

UNBOUNDED FREEDOM

A GUIDE TO CREATIVE
COMMONS THINKING FOR
CULTURAL ORGANISATIONS

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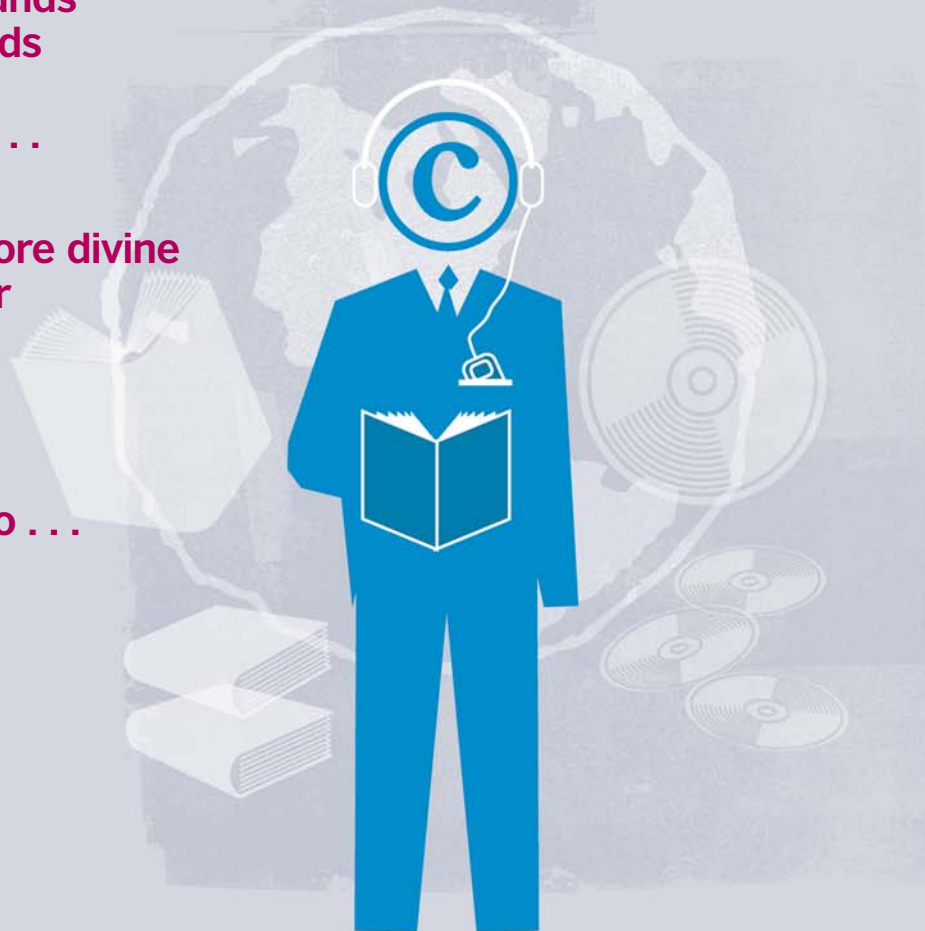


INTRODUCTION

... And sky-bound mores in mangled garbs are left
Like mighty giants of their limbs bereft
Fence now meets fence in owners' little bounds
Of field and meadow large as garden grounds
In little parcels little minds to please
With men and flocks imprisoned ill at ease ...

... Each little tyrant with his little sign
Shows where man claims earth glows no more divine
But paths to freedom and to childhood dear
A board sticks up to notice 'no road here'
And on the tree with ivy overhung
The hated sign by vulgar taste is hung
As tho' the very birds should learn to know
When they go there they must no further go ...

FROM *THE MORES*, JOHN CLARE, 1812–31





The Mores (or *The Moors*),¹ one of many poems written by John Clare about the effects of enclosure in the second decade of the 19th century on Helpston, the Northamptonshire village that was his home until 1832, was unpublished in Clare's lifetime. It opens with a glimpse of an 'unbounded', pre-lapsarian landscape, where the cattle may wander at will to the 'wild pasture as their common right', as does the poem's narrative, with very little grammar or punctuation to hamper its progress. Clare once wrote to his long-suffering editor and publisher, John Taylor, protesting, 'grammar in learning is like tyranny in government – confound the bitch I'll never be her slave and have a vast good mind not to alter the verse in question . . .'. There were many protracted negotiations between editor and poet. Taylor continued to correct Clare's spelling, grammar, punctuation and vocabulary, and curb his use of dialect. As the mediator between the 'peasant poet' and his literary marketplace, Taylor's revisions usually prevailed. Setting aside the odd row over the political cuts of 'radical slang' exacted by Clare's patron, Lord Radstock, Clare wished to please the man whose literary and commercial judgments shaped his career from the publication of *Poems Descriptive of Rural Life and Scenery* in 1820 to *The Rural Muse* in 1835. But relations between poet and publisher broke down in the years that followed. Clare was first admitted into an asylum in 1837, and spent the last 23 years of his life 'trapped' in Northampton General Lunatic Asylum where he died in 1864. During this period he wrote some of his best poetry, leaving behind an unwieldy mass of manuscript material. At his death his four published volumes contained only a tenth of the 3,000 poems written by this finest and most prolific of English rural poets.

Under the 1842 Copyright Act in force at Clare's death, three of the

volumes came out of copyright in 1871, and the last in 1877. Under common law, John Taylor, as the author's trustee, retained control over his unpublished work. In 1864, Taylor seems to have made a bargain with the publisher Joseph Whitaker, recognised in the *Dictionary of National Biography* as 'an authority upon copyright', to transfer these publication and manuscript rights to him in exchange for modest support for Clare's widow and children. None of the many editions of Clare's work in the 70 years after Whitaker's death in 1895 acknowledged any general copyright holder. In 1965, however, Professor Eric Robinson, a historian at the University of Massachusetts, claimed to have purchased the copyright to all Clare's unpublished writings in the possession of Whitaker's publishing house for £1. For the next 40 years, his Oxford editions have dominated Clare scholarship.²

As in those other high-profile cases where single individuals control the posthumous publications of major literary figures such as James Joyce and Sylvia Plath, problems began to emerge. At first, there was a welcome for the 'authenticity' of the Oxford editions, the moral guardianship and heroic editorial labours involved. But gradually scholars began to complain, not only at the expense, delays and frustrations that arose as Robinson demanded acknowledgement of his claim, but also because of what they saw as the deadening hand of the authorised 'definitive version'. The Oxford editions have favoured a so-called 'textual primitivism', which seeks to preserve the manuscript untrammelled, with all its misspellings and erratic punctuation intact. John Clare, once again the unique Child of Nature and solitary Original Genius, was this time to be preserved for posterity in the 'raw'. Some scholars began to fear that this misrepresented a poet whose poetry





was so self-consciously steeped in the landscape and other conventions of 18th-century verse, and alert to the philosophical paradigms of his Romantic peers. Robinson had helped to convince many of the contaminating effect of John Taylor's editorialising taste, but now Clare enthusiasts began to wonder if the editor's concern for the accessibility of the material, to which Clare so often deferred, did not have something to recommend it. Some argued that such matters could be properly addressed only if a modern edition were to be published with multiple or plural texts – Taylor's published version, as complete a transcript of the manuscript version as possible, *and* a modern reading version. Others maintained that there could be no single, final account of this dauntingly unfinalised body of work. Hovering near the surface of such murmurings was the uneasy conviction that well over a century after the poet's death, no single individual should be able to exert exclusive control over the poet's writings as his or her private property; especially the work of one so passionately opposed to exclusionary possession and enclosure. This was a bitter irony.

When, in 2000,³ Seamus Heaney, Tom Paulin, and the poet laureate, Andrew Motion, united with 25 other Clare scholars in a campaign to 'free' the poet, what and who were they defending? Was it the poet's wishes? If so, which poet? The timid wordsmith who deferred to punctuation, landscape conventions and his London editor; or the radical steeped in the local idiom who fell out with his sponsor at the last? Or should we try to imagine a Clare unconstrained by the literary fashions and other enclosures of his times? To whom do Clare's poems belong? What treatment do they deserve? As in his own pursuit of 'unbounded freedom', would he have urged us to honour the past, or look to the

future? Might he have pointed to the 1842 Copyright Act, instigated by William Wordsworth and petitioned for by Robert Southey, Thomas Carlyle and others, as the happy appropriation by rights-holders of the pre-Romantic notion of the author as original genius? Or turned our attention away from authors and rights-holders, to address an audience of users and consumers and emerging artists far wider than any he could have imagined? And if we are still haunted by Clare's critique of ownership and commodification, should we channel our energies into finalising the authoritative or authentic text – or look for better ways to share the rich provocation of his writing? In short, who owns culture? How should we promote it? How does it work best? What is it for?

In 2005, Adam Singer, Group CEO of the royalties collecting society for musicians, the Music Alliance, declared: '**All value is becoming a subset of intellectual property.**'⁴ You don't have to be a property fundamentalist to see this as the only future. Not so long ago you would have to be a business determined upon piracy to break the property law, but now a child can break the law with a click of a mouse, or be disqualified for plagiarism for inadequate attribution of a three-sentence quotation in an exam paper. Spend too much time ploughing through the 'cease and desist' notices on www.chillingeffects.com⁵ and the wholesale appropriation of human activity by intellectual property rights (IPR) seems inevitable.

The response to this 'second enclosure' has also been gathering pace, in the decisions of millions of consumers as well as governments and all layers in between. From early on, this fightback came in unexpected ways, from unexpected quarters, as John Kay pointed out in his *Financial Times* column in 2001:





‘Many people who would not dream of shoplifting a compact disc feel no compunction about downloading copyright music from the internet. The South African government’s record in protecting the rights of Western investors is impeccable, as it needs to be if the country is to attract the outside help needed. It will not expropriate the factories and mines of foreign companies. But it sees no reason not to import cheap generic drugs.’⁶

Even those who regard practitioners in the ‘sharing economy’ as ‘just a bunch of hippies’ can see that the social bargain anchored in a pragmatic compromise that is copyright is undergoing some kind of sea change today. What began as squabbles about ownership and availability is fast becoming a force for change in its own right that will transform communication in the information age. The changes are occurring in politics, the economy and law, but first and foremost in the domain of culture. Not only has instant communication through galloping ICT development brought cultural diversity to all corners of the globe, with myriad new types of horizontal encounter, engagement and cultural intelligence in its wake. But also, the culture of communication that accompanies it offers new forms of personal empowerment and large-scale collaboration that are competing with mass media-dominated more traditional structures.

Where does that leave cultural organisations? *Unbounded Freedom* is an exploration of the impact of this sea change on cultural organisations. We begin with a history – both here, and in Part One – which traces the steady encroachment of intellectual property rights over the cultural commons terrain since the early days of copyright in the 18th century.

This is for two reasons. In cultural commons thinking the value of intellectual property is predicated on the right to distribute rather than the right to exclusive ownership. If this stops us in our tracks, or strikes us as at the least counter-intuitive, it is because ‘intellectual property’ as the right to exclude is so deeply embedded in our ways of thinking and our institutions. Part One traces the rise of intellectual property rights in Britain and the USA to show how this came about, and to flag up some of the moments in that inexorable process in which a balance of interests was threatened and what was about to be lost, was signalled, or an alternative path was glimpsed.

Another reason for approaching the ‘second enclosure’ movement through the remnants of the first, including this brief excursion through the strange case of the poet, John Clare, is because of the perverse staying power of the pre-Romantic and Romantic notion of the author. The subject of copyright as we know it is a creator of a unique property that he or she owns by virtue of a singular, imaginative act, somehow cut off from precursors, interlocutors, and intended or unintended recipients. The model remains central to intellectual property rights discourse, despite the fact that the commercially produced mass popular culture of the 20th century, with its barriers of production costs, production values and the star system, has long since replaced the iconic role of the unique work of art with brand new forms of exclusion. When he mourned the delivering up of authentic exchange in the face of ready-made signs calling for passive acceptance, ‘little parcels little minds to please’, John Clare was attacking this notion of creativity, stripped of its relational powers and obligations. The same commodification and exclusion is under attack when Cory Doctorow, proponent of Creative Commons,⁷ explains his decision:





‘Some other writers have decided that their readers are thieves and pirates, and they devote countless hours to systematically alienating their customers. These writers will go broke. Not me – I love you people. Copy the hell out of this thing.’

The same cultural critique is implicit in the Brazilian interpretation of Creative Commons as a tool for ‘intellectual generosity’,⁸ empowering creators and artists to license their creations so that society as a whole is entitled to exercise some rights over their work.

However, both the challenge to IPR and the creative opportunities it allows us to glimpse today are shaped by 21st-century technological, economic and global determinants. This is the subject of Part Two. The emergence of a new type of ‘sharing economy’, which locates the wealth of networks not in the money that changes hands but in the combined powers of ‘commons-based peer production’ is offering increasingly urgent choices to everyone involved in cultural production today, whether you are a scientist, a human rights campaigner, a storyteller or a Brazilian minister of culture. We need to understand the nature of those choices – fundamentally different options in taste, in social behaviour and in ways of solving some of the most pressing problems of our time.












Part Three explores the resulting options for cultural relations organisations. Cultural commons thinking will have an impact on any cultural organisation at a number of different levels. First, it brings its own culture to challenge yours. There are new roles that emerge from the restoration of a relationship between creatives, their fellow creatives and their ‘users’ or consumers in the sharing economy. The selection of

a Creative Commons licence,⁹ while it remains within the copyright framework, is also an important commitment to a set of foundational beliefs. Any organisation wishing to work with cultural commons protagonists will want to understand the thinking, ethics and communicative conventions of highly focused, rising generations. Second, seismic changes in all the creative industries caught up in the intellectual property battle pose the fundamental challenge of keeping pace with reality. Cultural commons thinking is throwing up new categories of culture seemingly every day: go to the Creative Commons website (<http://creativecommons.org>) and you will be invited to explore remix contests, co-creation in education, ccMixter, visual digital iCommons, InfoVis as a new artistic practise, and science commons, before stepping through the door. Last, there is the question of cultural priorities, of knowing where to make a cultural intervention in what Martin Rose refers to as this ‘brave new horizontal world’.¹⁰ Where are the best entry points into the ‘conversation among the people formerly known as the audience’ – David Sifry’s memorable phrase¹¹ – which is emergent world public opinion? How can a positive engagement best be multiplied? Who are likely to be the best-equipped to go there?

Part Three also searches for some principles and developing trends. It looks at new kinds of authors, newly empowered end-users in new public spheres, and the transformative potential of new forms of publishing. It ends with a vision of the books of the future, which might yet set John Clare ‘free’.

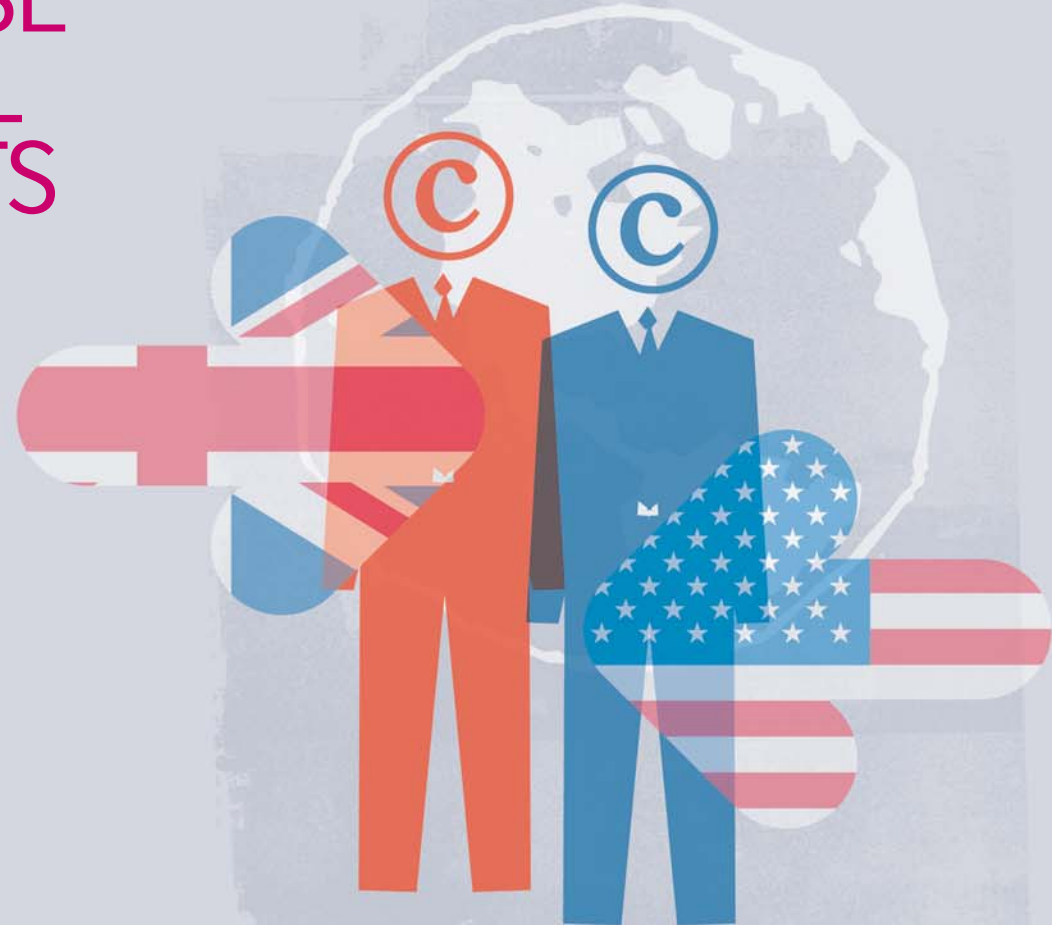


Notes

-  ¹ John Clare, 'The Mores', *Clare: Selected Poems and Prose*, chosen and edited by Eric Robinson and Geoffrey Summerfield, Oxford University Press, 1966.
-  ² Oxford edition of John Clare's collected poems:
www.oup.com/uk/catalogue/?ci=9780198123866.
-  ³ John Goodridge, 'Poor Clare', the *Guardian*, 22 July 2000.
-  ⁴ Speech at the Creative Britannia event hosted by the Institute for Public Policy Research, 16 June 2005.
-  ⁵ Joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and the Santa Clara University School of Law clinics: a searchable database of Cease and Desist notices for alleged online infringements of intellectual property rights.
-  ⁶ John Kay's website: www.johnkay.com.
-  ⁷ Cory Doctorow: www.craphound.com/someone/000363.html.
-  ⁸ Dr Ronaldo Lemos, Ministry of Culture Visiting Fellow at the Centre for Brazilian Studies, University of Oxford, 4 November 2005.
-  ⁹ Creative Commons licences:
www.creativecommons.org/about/licenses.
-  ¹⁰ Martin Rose, 'The Medium Term Future of Public Diplomacy', 2006, p. 3.
-  ¹¹ Quoted in *The Economist* special report, 'A Survey of New Media', 29 April 2006.

PART ONE

THE RISE AND RISE
OF INTELLECTUAL
PROPERTY RIGHTS
IN BRITAIN AND
THE USA





‘It is one of the great ironies of this period,’ comments John Brewer in *The Pleasures of the Imagination: English Culture in the Eighteenth Century*,¹² **‘that the establishment of an author’s rights in his literary property should have been achieved largely with the help of his old enemy, the bookseller.’** The earliest British copyright laws, beginning with the statute decreed by government under the Catholic Queen Mary Tudor in 1557 granting the Stationers’ Company, a guild of printers, a monopoly in legally produced books approved by the Crown, were instruments of censorship. With written permission from the author, the monopoly meant that the company could set the book’s price without considering market pressures. They were also authorised to confiscate unsanctioned books. Despite constant lobbying by the Stationers’ Company to keep their monopoly powers intact, this Licensing Act expired in 1694. By the time publishers were arguing their case for perpetual monopoly once again, in the run-up to the 1709 Statute of Anne, they were up against a new set of opponents – the Whig oligarchy – intent on playing on the longstanding hostility to special privileges and monopolies conferred by the Crown, most of which had been abolished after the Glorious Revolution. These opponents forcibly argued that perpetual copyright conflicted with a public interest in the free circulation of knowledge and information. They also argued that a book was not a thing, but ‘an Assemblage of Ideas’, which might be patented for a number of years like a mechanical invention, but could not be held permanently. The London publishers and booksellers, who wanted the right to sell a work or to sell the right in perpetuity, now turned to the author. At the time, against the prevailing notion of a paid author as a Grub Street hack, the great literary biographer Samuel Johnson was conveniently arguing that a good author had ‘a stronger

right of property than that of occupancy; a metaphysical right, a right, as it were, of creation’. Literary arguments around originality of style and sentiment, and creative genius, thus reinforced the commercial claim for ownership. Such a property right, the booksellers argued, was perpetual. An author could sell it, of course, and booksellers trade in it, but it could not be alienated.

Nevertheless, these booksellers’ claims on behalf of authors were repeatedly challenged, not least by the 1709 Copyright Act itself. Entitled ‘An Act for the Encouragement of Learning’, the legislation, an incentive to produce more books, granted the author protection for 14 years, renewable for another 14 years. The Stationers’ Company was granted exclusive rights to ‘the classics’ for a non-renewable 21-year term. These time limits created the first legal notion of a ‘public domain’ – a collection of works old enough to be considered outside the scope of the law, and under the control of the public and the culture at large. The Statute of Anne might have doffed its hat to authors in passing, but it essentially attempted to balance the interests of the book-printing industry with the concerns that English monopolies were growing too powerful. By the middle of the 19th century, however, as we have seen, authors and publishers were well aware of their common interest in the Romantic ‘star system’.¹³ From this point onward, those who pushed to enlarge and deepen copyright protection increasingly invoked the need to protect authors from ‘theft’. Now, as then, the threat of monopoly frequently conceals itself in this invocation of ‘intellectual property’ and the reward due to artists. This neglects the discussion of what is in the public interest – the criterion that throughout the 18th and 19th century was still meant to balance both.



'If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses it the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.'

LETTER FROM THOMAS JEFFERSON TO ISAAC MCPHERSON, 1813¹⁴

The phrase, 'intellectual property' is relatively young. It occurs in the title of the United Nations' World Intellectual Property Organization (WIPO), which first met in 1967. Soon afterwards, the American Patent Law Association and the American Bar Association Section on Patent, Trademark and Copyright Law changed their names to incorporate 'intellectual property'. In these recent decades, copyright as a 'property right' that prioritises the interests of established authors and producers over those of readers, researchers and future creators has spread through statutes, cases and treaties. Despite its different history, copyright has become bound in practice to such areas of law as trademark regulation, patent law, unfair competition law and trade secrets. But such recent trends run counter to the original purpose of American copyright.

Thomas Jefferson, at the time of the Constitutional Convention, was the most outspoken in explicitly dismissing a property model for copyright,

fearing that the monopolists would use their state-granted power to strengthen their control over the flow of ideas. Such warnings, if ultimately prophetic, were influential. While including copyright protection within the constitution, the Founding Fathers devoted the First Amendment to prohibiting government censorship of the press and dissident opinion. In the first century of American legal history, copyright was deemed a necessary evil – a limited, artificial monopoly not to be granted or expanded lightly. The framers of the US Constitution instructed Congress to develop a copyright statute that would provide an incentive to create and distribute new works. The law granted an exclusive right to copy, sell and perform an original work for a limited time; a monopoly, however, already restricted by several provisions that allowed for such good faith use – fair use or fair dealing – as political debate, education, research or artistic expression. The Constitution's framers and later jurists concluded just as importantly that creativity depended on the use, criticism, supplementation and consideration of previous works. Therefore, they argued, authors should enjoy this monopoly just long enough to provide an incentive to create more, but that the work should live afterwards in the 'public domain', as the common property of the reading public. A limited trade monopoly was to be exchanged for universal use and access. The law was designed to protect and therefore encourage specific expressions of ideas, while allowing free rein for ideas themselves. The aim was to create a policy that balanced the interests of authors, publishers and readers.

In the 20th century, copyright essentially continued to place the rights of publishers first, authors second and the public a distant third. In 1774, the copyright term had been set at 14 years. By 1978, it was automatically 75



years, and extended to cover film, music and photographs. This, too, might have remained a thorn in the flesh of a relatively small and specialised industry within society and the economy as a whole, had it not been for the rapid rise of the internet.

As the internet metamorphosed into the overarching medium of media, one of the unintended consequences of this was to give traditional copyright law the power to stop in their tracks millions of users employed in some of its most common functions. During the last few decades important restrictions on copyright ownership steadily eroded, as the view that intellectual property is about privatising public assets, and protecting national economies against international competition, prevailed. Like taxes, copyright terms are only ever harmonised upwards. President Clinton's copyright policies, carried out through powerful international treaties, stacked the power of the federal government firmly behind large, established producers at the expense of users, emerging artists and independent production companies. At the same time as digital networks rose to prominence and began to reveal their promise, Clinton's 1995 White Paper: *Intellectual Property and the National Information Infrastructure* assessed the impact of digitisation on the copyright regime. It was the rise of digital computation and the attendant communications, based in what we might call the popularisation of copyright, that prompted the subsequent 'land-grab' on the intellectual commons, erecting barriers across the whole domain of human knowledge and expression.

While the internet remained a text-based system used by academics and nerds, media corporations could happily ignore the emergence of this

participatory form of computer-mediated communications. As Richard Barbrook has chronicled in 'The Regulation of Liberty', a *Science as Culture* paper in 2002,¹⁵ experts advised them that the majority of the population was interested only in new information technologies that would offer a wider choice of media commodities. However, as more and more people went online, they began to enjoy sharing information with each other. Owners of music CDs gave MP3 copies to online friends or complete strangers. Media corporations began to realise that the internet threatened their core business, the sale of intellectual property. Owners of copyrights now began to demand that the state intervene to ensure that consenting adults were prevented from sharing information with each other without permission.

The White Paper referred to 'fair use' and users' rights as a 'tax' on copyright holders, and proposed extending copyright rules to cyberspace, as if its traditional principles did not already apply in the new medium. Subsequent legislative moves – in particular the Digital Millennium Copyright Act of 1998 (DCMA) – essentially nullified the role of deliberation and legislation in determining copyright. It let copyright holders police copyright, becoming cops, juries and judges in the new global commons. The DCMA weakened four important safeguards in the American copyright system.¹⁶ First, it gave up any pretence of balancing interests, giving control to rights-holders and content providers. Second, all discussion ceased of how copyright could encourage a rich public sphere and diverse democratic culture, as attention turned exclusively to preventing theft and extending markets. Third, WIPO and the World Trade Organization assumed a greater role in copyright policy as multinational media companies sought global standards in protection.





Last, the public bargain between producers and users, no matter how messy and imperfect, broke down as negotiation was replaced by technological locks on copyrighted material, and sweeping anti-circumvention provision threatened to override fair use, open access, judicial mediation, the public domain and the public interest.

In a series of high-profile cases, industry bodies sued the providers of technical facilities for swapping copyright material, while media corporations experimented with encryption and other software programmes to prevent unauthorised copying. Such anti-piracy offensives proved to be only partially effective. For instance, the music industry's attempts to close down Napster by 2001 simply encouraged people to install more sophisticated software for swapping music.¹⁷ Even worse, the failure to agree a common method of encryption led to MP3 becoming the *de facto* standard means for distributing music over the internet. The MP3 format didn't just make the piracy of copyright material much easier. As importantly, the social mores and technical structure of the internet encouraged enthusiasts to make their own sounds. The passive consumption of unalterable recordings was evolving into interactive participation within musical composition. Contrary to neo-liberal predictions, the transmutation of information into commodities was becoming more difficult as the digital age progressed.

Nevertheless, in what has been called the 'second enclosure',¹⁸ more and more material is removed from the public domain by means of the extension of the time limit on copyright. Moreover, many cultural products are now emerging 'triple protected', not only by copyright and code, but also by contracts or licences for which users waive all

remaining rights. Until the late 1980s, computer software was the subject of copyright protection. Now software can carry legal protections that stem from copyright, patent, trademark, trade secret, and contract law. Increasingly, copyright is replaced with click-through end-user licences for digital content, using contract law to establish the absolute property rights that copyright laws were originally intended to deny to publishers. This situation is already widespread when it comes to recorded music and film. DVD movies are protected using a rights management system called CSS, the content scrambling system. A song from Apple Computer's iTunes Music Store comes locked with a digital rights management system called 'FairPlay'. Writers might soon face the same problems as film-makers, having to clear every mention of a brand, idea, plot, or characterisation before publication. Meanwhile European and American negotiators are evolving new forms of intellectual property law, which could give database owners a global monopoly of unlimited duration. Further proposals for an entirely new 'ownership right', extending the 'permissions regime' to webcasters who distribute information over the internet into foreign markets, are on the table.

As the assumption has grown that more and stronger intellectual property can alone ensure the survival of creativity and innovation, the UK think tank, the Institute for Public Policy Research, published a literature review of the existing evidence in February 2006, entitled, 'Intellectual Property and the Knowledge Economy'.¹⁹ After 12 months of gathering diverse views on the impact of the current framework of intellectual property rights and possible changes to that framework, Kay Withers reported only patchy and conflicting evidence of whether the intellectual property regime had provided any quantifiable difference to











innovation at all. At the same time, she warned that: ‘The values of openness may always be less tangible and so, to a certain degree, they will involve a leap of faith from policy-makers,’ concluding: ‘Thus, we are presented with a cultural rather than economic choice regarding which type of capitalism we believe will best serve the public interest and commercial endeavour.’

‘Rap does not use melody and harmony in the same ways that other forms of music do. In fact, rap artists often “sample” bits of others’ melody and harmony, and use those “samples” as part of a rhythm track, completely transforming and recycling those pieces of music.

The death of tricky, playful, transgressive sampling occurred because courts and the industry misapplied stale, blunt, ethnocentric, and simplistic standards to fresh new methods of expression. The trend could have gone the other way. Courts and the music industry could have allowed for limited use of unauthorised samples if they had considered taking several tenets of fair use and free speech seriously – especially the question of whether the newer work detracts from the market of the original. In fact, as has been shown repeatedly, sampling often revives a market for an all but forgotten song or artist. The best example is the revival of Aerosmith since Run-DMC’s version of “Walk This Way”.

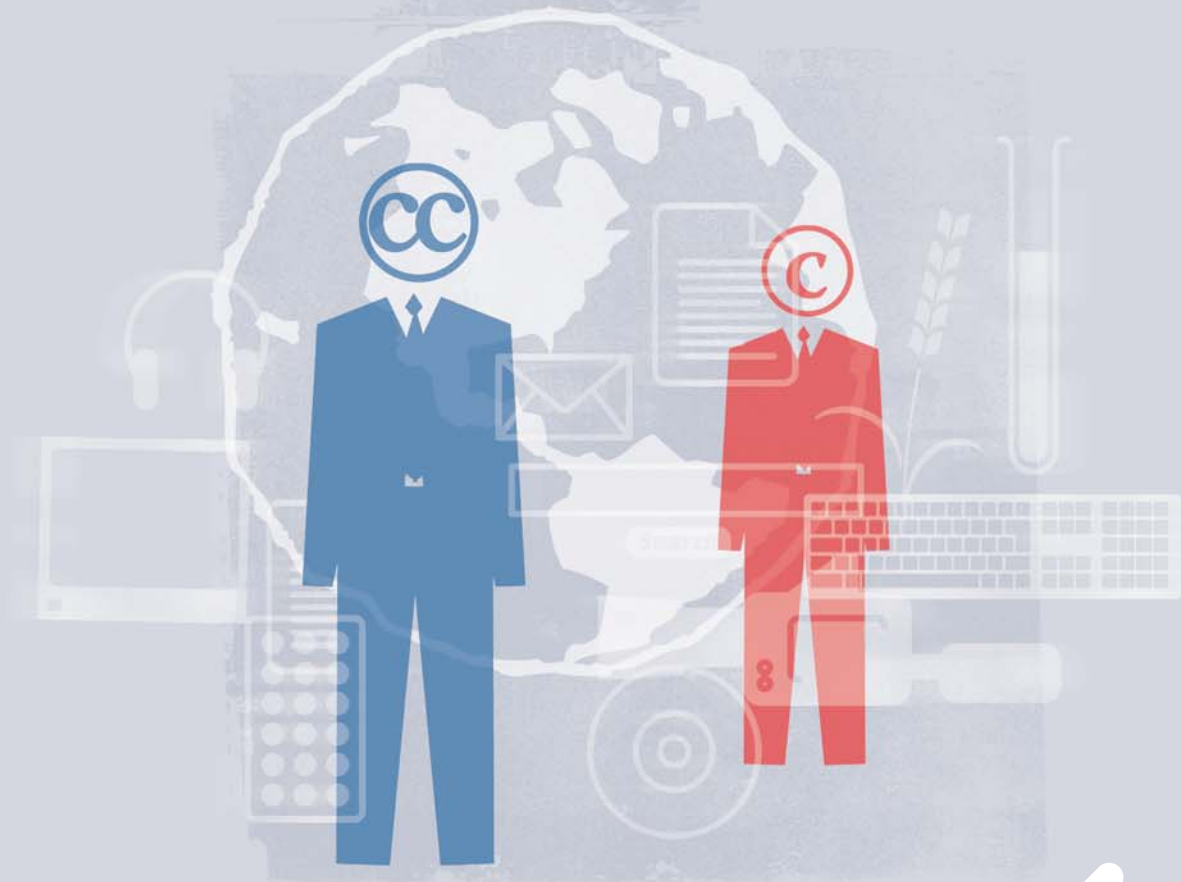
Copyrights and Copywrongs: the Rise of Intellectual Property and How it Threatens Creativity by Siva Vaidhyanathan, New York University Press, 2001, pp.131–144

Notes

-  ¹² John Brewer, *The Pleasures of the Imagination: English Culture in the Eighteenth Century*, Harper Collins, 1997, p.151.
-  ¹³ Siva Vaidhyanathan, *Copyrights and Copywrongs: the Rise of Intellectual Property and How It Threatens Creativity*, New York University Press, 2001, pp. 46–47.
-  ¹⁴ Letter from Thomas Jefferson to Isaac McPherson, 13 August 1813, in *The Writings of Thomas Jefferson*, Albert Ellery Bergh, ed., 1907, p. 326.
-  ¹⁵ Richard Barbrook, ‘The Regulation of Liberty: free speech, free trade and free gifts on the Net’, *Science as Culture*, number 2, volume II, 2002, see: www.constantvzw.com/copy.cult/texts/reg_liberty1.html.
-  ¹⁶ *Copyrights and Copywrongs*, p.159.
-  ¹⁷ Siva Vaidhyanathan, *The Anarchist in the Library: How the Clash Between Freedom and Control is Hacking the Real World and Crashing the System*, Basic Books, 2004, Chapter 4 *passim*.
-  ¹⁸ James Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’, 2003, see: www.law.duke.edu/journals/66LCPBoyle.
-  ¹⁹ Kay Withers, ‘Intellectual Property and the Knowledge Economy’, see: www.ippr.org.uk/publicationsandreports/publications.asp?title=&author=Kay+Withers&pubdate=&policyarea=&search=search.

PART TWO

THE ISSUES: INTELLECTUAL PROPERTY AT ITS LIMITS



SECTION 1: THE TECHNOLOGY CHALLENGE

‘Creation is unbelievably addictive . . . Creativity also plays a role in the programming community . . . creative programmers want to associate with one another: only their peers are able to truly appreciate their art. Part of this is that programmers want to earn respect by showing others their talents. But it’s also important that people want to share the beauty of what they have found. This sharing is another act that helps build community and friendship.’

CHRIS HANSON, OPEN SOURCE SOFTWARE PROGRAMMER, QUOTED IN *DEMOCRATIZING INNOVATION* BY ERIC VON HIPPEL, MIT PRESS, PAPERBACK EDITION, 2006

From the early 1980s through the late 1990s, artists, musicians, hackers, intellectuals, policy-makers and business leaders embraced the transformative potential of digital technology. The declining price of computation, communication and storage obscured a distinction crucial to copyright: that between the producers and consumers of information and culture. The features of Web2.0,²⁰ the latest user-improved version of the World Wide Web, and open source production, reflect those built into the internet by the first cyberspace pioneers. For their own use, these scientists invented a form of computer-mediated communication for sharing knowledge within a single virtual space: the ‘intellectual commons’. They adopted an architecture, ‘end-to-end’, that permitted simultaneous and unco-ordinated innovation at the edge of the network, a basic tenet that has ensured the bottom-up, user-driven innovation of the internet ever since. Telephone companies control the intelligence of the network from its centre, but in the internet, the intelligence and most of the network’s processing power is pushed out to the edges, thereby empowering innovators to try out their innovations without having to ask permission. Feedback also moves directly from user to innovator without being filtered through a network-owning intermediary. The centre of the network does not control the process so much as incorporate pieces of innovation into itself. Many more designers today benefit from the same ‘network effect’ whereby information is enriched by the many who submit data to a project, bringing more users on board in a virtuous circle of rapid innovation.

As the internet spread outside the university, its new users shared e-mails, swapped information, conducted online research and participated in network communities. Compare this set of opportunities with their



previous experiences as consumers of 20th-century mass media. Given the economics of production and transmission, the technical architecture, whether for print, radio, television, film or sound recording, was a one-way, hub-and-spoke structure, with unidirectional links to its ends, running from a high-cost centre to cheap, reception-only systems at the periphery. Whether you are talking about Hollywood films, music recording or the spectacle of political debate, the one-way technical architecture and the mass organisational model underwrote the development of a relatively passive cultural model of media consumption. There was no return loop to send observations or opinions back from the edges to the core, and no means within the mass media architecture for communication among the end points. Consumers would treat these communications as finished goods, completed statements uttered by a small set of actors socially understood to be ‘the media’ (whether state owned or commercial) and including equally far-removed reviewers, commentators and constellations of ‘stars’.

The internet has allowed us to replace a public sphere made up of finished statements, with one that invites us to a conversation. New mechanisms, from the simple mailing list and static web pages, to the emergence of writable web capabilities have enabled people to express themselves in combinations, on subjects and in styles that could not pass the filter of marketability in the mass media environment. The creation of new, decentralised approaches to debate and organisation has been accompanied by peer-produced methods of filtering for relevance and accreditation, using links and easy referencing to offer a ‘see for yourself’ set of options. Sites cluster around communities of interest. Procuring attention in the networked environment is more

dependent on being interesting to an engaged group of people than it is in the mass media environment, where the moderate entertainment of large numbers, even of weakly-engaged viewers, ensures success. Given this distributed architecture, with its multidirectional connections among all the nodes in the network information environment, non-market creativity, which in education, arts, sciences, political debate and theological disputation has always played an important part in information production, is now also capable of much greater co-ordinated effects. Even where it is not self-consciously co-operative, as in the results of any given Google search, the aggregate effect of individual actions acting on a wide range of motivations – market and non-market, state-based and non-state – offer a rich return. But the opportunity to harness collective intelligence has also spawned entirely new forms of collaboration in every domain of information and cultural production, from the peer production of encyclopaedias, to news and commentary, to immersive entertainment.

Equally unsurprisingly, market leaders in Hollywood and the music recording industry had a very different technological Utopia in mind. The reliance of digital distribution on copying held out the promise of higher levels of regulation than ever previously envisaged. High-profile litigation might be a holding operation until secure digital encryption formats could be standardised, paving the way towards a global ‘pay-per-use’ system, in which the content industries strive to create ‘leak-proof’ systems of sales and delivery, controlling access, use, and ultimately, the flow of ideas and expressions. The content industries were not secretive about their aspirations for charging for every bit of data, stamping out the used CD market, or destroying libraries through the extinction of fair use. They soon found, however, that this rapid expansion of e-commerce





was entirely dependent upon state surveillance and top-down legal regulation on a daunting scale, when the effectiveness of encryption and other security devices proved itself limited, as hackers demonstrated that anything that is encoded can eventually be decoded. As consumer activists, educators, scientists and librarians flagged up the dangers to democracy and creativity everywhere, battle commenced over what Professor Yochai Benkler, in his book, *The Wealth of Networks*,²¹ calls the ‘institutional ecology of the digital environment’ – major policy battles that he details exhaustively in every layer of this communications system – physical, logical and content.

But this stand-off between two such diametrically opposed visions of the future is precisely where the technological challenge to intellectual property as we have known it properly begins. In the late 1980s, Richard Stallman, a brilliant programmer working for the Massachusetts Institute of Technology, was especially distressed by the loss of access to communally developed code. Looking back to the early days of collaboration between the academy, the government and private industry, he saw the rise of proprietary software systems as a fundamental threat to creativity. In 1985, he founded the Free Software Foundation in response and set about developing and diffusing a legal mechanism that could preserve access for all to the software developed by software hackers, so that they were free to run a programme for any purpose, free to get access to the source code and adapt it, free to distribute copies, and free to improve it. His pioneering idea was to use the existing mechanism of copyright law to develop a General Public License (GPL) or ‘copyleft’, which would protect both the work and the principles by ensuring that users subscribed to the same openness and sharing. By

2000, the software they inspired had worked its way into the mainstream of the computer industry. A few years later, the Open Source Software movement, or FLOSS (Free/Libre/Open source software) has emerged as a major cultural and economic phenomenon. By mid-2004, a single major infrastructure provider and repository for open source software projects, www.sourceforge.net, hosted 83,000 projects and had more than 870,000 registered users, while a significant amount of software developed by commercial firms is also being released under open source licences.²² Here again, the only commands in the system are those given by programmers to the computers they run. These programmers operate under norms such as transparency in decision-making. Most interesting of these is their commitment to ‘forking’, whereby projects split up if necessary to pursue different solutions to the same problem in parallel, rather than leaving themselves vulnerable to winner-take-all bust-ups.

FLOSS in turn inspired Lawrence Lessig’s Creative Commons licences,²³ which recently have shown how relaxing key areas of traditional copyright can democratise creativity in a new remix culture, facilitated by the wider availability of digital sound and moving image production tools.

Technological advances in computer hardware and software and networking technologies have made it much easier to create and sustain a communal development style on ever larger scales. It took four years of user-led modification and improvement for the Apache web server software to become the most popular on the internet, used by 60 per cent of the world’s millions of websites, despite stiff competition from commercial developers. The modifications continue, co-ordinated by a central group of 22 volunteers. GNU/Linux, a hugely



complex and sophisticated operating system, built out of the voluntary contributions of thousands of developers spread around the world, ran more than a third of the servers that make up the web by the middle of 2000. **‘How is it,’** asks Steven Weber in *The Success of Open Source*, **‘that groups of computer programmers (sometimes very large groups) made up of individuals separated by geography, corporate boundaries, culture, language, and other characteristics, and connected mainly via telecommunications bandwidth, manage to work together over time and build complex, sophisticated software systems outside the boundaries of a corporate structure and for no direct monetary compensation?’**²⁴

Notes

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-  ²¹ Professor Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press, 16 May 2006, or see: www.benkler.org/wealth_of_networks/index.php/Main_Page.
-  ²² Steven Weber, *The Success of Open Source*, Harvard University Press, 2004, pp. 46–52.
-  ²³ Lawrence Lessig website: www.lessig.org/blog.
-  ²⁴ *The Success of Open Source*, p. 2.



SECTION 2: THE ECONOMIC CHALLENGE

‘Just when it seemed as if the long-running debate over illegal peer-to-peer (P2P) file-sharing was over and the record business had begun to make real progress in its battle to protect its copyrights, an unexpected champion of the “criminals” has emerged.

The voice belongs not to a geeky 16-year-old locked away in their bedroom, downloading Metallica, but to Terry McBride, the successful head of a recording and management company that has several multimillion-selling artists on its books.

McBride is so confident that the world’s major record companies are on the wrong track by suing P2P file-sharers that he is funding the defence of an American, David Greubel, who is facing prosecution by the Recording Industry Association of America (RIAA) for the file-sharing activities of his daughter. According to McBride, the litigation campaign amounts to the music business “suing its future” and is doomed to fail.’

MATT BYRNE, ‘MUSICAL HEIRS’, *THE LAWYER*, 8 MAY 2006



Users are transforming the internet and placing new demands on businesses daily. From open source to open content, new forms of organisation, production and distribution are emerging.

Some of the biggest online giants have already seen the opportunities.²⁵ After the roller-coaster period when ‘content was king’, leading to the dot.com boom and bust, companies that managed to survive, such as Yahoo!, Google, eBay, and Amazon, produced a new generation of Web2.0 internet applications, which drew anew on user-generated content and the harnessing of collective intelligence. In 2005 Yahoo! and eBay bought up Flickr, Skype and del.icio.us, while Writely was purchased by Google in March 2006.²⁶ More and more businesses are throwing themselves ‘open’ in many different ways, hoping that if they can capture enough ‘attention’, they will be able to turn it into revenue. Christian Ahlert is Public Project Lead for Creative Commons England and Wales and a founder member of Open Business, a forum for those who are helping each other develop successful open business models. He explained the centrality of ‘readers’ attention’ to openDemocracy’s Becky Hogge: ‘Because there is such an abundance of content out there, the value lies in how you categorise it, how you add value to the content through aggregating it as something that is of interest to you, the reader. So, many of these models are built around learning about your preferences, and creating trust networks.’²⁷

If it is difficult to grasp the way forward, one of the reasons is the challenge posed by the underlying concept of property, described by Steven Weber in his 2004 book, *The Success of Open Source*:

‘The intuition around “real” property is that to own something is to be able to exclude non-owners from it . . . Open source radically inverts the idea of exclusion as the basis of thinking about property. Property in open source is configured fundamentally around the right to distribute, not the right to exclude.’²⁸

In his review of Weber’s book last August in the *London Review of Books*, Lawrence Lessig expressed his concern that governments in particular had failed to grasp the implications of an emergent ‘sharing economy’. It had been possible as a result for the ‘market that controls today’s policy-makers . . . to keep them from grasping obvious truths that would add substantially to the general good’. The example he offered was of the two million volunteers self-organised in Microsoft newsgroups who, every year, work for free to help Microsoft’s customers – people they have never met – with their computer problems. Reformulating Weber’s question about what motivates open source programmers in general, Lessig asked: ‘What would motivate people to give up their time to help the richest software company in the world get richer?’ This is an important question to answer, Lessig concluded, because: ‘The communities that Microsoft husbands are important and genuine; the wealth they produce for Microsoft is great. The wealth similar communities could produce for society generally is even greater.’ Otherwise, ‘we all – citizens, businesses and governments – lose’.

When Ahlert interviewed Yochai Benkler on Open Business in April 2006, he agreed with Lessig: the emerging pattern of open production, he suggested, is completely invisible to traditional economics shaped by industrial norms. For decades we have understood the role people play





in economic production in one of two ways: either as employees in firms, following the directions of managers, or as individuals in markets, following price signals. His magisterial book, *The Wealth of Networks*, chronicles the emergence of a third mode of production in the digitally networked environment. Free software, Benkler points out, is only one example of a much broader phenomenon that he calls ‘commons-based peer production’ in the ‘network information economy’. For a huge range of diverse reasons, groups of individuals successfully collaborate on large-scale projects in response to social signals, rather than either market prices or managerial commands. From Wikipedia to the technology newsletter Slashdot, to collaborative platforms for the creation and distribution of music, text, and moving image, the networked environment has brought together the imagination and productive powers of individuals to work on new and unique outputs. The most important long-term effect of the pressure litigation has put on technology to develop decentralised search and retrieval systems he suggests, may be, ‘ultimately and ironically . . . to improve the efficiency of radically decentralised cultural production and distribution’, making it more rather than less robust.

Some of these projects are less self-conscious on the part of the users, like del.icio.us or Flickr. But for the most part, individuals self-identify for a given task, and through a variety of peer-review mechanisms, their contributions are recognised by the group and incorporated into what emerges as the collaborative output. What is so new about this sharing economy is not the ‘non-market motivations’ – all of us act on these many times in a day. But as two core inputs into information production have become widely distributed throughout the population – that is

‘computation and communications capacity on the one hand and human creativity, experience and wisdom on the other hand’, these same motivations **‘have moved from the domain of the social and personal to occupy a larger role smack in the middle of the most advanced economies of the world today’.**²⁹ It is the new feasibility of producing information, knowledge, and culture through social, rather than market and proprietary relations that creates opportunities for greater autonomous action on the part of millions of individuals – a more critical culture, a more engaged and better-informed society and the possibility of a more equitable global community.

Why do individuals participate? One part of the answer extends the insight of Thomas Jefferson when he compared the ‘non-rivalrous’ nature of the intellectual product to a shared taper. Not only do I not lose anything by sharing my knowledge with others, but in many situations it benefits me if others ‘speak my language’ – language is an ‘anti-rival good’. This is clear for the programmer in his community; for the mountain bike-user; for millions of music and movie fans; and for increasing numbers of people seeking to improve their social lives, democracies or environment. In the early 1990s, only a few academics could access this open form of computer-mediated communications. A decade later, almost every academic discipline, political cause, cultural movement, popular hobby and private obsession had a presence on the internet.

Of course, human creative capacity cannot be fully dedicated to non-market production. Personal computers, too, are used for earnings-generating activities some of the time. But in both these resources there remain large amounts of excess capacity, extremely diverse in their





quality, quantity and focus. The great success of the internet generally and peer-production processes in particular has been the adoption of technical and organisational architectures that have allowed people to pool their efforts effectively. Their modularity – the capacity to break a project down into small, discrete component parts that can be independently produced before they are assembled into a whole, allows contributors the flexibility to decide when and how and to what extent they participate in a project: the more fine-grained the components, the more people who can afford to participate. A successful, large-scale, peer-production project has a high proportion of fine-grained modules. Open source software projects in particular, however, show us that it may be possible for different individuals to contribute vastly different levels of effort, commensurate with their ability, motivation and availability. But this too, is possible. Given the large-scale connectivity we have today, and diverse human motivations, Benkler concludes, ‘it turns out that some combination of true believers, people who play around, occasional contributors, and people paid to participate at the interface of peer production and markets sustain these projects’.

As the advancing technical capacities of users increase the frequency and importance of such behaviour, we can expect further instances of decentralised innovation trumping innovation at the core. Experts assert that the rise of the sharing economy does not force a decline in market-based production, since it draws on impulses, time and resources that otherwise would have been spent in consumption. However, commons-based peer production now competes over taste, social behaviour and the ability to solve problems with those who produce information goods for which there are socially produced substitutes. Wikipedia poses a

challenge to other online encyclopaedias and may well come to be seen as an adequate alternative to Britannica as well. But the real challenge is to explore the many ways in which the two economies can reinforce each other. Rather than investing in expensive copyright protection systems, information may be commodified through tried-and-tested methods, but only if due respect is paid to the creative and generative social character of an active user community. Increasingly, as Richard Barbrook announced in *The Regulation of Liberty*, information exists as both commodity and gift, and as hybrids of the two. The passive consumption of fixed pieces of information now coexists with the participatory process of ‘interactive creativity’. One strategy can, for example, be used to enter the market, and another one adopted once you are established.

Already, as the relationship of firms to individuals outside them alters, there are casualties. Distribution, once the sole domain of market-based firms, can now be produced by decentralised networks of users, who share what they like, using equipment that they own and generic network connections. This distribution network allows a much more diverse range of products to reach much more finely grained audiences than were possible for the industrial model. The result has been described as: ‘from the edges, bottom-up, and long-tail’.³⁰ Under such conditions, peer-to-peer networks threaten to displace the entire music recording industry, while leaving musicians relatively insulated, with a stable revenue from performances and other sources. The social experience of going out to the movies may yet resume its hold over the film industry, replacing a 20-year-old mode of video and DVD distribution. The wealth of information about people’s search habits mined from the long tail by



Google advertising, for example, might give nimbler niche retailers the advantage over their larger competitors. The experiences of the established creative industries are different in each case, but in all of them, the business models are changing.

Meanwhile, in the past five years, parallel efforts have developed within a broad church of disciplines – in genomics, Tim Hubbard’s Human Genome Project; in pharmaceuticals, James Love’s R&D Treaty; in software development; publishing; and the arts. In each case, under closer investigation, counter-intuitive results disclose the significant benefits of a non-proprietary information culture.

‘Once you get *attention* – which may be a brand preference, a community people want to join and stay in, a recognition for your expertise, a software platform people want to use – then you need to figure out how to charge for something related – storage of photos, for example, or programming or training services, or personal appearances, or membership in the community.’

‘THE VALUE OF ATTENTION’ – INTERVIEW WITH ESTHER DYSON, FOUNDING CHAIRMAN OF ICANN, ON OPEN BUSINESS, FEBRUARY 2006

Notes

- 25 For example, 21 June 2006 announcement of new Microsoft and Creative Commons tool for copyright licensing: www.biz.yahoo.com/prnews/060621/sfw071.html?v=60.
- 26 See Becky Hogge, ‘Payday for the free internet’, openDemocracy, 14 March 2006: www.opendemocracy.net/media/payday_3351.jsp.
- 27 *Ibid.*
- 28 Steven Weber, *The Success of Open Source*, Harvard University Press, 2004, p.16.
- 29 Yochai Benkler interviewed on Open Business on 24 April 2006: www.openbusiness.cc/2006/04/24/the-wealth-of-networks.
- 30 Tim O’Reilly in an Open Business interview, 26 April 2006: www.openbusiness.cc/category/partners-feature.



SECTION 3: GLOBAL SOCIO-DEVELOPMENT AND THE CULTURAL CHALLENGE

‘Nature never says promote a monoculture; nature never banishes diversity: nature encourages diversity. Cultures that learn from nature have also thrived both in the creation of diversity and constant evolution and adaptation, as well as leaving enough place, enough space, for different ways to work . . . [W]e are at that moment when we can create the confusion that destroying other life is the ultimate creative act and we can reward it with patents and reward it with monopolies. Or, we can bring humility into the way we deal with life on earth.’

VANDANA SHIVA, FROM ‘BIODIVERSITY, CULTURAL DIVERSITY AND CELEBRATION: INTIMATE LINKS AND MATTERS OF SURVIVAL’, A LECTURE GIVEN IN MAY 2003 IN THE LIFT LECTURE SERIES IMAGINING A CULTURAL COMMONS

‘All of this is going to drive innovation to markets in countries that are more forward-looking because the internet is, of course, a global phenomenon and if you outlaw something it will crop up somewhere else. So our challenge as an industry and as an economy is to discover the rules by which we can create value and ultimately create wealth in this new environment. It’s not about protecting the old ways of creating wealth but rather that creative destruction has to take place. Although companies may suffer, I think we’ll all be better for it.’

TIM O'REILLY, INTERVIEWED ON OPEN BUSINESS, APRIL 2006

‘The human brain does not try to predict one single future. It imagines a wide range of possible futures, and for each one of those futures it makes time paths, saying, if this happens, then I will do that. The brain not only creates these time paths, it stores them. So one is constantly making a “memory” of possible futures.’

JULIA ROWNTREE, *CHANGING THE PERFORMANCE: A COMPANION GUIDE TO ARTS, BUSINESS AND CIVIC ENGAGEMENT*, ROUTLEDGE, 2006

The London International Festival of Theatre (LIFT)³¹ is an organisation with a long track record in bringing business, theatre and the community together in face-to-face encounters. Its experimental work shares some of the more enabling features of internet architecture. Just as the internet offers new easy ways to communicate not only with friends and family but also with geographically distant and more loosely affiliated others, LIFT creates mind-changing international and neighbourhood opportunities in the world city. LIFT, too, works on the relationship between enhanced personal autonomy and collectively negotiated knowledge. It, too, has become expert in the ways and means of facilitating intimate communication for a newly emerging, culturally diverse set of social relations – at a distance, across widely divergent interests and contexts.

In 2003, LIFT asked itself: **‘How, when goods held in common are now global in scope, and inevitably defined by processes of intercultural engagement and negotiation, is a distinct community to be forged globally and locally? What forms might these cultural commons take in relation to the all-pervading thrust of the market and how are specific rules and traditions to be imagined and established?’** It embarked on a series of lectures entitled *Imagining a Cultural Commons*.³² The second lecture of the series, given by the US attorney, Lawrence Lessig, at the Royal Geographical Society in May 2004, outlined how the collision between intellectual property and internet protocols were eroding cultural freedoms. But the series began with a lecture funded by Counterpoint, the British Council’s cultural relations think tank in the central hall of the Natural History Museum. It was an address by physicist and bioactivist Dr Vandana Shiva,³³ in which she described how multinational monopoly regimes are undermining biodiversity and thus the resilience of crops and communities



in India, locking farmers unwittingly into a cycle of debt and dependence on seeds that rely on chemicals to succeed. Interrupting her career, her response had been to take action and initiate a seed bank and seed-sharing scheme across India. She described the traditional celebrations of Chhattishgarh (www.chhattisgarh.com), where once, 'before industrial agriculture created monocultures', 200,000 varieties of rice were grown, each with its unique qualities – 'there are rices for lactating mothers; there are rices that are for healing, rices that are very good for arthritis; there are rices that are good in aroma as in the case of the famous basmati from our valley . . .'. Her organisation had been able to salvage 6,000 varieties and bring them back to the farmers' fields. Shiva's visit to London coincided with a polarised UK debate on genetic modification of crops, so it was particularly important that a speech full of haunting images from the front line, contained some happy endings: **'Four years ago, we suddenly had a claim by a Texas company that they had invented basmati and that the patent number 5663484 had 20 claims. And the claims included the length of the grain, the heights of the plant, the aroma of the rice and even methods of cooking . . . We started legal challenges in India, legal challenges in the United States . . . RiceTech was compelled because of legal action and peoples' mobilisation to drop 99 per cent of its claims to exclusive monopolies.'**

Many people fortunate enough to hear Dr Shiva talk, would have found themselves caught up in a systematic reversal of what Thomas Carlyle, in *Past and Present*, one of the great works in the 19th-century debate around commodification, called the 'extinction of the moral sense in large masses of mankind':

'The symbol shall be held sacred, defended everywhere with tipstaves, ropes and gibbets; the thing signified shall be composedly cast to the dogs. A human being who has worked with human beings clears all scores with them, cuts himself with triumphant completeness forever loose from them, by paying down certain shillings and pounds. Was it not the wages I promised you?'³⁴

As distant producers become recognisably human, and unpredictable, empathising cultural relations are restored to man and nature, 'them' and 'us' – we are made aware of a vast new set of opportunities. Searing insight into the scale of the devastation created for so many by the privatisation of agricultural biotechnology over the past 20 years, is accompanied by the sense of possible new experiments in mutual collaboration. Could farmers and local agronomists from around the world develop a feedback process that could gather the products of innovation into a self-binding commons, through a continued process of networked conversation among the user-innovators? How might this combine with public investment from national governments in the developing world, from the developed world, and from more traditional international research centres, to create a sustainable research foundation that could survive alongside the proprietary system? How committed would each actor be? There are tantalising possibilities of commons-based solutions to world development, with countries such as Brazil, China, India and Indonesia leading the way. But wouldn't the international intellectual property and trade system obstruct such an initiative? The questions return: who owns culture, and to what end?





Today, intellectual property cuts across so many aspects of our lives. There are the big rows that hit international headlines about access to medicines for HIV/AIDS or patenting the human gene, and many more big rows that do not: the privatisation of research and development, the patenting of computer software, databases, plants and indigenous knowledge. The challenge is not only to create a balance between public domain and private rights; the interests of creative people, rights-holders, and investors; between universities, government and industry; or between industrial countries and developing countries – for each of these players has been frozen by the kind of stand-off that Thomas Carlyle describes. It is rather, also, to restore the relationship to its complex, human form, and deploy productively the creativity and emotional intelligence that results. There is little chance of an institutional reform of the World Intellectual Property Organization (WIPO) or the Trade-Related Aspects of Intellectual Property Rights (TRIPS) that could fit them for this task.

However, today, international treaties are not the final word. The enhanced practical freedom of individuals in the sharing economy is emerging as a new global mover, with new forms of governance in its wake. For example, open source software is delivering the decision-making prerogative into the laps of developing countries such as Brazil. It is regrettable, but not surprising, that the *Special 301 Report*, issued by the US Trade Representative's Office, which grades every country in terms of how it protects IPR, downgraded Brazil to a Priority Watch Country in 2006. Brazil is forging ahead in the push to use open source software in government departments and telecentres set up by the federal government to provide internet service access to some of its

poorest and most remote regions. The Center for Technology & Society that is the home of Creative Commons in Brazil³⁵ is quite clear about its strategy: **'Brazil needs to leapfrog directly from the 19th century to the 21st century in terms of IP rights. In other words, it is mandatory for our cultural and economic development that we skip the "cultural industry" phase, predominant in the 20th century, [moving] directly to a "cultural society", which includes everyone in terms of access, production and dissemination of knowledge.'**

Free software has been adopted not only by several ministries but also by the army and the central data processing agency, governmental bodies at the federal, state and city levels, and the private sector. Cities in Brazil have been at the forefront of legislation mandating government offices to use free software where possible. Retail store chains, airlines, financial consultancies and supermarkets are following suit. Creative Commons has become a popular phrase and a media phenomenon, enthusiastically embraced by civil society and a huge community of artists alike, beginning with Minister Gilberto Gil, whose Ministry of Culture website is CC-licensed throughout. Here again, government policy begins with a change of mindset. For Brazil, the Creative Commons project is a tool empowering creators and artists to license their creations so that society as a whole is entitled to exercise some rights over their work. It is a 'tool for intellectual generosity, as well as for the emergence of open business models'. It is the artist or creator who decides, on a voluntary basis, which rights she or he wants to reserve, and which rights he or she wants 'society to be free to exercise'. The mindshift is profound. Trama Records, the largest Brazilian label, has translated and published Lawrence Lessig's book *Free Culture* under a Non-Commercial Creative Commons License. Trama supplies the book free to all public





libraries and to anyone interested in having a copy. Progress may not be fast enough, however, for those Brazilian world-class musicians who sell live-recorded CDs immediately after the ‘sound-system parties’ to the couple of thousand fans who turn up every week. As in other Latin American countries, creativity is moving to the periphery, with small start-ups finding the technological tools and business models they need, regardless of copyright and IP protection.

The world’s scientists, too, are facing choices that could have a huge impact on the developing world. Even in the developed world, the cost of scientific publications has reached crisis proportions. But authoring and peer review – the two core value-creating activities – are carried out by scientists who have no expectation of either royalties or payments. We are seeing new initiatives in scientist-run and -driven open access systems. There are different models. The purely non-profit Public Library of Science draws on authors’ payments, philanthropic support and university memberships for revenue. The for-profit BioMed Central, based in the UK, produces a variety of derivatives, such as subscription-based literature reviews and customised electronic updating services. Here, author payments are built into the cost of scientific research and included in grant applications. Both have waiver processes for scientists who cannot pay the publication fees. The articles on both systems are immediately available and free on the internet.³⁶ As long as established journals such as *Science* or *Nature* carry substantially more prestige than these, and while hiring and promotion decisions continue to depend on this prestige, they stand a limited chance of success. However, scientists are taking more of an interest. Individual scientists working with government-funding agencies, non-profits and foundations and

open business models can create the same good without its cost barriers. Such an initiative would significantly improve the access to this knowledge of universities and scientists in developing nations. At the same time, a much broader approach has been developing through the practice of self-archiving. Here the question is how to be able to search for papers on any given topic. Already, we see the invention, by organisations such as the Open Archives Initiative of tagging standards and protocols that allow anyone to search this resource. But the database itself is made up of a network of self-created, small personal databases that comply with a common search standard. Self-authorship and self-organisation are also at the centre of this initiative.

Every day, more of these decisions are being taken, weighing up the pros and cons of entering the sharing economy – rational decisions and emotional decisions, but choices made at the network’s edge. What is remarkable when one begins to explore these exponentially proliferating stories is the sheer energy of innovation, creativity and co-creation, which they uncover. Flip through the pages of *The Wealth of Networks* and on every other page there is an extraordinary project – a nuanced, collective analysis of the Barbie doll as a contested cultural figure in Wikipedia, which allows the reader to trace its evolution with accompanying discussions; the sheer ingenuity, skill, discipline and unorchestrated flair of the American students and activists who used the internet to generate research into and public criticism of defective electronic voting machines; the emerging phenomenon of Machinima, where the 3D rendering capabilities of a game are co-opted for the storyline of a short film, recorded while it plays, and posted on the internet. Perhaps the most telling remark in the whole of Yochai Benkler’s





vast survey is his reminder that, 'the internet does not make us more social beings. It simply offers more degrees of freedom for each of us to design our own communications space than were available in the past. It could have been that we would have used that design flexibility to recreate the mass-media model . . .'. Nothing in the nature of the technology required that it should become the basis of such a rich panoply of social relations.

The sudden explosion of what is referred to in the trade as user-generated content tells us less about the technology, or even the economy of our contemporary societies, than it tells us about ourselves, the under-represented participants in all cultural transactions. The team who drafted the *Adelphi Charter* put it rather well: 'The current laws do not reflect modern ways of thinking and working. They are out of touch with the public's demand to get access to information and knowledge and, in many cases, to be creative themselves. Just as the traditional, Victorian ways of teaching had to change when mass education arrived, so now, everyone wants to express their own creativity. IP laws have to change.'³⁷

'[We will see] a fundamental shift in the balance of power towards individuals. Individuals will declare what kinds of vendors they want sponsoring their content, and then those vendors will have the privilege of appearing, discreetly, around the user's content. There will be much less "advertising" and much more communication to interested customers. Advertisers will have to learn to listen.'

ESTHER DYSON, IN CONVERSATION WITH VINT CERF, IN THE *WALL STREET JOURNAL*,
6 MAY 2006





Notes

-  ³¹ For a short account of LIFT, see www.liffest.org.uk/about. For a fuller history, Julia Rowntree, *Changing the performance: a companion guide to arts, business and civic engagement*, Routledge, 2006.
-  ³² See Julia Rowntree, *Changing the performance: a companion guide to arts, business and civic engagement*, Routledge, 2006, pp. 225–29.
-  ³³ Vandana Shiva, 13 May 2003, Imagining a Cultural Commons, lecture on ‘Biodiversity, cultural diversity and celebration: intimate links and matters of survival’.
-  ³⁴ Thomas Carlyle, *Works*, The Centenary Edition in 30 vols, London: Chapman & Hall, 1896–99, vol.10, p.194.
-  ³⁵ Creative Commons in Brazil: www.openbusiness.cc/brazil, posted on 30 August 2005.
-  ³⁶ Public Library of Science and BioMed Central: www.plos.org and www.biomedcentral.com/info.
-  ³⁷ The Royal Society of Arts, *Adelphi Charter on Creativity, Innovation and Intellectual Property*, FAQs, summary at: www.adelphicharter.org/pdfs/faqs.pdf.

PART THREE

OPTIONS FOR CULTURAL ORGANISATIONS





SECTION 1: NEW AUTHORS

‘There is a deal. The problem is, they are looking to build their various assorted businesses and to do this by getting music at the cheapest, lowest price. Our job is to look after the interests of our 44,000 writers and composer members to make sure that they have an opportunity to participate in a fair way in this new online world. And that while all these other people are building their businesses, they get a chance to make a living from doing what it is they love, which is writing the music that we want to buy.’

ADAM SINGER, CEO OF THE MUSIC ALLIANCE, SEPTEMBER 2005

‘We have to weigh the interest in developing that technology as effectively as possible against the need to ensure that there is sufficient incentive to produce new music and new recordings. But it is the former, not the latter, that we need to worry about. If there is a problem in the music business, it is not a shortage of material.’

JOHN KAY, *FINANCIAL TIMES*, 21 MARCH 2001

‘My personal view is that we mustn’t ever see this explosion of creativity as competition.’

SIMON NELSON, HEAD, RADIO AND MUSIC INTERACTIVE, BBC, MARCH 2006



The Creative Commons project, started in 2001 by a group of cyberlaw and intellectual property experts, computer scientists, artists and publishers in the United States, describes its approach in the following terms:

‘We use private rights to create public goods: creative works set free for certain uses. Like the free software and open source movements, our ends are co-operative and community-minded, but our means are voluntary and libertarian. We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them – to declare “some rights reserved”. A single goal unites Creative Commons’ current and future projects: to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.’

www.creativecommons.org/about/history

Many creators of intellectual property, the group believed, would be quite happy to have their work used and reused in a range of ways, without potential users having to contact them, their agent or lawyer, in order to request permission, and without giving up all of their rights over the work. With the Yahoo! search engine (www.search.yahoo.com/cc) now indexing millions of Creative Commons-licensed works, this was an idea whose time had arrived. As of the end of November 2005, representatives from 46 countries and regions had joined the initiative, and licences for 26 of those countries were completed (www.creativecommons.org/worldwide).

Creative Commons (www.creativecommons.org) exists within existing copyright law. The intention is to avoid the problems current copyright

laws create for the sharing of information, by allowing an individual to attach to their work off-the-peg model licences that define simply what others may or may not do with it. There are currently six different machine- and human-readable standard Creative Commons licences to choose from (www.creativecommons.org/license), ranging from the most restrictive, ‘share-lite’, Attribution Non-Commercial No Derivatives Licence, to a public domain licence under which you allow any uses of your work, and basically renounce copyright. The most share-lite licence allows others to download your works and share them, provided they mention you and link back to you; but it does not allow them to be changed or used commercially in any way. Share alike, on the other hand, lets others remix, tweak, and build upon your work even for commercial reasons, as long as they credit you and license their new creations under the identical terms. This licence is often compared to open source software licences: all new works based on yours will carry the same licence, so any derivatives will also allow commercial use.

With the exception of the no-derivative and share alike options, the different uses these licences permit can also be combined. In each case, too, the licences make it clear that they are non-exclusive: ‘Any of these conditions can be waived if you get permission from the copyright holder.’ Each licence requires that the creator of the original content be acknowledged, and includes certain common clauses. In each case, the licence includes a plain-language summary of the licence with corresponding ‘symbols’, a legal code setting it out in full, and a digital code that will enable Creative Commons-aware search engines such as Yahoo!’s to index licensed content more easily.



Creative Commons says further: ‘Our aim is not only to increase the sum of raw source material online, but also to make access to that material cheaper and easier. To this end, we have also developed metadata that can be used to associate creative works with their public domain or licence status in a machine-readable way. We hope this will enable people to use our search application and other online applications to find, for example, photographs that are free to use provided that the original photographer is credited, or songs that may be copied, distributed, or sampled with no restrictions whatsoever. We hope that the ease of use fostered by machine-readable licences will further reduce barriers to creativity.’

Outlining the advantages in an article entitled ‘Free-for-all?’, written for *The Author* in autumn 2005, Nicola Solomon, Head of Intellectual Property and Media at Finers Stephens Innocent solicitors, warned potential licensors to look carefully at the particulars of a Creative Commons licence to ensure that it gave them what they needed:

- even if you grant non-commercial rights only, you will be unable to grant a publisher exclusive rights for the same work, and this may be a bar to publication
- academics seeking citations, for example, should realise that there is no obligation on the user to tell you what they are doing with your work
- originating in America, the moral rights clauses are weak, and no provision is made for dealing with the moral right to object to false attribution

- the licence is given for the full terms of copyright only, so once unleashed, you have no means of retraction in a fast-moving subject.

On the positive side, Solomon divided up her comments revealingly between ‘making you more beautiful, more popular, and richer’:

- ‘more beautiful’ might include individuals empowering researchers and other writers to quote you, even at length, without having to trace the author, seek permission or legal advice; adding to the precious resource that is the commons; or academic and other public institutions, like the Creative Archive, giving wider public access to their collections
- ‘more popular’ emphasises the advantages opened up by shared licences for helping people and organisations alike find new and wider audiences for their work and their ideas; like Cory Doctorow, musicians have gained instant fan bases by inviting everyone to copy, mix, remix, sample, imitate, parody or even criticise their work using a Creative Commons licence
- ‘richer’ – last, ‘by canny use of the licences, such as limiting the licence to non-commercial use, or licensing parts only’, while you cannot use a Creative Commons licence for paid use, ‘you can draw a wider audience to your work and still retain the right to exploit the work commercially’.

It is useful to be reminded that here as in the pages of Open Business, we are very much in the real world where remuneration is a high, if not

all-consuming, priority. Creative Commons licences are designed to cope with an unsatisfactory situation. They obviate some of its worst effects. There is certainly ingenuity in triggering a rolling process that constructs a legally self-reinforcing domain. And it is no doubt worthwhile helping creators make the best of the internet as a method of display and distribution for their work. But do the licences make any real difference?

When the UK launched its own Creative Commons licences in March, 2005, the initial response from both individuals and organisations was cautious. The think tank Demos made an early decision to release their publications online with a Creative Commons licence. The BBC also dipped a toe in the water with its Creative Archive (<http://creativearchive.bbc.co.uk/>) licence, which was, however, hedged about with strictures constraining use: no commercial use; no endorsement, parody or derogatory use; no political, campaigning or religious use; or use outside the UK. They described it nevertheless as ‘a challenging new territory for rights owners’. In September, Paul Miller reported to the Common Information Environment Group that while Creative Commons had attracted a lot of interest in the creative industries, the broader public sector had been slower to recognise the potential benefits of vastly increased profile and cost-effectivity for all sorts of public initiatives, including those publicly funded to promote the use and reuse of information online. Individuals also appear to have played safe: the most restrictive, ‘share-lite’, licence, according to Christian Ahlert, has proved most popular with artists in the UK so far, beating into second place those that permit derivatives that thrive in the rest of Europe.

But appearances might have been deceptive. The first generation of

cultural commons activists in the UK would have used American licences. This includes many of the most innovative creatives who joined the rest of the world at the iCommons Summit, ‘Towards a global digital commons’, in Rio de Janeiro in June 2006.³⁸ The high energy levels on the iCommons Summit web pages of the Creative Commons website are a better indication of things to come. The single most dramatic development, undoubtedly, has been another decision by the BBC. This time, looking to its audiences in 2010, it appears to have wholeheartedly embraced ‘the Share philosophy’ in planning its new editorial prototype, Creative Future, launched to a well-deserved fanfare in April 2006.³⁹ It seems that the very ‘reasonable’, pragmatic tone of Creative Commons may conceal a surging power of transformation that is only now beginning to surface.

Creative Commons is not the Utopian world of Romantic authentic exchange that Carlyle thought money had destroyed. But it draws on the same insight. It turns out that what makes for success is not whether money is exchanged or whether laws are challenged. What makes cultural commons thinking the basis of a gathering social movement worldwide, is the perception that it is the mutually enabling relationship that matters most. These licences make it easier to share. Those whose innovating energy have begun to transform the centre from the edge – who we might think of as the new authors – are people who have understood this. And they are also its beneficiaries.

Whether you look at a mature movement such as the open source software movement, or emergent groups, such as the free culture movement or the scientists’ movement for open publication, these people are intent on creating a domain of open cultural sharing,



somewhere where all can be creative together. An Open Business⁴⁰ project, too, has a quality that is hard to pin down, from the perspective either of law or of economics. It recognises that the same transaction could at one and the same time be a commodity, a gift and a public service – as long as the common culture, the enabling relationship, is intact.

Cory Doctorow, for example, has three novels under different Creative Commons licences. *Down and Out in the Magic Kingdom*, not only sold its entire printing edition, but was also downloaded 400,000 times from the internet. Hitherto, downloading has been an awkward and expensive business. But that is changing, and Doctorow admits on Open Business that he is under no illusion that this situation is going to last. Up until now, he argues, giving away books has made him money, in print as well as in ‘landing speaking gigs, columns, paid assignments’, and all the activities, ‘contingent on my public profile’. He has, however, also gathered a great deal of market intelligence about the medium he works in that he is convinced will be invaluable for his evolving practice, for this is how he sees ‘e-books’ – a co-creation with your readers, a practice not a product. Meanwhile, he runs one of the most popular blogs on the internet. In publishing his third book in June 2005, Doctorow added a new, ‘cool’, licence:

‘[T]he Creative Commons Developing Nations Licence . . . means . . . that if you live in a country that’s not on the World Bank’s list of high-income countries, you get to do practically anything you want with this book. While residents of the rich world are limited to making non-commercial copies of this book, residents of the developing

world can do much more. Want to make a commercial edition of this book? Be my guest. A film? Sure thing. A translation into the local language? But of course. The sole restriction is that you may not export your work with my book beyond the developing world. Your Ukrainian film, Guyanese print edition, or Ghanaian translation can be freely exported within the developing world, but can’t be sent back to the rich world, where my paying customers are.’

These self-empowered new authors only look like old authors. What they bring with their choice of licence is a whole new social structure that takes its inspiration from the open source software movement. Steven Weber has described the open source licence as a ‘*de facto* constitution’⁴¹ for communities connected by a shared goal of creating a common product. It follows certain rules, based on certain values, and with an emerging governance mechanism to match. Since software developers who participate expect at different times to be both agents and beneficiaries, the values are competitive, but non-adversarial in important ways.

Those who join the community expect to be treated fairly; make public any problems; and prioritise the needs of the users while protecting the community. Each aspires to a condition of freedom through access to the source code, but those who believe in non-commercial use will not discriminate, for example, against those who wish to use the same access for different or commercial purposes. Because this is a meritocracy, ‘developers are given equal opportunity to succeed (or to fail) based on how good they are as coders’. The emphasis on reputation and accreditation stems from this core value. Status in the group has much



more to do with making an authentic contribution than with any pre-existing entitlement. Dissident opinion, in possessing the right to ‘fork code’, allows for parallel development of contesting arguments. Taking its cue from this principal mechanism, Wikipedia, for example, rather than suppressing dissent, uses contrasting perspectives to place issues into sharp relief. This also transfers a very important source of power from the charismatic leader who initiated the project, to his or her followers.

As a consequence of these simple principles, a new culture is emerging, which is reshaping not only the ‘who’ but also the ‘how’ of cultural production, so that it is transnational, more egalitarian, more transparent to its users, less deferential, much more diverse and, above all, self-authored.

Notes

-  ³⁸ 2006 iCommons Summit: www.icommons.org.
-  ³⁹ On 25 April 2006, BBC press release, ‘BBC’s Director of New Media and Technology defines vision for the future’: www.bbc.co.uk/pressoffice/pressreleases/stories/2006/04_april/25/newmedia.shtml.
-  ⁴⁰ Open Business: www.openbusiness.cc.
-  ⁴¹ *The Success of Open Source*, p.179.

SECTION 2: NEW USERS AND NEW ‘TRUST BRANDS’

‘The “Share” philosophy is at the heart of [bbc.co.uk 2.0](http://bbc.co.uk),’ new media director Ashley Highfield told staff on Tuesday. ‘We are looking to a world where you could share BBC programmes, your own thoughts, your own blogs and your own home videos. It allows you to create your own space and to build www.bbc.co.uk around you.’

PRESS RELEASE FOR THE LAUNCH OF THE BBC’S NEW EDITORIAL BLUEPRINT FOR 2010, CREATIVE FUTURE, APRIL 2006

Announcing the initiative during the Royal Television Society’s Fleming Memorial Lecture on Monday, Director-General Mark Thompson said that ‘the BBC can no longer think of itself as a television and radio broadcaster with “new media on the side”. We should aim to deliver public service content to our audiences in whatever media and on whatever device makes sense for them, whether they are at home or on the move,’ he said.

‘We’ve recently started a project to reassess the entire BBC website. Inviting people to contribute via this competition is an essential component of that work,’ said Tom Loosemore, BBC New Media and Technology’s Head of Strategic Innovation. **‘Given our publicly funded status, we’re delighted that the open nature of the web offers the BBC’s users the chance to contribute their own ideas directly into the creative process. It is, after all, their website.’**

The BBC’s new editorial blueprint for 2010,⁴² in the words of the Director-General, began with the insight that the BBC has to adapt, or go under: ‘The second wave of digital will be far more disruptive than the first and the foundations of traditional media will be swept away, taking us beyond broadcasting.’ They are not alone in this realisation. Another dramatic example was last year’s launch, by Laurier LaPierre, the Chairman of the National Advisory Board of Canadian Culture Online, of *A Charter for the Cultural Citizen Online*⁴³ calling for the ‘creation of an online cultural agency at arm’s length from government’, with a level of funding that can place digital culture on a similar level as film and television.



Here again, there is an attempt to powerfully reframe the language in which online culture is discussed. LaPierre also wants a cross-generational dialogue to start now with the users of digital culture, not as consumers (or thieves) but as ‘citizens’. Each citizen has a claim on the ‘public commons’ of the internet, which come with certain rights as laid out in the *Charter for the Cultural Citizen Online*, including enough opportunities for free and unfettered interactive participation – opportunities ‘to learn, to inform, to create, to entertain or to be entertained, to exchange or to reach an audience, or any combination of these’ – to ‘foster a sense of democratic ownership of virtual public spaces’.

The BBC, in moving away from the ‘entertainment-as-finished-goods’ era, also acknowledges that they have entered uncharted waters, accepting that everything about their institutional culture – what they do, how they distribute, how they offer their content and why – is challenged by this gathering wave of digital innovation. The BBC has looked for renewal in many different directions, but with one underlying theme: the construction of a new relationship with ‘the edge’ – with their audiences.

Among the audiences to whom they have to relate, are those who already have a sophisticated grasp of the internet; young people who have brought themselves up not on pre-programmed content, but on co-creation models of communication, who have their own blogs, or run their own podcast radio stations. Unlike established and successful authors who have a loyalty to their publishers, these are people who do their own marketing and who are in no need of a publisher. But they might enter into a rewarding exchange, a mutually enabling cultural

relationship, an opening to an opportunity. There are currently, it seems, 21 million iPods out there ‘on the loose’. Moreover, anyone with a microphone, a computer and a broadband connection can now be a creator and distributor of content. It turns out that the edge is full of these new authors.

What are the characteristics likely to be of such a productive relationship? It is to these new authors in these new ‘creative industries’ that we might turn for a few clues into the future. In early March this year, the BBC’s Head of Radio and Music Interactive, Simon Nelson, was interviewed by Hugh Fraser from the new podcast magazine, ID3.⁴⁴ It was a frank, egalitarian, and cheerful exchange.

Fraser wants to know if the BBC is going to muscle in on their creative space. But he is equally intrigued by the extent to which the podcasters’ burgeoning practice might transform the ‘BBC’s very savoury image’. There is quite a lot of gentle ribbing. It extracts from Nelson an impressively open, even affectionate response. Nelson accepts the fact that if ‘on demand’ programming is going to transform the BBC, then one place to start would be to register the run-away podcasting success of Lord Bragg’s ‘very intellectual programme with lots of academics on it’, ‘In Our Time’, as just that, ‘a demand for high-quality, intellectually stimulating content’. He is also solicitous for the ‘incredible creative development’ of the new medium under conditions when, with Ricky Gervais leading the way, there is a ‘rush to find gold in the hills’. It has to be said that podcasters discussing the interview were not so worried about this prospect.



However, it is not the content of the exchange that seizes the attention, so much as the relationship between the two men. To listen to Simon Nelson talk to his podcaster audience is again to be strongly reminded of what Steven Weber, in *The Success of Open Source*, describes as the typical ‘non-authoritative setting’ of open source communities. Citing as an example the modern religious community, where, ‘it is the leader who is dependent on the followers more than the other way around’ – Weber claims that among these successfully collaborating open source programmers, ‘relationships [are] primarily characterised as bargaining relationships’ and, ‘the less dependent party to the relationship (the one who would be harmed least by a rupture) is the more powerful’. He concludes: ‘Leaders of open source projects understand the consequences intuitively – the primary route to failure for them is to be unresponsive to their followers.’

Nelson too, certainly understands this. When at one point in his interview he thinks about ‘competition’ – a notion and a prospect that he soon moves to one side – it is the community of podcasters and future podcasters, not the private sector, to whom he refers. Even defers, since he is dependent on sustaining a productive relationship with these ‘users’ who will create the content on his new platforms, and who will never think of that content or themselves as ‘owned by the BBC’.

A second snapshot presented itself the following month. In April this year, Deek Deekster, in his blog, wrote up a ‘historic encounter’ that had taken place the day before.⁴⁵ A group of UK podcasters had spent two hours ‘deep in the bowels of BBC Television Centre . . . discussing UK podcasting’. Chris Vallance of Radio 5 Live’s Pods and Blogs had ‘invited

British podcasters to discuss podcasting, broadcasting and where the two might meet up’. Present at this historic event were, ‘a mixture of podcast producers from businesses deriving income to passionate enthusiasts, all reporting rapidly quickening growth in the podcast phenomenon, which was attributed partly to the BBC’s recent promotion of podcasting’. There are, Deekster rejoiced, ‘well over 250 active UK podcasters right now and this was an acknowledgment that they are beginning to emerge as a source of talent with new ideas and voices’.

There was much frank talking about creative freedom and licences. The BBC was told about the MCPS-PRS podcast licence, while the Creative Commons concept was flagged up as flexible, easy to understand and easy to adopt. The BBC podcast ‘experiment’ was debated and podcasts from Germany and Pakistan listened to, as people agreed on the ‘distinctive genuineness and intimacy’ of the new medium at its best.

At one point, Chris Vallance interviewed the assembled podcasters, and it is a recording of this that Deekster offers next to anyone interested. He is concerned that listeners should get the whole picture, for it seems that everyone in the room is in fact recording everyone else, ‘with multiple recording devices, they record him interviewing them. At one point Podcast Paul’s microphone is clipped to a pint of beer, and my Sony Minidisc recorder is balanced on a sauce bottle’.

Cultural commons thinking prepares us for a mutual world in which we will all be authors, publishers and real-time reporters. ‘Prioritising the needs of users’ is a bland enough aim, until one considers the ways in which user-led innovation could create and destroy whole industries,



and transform our public spheres. The ‘savory image’ of the BBC can hardly expect to emerge intact from such an experiment. Opportunities and the challenge for such cultural organisations are equally vast, since they will operate at the boundary line where the relationship between cultural commons innovation and more traditional forms of organisation, whether the private company or the national government, is being worked out. Different information flows and different protocols structure hierarchical organisations, so the interface promises to be a place of dynamic cultural encounter, where new forms of organisation are born.

At the same time, there is one strand in cultural commons thinking that makes it easier for cultural organisations to embark on more mutual relationships of trust with huge new publics: it is accustomed to recognising the value of giving – giving respect, giving trust. As Onora O’Neill, 2002 Reith lecturer on ‘A Question of Trust’ said at a recent Counterpoint conference: ‘You can’t build trust. There are only three things you can do with trust: give it, earn it and fritter it away.’ It’s a start.

‘ID3 looks like it’s shaping up to be another great resource for anyone interested in podcasting. I may be a founder of the other podcasting magazine (see my previous post), but I really do wish them all luck over at ID3, Nicole and Hugh in particular.’

COMMENT ON WWW.VERBALISM.NET, 2 MARCH 2006

Notes

- 42 BBC press release, 25 April 2006, ‘Creative Future – BBC addresses creative challenges of on-demand’: www.bbc.co.uk/pressoffice/pressreleases/stories/2006/04_april/25/creative.shtml.
- 43 Laurier LaPierre, *A Charter for the Cultural Citizen Online*: www.pch.gc.ca/progs/pcce-ccop/pubs/CanadianCulture/tdm_e.cfm.
- 44 Hugh Fraser interviews Simon Nelson. Podcast available at: www.blog-relations.com/2006/03/01/bbc-podcast-interview.
- 45 Deek Deekster on 9 April 2006: www.five.org/blog/2006/04/uk-podcasters-meet-bbc.html.



SECTION 3: NEW PUBLISHING

The rewards in undergoing the transformation held out by cultural commons thinking can be high. Encouraging evidence emerges from an unlikely quarter – academic publishing. *The Economist* and *Financial Times* columnist John Kay signalled the crying need for change in May 1999, when he argued:

‘If there is to be a copyright licensing agency it would surely be more sensible if universities licensed publishers to use the material produced in universities rather than – as at present – publishers licensing universities to use the material produced in universities.’

In the case of scientific publishing, we have noted some of the developments in applying commons-based thinking. But the production of educational courseware has proved more intractable. In the emerging culture of American academe that dominated the 1980s and 1990s, when other universities were trying to raise extra revenue from ‘distance learning’, MIT made the bold decision to launch the OpenCourseWare initiative, which today provides syllabuses, lecture notes and problem-solving exercises from over 1,100 courses to teachers globally. The content is, by and large, a side effect of university teaching. Although it gives people all over the world access to the work of some of the most renowned academics, what it cannot do is to take advantage of an emergent consensus about better ways to use this technology to make knowledge open to active appropriation rather than passive consumption.

This model would allow users to go to the website, co-create content and change it. This has been attempted in Wikibooks and other initiatives in collaborative school textbook authoring, where teachers and educators work together, locally and globally, on an open platform. But it has not proved productive to date. Using the internet to produce and disseminate content may sharply reduce costs, but in the case of school textbooks, the need for centralised quality control precludes the kind of collaboration that works best in this technology – where many more people can be involved in finer-grained modules. It is better suited to higher levels of education, where instructors have a greater freedom to select their materials as a matter of course.

One firm of academic publishing consultants, Eve Gray & Associates⁴⁶ has had great success, however, with an open access project to overhaul the publishing strategy of the Human Sciences Research Council (HSRC) in South Africa. In 2001, when Eve Gray was first approached to conduct a survey of HSRC's publishing strategies, this was the largest social science research organisation in the country, employing 250 full-time researchers in 12 research programmes throughout Africa. However, the university sector as a whole was having to switch from dependence on funding from the state to much greater reliance on contract research. The traditional strategy of publishing lots of research as a condition of funding and distributing it through academic bookshops and university libraries had ceased to work, and Gray had to report that: **'The academic monograph in Africa was under siege, probably ahead of the rest of the world, where it is becoming a threatened species, probably killed by the "publish-or-perish" syndrome and its resultant market glut.'** HSRC researchers were keen to sell to bookshops, but the cost of processing the invoices exceeded the profit margin on the books. To make matters worse, HSRC had not entirely shed its image as a mouthpiece of the former apartheid regime. It needed a fresh start. Over three years, Eve Gray's team convinced HSRC to change their strategy – to give away all their research books online, and offer a high-quality, print-on-demand service for anyone who wanted the paper version. The result was that 'the sales turnover of the publishing department rose by 300 per cent', and in the process, the reputation of the university was transformed.

Electronic distribution of scholarly content offered a seductive alternative from the outset, since the creation of virtual communities with an

interest in African studies could provide a route to more effective dissemination of African-based scholarship, reversing its reliance on publications emanating from the USA and Europe. Print-on-demand might work much better for low print runs, but this would require a rethink of the entire tradition of scholarly publishing. Could the academic community be persuaded to try it?

The new publishing strategy undertook to promote the research reputation of the HSRC internationally and attract new clients. Financial reward would be measured not through the turnover in book sales but in the contribution made to attracting research funding and contracts. But for this to work, HSRC would have to understand its role in the business of information. Clients and customers were buying solutions to their problems as a hybrid combination of publications and research services. Eve Gray & Associates recommended that HSRC continue to provide printed books, but that all content should be stored in a digital database/library, which would be fully searchable. The client could read documents on screen, or download for free printing or order a print-on-demand book supplied on a cost-recovery basis. Creative Commons licences would be used to manage online content; research reports would be published free of charge. If HSRC wished to earn revenue from its content, it was recommended that it license that content to online business information providers. There would be some room for the development of interactive data provision to enhance some products. Electronic publishing would give HSRC international and African reach, lower production costs, strong control over branding, and greater multimedia flexibility, as well as capacity for highly specialised, low-volume products, for updating content and indexing. It was recommended that a centralised publishing

department be recreated, with a publishing director and a small staff to manage outsourced services. A lot of time was spent explaining to researchers that the publisher was a strategic decision-maker, who would have to work closely with research teams, combining knowledge of research and publishing environments. Since the published information would become the face of HSRC to the outside world, it was vital that this was achieved with strategic intent.

In the early stages it was difficult to build consensus around the open access model. Researchers missed the conventional bookshops, book launches and personal profiling of authors as opposed to an organisational marketing model. Prestige, they understood, was built around books on a bookshelf, with their name on the spine, preferably with a reputable overseas partner. In the past, publishing decisions had rested on internal evaluation needs and the ambitions of individual researchers. Researchers and units were judged and promoted according to the print run they achieved, even though most books ended up piled in locked storerooms.

If open access publishing is to take off in the long run, Gray became convinced that research accreditation policies would need to be looked at. Many researchers expressed considerable fear of copyright infringement of their work and appropriation of their intellectual property online. At every year end, there was pressure from the finance department to treat publishing as a profit centre, rather than measuring its cost-effectiveness in terms of its overall contribution to the growth and success of the organisation. A champion – who would energetically argue that online publishing at least had the advantage of chiming with important institutional goals – was missing in the transition years at HSRC.

Under pressure, the open access model began to fade from view. Website development stalled in the absence of an opportunity to rise to the needs of its target market – the only way delivery of content was to be improved.

In the end the publishing division did make the decision to revert to a full open access model. The website was improved, with attention given to navigation and search functionality. As the reputation of the HSRC press built up, better interaction between the publishing and the marketing departments ensured that there was a strong branding effort through well-designed publications in print and online, promoting HSRC research nationally and internationally. 'Buy-in' took three years but, in 2005, it was recognised that the publishing department had played a crucial role in securing HSRC's new image as a social science research body with a contribution to make to social justice. With more than 200 publications online, HSRC had become the first port of call for many journalists looking for up-to-date and hard data on developments in South Africa. Politicians also appreciated the easy access to important research findings to inform policy-making. Once academic conservatism had been overcome, and the open access model had been fully embraced, with many products becoming free of charge online, the sales turnover of the publishing department rose by 300 per cent. The advertising value of HSRC's press, broadcast and television coverage in 2004 rose to R2.5 million alone. International co-publishing partners, initially suspicious of the open access publishing model and reluctant to have their content available online, were finally won over, having seen the positive impact on sales of the online publication.

The project began in 2003, at a moment when the open access model had gained international respect from policy-makers who saw its usefulness for any publicly funded research organisation with urgent development goals. But success here was not about a decision to give content away free – either of control or of good financial sense. It was a commitment to contributing to a ‘free culture’ – as in ‘free speech not free beer’ as Richard Stallman famously formulated it – that could support and protect its innovators and creators. This was achieved in several characteristic areas of transformation: an overall approach, which began by asking how technology could best serve the highest ambitions of the organisation as a whole; the move away from a proprietorial concept of authorship; and, most importantly, the opening up of content to enable a much wider range of services to users and a much broader user involvement. The principal question to be addressed was how to open up content, so that it could be updated, changed and enriched, through a more creative relationship to clients and partners.

Note

 ⁴⁶ For full HSRC case study: www.evegray.co.za: *Digital Publishing And Open Access For Social Science Research Dissemination. A Case Study*, © Eve Gray, Karen Bruns and Francois van Schalkwyk, updated version, May 2005.

SECTION 4: BOOKS ON THE LINE

‘[W]e see as a consequence primarily of mass migration and ICT globalisation, the uneven but relentless extension of what we are calling the “horizontal world”. It is a hybrid of electronic, face-to-face, familial and imaginary networks, which cut across the conventional silos of national organisation. It is a medium that subverts many of our assumptions about how we can and should communicate between nations and culture, . . . horizontality challenges very seriously the way that cultural relations . . . are done.’

MARTIN ROSE IN ‘THE MEDIUM-TERM FUTURE OF PUBLIC DIPLOMACY’, 2006

‘I take the view that the book is a “practice” – a collection of social and economic and artistic activities – and not an “object”. Viewing the book as a “practice” instead of an object is a pretty radical notion, and it begs the question: just what the hell is a book? When you download my book, please: do weird and cool stuff with it. Imagine new things that books are for, and do them. Use it in unlikely and surprising ways. Then tell me about it. E-mail me with that precious market intelligence about what electronic text is for, so that I can be the first writer to figure out what the next writerly business model is. I’m an entrepreneur and I live and die by market intel.’

CORY DOCTOROW ON OPEN BUSINESS, DECEMBER 2005



In the annual meeting of the Booksellers Association (BA) this April, leading lights could be forgiven for seeming at one moment scathing about Google's Publisher programme, (David Roche, BA President, told the conference, that "the "sop" of Google adding a local shopping button to click through to show people the location of their local bookstore is more than offset by the list of internet sites above it') and at another, to have already set their sights on a new, if uncertain dawn: 'Publishers see bookshops as a route to market, not *the* route.'

The shift might well have had something to do with the announcement in March 2006 that at least six million books, documents and other cultural works would be made available online over the next five years under the auspices of a planned European Digital Library.⁴⁷ The final figure would be much higher as 'every library, archive and museum in Europe will be able to link its digital content' to the library through 'a single multilingual entry point, which will take the form of a web portal'.

Announcing these plans, which she described as a framework for protecting intellectual property rights, Viviane Reding, the EC's information, society and media commissioner, made two pointed remarks. Sponsorship by the private sector, she noted, would be sought alongside public funding to accelerate the digitisation process. Second, it was Google's digital library project that had 'triggered a reflection' on how to deal with Europe's cultural heritage in the digital age. The resulting decision marks a significant shift in the copyright balance.

The 'trigger' identified by Reding was Google's announcement at the end of 2004 of a new book search service in which it would scan, digitise

and make searchable the collections of five of the largest libraries in the world through a virtual or electronic card catalogue. Under the Google Publisher programme it would work with publishers to make titles searchable and easy to purchase by providing links to those who advertised. These would include Amazon, who had recently launched their own similar and successful, though ad-free, service based partly on Google's search technology, which makes it possible to search inside books from Amazon's website.

The Library Project⁴⁸ was perhaps the more controversial component of Google's plan. Works in the public domain would be scanned and available to read in total, though not to download. Copyright protected books would also be completely scanned, but only brief 'snippets' surrounding the key words searched would be offered to the public. Google gave publishers and copyright holders a few months to opt out of this process – otherwise they would proceed as planned. Google argued that this fell under the 'fair use' provision made for providing a public service, since they were not selling books, but making their revenue from advertisements on the search and results pages. Academics and librarians anticipated the boost to reading that would result, and also argued that rarely read books would receive welcome new attention. Publishers disagreed. While the French raised objections to this promotion of the English language at the expense of other languages, by the end of the year Google was being sued by publishers and authors alike in the Authors Guild and the Association of American Publishers, who argued that this was, nevertheless, a violation of their copyright. US existing copyright law found itself in disarray.





As if this were not enough turmoil, the initiative in turn spurred on the efforts of Brewster Kahle and his colleagues at the Internet Archive. Kahle, having sold a first search engine to AOL, sold his next, which mapped the behaviour of internet users, to Amazon for \$250 million. Like other net entrepreneurs, he now decided to plough his gains into a 'non-profit' endeavour. This, as he told Becky Hogge in an interview in the *New Statesman* in October 2005, was no less than a bid to improve on the ancients who built the library of Alexandria by making a 'permanent record of all human knowledge', but by making it 'universally accessible' as well.⁴⁹ Kahle's library was to be 'open content', and indeed, he was willing to sue the US government for breaking the First Amendment in attempting a digital enclosure of what analogue libraries held in the public domain: 'We needed some clarification . . . In the US, the way you ask a question like that is that you file a law suit.'

That October, Kahle had launched his Open Content Alliance (OCA), with members including Adobe Systems Inc., Hewlett-Packard Labs, Columbia University, the Biodiversity Heritage Library and Smithsonian Institution, the University of Toronto, the National Archives in the United Kingdom – and the European Archive, plus Yahoo! and MSN Search who also gave a plug to the 'openness' of the project. The OCA had found a way to skirt around the copyright problems that were plaguing Google. Aside from texts in the public domain, with which the project would commence, Yahoo!, unlike Google, would scan and digitise only those texts where permission has expressly been given by the copyright holder. Its index would be searchable by any web searcher engine, in contrast to Google's exclusive control. Content would include books, speeches, spoken word

audio, video and music. Moreover, this would be a worldwide, multilingual project. This time, given the respect that had been shown to copyright, academics and librarians were even more delighted, and publishers were pleased on behalf of the authors whom they said would, in large part, be the beneficiaries. The OCA added that it would work directly with publishers to evolve business models that would encourage them to make works publicly available.

While Google had released few details of its scanning methods, the OCA's launch of the Open Library last October was impressive. The website's interface modelled on that of the UK's British Library, allows visitors to download and print books for free. For \$8 each, they can purchase bound copies, even creating their own book covers and art. Users can search inside the works, and see the tabs where the search terms occurred. Meanwhile, volunteers from LibriVox, an open source project to make books freely available in audio, have also made recordings that people can access via the site. In addition, Internet Archive, the host team, has launched a fleet of 'bookmobiles' into touring the USA to promote on-demand printing of books. Its vans are equipped with printers, binders and computers so that it can print books on demand for children across the country.

Hogge asked Kahle how he would square the inevitable difficulties the OCA will face in moving on to digitising copyrighted books, with his ambition to complete his collection. Kahle was sure that time will cure all:

'The internet evolved in the early 1990s with public works, and then by 1994 to 1995 there was enough of a user base that we could



start to get commercial entities involved. If we get the technology right based in the public domain, I think the same thing will happen with books.'

It seems as if the EU commissioner is equally sanguine. The report back from the consultation process preceding the decision to launch the European Digital Library has an interesting summary of the 'general orientation' of its findings:

'The initiative is generally very well received, in particular by cultural and academic institutions, citizens, technology firms and national ministries . . . The copyright issue is indeed the most contentious part of the consultation. Whereas the rights-holders emphasise the adequacy of the present copyright rules, cultural institutions stress that change in the copyright framework is necessary for efficient digitisation and digital preservation.'⁵⁰

Back in the UK a month later, the Booksellers Association (BA) got the message. As BA Chief Executive Tim Godfray, put it: 'Events are moving very fast. Google is selling content, and governments and libraries are now supporting the concept of free access of information.'⁵¹ Realising that they had been 'ostrich-like', the BA set up a Digitisation of Content committee to report in September 2006.

New opportunities may well relate to the 'long-tail' effect of distributed publishing. Given the wealth of information they mine about people's search habits, Google Ads, for example, could advantage niche retailers in the book trade, offering them a fresh chance to direct their advertising budgets towards a newly accessible marketplace. Small retailers might

even flourish in the digital information economy, while leaving larger retailers struggling to compete.

Within this kind of 'climate change', it is not 'pro-piracy/anti-artist' to suggest that the desire to remunerate the creator of a book may not be sufficient incentive in a few years' time. As Christian Ahlert of Open Business explained to a recent meeting of sceptical PEN authors: 'Copyright made sense in the context of an innate cost barrier to reproduction (whether with the book or the record), and where an author could reasonably expect to earn a living by selling physical reproductions of a work. Then the law backed up the prevailing physical order.' Not any longer. He argues that, even if it is bad for many publishers, 'the potential for unchecked distribution of creative work might be good for artists and for culture', concluding: 'If it could be shown that we could do things differently – sustain cultural production while allowing freer access to works – what would be the argument not to do so?'⁵² However, it is not enough to put your PDF on the internet; something more dynamic will be necessary to achieve results, both in terms of copyright and reproduction processes. Cultural norms, loyalties and established institutional habits are likely to be crucial determinants in success or failure.

We don't have to be convinced by the wilder stories of 'remixed books and liquid knowledge', to agree with Cory Doctorow that the question is on the table: what the hell is a book? Putting the question at least paves the way to listening to new generations and other cultures. But nobody can be in doubt today that there are some wonderful answers to be found. Yochai Benkler is surely right to herald a new era for culture with its own reply to Walter Benjamin's classic article written in 1937 – 'The Work of Art in the Age of Mechanical Reproduction'.

‘He saw in mechanical reproducibility the possibility of bringing copies down to earth, to the hands of the masses, and reversing the sense of distance and relative weakness of the mass culture. What Benjamin did not yet see were the ways in which mechanical reproduction would insert a different kind of barrier between many dispersed individuals and the capacity to make culture.’⁵³

What he also could not see was the ways in which the connective capabilities of digital media, large and small, near and far, would begin to erode those barriers. Cultural organisations are at the centre of a vast paradigm shift, and must be prepared for anything.

Notes

- 47 European Digital Library launch:
<http://libraries.theeuropeanlibrary.org/press/edl20050504.html>.
- 48 Google Book Search programme:
www.books.google.com/googlebooks/common.html.
- 49 Becky Hogge interviews Brewster Kahle:
www.newstatesman.com/200510170018.
- 50 From Results online consultation ‘i2010: digital libraries’ p. 2, at:
www.europa.eu.int/information_society/activities/digital_libraries/doc/communication/results_of_online_consultation_en.pdf.
- 51 Tim Godfray at the Booksellers Association annual meeting:
www.publishingnews.co.uk/pn/pno_news33.asp.
- 52 Report on PEN meeting on 14 March 2006:
www.openbusiness.cc/2006/03/14/21-february-at-the-english-pen.
- 53 *The Wealth of Networks*, p. 296.

APPENDIX 1: FURTHER READING

Essays, etc.

Adelphi Charter on Creativity, Innovation and Intellectual Property:
www.adelphicharter.org.

Richard Barbrook, 'The Regulation of Liberty: free speech, free trade and free gifts on the Net', *Science as Culture*, number 2, volume II, 2002:
www.constantvzw.com/copy.cult/texts/reg_liberty1.html.

James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', 2003: www.law.duke.edu/journals/66LCPBoyle.

Becky Hogge, 'Virtual Reality' column on
www.openDemocracy.net/columns/virtual_reality.jsp.

Lawrence Lessig, 'Do you Floss?', *London Review of Books*, 18 August 2005.

Nicola Solomon, 'Free-for-all?', *The Author*, autumn 2005.

William St Clair, 'But what did we actually read?', *Times Literary Supplement*, 12 May 2006.

Books

John Barrell, *The Idea of Landscape and the Sense of Place 1730–1840: An Approach to the Poetry of John Clare*, Cambridge University Press, 1972.

Professor Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale University Press, 2006.

John Brewer, *The Pleasures of the Imagination: English Culture in the Eighteenth Century*, Harper Collins, 1997.

Eric von Hippel, *Democratizing Innovation*, MIT Press, paperback edition, 2006.

David Simpson, *Fetishism and Imagination: Dickens, Melville, Conrad*, Johns Hopkins University Press, 1982.

Siva Vaidhyanathan, *Copyrights and Copywrongs: the Rise of Intellectual Property and How It Threatens Creativity*, New York University Press, 2001; *The Anarchist in the Library*, Basic Books, 2004.

Steven Weber, *The Success of Open Source*, Harvard University Press, 2004.

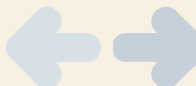
APPENDIX 2: EXECUTIVE SUMMARY

- 1 The social bargain anchored in a pragmatic compromise that is copyright is undergoing a significant sea change today. What began as squabbles about ownership and availability is fast becoming a force for change in its own right that will transform communication in the information age. The changes are occurring in politics, the economy and law, but first and foremost in the domain of culture.
- 2 The culture of communication that accompanies instant communication through galloping information and communication technologies (ICT) development offers new forms of personal empowerment and large-scale collaboration that are competing with mass media-dominated, more traditional structures.
- 3 In cultural commons thinking the value of intellectual property is predicated on the right to distribute rather than the right to exclusive ownership. If this strikes us as counter-intuitive it is because ‘intellectual property’ as the right to exclude is so deeply embedded in our ways of thinking and our institutions.
- 4 The subject of copyright as we know it, is a creator of a unique property that he or she owns by virtue of a singular, imaginative act.
- 5 Cultural commons thinking will have an impact on any cultural organisation at a number of different levels. First, it brings its own culture to challenge yours. Cultural commons thinking is throwing up new categories of culture seemingly every day.
- 6 The 1709 Copyright Act, the Statute of Anne, created the first legal notion of a ‘public domain’ – a collection of works old enough to be considered outside the scope of the law, and under the control of the public and the culture at large.
- 7 Described as ‘An Act for the Encouragement of Learning’, it granted authors and publishers exclusive rights for a certain time period, thus forging an alliance that by the 19th century had crystallised into what might be called the Romantic ‘star system’.
- 8 This mechanism has proved remarkably durable. In recent decades, copyright as a ‘property right’ that prioritises the interests of established authors and producers over those of readers, researchers and future creators has spread through statutes, cases and treaties.
- 9 In the first century of American legal history, copyright was deemed a necessary evil. The law granted an exclusive right to copy, sell and perform an original work for a limited time, a monopoly, however, already restricted by several provisions allowing for such good faith use – fair use or fair dealing – as political debate, education, research or artistic expression. This limited trade monopoly was to be exchanged for subsequent universal use and access.

- 10 As the internet metamorphosed into the overarching medium of media, one of the unintended consequences was to give traditional copyright law the power to stop in their tracks millions of users employed in some of its most common functions.
- 11 However, as more and more people went online, they began to enjoy sharing information with each other. As the internet spread outside the university, its new users shared e-mails, swapped information, conducted online research and participated in network communities.
- 12 Given this distributed architecture, non-market creativity – which in education, arts, sciences, political debate and theological disputation has always played an important part in information production – is now also capable of much greater co-ordinated effects. This has spawned new forms of collaboration in every domain of information and cultural production, from the peer production of encyclopaedias, to news and commentary, to immersive entertainment.
- 13 Owners of copyrights now began to demand that the state intervene to ensure that consenting adults were prevented from sharing information with each other without permission.
- 14 In particular the Digital Millennium Copyright Act of 1998 has allowed copyright holders to police copyright, becoming cops, juries and judges in the new global commons. For their part, the content industries were not secretive about their aspirations for charging for every bit of data.
- 15 A public bargain between producers and users has broken down as negotiation was replaced by technological locks on copyrighted material and sweeping anti-circumvention provision.
- 16 However, anti-piracy offensives have proved to be only partially effective. The music industry's attempts to close down Napster by 2001 simply encouraged people to install more sophisticated software for swapping music. It encouraged enthusiasts to make their own sounds.
- 17 Nevertheless, in what has been called the 'second enclosure', more and more material is removed from the public domain by means of the extension of the time limit on copyright. Many cultural products are now emerging 'triple protected', not only by copyright and code, but also by contracts or licences for which users waive all remaining rights.
- 18 Recent research reports only patchy and conflicting evidence of whether the intellectual property regime has provided any quantifiable difference to innovation at all.
- 19 Into this stand-off between two diametrically opposed visions of the future, Richard Stallman introduced the Free Software movement – FLOSS. His pioneering idea was to use the existing mechanism of copyright law to develop a General Public License, which would protect both the work and the principles by ensuring that users subscribed to the same openness and sharing. By 2000, the software they inspired had worked its way into the mainstream of the computer industry.



- 20 The features of Web2.0, the latest user-improved version of the World Wide Web, and open source production reflect those built into the internet by the first cyberspace pioneers. An ‘end-to-end’ architecture permitted simultaneous and unco-ordinated innovation at the edge of the network, a basic tenet that has ensured the bottom-up, user-driven innovation of the internet ever since.
- 21 Technological advances in computer hardware and software and networking technologies have made it much easier to create and sustain a communal development style on ever larger scales. Users are transforming the internet and placing new demands on businesses daily. From open source to open content, new forms of organisation, production and distribution are emerging.
- 22 Some of the biggest online giants have already seen the opportunities.
- 23 But the emerging pattern of open production can be completely invisible to traditional economics shaped by industrial norms. For a huge range of diverse reasons, groups of individuals successfully collaborate on large-scale projects in response to social signals, rather than either market prices or managerial commands.
- 24 Rather than investing in expensive copyright protection systems, information may be commodified through tried-and-tested methods, but only if due respect is paid to the creative and generative social character of an active user community.
- 25 The new feasibility of producing information, knowledge, and culture through social, rather than market and proprietary relations creates opportunities for greater autonomous action on the part of millions of individuals – a more critical culture, a better-informed society and the possibility of a more equitable global community.
- 26 There are tantalising possibilities of commons-based solutions to world development, with countries such as Brazil, China, India and Indonesia leading the way.
- 27 At the same time, intellectual property cuts across so many aspects of our lives: access to medicines; patenting the human gene; the privatisation of research and development; and the patenting of computer software, business methods, databases, plants and indigenous knowledge.
- 28 However, today, international treaties are not the final word. The enhanced practical freedom of individuals in the sharing economy is emerging as a new global mover, with new forms of governance in its wake.
- 29 We are seeing new initiatives in scientist-run and -driven open access systems.
- 30 What makes cultural commons thinking the basis of a gathering social movement worldwide is the perception that it is the mutually enabling relationship that matters most. Deceptively innocuous, Creative Commons licences make it easier to share. New authors are people who have understood this. And they are also its beneficiaries.



- 31 A new approach to publishing, such as the Open Access project to overhaul the publishing strategy of the Human Sciences Research Council in South Africa, transformed the entire organisation. Success was not about a decision to give content away free – either of control or of good financial sense. It was a commitment to contributing to a ‘free culture’ – as in ‘free speech not free beer’ as Richard Stallman famously formulated it – that could support and protect its innovators and creators.
- 32 As a consequence of such simple principles, a new culture is emerging that is reshaping not only the ‘who’ but also the ‘how’ of cultural production, so that it is transnational, more egalitarian, more transparent to its users, less deferential, much more diverse, and above all, self-authored.
- 33 However, it is not enough to put your PDF on the internet: something more dynamic will be necessary to achieve results, both in terms of copyright and reproduction processes. Cultural norms, loyalties and established institutional habits are likely to be crucial determinants in success or failure.
- 34 Cultural commons thinking prepares us for a mutual world in which we will all be authors, publishers and real-time reporters. In these circumstances, user-led innovation is creating and destroying whole industries, and transforming our public spheres.
- 35 Cultural organisations are at the centre of a vast paradigm shift, and must be prepared for anything.



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