The Creative Common Misunderstanding

Florian Cramer

Lately, the growing popularity of the Creative Commons licenses has been accompanied by a growing amount of criticism. The objections are substantial and boil down to the following points: that the Creative Commons licenses are fragmented, do not define a common minimum standard of freedoms and rights granted to users or even fail to meet the criteria of free licenses altogether, and that unlike the Free Software and Open Source movements, they follow a philosophy of reserving rights of copyright owners rather than granting them to audiences. Yet it would be too simple to only blame the Creative Commons organization for those issues. Having failed to set their own agenda and competently voice what they want, artists, critics and activists have their own share in the mess.

In his paper 'Towards a Standard of Freedom: Creative Commons and the Free Software Movement', free software activist Benjamin Mako Hill analyzes that

> *despite CC's stated desire to learn from and build upon the example of the free software movement, CC sets no defined limits and promises no freedoms, no rights, and no fixed qualities. Free software's success is built upon an ethical position. CC sets no such standard.*[1]

In other words, the Creative Commons licenses lack an underlying ethical code, political constitution or philosophical manifesto such as the Free Software Foundation's 'Free Software Definition' or Debian's 'Social Contract' and the Open Source Initiative's 'Open Source Definition'.[2] Derived from each other, these three documents all define free and open source software as computer programs that may be freely copied, used for any purpose, studied and modified on source code level and distributed in

[1] Benjamin Mako Hill, Towards a Standard of Freedom: Creative Commons and the Free Software Movement, http://www.advogato.org/article/851.html

[2] http://www.gnu.org/philosophy/free-sw.html, http://www.debian.org/social_contract, http://www.opensource.org/docs/definition.php

modified form. The concrete free software licenses, such as the GNU General Public License (GPL), the BSD license and the Perl Artistic License, are not ends in themselves, but only express individual implementations of those constitutions in legal terms; they translate politics into policies.

Such politics are absent from the Creative Commons. As Mako Hill points out, the 'non-commercial' CC licenses prohibit use for any purpose, the 'no-derivatives' licenses prohibit modification, and the CC 'Sampling License' and 'Developing Nations License' even disallow verbatim copying. As a result, none of the user rights granted by free and open source software are ensured by the mere fact that a work has been released under a Creative Commons license. To say that something is available under a CC license is meaningless in practice. Not only does the CC symbol look like a fashion logo, it also isn't more than one. Richard Stallman, founder of the GNU project and author of the Free Software Definition, finds that 'all these licenses have in common is a label, but people regularly mistake that common label for something substantial.'[3] Yet some if only vague programmatic substance is expressed in CC's motto 'Some rights reserved.' Beyond being, quote Mako Hill, a 'relatively hollow call', this slogan factually reverses the Free Software and Open Source philosophy of reserving rights to *users*, not copyright owners, in order to allow the former to become producers themselves.

While Mako Hill embraces at least a few of the CC licenses, such as the ShareAlike License under which his own essay is available, Stallman finds it a

> *self-delusion to try to endorse just some of the Creative Commons licenses, because people lump them together; they will misconstrue any endorsement of some as a blanket endorsement of all.*[4]

According to an entry on his weblog, Stallman had 'asked the leaders of Creative Commons privately to change their policies, but they declined, so we had to part ways.'[5] The Debian project even considers all CC licenses non-free and recommended, in 2004, that

> *authors who wish to create works compatible with the Debian Free Software Guidelines should not use any of the licenses in the Creative Commons license suite*[6]

[3] http://www.linuxp2p.com/forums/viewtopic.php?p=10771

[4] Ibid.

[5] http://www.fsf.org/blogs/rms/entry-20050920.html

[6] http://lists.debian.org/debian-legal/2004/07/msg01193.html

mostly because their attribution clause limits modifications, because of restrictions on the Creative Commons trademark and ambiguously worded anti-'Digital Rights Management' (DRM) provisions that could be interpreted as prohibiting distribution over any encrypted channel, including for example PGP encoded email and anonymizing proxy servers.

[7] http://www.sourcelabs.com/blogs/ajb/2006/02/creative_commons_is_broken.html

Whatever stance one may adopt, the name 'Creative Commons' is misleading because it doesn't create a commons at all. A picture released, for example, under the Attribution-ShareAlike license cannot legally be integrated into a video released under the Attribution-NonCommercial license, audio published under the Sampling License can't be used on its soundtrack. Such incompatible license terms put what is supposed to be 'free content' or 'free information' back to square one, that is, the default restrictions of copyright – hardly that what Lawrence Lessig, founder of the Creative Commons, could have meant with 'free culture' and 'read-write culture' as opposed to 'read-only culture.' In his blog entry 'Creative Commons Is Broken', Alex Bosworth, program manager at the open source company SourceLabs, points out that 'of eight million photos' posted under a CC license on Flickr.com

> *less than a fifth allow free remixing of content under terms similar to an open source license. More than a third don't allow any modifications at all.*'[7]

The 'principle problem with Creative Commons', he writes, 'is that most of the creative commons content is not actually reuseable at all.'

While these problems may at least hypothetically be solved through improvements of the CC license texts – with the license compatibility clauses in the draft of the GNU GPL version 3 as a possible model – there are farther-reaching issues on the level of politics as opposed to merely policies. CC's self-definition that 'our licenses help you keep your copyright while inviting certain uses of your work – a "some rights reserved" copyright' translate into what the software developer and Neoist Dmytri Kleiner phrases as follows: 'the Creative Commons, is to help "you" (the "Producer") to keep control of "your" work.' Kleiner concludes that

> *the right of the consumer' is not mentioned, neither is the division of 'producer' and 'consumer' disputed. The Creative 'Commons' is thus really an Anti-Commons, serving to*

legitimise, rather than deny, Producer-control and serving to enforce, rather than do away with, the distinction between producer and consumer.[8]

Citing Lessig's examples of DJ Dangermouse's *Grey Album* and Javier Prato's *Jesus Christ: The Musical* – 'projects torpedoed by the legal owners of the music used in the production of the works' – Kleiner sharply observes that 'the legal representatives of The Beatles and Gloria Gaynor could just as easily have used Creative Commons licences to enforce their control over the use of their work.'

The distinction between 'consumers' and 'producers' couldn't be more bluntly stated than on CC's home page. It displays, on its very top, two large clickable buttons, one labelled 'FIND Music, photos and more', the other 'PUBLISH Your Stuff, safely and legally', the former with a down arrow, the latter with an up arrow in its logo.[9] The small letters are no less remarkable than the capitals. Upon first glance, the adverbs 'safely and legally' sound odd and like material for a future cultural history museum of post-Napster and post-9/11 paranoia. But above all, they name and perpetuate the fundamental misunderstanding artists seem to have of the Creative Commons: Free licenses were not meant to be, and aren't, a liability insurance against getting sued for use of third-party copyrighted or trademarked material. Whoever expects to gain this from putting work under a Creative Commons license, is completely mistaken.

Artists are desperately looking for a solution to a problem that ultimately resulted from their own efforts of redefining art. When art was granted, in Western cultures at least, an autonomous status, artists were – to a moderate degree – exempt from a number of legal norms. Kurt Schwitters was not sued for collaging the logo of German Commerzbank into his 'Merz' painting which yielded his 'Merz' art. Neither did Andy Warhol receive injunctions for using Coca Cola's and Campbell's trademarks. As long as these symbols remained inside the art world, they did not raise corporate eyebrows. Experimental artists embraced the internet just because it did away with the separation of white cubes – in which logos and trademarks were safe from being mixed up with the original ones – and the outside world. Mainly thanks to the internet, artistic simulations of corporate entities were believable for the first time. The Yes Men could pose as the World Trade Organisation and get invited to World Economic Forum as WTO representatives, 0100101110101101.org could tactically disguise themselves as the Nike company. Older artistic simulations like Res Ingold's 'Ingold Airlines' were not only transparent

[8] Dmytri Kleiner, The Creative Anti-Commons and the Poverty of Networks, http://info.interactivist.net/article.pl?sid=06/09/16/2053224

[9] http://creativecommons.org/images/find.gif, http://creativecommons.org/license

and clumsy in comparison, but also on the safe grounds of an art system with little or no interference of corporate lawyers. But ever since the world wide web, file sharing and cheap or free authoring software tore down walls between art and non-art practice, producers and consumers, former consumers were held liable as producers, and artistic production became subject to non-art world norms, as obvious in the FBI investigations of Steve Kurtz and ubermorgen.com for bioterrorism and tampering with the U.S. presidential elections respectively.

Previous artistic critiques of corporate and intellectual ownership were much less efficacious even where they were programmatically more radical. Between 1988 and 1989, a series of countercultural 'Festivals of Plagiarism', organized by Stewart Home, Graham Harwood and others, struggled with wide gaps between radical anti-copyright rhetoric and an artistic practice limited mostly to photocopied mail art work. John Berndt, a participant of the London Festival of Plagiarism, left with the impression that

> *a repetitive critique of 'ownership' and 'originality' in culture was juxtaposed with collective events, in which a majority of participants [...] simply wanted to have their 'aesthetic' and vaguely political artwork exposed*[10]

making fellow Neoist tENTATIVELY, a cONVENIENCE conclude that 'Festivals of Recycling might have been more accurate descriptions' for the events:

> *By virtue of calling the act of reusing and changing previously existing material (not even always with the intention of critiquing said material) 'Plagiarism' the appearance of being 'radical' could be given to people whose work was otherwise straight out of art school teachings.'*[11]

Today, similar gaps and misunderstandings exist between copyleft activists and artists who just seek to legitimize their use of third-party material. When Lawrence Lessig characterizes the Creative Commons as ''fair use'-plus: a promise that any freedoms given are always in addition to the freedoms guaranteed by the law'[12], this is technically correct, but nevertheless misunderstandable, especially for people who aren't legal experts. Putting a work under a CC license – or even a non-ambiguously free GNU or BSD license – means to *grant* rather than to *gain* uses in addition to standard fair use. The Creative Commons do not solve the

[10] John Berndt, Proletarian Posturing and the Strike that Never Ends, SM!LE magazine, Baltimore, 1988.

[11] tENTATIVELY, a cONVENIENCE, History Begins where Life Ends, self-published pamphlet, Baltimore 1993.

[12] http://creativecommons.org/weblog/entry/5681

problem of how not to get sued by Coca Cola or Campbell's at all. Non-free copyrighted material cannot be freely incorporated into one's work no matter what license one choses. Even worse, the opposite is true: copyright owners are most likely to categorically refuse clearance for anything that will be put into free circulation because the license of the work incorporating theirs would effectively relicense the latter. If, for example, the Corbis corporation would permit the photograph of Einstein sticking out his tongue – for which it holds the rights – to be reproduced in a freely licensed book, it would free the picture for anyone else's use as well. Since this can hardly be expected from the Bill Gates-owned company, free licensing often restrains rather than expands one's possibilities of using third-party material.

This example reveals a crucial difference between software development and artistic practice: Programming can sustain itself on its own, self-built library of reusable work, art hardly so. The GNU copyleft works on the premise that modifications are also contributions. If, for example, a company like IBM chooses to modify the Linux kernel to run on its own servers, the GNU license forces it to give back the added code to the development community. And the more code is available as free software, the higher the incentive for others to simply build on existing free code libraries and give back changes rather than building a new program from scratch. This explains why even for computer companies, free software development can make more economic sense than the close source commercial model. In addition, free software development profits from a difference between source code and perceivable appearance that doesn't have an exact equivalent in most artistic work: Programs can be written that look and behave similarly or identically to proprietary counterparts as long as they don't use proprietary code and do not infringe on patents and trademarks. This way, AT&T's Unix could be rewritten as BSD and GNU/Linux, and Microsoft Office could be cloned as OpenOffice. Even patents which could spoil such borrowings aren't as internationally universal and not remotely as long-lasting as copyright. In other words, free software development could be an ‘appropriationart’ without copyright infringement.

The same isn't possible for most artists, however. It makes little sense for them to restrict their uses to material whose copyright has either expired or that has been released under sufficiently free terms. The Coca Cola logo can't be cloned as a copylefted ‘FreeCola’ logo, and it would be pointless for the Yes Men to pose as an ‘OpenWTO’ or for 0100101110101101.org to have run as ‘GNUke’ instead of Nike. If even

harmless collaging, sampling and quoting becomes risky because of media industrial internet copyright paranoia and whole business models based on injunctions and lawsuits, this is a political matter of fair use, not of free licenses. In the worst case, free licenses, all the more fluffy and pseudo-free ones like the Creative Commons, could be used to legitimize new restrictions of fair use legislation, or even its abolition altogether, with the alibi that the so-called 'ecosystem', or ghetto, of more or less freely licensed work provides enough fair use for those who bother to care.[13]

It is not hard to bash the Creative Commons for being an organization run with little understanding of the arts, and not even a good understanding of open source and free software philosophy. On the other hand, artists themselves have failed to voice what they want. The exceptions are few and rather marginal: the anti-copyright philosophies and politics of Lautréamont, Woody Guthrie (who, according to Dmytri Kleiner, released his songbook with the license that 'anybody caught singin' it without our permission, will be mighty good friends of ours, cause we don't give a dern. Publish it. Write it. Sing it. Swing to it. Yodel it'), Lettrists, Situationists, Neoists, Plunderphonics musicians and some internet artists including the French artlibre.org collective whose 'Free Art License' predates the Creative Commons by two years.[14]

A team of lawyers whose work consists of creating, as Bosworth puts it, 'low cost legal templates', the Creative Commons organization has simply listened to all kinds of artists and activists, trying to do justice to diverse and sometimes contradictory needs and expectations, with licenses 'designed to give artists choice' (Mako Hill) rather than prioritizing free use and reuse of information. In contrast, Free Software and Open Source are, like any human and civil rights effort, universalist at their core, with principles that are neither negotiable, nor may be culturally relativized.

If someone is to blame for the fact that artists, political activists and academics from the humanities have largely failed to recognize those essentials, then it is Eric S. Raymond, founder of the 'Open Source Initative' (http://www.opensource.org), the group that coined the term 'Open Source' in 1998. The main advantage of the term 'Open Source'

[13] This scenario isn't too far-fetched considering Lessig's recent advocacy of the non-open file format Adobe/Macromedia's Flash which he calls a 'crucial tool of basic digital education in a free culture' (quotation translated from the German article, http://www.heise.de/newsticker/meldung/78278/, see also http://lwn.net/Articles/199877/) Since proprietary file formats cannot be universally accessed and lock information into technology whose availability is at the mercy of a single vendor, they restrain fair use.

[14] http://artlibre.org/licence/lal/en/

[15] It is not coincidental, for example, that the term 'Open Content' and the web site http://www.opencontent.org was launched in 1998 only a few months after the first propagation of 'Open Source', until its founder David Wiley abandoned the initiative in 2004 in order to – ironically or not – become a director of Creative Commons.

over ‘Free Software’ is that it doesn’t merely refer to computer programs, but evokes broader cultural connotations.[15] For most people with artistic backgrounds, GNU’s ‘Free Software’ sounded too confusingly similar to (closed-source) ‘freeware’ and ‘shareware.’ ‘Open Source’ sparked an all-the-richer imagination as Raymond didn’t simply pitch it as an alternative to proprietary ‘intellectual property’ regimes, but as a ‘Bazaar’ model of open, networked collaboration. Yet this is not at all the Open Source Initiative’s own ‘Open Source Definition’ says or is about. Derived from Debian's ‘Free Software Guidelines’, it simply lists criteria licenses have to meet in order to be considered free, respectively open source. The fact that a work is available under such a license might enable collaborative work on it, but it doesn't have to by definition. Much free software – the GNU utilities and the free BSDs for example – is developed by rather closed groups and committees of programmers in what Raymond calls a ‘Cathedral’ methodology. Conversely, proprietary software companies such as Microsoft may develop their code in distributed ‘Bazaar’ style. Nevertheless, the homepage of http://www.opensource.org states that the ‘basic idea behind open source’ is about how ‘software evolves’, ‘at a speed that, if one is used to the slow pace of conventional software development, seems astonishing’, thus producing ‘better software than the traditional closed model.’ Regardless which position one takes in the philosophical and ideological dispute between ‘Free Software’ and ‘Open Source’, the self-characterization of Open Source as a development model mixes up cause and effect, being inconsistent with what the Open Source Definition, on the same website, qualifies as Open Source, i.e. software whose licenses fulfill its criteria of openness.

Given how ‘Open Source’ has been propagated as a model of networked collaboration instead of user rights or free infrastructures, the gap between the lip-service paid to it in the arts and humanities and the factual use of free software and copylefts comes as little surprise. ‘Cultural’ free software conferences whose organizers and speakers run Windows or the Mac OS on their laptops continue to be the norm. With few exceptions, art education hardly ever involves free software, but is tied to proprietary software tool chains. Yet – often vague or ill-informed – ‘Open Source’ references abound in media studies and electronic arts writing.

The problem is not so much that people do not use free operating systems, but that software-political correctness anxiety prevents a more honest critical discourse. A debate on ‘why free software doesn't work for us’ would be more productive for free software development than the

current hypocrisy. Recent discussions on why, for example, free software culture involves disproportionally few women – even in comparison to proprietary software development – have at least begun to tackle some of those issues.

Productive critique, after all, is needed. Eight years after the coinage of 'Open Source', Raymond's Hegelian claims of superior development methodologies sound increasingly hollow. Free software hasn't displaced proprietary software at all. Despite its success on servers and in embedded systems, it is unlikely to take over mainstream personal computing any time soon. Free software, it seems, has its strength in building software infrastructure: kernels, file systems, network stacks, compilers, scripting languages, libraries, web, file and mail servers, database engines. It lags behind proprietary offerings, for example, in conventional desktop publishing and video editing, and, as a rule of thumb, in anything that isn't highly modularized or used a lot by its own developer community. The closer the software is to the daily needs and work methods of programmers and system administrators, the higher typically its quality.

Similar rules seem to apply to free information, respectively 'Open Content' development. The model works best for infrastructural, general, non-individualistic information resources, with Wikipedia and FreeDB (and lately MusicBrainz) as prime examples. Similarly, the cultural logic of sounds and images circulating under CC licenses is largely that of stock music, stock photography and clip art, regardless the fact that current CC licenses mostly fail to permit their 'mashups', boiling down to little more than 'Web 2.0' lifestyle logos. Beyond software, infrastructural information and publishing that waives reproduction rights, the value of free licensing is somewhat doubtful. Experimental, radical art and activism that does not play nice with third-party copyrights and trademarks can't be legally released and used under whatever license anyway. Its work should rather – and explicitly – be released into the public domain with, quote Jodi, 'all wrongs reversed' and, quote Kleiner, 'all rights detourned under the terms of the Woody Guthrie General License Agreement.' For professional artists, this simply means to acknowledge the reality of contemporary art economics: that artists, with the exception of a handful of stars, no longer live from producing material goods (for which copyright granted lifetime monopolies, or at least the illusion of continuous revenue streams), but like 17th century project entrepreneurs from commissioned projects whose material products have little or no market value by themselves.

Copyright, having turned from regulation into subsidy of publishing industries, is the 21st century equivalent of drug legislation. Everyone knows that it is obsolete, dysfunctional, and depriving people of their rights; absurd wars are fought in its name. The simple fix is to abolish it.