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Byresearchers at the Economic Observatory of the University of Openess

Creative Commons advertise their licenses as the best-of-both-worlds between copyright and the public domain. But is the word 'commons' then a misnomer, and can such licensing be subjected to the same abuse as copyright? Saul Albert raises the question and a discussion within the University of Openess Wiki follows

The Creative Commons licenses have become a kind of default orthodoxy in non-commercial licensing. Every unpunctuated half-sentence spilled into a weblog, every petulant rant published by 'Free Culture' pundits, every square millimetre of Lawrence Lessig's abundant intellectual property is immediately and righteously staked out as part of the great wealth of man's 'Creative Commons'.

First off, this proposal still holds the basic assumption that everything I make and say is property which in most areas of 'creative' work is both ridiculous and reactionary, as well as generally objectionable. The logic that more politically aware CC. pundits use; that you can't ignore the reality of the market and you have to use copyright to fight copyright is fine in theory, but makes the assumption that every maker and sayer has equal recourse to legal process. Putting aside, for a moment, this little problem of economic and legal inequality, I am still suspicious of anything advocated strongly by clever, sleek, young lawyers. Are they really 'streamlining' the legal process? Cutting out the armies of jabbering middlemen in their patronising promotional movie? Or, are they waxing lyrical about a supposed 'commons' while making the convoluted mess of intellectual property ownership even more complex and impossible for lay people to negotiate? Imagine the process of making a new work with copyleft material:

'Hmm... let me see, I can reproduce this part of that lyric, but I have to credit it, and this bassline allows me to sell the piece, but means my tune has to have the same share-alike-non-commercial license on the whole track, and using this guitar riff means I have to make sure anyone who uses my tune abides by the Geneva Convention on Human Rights.'

Yes, some of these 'pick and choose' licenses even have such moralistic overtones. The 'Common Good' public license insists that the use of anything licensed by it must not be used in a way that contravenes the Geneva Convention. Everyone is in favour of the Geneva Convention, but this is so unimplementable as to be purely symbolic. Although the prospect of AC/DC suing the US military for blasting 'insurgents' in Fallujah with 'Hell's Bells' is appealing, there are many far more effective ways, both symbolic and material, to contribute to Human Rights causes. If I want other people to use my work and have already made the conceptual leap to contributing to a public domain, why would I want to impose arbitrary, untested restrictions on them? I certainly don't want their arbitrary restrictions imposed on me.

The public domain is about non-ownership, not more accurate descriptions and granularity of ownership. Licensing structures like the Creative Commons help copyright owners and their lawyer lackeys catch up with today's faster moving, smaller-scale and more intricate network of information exchange between 'prosumers', not by 'freeing' it, but by describing it as intellectual property more efficiently.

[IMAGE] > Original Cartoon concept and design for above illustration by Neeru Paharia, original illustration by Ryan Junell, photos by Matt Haughey, licensed under a creative commons license

The clue to whose interest is served by that efficiency is in the cringe-makingly patronising spiel about 'human readable', 'lawyer readable' and 'machine readable' licenses. The solution to incomprehensible legalese is not to say 'oh, you poor little human, you shouldn't have to take responsibility for your own labour, let us take care of that'. The solution is to reform arcane legal language and customs so that everyone can understand them. If half the Creative-Commons-license-using bloggers donated half the money and time they spend on trendy haircuts to initiatives such as the Plain English Campaign, the 'lawyer readable' section could be obsolete within a year.

And the machine readable part? I can already see the software these shysters are going to build. You'll no longer need to call your lawyer when someone plagiarises you (or weaponises your music). There will be automated systems that will discover licensing inconsistencies, call the appropriate lawyers who, (as part of the Creative Commons service) will simply bill your credit card for their micro-legal-fee, and credit your account with an out-of-court micro-settlement. You might find out about the whole ordeal when checking your credit card bills at the end of the month, wondering why you're getting poorer and poorer while the solicitor next door has just installed a jacuzzi in his back garden.

There are some fights worth fighting - like the fight for someone to be able to make something that does not become intellectual property by default, the fight for an accessible and fair legal system, and the fight for someone's right to make a living from their work without having to sue anyone. That is what copyright is for. It works. It has been tried and tested in the courts for hundreds of years. The enemies in this fight are the greedy, powerful people and corporations have bullied copyright law into an absurdity, and will continue to abuse any other system that anyone comes up with until we make them stop existing.

Discussion among University of Openess Wiki users

To a point interesting but I think you have a fundamental misunderstanding of copyright law and the aim of Creative Commons licences (I am one of those lawyers).

CC aims to make explicit what pre-existing rights the author (well OK... not **just** authors, but it's a shortcut word) has chosen to waive, in a way which is easily accessible and understandable. The 'machine readable' part is simply trying to make those waivers explicit to search engines in order to increase the accessibility of work under the CC license. It's more about making life easier for people who might want to use Anita's work (cartoon above, which of course you wouldn't have been able to use without the waiving of rights) than about making life easy for Anita. There are of course people who take issue with copyright law, but that's not a reason to generalise the complaint to a licensing system designed to address some of the problems that result from the law.

Some thoughts:

- CC is not about tying up creative work in legal jargon. It doesn't introduce arbitrary restrictions - it can only introduce conditions to the relaxing of rights which already exist.
- You are **more** free to use a CC licensed work than if no such licence was used.
- The author does not have to use a CC licence but they have every right to choose to.
- You do not have to use CC licensed work but you are bound by copyright law.
- The average author may not have the knowledge to structure their own licence from scratch and might well not want to waste their time doing so. Like it or not, 'lawyer readable licences' are what courts look at.
- Even if authors did have the knowledge and inclination, the likely result would be a mess of different

licences each with its own separate conditions. That would be less accessible to you than the CC standardised forms.

I'm **very** surprised to see a rant against CC here [on the Wiki of the University of Openess]. I'd actually been thinking of pointing out the related Science Commons project as something Uo might be interested in looking into.

Some responses:

> I'm **very** surprised to see a rant against CC here.

I would just like to point to the UoClaimer [<http://twentiethcentury.com/uo/index.php/UoClaimer>] here. I'm sure many in the uo are very interested in pursuing Creative Commons and Science commons approaches.

I fully understand the rhetoric surrounding the Creative Commons; what it says it does on the tin. Having heard the arguments, I am not convinced. Like many liberal reformist movements, the 'good' intentions of the Creative Commons are easily hijacked by the people who are currently exploiting existing copyright law and the original 'good' intentions for that. As soon as the dinosaur copyright holders and collecting organisations wise up to the world of micro-payments and infinitesimally divisible rights and waivers, the bureaucracy and compensation situation of compound-licensed works will become far more Byzantine than it is already.

> It doesn't introduce arbitrary restrictions - it can only introduce conditions to the relaxing of rights which already exist.

That may be true of the Creative Commons, but other attempts to map very successful Free Software licenses onto non-technical fields have often decided to impose arbitrary and sometimes absurd restrictions. Actually, I think you may be wrong about this anyway. Surely the 'share-alike' insistence that derivative works be licensed under the same agreement can be seen as an arbitrary restriction.

> You are **more** free to use a CC licensed work than if no such license was used.

But less free than if the work is in the public domain. If you want to play, contribute to the public domain. If you want to reserve your rights, do. Also, If I buy the right to use your work using existing copyright law, I can use it for anything I want and adopt whatever license I like for my derivative work. In this sense, freedom as in 'libre' for my derivative work is more attainable under default copyright law than if you impose a perpetual Creative Commons license, it just costs me some money. If you use a Creative Commons license, I can't use your 'non-commercial-share-alike' component for my commercial venture at all, ever, even if I want to buy that right.

> Like it or not, 'lawyer readable licenses' are what courts look at.

Then concentrate efforts on cleaning out the legal language, reform the **application** of copyright law and the legal processes in general - which most people are currently too scared of to get involved with unless under duress.

Lazy orthodoxy and co-opted reform is what's under attack here, and you haven't answered the meat of the questions raised. The implicit proposal of this attack on the CC is:

- Concentrate efforts on reforming abuse of existing tested systems.
- Concentrate on making existing processes and infrastructures accessible to everyone.
- Concentrate on expanding the public domain through education and campaign against default copyright.

In my opinion the CC hype is just a distraction from these older, harder and more important battles.

> In my opinion the CC hype is just a distraction from these older, harder and more important battles.

I think you both make good points, but would the logic of the above argument mean that Stallman should not have bothered with the GPL. Also I thought the CC approach was in part a response to the IP gold rush rather than its cause.

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I'm certainly not arguing that CC is the cause, but that it's motivations and parameters do not depart from the market logic that results in abuse of IP law.

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There is a distinction to be made between the GPL and the CC. The GPL was just good engineering methodology for years before Eric Raymond and others evangelised Free Software into venture-capital friendly 'Open Source'. The CC and the GPL are nothing more than efficient methods of regulating property and labour in an information economy. There's nothing wrong with that, but using the word 'commons', and associating this engineering / labour methodology with a pre-enclosure J.S. Mill-esque political 'freedom' is misleading. The GPL may have been evangelised, but at least it is honest about what it is: 'a licence'. The whole 'commons' crowd - Bollier, Lessig etc. scare me because they do not wear their colours as clearly as the Free Software people, whose radical libertarian politics are very openly progressive one minute, and openly disturbing (see Eric S. Raymond's Gun Nut page) the next.

Eric S. Raymond is not among the Free Software-people. He's an Open Source guy.

CopyCan and CopyCant

The first point about unequal recourse to litigation makes the rest of this discussion a moot point. The legal mediation of intellectual property as a mass market service product is a horrifying prospect. In the case of the Creative Commons, the rhetoric simply ignores the material reality that most people can not afford and would probably never want to engage in litigation of any sort, certainly not against powerful, rich companies with armies of lawyers.

At the same time, given current distribution media and formats, copyright is practically unenforcible. Punitive enforcement of copyright law in a few highly publicised 'example' cases in which individuals are persecuted for downloading copyright material is deeply irresponsible on the part of the rights holders. Irresponsible because they must bear some responsibility for the ease with which their

material is duplicated and distributed; which is an intentional strategy on their part.

Take the example of commercial software. It is in the interests of the software company for their software to be easily pirated. Many specialist software titles are hard to 'crack', but in many cases 'industry standard' applications are easily pirated. If, for example, it were impossible to pirate Adobe Photoshop, this software would not occupy the position of market leader for photo manipulation. Students, learners, tiny companies that currently find it easy to download and use pirate versions of these warez, grow up to found established companies and businesses that are no longer 'under the radar' of the copyright holders, and so buy licences. If it were impossible to do so, they would use something else, and buy licences for that product if and when it became necessary and profitable for them to do so. Knowing this, Adobe maintains a relatively relaxed copyright enforcement and security implementation. They do not seem to prosecute individuals, although presumably they have the right to do so.

The same logic applies on another level to music distribution. Music becomes popular in some markets because it is easily distributable. If the only way for Bulgarians to listen to Britney was for them to spend 10-12 Leva (5-6 Euros) on a CD, they would not listen to Britney. Piracy created this market and many others.

There is a harsh duplicity in the way large multinational IP owners use copyability as a publicity strategy on one hand, and then on the other bully the public into paying extortionate prices for dead media by singling out individuals and persecuting them as examples for taking the bait of copying the 'property' they have made intentionally copyable.

If, as is constantly threatened, Digital Rights Management becomes a reality and it is then impossible to buy hardware, software and media that allow the reproduction and distribution of copyrighted information, punitive enforcement of redundant copyright law on individuals will no longer be necessary, because it will simply be impossible for them to copy and redistribute this property.

Thinking again about how to articulate copyright and copyleft, there seems to be a need for a functional articulation of the reality of how this law is applied rather than the legalistic, utopian fantasy of an IP 'commons'. For this purpose I suggest the principles of 'CopyCan and CopyCant'. Simply, it is possible to copy 'CopyCan' material, and impossible to copy 'CopyCant'. No lawyers necessary. It becomes the responsibility of the producer to prevent the copying of their material. If this entails the implementation of DRM, fine. If it requires cyborgs to register a serial number keyed to an iris print and a cochlear implant for every piece of commercial music that they buy that prevents others from hearing the uniquely signed secure transmission of this audio unless they also buy it, fine. See how many people buy Britney's albums on these terms.

Also see: 'Goatherds in Pinstripes' by Gregor Claude, in *Mute* 23, June 2002 (in the Metamute 'archive' section)

Links (with thanks to Rob Myers for these)

Broader critiques of FreeSoftware

Project Oekonux mailing list

Article and discussion on FOSS, IP Laws, and Expanding Legal Choices

Others of interest

Adina Levin, Commons-based peer production is not communism, 2004

Johan Söderberg, Reluctant revolutionaries – the false modesty of reformist critics of copyright, 2004

Books

Lawrence Lessig, Free Culture, Penguin, 2004

Greg London, Drafting the Gift Domain, 2004

Joshua Gay (ed), Free Software, Free Society: Selected Essays of Richard M. Stallman, GNU Press , 2002

Mailing lists

Creative-friends - For a truly free and accessible BBC Creative Archive

Cc-bizcom - A discussion of hybrid open source and proprietary licensing models

Cc-licenses - Discussion on the Creative Commons license drafts

Commons-law -- A discussion list on law, culture and technology

Other links and references

'Content Flatrate' and the Social Democracy of the Digital Commons

Digital Rights Management