Microsoft's PlayReady and Widevine). The "digital rights locker" that will hold purchaser data will be hosted by a company called Neustar, which is developing the backend software now.

And in the [other camp](#)? Well, to start with, there is the remaining major studio: Disney. And then there's, well, maybe nobody. But everyone's expectation is that Disney's partner in combat is Apple, which has not joined the other group. Apple CEO Steve Jobs, incidentally, remains Disney's largest single shareholder, as a result of the sale of Pixar to Disney (Amazon is also notable by its absence from the DECE member roster). According to [one report](#), the Disney plan may rely on an Apple approach called MobileMe. Disney also made an announcement last week at CES, saying that it would take KeyChest live before the end of the year, and would announce other participating companies shortly.

In principle, the approaches are somewhat similar, but technically each takes a different in approach. The similarity is that each is based upon a "digital rights locker," or central repository of purchaser data. In the case of Disney, that repository is called the "KeyChest."



After that point, however, the two approaches diverge. In the case of the Disney approach, existing standards will be used to make the system work. But in the case of DECE, both content and devices will need to implement a new format standard created by DECE. And while the DECE format will rely on DRM, the KeyChest system will not - or not necessarily, anyway. But it isn't incompatible with DRM, either, so a content vendor can still add DRM features to the content that it sells. And, of course, just like DECE, the Disney approach will only work with download services that decide to participate in the KeyChest program.

Why have two different approaches at all? I expect that there are multiple reasons, but from what I've read, one is that the DECE approach is intended to make it more likely that consumers will want to buy, rather than merely rent, new videos, while the Disney approach will work well with rentals, which some think will be the wave of the future.

The fact that Disney is pushing a different technology doesn't make this a standards war from a purely technical sense, because Disney stresses that its approach would be compatible with DECE. Unfortunately, it comes out the same way, because for a new standard like DECE to succeed, it almost has to become universally adopted. The fact that Apple, which has soundly thumped the content owners with its iTunes store, isn't in the DECE camp has that group concerned, because if Disney and Apple don't actively implement DECE, then content purchasers may never get on board the DECE bus. After all, if Apple and Disney don't implement DECE, then someone buying DECE compliant content won't be able to fully take advantage of DECE's portability on. And if consumers don't demand DECE, then why bother to implement it at all?

So there we are. With the multiyear HD DVD Blu-ray battle still a recent memory, we have a new standards face off in video, just as we do in eBooks, and just as it looks like we may in on-line print, where a new consortium led by the News Corporation and others is launching a standards-based "digital newsstand." All of these devices, of course, are targeted at you and I, and each has the potential to not only extend the woes of the music/video/print vendors behind these standards battles, but to waste your money and mine as well.

Does that strike you as a shame? Me to.

So if you've still got a Betamax in the back of your closet, you might want to finally throw it out. After all, you may need the storage space soon for yet another wave of consumer electronic equipment that has been rendered obsolete by a needless standards war.

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INTRODUCING:

The Alexandria Project, Chapter 1: Meet Frank

Andrew Updegrove



On the morning of Sunday, December 12, a morbidly obese Corgi named Lily was sniffing a tree on 16th street, in the Columbia Heights neighborhood of Washington, D.C. A cold, insistent drizzle was falling, but Lily didn't care, because Lily was sniffing at her favorite tree. Indeed, the meager processing power of Lily's brain was wholly occupied with sampling the mysterious scents wafting up from the damp earth, for this was the favorite tree of every other dog in the neighborhood as well

Something more annoying than the rain was nagging at the edge of her senses, though. At last the sounds began to penetrate.

"C'mon, Lily! Hurry up!"

Lily turned her head. The distraction was coming from the individual at the other end of Lily's leash. She eyed him briefly, noting the sockless feet jammed into worn, black loafers. Above bare ankles, a pair of pajama-clad legs disappeared into a rumpled raincoat, out of which extended an arm holding an umbrella. The umbrella sheltered a stubbly, forty-something face topped by thinning black hair pulled back in a ponytail. Lily decided that the face did not look happy.

"Ah!" thought Lily. "That would be Frank." Relieved, she returned to the important work at hand.

"**C'mon**, Lily!" repeated Frank.

The fact that Frank's face was not happy was not particularly remarkable. Even in pleasant weather, Frank usually towed a personal raincloud over head, incessantly dwelling on the minor miseries of his life. Not long ago, that cloud had turned jet-black when Doreen, his mother, entered a retirement home. After helping her move in, Frank prepared to leave.

His mother stood by the doorway of her new apartment, lower lip atremble as she held Lily in her arms with difficulty. It was clear that she was decompensating rapidly. No use dragging things out, Frank thought. Transitions are difficult, and best dealt with quickly.

"Well, Mom," he said, "I guess I'll be leaving now."

With a sudden lunge, Doreen thrust Lily into Frank's arms. He stepped back with surprise into the hallway, too horrified to allow himself to grasp the obvious.

"The home doesn't allow pets," his mother blurted. "I never could have taken the plunge if I didn't know Lily would be safe with you. Now don't you worry; I've made you her legal guardian, so it's all set. Now go! Get out of here, before I change my mind."

Frank desperately wanted her to change her mind. But his mother had already slammed the door in his horrified face. Despite her impressive girth Lily was only three years old, and acknowledged his existence only by barking. He could hear his mother sobbing on the other side of the door, and felt like crying himself.

That had been two long, loud months ago, and he was still in mourning.

"**Come on!**" Frank hissed. At last, Lily turned away from the tree, looked up at him reproachfully, and barked.

"OK, OK," Frank said, and fumbled in his pocket. He held a dog treat up for Lilly to see. "**OK?**"

Lily seemed satisfied, and began looking for just the right place to do what at last needed to be done. At last, Lily squatted, looking blankly ahead. Frank sighed with relief.

A blue plastic bag inverted over his free hand, Frank scooped up Lily's grudging gift. He handed over the biscuit, jerking back with fingers barely intact.

Frank watched Lily happily crunch away. "Isn't that just the story of my life?" he thought bleakly. "Every day I give her a cookie, and every day she gives me a bag of crap."

Making his way back through the rain, Frank reflected that his day generally went downhill from there.

~~0000 0001 0010 0011 0100 0011 0010 0001 0000~~

Lily shook herself mightily inside the door, wetting what little of Frank was still dry. Satisfied, she planted her substantial hindquarters firmly on the floor, looked at Frank, and barked. Frank sighed, picked the dog up, and carried her up the stairs to his second floor flat.

As he climbed to the top, his rising eyes met a pair of fuzzy pink slippers, and then a floral house dress, followed by folded arms draped with a bath towel. At last, the angry face of his across the hall neighbor appeared. Not for the first time, Frank noted the uncanny resemblance his neighbor bore to North Korean president Kim Il-Jung, only with hair curlers.

"Morning, Mrs. Foomjoy," Frank offered as Lily twisted wildly in his arms. He deposited the dog at her feet.

"Shame on you!" Mrs. Foomjoy barked as she knelt to massage Lily with the bath towel. "Poor, dear wet baby!" she crooned.

"It's raining, Mrs. Foomjoy," Frank observed. "Lily hasn't learned how to use the indoor facilities yet."

"Then why isn't she wearing the lovely rain jacket I gave her?" she snorted. "What is **wrong** with you? You don't deserve a dog like this!"



Frank couldn't have agreed more. Lily groveled at Mrs. Foomjoy's feet, and then leaned to the side until gravity obligingly rolled her over onto her back. Whining ecstatically, the dog gazed up adoringly with goggle eyes as Mrs. Foomjoy rubbed her stomach.

His neighbor grabbed the leash from Frank's hand when she stood up. "I'll see to the welfare of this dog!" she snapped. A moment later, her door slammed shut, leaving Frank standing alone in the poorly lit hallway, a warm, blue plastic pendulum

swinging slowly from side to side in his hand. Startled but relieved, he entered his own apartment, and softly shut the door.

Frank hung his dripping raincoat on the hook in the linoleum floored hallway. At one time, his apartment's décor might have been described as "late Twentieth Century divorced middle aged male." Now the most obvious theme was pervasive clutter. He poured a cup of coffee and sat at the small table in the small kitchen and looked at the large laptop screen that stared blankly back at him. With resignation, he turned it on.

Normally, the sound of a computer booting up would have struck him as cheerful; the imperceptibly soft whir of the cooling fan spinning up to speed; the blinking lights at the edge of the keyboard; the screen phosphorescing with a pearly glow. After all, [information technology](#) – IT – was not only his profession, but a major part of his way of life. Computers provided Frank's preferred link to the world outside. Digital links were safer, he thought, bringing him about as close to his fellow man as he usually wished to be. Closer than that, and things were apt to become unpredictable.

Which brought him back to the night before. Be honest, he mused ruefully. You got what you deserved. Or didn't get what you didn't deserve, to be more precise.

Frank sighed. Should he, or shouldn't he check his email? The rational side of his brain said, yes, what's there is there. Deal with it.

But the other side of his brain had a different suggestion: "Go back to bed," it whispered, "It's Sunday. You don't have to deal with anything today." That was true, he thought. Who knows what might happen by Monday? There could be a typhoon by then. Or maybe giant pterodactyls would erupt from a wormhole in the Mall, sending tourists streaming for the safety of Metro stations. That side of his brain was lobbying strongly to take two aspirin, pull the covers back over his head, and let reality take care of itself for another twenty-four hours.

Frank sighed again. He might as well see sooner than later what people from his office had posted on line. A few clicks later and he was at Mary the receptionist's Facebook page. Yes, there were pictures from the party. Lots of them. Later would do just fine after all, he decided. He snapped the laptop shut without turning it off.

The sad thing was, Frank had actually been looking forward to the [Library of Congress](#) IT Department Holiday party. He had brought his daughter Marla with him, a Georgetown University grad student, and he appreciated the great impression she always made on his co-workers. Unlike her Dad, Marla was self-assured. She worked the crowd like a pro, chatting and shaking hands, laughing and poised. How could he feel anything but proud of her? It was hard not to drink a bit more than usual as he watched from the security of the bar in the rear of the function room.

More to the point, Frank had been looking forward to making Marla feel proud of her old man as well. Everyone knew that the Director of IT at the LOC was going to announce his choice to head an important security initiative mandated by no less than the Cybersecurity Subcommittee of the House Committee on Science and Technology. Frank figured he had the job all sewed up. After all, he was, or at least at one time had been, a recognized cybersecurity expert – a McArthur "Genius" Award recipient, no less – for his creative work in the early days of computer networking.

So when his boss stood up and tapped on his glass, Frank sat up straighter. He listened as his boss welcomed the spouses, thanked his staff for their work that year, and told a few jokes at his own expense. At last, he began to make the announcement that Frank was waiting for.

And then it happened. One moment, Frank was looking sideways to see the reaction on his daughter's face when the announcement was made, and the next he was hearing someone else's name instead. And not just any name, but Rick Wellesley's name – "only out for himself" Rick, a person who had never had a creative thought in his life, someone who had even briefly reported to Frank when he first came to the LOC. **Rick Wellesley?** How could this be happening?

But it was. There was Rick, standing and basking in the applause, glancing briefly and triumphantly in Frank's direction. Frank was stunned, his face burning. And then angry. Without a word to his daughter, he stood and walked to the bar, turning his back on the party as George finished up. Knocking back another drink, Frank felt foolish as well as angry. Everyone must have turned to look at him, he thought, but he was afraid to turn around to find out. He stayed at the bar until Marla came looking for him.

Sitting now in his kitchen, Frank felt his face burn again. After all, he thought, everyone had expected the job to go to him. Then, with a wrenching feeling, he had a worse thought – what if no one had expected him to get the job? Maybe he was the only one in the whole damn department who hadn't seen it coming. Maybe everyone had been laughing up their sleeves at him as they watched him bask in his expected glory, just waiting for his jaw to drop when he realized that he had been skunked by Rick. Of course that had been the case, he thought wretchedly. He was convinced of it.

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And why not? What had he really done in the last 20 years? Sure, he'd become a star at the [Massachusetts Institute of Technology](#) – just "MIT" to anyone in the know. He'd enrolled at the age of 16 after skipping two years of middle school, not that skipping a few grades was unusual at MIT. But as an undergraduate he'd been part of [Project Athena](#), an ambitious effort to create a campus-wide distributed computing system for the whole university. Of course, the goal for the project's corporate sponsors was to use MIT as a testbed. Later, they hoped to productize the design and hopefully make a ton of money.



Frank had locked immediately onto the security challenges that such a system would present. He already had privileges to use MIT's gateway to the government-funded Advanced Research Projects Agency Network – the now-famous "[ARPANET](#)" that was the precursor to the Internet. Only select institutions had access to it then, but he connected the dots immediately between where Project Athena and the ARPANET together could eventually go. It hit him between the eyes that this was the start of something big. Linking terminals together around a campus was today's goal, but the next step would be to connect those networks together all over the world via the telecommunications networks that already existed, using ARPANET technology.

But then what? How would you reliably restrict access to any particular data to one person, and not let it be seen by someone else? MIT was already a hotbed of hackers. If students already went to any lengths to break into restricted sections of university computers just for fun, what would criminals, or enemy countries, not do to break in to classified computers, once someone had linked everything together?

Frank tackled that issue with gusto his senior year, if not discipline. He was a big picture guy, and what a big and exciting picture it was! The idea of wide area networks was brand new, and big ideas were needed to make sense of it all; the details could come later. When Frank graduated, he stayed on at MIT, nominally in a PhD program, but for all practical purposes he lived at a terminal in the Project Athena lab, surviving on coffee and code like so many other young computer engineering students back in the day.

Luckily for Frank, he found a mentor that reined him in enough to keep his ideas from flying off into every direction, and pushed him mercilessly to get most of the good ones down on paper in some sort of coherent order. His mentor was an engineer lent by the sponsoring companies to help oversee the project, and he and Frank hit it off. Often they talked till all hours, the older man channeling Frank's enthusiasm and helping him follow his insights down the right paths.

Frank never completed his doctorate, but he did finish his Masters Thesis – and by anyone's account it was brilliant. He anticipated just about every security challenge that would arise over the next 20 years as the Internet took off. He also suggested at a high level most of the solutions that were later refined and implemented to deal with a massively networked world. Even today, his thesis remained an obligatory foundational reference in just about every new network and Internet security paper written.

His thesis also brought him to the notice of the mysterious keepers of the [MacArthur Fellows Program](#) as well – the unknown judges that every year contacted the select few out of millions who they had decided, “show exceptional merit and promise for continued and enhanced creative work.”

Receiving a MacArthur Fellowship – a “Genius Award,” as everyone called it - had been the high point of Frank’s professional career. And as a practical matter, it also brought the end of it, because the payments of \$25,000 every three months for five years gave him the freedom to do whatever he wanted to – including get married.

Unfortunately for Frank, whatever he wanted to do seemed to change every other week. It wasn’t long before his work at Project Athena suffered. He no longer listened to his mentor, and people began to notice that his assigned tasks no longer got done. Instead, he would plunge from one question that intrigued him to another, never getting very far with any of them. And his new-found fame and already well-nurtured ego led him to be even more obnoxious than he had been before. Soon, the other guys in the lab were not only annoyed with his failure to meet his commitments, but sick of hearing his latest revelations about security– or any other topic on which he had decided he was now the world’s leading expert. And there were many such topics.

Eventually, it was his mentor that took him aside and told him that if he didn’t shape up, his days in the lab were numbered. That conversation occurred late one afternoon over a cup of coffee in the corner of a deli in Kendall Square, and Frank didn’t take it well. What right did some middle aged, middle-management type with a degree from a state school in the Midwest have to tell a certified Genius anything about anything?

Probably a lot, Frank reflected now regretfully, gazing at his closed laptop. Like the immature idiot he was then, he had cleared his things out of the lab that night and never returned. Eventually, the MacArthur Fellowship money ran out, and with a wife and young daughter, Frank had to get more serious about working. Or at least he should have. His thesis and award carried him from job to job for awhile, but when the bottom fell out of the economy, great resumes were soon a dime a dozen.

And by then, even his resume was getting pretty long in the tooth. Frank had no “continued and enhanced creative work” to show for his five years of subsidized, random behavior. He’d never written another paper, and it was others, and not him, that turned his thesis ideas into real protocols and products. As the jobs got scarce, reference checks counted a whole lot more, and the feedback about Frank always came back the same: brilliant, arrogant, unfocused, unreliable. Of course, that was more charitable than what his soon-to-be ex-wife was saying. But he hadn’t listened – even to her.

Frank usually tried not to think much about the years that followed. The startup that had signed him up as [Chief Technical Officer](#) and the VCs that fired him; the time spent without a job at all; the rut he fell into for years after his wife moved out with his daughter, when he said the hell with everything and everybody: punching the clock in whatever high school, small business or municipal IT department would take him on till he got fired again. Then wait till his unemployment ran out and look for something else he could do in his sleep, until even that became too much to be bothered with.

Through all that time, though, people who really knew him would still seek Frank out, and he maintained a low-key consulting business on the side to help pay the bills. Among the elite in the world of security, Frank still had the reputation of a wizard, able

to come up with the kind of amazing insights that would make the most impenetrable problems suddenly transparent. An emailed plea for help describing something dense and dark that had already defied all of the usual tricks would generate a response from Frank an hour or two later, usually beginning, "It strikes me that..." and ending with, "I suggest you try..." Invariably, what Frank suggested worked. But requests for his ongoing assistance went unanswered.

Eventually, it was his daughter Marla that set him back on his feet. One Friday when he was out of work again, Frank picked her up for their weekend together. But something was wrong; something was clearly on her mind. His normally chattering preteen wasn't saying a word. As they walked, she looked down at her feet. Then she looked up as if to ask him a question, only to look down again. After a while, Frank got irritated. "Marla, if there's something you want to ask me, just ask it already!"

But Marla still paused. Then she said, "Dad, you know I'm in a computer class now, don't you? It's something you have to take in eighth grade."

"Yes," he said, surprised. "So?"

"Well," she said, and stopped. He waited, now curious.

"Well," she started again, "Today we took a tour of a big technology company, and we all had to sign in and wear these name tag things. One of the people that worked there gave us a tour, and when she saw my name, she asked if I had a father named Frank, so of course I had to say 'yes.'"

"Uh huh." said Frank, not liking where this was going.

"Well..." Marla paused again, and then the words came rushing out. "She said that she went to school with you and you were the most brilliant person she had ever known and that you'd gotten a big award for being a genius and she wanted to know what you were doing now." Marla stopped abruptly for a long moment. "And I didn't know what to say."

Frank wished this could be all over, and now.

But, Marla, of course, needed an answer. "Dad, the guide said you really used to be somebody."

Frank looked away, and tried to think what to say. And then Marla finished him off

"Dad, she wasn't telling the truth, was she?"

Frank felt as if he couldn't breathe. His daughter thought so little of the father she knew that she needed to know the guide had made a mistake? Or was it that she would be too ashamed of what he had become to be able to deal with the truth? He felt sick.

By then, they were standing in front of the door of his cheap apartment building. The traffic rushed past the garbage cans and trash piled up on the curb, and Frank took it all in. The sights, the smells, his life – they all fit together perfectly, he thought. Still, he couldn't think of a word to say to the young girl beside him.

Finally, Marla put her hand on his arm. "Dad, let's go upstairs," she said softly.

That was ten years ago. The next Monday he sucked it up and called George Lambert, his old mentor, and asked for a job. George was now the head of the IT department at the Library of Congress now, and Frank called him out of the blue to ask if they could get together for coffee.



George had been as gracious as Frank had been uncomfortable. Frank had sent his resume along by email, for what it was worth, and George cut straight to the chase.

"You know I'll need to bring you in at the bottom, Frank. Can you deal with that?"

Frank was prepared. "Sure, sure, George. I'll be fine with that."

George nodded, brows furrowed. Then he changed the topic. "How's that cute God daughter of mine these days? I can't even remember the last time I saw Marla."

"She's great," said Frank, suddenly determined; it helped to remember why he was sitting here. "Just great. We get together every weekend. She's in eighth grade now. She's smart as a whip and gets straight As."

They chatted about family for a few more minutes, and then George looked at his watch. They both stood up, and shook hands.

"I won't let you down," Frank said as he looked George in the eye for the first time.

"I know you won't," his new boss said. But Frank could tell he was only being polite.

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Sitting in his kitchen, Frank reflected that he'd been as good as his word. But not much better, he made himself admit. Yes, he'd rarely missed a day of work, and no one could say he hadn't earned his paycheck. And yes, he'd earned every promotion he'd been given.

But the promotions had been few, and ended long ago. Frank still had tremendous insights into IT architecture, and he remained as interested as ever in new developments in security. His cubicle at the LOC was stacked with articles, and he read voraciously on line. For anyone in the office with a thorny problem, Frank was the go-to guy who could always solve it, provided it was a discrete issue and he could do tackle alone. Sitting at a keyboard and given a problem at the code level to fix, Frank was still The Man – the harder the better, just bring it on. Three hours, eight hours or twenty hours later, he'd still be going at it until an elegant and creative fix was in place.

Management level work, though, was something else again. Every time George gave him a shot at a long term project with a couple of others to supervise, Frank would stumble. Somehow, he could never pull it all together.

Half the time, he'd be up in the clouds thinking big thoughts that went wildly beyond the task at hand, and the rest of the time he'd be down in the weeds, diving down rat holes as one thought after another occurred to him that usually had little to do with the task at hand. The folks he was supposed to be supervising never knew what they would be doing from one day to the next, or what, if anything, Frank did with the work they did complete. Ultimately, George always had to take the project back. Of course, it didn't take long before the big projects stopped coming, and Frank settled into the solitary niche where he stayed.

But Frank wasn't done beating himself up. Admit it, he demanded of himself, you were relieved when the projects stopped coming. You've been marking time for years now, and that's all you'll ever do. What right did you have to think George would throw this project your way?

But this had been a security job, dammit. That (and the drinks he'd had) were what had led him to corner George in the cloakroom the night before.

"I'm sorry, Frank," George had said, slowly wrapping his scarf around his neck. "I thought about letting you know ahead of time, and then didn't. I guess I should have."

"Can the crap, George!" Frank barked. "Rick can't find his own ass with both hands in a well-lit room. What were you thinking?"

George buttoned his overcoat, and reached for his hat. "Of course Rick can't hold a candle to you when it comes to security, Frank. There's nobody I've ever worked with who has the insight and ideas that you do. And everybody knows nobody covers his butt like Rick."

Frank let his breath out with a rush in exasperation as George settled his hat on his head. "So then why..?"

Now George turned and glared at him as he pulled on his gloves.

"Frank, you may know security, but when it comes to understanding people and how to manage them, you haven't got a clue. Yes, Rick is one hell of a weasel. But one thing you can rely on a weasel to do is to watch out for themselves. That means that if you give him a job to do and tell him his job is on the line, by hook or by crook, he'll get it done. And I can't say that about you."

Well, what could Frank say to that? Worse, he'd asked George for an explanation, and now there was nothing to but listen to what Frank already knew was the truth.

"How many chances have I given you over the years, Frank? I can't remember, can you?" Frank looked away.

"You're twice as smart as I am," George continued. "You should have had my job by now! But that's never going to happen unless you grow up and perform. And if you think I'd stick my neck out for you with Chairman Steele grandstanding in the House and looking for the next poor bastard to eviscerate in front of the cameras in a committee meeting, well, you're just delusional. Good night, Frank."

There hadn't been anything Frank could say to that, of course, and he was relieved as George walked away. Furious at himself, George and Rick, in roughly that order, he stalked back to the bar.

Frank decided that was about as much of the night before as he was up to reliving; he'd leave the scene with Rick for his next exercise in psychological self abuse. It had all escalated so stereotypical anyway; Rick's approach to him and his smarmy condescension, his insult in response. Ok, enough.

Frank felt the anger well up again, and with it, a sense of purpose. Screw the jerk; just because Rick got the project, that didn't mean that Frank couldn't still show him up. After all, Frank had been so sure he had the spot in the bag that he'd already started writing up his proposal. No way was Rick going to be able to pull this job off; George would realize that soon enough, and then there'd be no one to turn to but Frank.

Frank snapped open his laptop and punched the keys with fury, rushing through the complicated log in sequence that would take him into the heart of the LOC's security system, where his proposal was archived. Highlighting the file name, he hit the entry key, leaned back, and waited for the proposal to display.

Except it didn't. Frank leaned forward and hit the enter key again. Still nothing. Perhaps his laptop had frozen. But now, when he down-arrowed, his cursor moved.

Then Frank noticed that something on the screen was changing: the background color was beginning to warm up, turning reddish, orange and yellow, as if the sun was rising behind it. Now that was different! Frank watched with growing astonishment as the colors began to shimmer, and then coalesced into shapes that might be flames. Yes, flames indeed – but not like a holiday screen-saver image of a log fire – this was a real barn-burner.

Frank wondered what kind of weird virus he'd picked up, and how. After all, he was an IT security specialist, and if any laptop was protected six ways to Sunday, it was his. So much for whatever he had planned for today; he'd have to wipe his disk and rebuild his system from the ground up.

He was about to shut the laptop down when he noticed that the flames were dying away. Now what? An image seemed to be emerging now from behind the flames as they subsided. Frank leaned forward; the image became a tall building, maybe some sort of lighthouse. Underneath, there was a line of text, but in characters he couldn't read. Truly, this was like no virus he'd ever seen. He reached for his cell phone, and took a picture of the screen just before it suddenly went blank.

Frank was impressed. Whoever had come up with that one certainly had a sense of style. A weird one, but hey, graphic art wasn't the long suit of most hackers.

Frank got a pad of paper and a pen from his desk, and punched up the file directory again, highlighted his proposal, and pressed the Enter key again. This time, he would watch more closely and take notes.

But all that displayed was this message: "File not found."

Frank tried again – no luck. He did a word search on the document title. Nothing. His proposal was gone.

Now, Frank was alarmed. After all, the directory he was staring at was in the innermost sanctum of the Library of Congress computer system, and the LOC was the greatest library in the world. Within its vast holdings were books that could be found nowhere else in the world. Recently, the Library had even begun digitizing materials, and then destroying the physical copies. If someone had been able to delete files in the most protected part of the Library's computer system, what else might be missing?

Frank raced through a random sampling of sensitive directories; hard to tell for sure, but everything seemed intact. He checked the server logs for the Library's indexes, holdings and other user-accessible resources: everything seemed undisturbed, with no meaningful changes in the amount of data stored.

Frank drummed his fingers on the table in the cramped dinette. How to begin figuring this one out? Then he noticed his cellphone, and sent the picture of the screenshot to his laptop. The picture wasn't great, but now he could tell that the letters were Greek. He cropped the image until just the text remained, then ran it through a multiscript [OCR](#) program. Finally, he pasted the new version of the same text into a translator window. No luck – all he got was a "cannot translate" message.

Frank's fingers drummed again. He reopened the drop down menu in the translator screen, and on a hunch tried "Ancient Greek." This time, the screen blinked.

Frank looked, and then he blinked, too. But the translation still read the same:

**THANK YOU FOR YOUR
CONTRIBUTION
TO THE ALEXANDRIA PROJECT**

You can Find the Further Adventures of Frank

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CONSIDER THIS:

#62 The New Yorker Story

(J.D. Salinger, R.I.P)

Andrew Updegrove



If you cared about writing when you were growing up and are now, say, between 45 and 60, then during your formative years you likely felt an obligation to read *The New Yorker*. Or at least be able to sound like you did.

Back then, the now venerable magazine was under the direction of its second editor, William Shawn (1951 – 1987), and was still at the height of its reputation, although its powers were then already waning. In any given issue, you were apt to find the latest work of the leading authors of the day: writers like John Updike, John Cheever, Vladimir Nabokov and Philip Roth, to name a very few. Indeed, for an author, becoming a regular contributor to the pages of *The New Yorker* was synonymous with making it as a writer, period.

Under Shawn, the light fiction of the famous humorists that had graced the pages of the magazine in its first decades – authors like William Benchley, James Thurber and S.J. Perelman – was less welcome than it had been under the leadership of founding editor Harold Ross. But the magazine continued to set the industry standard for non-political, single-pane cartoons via the contributions of artists (Ross always referred to his cartoonists as “artists,” and justly so) like Peter Arno, Edward Koren, William Steig and Gahan Wilson.

The wonderful work of these artists, and the striking cover art that they and others contributed, ensured that *The New Yorker* was accessible to everyone, even if they just looked at the pictures (much like another magazine then enjoying its heyday, and paying top dollar for great cartoons by famous artists. [That magazine](#) was founded by Hugh Hefner, and was also popular with a significant percentage of the population during its formative years).

But whatever the work – whether short commentaries in the *Talk of the Town* section, new fiction by a famous author, or poetry, anything that appeared in *The New Yorker* from the very beginning was invariably knowing and sophisticated. And so it had been foretold: Harold Ross famously (and emphatically) proclaimed in the 1925 prospectus that preceded *The New Yorker's* launch that the magazine, “was not intended for the old lady in Dubuque.”

During the magazine’s first half century, a wonderful array of staff and contributing writers made the magazine dazzle with talent and style that was not afraid to be

both sly as well as sophisticated. And while Ross may have shunned the old lady in Dubuque, he never lost touch with the kind of people he rubbed elbows with and enjoyed during his roustabout youth as a cub reporter out West and his army years in France during World War I.

But under the (to me) too-precious eye of William Shawn, the magazine became perhaps too impressed with itself. Staff writers like Brendan Gill, who rode the coattails of the magazine throughout their entire career as a distinctly minor light on the literary scene, basked in the reflected glory of Shawn's refined approach. Gill fawned over Shawn to the point of embarrassment in his 1975 book, [Here at the New Yorker](#), just one of at [least 25](#) full-length treatments of the magazine, many by its own writers.

Gill's book was less about the magazine, though, than a paean to the joys of being Brendan Gill, and an opportunity to settle scores with (justifiably) better known literary figures than himself, such as the brilliantly witty but personally difficult James Thurber (who he labeled as "malicious") and that rube from the frontier, Harold Ross, that had hired him and for many years had paid his salary

Once upon a time, a roustabout named Harold Ross created a magic magazine that managed to define sophistication while remaining accessible to everyone

(Gill clearly believed that the unfinished Ross was unworthy to be editor of *Gill's* magazine).

But I digress. Indeed, while *The New Yorker* was a standard in its own right (I use the past tense advisedly), this essay is not about the magazine, but about a type of story that flourished under the exquisitely refined guardianship of William Shawn – a type of story that came to be called by some, "a New Yorker Story." And also about the author that perhaps did most to popularize that type of tale, before withdrawing from the scene, to observe, but not to publish, from his secluded aerie in New Hampshire.

What was a New Yorker Story? Think of any of the last works that J.D. Salinger shared with an unworthy world before he removed himself from the scene of public letters to write only for himself. Or think of a Seinfeld episode, only without the humor. Or of a shaggy dog story (as in, you can't tell one end from the other).

Indeed, the concept of a New Yorker story was intended to be as minimalist as possible, and with as little, or no, explanation for whatever identifiable conclusion (if any) might lie at the end of the piece. No *dénouement* allowed for the fiction that made Shawn's eye sparkle with editorial avarice! Instead, a typical plot line might run as follows:

A young woman comes home to her apartment. Dreamily, she removes her coat and drops it carelessly on a chair. She stares out of her window at the bright colors of spring, reflecting on the perfection of the whirlwind relationship she is experiencing with a dashing young man she met on the streets of Paris. Never before has she known such bliss and fulfillment.

Turning away from the window, she notices a single red rose in a bud vase on the table in her almost barren flat; beside it is a small note card, a had written message can be seen: *"My love for you will survive the end of the world."*

Suddenly, she knows that for her, the relationship is over.

Ready to lose your lunch? Yes, I was too, back then. In fact, there were good reasons why many only read the cartoons during the Shawn years.

Perhaps we should not be too harsh on Shawn for nurturing fiction writers willing to write *New Yorker* stories. Those were, after all, the hay days of Truffaut and Bergman in film, and of Kandinsky, de Koonig and Pollock in art. Even in theatre, Samuel Beckett's [Waiting for Godot](#) was setting expectations of obscurantism never before seen on the theatre stage. And in modern symphony? Don't ask.



How could someone with Shawn's refinement, someone living in New York after all, do otherwise? Traditional fiction must have seemed hopelessly quaint and artless unless it, too, could achieve (at least) the obscure. But the unique value of *The New Yorker*, of course, had never been to mimic a museum show catalog. Its reputation had been made on providing accessible sophistication that, to the extent it took itself too seriously, was also willing to chide itself for its own self-indulgence.

Of course, the days of William Shawn are now long gone. And so, too, are the glory days of the magazine he transitioned from its peak to its present reality. A succession of editors succeeded him, and while some have wrought worthwhile changes, the magazine has never succeeded in rescaling the heights of influence from which it once so effortlessly reigned.

Today, the single piece of fiction that appears in each issue is more accessible, but the authors whose work appears do not have the stature of those of yore. Besides its several short poems and its (still wonderful) artwork, it continues to offer worthwhile and well written reviews, and a meaningful percentage of serious work by authors like [Seymour Hersh](#). But its effort to return to light fiction (most issues include a "Shouts and Murmurs" piece, a category resurrected from the Ross years) as resulted in a series of formulaic, and sometimes embarrassing, set pieces. And much of the regular diet of articles are about not much at all, written in the same spare prose perfected by *New Yorker* contributor John McPhee, but lacking the same Spartan wit and turn of phrase that McPhee doles out sparingly to light up an entire page of prose.

Perhaps J.D. Salinger was more prescient than eccentric, despite the long-held consensus to the contrary. After all, Shawn tried to put the inaccessible on a pedestal as proof of his, and his magazine's sophistication, and devalued *The New Yorker's* reputation in the process, losing much of its audience in the process.

Salinger may have known that the public would abandon him, too, once it realized that [The Catcher in the Rye](#) was an accidentally accessible fluke that he would not be willing, or perhaps even able, to provide to them again.

Happily, we do not see much of the The New Yorker Story in *The New Yorker* anymore. But unhappily, we don't have *The New Yorker* of its glory years to look forward to each week, either.

What a shame.

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