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Creative Commons and contemporary copyright: A fitting shoe or “a load of old cobblers”?

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Abstract

This article examines copyright’s historic trajectory from a common law to a statutory privilege, turning almost full circle in recent years, in the current age of high technology. It simultaneously probes theories of intellectual property rights which are grounded in somewhat skewed ideas related to tangible property, and contextual parallels and contrasts are drawn between physical and ephemeral resources throughout. The founding and fomenting of various civil society organisations in response to the expansions in the term and scope of copyright law, such as Creative Commons, is then charted. This leads on to complex questions about what constitutes the public domain, and whether and how it should be facilitated. The aims of grassroots movements such as Creative Commons to persuade and assist authors, through voluntary means, to relax their legislative rights and its impact on copyright law and practice, are also critically evaluated.

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Introduction

Copyrightable subject matter has become something of a Cinderella in the intellectual property realm in the last few decades. For many moons, the poor relation of its more celebrated siblings, trademarks and patents, copyright law has, for industry representatives at least, become the enchanted formal attire of this particular belle of the ball. The admiration for this legal cladding is not universal, however, and many see copyright’s coverage as a proverbial bunch of rags — an ill–tailored and ungainly law which is wreaking havoc on creativity — and desperately in need of a fairy godmother or handsome prince to sort it all out.

1. Copyright: On the quest to shod a foot (or dress a princess)

Before the enactment of the world’s first copyright statute, the Statute of Anne in 1710, a

common law copyright existed in England, which vested in the Stationers' Company a monopoly over publishing, akin to an exclusive property right. When former legislation lapsed, Queen Anne placed copyright on a statutory footing.

> Here Thou, great *Anna!* whom three Realms obey,
> Dost sometimes Counsel take — and sometimes *Tea.*
> (*And sometimes copyright laws make*). [1]
>
> Alexander Pope, *The Rape of the Lock*, Canto III.

Even after the enactment of the Statute, attempts were made for a number of years to establish that where the statutory requirements for claiming copyright had not been fulfilled, an author seeking copyright protection of a work could still rely on the common law copyright [2]. This moot matter was finally put to rest in a seminal case, *Donaldson v. Beckett* [3], where the court, overruling *Millar v. Taylor* [4], decided that the pre–existing common law right had been subsumed by the statutory right, as otherwise the latter would have been emasculated by the former.

Within a century the U.S., which looked to England for its model of copyright, had experienced a similar evolution in its copyright law, theory and practice [5].

2. Cobbled together or hewn asunder? Natural and positivist or specially tailored rights

Essentially, the underlying tension between the common law and statutory copyright was in the struggle between, on the one hand, a concept of copyright as a natural right and, on the other, a positivist understanding of this right as something granted solely and exclusively by statute.

Natural rights emanate from natural law. Natural law derives from a higher realm, not just from the human legislature alone and dates back to the ancient Greeks, at least [6].

This law encapsulates morality, but there is no consensus as to what its precepts might be. Within the Christian tradition, Thomas Aquinas argued that this law became known to us through reason: for William of Ockham, it was through revelation, or scriptures. The former's thesis predominated, although in John Locke's work on property, references are made both to our capacity for reason and revelation [7]. Natural law also has an alternative secular foundation and proposes that we have rights because we are human, rather than because they are God–given. An attraction of natural law is that it claims to be moral but as an unwritten law, competing versions exist.

Positivist rights, on the other hand, are human–made and subsist independently of moral concerns. Positivists believe that when you want to know what the law is, you simply look at the statute books — an enquiry into the nature of law need go no further [8]. In our representative democracies, the legislature does have an obligation under the rule of law: that all interests should be represented, not those of just a few. Whilst positivism does not necessarily coincide with morality, it may do so [9].

(1) Natural rights in real property

Natural rights to property or intellectual property inhere in the individual and as such, are recognised as opposed to being granted by the legislature. In the words of one Irish judge, "justice is not subordinate to the law," [10] meaning that positivist law cannot operate inconsistently with this higher legal standard, derived from natural law. On the natural law side, Locke's labour theory has been the bedrock on which the understanding of copyright rests, although Locke himself never wrote on the topic of intellectual property. However, he did write about property [11] and his view of the world was that God had given the Earth and its resources to mankind in common and the utility of these gifts should be maximised. Man (not woman), could obtain exclusive property rights by mixing his labour with anything in the commons, providing that "enough and as good" was left over for everybody else and that appropriated resources were not wasted [12]. If the latter condition was not satisfied, others could take from the surplus of the encloser [13], which appears to be a Lockean sanction of the acquisition of land and goods through squatter's title, or adverse possession [14].

Locke's theoretical right to squat is enshrined in the Brazilian *Constitution* [15], where land not put to its best use can be re–appropriated by the poor [16]. Nevertheless, in the "country of everyone" [17], this top–down permission receives little legislative back–up and even less support in the courts. This has led to the formation of a civil society movement — the largest squatters' group in the world called the MST or Landless Peasants' Movement, in which the rural poor organize themselves over many months and occupy unused land, often eventually attaining title to the same [18].

Civil society responses to the gap between the government and the people also reverberate in the intellectual arena, where the equivalent of the physical commons is the public domain, a somewhat controversial concept, to which this article will return below. The online equivalent to the MST may have a number of manifestations: cyber–squatters or, simply, ordinary individuals who ignore anti–piracy laws in the absence of constitutional blessing. Alternatively, a legally permissible approach can be taken through the use of works which have been released with Creative Commons [19] licences, explored in greater depth later in this article.

Put bluntly, your options are threefold: you can obey (copyright law) and pay (royalties); civilly disobey and possibly pay (a fine or with your freedom); or engage in civil obedience. The latter involves contracting out of copyright's automatic legal rights and is enshrined in the Creative Commons ethos.

(2) Natural rights to intellectual property

In the case of intellectual resources, Locke's proviso on the confiscation of wasted goods could be interpreted as a wholesale invitation to piracy, where software has become obsolete [20]. This reading, however, finds little exposure in popular academic work [21] and jurisprudence, and the stock phrase "Lockean–style property rights" is almost universally understood to mean a perpetual, exclusive right of authors or owners to their intellectual work [22].

Proponents of strong intellectual property rights argue that intangible goods are abundant and non–rivalrous, and that Locke's two provisos can thus be excised from his theory to allow unlimited privatisation in the belief that "enough and as good" will always be left over. Nonetheless, such frontiers can create an artificial scarcity, unjustifiable on any sensible interpretation of Locke's work, since he believed that God ordained that the best use possible be made of our resources. Moreover, he never specifically earmarked where the profit from enclosure should be directed. We cannot therefore assume that big business or, indeed, any other actors, are automatically entitled to exclude the masses from the fruits of their labour, especially in cases of palpable inequality in contribution, control and participation. When intellectual works are encased, Lockean thought allows for access and, indeed, practically mandates possession and redistribution where the resource has not been used as well as it could.

In the free software world, Raymond uses an interpretation of Locke to explain a species of property rights where, strictly speaking, the rights are delineated by custom rather than law [23]. In a process which he equates to homesteading land, it is the assertion and recognition of authorship rather than economic rights or rights to exclude which are of paramount importance in this domain. Whereas the creator of a given program would normally wish to share his or her creation in order to avail of peer review and to disseminate the work for the enhancement of reputation, rights akin to the continental system of moral rights, such as attribution, and the right to object to modifications and derogatory representations of the work must be observed. Sanctions for non–observance of these rules may include flaming and ostracism from online communities.

Raymond also talks about the rituals attached to the "adoption" of "orphaned", or obsolete, projects — of software programs which are no longer being maintained by their creator — and explains that while this practice is permitted, any would–be adoptive "parent" must first endeavour to find the author of the program and seek their blessing. If the owner unreasonably withholds consent, the newcomer may "fork" or split the project. Thus, depending on Locke to justify strong and exclusive intellectual property rights, is at best tenuous. Moreover, the apportionment of territory, be it physical or virtual, does not inevitably lead to the accruing of benefits solely for a few.

(i) From glass slippers to glass houses: Registration of real and intellectual property

Current trends in copyright law appear to have made a 360° turn: whilst the rhetoric of intellectual property protection is that of balancing interests [24], the substance is one of natural law. For example, whilst at one time under statutory rules the author had to take action by means of registration in order to protect his or her work [25], today no formalities

are required and copyright vests automatically on creation of the work [26]. Far from being a burden, formalities attaching to the protection of creative works, and the provision of written records, are desirable in order to enable the public to be able to identify a work's creators [27].

Moreover, despite the manifest number of strained parallels between rights to tangible and intangible resources, this curious trend towards intellectual property coupled with anonymity is, in the England and Wales jurisdiction, for instance, completely out of kilter with law reform in real property law. Since the enactment of the Land Registration Act, 2002 and a number of its predecessors, in order to establish a legal right to one's property, it must be entered in the State registry, which will soon be solely electronic. Rights may be lost unless compliance with bureaucratic formalities is achieved. Land registration was introduced to address the problems involved in ascertaining ownership where there was no centralised registry and when title deeds could easily go astray [28]. There has, therefore, been a seismic shift from rights being based largely on undocumented possession [29], a somewhat Lockean, natural law derived approach, to the legal ownership of land being granted by a centralised State registration system — yet in the intellectual realm, matters have veered off in the opposite direction.

The drive to introduce registration exhibits Lockean strains regarding the need to make good use of scarce resources, which may involve being able to identify owners easily. Whilst intellectual property rights are subject to a limited temporal duration, orphaned or obsolete works could be put to better use if they were made available, unfettered or at a fee, for modification. The current position is not eased by a system which allows strong protection with no provisions for authorial identification. Despite the tangible property justification for intangible property rights, when it comes to protecting ownership of these resources, the rules are arbitrarily different.

In a further reinforcement of authorial rights, whilst ownership of a qualifying work is automatic upon creation, valid copyrights cannot simply be abandoned. In an attempt to address this situation, Creative Commons provides a means by which copyright owners can donate a protected work to the public domain. A model document allows for such a dedication on the Creative Commons Web site but is as yet legally untested [30]. Creative Commons does not provide a registry of copyrighted works but it allows users to determine which licence applies to any given work [31].

The above would appear to raise a critical point about copyright law: the Berne Convention aside, why not have a register? If the rejoinder is "the Berne Convention prevents this", then this Berne blockage may need to be dislodged. Inefficient legislation is by its nature, undemocratic and should be open to reform.

(3) A sole alternative? The positivist approach

Whilst Lockean theory applies principally to natural rights, positivist rights — or rights that do not have a moral component and merely derive from statute — in a functioning democracy should be premised on utilitarian principles.

Legal postivism is an approach that, in its early manifestation, presented law as the commands of a sovereign, backed up by the threat of sanctions [32]. In contrast to natural rights, or rights derived from natural law, legal positivism does not require the morality of laws to be determined by a higher, esoteric standard: it is therefore, somewhat more descriptive rather than prescriptive. Positivism does not enquire into the social context or philosophical underpinnings of the law: instead it points out the location where particular rules can be found. Nonetheless, one of its chief proponents, Jeremy Bentham, was also a utilitarian who advocated doing the most good for the largest group. This, in a representative democracy, would signify the maximisation of happiness for the greatest number of people, whilst protecting minority rights: those of big business, for example. The legislature's primary goal should be to achieve an equilibrium between competing interests, with a fair weighting being given to all interested parties. If drafted with this balance at the fore, this would lead to a much fairer allocation of property rights than within the natural law framework, where inborn rights cannot be disturbed, regardless of the inequality they may cause — depending on whose version of natural law is adopted, of course. Equally, natural law could be structured to recognise communal, rather than private ownership — however, in the prevailing political and legal climate, this is unlikely to occur [33].

Positivist approaches to the justification of intellectual property rights focus on the incentive to create and innovate or to reward, rather than on issues relating to scarcity and allocation efficiency, given that intangible resources potentially abound. Wagner correctly identifies information as a public good, and argues that an incentive based regulatory approach is

probably required in order to encourage people to produce works [34]. This claim does not mean, however, that incentive has to hinge on private property–based economic premises. Lucre does not always turn out to be creativity's primary lure.

In a truly representative democracy, where copyright is a positivist or statutory right, it is imperative that the legislature strike a balance between authors' and owners' rights and those of the public: industry interests should not dominate the scene entirely. Matters necessarily become more complex when the means of creation and distribution rapidly and radically change.

Lessig expresses the idea thus:

> "The pattern says fit the law to the new technology, so that the new technology can flourish. Adjust the law to the new ways in which content gets distributed so that content gets distributed in its most efficient, productive, innovative way, and let Congress later assure that content owners get paid for their product." [35]

Current practice has not followed this prescription: copyright law increasingly protects owners. Law adapted to technology would ideally be *sui generis* in nature, given that with each new technological invention, the law and its subject would have to be studied and specially tailored to ensure an appropriate balance. This may mean adjusting the length and/or breadth of protection, for instance.

Originally, copyright legislation sought to achieve a balance between owners and the public, limiting the common law or natural rights based perpetual copyright to a term of 14 years, renewable for another 14 years, if the author was still alive at the expiry of the first period. It also put one's copyright solely on a statutory footing. However, the term of copyright has been consistently increased over the centuries and now stands at the life of the author plus 70 years in many jurisdictions around the world, although in Mexico, it lasts for even longer at the author's life plus 100 years [36].

Recently, the *Economist* suggested resurrecting the term of protection granted under the Statute of Anne although reinforced by a frontier of copy protection. However, such a move would bring copyright much closer to patent law and would be an unsatisfactory solution for copyright advocates [37]. Prior to this proposal, Lessig had suggested a 75–year term, granted in five–year increments with an obligation to renew every five years [38], seeking to re–establish the positivist heritage of copyright protection — if a somewhat weighted one.

In our current legal and political climate, much of the worldwide intellectual property is owned by industries, with large intellectual property portfolios and strong lobbying power. In such an ambiance, legislative enactments have become increasingly partial and the passage in the U.S. of the Copyright Term Extension Act [39] in 1998 was notable for the fact that its sponsor believed that the copyright term should go on forever [40].

(4) Hiding intent: Natural law masquerading as positivism?

The constitutionality of this Act was challenged unsuccessfully in the U.S. Supreme Court in 2003 in *Eldred v. Ashcroft* [41]. The majority of the Court held that the extension in the copyright term, which would apply equally to new works and works about to fall into the public domain, was constitutionally permissible, despite the fact that in the latter case, it could hardly be claimed that incentive could thus be spurred. Posthumous reward, rather, underpinned the decision. Arguments against the application of the extension to works which had already been created on the grounds that this extra time would have no effect on incentive, received a short shrift. In effect, the majority's rationale seemed to be based more on natural law rather than positivism without a hint of judicial reflection on this state of affairs in the majority decision.

Most of the judges considered that an endeavour to harmonise the duration of U.S. copyright law, with the longer European term was a coherent step. Indeed, the European copyright term extension was introduced to bring all member states into line with the maximum term then granted within the E.U. [42]

Lessig points out that creative workers in the European copyright tradition claim rights based on their creativity [43], a type of natural right, rather than positivist or statutory rights granted to them by the government. Moreover, natural law based justifications of copyright are more prevalent in the European civil law tradition than in the U.S. These would depend more on Hegel's than Locke's works for their theoretical justification [44]. The U.S. Court's decision presented something of an about–face to the centuries old assertion that U.S. copyright law is

a statutory right and no more. A 20–year extension to the copyright term with retrospective effect was permissible, however, because it was still deemed to be a “limited time” within the relevant Constitutional provision [45].

The Court also felt that given prolonged life expectancy, such an extension was required. The logic of this argument is hard to follow through in a global context. Would this mean that where life expectancy falls that the term of copyright should be curtailed? Should the prevalence of potentially fatal infectious diseases in certain parts of the world be a determining factor of the copyright term? Should authors' rights be tied into their ethnic group's life expectancy? Should women get a different term of protection than men, given their greater average lifespans? What other arbitrary factors could be taken into account, following this flimsy line of reasoning?

This judgment also ignored the fact that a limited but lengthy copyright term, when applied to digital technology or software, or indeed, traditional copyrightable works such as books made available online, can equate to a *de facto* perpetual right [46], if the right in question endures long after the technology has become obsolete. A century of protection, give or take a few, is very difficult to justify from any perspective for a piece of software, which generally becomes obsolete after five to 10 years.

Neither can such a right be solely a positivist right: it resembles more closely a common–law, perpetual copyright, on a statutory footing and there is a sense that statute, rather than granting copyright, is recognising a pre–existing right and upholding it as if it were natural law–based, antecedent and imprescriptable [47].

This is also a partial interpretation of Locke's property rights because it would appear that Locke's proviso about putting resources to their best use is misapplied in favour of rights without responsibilities.

(5) A heeling approach: On balancing claims

Justifications for private property rights in the creation or collation of information are often made on the grounds that the intellectual commons will be thus augmented through private investment rather than shrivelled [48] but such claims are not unanimous. Such laws can create an artificial scarcity and thus encourage monopolies [49]. In any case, evidence about the need for incentives varies greatly, depending on whether authors, owners or end users are being consulted. For instance, whilst the heavy metal group, Metallica, pursued Napster vigorously for facilitating piracy [50], other artists such as Courtney Love were not against music sharing via peer–to–peer networks. She did claim, however, that the music industry, rather than musicians, profited hugely through artists' work and also declared: “There were a billion music downloads last year, but music sales are up. Where's the evidence that downloads hurt business? Downloads are creating more demand.” [51]

Statistics on piracy are rarely carried out by independent bodies and even the use of this term is controversial. Groups such as the Grateful Dead have always allowed people who attended their concerts to record them. This encouraged interest in their music, and tended to increase sales, given that the band believed that live concerts are not comparable to recorded versions of the band's music [52].

The success of acts such as Lily Allen and the Arctic Monkeys, both of whom have released their music on MySpace, show that different models are viable and, indeed, perhaps preferable in attaining reputational capital.

Whilst free access increases with the proliferation of peer–to–peer networks, this deficit may be redressed through a greater number of copies purchased and a reduction in advertising costs. In any case, this digital genre is almost impossible to control.

Much of the input into the enactment of legislation to protect intellectual property rights is based on fear of what will happen in the absence of these property rights or as a response to lobbying by industry interests. In a subspecies of copyright [53], a *sui generis* right passed in the E.U. in 1996 to protect databases which fell below the threshold of originality necessary to attract copyright protection [54], was recently evaluated by the Directorate General of the Internal Market [55]. Contrary to their expectations and aspirations, the U.S. market for these products had greatly increased in the absence of any type of legal protection, whereas the market within the E.U. had not. Whilst the report shows that European database owners perceive a need for this right — the sources for the survey were 500 Western European database producers, of whom 101 replied and the world's largest database directory: the *Gale Directory of Databases* [56] — the evidence does not support this belief. The E.U. share of the

database market has not improved since the passage of the Directive [57] and, having risen until 2001, has now fallen back to 1998 levels when the Directive came into law in the Member States. Other stakeholders, such as end users, do not appear to have figured highly in importance in the evaluation, yet the Internal Market and Services Directorate General has been lobbied by the European publishing industry, who are favourable to this Directive [58]. The report, while acknowledging the thriving U.S. market, describes the E.U. legislation as a "political reality" and is ill–disposed towards its repeal [59].

James Boyle, professor of law at Duke University, writing for the *Financial Times* asks "what is the purpose of a review if the status quo is always to be preferred?" [60]

Continuing on the topic of incentives, an area of western Spain, Extremadura, has made copious use of free software in its implementation of a plan to digitalise the entire population of the region [61]. Instead of inhibiting the wholesale copying of their distribution of the Linux operating system, called gnuLinEx [62], their motto is "Be Legal: Copy gnuLinEx". Far from edging out proprietary competitors, sales and distribution of both free and proprietary software in the region have increased [63].

As Benkler, professor of law at Yale Law School, puts it "[T]he networked information economy makes it possible for non–market and decentralized models of production to increase their presence *alongside* the more traditional models causing some displacement, but increasing the diversity of ways of organizing production rather than replacing one with another." [64]

However, as access to the public domain is increasingly controlled by licensing, creative activity is being stymied by this privatisation. "Free culture is thus transformed into licensed culture ... . The freedom to tinker, especially for the technologist to tinker, is threatened." [65]

In sum, whether premised on perpetual, natural law rights or positivist rights which are vulnerable to lobbying by industry interests, copyright is perceived by many authors as an inhibition to the dissemination of their works in the digital age. End users largely disrespect this law and copyright is, increasingly, a shoe which does not fit. Miller's ponderings about whether to put new wine in old or new bottles, reveals something of the problem [66], and even though the matter is now of mere academic interest, copyright, in its current incarnation, is quite an anachronistic law for many of today's new technologies.

Change has been sought without success to date both through the legislative process [67], and the courts [68], and now only a few options remain: to ignore copyright's strictures entirely and face the potentially significant consequences, inhibit one's own creativity in fear of consequences of intentional or inadvertent violations, or create a civil society movement which encourages authors voluntarily to relax the rights to which they are entitled under statute/natural law. Whilst somewhat unsatisfactory, in the absence of a better idea, Creative Commons is serving to spread the message about copyright's ills.

3. Enter a handsome prince, seeking a shoe that fits

Lawrence Lessig has written several books on the way in which digital resources and the law interact. He also acted as counsel to the plaintiff in *Eldred v. Ashcroft*. In 2001, inspired by the free software movement, he set up an organisation called Creative Commons, which is a civil society response to the difficulties he encountered in challenging copyright's length and breadth through the courts.

Creative Commons is a not–for–profit organization initially funded with a grant from the Center for the Public Domain [69]. It offers a "flexible" copyright protection for creative works by providing a number of different licence options for authors and other innovators, with the intention of halting and/or turning back the ever increasing scope and duration of copyright protection. This movement also boasts an eclectic composition of actors and is seeking to counterbalance "a kind of land grab in cyberspace on the part of major content industries" [70].

Creative Commons has been described as "a kind of environmentalism for culture" by one of

its founders, James Boyle. Its goal is not to abolish copyright law, but, rather, to achieve a balance which appears to have been mislaid. Lessig believes in the need to intersperse strong copyrights with intermediate stages of ownership and control, so that property rights may continue to exist but these owners are encouraged to allow access to their property, through the use of licences. He also claims that at present, the debate between rights holders, and those that require access is polarised and that the middle ground is not being represented [71].

The licences can be downloaded for free from the Web site and lawyers are not needed to advise on which licence to use as there is a lay person's version of each licence, which employs less specialised terminology than the lawyer's copy. The organisation also facilitates electronic tagging of digitalised content so that users do not have to contact publishers in order to check the licensing status of the work in question. This is achieved through the machine readable copy of the licence. These three aspects of the licence are known as the commons deed, the legal code and digital code, respectively.

4. Creative Commons licensing: Gilded carriage or plain old pumpkin?

(1) The "whys" of the licences

Creative Commons does not challenge the existence of copyright law: in fact, it depends on it. Creative Commons licences work within the system as, indeed, do free software licences such as the GNU GPL. These licences permit liberal access and conditional reuse. Yet they also discourage abuse of these privileges by relying on copyright law for enforcement purposes. The payoff for for this voluntary altruism is exposure. The public also benefits through a greater number of works which can be accessed. All transactions can be carried out via the Internet and there are a number of different licences with varying conditions available to copyright owners.

The author's first experience of using Creative Commons licences occurred in 2004, on publishing an article in the *European Intellectual Property Review*, when the editors requested the attachment of such a licence to the work [72]. From the author's point of view, payment, even if sought, would likely yield naught, whereas publicity and dissemination should, theoretically at least, contribute towards reputational capital. Therefore, the ability to opt out of copyright's habitual restriction on copying is desirable. In another instance, the posting of a chapter on the book's Web site was possible, prior to publication [73].

In order to ensure integrity of the work, academic authors may not wish to permit derivative works, whereas the requirement of attribution would be of prime importance. Not all works follow this road map, however. Authorship of Wikipedia, is not immediately apparent. Entries are released under the GNU Free Documentation Licence, a licence recommended principally for instruction manuals which can be modified by people other than the author and discussed later in this article.

The use of Creative Commons licences does not rule out the possibility of making money but it does encourage copyright owners to experiment with different arrangements for the licensing of their work. For example, Cory Doctorow's novel *Down and out in the Magic Kingdom* [74] was published in hard copy and soon after, posted on the Internet, *gratis*, with a Creative Commons licence attached. Doctorow decided to license the work in this way because it increased its circulation. One year later, he re–released the work under a more permissive licence which no longer restricted users from making derivative works [75].

The release of the work on the Internet may increase sales of the hard copy [76]. It may, on occasion, also raise the second–hand bookstore prices of out–of–print books — as experienced by Peter Wayner, who wrote a book about the free software movement. When the book went out of print, Wayner released the book online, with a Creative Commons licence. As the number of downloads increased, there was a commensurate rise in the price of the book in the aforementioned retail outlets [77].

(2) A magical array of technicalities

Creative Commons licences, as stated earlier, are composed of three separate layers. The first is known as a human–readable description of the licence, which explains in simple language the rights granted by a particular licence. The second is the licence itself, which is intended principally for lawyers. The third is a version of the licence, which is machine–readable and allows computers to interpret automatically the content being shared. These licences extend rights beyond those normally available under fair use. They allow for sampling, sharing, copying and help to bring about equilibrium in this arena [78].

A “CC”, for Creative Commons, mark may be used which indicates that some rights, but not all, are reserved. Alternatively, in the case of dedication to the public domain, all rights are ceded.

Creative Commons licences are legal documents, in the form of contracts. A significant disadvantage of the use of this type of legal device, as opposed to rights being granted under statute, is that in order for users to be bound, there must be privity of contract. This means that only parties to the agreement are bound. If X creates a software program and releases it under the GNU GPL and Y violates the licence, in principle, X can sue Y. However, if Y were to detach the licence and pass the software to Z, who did not follow the terms of the GNU GPL (for whatever reason), Z cannot be sued in contract as there is no contract or agreement between X and Z. X’s remedy will then lie in the domain of copyright law, a fallback position in case of licence violations of this nature, or where a clause of a licence is not upheld. Copyright, as a statutory right, binds everyone, including third parties who may have escaped contract law’s clutches.

A criticism of the GNU GPL, and, consequently, Creative Commons licences, is that they may not be upheld in every jurisdiction around the globe [79]. Neither contract nor copyright law is based on an international standard: each country has its own peculiarities. However, early signs are positive. The GNU GPL has now been upheld in two jurisdictions [80] and a recent decision in a Dutch court, similarly upheld a Creative Commons licence [81]. Whilst it is arguable that such decisions are few, it is hoped that at some point these licences will start to feed back into judicial decisions, affecting the way in which courts arrive at their judgments and may eventually influence the way in which the legislature deals with intellectual property.

With the exceptions of the public domain dedication [82], (misleadingly classified as a licence in several sections of the Creative Commons Web site [83]), the sampling licence and the Founder’s Copyright, each licence fully protects the owner’s copyright. The licences do not interfere with user rights under copyright law, such as fair use. Creative Commons licences come in six different formats. All six licensing forms require attribution, or recognition of the author. They are set out on the Creative Commons Web site and are annotated below:

The least demanding licence just requires attribution [84], and this is reminiscent of Berkeley Software Distribution, or BSD style licensing in the software realm, which traditionally was used for free versions of Unix and which permitted proprietary modifications. This licence puts very few demands on those seeking to use the work. It is detailed as follows:

> Attribution (by)
>
> 
> Choose by license. This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with your works licensed under Attribution.
>
> Read the Commons Deed | View Legal Code

The next licence, known as share–alike [85], allows users to modify the work, providing modifications are made available using the same licence. This resembles closely the GNU GPL. Its terms are as follows:

> Attribution Share Alike (by–sa)
>
> 
> Choose by–sa license. This license 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 license is often compared to open source software

licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use.

Read the Commons Deed | View Legal Code

Alternatively, one may require that no derivative works be made, and the following licence allows copying and distribution of the intact work [86]. Copies and distributed copies must carry the same licence.

Attribution No Derivatives (by–nd)


Choose by–nd license. This license allows for redistribution, commercial and non–commercial, as long as it is passed along unchanged and in whole, with credit to you.

Read the Commons Deed | View Legal Code

The condition attached to the next licence is that derivative works cannot be commercial, attribution is required but they can be licensed on different terms, for instance, derivative works could be licensed to prevent further modifications [87].

Attribution Non–commercial (by–nc)


Choose by–nc license. This license lets others remix, tweak, and build upon your work non–commercially, and although their new works must also acknowledge you and be non–commercial, they don't have to license their derivative works on the same terms.

Read the Commons Deed | View Legal Code

Another licence allows sharing, but only on non–commercial terms, and requires that derived works adopt the same licence as the base work — again, a feature of GNU GPL–style rather than BSD–style licensing [88].

Attribution Non–commercial (by–nc)


Choose by–nc–sa license. This license lets others remix, tweak, and build upon your work non–commercially, as long as they credit you and license their new creations under the identical terms. Others can download and redistribute your work just like the by–nc–nd license, but they can also translate, make remixes, and produce new stories based on your work. All new work based on yours will carry the same license, so any derivatives will also be non–commercial in nature.

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The final licence forbids derivative works and only permits non–commercial reuse [89].

Attribution Non–commercial (by–nc)


Choose by–nc–nd license. This license is the most restrictive of our six main licenses, allowing redistribution. This license is often called the "free advertising" license because it allows others to download your works and share them with others as long as they mention you and link back to you, but they can't change them in any way or use them commercially.

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These licences may serve as a starting point and issues such as whether the work can be used commercially or whether derivative works can be made may be negotiated at a later date.

Clearly, the share–alike clause and the no derivatives condition cannot both be incorporated into the same licence.

Approximately 140 million Web pages now use Creative Commons licences, according to mid–year statistics for 2006 [90]. It would appear that continental style authorial rights, which are not well protected in common law countries, such as attribution, — which earns reputational rather than financial capital — is the primary consideration of the majority of authors. Some early licences did not impose any restriction on use [91], but these are no longer an option, since version 2 of the licences has been made available. The share–alike provision predominates although its use has fallen from approximately 75 percent of licences in 2005 [92] to just over 66 percent in 2006 [93].

It is informative to note that few authors choose attribution as the only condition of reuse of their works — most attach some other conditions to their contribution to the public domain. This tendency mirrors the trend in free software licensing where the GNU GPL dominates over other licences [94]. This reconstruction of a public domain with an expansive nature, first given licensing form through the use of the GNU GPL, has gained popularity outside of the software sphere.

Content owners may still earn an income from their works but contributions to the public domain are encouraged. Copyrighted works can be donated to be held on public trust and the organisation may also seek, in the future, to acquire works of great importance on these terms [95].

(3) The genesis, evolution and spread of the idea

Before the advent of Creative Commons, there were, and still are in existence, hundreds of licences which relax, to a varying degree, the extent to which copyright applies to software. The genesis of this idea is located in the free software movement which was founded by Richard Stallman in the mid–1980s. Stallman decided to form a free operating system, called GNU [96] after copyright law was extended to software by the legislature in the early 1980s [97]. This occurrence restricted programmers' ability to share and improve programs. In addition to starting the world's first free software charity, the Free Software Foundation, Stallman also founded a licence, called the GNU GPL. The GNU GPL, now in its draft, third edition, gave rise to the coinage of the term "copyleft" which allegedly reverses rather than reserves, all rights [98].

In addition to the Free Software Foundation (FSF), another organisation, the Open Source Initiative [99] also approves a plethora of licences, some of which are common to those sanctioned by the FSF. Free software is also described as open source, FOSS, FLOSS, LOSS [100] and software libre, depending on the ideological camp to which one belongs. It has been said:

> "[w]ith open source, everything is allowed except that which is forbidden. On the other hand, with a proprietary source, everything is forbidden except that which is allowed." [101]

The free software ethos has not been confined to software as the FSF also created a licence, the Free Documentation Licence (FDL), for non–software works, such as its manuals. This trend towards making information freely available or licensed on liberal terms has increased greatly in the last few years. For instance, the Massachusetts Institute of Technology makes available classes via their MIT Open Course Ware project under Creative Commons licences [102], operating on a similar basis to the FDL.

To give a sense of how the philosophy of these movements have spread across the globe, Ignasi Labastida i Juan, the leader of Creative Commons in Spain, noted that in 2003 the University of Barcelona was searching for an appropriate way to publish teaching material. Just as Creative Commons had copied the licensing idea from the Free Software Foundation, his University adopted MIT's model and licences were ready in 2004 [103]. Given that copyright law differs from state to state, licences must be harmonized in order to be valid in each country. Whereas Spanish law only permits authors to use the licences due to their continental–style recognition of moral rights, other countries such as the U.S., have a broader reach [104].

Creative Commons licences have mainly been designed for non–software works, although the organization has added a human–readable commons deed and its metadata to the original GNU GPL [105] which is known as the CC–GNU GPL. Furthermore, it collaborated with Brazilian

lawyers to translate the GNU GPL into Portuguese in Brazil, which coincided with the Brazilian government's announcement four years ago, amidst much fanfare, that 2004 was the "year of open source" [106]. The government planned to switch its entire administration to free software, estimating that the savings from doing so would amount to over US$1bn per year in licensing fees. At the same time, the Brazilian Minister for Culture, Gilberto Gil, adopted Creative Commons licences for some of his music [107], and much publicity for liberal licensing, both of software and non–software works, was thus attained.

The GNU GPL's translation into Portuguese by Creative Commons is unique and it has not been translated into any other languages by this organisation. FSF, however, hosts many unofficial translations on its Web site [108]. There is a lot of collaboration in free software creation all over the world and if there were minor differences in translation in various countries, an array of licences could be a source of great confusion when deciding who could do what, with what, where — therefore, official versions are not available. Multiple versions of the GNU GPL could cause forking, or splits, in the code base of given programs, potentially threatening their standardisation and raising software compatability issues. This is an increasingly likely scenario in trading blocks, such as the E.U., which includes different linguistic and legal traditions, where collaborative creative projects involving citizens of several different member states regularly take place.

Here the practice of the free software movement and Creative Commons differ: the latter organisation encourages the harmonisation of licences with local law. Undoubtedly, the subject matter covered influences this.

(4) A radical agenda? All that glitters may not be gold

The motives of many of the actors in this realm vary from increasing intellectual property rights formalities, so that prospective end users know whom to contact about obtaining permissions to reuse copyright works. Additionally, these motives ameliorate the onslaught of propertisation of freely available resources by legislative actions, such as increasing the copyright term or, indeed, adopting a freeware approach in which interest in the author's works is generated by the distribution of free samples of proprietary work. All of these initiatives enrich what is available in the information commons, to a greater or lesser extent and consequently also benefit the public, to some degree. Licensing copyrighted works in the manners facilitated by Creative Commons does not enhance the public domain as such but creates a type of information commons with fewer restrictions than normally exist under copyright law. Lessig presents the phenomenon of licensing out of copyright as "rebuilding a public domain": and states that Creative Commons "relies upon voluntary steps to achieve this rebuilding." [109]

Positions may appear to be polarised, with the legislature riding in tandem with big business on the one hand and civil society organisations, such as Creative Commons, the Center for the Public Domain, Electronic Frontier Foundation and American Civil Liberties Union, to name but a few resisting the tendency to privatise, on the other [110]. Creative Commons does not propose a revolutionary path, but seeks, rather, to steer an even course between privatisation and a total renunciation of ownership. It does not challenge the system but operates within it. Much of its appeal is that it has "spread the message" about copyright's strictures, rather than changing the law. It has succeeded in encouraging high profile participants such as David Byrne and the Brazilian Minister for Culture, Gilberto Gil, in the musical arena, as well as reaching many organisations around the globe which may otherwise have continued, albeit unintentionally or unthinkingly, to restrict access to their works.

The FSF is not particularly supportive of Creative Commons: the former organisation stands first and foremost for freedom and alleges that Creative Commons licences do not all share a specific freedom [111]. The focus of both organisations certainly differs, evinced by the language employed in the licences. Whereas the GNU GPL is addressed to the user in terms of what rights she gains through the use of the licence, Creative Commons licences are directed towards the owner of the copyright [112].

Creative Commons proponents refer regularly to the public domain as if it had a universal meaning but the use of this term and prescriptions for its use have given rise to some controversy, explored below.

5. Cobbling creativity? Privatisation versus the public domain

When we ruminate about the commons or the public domain, such is the influence on our culture by thinkers such as Locke, that we tend to visualise an unowned resource, which at some stage in its development will likely fall prey to privatisation. We do not always view such a resource in a positive light or as something, which should be left alone but instead see it as a problem in need of a regulatory solution. Hence arguments about the "Tragedy of the Commons" resonate even when the commons in question is the public domain itself — a non–rivalrous good, which cannot be depleted just by use. Ironically, however, the survival of the commons or public domain is essential as a platform for property rights.

Just as we make thoughtless leaps in applying Locke's labour theory to intellectual resources where the "sweat of the brow" or effort alone may give rise to certain intellectual property rights [113], regardless of their different nature, other philosophers such as Hegel also theorised about the nature of ownership and the public domain. Hegel considered the existence of the public domain to be imperative. Unlike Locke, for whom the addition of labour to something in the commons allowed one the right to enclose, for Hegel, it was the addition of one's will to something unowned that gave rise to property. He claimed that "property is the *embodiment* of personality" [114]. The idea of ownership in Hegel's theory has been explained in the following terms:

> "possession is not physical as much as metaphysical — the important issue is whether one's will has possessed the external object ... a thriving commons is instrumental for Hegel, serving as a symbiote of private property." [115]

Restricting access to public domain material may eventually close off the raw material from which new works can be created as intellectual resources, whilst abundant, are not infinite. Raquel Xalabarder, Professor of Law and Political Science Studies at the Open University of Catalonia, ponders whether authors have surreptitiously been granted a new right to control use of their works in the digital domain [116], given that before the advent of the Internet, authors' rights were not as extensive as they are today. As if to counterbalance this new restriction — the author's right to control copying and distribution of their works on the Internet — in a relatively recent Canadian case [117], the Supreme Court characterised exceptions to copyright, such as fair dealing, in the positive terminology of "user rights". It said: "The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively." [118]

Nonetheless, in Western culture, notions of the individual, romantic author and the need for strong intellectual property rights often obfuscate the fact that what is being protected is investment, rather than creative or innovative processes. Many companies survive on the ownership of intellectual property alone. This control exercised by way of licensing, supplies a continuous flow of revenue through access fees and has led to the phenomenon of "lean production" in which companies, rather than creators, do not need to possess any substantial real property [119].

Such developments have led to a surge in anti–intellectual property feeling, where copyright, rather than spurring creativity, is hindering it by erecting barriers, which are hard to surmount and often also difficult to detect [120]. Rights, stripped of responsibility, are often provided and Coombe wonders whether it is possible that a definition of authorship which embraces these rights and responsibilities can be encouraged to undergo a renaissance [121].

The preoccupation is that if access to creative works is shut off by a small number of actors, sources of creativity could be severely and permanently restricted. Lessig is principally concerned with content owners' rights to deny access, and this is a separate issue from the right to charge for access, given that the former right encourages "monopolistic chokeholds on innovation" [122].

The ongoing tendency by big business to enclose resources which are or should be the property of everyone has led to an upsurge in the number of civil society groups, which encourage individuals and organisations to waive some or all of their rights. This is a type of recapture and rejuvenation of the public domain, albeit somewhat artificial, by encouraging owners to drop their fences or at least to license their intellectual property. In a legislative move, a Bill, entitled the Public Domain Enhancement Act which would encourage older, non–

commercially viable works to enter the public domain before the copyright has expired, has been introduced, albeit unsuccessfully, in the U.S. Congress [123].

Endeavours to alter the current status quo have been threefold: through the courts, the legislature and also by means of social activism.

Ironically, while many private interests have inhibited the public domain, many are also involved in expanding it. This demonstrates that both governments and private initiatives can contribute to enhancing and expanding the public domain [124] rather than only restricting access to it. Relying solely on voluntary effort, however, indicates that our system of representative government is not working in the way that it should. Sooner or later, the legislature will have to start representing the interests of the majority of its electorate, rather than those with the biggest financial muscle.

(1) The public domain in the eye of the beholder

However, most ideas relating to the public domain emanate from the U.S., and this may prove problematic if American legal principles were to dominate the worldwide re–creation of this artificial public domain.

> "A vibrant cultural domain will also require consideration of means to maintain cultural diversity and ongoing dialogue across and between cultural traditions." [125]

Authors may have taboos about the use of their "public domain" material, or not wish to use a system of licensing, foreign to them, to indicate the rights which they relinquish or retain. The encouragement of the use of licences presupposes the acceptance of Western–style copyright, an export of dubious value, considering the many extant problems in its places of origin and adoption.

The meaning which we attach to the public domain in our world of globalised intellectual property rights is in need of further clarification.

Moreover, it has been the tradition of the designers of Western style, intellectual property rights to recognise property rights only in resources which have an identifiable, and usually individual author, and to classify resources with communal authorship or informal property rights as unowned. Thinkers such as Locke, who have exerted a huge influence on our conceptualisation of resource management, had a somewhat limited view of what constituted ownership: when something had not been enclosed, such as Native American land. Locke classified this land as being part of an unowned commons, which could be appropriated and privatised subject, of course, to his two provisos (which presumably were not available to the indigenous themselves). This typified a colonial mentality: to propertise resources, which did have informal or intermediate types of ownership rights, ignoring these rights in order to be able to justify colonisation and theft [126]. Furthermore, Hardin's portrayal of the commons [127] is hardly representative: almost all communally owned or shared resources are managed locally and some sort of customary property rights are clearly delineated and recognised [128].

Indeed, some authors claim that most people, when given the option, prefer a regulated and structured, rather than an open access public domain [129], given that this ensures that the public domain is not exploited by owners who, on obtaining intellectual property protection, refuse to license their works. This trend echoes some of the much earlier reasons for the use of the GNU GPL over the BSD licence, which predates it. With BSD licences, proprietary add–ons could be made and so the commons, if not maintained by a group of developers, could become obsolete as there was no obligation on users to give anything back. By way of contrast, the GNU GPL creates a contributory software commons, given that you must re–license your derivative works under the same licence and make some return where you have received. Whilst the GNU GPL is more bureaucratic in that more formalities and conditions attach, its use is much more widespread than BSD.

Certainly, in the physical realm, structure and regulation appear to be the norm and informal property rights abound wherever there are competing interests. The history of the Internet also supports this view, where licensing in one form or another proliferates. Certain notable exceptions are the World Wide Web software, which CERN released to the public, unlicensed, and BSD–style licences, which allow privatisation of modifications, although attribution is required. However, the GNU GPL, which does not allow privatisation, is now the dominant licensing paradigm in the free software world. No privatisation is permitted in this sphere: altruism is mandatory, although some authorial rights are reserved.

The attempt to close off the virtual commons can be perceived as a type of neo–colonisation, with industry groups in the shoes of colonising states. Recognition of intermediate property rights, even when unfamiliar, is essential to the protection of the public domain in a broad sense.

> "[I]n the advent of an awareness of the valuable genetic and knowledge resources within native communities and lesser developed nations, the advocates for the public domain — and, in turn, propertization — have flipped. Now, corporations declare the trees and the shaman's lore to be the public domain, while indigenous peoples demand property rights in these resources." [130]

Self–serving interpretations of what constitutes an unowned resource has led to courts deciding to extend the boundaries of property rights, often through patent law, where legislation is silent on a particular question [131], even as they indicated the desirability of legislative intervention. Nowadays, in order to avoid pillage of this nature of the public domain peculiar to a particular region of the world, many countries have developed *sui generis* regimes for genetic resources and traditional knowledge [132].

The public domain in the sense used by Creative Commons would appear to mean communal resources, which should always be available for use and reuse, although Lessig distinguishes between the public domain, in which resources are copyright–free and the "effective public domain", in reality a type of commons, in which works can be reused, because they are licensed [133]. Licensing has become a means of creating a synthetic public domain, where the actual public domain is shrinking [134]. Whilst advocating that the real public domain be enhanced through searching out an appropriate copyright term, Creative Commons also seeks to construct an artificial public domain [135] based on voluntarily licensed works.

Care must be taken when this scheme meets indigenous or unfamiliar property rights, as clashes over ownership and dedication to the public domain may ensue, especially given that the licences are described as having worldwide application [136].

6. Nailing the solution: Recycle, repair or replace?

It has been hypothesised that civil society organisations such as Creative Commons may start to influence the legislative process in the future and make it reflect in a different way about any future extensions of the copyright term [137].

Movements such as Creative Commons have been described with circumspection by some U.S. academics who argued that this phenomenon creates a situation in which "[i]nstead of 'order without law' ... we have 'order despite law' (order because of 'law')." Merges rejects the notion that Creative Commons is a panacea for all legislative ills in copyright but it is, rather, a second–best solution, given that the extensions were not wisely granted in the first place. At least, however, civil society can do something about the legislature's actions [138].

Conclusion

Creative Commons emerged in tandem with efforts to hold back the top–down spread of copyright through the courts and the legislature. Endeavouring to effectuate legislative change would engage participants in systemic inertia, for states are no longer free to "go it alone" in light of the multiple layers of legislative enactments internationally. In the face of this fact, it is heartening to see the vibrancy that Creative Commons has evoked in civil society.

My own university, the National University of Ireland, Galway, hosted a conference in June 2007 dealing largely with these issues in the teaching and learning spheres [139]. Many publications from regional governments and universities in Spain make widespread use of Creative Commons licences as dissemination rather than restriction is of prime importance. In the U.K., several reports have been produced over the last few years and this trend towards

internationalisation will likely increase in the next few years. It is high time that this ground–up movement receives some legislative recognition, if we are to go on believing in the democratic premise of legislation: that it should enshrine an appropriate balance and not be weighted too heavily in favour of particular, if dominant, minority interest groups.

About the author

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Notes

1. Author's modification.

2. In *Millar v. Taylor* (1769) 4 Burr. 2303.

3. (1774) 2 Bro. P.C. 129, 4 Burr. 2408.

4. (1769) 4 Burr. 2303.

5. *Wheaton v. Peters* 33 US (8 Pet.) 591 (1834). The U.S. Constitution, Article 1, Section 8, Clause 8, treats copyright as a balance between private and public rights and is premised on utilitarianism. Copyright statutes have consistently maintained this course, granting exclusive rights for a limited time only, albeit incrementally increasing.

6. John M. Kelly, 1992. *A short history of Western legal theory*. New York: Oxford University Press, pp. 19–21.

7. Peter Laslett (editor), 1988. *Locke: Two treatises of government, Book II*. Third edition. Cambridge: Cambridge University Press.

8. In another, competing school of thought, American legal realism, advocates believe that the law cannot be known until it reaches the court room.

9. John M. Kelly, 1992. *A short history of Western legal theory*. New York: Oxford University Press, pp. 312–315.

10. As per Walsh J. in *McGee v. the Attorney General & Anor* [1974] IR 284, at http://www.bailii.org/ie/cases/IESC/1973/2.html, accessed 14 May 2007.

11. Peter Laslett (editor), 1988. *Locke: Two treatises of government, Book II*. Third edition. Cambridge: Cambridge University Press.

12. These are known as Locke's "two provisos".

13. Peter Laslett (editor), 1988. *Locke: Two treatises of government, Book II*. Third edition. Cambridge: Cambridge University Press, p. 290.

14. For a further elaboration of this point, see Maureen O'Sullivan, 2002. "The Linux Operating System: A Socio–legal Study," Research LLM Thesis, University of Warwick, School of Law, pp. 63–65, on file with the author.

15. Brazilian *Constitution*, Chapter III, Articles 184-191 deal with the conditions under which squatters may occupy unproductive land and appropriate it to themselves, at http://www.v-brazil.com/government/laws/titleVII.html, accessed 2 May 2007.

16. For a comparative perspective between Brazilian and English law on adverse possession,

see Lauren Hartigan, 2006. "Squatting: A Constitutional Right?: A Comparative Study of Adverse Possession in England and Brazil," dissertation, University of West of England, Bristol.

17. Brazil's motto is "*um pais de todos*", or a country of everyone.

18. João Pedro Stedile, 2002. "Landless battalions," *New Left Review*, volume 15 (May–June), at http://www.newleftreview.net/NLR24904.shtml, accessed 2 May, 2007.

19. The Creative Commons Web page can be accessed at http://creativecommons.org.

20. Maureen O'Sullivan, 2005. "Software patents: Legal and political aspects," lecture at the Summer School on Libre Software, at Universitat Jaume 1, Castellón, Spain, 1–5 July, on file with the author and in Maureen O'Sullivan, 2007. "Lockean style property rights in land, software and genes," In: Emilio Mordini (editor). *Bioethical implications of globalisation*, forthcoming 2007).

21. Despite the author regularly harping on about it.

22. Of interest is the fact that writers such as James Tully and Peter Drahos have claimed that Locke was seen as an early socialist and also that perhaps he did not even have a theory of property — James Tully, 1993. *An approach to political philosophy: Locke in contexts*. Cambridge: Cambridge University Press, p. 111 and Peter Drahos, 1996. *A philosophy of intellectual property*. Aldershot: Ashgate, p. 42.

23. Eric Raymond, 2001. *The cathedral and the bazaar*. Revised edition. Sebastopol, Calif.: O'Reilly, pp. 65–111.

24. *U.S. Constitution*, Article 1, Section 8, Clause 8, for instance, grants authors and inventors, a limited time of protection in exchange for the subsequent enhancement of the public domain when the term of protection expires, http://www.law.cornell.edu/constitution/constitution.overview.html, accessed 2 May, 2007.

25. As seen in *Donaldson v Beckett* (1774) 2 Bro. P.C. 129, 4 Burr. 2408.

26. Under the Berne Convention which accordingly alters the law of signatory states.

27. Lawrence Lessig, 2004. *Free culture*. New York: Penguin, p. 288.

28. Kevin Gray and Susan Frances Gray, 2005. *Elements of land law*. Fourth edition. London: Butterworths, p. 357.

29. Possession, in the adage, being 9/10 of the law.

30. http://creativecommons.org/licenses/publicdomain/, accessed 2 May, 2007.

31. Corey Field, 2003. "Copyright, technology, and time: Perspectives on 'interactive' as a term of art in copyright law," *Journal of the Copyright Society of the U.S.A.*, volume 50, p. 49.

32. John M. Kelly, 1992. *A short history of Western legal theory*. New York: Oxford University Press, p. 384.

33. In one Irish case, *Phonographic Performance (Ireland) Ltd. v William Cody and Princes Investments Ltd.* [1994] 2 ILRM 241, at 247, the judge said that in Ireland, the common law copyright may have survived, as well as stating that copyright was a property right within the Irish Constitution, giving rise to the possibility that copyright exists in the Irish jurisdiction, not just as a statutory or positivist right but also as a natural law, and potentially perpetual, right.

34. R. Polk Wagner, 2003. "Information wants to be free: Intellectual property and the mythologies of control," *Columbia Law Review*, volume 103 (May), 995 at p. 1001.

35. Lawrence Lessig, 2003. "The Creative Commons," *Florida Law Review*, volume 55 (July), 763 at p. 773.

36. Federal Copyright Act, 1996, Article 29 (amended in 2003), at http://www.wipo.int/clea/docs_new/en/mx/mx003en.html, accessed 2 May, 2007.

37. Catherine Seville, 2003. "Copyright's bargain — Defining our terms," *Intellectual Property Quarterly*, 312 at pp. 340–341.

38. Lawrence Lessig, 2004. *Free culture*. New York: Penguin, p. 292.

39. Also known pejoratively as the "Mickey Mouse Protection Act".

40. Mary Bono, widow of Sonny Bono, said that her late husband "wanted the term of copyright protection to last forever", 144 Cong. Rec. H9952 (daily ed. October 7, 1998), quoted in Christopher Ledford, 2005. "The dream that never dies: *Eldred v Ashcroft*, the author and the search for perpetual copyright," *Oregan Law Review*, volume 84, 655, at http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/commentary/LedfordCommentPerpetualC-R(OreLRev2005).pdf, accessed 2 May 2007.

41. 537 US 186 (2003).

42. Germany already granted a term of the author's life plus 70 years.

43. Lawrence Lessig, 2004. *Free culture*. New York: Penguin, p. 250.

44. Whilst the source of Locke's right to enclose is based on labour, for Hegel, personality is the pertinent "added ingredient" to the commons. Locke's works have predominated in common law jurisdictions: Hegelian approaches are more likely to proliferate in civil law countries.

45. Article 1, Section 8, Clause 8, http://www.law.cornell.edu/constitution/constitution.overview.html, accessed 2 May 2007.

46. Keith E. Maskus and Jerome H. Reichman, 2004. "The globalization of private knowledge goods and the privatization of global public goods," *Journal of International Economic Law*, volume 7 (June), 279 at p. 284.

47. For an eloquent account of the differences between positivist and natural law rights and the legislature's and judiciary's responsibility in granting these, see the judgment of Walsh, J. in the Irish case, *McGee v. the Attorney General & Anor* [1974] IR 284, at http://www.bailii.org/ie/cases/IESC/1973/2.html, accessed 2 May 2007.

48. "Symposium: The Law & Technology of Digital Right Management Transcript, Edited & Excerpted Transcript of the Symposium on the Law & Technology of Digital Rights Management," 2003. *Berkeley Technology Law Journal*, volume 19 (Spring), 1002.

49. Maureen O'Sullivan, 2002. "The Linux Operating System: A Socio–legal Study," LLM thesis, University of Warwick, School of Law, pp. 92–95, on file with the author.

50. Christopher Jones, 2000. "Metallica rips Napster," *Wired* (April), at http://www.wired.com/news/politics/0,1283,35670,00.html, accessed 2 May 2007.

51. Courtney Love, 2000. "Courtney Love does the maths," *Salon Magazine* (June), at http://archive.salon.com/tech/feature/2000/06/14/love/print.html, accessed 2 May 2007.

52. John Perry Barlow, 1992. "The economy of ideas," at http://homes.eff.org/~barlow/EconomyOfIdeas.html, accessed 2 May 2007.

53. Although this is always fervently denied.

54. Directive 96/9/EC on the legal protection of databases, http://europa.eu.int/ISPO/infosoc/legreg/docs/969ec.html, accessed 2 May 2007.

55. DG Internal Market and Services Working Paper, 12 December 2005, Brussels, at http://europa.eu.int/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf , accessed 2 May 2007.

56. Philip J. Cardinale, 2007. "Sui generis database protection: Second thoughts in the European Union and what it means for the United States," *Chicago–Kent Journal of Intellectual Property*, volume 6, 157, at p. 171.

57. DG Internal Market and Services Working Paper, 12 December 2005, Brussels, at http://europa.eu.int/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf , accessed 2 May 2007, p. 6, p. 21.

58. DG Internal Market and Services Working Paper, 12 December 2005, Brussels, at http://europa.eu.int/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf , accessed 2 May 2007, pp. 24–25.

59. DG Internal Market and Services Working Paper, 12 December 2005, Brussels, at http://europa.eu.int/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf , accessed 2 May 2007, pp. 25–26.

60. James Boyle, 2006. "Two database cheers for the EU," *Financial Times* (2 January), at http://news.ft.com/cms/s/99610a50-7bb2-11da-ab8e-0000779e2340.html, accessed 31 May, 2007.

61. The home page, in Spanish, is available at http://www.linex.org/, accessed 2 May 2007.

62. This stands for "Linux" in "Extremadura".

63. Personal communication from Jorge Villar who works on this project, 3 April 2006.

64. Yochai Benkler, 2003. "Freedom in the commons: Towards a political economy of information," *Duke Law Journal*, volume 52 (April), 1245 at p. 1247.

65. Lawrence Lessig, 2003. "The Creative Commons," *Florida Law Review*, volume 55 (July), 763 at p. 771.

66. Arthur R. Miller, 1993. "Copyright protection for computer programs, databases, and computer–generated works: Is anything new since CONTU?," *Harvard Law Review*, volume 106 (March), 977, at p. 979.

67. Lawrence Lessig's Public Domain Enhancement Act has not, as of yet, been passed, http://www.govtrack.us/congress/bill.xpd?bill=h109-2408, accessed 2 May 2007.

68. *Eldred v. Ashcroft* being a prime example.

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79. This has been a long–standing argument of the author who initiated a civil society project in 2003, entitled the Free Software Act — a model law designed to protect free software and to enshrine licensing terms in legislation — the first objective being to highlight the lack of legislative response to society's needs and the second, to ensure that all parties are bound. Contract, of course, is a more practical solution, if a less ideologically satisfactory one.

80. On different grounds, see: *Welte v. Sitecom Deutschland GmbH* (2004) District Court of Munich, http://www.jbb.de/judgment_dc_munich_gpl.pdf and *Wallace v. Free Software Foundation* (2006) U.S. District Court, Southern District of Indiana Indianapolis Division, http://www.fsf.org/news/wallace-vs-fsf/view?searchterm=daniel%20wallace, accessed 2 May 2007.

81. Ingrid Marson, 2006. “Creative Commons license upheld by court,” *C/Net News.Com*, at http://news.com.com/2102-1030_3-6052292.html?tag=st.util.print, accessed 2 May 2007.

82. http://creativecommons.org/license/publicdomain-2?lang=en, accessed 10 May 2007.

83. http://creativecommons.org/about/licenses/meet-the-licenses and at http://creativecommons.org/license/, accessed 10 May 2007.

84. Known as “Attribution (by)”, http://creativecommons.org/about/licenses/meet-the-licenses, accessed 2 May 2007.

85. Attribution Share Alike (by–sa), *ibid.*

86. Attribution No Derivatives (by–nd), *ibid.*

87. Attribution Non–Commercial (by–nc), *ibid.*

88. Attribution Non–Commercial Share Alike (by–nc–sa), *ibid.*

89. Attribution Non–Commercial No Derivatives (by–nc–nd), *ibid.*

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96. A recursive acronym which stands for “GNU’s Not Unix!”

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99. The Open Source Initiative’s Web site is at http://opensource.org.

100. Free/open source software, free/libre/open source software and libre/open source software, respectively.

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102. http://ocw.mit.edu/OcwWeb/Global/terms-of-use.htm, accessed 11 May 2007.

103. In the foreword of Raquel Xalabarder Plantada, 2006. “Las licencias Creative Commons: ¿Una alternativa al *copyright*?” *UOCpapers*, number 2, at http://www.uoc.edu/uocpapers/dt/esp/xalabarder.html, accessed 2 May 2007.

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California 793 P.2d 479 (Cal. 1990), being prime examples. In both cases, respectively, legislative gaps meant that it was unclear whether living organisms were intended to be covered by patent law or whether one had ownership over one's genes. In the two instances, courts chose to fill these gaps rather than waiting for the legislature to do so thereby stepping outside their jurisdiction and arguably "making law" in the process.

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