

Formalism and Formalities: The Public/Private Distinction and Formal/Functional Analysis

Reform(aliz)ing Copyright for the Internet Age
Berkeley, CA
April 18, 2013

Michael W. Carroll
Professor of Law
American University Washington College of Law



Legal Formalism

“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

Anatole France, *Le Lys Rouge* (1894)

[« *La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain. »*]

Legal Formalism

• **Formal v. Substantive Equality**

- Formally, automatic copyright treats all authors equally with respect to entry into the copyright system.
- Substantively, a range of provisions substantively treat commercially important authors/works differently.

Legal Formalism

- **Formal v. Substantive Equality**
 - Democratic theory requires that public policy treat the interests of all authors admitted into the copyright system as equally important.

Formal/Substantive Equality

- Call this the principle of “copyright neutrality”

Formal/Substantive Equality

- Therefore any exercise of public authority re: copyright formalities should take into account the diverse range of copyright-relevant interests of all authors.

Legal Formalism

- What is a copyright formality?
 - Formalist = Public formalities
 - Realist = Any functional formalities that condition exercise or enjoyment of copyright.

Legal Formalism

•Public/Private Distinction

- “Death of formalities” narrative is a story about diminishment of mandatory formalities imposed by public law.
- Call these “public formalities”

Legal Formalism

•Public/Private Distinction

- Early 20th century demise of public formalities coincides with rise of private (or quasi-private) registries administered by Collective Management Organizations (CMOs).

Legal Formalism

•Public/Private Distinction

- Formalities are Dead!
- Long Live Formalities!

Legal Formalism

•Public/Private Distinction

- Instead of a “Death of Formalities” story, we should recognize that this is an outsourcing/privatization story.

Legal Formalism

•Public/Private Distinction

- On this view, we are not choosing between formalities and no formalities
- Choice is whether privatizing formalities is desirable public policy
- Choice is between the relevance of public and private systems of formalities

Legal Formalism

•Public/Private Distinction

- Reform(aliz)ing Copyright on this view means reclaiming an increased role for public policy in establishing, administering or regulating new and existing systems of copyright formalities

Legal Formalism

•Public/Private Distinction

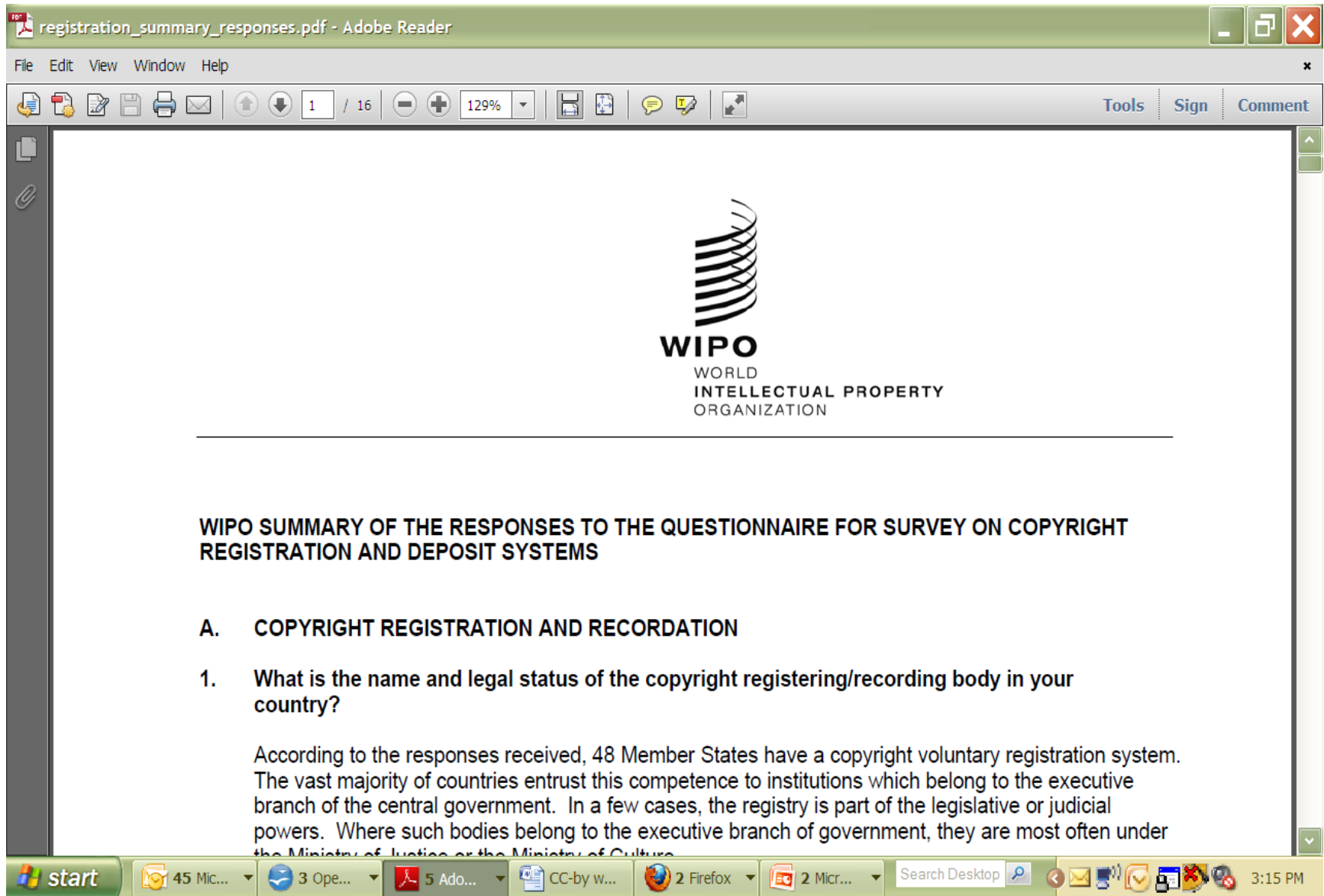
- Discourse in the United States about copyright formalities tends to focus on public formalities
 - Have an operational public formalities system
 - Relatively less private formalities in CMOs than in other parts of the world

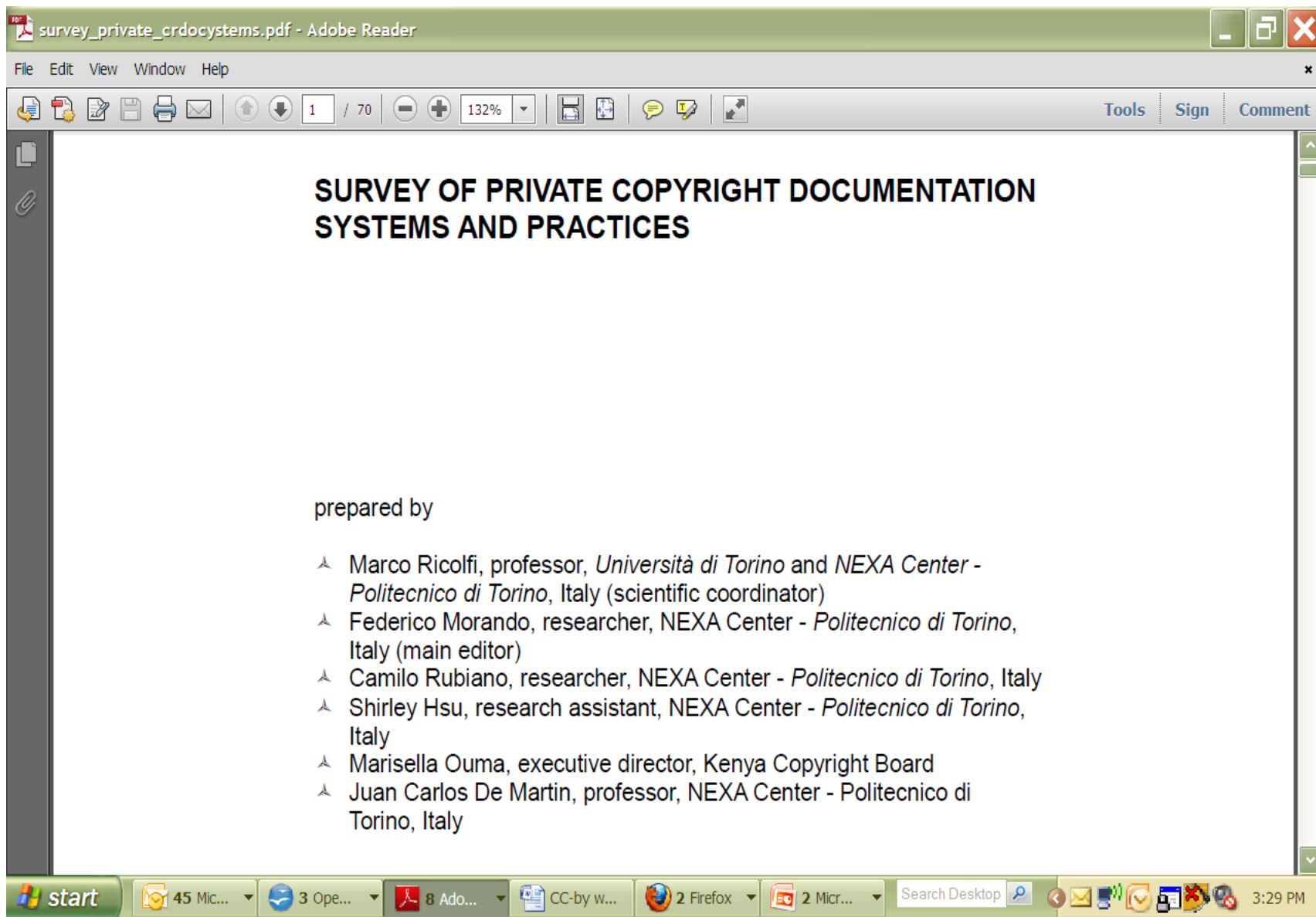
Legal Formalism

•Public/Private Distinction

- If we look outside the United States, we see the acceptance of the diminished importance of the public/private distinction.
- Where?

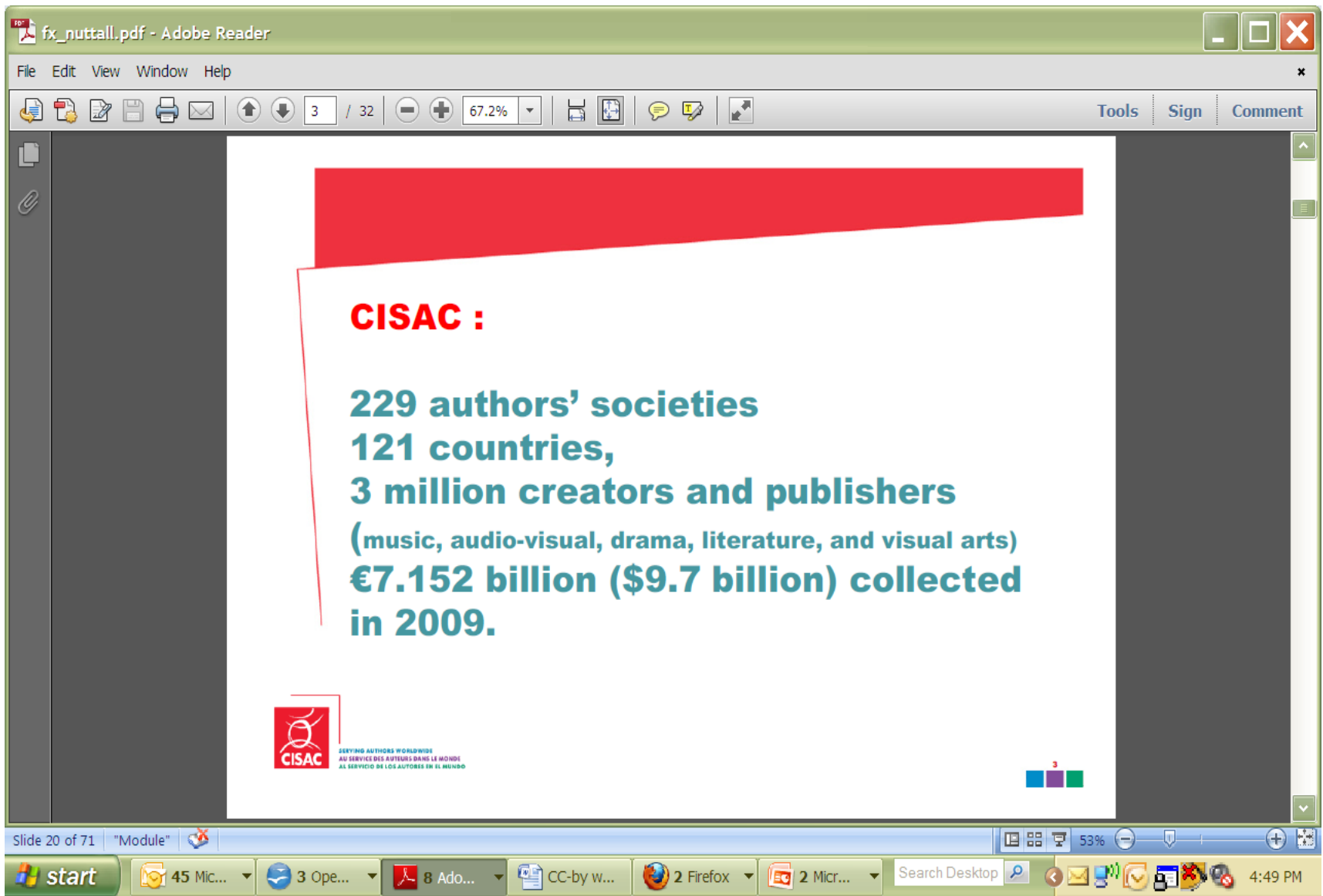








Slides by François Xavier Nuttall, Technology Intelligence Senior Consultant, International Confederation of Societies of Authors and Composers (CISAC)



Slides by François Xavier Nuttall, Technology Intelligence Senior Consultant,
International Confederation of
Societies of Authors and Composers (CISAC)

fx_nuttall.pdf - Adobe Reader

File Edit View Window Help

22 / 32 67.2%

Tools Sign Comment

Latin Net

- SACVEN, SADAIG, SAYCE, SAYCO, SCD, SGACEDOM, BOBODAYCOM, SPAC, SPA, NICAUTOR, SACIM, AEI, SGAE

MIS@ASIA

- MCT, COMPASS, VCPMC, IPRS, KCI, FILSCAP

WID

- ACUM, AEPI, AMIRA, HDS ZAMP, IMRO, KOMCA, MASA, MCSN, MESAM, MSG, MUSICAUTOR, NASCAM, ONDA, OSA, SACM, SAMRO, SESAC, SOKOJ, SOZA, SQN, APRA, UCMR ADA, ZAIKS

NOR DOC

- KODA, STIM, TEOSTO, TONO, NCB, EAU

ECAD

- ABRAMUS, AMAR, SPACEM, SICAM, SOCINPRO, UBC

Blue Cylinders

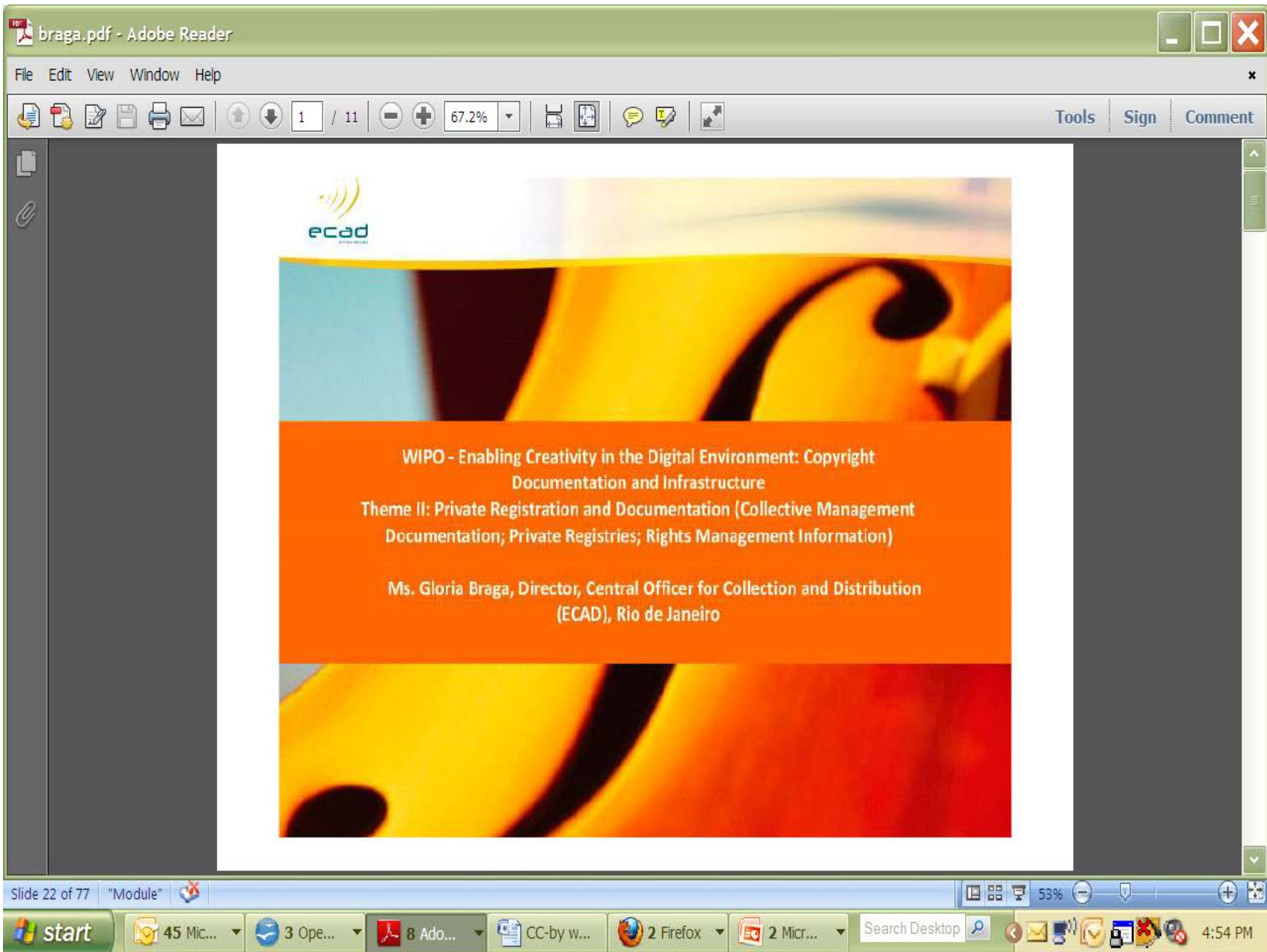
- JASRAC, AKM, SACEM, GEMA, SABAM, SIAE, BUMA STEMRA

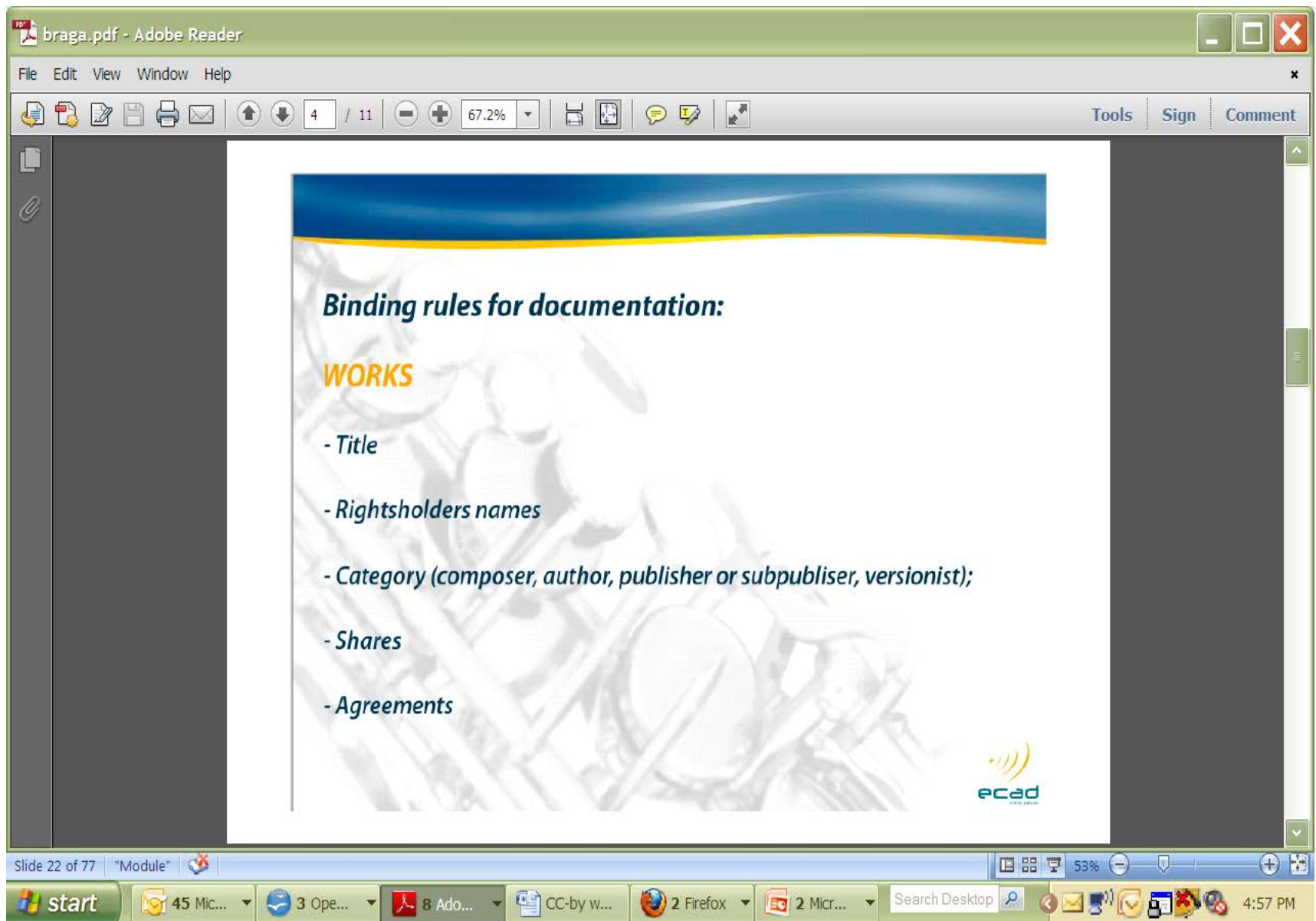
Other Organizations

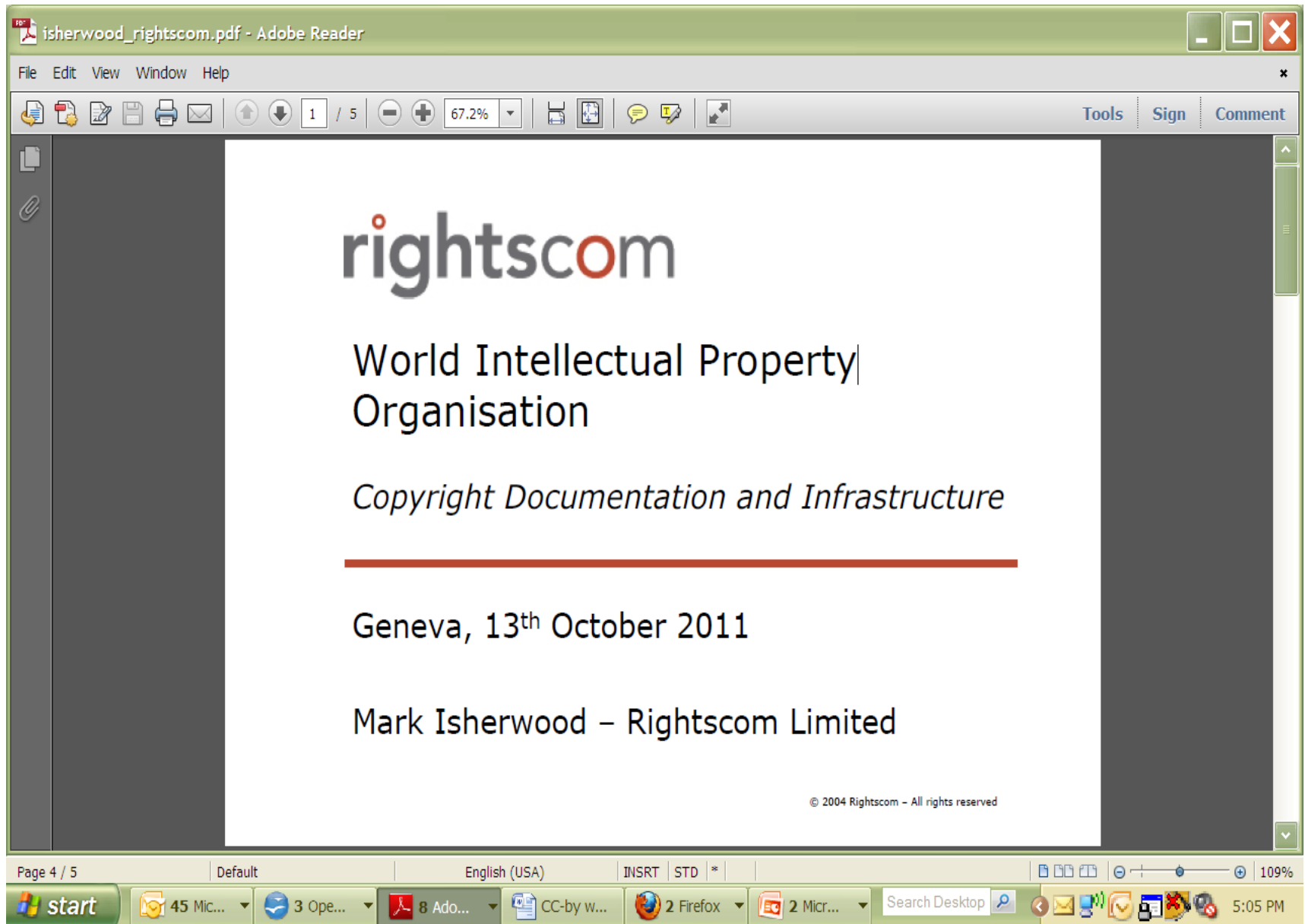
- SUISA, PRG for Music, SOCAN, ARTISJUS, BMI, ASCAP

Slide 20 of 70 "Module"

start 45 Mic... 3 Ope... 8 Ado... CC-by w... 2 Firefox 2 Mic... Search Desktop 4:40 PM







ishewood_rightscom.pdf - Adobe Reader

File Edit View Window Help

Tools Sign Comment

What does management of this change require?

- ▶ Standardisation and automation
 - ▶ Message creation and ingestion; e.g. DDEX, EDItEUR, EMA etc.
 - ▶ Message exchange;
 - ▶ Exchange of resource files; e.g. ISRC, ISWC, ISBN, ISAN etc.
 - ▶ Choreographies for message exchange;
 - ▶ Unique identification of all participants and
 - ▶ Accessible databases of all data e.g. GRD, EDIR, IMR etc.
- ▶ Only this will lead to efficient data along the digital media supply chain

rightscom

© DDEX/4 © Rightscom

Slide 24 of 77 "Module"

start 45 Mic... 3 Ope... 8 Ado... CC-by w... 2 Firefox 2 Micr... Search Desktop 5:06 PM

ishewood_rightscom.pdf - Adobe Reader

File Edit View Window Help

Tools Sign Comment

Other considerations

- ▶ Current environment people intensive which is unsustainable
- ▶ Lack of infrastructure is leading to pressure for legislative reform
- ▶ Convergence of media and distribution channels means all activities must be cross-media
- ▶ Rights management is inherently complex but no more so than mobile phones
- ▶ Role of policy makers is to support and encourage not legislate

DDEX

rightscom

© Rightscom

Slide 25 of 77 "Module"

start 45 Mic... 3 Ope... 8 Ado... CC-by w... 2 Firefox 2 Mic... Search Desktop 5:07 PM

YouTube™ AudioID & YouTube™ VideoID

Block, Monetize, or Track Viewing Metrics — It's Automated, and It's Free

Overview

YouTube has created an advanced set of copyright policies and content management tools to give rights holders control of their content. YouTube provides content management solutions for rights holders of all sizes across the world, and provides tools to cater to the specific needs of various rights owners.

Commercial partnerships

Use of YouTube's copyright tools is free, and does not require any commercial partnership with YouTube. Content partners who would like to monetize their content can apply to join our [YouTube Partner Program](#).



Send feedback

Realist Public Policy

- Systems of public formalities coexist with private formalities and always will
- Role of policymakers is to ensure that both public and private formalities serve the public interest

Realist Public Policy

- Systems of formalities will function better when they are **interoperable** and **transparent**
- Public policy about formalities should not be limited to digitizing and improving the performance of voluntary public formalities systems.

Realist Public Policy

•Interoperability

- Use open standards
 - Both public and private databases need standard to identify, e.g.
 - Identity of author(s)
 - Identity of work(s)
 - Relevant dates
 - Rights claimed

Realist Public Policy

•Interoperability

- Government should not only engage in best practices on use of open standards
- Also, should use regulatory and convening power to require (or at least encourage) use of common, open standards by private formalities systems

Realist Public Policy

•**Transparency**

- Authors benefit from greater transparency from formalities systems
 - Greater support for transaction structure (licensing)
 - Ease of holding rights management accountable
- Public benefits from more efficient transactions and better data about the creative sector