REPOSITIONING CREATORS' RIGHTS IN THE DIGITAL WORLD: Creators Rights and the Copyright Debate

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Introduction

This report is the result of a survey of the two main streams of thought framing the current debate on copyright law – the Open Source software movement, and the Copyleft movement. Historically, Open Source (variously called Floss, for Free/Libre and Open Source Software, shareware and Open Source) came first, evolving parallel to, and in opposition to, Microsoft's method of producing and marketing software. The experience led to conflict over the vision of the emerging Internet, and ultimately focused on questions of how copyright should work in cyberspace. Copyleft was the result, dubbed in counter distinction to copyright owners, or content providers, who are variously characterized as Copyright Maximalists, Copyright warriors, and dinosaurs.

Moreover, if Open Source evolved from an underground of nerds, hackers and independent software creators who insisted on participating in evolution of the Internet, Copyleft emerged from academia and public interest advocacy groups. Copyleftists are concerned more with the content of the evolving world wide net than the structure and technique of its constituent elements. While Open Source can be described as both a theory and a practice, Copyleft is a critique which focuses on the law. In particular, the Digital Millenium Copyright Act ("DMCA") in the United States, the World Intellectual Property Organization ("WIPO") treaties being discussed internationally and in Canada in connection with our own domestic reform process, and questions about technical prevention measures ("TPMs"). Copyleft as a set of ideas is part communications theory, part business model, and part political ideology. In so far as it is a movement of ideas, it is in a state of flux.

In general, Copyleft proponents call for a re-conceptualization of the old relationship between information and the public, which is to say, of cultural expression and communication as reconfigured in the digital world. The emergence of the Internet provoked discussion about the place and importance of content in cyberspace, and the so-called the cultural wars, are in large measure a battle over the vision of what the 'net should be like, and how (for whose benefit) it should be used. So it is, above all, a debate about fundamental principles and values.

The period under scrutiny is marked by a sharp increase in the public's access to and personal interest in computers and the Internet. Over the last fifteen years, the Internet has brought us e-commerce and P2P file-sharing, and words like zine, blog, cashe, spam and googlewash have entered the lexicon. The downloading phenomenon has presaged a huge public controversy focused on the recording industry and its relationship to fans and artists alike, copyright being the flashpoint. The underlying question is not always mentioned, but is has to do with the extent to which the trade-off for the monopoly granted by the state has paid off in new inventions. As a concept, does copyright work to encourage continued creativity and culture? But it also draws attention to the big picture and the erosion of creators' rights happening at both ends of the equation, pressure publishers and distributors (the cultural industries) and from the general public (individuals). The purpose of this report is to identify the place accorded creators and issues of creativity in the debate.

I Open Source

EVOLUTION OF THE OPEN SOURCE MODEL

I think the most important political battle that is being fought today in the technological, economic, social and cultural fields has to do with free software and with the method digital freedom has put into place for the production of shared knowledge… The most interesting feature of all of this is that this movement emerged from society, and not from corporations, from political parties, from institutions, from traditional modes of representation or organization – and that implies a deep structural change, not only of content, but of form, of process, reflected in the things we say, the things we propose, as well as in the way we say those things and the way we propose.

Gilberto Gil, Brazilian Minister of Culture

The Open Source concept originated in the technological world, specifically the world of computer programming. The term refers to the original response of young software engineers and programmers who were concerned about their inability to access program source codes which they needed in order to examine, fix and build on them. Consequently, they began to build their own programs and their own code, sharing freely with others. With the advent of the Internet, global sharing of code became possible, and eventually, the development of a multiplicity of free software networks. Open Source is best known for the early Open Source platform, Linux.

The ideas flowing from this movement were spawned from practice and related to experience. The principles that developed to support the practice have permeated modern culture, naturally, they are focused on the Internet, which is to say the rules and protocols governing it. The main thrust of this approach incorporates both a concern for the public interest, and for individual rights. (Eg. The idea of organizing and developing a public domain on the Internet and of expanding it with material still under term of copyright, the notion of not protecting content and leaving creators to develop their individual distribution systems through the net).

The Open Source approach is rooted in a simple *quid pro quo*. Code creators and other individuals are given access to the entire body of code for their own personal use in exchange for any contributions they may make to the overall code. In other words, the body of information collected comprises the shared knowledge of hundreds of contributors. The contractual relationship that underlies this model can contain negotiable terms and is based on voluntary contributions. However, in all instances, in order to be considered an Open Source licence, the licence must contain terms that provide for, among other things:

1. Permission for royalty-free redistribution (including source code); and

2. Permission for modifications and the creation of derived works.

Though the terms Copyleft and Open Source are not synonymous, a licence that meets these requirements is now often referred to as Copyleft.

With the evolution of a global Open Source culture, two marginally competing lines of thought emerged in the Open Source model, represented on the one hand by the Open Source Institute ("OSI") and on the other by the Free Software Foundation ("FSF").

The OSI was best defined by the 'Open Source Definition', which provides that the agreement for the distribution of the Open Source software must contain the following elements: a) free redistribution; b) the inclusion of source code; c) allowance for modification and derived works; d) the maintenance of integrity on the author's source code; e) no discrimination against persons or groups; f) no discrimination against fields or endeavors; g) the ability for distribution of the licence; h) no licensing to a specific product; i) no licensing that restricts other software; and j) no licencing that is not technologically neutral.[1]

The FSF, is primarily defined by the application of its four freedoms, described by some as the philosophical cornerstone of the free software movement:

Freedom 0:	The freedom to run a program for any purpose:
Freedom 1:	The freedom to study a program and adapt it for new needs:
Freedom 2:	The freedom to redistribute copies and thus help partners and neighbors; and
Freedom 3:	The freedom to improve program and to share innovations with the community.[2]

The primary point of divergence between these two groups was the FSF's General Public Licence ("GPL"), the Open Source licence that is tied to the GNU/Linux Open Source software.

While the GPL is praised on many fronts, primarily for allowing developers to retain control over their code, and offering individual developers protection from exploitation by large corporations, it is not without its critics. Despite the protection GPL offers, some developers are concerned about the exclusive nature of the licence and the inability to reapply the code that they contributed to the GNU/Linux model in other systems. This concern is reflected in the comments of Bjorn Rees and Daniel Stenberg:

> Our most fundamental problem with the GPL was its extensive scope. The GPL required that the source code of everything that went into the executable should be made publicly available under terms that were compatible with the

[1] www.opensource.org/docs/definition . Accessed on March 28, 2005.

[2] Gilberto Gil, "Speech to New York University", www.nyu.edu/voices .

> GPL. There was not notion of proportional fairness; the *quid pro quo* was in reality a *quodquo pro quo*….The GPL disallows combinations of GPL-covered code with code covered by other licenses, if those licenses have "further restrictions". In the absence of legal precedence, the compatibility between the GPL and other licenses is being decreed by the Free Software Foundation.[3]

The community's solution to this conflict was the development of the Free/Libre Open Source Software ("FLOSS") model, which was eventually the inspiration for the Creative Commons licence, discussed in greater detail below.[4] Popularized in a June 2001 letter to the European Commission, FLOSS was created by combining key theories behind the FSF and OSI. In the FLOSS model, Libre is used to connote that "free as in freedom" is the intended understanding, rather than "free of charge", ie. *gratis*.[5]

THE POWER OF COUNTER CULTURE

One of the fundamental pressures driving the grass-roots development of the Open Source model, and likewise the evolution and success of the Creative Commons, was the general distrust of corporations. Among the Internet generation of computer programmers, there was a general fear that corporations would exploit their code, without appropriate recognition or the ability to access and utilize their own contributions.

This fear also permeated the creator community, as evidenced by the comments of Janis Ian, the independent and self-publishing musician and journalist:

> I do not pretend to be an expert on intellectual property law, but I do know one thing, if a music industry executive claims I should agree with their agenda because it will make me more money, I put my hand on my wallet…and check it after they leave, just to make sure nothing's missing.[6]

Through the development of the Open Source community this fear is translated into a widespread practice based on a hands-on relationship with technology, an ethic of sharing and cooperation, and a kind of public (or public spirited) enterprise. A number of corporations including Apple Inc. and RedHat have embraced an Open Source model and have created very successful cooperative protocols.

THE BIRTH OF OPEN CONTENT

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[3] Bjorn Rees , Daniel Steinberg "Working without Copyleft" www.oreilly.com/pub/a/policy/2001/12/12/transition.html

[4] "Creative Commons 101" http://creativecommons.ca/index/php?p=cc101 .

[5] Ibid.

[6] Janis Ian, "The Internet Debacle and Alternate View" Performing Songwriter Magazine, May 2002.

As the Open Source model became more successful in the Internet community, it was a natural step to employ the concepts underlying the Open Source model to the creative and artistic communities. The move led to a re-branding of the term to capture the creative ideas, called "Open Content".

The term Open Content was coined by ***Eben Moglen***, professor of law at Columbia University and solicitor to the FSF, who has taken one of the most extreme approaches to the application of Open Content. This position is detailed in his famous article "The dotCommunist Manifesto",[7] which can be read as a model for creative communism.

Despite its radical position, this work effectively incorporates the principles underlying the Open Content model. Moglen argues that creative works should not be owned by a creator, publisher or employer, but should be created for the benefit of the community. This model, in its pure form, has no place for creators who require financial remuneration for their creative acts; remuneration for creation would reside in intellectual reward of 'cultivating the mind and developing skills.' Moreover, it requires the creation of a new class of creators who have no interest, financial or moral, in the works they create. The idea therefore takes Open Source a step further, removing the contractual and voluntary agreements that facilitate use.

Professor Moglen sees the transformation in the cultural structure as a necessary consequence of the advent of digital technology. He asserts that within a culture dictated by technology there is no place for an exclusionary intellectual property regime.

> Digital technology transforms the bourgeois economy. The dominant goods in the system of production – articles of cultural consumption that are both commodities sold and instructions to the worker on what and how to buy – along with other forms of culture and knowledge now have zero marginal cost. Anyone and everyone may have the benefit of all of the works of culture: music, art, literature, technical information, science and every other form of knowledge. Barriers of social inequality and geographic isolation dissolve. In place of the old local and national seclusion and self sufficiency, we have intercourse in every direction, universal inter-dependence of people. And as in material, so also in intellectual production. The intellectual creations of individual people become common property.

With the rise of digital common property, Moglen places the onus on the creator to reform their perception of entitlement to remuneration from and ownership interest in their creative works.

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[7] Eben Moglen, "The dotCommunist Manifesto" January 2003. .
http://emoglen.law.columbia/publications/dcm.html

> With this change, man is at last compelled to face with sober senses his real conditions of life and his relations with his kind. Society confronts the simple fact that when everyone can possess every intellectual work of beauty and utility – reaping all the human value of every increase of knowledge - at the same cost that any one person can possess them – it is no longer moral to exclude….
>
> Throughout the digital society the classes of knowledge workers – artists, musicians, writers, students, technologists and others trying to gain in their conditions of life by copying and modifying information – are radicalized by the conflict between what they know is possible and what the ideology of the bourgeois compels them to accept. Out of that discordance arises the consciousness of a new class and with its rise to self-consciousness the fall of ownership begins.

Moglen's theory implies that all creators would prefer to have access to a bounty of creative information from which to derive inspiration rather than the right to integrity of their own creations. His is presented as an either/or choice.

He also suggests that once the creative community sees it is morally improper to exclude the greater community from using a work, they will then determine that financial remuneration for their works will not be necessary. Reward for creative endeavors simply will be derived from the internal gratification that comes with creation and the luxury of time to cultivate creative thought.

> Creators of knowledge, technology and culture discover that they no longer require the structure of production based on ownership and the structure of distribution based on coercion of payment…Free information allows the worker to invest her time not in the consumption of bourgeois culture, with its increasingly urgent invitations to sterile consumption, but in the cultivation of her mind and her skills.

Under the purist model of Open Content, there is an absolute destruction of creative industry both for the creators, and the publishers, marketers and agents who commodify it. Consequently, not only does the model preclude any consideration of artists who may find its necessary to seek financial remuneration for their works, but also, the model precludes the development and success of cultural industries which rely on the protection of intellectual property as a source of income production.

In the Open Content regime material can be openly copied and freely used and modified by anyone. Some creators have embraced this model of creative communism and applied it to works in the public domain, or to the licensing of their own materials. Licenses in the

Open Content regime are generally based on GNU's Free Documentation Licence, which imposes no restrictions on the manner of use.[8]

Though "The dotCommunist Manifesto" effectively captures the underlying principles of the Open Content model, other commentators and advocates of the Open Content model have moderated the position taken by Moglen, and have adopted the strategy to one that provides a mechanism for creator remuneration. This moderation can be seen in the writings of David Bollier and J.P. Barlow.

John Perry Barlow, a former songwriter for the Grateful Dead, is the co-founder of the Electronic Frontier Foundation ("EFF"), a lobbying group that focuses, in part, on protecting users rights in cyberspace. Barlow shook up the cyber world with his 1994 text "The Economy of Ideas"[9], wherein he asked the critical question:

> The enigma is this: If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without knowledge, without its even leaving our possession, how can we protect it?

Barlow found the answer he was seeking, at least in part, in Open Content, and eventually, the Creative Commons. As a creator, however, Barlow was not willing to abandon the need for remuneration, nor the need for creators to be able to gain sufficient remuneration within their creative careers exclusively.

> All the same, there remains a general and passionate belief, that in the absence of copyright law, artists and other creative people will no longer be compensated, I am forever accused of being an anti-materialistic hippie who thinks we should all create for the greater good of mankind and lead lives of ascetic service. If only I were so noble. While I do believe that most genuine artists are motivated primarily by the joys of creation, I also believe we will be more productive if we don't have to work a second job to support our art habit.[10]

Though Barlow's career was successfully born out of traditional industry models, he looks to models supported by Open Content, rather than traditional means of remuneration to ensure creator payment. Citing in one instance, Courtney Love, Barlow suggests that creators will be able to derive remuneration from a patronage and a tip-based economy.

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[8] http://en.wikipedia.org/wiki/open_content.

[9] John Perry Barlow, "The Economy of Ideas" Wired 2.03, March 1994.

[10] John Perry Barlow, "The Next Economy of Ideas" Wired 8.10, October, 2000.

> Think of how the emerging digital conveniences will empower musicians, photographers, filmmakers and writers when you can click on an icon, upload a cyber-dime into their accounts, and download their latest songs, images, films or chapters all with out the barbaric inconveniences currently imposed by the entertainment industry.[11]

True to the Open Content model, Barlow believes that other values will motivate creators to continue down the path to creation, including relationships, conveniences, interactivity, service and ethics. He advocates the ability for end users to determine the uses of information and that in empowering this use, users will have a stronger inclination to pay creators than corporations ever had.

Though ***David Bollier*** is not a creator in the traditional sense, he has, however,made a career commenting on digital technology and its impacts on modern life. He is particularly known for his commentary related to the library and scientific communities. He focuses on the alternative motivations that would drive creation within the scholarly community when a Open Content model is employed.

He suggests that under an Open Source model, where information is freely accessible to end users, the research that is generated by universities would be available to a wider audience and, thus, more influential that ever before. In turn, he suggests that this strategy would lead to a larger readership for scholarly works and a greater impact among peers, adjacent disciplines and the general public.[12]

Bollier shares Barlow's concern for securing remuneration for the creator. However, he suggests that this is a secondary motivation in the salaried scholarly community where scholarly communications are considered a contribution to their fields generally. At the end of the day scholarly contribution provides the writer with a *quid pro quo* through access to the greater body of scholarly work and through academic credit that is translatable into promotion and salary increases.

Thought the commentators on this issue suggest different approaches to the Open Source/ Open Content model, the goals of the Open Content model, as expressed by Eben Moglen remain consistent throughout:

1. The abolition of all forms of property in ideas;
2. The withdrawal of all exclusive licences;
3. Common social development of computer programs and all other forms of software, including genetic information, as public goods;
4. Full respect for freedom of speech, including all forms of technical speech;
5. Protection for the integrity of creative works; and

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[11] Supra., note 9.

[12] David Bollier, "Defending the Scholarly Commons" , remarks to Research, Funding and the Public Good at Georgetown University, November 16, 2004.

6. Free and equal access to all publicly-produced information and all educational material used in all branches of the public education system.[13]

PERCEPTIONS OF COPYRIGHT LAW

It is clear from the Open Content goals outlined above, that the Open Content movement sees no future role for traditional copyright law. As expressed by Barlow, proponents of this model believe that traditional copyright law is dead, and that eventually it will be replaced by a system of unwritten codes and ethical systems.

> While there is a certain grim fun to be had in it, dancing on the grave of copyright and patent will solve little, especially when so few are willing to admit that the occupant of the grave is even deceased, and so many are trying to uphold by force what can no longer be upheld by popular consent…. After all, people do business. When a currency becomes meaningless, business is done in barter. When societies develop outside the law, they develop their own unwritten codes, practices and ethical systems. While technology may undo law, technology offers methods for restoring creative rights.[14]

Total abandonment of traditional legal structures is riddled with pitfalls includingthe possibility of empowering content industries such that they are able to determine the terms by which created information can be used.[15] This concern has been reiterated by advocates of the Creative Commons:

> Lawrence Lessig has said that "code is law", suggesting that what we can and cannot do with technology is governed not by acts of parliament but by policy embedded in computer software. We need to ask accountability and transparency questions around who sets that policy and whether that policy is under the control of citizens or software vendors.[16]

The need for a clear and applicable rule of law is one of the major points of divergence between Open Content and the Creative Commons.

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[13] Supra note 7.

[14] Supra note 9.

[15] David Bollier, "Reclaiming the American Commons", remarks to Sirsi SuperConference 2004, St. Louis, Missouri, April 18, 2004.

[16] Russell McOrmond, "Layer 8 and Layer 9 of the OSI Protocol Stack", presentation for the Open Source weekend 2004.

PRACTICAL APPLICATIONS OF THE OPEN CONTENT MODEL

OPEN SOURCE AS A CORPORATE and GOVERNMENTAL STRATEGY:

Within the business community, there is a growing appreciation of the basic business advantages of Open Source software and open technology, including less cost, faster deployment and flexibility. These benefits are forcing business and governments alike to seriously consider Open Source and Open Content models.[17]

Many commentators are suggesting that corporations need to employ the Open Source strategy in order to be successful in the new digital economy. This is seen particularly in the comments of ***Gilberto Gil*** has he contemplates the role of Open Source in the development of the Brazilian economy.

> Of course I accept this challenge; I want indeed for the Ministry of Culture of Brazil to be a laboratory for new ideas, capable of inventing new procedures for the worlds' creative industries, and capable of proposing suggestions aimed at overcoming the present dead ends…
>
> A global movement has risen up in affirmation of digital culture. This movement bears the banners of free software and digital inclusion, as well as the manner of endless expansion of the circulation of information and creation, and it is the perfect model for a Latin-American developmentalist cultural policy….
>
> The issue of free software is also an issue of collective and therefore national sovereignty. It is fundamentally a cultural issue, and for this reason it has to do with the sorts of nations we are building for ourselves with our autonomy and with our capability to respect differences, whether as individuals or as social groups, as a national society and as a global society.

OPEN CONTENT COMMUNICATIONS MODELS:

The models for Open Content communications that have been successful in application depart on one particular point from the model initially suggest by Eben Moglen – they all rely on the voluntary contributions of the creators.

[17] Jay Lyman, "Conference discusses why 'Everybody Needs and Open Source Strategy'", March 10, 2005. http://business.newsforge.com/article.pl?sid=05/03/10/1852219

One of the successful applications of the Open Content model are Open Access journals started by libraries and scientific disciplines associations. The creation of these journals is inspired by the Open Source ideals of voluntary contribution and free use of materials by end users. The success of the Open Access journal strategy can be seen at the web site of the Directory of Open Access Journals.[18] This web site claims to be a directory of quality controlled scientific and scholarly open access journals. This web page provides a portal to approximately fifteen hundred such journals.

This strategy is also being employed by university communities. Instead of employing the traditional knowledge acquisition strategy purchasing information from publishers, universities are taking steps to develop their own digital commons. An example of a successful digital commons is MIT's D-space model, which has been adopted by a number of Canadian universities including the University of Calgary.[19]

FUTURE CHALLENGES FOR OPEN SOURCE

A consequence of this model, which has been noted by Canadian commentator **Russell McOrmond**, is the transfer of control over creative product and the tools for dealing with that creative product to the hands of the end user.

> I believe that in a democratic society, in order to protect communications rights such as freedom of speech, we need to ensure that any hardware assist for communications, whether it be eye-glasses, VCR's, or personal computers, must be under the control of citizens and not a third party.

Not only does this model transfer control to the end user, but the theories and logic behind Open Source have spawned a generation of Internet users that perceive an entitlement to freely use material that is found on the Internet, even if this material is expressly protected by copyright law.

The problems perpetuated by the culture of misinformation on the Internet are best expressed by **Kathy Biehl** in her article "Bloggers Beware: Debunking Eight Copyright Myths of the Online World":

> Misinformation has a way of taking root online and turning into virtual kudzu… A handful of myths has spawned practices, particularly among bloggers and web site owners, that turn copyright on its head. These myths are rooted in the assumption that everything is up for use online unless and until it is proven otherwise. It doesn't help that technology made it so easy to take and share images text and files. Those myths and that ease have fostered a presumption of

[18] www.doaj.org

[19] http://dspace.ucalgary.ca

> entitlement that causes Netizens to treat the Internet as a buffet spread of photos, articles, sounds and multi media files free for the plucking and posting.[20]

This sentiment is echoed by creators, who believe that they deserve to be paid for their works and that their works should be communicated to the public under the terms and in that circumstances that they deem appropriate.

> A post hoc rationalization for taking something for nothing may ease the consciousness of file sharers, but it does little to address the heart of the problem – artists and creators deserve to get paid for their works. Justifying theft is no better than calling a twelve year old who uses the Internet to get free music a pirate. [21]

IN SHORT

Open Content is an attempt to import the Open Source model into the artistic realm. Advocates of this system argue that creative works should not be owned by a creator, publisher or employer, but should be created for the benefit of the community. This model in its pure form has no place for creators who require financial remuneration for their creative acts; remuneration for creation would reside in the intellectual reward of cultivating the mind and developing skills. This model requires the creation of a new class of creators who have no interest in ownership of the works they create. The idea therefore takes the Open Source idea a step further, removing contractual and voluntary agreements.

A pure Open Content model would strip the rights of individual creators, removing all property rights and restrictions on the manner in which their creations may be used. This is very different from the sharing model that drove development of Open Source, and has drawn criticism from of some Open Source advocates.

Implementation of Open Content calls for a radical cultural shift away from a market economy that could destroy commercial publishing. Though the practical application of this model in its purist form may be far from probable, the impact of the Open Source/Open Content concepts on the evolution of copyright law are present and cannot be discounted.

II Copyleft

[20] Kathy Biehl, "Bloggers Beware: Debunking Eight Copyright Myths of the Online World" December 16, 2004. www.llrx.xom/features/bloggersbeware.htm

[21]Rob Kasunic "Solving the P2P Problem".
http://fairuse.stanford.edu/commentary_and_analysis/2004_03_kasunic.html

The ideas that have coalesced into what is broadly known as Copyleft are related to those generated in the Open Source movement. Indeed the two movements have leaders and heroes in common. Creators have had a role to play in the articulation of the Copyleft positions, both in Canada and the United States. Many artists, especially younger musicians and singer/songwriters, have been vocal and inventive in their response to the challenges of the e-media. However, the serious intellectual work has been undertaken mainly by academics. Two key proponents in the US over the past fifteen years have been John Perry Barlow and Lawrence Lessig. Both have been prolific and outspoken as writers and activists for the cause, Barlow as an artist and co-founder of the Electronic Frontier Foundation, and Lessig as law professor and litigator.

Among the commentators, there are those who have become leaders in the debate, and lightening rods for the mounting public concern about the organization of the web. Additionally, however, there are growing numbers of users and creators who toil in the backwaters of the movement, writing blogs, constructing websites and circulating articles about the issues. [Though blog commentary is not canvassed in great detail in this paper, a small sampling of blog commentary is provided in Schedule I.] There has never been a time when copyright was as much discussed and debated by a diversity of people as it is today. Copyleftists would respond with the observation that copyright has never before extended into the ordinary life as much as it now does either.

THE IDEOLOGUES: THE NINETIES

John Perry Barlow, former lyricist for the Grateful Dead, retired Wyoming cattle rancher and co-founder in 1990 with Mitchell Kapor of the Electronic Frontier Foundation (EFF) published a seminal article in the March 1994 issue of *Wired* magazine, which is now taught in many law schools. Entitled "The Economy of Ideas", Barlow makes the bald and contentious statement that "intellectual property law cannot be patched, retrofitted or expanded to contain digitized expression", and furthermore, that increasing difficulty of enforcing existing copyright …is already placing in peril the ultimate source of intellectual property – the free exchange of ideas."[22] To begin with, Barlow points out the essential difference between old methods of disseminating artistic expression and information through physically based media (books, films, etc.), and the new systems which are capable of distributing the wine without the bottles. This, in fact, is the central metaphor of the piece, hence the subtitle '*Selling wine without bottles on the Global Net'*.

"When the primary articles of commerce in a society look so much like speech as to be indistinguishable from it, and when the traditional methods of protecting their ownership have become ineffectual, attempting to fix the problem with broader and more vigorous enforcement will inevitably threaten freedom of speech." The explanation comes with predictions: "The greatest constraint on your future liberties may come not from government but from the corporate legal department laboring to protect by force what can no longer be protected by practical efficient or general social consent."[23]

[22] Supra., note 9.

[23] Ibid.

As Barlow sees cyberspace, "notions of property, value, ownership, and the nature of wealth itself are changing more fundamentally than at ay time since the Sumerians first poked cuneiform into wet clay and called it stored grain." What is happening in the digital realm, is this, "Since it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression."

Despite the urgency of the situation and the speed of change, Barlow nevertheless, proposes a moratorium on litigation, legislation and international treaties until we have a clear sense of the entire enterprise in cyberspace. Laws should be developed on the basis of social consensus, he notes, and at the moment, consensus around copyright is disintegrating. He then points out that faith in the law is not an effective strategy; the law adapts by increments, and "at a pace second only to geology". What is happening now, is happening quickly, and "it may well be that when the current system of intellectual property law has collapsed, as seems inevitable, that no new legal structure will arise in its place."

Barlow discusses the nature of information in cyberspace: Information as a life form, as a phenomenon that "wants to be free", as a relationship ("receiving information is often as creative an act as generating it"), as something that is not perishable though it is likely to acquire (or be assigned) different values over time. (And these, he acknowledges are "highly subjective and conditional.") Information in cyberspace becomes liquid, he says. The old static media (books etc.) that resist the evolutionary impulse will be replaced in cyberspace by old forms rather like the oral tradition that have no 'final cut'. He then adds this comment:

> Because there was never a moment when the story was frozen in print, the so-called 'moral' right of storytellers to own the tale was neither protected nor recognized. The story simply passed through each of them on its way to the next, where it would assume a different form. *As we return to continuous information, we can expect the importance of authorship to diminish. Creative people may have to renew their acquaintance with humility.* [emphasis added]

In his description of the economics of ideas, Barlow speaks of the liquid commerce of electronic information and theorizes a role for artists. "Information economics, in the absence of objects, will be based more on relationship than possession," he explains. Understood as a means of conveying intellectual information, he cites two models: the performance, and the service. "In fact, until the late 18th century the service model was applied to much of what is now copyrighted. Before the industrialization of creation, writers, composers, artists and the like produced their products in the private service of patrons. Without objects to distribute in a mass market, creative people will return to a condition somewhat like this, except that they will serve many patrons rather than one." He offers his own experience as evidence. "In regard to my own soft product, rock 'n' roll songs, there is no question that the band I write them for, the Grateful Dead, has increased

its popularity enormously by giving them away. We have been letting people tape our concerts since the early seventies, but instead of reducing the demand for our product, we are now the largest concert draw in America…" His words of advice for the artists in the crowd are vague. "Whether you think of yourself as a service provider or a performer, the future protection of your intellectual property will depend on your ability to control your relationship to the market – a relationship which will most likely live and grow over a period of time."

Finally, like other writers, Barlow talks about the attitudes of Americans to copyright and decries the effects of copyright enforcement on the culture.

> Instead of cultivating among the newly computerized a sense of respect for the work of their fellows, early reliance on copy protection led to the subliminal notion that cracking into a software package somehow 'earned' one the right to use it. Limited not by conscience but by the technical skill, many soon felt free to do whatever they could get away with. This will continue to be a potential liability of the encryption of digitized commerce.

He ends the article with the following five predictions:

- In the absence of the old containers, almost everything we think we know about intellectual property is wrong. We are going to have to unlearn it. We are going to have to look at information as though we'd never seen the stuff before.

- The protections that we will develop will rely far more on ethics and technology than on law.

- Encryption will be the technical basis for most intellectual property protection. (And should, for this and other reasons, be made more widely available.)

- The economy of the future will be based on relationship rather than possession. It will be continuous rather than sequential.And finally, in the years to come, most human exchange will be virtual rather than physical consisting not of stuff but the stuff of which dreams are made. Our future business will be conducted in a world made more of verbs than nouns.[24]

Two years after publishing this apologia in *Wired*, in February 1994, Barlow released a public statement directed to legislators as well as the media called a "Declaration of Independence of Cyberspace"[25] which takes fundamental issue with the assumption of government (and industry) of the responsibility for designing the web. It said in part:

[24] Ibid.

> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.
> ……
> Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, there is no matter here.
> ……
> Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

The tenor of the document is what is significant, as is the positioning of the arguments of webheads and cyber-travellers as contrary to established order. Like others who have gathered around the EFF, Barlow fashions himself as a dissident and futurist. Much of what he says stems from his experience as a performer, and carries the cachet of fame. However, his view of creators and their position in this new-world is curiously antiquated in that he seems to hark back to old systems of private patronage. He has few words of concern or even interest in the economics of creation; his focus is exclusively on the economics of the cultural industries, and to some extent the public domain. When he speaks of oral culture, moreover, when he states that stories were simply passed on and that there was not protection for the expression, he clearly is not thinking about indigenous cultures. These we know have long had protocols and systems of ownership.

Lawrence Lessig is a law professor at Stanford University, founder of the Stanford Centre for Internet and Society, author of several books with catchy titles (and descriptive subtitles) like *The Future of Ideas – The Fate of the Commons in the Connected World*, and *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*,[26] and famous for having challenged the Sonny Bono Act, extending the term of copyright, in the United States Supreme Court in 2002 on the grounds that it was unconstitutional – and losing. Lessig has attracted a large following for his cogent analysis, and his unvarnished prose.

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[25] John Perry Barlow, "Declaration of Independence in Cyberspace". www.eff.org/~barlow/Declaration-Final.html

[26] Lawrence Lessig, "Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity", (New York: The Penguin Press, 2004).

His early work had to do with explaining the meaning and function of computer code, and how the code becomes law. Latterly he has been focussed on copyright issues. In his latest book, *Free Culture*, he credits the inspiration of Open Source pioneer Richard Stallman's book, *Free Software, Free Society* for his thesis and title.[27] He also makes particular point in the preface of noting his own non-anarchist and pro-property leanings, "A free culture is not a culture without property; it is not a culture in which artists don't get paid. A culture without property, or in which creators can't get paid, is anarchy not freedom. Anarchy is not what I advance here".[28] What he does advance is an argument for balance between anarchy and over-control.

> A free culture like a free market is filled with property. It is filled with rules of property and contract that get enforced by the state. But just as a free market is perverted if its property becomes feudal, so too can a free culture be queered by extremism in the property rights that define it. That is what I fear about our culture today. It is against that extremism that this book is written.[29]

Free Culture is a combination of lessons and sermons: lessons to be found in real life stories about the intersection of creativity with property law, and sermons about the nature and history of that law. He notes, for example, that the historical focus of copyright law was primarily on commercial creativity, while non-commercial culture went essentially unregulated. "For the first time in our tradition, the ordinary ways in which individuals create and share culture fall within the reach of the regulation of the law, which has expanded to draw within its control vast amounts of culture and creativity that it never reached before. The technology that preserved the balance …. has been undone, The consequence is that we are less and less a free culture, more and more a permission culture."

Early on, Lessig makes a distinction between artists and producers by pointing out that amendments to the American Copyright Act are often justified as necessary for the protection of commercial creativity, but that this protectionism is not aimed at artists or intended to benefit them so much as to protect "certain forms of business" and the current practice of "owning" culture. He reviews the history of the US law, and concludes that the advent of the Internet has eliminated the natural limit to its reach, allowing the effective control of the creativity of everyone, not just commercial creators. Moreover, he maintains, "[t]he law's role is less and less to support creativity and more and more to protect certain industries against competition." [30]

Expanding on his thesis, Lessig states "Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. That

[27] Ibid., p.xvi.

[28] Ibid., p. xvi
[29] Ibid., p. 8.

[30] Ibid., p.19.

building is always and everywhere, at least partially, done without permission and without compensating the original creator. No society, free or controlled, has ever demanded that every use be paid for or that permission for Walt Disney creativity must always be sought. Instead, every society has left a certain bit of its culture free for the taking -- free societies more fully than the unfree, perhaps, but all societies to some degree."[31]

In a long section on piracy, Lessig similarly points out the double standard in American copyright history. "We may have been born a pirate nation, but we will not allow any other nation to have a similar childhood."[32] The war on piracy being led by the copyright warriors from the entertainment industries has turned into a civil war in which free culture is the casualty. At issue, in other words, are important social conventions, for we are encountering the consequences of a culture that is largely mediated, and therefore owned by private corporations and institutions. The issues raised are at the level of human rights: access to the past, to memory (collective and individual), and to primary sources.

Lessig ultimately calls for an "environmentalism" for culture.

> [It] is not that the aims of copyright are flawed. Or that authors should not be paid for their work. Or that music should be given away "for free". The point is that some of the ways in which we might protect authors will have unintended consequences for the cultural environment, much like DDT had for the natural environment. And just as criticism of DDT is not an endorsement of malaria or an attack on farmers, so, too, is criticism of one particular set of regulations protecting copyright not an endorsement of anarchy or an attack on authors. It is our environment of creativity that we seek, and we should be aware of our actions' effects on that environment.[33]

Facilitated by technology, copyright law has reached into every nook and cranny of culture and everyday life. "The technology expands the scope of effective control because the technology builds a copy into every transaction," Lessig explains. And this is the key point, the law is triggered by copying. And the result of enabling technology to control copyright is the simple fact that it will no longer be balanced. It will simple mean what the owners dictate their terms.[34] "Using code, copyright owners restrict fair use; using the DMCA they punish those who would attempt to evade restrictions that they impose on fair use. Technology becomes a means by which fair use can be erased."[35]

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[31] Ibid., p. 29. The reference here is to the use Disney made of the Buster Keaton character *Steamboat Bill Jr.*, in creating his cartoon *Steamboat Willie* – ironically a free use Disney Corp. would not permit today.

[32] Ibid., p. 64.

[33] Ibid., p. 129.

[34] Ibid., pp. 146-147.

[35] Ibid., p. 160.

The law itself is not the enemy, Lessig reiterates; the enemy is regulation, and the power that supports it. Lessig points to the duration of the copyright term, which in the US has tripled in the last thirty years. With this has come the regulation of the creative process. "It is the massive expansion in the scope of the government's control over innovation and creativity; it would be totally unrecognizable to those who gave birth to copyright's control."[36] In short, Lessig sees the turn of events as a travesty, the hijacking of copyright by corporate lobbyists and the depleting of the public good. *"Never in our history have fewer had a legal right to control more of the development of our culture than now."* [emphasis the author's] In the end, he alleges this is the abuse of power.[37]

"In the middle of the chaos that the Internet has created, an extraordinary land grab is occurring. The law and technology are being shifted to give content holders a kind of control over our culture that they have never had before. And in this extremism, many an opportunity for new innovation and new creativity will be lost."[38] He points out that, beyond the controls the law provides, technology is also giving content providers the means for further control that is unregulated. Content providers can charge what they can get. And one result of this is the growing incidence of illegal behaviour, in fact its banalization, and its growing social acceptance.

Like Barolw, artists are not part of Lessig's purview, but he does at least pose the question about payment: "If the only way to assure that artists get paid were the elimination of the ability to freely move content, then these technologies to interfere with freedom to move content would be justifiable", he allows.[39] However, he suggest, that there is another way to assure compensation, one that would leave consumers and creators more free, and would not present the choice as one between "property and piracy" as happens now; for at the moment, he contends, the copyright warriors, "… are riding the law to protect themselves against this new form of competition. For them the choice is between forty-three million Americans as criminals and their own survival."[40]

He concludes that while the copyright wars rage, everyone has been focused on the wrong thing. "No doubt current technologies threaten existing businesses. No doubt they may threaten artists. But technologies change. The industry and the technologies have plenty of ways to use technology to protect themselves against current threats of the Internet. This is a fire that if let alone would burn itself out." [41]

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[36] Ibid., p. 162.

[37] Ibid., p.170.

[38] Ibid., p. 181.

[39] Ibid., p. 204

[40] Ibid.

[41] Ibid., p. 211.

Lessig repeatedly maintains in *Free Culture* that he is a supporter both of property and intellectual property, including copyright. In making rather a point of this, he seems to be addressing a critique, although he does not expound. Nonetheless, this is a significant difference to the stand proposed ten years before by John Perry Barlow. What Lessig is militating against is the "naked self-interest driving the copyright war", and what he cares about is the growing prejudice to the public good exacted by the process and by the growing body of jurisprudence. The public good he interprets largely in terms of the need for a robust and accessible public domain, and he laments it is being depleted by private interests. He expresses no interest in the issue of the creative return to society from the monopoly, although he promises to delineate a better mousetrap (for compensating authors) in the last chapter. Something, for some reason, he neglects to do.

Pamela Samuelson and Jessica Litman are two of the better known academic activists in the United States, law professors at Wayne State and University of California at Berkeley respectively. Both have written extensively on the subject of intellectual property law, particularly since 1996 and the appearance of Clinton Administration's White Paper on Intellectual Property.[42] Both are highly political, and take no prisoners.

In her much circulated article, "The Copyright Grab"[43], originally published in *Wired* in 1996, Samuelson delivers an analysis of the agenda of the "copyright maximalists" prefaced by this scene-setter: "Why would the Clinton administration want to transform the emerging information superhighway into a publisher-dominated toll road? The most plausible explanation is a simple one: campaign contributions." As she sees it, the cozy relationship between the content lobby and legislators is reflected in the White Paper, which is essentially an advocacy document for the maximalist point of view. What the copyright owners want, in short, is even greater control than they already have. These are people who "regard all unauthorized use of copyrighted work as theft."

What the copyright maximalist agenda wants, therefore, is to:

1. Give copyright owners control over every use of copyrighted works in digital form by interpreting existing law as being violated whenever users make even temporary reproductions of works in the random access memory of their computers;

2. Give copyright owners control over every transmission of works in digital form by amending the copyright statute so that digital transmissions will be regarded as distributions of copies to the public;

[42] "Intellectual Property and the National Information Infrastructure: The Report on the Working Group on Intellectual Property Rights" (1995). http://www.uspto.gov/web/offices/com/doc/ipnii

[43] Pamela Samuelson, "The Copyright Grab", *Wired* 4.01, January, 1996.

3. Eliminate fair-use rights whenever a use might be licensed. (The copyright maximalists assert that there is no piece of a copyrighted work small enough that they are uninterested in charging for its use, and no use private enough that they aren't willing to track it down and charge for it. In this vision of the future, a user who has copied even a paragraph from an electronic journal to share with a friend will be as much a criminal as the person who tampers with an electrical meter at a friend's house in order to siphon off free electricity. If a few users have to go to jail for copyright offenses, well, that's a small price to pay to ensure that the population learns new patterns of behavior in the digital age.);

4. Deprive the public of the "first sale" rights it has long enjoyed in the print world (the rights that permit you to redistribute your own copy of a work after the publisher's first sale of it to you), because the white paper treats electronic forwarding as a violation of both the reproduction and distribution rights of copyright law;

5. Attach copyright management information to digital copies of a work, ensuring that publishers can track every use made of digital copies and trace where each copy resides on the network and what is being done with it at any time;

6. Protect every digital copy of every work technologically (by encryption, for example) and make illegal any attempt to circumvent that protection;

7. Force online service providers to become copyright police, charged with implementing pay-per-use rules. (These providers will be responsible not only for cutting off service to scofflaws but also for reporting copyright crime to the criminal justice authorities); and

8. Teach the new copyright rules of the road to children throughout their years at school. [44]

These precepts, Samuelson points out, translate into several new kinds of restrictions. The right to browsing, sharing or making noncommercial copies of copyright material is rescinded, along with "first-sale" rights to dispose of a legitimately purchase copy of something; service providers are forced to troll clients' files in the pursuit of unlicensed material. Children are taught sharing is bad. "To ensure that future generations are broken of the habit of thinking that it's OK to share copies of copyrighted works with a friend, the White Paper offers examples of lessons about copyright…[t]he general theme of [which] …. would be, "Just say yes" to licensing."

Like Barlow and others, Samuelson counsels caution in designing legislation to cover the web. "It is far more important to get copyright legislation and treaties right than to act fast on a flawed proposal."[45] She makes the case that copyright law has not historically attempted to regulate private noncommercial activity, that it largely regulated industry-to-

[44] Ibid.

[45] Pamela Samuelson, "On Author's Rights in Cyberspace: Questioning the Need for New International Rules on Authors' Rights in Cyberspace?", *First Monday,* October 1996. http://mars3.gps.caltech.edu/libip1/Samuelson.html#author

industry relationships, that it made sense for policy making to be done by technicians. "[T] he longtime reliance on experts to formulate copyright policy has made them accustomed to consulting no one but themselves and affected industry groups….The only groups that have any sustained history of representing the interests of users in copyright policymaking have been library groups….." And adds, that proposals for TPMs and digital right management, are likely to impede invention. In the light of the copyright wars, Samuelson warns:

> The public is more likely to respect an expanded scope of rights for authors in cyberspace if representatives of user interests have participated in negotiations about an expansion of those rights and have been persuaded that the expansion is in the public interest. Without widespread pubic acceptance for a broader scope of rights, it will be difficult, if not impossible, to enforce those rights without costly and intrusive efforts.

Basically, Samuelson is suggesting that the social consensus around copyright has been fractured. As part of her defence of the public domain, she denounces the invasion of the private sphere by copyright owners and advocates the rights of users. As for creators, "The biggest challenge that cyberspace poses for authors and publishers is not how to strengthen copyright law, but how to reinvent their business models so that they figure out how to provide content that will interest potential customers on terms that these customers find acceptable."

Jessica Litman's criticisms of the White Paper on copyright are similar to Samuelson's. She talks about the lack of balance, and the need for a movement to counter-balance the existing accommodation of interests, and insist that "that the benefits of the new technology should not be arrogated solely to publishers".[46] She writes about the concept of a user's bill of rights, and latterly, about the court battles of the music industry, parsing the politics and legal language. In a speech given in Toronto in 2000 called The Demonization of Piracy[47], she notes that piracy has ceased to refer to the illicit manufacture of knock-off copies for sale into a traditional market and has come to be understood as any unauthorized use. In 2001, she published *Digital Copyright*,[48] a book in which she rejects the reproduction right that is central to the current law on the grounds that digital information cannot be used without making copies, but because of this, copies are no longer a way to distinguish activities copyright owners should expect to control (as opposed to those they shouldn't). And, Litman points out, copyright no longer focuses on incentives, "it concerns itself obsessively with issues of control".

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[46] Jessica Litman, "Innovations and the Information Environment: Revising Copyright Law for the Information Age", Or. L. Rev. 19 (1996).

[47] Jessica Litman, "The Demonization of Piracy", CFP 2000: Challenging the Assumptions, Tenth Conference on Computers, Freedom and Privacy, Toronto, April 6, 2000. http://www.law.wayne.edu/litman/papers/demon.pdf.

[48] Jessica Litman, "Digital Copyright", (Amherst, NY: Prometheus Books, 2001).

A historian of American copyright law, she describes its evolution from one "designed to ensure the enhancement of the public domain to one designed to support the indefinite proprietary treatment of articulated thought."[49] She notes the extension of copyright over the last century from 14 to 95 years (for corporations) and the evolution of "the predominant metaphor for copyright from the notion of a *quid pro quo*… [to] a bargain in which the public granted limited exclusive rights to authors as a means to advance the public interest. The model was about compensation: it focused on the copyright as a way to permit authors to make enough money from the works they created that they would be able to make the works available to the public." And finally, from the idea of the bargain to a system of incentives, which is not rooted in compensation, but in the effort to promote production of "more works of authorship".[50]

Litman characterizes the history of US legislation as a private deal resulting from "multilateral bargaining among affected stakeholders" and calls attention to those whose interests are not-represented. (While libraries and educators are there, the general public is not.) "[T]he group most drastically affected by the application of copyright law to the new digital technology is neither the publishers and their friends, nor the librarians and their friends, but individual users making noncommercial, consumptive use of copyrighted works from their homes and offices." She continues, "Just as digital technology promises and threatens to permit any member of the public to act as her own publishers, it also promises and threatens to subject every member of the pubic to the provisions of a copyright law that was drafted by copyright lawyers with no attention to the question of whether it could make sense to the public at large."[51] Her contention is that it doesn't make sense, and that the law, and changes to it, have to be reconsidered with these new paradigms in mind.

Litman's take on TPMs is that their use makes the public's access to ideas and information "contingent on the copyright holders' marketing plans and puts the ability of consumers to engage in the legal uses of the material in those texts within the copyright holder's unconstrained discretion. In essence, that's an exclusive right to use." Like Barlow and Samuelson, she assumes that cultural creation will happen no matter what the economics, and though she pays some attention to the impact of TPMs on innovation, she does not purse the investigation into the arts.

Esther Dyson**,** an entrepreneurial, high-tech industry analyst who is regularly described as "the most powerful woman in the Net-erati", is another critic associated with Copyleft in the US. In 1993, a profile in *Wired* described her extraordinary reputation thus: "People want to talk to Esther – because she is Esther. In the world she travels in, she is one of those women, like Martina in tennis, or Hilary in politics, who need only be identified by

[49] Jessica Litman, "Sharing and Stealing", 26 COMM/ENT No. ¾, 2004. http://www.law.wayne.edu.litman/papers/sharingandstealing.pdf

[50] Supra note 47.

[51] Jessica Litman, "New Copyright Paradigms", in Laura A. Gassaway, *Growing Pains* 63 (1997). http://www.law.wayne.edu/litman/papers/paradigm/htm

her first name."[52] Dyson has written two books, the best known being *Release 2.0 – A design for Living in the Digital Age*[53] published in 1997, but she is mainly known for her exclusive newsletter, *Release 1.0* and her compelling public appearances. Dyson is, in fact, the embodiment of the business model she promotes. She can be found at *edventure.com* where her activities and appearances are chronicled, and her ideas highlighted. A dealer in intellectual property, she sells both services (private advice) and performance (as a keynote speaker).

Dyson's seminal article modestly titled, "Intellectual Property on the Net"[54] which appeared in 1995, is an apologia for Open Source and (almost) open content. In essence, she takes the John Perry Barlow model and gives it theoretical flesh. In a world where "content-based value" will be created on the net by providing such things as selection, the presence of other people, the assurance of authenticity, "creativity will proliferate, but quality will be scarce, and hard to recognize. Creators will have to fight to attract attention, and to get paid." She elaborates, "We are not saying that content is worthless, or that you can get it for free. What we are saying is that content providers should manage their businesses as if it were free, and then figure out how to set up relationships or develop ancillary products and services that cover the costs of developing content. The creator who writes off the costs of developing content immediately - as if it were valueless – is always going to win over the creator who can't figure out how to cover those costs. Other players may simply try their hands at creative endeavors based on service, not content assets: filtering content, hosting online forums, rating others' content, custom programming or performing."

Further on, "Frustratingly to creators of content, the value of their work doesn't generally get recognized without broad distribution. This means that any artists or creator must somehow attract broad attention to attract huge payment for copies - which somehow means you give the first performances, books or whatever away in hopes of recouping with subsequent works. But that very breadth of distribution lessens the creator's control. In principle, it should be possible to control and charge for such works, but it will become more and more difficult. People want to pay only for that which is scarce – a personal performance or a custom application, for example, or some tangible manifestation which can't be easily reproduced (by nature or by fiat; that's why we have numbered lithographs, for example.) The trick is to control not the copies but a relationship with the customer - a subscription."

Dyson's news for artists is not enigmatic. "In entertainment and art, there will be unique content, but pricing as a whole will trend downwards as more and more creators compete

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[52] Pauline Borsook, "Profile on Esther Dyson" *Wired* 1.05, May 1993. www.wired.com/wired/archive.people/esther_dyson/

[53] Esther Dyson, "Release 2.0 – A Design for Living in the Digital Age" (Broadway Books, 1997). www.edventure.com

[54] Esther Dyson, "Intellectual Property on the Net", *Release 1.0*, December 28, 1994. www.eff.org/Misc/Publications/Esther_Dyson/ip_on_the_net_article

for attention using low-cost, easy-to-use production tools. More artists will find their audiences within their local communities – geographical or net-based – rather than hit the big time. Local barriers to entry will be low, but global competition will be strong. There's the odd movie star or work of art for which no substitute is acceptable, but most entertainment is a way of spending time - not a unique experience."

The media industries, Dyson allows, have somewhat different economics than most. Here "payments to creators are likely to come not from the viewers, readers or listeners, but from companies who will use the content as – or to deliver – advertising." And here, is the key. Dyson maintains that the important question is not whether it is fair to charge someone for something that can be delivered with no incremental cost, but "how we should allocate the cost of developing that value among the people who benefit from it?" This includes the question of how artists cover their costs and fund their habit. Dyson contends that creativity will return to being prerogative of private patrons. "In essence advertisers will sponsor lives and online forum hosts rather than content. Creators and performers will be under contract - the best ones at high prices, since they will be free to negotiate for the highest bid. Just as prominent patrons such as the Medici sponsored artists in the Renaissance, corporations and the odd rich person will sponsor artists and entertainers in the new era. The Medici presumably had the pleasure of seeing or listening to their beneficiaries and sharing access to them with their friends. This won them renown and attention as well as a certain amount (we hope) of sheer pleasure at the art."

In a section entitled "Low price-content drives out high-priced", Dyson finally speaks directly to creators. "Creators worry that they won't be paid and creative effort may be discouraged. The free-content market certainly will discourage redundant effort, since the wheel won't need to be reinvented. The free-content market might also discourage a lot of current marketing designed to draw attention to content. Why market a book that's free? It should 'sell' by itself, drawing attention to the author or not at all. There's no external reason to sell it, so poor novels won't be foisted on the public, and good ones may find their audience by themselves – or through the efforts of filter agents who get rewarded for finding (not creating) good content. The novelist, then, will be rewarded by fees for his performances, or perhaps by finding sponsors for his next works. He may write serials and find people who will pay for is continuing service."

THE COMMENTATORS: 2000 AND BEYOND

While thinkers like Lawrence Lessig and John Perry Barlow continue to write, analyse and conceptualize, they have been joined in the agora by a plethora of theorists, idealists, and thinkers, active in many fields and endeavors, who weigh in with their opinions on copyright on a regular basis.

In Canada, ***Michael Geist,*** a law professor at the University of Ottawa and the Canada Research Chair in Internet and E-Commerce Law, has become a leading voice in the debate, from his perch, his column "Law Bytes", in the *Toronto Star*. He is a hero to indie musicians who consider all recording companies the enemy and Geist the lone voice speaking out against their control, and to independent software creators for the same reasons. In his columns he raises concern about the invasion of privacy by technology, and

has opposed a change of law to give photographers first rights in their work in part because of this. He is a champion of users' rights, and an outspoken opponent of TPMs. "Canada does not need protection for technological protection measures. In order to maintain personal privacy, a vibrant security research community, a competitive marketplace, and a fair copyright balance, we need protection *from* them." He speaks about balance, or more precisely imbalance: "policymakers and politicians….have already used legislative intervention to establish many rights and protections that have tilted the copyright balance heavily toward creators at the expense of users."[55] Creators, whether as individual artists or stand-ins for the cultural industries, are identified as part of the problem. While he speaks in specifics about industry groups and their representatives, he generally characterizes the battle as one between "users and creators".

Geist represents a second generation of analyst academics who have joined the fray, and are taking an active and public interest in copyright reform. This new generation includes hybrids like ***Laura Murray*** in Canada, and ***Kembrew McLeod*** in the United States. Both reflect the new multi-media, multi-purpose approach to post-modern intellectual work. Murray is a professor of English Literature at Queen's University, who has taken an interest in copyright law as an educator, writer and musician. She writes scholarly articles, gives media interviews, and operates a website called faircopyright.ca. Mcleod, an artist, music critic and associate professor in the department of Communications Studies at the University of Iowa made a name for himself as a graduate student by successfully trade marking the term "Freedom of Expression". The hoax turned into his first book, *Owning Culture: Authorship, Ownership and Intellectual Property Law,*[56] which is a far-ranging, left analysis of the effect of intellectual property law in the global commercial context. In it, McLeod looks at the cultural industries (the music industry particularly) and evaluates the ways in which western IP law recognizes only highly circumscribed sets of productive relationships, characteristically those that privilege individuals over collective notions of creativity and institutionalized processes of cultural production over less formal ones. In a departure from other Copyleftist texts, he explores the ethno-centrism of IP regimes which "produce conceptual and legal categories that exclude from patent protection the contributions and knowledges [sic] of local communities, farmers and indigenous peoples."[57] His second book, the lead item on his website, *Freedom of Expression ®: Overzealous Copyright Bozo and Other Enemies of Creativity* [58] takes his arguments further into the issues of downloading and the rampant privatization of culture .

Like many, Murray and McLeod arrived at their activism through personal experience in music, and like many of their generation have been affected by the battle over

[55] Michael Geist, "Law Bytes", *Toronto Star*, February 21, 2005.

[56] Kembrew McLeod, "Owning Culture: Authorship, Ownership and Intellectual Property Law" (Peter Lang, 2001)

[57] Ibid., p. 159.

[58] Kembrew McLeod, "Freedom of Expression ®: Overzealous Copyright Bozos and other Enemies of Creativity" (Doubleday/Random House, 2005).

downloading which has seen recording companies suing fans in the attempt to curb file sharing. Public resistance in this case can be understood to be a consumer revolt in some measure, pitched against a business model that would disallow selection, sampling, and mixing, except under license. On another level, it is also a rejection by artists of the control exerted by record labels, large and small, on the careers of artists. The phenomenon has already proven that the Internet can be an extremely effective route to new audiences, a route, which allows independent cultural production to take place outside traditional channels and editorial control.

In Canada, university commentators like Laura Murray and Michael Geist appear as "experts" in the public debate, although neither of them has produced a book-length study. Murray has authored a piece on the subject of current copyright reform published in *First Monday* in 2004 that addresses the major issue consuming the attention of her community, namely the educational use of material from the Internet, and the proposal for an education exception. She takes a critical look at fair dealing as an alternative.[59] Geist who has been on the scene for several years is a well-established voice. His ideas are mainly showcased in his "Law Bytes" columns and on his website. (Recently, these have been the subject of a forty-page rebuttal by ***Barry B. Sookman*****,** partner at McCarthy Tétrault LLP and head of its Internet and E-commerce Law Group.[60]) There is, in fact, a growing literature on the Internet coming not only from law professors, consultants and economists, but from journalists, researchers and students in fields like communications and cultural theory, political science, and most important, from creators, in this case particularly software creators. The material provides context and a history, which is to say different prisms for viewing and understanding copyright in the virtual world. Marxist interpretations take note of the commodification of information; and the paradox in the situation where cultural expression is been privatized ("locked up" as the current saying goes) at the same time as individual privacy is being invaded by smart technologies; copyright has become part of everyday life. So, for example, the play of lights over Niagara Falls at night belongs to Disney Corp, which apparently means anyone wishing to video the Falls at night now has first to get clearance.

As Johan Söderberg explains in his article, "Copyleft vs. Copyright",[61] Open Source built a parallel economy that actually outperforms the market economy; both have developed a system of licensing, supporting a proprietary regime on the one hand, and a communal one on the other. No apologist for Hollywood much less AOL/Time Warner, Söderberg writes:

> What reformist critics of copyright like Pamela Samuelson miss is that the sectors troubled by unauthorized copying are not entrenched, 'Second Wave' dinosaurs. On the contrary, the contradiction of intellectual property strikes at the heart

[59] Laura Murray, "Protecting Ourselves to Death: Canada, Copyright and the Internet" *First Monday*, 9.10. www.firstmonday.org/issues/issue9_10/murray/index.html

[60] Barry Sookman, "TPMs': A Perfect Storm: Replies to Professor Geist". www.mccarthy.ca/search/pub/publications.asp?pub_code=1845

[61] Johan Söderberg, "Copyleft vs. Copyright: A Marxist Critique", *First Monday,* 7.03, 2002. www.firstmonday.org/issues.issue7_3/soderberg/index.html

> of the 'Third Wave' economy, whether it is multimedia entertainment, software producers, biomedical conglomerates or other industries based on cutting-edge science. To put it in a catchphrase, we are not witnessing a death struggle but preparations for birth.

The scenario, he suggests, may not be the collapse of capitalism, but of capitalism retooling.

COPYLEFT AND COPYRIGHT LAW

The Copyleft view is typically accompanied by a critique of the monopoly of media/entertainment industry, and the restrictions it exercises on public access to cultural artifacts via the so-called "copyright system". The issue of the Public Domain is central, and discussed in terms of the public interest and basic human rights and freedoms. Bob Young, Open Source entrepreneur and former owner of the highly successful Open Source software company RedHat put $15 million into a foundation to address the issue.[62] Laura Murray, in "Protecting ourselves to Death," likewise defends a concept of fair dealing that in essence includes the notion of a commons, perhaps a (de)limited commons, where informal community sharing, word-of-mouth discussion, all that human activity and interaction which translates objects and expressions into culture, occurs.[63] This, according to Copyleftists, would be brought under the purview of copyright by technology and the Internet. The assumption seems to be that the nature of the activity remains unchanged (the medium in this case, not being the message); however, it may well might not. This is so not only because transmission entails copying, but also because the small circles of friends can now translate into networks of tens, and thousands.

Some Copyleft proponents call for abandonment of copyright entirely; most concede it has its purpose, maintaining that this has been perverted. Moral rights are sometime mentioned in this connection. Independent software creators, for example, will say they "live on their moral rights", explaining that the obligation to identify the author of a work is why the model of giving music/software away *gratis* works as a way of selling their services. The copy of a poem or song is the loss-leader or advertisement for commissions or appearances. The main thrust of the argument, however, can be understood as the attempt to carve out a publicly controlled, commercial-free, commons. At the same time, creators/artists (who work both sides of the street being creators of copyright material as well as users of others' work, their own work depending absolutely on this exchange) [note that they are being joined by bands of enthusiasts and amateurs.] are of mixed mind when it comes to the Internet and the issues like downloading. SOCAN and the Song Writers Association of Canada did not support CRIA's bid to sue downloaders, for example. Moreover, most artists understand the advent of digitization and the Internet as a means of self publishing and of publicizing their work, of by-passing producers

[62]The organization that was started by Bob Young is the Center for the Public Domain. www.centerforthepublicdomain.org

[63] Supra note 59.

(publishers, directors, curators etc.) in the quest for an audience, as well as a way to do research and to interact with readers and audiences. The Internet is by no means a tragedy, or a debilitation of creativity. But it has brought new pressures to bear on creators' rights, and places a premium on redefining the public interest in the exchange.

Another argument often made by Copyleftists in support of "free culture", concerns the idea of originality. Says Murray, "Creators do not create from nothing. They borrow from peers and previous generations - through fair dealing, permission, or the public domain; they create; they have a limited monopoly to reward their talent and effort; and then that material becomes free again for later generations of creators. Cultural markets depend on non-market creativity, which generates new ideas and revisits old."[64] She makes the important observation that the marketing of creators can only happen if the content is taken up by the culture. Expression seeks an audience, books become literature when people read them and talk about it. Or as dub poet Lillian Allen has phrased it "there is no art without culture and no culture without community".[65] The point is, that art doesn't happen in a vacuum. And, in fact, no serious artist is likely take issue with the idea that creation is the sum of its past. Art history has traditionally been written on this presumption, and it is why, for example, when the Writers' Union of Canada crafted a statement on cultural appropriation in 1992, it began with an acknowledgement of this essential ingredient of art and culture and proceeded to grapple with the practice of "misappropriation".[66] The point about originality, however, is typically raised in defense of Open Source approaches to research and development policy, and in reference to situations where traditional disposition of intellectual property law has inhibited invention (mainly in connection with software, though there are stories from other eras and media as well).[67] It is also used to make the case for the Public Domain.

The response of Barry B. Sookman to Michael Geist (and indirectly to the positions espoused by education sector lobbyists like Laura Murray) is instructive, if only because he goes back to the original purpose of copyright. Quoting Justice McLachlin of the Supreme Court of Canada in *Bishop v. Stevens*,[68] he reminds us that the Canadian Copyright Act "was passed with a single object, namely, the benefit of authors of all kinds." He further interprets the Supreme Courts reference in the *Tariff 22*[69] ruling "to not permitting acts to be done 'unfairly at the expense' of rights holders [a]s an acknowledgement of the longstanding principle… that a key purpose of copyright is to reward authors and protect property arising from the intellectual efforts of authors."[70]

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[64] Ibid.

[65] Lillian Allen, *First Steps on the Road to Cultural and Racial Equity*, Toronto, Ontario Ministry of Culture and Communications, 1992.

[66] The Writers' Union of Canada, "Statement on Cultural Appropriation" (1992).

[67] Supra. Note 26

[68] [1990] 2 S.C.R. 467.

[69] [2004] 2 S.C.R. 427.

[70] Supra note 60.

Sookman's rebuttal mainly focuses on the issue of TPMs, but, he continually points out absence of creators in Geist's purview even while noting that Geist fingers creators as the culprits in producing the imbalance problem. [see above quote] "Somehow the goal of protecting property has been de-emphasized in favour of creating a 'public domain'; the goal of rewarding authors has been subjugated to 'fair dealing'; and the notion of exclusive rights has been eclipsed by 'user rights'." Sookman's main point is that the balance Geist is promoting ignores the perspective of creators and that fails to take into account a large enough picture not only to identify the public interest in these issues, but actually to define and defend it. "My argument is that any such singular focus is fundamentally flawed. It misses the critical reality that the public interest in the creation and dissemination of works is serves by protecting TPMs. To have a vibrant public domain and works that can be used for fair dealing purposes, there must be adequate incentives for works to be created in the first instance."[71]

CREATORS AND THE OPEN SOURCE/COPYLEFT VISION

For the most part, Copyleft proponents do not talk about creativity; few even refer to the original *quid pro quo* of copyright. If artists are mentioned, it is usually for the purpose of furthering the debate about 'balance' and/or devaluing their interests. Most Canadian Copyleftist critics see the issues in terms of imbalance, where the critical absence at the reform table is not creators, but consumers or users. Only the courts, specifically the Supreme Court of Canada, are said to give voice to the rights of the general public. As Laura Murray states. "..[T]he courts are almost alone in Canada in articulating the idea of balance and flexibility of use and access."[72] (Murray then quotes the musings of Justice Binnie in the *Théberge*[73] on the inefficiency of overcompensating artists, and excessive control by holders of copyright after first sale.) Murray also discounts the notion that moral rights are in any way affected by interlibrary loan exceptions stating that "Licensing solutions may benefit some creators, but licensing by its nature reduces creators' ability to control the use of their work. The concern about moral rights serves as part of the government's rationale for what can be described as a tax on education." She suspects creators of raising the issue "strategically rather than sincerely", and apparently dismisses the effect of a legal precedent. For example, the exemption for individuals with perceptual disabilities allows the making of talking books without permission, and, it has been assumed, without the necessity of informing the writers.[74] (While publishers generally have the final say on jacket cover and copy, authors are nevertheless consulted as a rule. In fact, digitization has increased the participation of writers in the process.) However, the

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[71] Ibid.

[72] Supra note 59.

[73] [2002] 2 S.C.R. 336.

[74] John Lorinc, Creators and Copyright, *Lorinc/Beulieu Report* for the Creators Copyright Coalition, March 2005.

exemption and exceptions generally, have led to the widespread notion that exceptions exempt all rights. As a result, there is no protocol for informing authors, and no respect for the issues arising from their moral rights such that a user producing a major project such as a talking book (which actually creates a copyright in the new rendition, owned by someone other than the original author, whose work is a recording of the original authors work) would normally consult with the author.

The main thrust of the Copyleft debate has been the demand that the Internet not be turned over to e-commerce, and that a public commons with some rules be allowed to thrive where the "ordinary" currency between and among individuals in cyberspace is left outside of formal copyright regimes. The role of creators is presented mainly in terms of a new business model, the one popularized by J.P Barlow and success stories like Bob Young's RedHat, which defy the convention that says you can't make money giving stuff away for free.

"The free proliferation of expression does not decrease its commercial value. Free access *increases* it, and should be encouraged rather than stymied," writes Barlow. "For ideas, fame *is* fortune. And nothing makes you famous faster than an audience willing to distribute your work for free."[75] Returning to his original text on the economy of ideas, Barlow expounds on the philosophy behind it. "Let me state a creed: Art is a service, not a product. Created beauty is a relationship, and a relationship with the Holy at that. Reducing such work to 'content' is like praying in swear words. End of sermon. Back to business."[76] It is the relationship that should provide the basis for remunerating artists, he says, not the fixed form of creative expression which is the book, the painting or the CD. His approach remains radically critical of the basic concepts of copyright. Whether or not they subscribe to the full ideology, many artists agree with the analysis and have taken up Barlow's challenge; scores of young musicians are using the Internet to distribute their work, as are writers, photographers, visual artists and others. Not all below the age of 30 either. (Visual artist Doris McCarthy, 94, has had a website and virtual gallery for four years.[77]) Still, the model is not easily or obviously transferable to all media, genres or artistic practices. Thus it is not at all clear where and how it relates to the much larger issue of how a society provides for the creation of art and culture. There is no question, though, that it involves departing from traditional systems of marketing. For one thing, it reverses the usual arrangement so that the old adage about the true function of the author's book tour being "see the body, buy the book" becomes a strategy of "see the book, buy the body."

Nonetheless, and despite the promise of the Internet, there is something strangely reminiscent about the concepts that artists should allow the free exhibition of their work as a way of advertising. This was the argument used in the 1980s by libraries in opposition to the introduction of the Public Lending Right, and by museums and public art galleries both

[75] Supra note 10.

[76] Supra note 9.

[77] www.dorismccarthy.com

against the payment of an exhibition fees to visual artists and to the exhibition right eventually enshrined in the Copyright Act in 1988. Artists were admonished that the library and the art gallery were public institutions serving a public good, and that artists should be content to permit their work to be used in return for the exposure.[78]

Likewise, the proposal that a technology has arrived and will introduce new ways of doing things, which, of necessity, will redefine artists' work, smacks of technological determinism, a conundrum that has bedeviled Canadian cultural policy for six decades. The Canadian cultural industries and Canadian cultural policy, despite sometimes noble attempts, have failed to find a means of returning reasonable revenues to creators such that they can continue to create. Like the Copyright Act itself, cultural policy has succeeded in constructing extremely competent and successful cultural industries and employment for thousands of individuals (including artists at their day-jobs), but only imperfectly, fitfully, and at appallingly low rates, remunerates creators.

If the Copyleft critique has failed so far to address the crux of copyright, and has avoided including fundamental questions about the political economy of creation, which is to say the status of the artist and the health of creativity, its ideas are nonetheless critical and timely. And they point to the incontrovertible importance of both the public domain and fair dealing to everyone, but particularly to creators.

III THE CREATIVE COMMONS LICENCE

EVOLUTION OF THE CREATIVE COMMONS

If Public Domain can be considered a container, then the Commons represents its content of inexhaustible resources, jointly held and accessible without permission. Open Content is a philosophical context in which Creative Commons develops its menu of licenses, a set of legal provisions that allows anyone to use certain works without specific permissions or royalties.[79]

Andrea Ciffiolilli, PhD Candidate, Department of Economics, Universita Politecnica delle Marche, Ancona, Italy.

[78] Supra note 74. This brought the response from artist John B. Boyle, "Hey, this is Canada. People die from exposure."

[79] Andrea Ciffolilli, "The Economics of Open Source Hijacking and the Declining Quality of Digital Information Resources: A Case for Copyleft", First Monday 9.9, www.firstmonday.org/issues/issue9_9/ciffolilli/index.html

Call it the Commons,[80] the Knowledge Commons,[81] or the Global Commons,[82] the right of 'common' has been recognized in law since the Renaissance.

Though the term Commons has been used historically in relation to communal property and in relation to the environment, it is increasingly becoming a term of reference used to describe endangered public resources, including knowledge and the arts. The overarching idea in a common property regime is that the property in question is owned by a defined community, and is managed in accordance with long term goals for the general benefit of the entire community. Most common property regimes are very careful about the commodification of resources, for fear it would lead to the depletion of the resource or the creation of social inequality.[83]

Carol Rose, a professor of Law and Organization at Yale University, has spent a great deal of scholarly time examining the social features that are beneficial to the creation of a common property regime.

> Nevertheless, issues concerning the global commons pose a particular challenge to the social optimism of the CPR ("Common Property Regime") literature: however effective CPRs might be for small-scale resources, they could be entirely ineffectual on a large scale. A new literature on social norms seems to be converging on the view that while community regimes for managing common property are not at all unusual, such regimes are very likely to develop only under certain favorable conditions. These circumstances can be predicted from transaction cost analysis. Critically important are opportunities for mutual monitoring and social leverage; small group size helps to produce these opportunities, as do pre-existing familial and social relations. Robert Ellickson, a leading figure in the new norm literature, predicts that norms are likely to emerge to overcome collective action problems in what he calls "close-knit groups" but he is agnostic about whether this can occur on a larger scale or among strangers.[84]

[80] Supra note 12

[81] Christopher May, "Digital Rights Management and the Breakdown of Social Norms" First Monday 8.11, www.firstmonday.org/issues/issues8_11/may/index.html

[82] Carol Rose, "Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old Fashioned Common Property Regimes", 11 Duke Envtl. L. & Pol'y F. 45

[83] Supra note 15.

[84] Ibid.

Given the perceived barriers related to the size of the global creative community, one must ask the question 'Does the Creative Commons present the remedy, or is it simply not going to fit all creative models?' This question will remain unanswered for a period of time, though the immediate success of the Creative Commons model is indicative of its appeal.

The minds behind the Creative Commons have taken inspiration from historical concepts of the Commons, the Public Domain, Open Source and Copyleft in shaping the Creative Commons. A commons, which they argue, will not fall victim to the tragedy of the commons due to the unconsumable nature of the information.

The Creative Commons and the Creative Commons Licence are the brain child of Lawrence Lessig, Stanford University Professor, author, blogger and "Internet guru". Ideally, Lessig and his fellow advocates see it as the commons that would hold all forms of creative property in common for the benefit and use by all. They see the Creative Commons option as one that creates a middle road between the "All Rights Reserved" standard copyright disclaimer and a "No Rights Reserved" surrender to the public domain, and addresses the concerns that are raised by this dichotomy.

> Too often the debate over creative control tends to the extremes. At one pole is a vision of total control — a world in which every last use of a work is regulated and in which "**all rights reserved**" is the norm. At the other end is anarchy — a world in which creators enjoy a wide range of freedom but are left vulnerable to exploitation. Balance, compromise, and moderation — once the driving forces of a copyright system that valued innovation and protection equally — have become endangered species.[85]

The Creative Commons Licence provides the creator with control their rights and gives them the opportunity to create a "Some Rights Reserved" licence that can be tailored to the creators' specific needs and desires.

The Creative Commons Licence takes its inspiration from the original Open Source and FLOSS communities. The menu-style licensing strategy, wherein rights holders pick and choose the rights they would like to licence, is derived from the FLOSS model. The concept is further based on principles that are expressed in the idea of the Public Domain, but also in the Open Source movement, and the debates of the Cultural Commons and other Open Content public interest groups.

It is a repeated theme among the founders of the Creative Commons that the future greatness of any society is dependent on the ability of its creators to stand on the shoulders of the giants of the past. This observation about the nature of human creativity often frames arguments in favour of the Creative Commons licence which are directed at the issue of access, as it relates to end users and other creators. Not only to the 'Commoners' believe in the expansion of the Public Domain, they also believe that once artists become

[85] Supra note 4.

aware of the objective of the Commons many will choose to turn their works over to the public, or to exercise only some, but not all, of the rights available to them under the law.

> The purpose of all of this [Creative Commons] was to demonstrate that you could give up control over part of your rights and encourage lots of creativity on top of it without necessarily giving up the right to make money from the underlying content that's being sampled. / The sampling licence in its pure form says, you can sample me, you can sample me for commercial purposes, but you cannot copy my underlying song and distribute that for either commercial or non-commercial purpose.[86]

THE CREATIVE COMMONS LICENCE

A creature of the twenty-first century, the Creative Commons regime was introduced in the United States in the Spring of 2003 and is rapidly expanding to other jurisdictions. Versions of the Creative Commons Licence are already available in Canada, Australia, Austria, Belgium, Brazil, Finland, France, Germany, Japan, the Netherlands and Taiwan. Working with various global agencies, its founders are pushing for the introduction of the licence in Chile, China Croatia, Ireland, Israel, Italy, Jordan, South Africa, Sweden, Switzerland and the United Kingdom.

Though the Creative Commons licence, is the most common version of a commons licence, it is not the only version currently employed. Art Libre, an organization operating primarily out of France has launched a commons licence under its 'Free Art' label. Though the labeling is different, the impetus behind the licence is similar.

Generally, the rights that can be controlled under the Creative Commons licence include:

a) Attribution: Allows others to copy, distribute, display and perform a copyright protected work, or a derivative work based on it, but only if they give the initial creator credit.
b) Noncommercial: Allows others to copy, distribute, display and perform a copyright protected work, or a derivative work based on it, but only for noncommercial purposes.
c) No Derivative Works: Allows others to copy, distributes, display and perform verbatim copies of a copyright protected work, but not a derivative work based on it.
d) Share Alike: Allows other to distribute derivative works only under a licence that is identical to a licence that governs the original work.

The influence of Copyleft in the Creative Commons regime is seen in the Share Alike aspect of the licence, or the aspect of the licence that calls for reciprocal licensing under

[86] Richard Koman "Remixing Culture: An Interview with Lawrence Lessig", February 24, 2005. www.oreillynet.com/lpt/a/5666

identical terms of the parent licence. A Share Alike Creative Commons licence implicitly authorizes the production of derivative works. A licence cannot include both Share Alike and No Derivative Works options. The most commonly employed version of the Creative Commons licence is the "Attribution-Noncommercial-Share Alike" licence.[87] There remains space within the Creative Commons regime for the commercial exploitation of work, whether this is achieved through individual licences or alternative collective licensing regimes.

With the Creative Commons Canada licence, there are six possible licences, each of which reserves a different subset of copyright(s). The appropriate licence is generated on a creator's response to the following two questions:

A. Do you want to restrict commercial uses of your work, i.e. permit others to copy, distribute, display and perform the work and derivative works based upon it only for non-commercial purposes?
B. Do you want to allow modifications of your work?
    i. Yes, i.e. permit others to create derivative works
    ii. Yes, as long as the other works are share alike, i.e. permit others to distribute derivative works only under a licence identical to the licence that governs your work.
    iii. No. i.e. permit others to copy, distribute, display and perform only verbatim copies of the work, not derivative works based upon it.

Once a creator has selected the appropriate Creative Commons Canada licence variant for his or her digital work, the licence generator will output three different formats of the licence, each with its own specialized function.[88]

Regardless of the form of Creative Commons Licence that is selected, the licence has standard terms that specify it applies worldwide, lasts for the duration of the work's copyright, and is non-revocable.

The Canadian Creative Commons licence varies slightly from other international models as the licence terms needed to be adapted from the American model to specifically include the concept of creator moral rights. Pursuant to the terms of the licence the creator moral right of attribution is retained, but, in all versions of the licence the right to integrity of the work is expressly waived.

SUPPORTING THE REMIX CULTURE

The impacts of a strong counter culture have been critical in the development of the Creative Commons licence. The primary parties who were considered in the development of the licence were creators, both in their creator and user capacities, and end users of creative information who benefit from a healthy and vibrant Public Domain.

[87] http://creativecommons.org/about/licenses/
[88] www.icommons.ca

Particular consideration was given to the need for a strong "Remix Culture", defined by Lessig as a diverse outpouring of creativity particularly in forms such as documentary film makers and music sampling, which are based on multi-media and compilation. The appeal of the Creative Commons has been heightened by recent news stories about the plight of film makers trying to clear the rights to old film clips, lyrics, corporate logos and such, and of culturally important films forced out of distribution because the term of licence on "Happy Birthday" had expired.

The advent of Napster and the second-generation Peer-to-Peer stacks led to an unprecedented upheaval in the music industry, as these programs are seen as tools that facilitate mass infringement. However, Lessig and others in the academic world support P2P for the "Remix Culture" benefits.

> Now I don't personally support the idea of people using peer-to-peer technologies to commit acts that are considered illegal. So I am not interested in peer-to-peer surviving for the purposes of enabling copyright infringement. But I am really eager that the technology be allowed to exist so that the many legal uses that it will encourage – including uses that will support the remix culture – will be able to take off.[89]

The potential advantages of a P2P system are also advocated by Neil Leyton, an indie musician and founder of the independent music label Fading Ways. This label has released a number of "Sample" CD's under Creative Commons licence. The general perception advocated by Leyton and other independent artists is that P2P, the Internet and the Creative Commons open marketing and creative tools that had previously been inaccessible to most artists.

POSITION OF THE CREATOR

There is a cogent belief in the Creative Commons culture of providing due respect to both the creator and the user, while achieving a "balance" which is seen by many as critical to the modern evolution of copyright. However, as in all balance equations, there are, presumably, benefits and burdens that must be assumed by each party.

> Both sides of the copyright bargain deserve respect. Copyright imposes responsibilities as well as rights upon both authors and the public. It is simply not fair for one side to take all the benefit and accept none of the responsibility of the copyright bargain. This applies equally to authors and the public. The public must ensure that authors are economically rewarded for their creative gifts, and authors must ensure

[89] Supra note 86.

> that the public is able to retain its rights and abilities to use and access creative expressions[90]

Generally, some creators have seen the licence as an empowering tool. It is their first opportunity to easily market their works in the manners they would desire, and therefore gives rise to the possibility of the implementation of extensive alternative marketing strategies. This perception was very evident in the comments of Gilberto Gil, Brazilan Culture Minister and Grammy award winning artist, when he addressed students a presentation at New York University on the eve of the launch of the Creative Commons Licence.

> This licence allows us musicians and composers to make it explicit to the world – in a manner intelligible to any legal system - that our work, or some of our works, may be samples in the creation of other artistic works, without the people who sample having to ask us permission or pay anything for the sounds sampled, even if they want to commercially release creations that use elements of our own creations …
> Copyright today has become an absolute restriction. In the Creative Commons model, which the Brazilian Ministry of Culture fully supports – as my show tomorrow at town hall will prove –you, as creator, have the possibility of liberating some rights to your creative work, or all of them, in addition to the possibility of managing the licenses you adopt. [91]

The commons approach has also been praised for its recognition and acceptance of the diversity among creators and creator groups. Proponents of the Creative Commons do not believe that all artists have the same interests, goals or motivations. They recognize that modern advances in the digital realm have helped some creators, by providing access to new markets and additional materials, while it has hindered some other creators through lost sales and Internet piracy.

> The overt claim is that copyright exists to protect the rights of "our" creators, who have been "shaken" by new technologies. The claim is at once an overstatement and an understatement. Some creators do stand to lose from unauthorized circulation of their work on the Internet, or unauthorized copying of it with new technologies. As harm is done to these individuals, they may be discouraged or prevented from developing new works from which many might benefit.[92]

[90] Robin Gross in Supra note 81.

[91] Supra note 2.

[92] Supra note 59.

However, within this discussion comes the recognition that the position of creators in the copyright debate cannot be presented as a uniform or consistent one. This recognition has also begun to take hold in the industry. As exemplified by the stance taken by Neil Leyton through Fading Ways:

> Fading ways would also like to take this opportunity to reiterate our position on this issue: Canadian artists are NOT monolithic in their opinions.[93]

Nor is it always appropriate to lump the interests of creators in with the interest of publishers and other right holders who may not share the interest in moral rights or the further development of the creative community. This observation was accurately presented by Laura Murray:

> Just as most copyright discussion positions creators and users on opposite sides of the battle, it tends to lump creators with other rightsholders (companies, heirs, assigns, collectives). This is a false geometry. Creators are not even merely a subset of the group "rightsholders" they are more accurately thought of as rightsholders and creators.[94]

One concept that has not been lost on the advocates of the Creative Commons is the need to ensure the remuneration of artists. Many artists seem indifferent to the source of remuneration and don't care whether it comes from licensing of the works, payment under alternative licensing regimes that facilitate commercial uses, or from additional sale generated under the alternative marketing strategies fostered under the Creative Commons licence.

> When copyright was started, it was to ensure that somebody who invents something or creates something benefits from that. But what is happening now is that people aren't benefiting from it at all. It's the corporations that are benefiting.[95]

The Creative Commons and other Internet tools are seen by many in the creative community as tools that allow creators to secure and control their own remuneration without interference from industry intermediaries who would take a cut of profits and eliminate these tools.

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[93] Fading Ways Press Release, www.digital-copyright.ca/discuss/4448

[94] Supra note 59.

[95] "Neil Leyton Speaks Out" , Soulshine Features http://soulshine.ca/features/featuresarticles.php?fid=83

POSITION OF COPYRIGHT LAW

The Creative Commons generally supports the existence of copyright law both within and outside the digital world. This comes in part from the recognition of the need for multiple strategies for the administration of rights systems, and the variant desires among creator groups.

> Certainly, it is in the public interest that works be protected; they represent human labour and resources that it would not make sense to waste. During copyright term, creators may be protectors of works; they can decide when, how and if to publish or sell and even after publication or sale they have a moral right to the integrity of their work, and can go to court to prevent it from being mutilated or altered. However, if moral rights are asserted to insulate published works from interaction with the world, protecting these rights may not protect the work itself.[96]

The copyright law has been the subject of criticism within the Creative Commons community for its prevailing "protection" rhetoric and the concern that the need for protection may, on occasion, be improperly focused on the copyright industries rather than the content creator. Protection rhetoric has also been criticized where there is a fear that certain works may be kept out of the market for an extended period under the auspices of protection.

> Cultural markets depend on non-market creativity, which generates new ideas and revisits old. Insofar as protection is a goal of copyright law and policy, it must apply to non-market cultural practices just as strongly as its does to market culture.[97]

Though there is generally support for the legal system, copyright law is seen as taking material out of the common pool.[98] Advocates of the Creative Commons would like to include as much material as possible in the common pool, and accordingly are opposed to any revisions the copyright law that would extend the term of protection of works or otherwise serve to keep works out of the commons.

This consistency in this position, as it applies to inheritance of rights, the application of Digital Rights Management tools, term extension and all other manner of copyright

[96] Supra note 59.

[97] Ibid.

[98] Ibid.

expansion can be seen by examining the comments of a divergent pool of copyright commentators.

Russell McOrmond, a FLOSS advocate and technology consultant, when commenting on inheritance rights and term extension has said:

> From my own experience I believe it is far more likely that my children are going to be creators and live off of their own creativity, not mine. My legacy should not only be beneficial for my own offspring, but the new generation of creators that will hopefully build on my creativity…. I see copyright as a balance not only of the rights of creators and their audiences, but also as a balance of the rights of past creators and future creators.[99]

There is also concern over the application of Digital Rights Management and how this may impact the ability of users to access works for where access is being sought for entirely lawful purposes. This is a concern that has been expressed by critics, such as David Bollier, [100] representatives of the greater library and academic communities,[101] and creators themselves. The concern over expansive corporate and legislated control is best articulated by Neil Leyton, under the auspices of his label Fading Ways:

> We are running the risk of authoring ONE exclusive cultural world at the expense of true art and cultural diversity. Ultimately, the very ability to create will disappear, once the monopoly of culture desired by CRIA et al. is achieved from a ridiculously strong copyright act, Digital rights management and technological protection measures.[102]

Perhaps the most consistent message that comes out of the Creative Commons is one that is framed by Lessig himself:

> The spiral will not end until governments recall a simple lesson: Monopolies are evil, even if they are a necessary evil. We rightfully grant the monopoly call copyright to inspire new creative work. But once that work has been

[99] Russell McOrmond "New Generation of Independent Creativity" April 20, 2004, www.flora.ca/creators/crean20040420.html

[100] Supra note 15.

[101] Fred von Lohmann, "Fair Use and Digital Rights Management" http://www.eff.org/IP/DRM/fair_use_and_drm.html ; Renato Iannella "Digital Rights Management in the Higher Education Sector", IPR Systems Pty Ltd., 2002; Karen Coyle "The Technology of Rights: Digital Rights Management", based on a talk given at the Library of Congress November 19, 2003.

[102] Supra note 93.

> created, there is no public justification for extending the term. The public has already paid. Term extension is just double billing. Any wealth it creates for copyright holders is swamped by the wealth the public loses in lower costs and wider access.[103]

Nowhere in this rhetoric is there a critique of the ability of a creator to freely enter into contract with a company or individual, and to freely negotiate the terms.

PRACTICAL APPLICATIONS

The practical applications of the Creative Commons regime are numerous and far-reaching. They are evidenced by the music of Gilberto Gil and other artists whose works have been released under the Creative Commons and by a growing acceptance of derivative works and a sampling culture.

The impact of the Creative Commons, and the industry doors that this opens, has been noted by alternative artists and traditional artists alike. The embrace of the Internet as a marketing tool in traditional arts sectors was described by Kip Cranna of the San Franscico Opera in an interview with Xeni Jardin, "We're counting on technology to save us, because it helps us reach larger audiences than we could accommodate in even the largest of opera houses and concert halls."[104]

Many artists have noted the implication of Internet marketing in terms of their ability to reach broader audience and increase sales. Artists have recognized that where works are given away, over P2P systems or under a Creative Commons licence, it can increase their marketability by exposing more people to their works.

> The free proliferation of expression does not decrease its commercial value. Free access increases it, and should be encouraged rather than stymied….All of these examples point to the same conclusion: Noncommercial distribution of information increases the sale of commercial information. Abundance breeds abundance.[105]

Further, the Internet, through P2P and Creative Commons licence, has provided a marketing tool to some artists who did not have access to traditional marketing models. This is evidenced by the comments of Janis Ian, who effectively breathed new life into her career through the implementation of creative Internet marketing strategies.

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[103] Lawrence Lessig, "They're not Worthy: Why extend the Copyright on Works that no Longer have Commercial Value?" *Wired*, 13.01 www.wired.com/wired/archive/13.01/view.html?pg=5

[104] Xeni Jardin, "Technology Gives Boost to Classical Music Groups", www.msnbc.msn.com/id/6124628/print/1/displaymode/1098

[105] Supra note 10.

> As for publicity, I found that traditional means, like the Tonight Show, Time and Newsweek, simply weren't working out as well for artists like me, because we were considered too old and not quite important enough. So I started to find other ways of promoting myself so as to keep in touch with fans.[106]

FUTURE ISSUES FOR THE COMMONS

Historically, there have been problems in communicating copyright policy and perspectives to the public. A number of commentators have cited language (jargon) barriers as the major impediments to community communications.

> The problem is, we do not really have our own language to get beyond the "property categories" of copyright law. We do not have our own sovereign discourse for asserting the value of free, un-metered exchanges of information….We do have the language of copyright law and the public domain. But I believe this language doesn't recognize how the sharing that goes on in a cultural commons – outside of the marketplace – is a powerful creative force in its own right.[107]

The goals of the Creative Commons for the future development of a full and healthy commons are admirable although they have not been the subject of discussion within the artistic communities. The Creative Commons Licence is not a solution for every artist, and not a complete solution for all who may wish to participate, but it does seem to provide them with the tools to manage their rights in a digital environment.

The founders of the Creative Commons are looking to the future and want to develop a large repository of Creative Commons licensed works in the form of an Intellectual Property Conservancy. The purpose of the Conservancy would be the protection of works of public value and importance, to ensure their integrity and wide spread availability. An Intellectual Property Conservancy developed by the Creative Commons would be founded upon principles of sharing, publication and creative interactivity.[108]

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[106] Dominick Miserandino "Janis Ian – Folk Singer/Songwriter", www.thecelebritycafe.com/interviews/janis_ian.html

[107] Supra note 16.

[108] http://creativecommons.org/about/legal/#ip

Susan Crean is a writer, editor and cultural critic who has written extensively about cultural policy over a career as a scholar and activist. She has been representing writers and other creators on copyright issues since 1972, and has had numerous short-term appointments to Canadian Universities from the University of Prince Edward Island to the University of British Columbia where she was the first Maclean-Hunter Chair in Creative Non-Fiction in 1988. Her last book, *The Laughing One – A Journey to Emily Carr* was nominated for Governor General's Literary Award in 2001.

Virginia Jones is a lawyer and advocate whose practice is focused exclusively in the areas of copyright and copyright policy reform. She has engaged in extensive review and commentary on digital copyright issues including the peer-to-peer stack and copyright reform tied to the WIPO treaties as it is taking place in both Canada and the United States.

SCHEDULE I

Bloggers Notes and Comments

The following notes are provided for your review and as a representation of the current community dialogue. Their use is subject to the terms and conditions of use that are posted on the web site where they initially appeared.

The essence of the matter is - if we want to be free, we have to allow freedom of choice. You can't brow-beat someone into Free Software - in doing so, you take away their Freedom. Thats not what I call Free as in Freedom not Beer.

I've broken away from the 'Free Software Only' camp, the 'Never May Open Source Tread Here' groupies. Likewise with Open Source. I've been more drawn to Creative Commons as a solution, because it offers a spectrum from full Copyright as it is conventionally used, to Free Software, non-commercial copying only, and finally the Public Domain. But all of these camps have their own parking spaces. Creative Commons is the closest that I can get to uniting this movement of 'Stuff', of alternative copyright, while allowing freedom of choice.

- www.copyleftmedia.org.uk weblog Miriam Clinton (nee Rainsford)
- Copyright © 2002 Miriam Rainsford

So, here's a success story for Canadian culture. Yay. You don't need to know about it, or care about it, because it works behind the scenes—and who would argue about a little bit more money making it to Canadian artists and publishers?
Oh wait, the **copyleft** movement would argue with that, or at least some in their fold would. Copylefters, lovingly profiled in this very magazine a year and a half ago, are the anarchists of creativity who, at their extreme edge, advocate the removal of all restraints on use and reuse of creative material. Music downloaders, cut and pasters – we all do it, and we're all vaguely aware that at some point someone will probably figure out a way for us to pay for it. Certainly, I do not mind paying 99 cents to download a Ron Sexsmith song to my iMac, and I don't really need to know where exactly every cent of that 99 is going. I assume Mr. Sexsmith is getting some of it, and if he's not that he'll make a big enough stink about it that the system will eventually change. Who can argue against artists getting paid for what they do?
And yet, it's increasingly popular to do so. The Walrus just recently ran a sarcastic humour piece suggesting the publishing industry lobby for a hidden tax on blank paper, just like the music industry succeeded in doing on blank tapes and cds. It included some lame argument about people who only buy blank cds for data – why should they pay an extra cent or so because other people are putting copyrighted music on the cds? Well, it's called the economy, and though I am NOT advocating for a paper tax here, I generally support any measure or agency, like Access Copyright, designed to help artists make a living at what they do. And I've got my cheque stub from AC to prove that's what's happening

- John D. March 13, 2005
- http://Blog.thismagazine.ca

"But what if artists don't mind having their work, as long as it is credited to them, floating freely in the ether? Even the RIAA can't see anything wrong with the Creative Commons in theory. "If a copyright owner has consented to the distribution or copying of his or her work in a particular fashion, that's great" says Jonathan Layme, an association spokesman. "What we're concerned about is when they right is deprived of them and someone else is making that choice for them and giving it away for free, i.e. unauthorized file sharing."

- Biella October 7, 2004
- www.healthhacker.org

"As a copyfighting lawyer, I love the spirit of tinkering in the air. The whole event was brimming with the spirit of exploration, interoperation, and user driven innovation. The more people who catch that excitement, the more people we'll have fighting laws that restrict out ability to open boxes and re-use the contents

- Wendy Seltzer EFF March 18, 2005
- www.corante.com/copyfight

"They (music companies) dictate cultural taste based on relatively narrow and often deeply ignorant criteria related to marketing and money and fear of the new and the different. This is what they do. In other words, it was shelved because it's different, unique, a little eccentric, all bells and oompah horns and strings and oddly lovely circuslike arrangements and you as the co-opted overmarketed oversold listening audience can't really handle anything like that anything challenging or interesting or distinctively or deeply cool or

lacking in prepackaged backbeats that sound just like Kelly Clarkson or maybe "American Idiot", even if it comes from a stupendously talented world-class Grammy winning artist"

- Donna Wentworth quoting Fred von Lohmann, March 17, 2005
- www.corante.com/copyfight

"I think it is helpful to educate consumers that there is a place like the Creative Commons where one can access intellectual property that has been freely made available to the general public without compensation and that that should be distinguished from sites that are permitting access to infringing material"

- Donna Wentworth quoting Hilary Rosen of the RIAA, March 14, 2005
- www.corante.com/copyfight

"Many of those extracting new value from old content are not the original creators or rightsholders. Some of them are repurposing older material , and others are aggregators who have found ways to find new markets for material that's fallen beneath the commercial radar"

- Andy Scudder quoting Chris Anderson, February 3, 2005
- http://freeculture.org/blog

"In a way, it's embarrassing to watch the old media guard flounder and attempt to regulate these distribution methods our of existence simply because they don't jive with their current modus operandi. At the same time, it's frightening because they something succeed at convincing people that their distribution methods should be protected at all costs. It's at this point that we're reminded again how an open marketplace allows more people to prosper than a closed system. Using copyright to confine the distribution of works not only limits the success of its creators, but also the success of the distributor, and the public when it keeps that media out of the very culture in which it was designed to exist."

- Andy Scudder February 3, 2005
- http://freeculture.org/blog

"Everyone who is in the group ("Free Culture Swarthmore") knows what 'free culture' is and what Free Culture is, but each persons ideas are a little different from the next, and trying to articulate those ideas has proven surprisingly difficult./ What makes identifying whay we do and who we are so hard? Perhaps the biggest obstacle is that there is no commonly accepted jargon for taking about the things that we are interested in…Thus our greatest challenge is trying to bring those important issues to the attention of the public despite this language barrier"

- Alex Benn March 10, 2005
- http://scdc.sccs.swarthmore.edu/wordpress

"His (Lessig's) piece reminded me of the recent controversy with Indiana UP and the countless other instances where literary executors control access and/or permission to use exerts from materials from archival materialism and as in the Indiana case, refuse to grant permission… IN the case of literary executors, it always seems to give them so much power to be able to refuse a request. It seems like we need a different system – something that does not put so much power into those who do not ant the criticism or comment."

- Elizabeth Townsend August 20, 2004
- http://academiccopyright/typepad.com

So perhaps for the first time, the committee (WIPO) will be focused on the question of to maintain our (users) ability to freely access and create knowledge. This was an amazing victory in line with the Development Agenda and a step forward for the Treaty for Access to Knowledge"

- David T November 19, 2004
- www.public-domain.org

"The real disagreement between OSI and FSF, the real axis of discord between those who speak of open source and free software, is not over principles. It's over tactics and rhetoric."

"We hackers are thinkers and idealists whol readily resonate with appeals to principle and freedom and rights"

"So it is for all of us: to the rest of the world outside our little tribe, the excellence of our software is a far more persuasive argument for openness and freedom than any amount of highfalutin appeal to abstract princples"

- Eric's Random Writings June 28, 1999
- "Shut up and Show them the Code"
- www.catb.org

"The other is open source, the Internet engineering tradition, in which source code is generally available for inspection, independent peer review and rapid evolution. The standard bearer of this approach is the linux operating system."

"The pattern is simple and compelling. Where we have open-source software, we have peer review and high reliability. Where we don't, reliability suffers terribly. This fact in itself is probably sufficient to marginalize closed source development in the future."

- Eric's Random Writings
- Keeping and Open Mind
- March/April 1999 "Cyberian Express"
- www.catb.org

"First, the web response to OntheCommons.org has exceeded our expectations. The site now receives an average of 15,000 visits a month. About 20% of these visits come from beyond the U.S., which means that interest in the commons is truly global in scope.

- David Bollier March 18, 2005

- http://onthecommons.org

All articles would be deposited in the NIH's online repository, PubMed Central, which would then be accessible to anyone with an internet connection. Imagine the boon to scientists worldwide, who could collaborate on finding solutions to medical challenges. Imagine the benefit to ordinary doctors and citizens wanting to learn more about a given medical issue. Price and copyright permissions would not be an issue. And why should they? We, the taxpayer have already paid for all this research."

- David Bollier March 16, 2005
- http://onthecommons.org

"Creators not politically powerful, so alliances need to be made. – alliances with users rather than non-creator copyright holders"
"The greatest threats identified were not end users not paying royalty payments, but the ability of creators to create, distribute and profit from works under their own terms"

- Russell McOrmond September 8, 2003
- www.digitalcopyright.ca

131 words from On Bullshit violates copyright? Bullshit! -- UPDATED
A reader writes, "Much-blogged 'On Bullshit' essayist Harry Frankfurt, of Princeton's philosophy department, has asked me to pull a 131-word excerpt from his essay from my blog, saying that it'll hurt his profits. Has the guy--an academic, no less--never used quotation in his work? Never heard of fair use?"
Here's 131 words from On Bullshit for your perusal. In my view, the claim that this is either a "clear infringement" of copyright or will displace sales of the book is so unlikely as to constitute *bullshit*.
One of the most salient features of our culture is that there is so much bullshit. Everyone knows this. Each of us contributes his share. But we tend to take the situation for granted. Most people are rather confident of their ability to recognize bullshit and to avoid being taken in by it. So the phenomenon has not aroused much deliberate concern, or attracted much sustained inquiry. In consequence, we have no clear understanding of what bullshit is, why there is so much of it, or what functions it serves. And we lack a conscientiously developed appreciation of what it means to us. In other words, we have no theory. I propose to begin the development of a theoretical understanding of bullshit, mainly by providing some tentative and exploratory philosophical analysis.

- March 16, 2005
- BOING BOING
  http://www.boingboing.net/2005/03/16/131_words_from_on_bu.html

Cory's editorial on chicken companies and copyright
I wrote this editorial for the Edinburgh law school's website on how the copyright wars are being waged today because big technology companies have lost their nerve. It has extra meaning this week, when Grokster is being played out at the Supreme Court, where a tech

company has exhibited the intestinal fortitude to stand up to the entertainment industry bullies.

Time was, companies like Sony could be relied upon to spend hundreds of millions of dollars defending its right to market good technology to its customers -- the company spent eight years in court sticking up for the VCR at a time when the consensus among legal scholars was that giving the public the ability to copy movies in their sitting rooms was flat-out illegal.

Time was companies shipped products that sat at the intersection of the limits of engineering and what the public could be convinced to buy: jukeboxes, cable TV, radio, VCRs, MP3 players, you name it, if it was dodgy, cool and likely to freak out an entertainment exec, someone out there would offer it for sale.

Time was that copyright changed whenever some entrepreneur invented something cool and infringing and compelling and the courts or lawmakers legalized it with reforms to copyright.

Times have changed. Today, businesses shrink away from offering general-purpose technology whose suite of uses includes ones that fall outside the confines of today's copyright -- like automatic commercial-skipping in PVRs. They run screaming from businesses that are clearly infringing by today's standards -- like DVD-ripping movie jukeboxes.

- Cory Doctorow March 30, 2005
- BOING BOING http://www.boingboing.net/2005/03/30/corys_editorial_on_c.html

700+ Orphan Works comments at the Copyright Office

Gavin sez, "The U.S. Copyright Office has posted the orphan works comments that were submitted. Over 700 comments were submitted in total. The CO will be accepting comments in direct reply to these through May 9."

- Lessig (for Save the Music and CC):
- Internet Archive (Note: The Internet Archive's comment has some particularly interesting suggestions, including using orphan works under the Creative Commons by-nc-nd license.)
- FreeCulture.org
- Public Knowledge
- Library of Congress
- Microsoft
- Copyright Clearance Center (copyright.com)
- RIAA
- Elizabeth Townsend (Academic Copyright)
- MPAA
- ASCAP
- Samuelson Clinic
- Consumers Electronic Association

- March 29, 2005

- BOING BOING
  http://www.boingboing.net/2005/03/29/700_orphan_works_com.html

Shirky: stupid (c) laws block me from publishing own work online
Clay Shirky tells Boing Boing:
Welcome to the Copyfight. So, at Etech this year, I gave a talk entitled Ontology is Overrated. I want to put a transcript up online, and Mary Hodder, who recorded the talk, graciously agreed to give me a copy of the video.
When she came by NYC last week, she dropped off a DVD, which I then wanted to convert to AVI (the format used by my transcription service.) I installed ffmpeg and tried to convert the material, at which point I got an error message which read "To comply with copyright laws, DVD device input is not allowed." Except, of course, there are no copyright laws at issue here, since I'M THE COPYRIGHT HOLDER.
Got that? I am in possession of a video, of me, shot by a friend, copied to a piece of physical media given to me as a gift. In the video, I am speaking words written by me, and for which I am the clear holder of the copyright. I am working with said video on a machine I own. Every modern legal judgment concerning copyright, from the Berne Convention to the Betamax case, is on my side. AND I CAN'T MAKE A COPY DIRECTLY FROM THE DEVICE. This is because copyright laws do not exist to defend the moral rights of copyright holders -- they exist to help enforce artificial scarcity. Copyright holders in my position, who want to use Creative Commons licensing to share material, are treated as pathological cases, because we're not behaving in the extortionate manner that current regulations are designed to protect.
I've gotten the copy another way, and the transcript will go up, but this is the state of the world, circa 2005: I can be prevented from copying my own words from my own devices, precisely because I want to share them freely, a use the law is perfectly prepared to regard as irrelevant.

- Clay Shirky March 31, 2005
- BOING BOING
  http://www.boingboing.net/2005/03/31/shirky_stupid_c_laws.html

“Your new legislation would further, and unnecessarily, empower these corporations. Specifically the "anti-circumvention" provisions in the proposed legislation would treat every Canadian as a criminal in order to control those few Canadians who might actually be crooks. These provisions call for laws that would criminalize the writing of software and even the possession of software tools that have many legitimate uses. But because these tools "might" be used to pirate a song this law calls for the RCMP to throw you in jail just for owning the tool, not for pirating the song. It's like a law that made owning screwdrivers illegal because they can be used to commit crimes such as break and enter, or robbery.
The ironic part of this effort by the world's music publishers for this flawed legislation to combat the pirating of copyrighted songs, is that despite all the hype of Napster and Gnutella creating a generation of Canadians who do not respect the musicians copyrights, the sales of copyrighted CD's are at all-time highs. The simple fact is that the average

Canadian is honest and law-abiding. We don't need new laws like this proposed anti-circumvention rule to protect multi-national publishers from their Canadian customers. This transfer of power to the multinational publishing and technology firms, at the cost of rights currently held by all Canadians, is designed to solve a nonexistent problem.
My primary concern is these anti-circumvention rules will pose a serious threat to Canadian entrepreneurs. These rules will enable the global publishers to stop not just criminals from stealing their copyrighted intellectual property, but will enable them to stop competitors from offering alternative solutions to the marketplace."

- Bob Young
- http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp00416e.html

Open Letter to Darl McBride of SCO from Bob Young

To the Editor,

I've kept out of this debate as I no longer work at Red Hat and wanted to give Matthew Szulik and the Red Hat team complete control over Red Hat's communications with the press.

But three years have passed since I worked at Red Hat. Lulu.com is where I'm spending my time and energies, now I figure I can and should speak up. Lulu is attempting to create a marketplace for digital content. Its goal is nothing less than to enable authors to decide for themselves how to edit, market, and grant rights to others over the use of their works (copyright).

On the off-chance that anyone is taking Darl McBride's campaign seriously I can no longer sit idly by, as to do so could some day restrict the users of Lulu.com from choosing the copyright terms and conditions that most suit the needs of the projects they are trying to advance.

- Bob Young, December 7, 2003
- http://people.lulu.com/blogs/view.php?blog_id=256

Content Creator's Bill of Rights

1. Publishing is free.
2. The creator controls his own work.
3. The creator chooses whether to reserve all rights or some rights associated with his content.
4. Distribution is not exclusive.
5. The creator sets the price for his content and chooses the amount he makes on each sale (royalty).
6. The creator shall have the option to give away his content for free.
7. The creator has the right to know what and how many books, songs, or images he has sold—as well as the amount of royalties earned—instantly.

8. The creator controls the production process. Editing, producing, designing, proofreading —important parts of publishing—are the responsibility of the creator. These services can be purchased, or not.
9. Modifying content is free and instant.
10. Un-publishing is free and instant.

- Bob Young, December 10, 2003

Lulu is a tool for creators. It's also a business, to be sure. Lulu's commission on the sale of content through its site is 20%. But we are not in business to own anyone else's intellectual property. We're not in business to control how or where creators or publishers sell their intellectual property. Lulu exists to provide options and to help make sure that the flow of knowledge into the world remains a roar and not a trickle. In the long run we're all better off that way.

- Bob Young, December 10, 2003
- http://people.lulu.com/blogs/view